



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC. NO. 145 OF 2015

KIMANI GECAU.....APPLICANT

VERSUS

OFFICIAL RECEIVER/INTERIM LIQUIDATOR RURAL

URBAN

CREDIT FINANCE LTD (IN LIQUIDATION).....RESPONDENT

RULING

[1] The court is moved via a motion dated 18.3.2015 seeking leave to sue the Respondent under Sections 288 and 241 of the companies Act, Rule 7(1) of companies (Winding up Rules), and for Extension of time to institute suit against the Respondent under S 27 and 28 of Cap 22 and Section 3A and 95 of CPA, Cap 21 plus costs.

[2] The Application is based on the grounds that the applicant intends to receiver Kajiado/Ololoitikoshi/Kitengela/89 (suit land herein) and an injunction to restrain the Respondent from selling/transferring the same and compel the Respondent to discharge the same property.

[3] The Applicant had filed HCC 2175/95 but was struck out as there was no leave to institute it against Rural Urban Credit Finance ltd and another as same was under Receivership. The time to re-institute suit has lapsed and claim is time barred thus the application for extension of time and leave under S.228 and 241 of Companies Act.

[4] The application is supported by the affidavit of KIMANI GECAU sworn on 18.3.2015. The application is opposed and the Respondent has filed Replying Affidavit sworn by P.THOTHI KANYUIRA on 5.6.2015.

[5] The parties agreed to canvas the application by way of written submissions which they filed and exchanged. The Applicant submits that he has a good claim against Respondent with high chances of success yet his claim was dismissed on technicalities and was not heard on merit. He invokes the provisions of Articles 159(2)(d) constitution of Kenya and S.1A of CPA Cap 21 and prays the application be allowed for the interest of justice.

[6] The error of filing the HCC 2175/1995 is attributed to his then advocate and submits that, the advocate's mistake should not be visited upon the applicant. He cites **BARCA K APPAREL EPC LTD VS. ROSE MBULA OJWANG T/A FAIDA 2002 CATERERS NRB CA 250/05**

and also CMC HOLDINGS LTD VS. JAMES MUMNO NZIOKA NRB C.A 329/01. The above principles in the above cases, also applied in **MBOGO & ANOTHER VS. SHAH (1968) EA 93.**

[7] The applicant prays for the orders. The Respondent submits that the Applicant filed HCC 2175/95 (later changed to HCC.295/013) when the suit land was advertised for sale and he was represented by an advocate. No leave was sought to lodge suit as provided by S.228 of the Companies Act. As a result suit was later struck out. The Applicant also seeks leave to file suit out of time under the provisions of S.4 of Cap 22.

[8] The suit ought to have been lodged 6 years from the date of the breach of the contract. The cited provisions S.27 and 28 of Cap 22 do not apply to the instant application and the case. The overriding provisions of S.1A Cap 21 and Article 159 of the constitution would not apply in the circumstances of the instant case. Refer to Civil Application NAI.320/014 (KLR 242/014) J.K.U.A.T vs. MBEERA & OTHERS, which held that;

“...Article 159 (2) d...is not panacea if all procedural short falls. All that courts are obliged to do is to be guided by the principle that justice shall be administered without undue regard to technicalities”.

[9] After going through the pleadings, Affidavit and the submissions, I find the following issues emerge:

- a. Whether S.27 of Cap 22 is applicable in the instance matter?

If above is Affirmative,

- b. Whether there are materials before the court to meet the thresh hold of extension of time?
- c. Whether there is merit in granting leave to sue the Respondent under S.228 of the companies Act?

[10] S. 4(2) Cap 22 provides that actions on contract become time barred after the breach of contract. S.27of the same Act provides a window for lodging suit out of time in the matters based on tort upon fulfilling the conditions therein set. There is no provision for extension of time in claims based on contract after lapse of 6 years. In the case of the court of Appeal at **KISUMU CIVIL APPEAL NO. 37 OF 2013 BETWEEN WILLIS ONDITI ODHIAMBO AND GATEWAY INSURANCE CO. LTD**

The court held that;

“Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The Section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo, J. had no jurisdiction to extend time as he purported to do on 28th May,1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent.”

In the court of appeal case of **DIVECON VS SAMANI [1995-1998] 1 EA 48** at page 54 in which theAppellate Court rendered itself thus:

“No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal

of Part III shows that its provisions do not apply to actions based on contract.”

The above decisions correctly interpreted the provisions of Section 27(1) of the Limitation of Actions Act and there is no basis to depart from the same and in any case they are binding to this court. The court has therefore no discretion in this matter. Furthermore this is not a mere technicality. It is a jurisdictional issue.

[11] The above issue alone determines the entire application and it is moot to deal with the other issues. The claim has been time barred, it is academic exercise to consider or even give leave to institute suit against Receiver under S.228 of Companies Act. In any event the application does not enjoin the buyer of the suit land who has title.

[12] In the case of **HCC. NO. ELC NAI 809/012 MUTHUA vs. WEST PRIDE LTD & ANOTHER**, the court held to the effect that it could not grant orders which would affect a person who is not a party. The suit sought to be filed is for recovery of land and discharge of the title. The same claim has been overtaken by event by virtue of the discharge and transfer of the suit land to a third party.

[13] The upshot is that the application is dismissed with no orders as to costs, as the Respondent failed to attend court for submissions.

Dated, signed and delivered in court at Nairobi this 3rd day of October, 2015.

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C. KARIUKI

JUDGE