



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 307 OF 2008

PAUL AINEA MWENDWA. 1ST PLAINTIFF

GLADYS M'MBONE. 2ND PLAINTIFF

VERSUS

JOSEPH THIONGO MWANGI. 1ST DEFENDANT

GEOFFREY NJUGUNA GACHWE. 2ND DEFENDANT

JOEL MWAURA KARUAI. 3RD DEFENDANT

RULING

The Application for determination is the Originating Summons dated 21st May, 2015 brought under Sections 28(3) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya, Order 50 Rule 6 of the Civil Procedure Rules 2010, Sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

The Plaintiffs seek for orders that: -

- 1. The Honourable court be pleased to grant leave for enlargement of time for filing the suit.**
- 2. The Honourable Court be pleased to order that the suit so filed and pending before this Honourable Court out of time, is duly filed and properly on record.**
- 3. This Honourable court to direct the suit to be set down for hearing without further delay in the interest of justice.**

The Application is premised on the grounds set out on the body of the Application which are that: - the Plaintiffs have a genuine case which ought to go for full trial, the delay in filing the suit was not inordinate so as to render the prayers sought herein unjustifiable, the delay in filing the suit was due to inadvertence on the part of the Advocate on record for the Plaintiff and that there will be no prejudice visited on the Defendants.

The Application is further supported by the Affidavit of one Wangalwa Oundo Advocate having the conduct of this suit on behalf of the Plaintiffs sworn on 21st May, 2015. He depones that leave to file suit out of time was granted on the 19th day of May, 2006 which was to lapse after 14 days. He further depones that the delay in filing the suit was by five (5) days which delay is not inordinate in the circumstances so as to prejudice the Defendants.

The delay was due to inadvertence on the part of the advocate having the conduct of the suit which mistake should not be visited upon the Plaintiffs and that there is no prejudice to be suffered by the Defendants herein as they have already taken out third party proceedings.

The Defendants opposed the Application and filed a replying Affidavit by Catherine Ngala Advocate sworn on 15^h June, 2015. In the said Affidavit, she depones that it is the 1st and 2nd Defendants who raised a preliminary objection on the ground that the suit filed on 7th June, 2006 was filed out of time limited by a court order issued by Hon. Justice Aluoch on 19th May, 2006.

Honourable Lady Justice Aburili allowed the Plaintiff to file an Application for extension of time within 14 days else suit stands struck out. The Plaintiffs' Advocate filed the Application on 21st May, 2015. She depones that the Plaintiff cannot file an application to extend time on a suit already filed in court that had been filed out of time. In her Affidavit she contended that the order given on 8th May, 2015 only allowed filing of an Application for extension of time but the merits of such Application will remain subject to scrutiny when hearing such an Application and hence the Plaintiff must show that he deserves such extension. It is her position that the 1st and 2nd Defendants paragraph 11 of the defence has raised the issue but nothing was done by the Plaintiff since they were served with the defence on 12th July, 2006 almost ten (10) years ago and the delay of 10 years is a prolonged inordinate delay.

When the matter came up in court, the counsels made oral submissions. It was submitted on behalf of the Plaintiff that in the ruling dated 8th May, 2015 delivered by Honourable Justice Aburili, she granted Plaintiff's leave to file an Application for extension of time within 14 days which in his submission, he did file on time. He referred the court to Section 28 (3) of the Limitation of Actions Act which allows a party to seek extension of time when the suit has been filed. He further submitted that the counsel for the Defendants had enough time to canvass the issues before Justice Aburili before she allowed the Plaintiffs to file the Application and that the Defendants will not suffer any prejudice if the Application is allowed.

On her part, counsel for the Defendants submitted that the Plaintiffs had raised an objection on the ground that the suit was filed out of time given by the orders that were granted by Hon. Justice Aluoch. The orders given by Hon. Justice Aburili gave the Plaintiffs 14 days within which to file an Application for extension of time. She took issue with the said orders and submitted that the Plaintiffs cannot seek to regularize that which has been done and that the Plaintiffs had to give sufficient reasons because the order was not automatic.

In her submission, the Hon. Judge Aburili was availing the Plaintiffs a chance to convince the court that there are good grounds but in her view, no sufficient grounds were given and granting the Plaintiffs leave at this stage will take away the Defendants' opportunity to challenge the leave granted by Hon. Justice Aluoch. She urged the court to dismiss the Application.

I have perused the court file and it's important for the court to highlight the following: -

That the suit herein was filed on the 7th June, 2006. A casual glance at the Plaint reveals that the accident the subject matter of the suit occurred on the 16th day of September, 2001. This clearly shows that the suit was filed out of time but the leave of the court was sought but the Plaintiffs did not comply with the condition given by Justice Aluoch for filing the suit within 14 days. This order was not brought to the attention of the Defendant.

The first and second Defendants filed their statement of defence on the 12th day of July, 2006 and in paragraph 11 of the defence, they raised the issue of limitation and pleaded that the Plaintiffs' suit is statutory time barred.

In the reply to defence filed on the 27th July, 2006 paragraph 4, the Plaintiffs averred that the suit was properly instituted pursuant to leave granted to file suit out of time on 19th May, 2006.

That order was given on 19th May, 2006 wherein the Plaintiffs were granted leave to file suit out of time and the same was to be filed within 14 days from the date thereof. However, this did not happen. The suit was filed outside the fourteen (14) days period ordered by the court.

On the 12th November, 2015 Mrs. Ngala Advocate for the Defendants filed a notice of preliminary objection on the ground that the suit filed on 7th June 2006 is statutorily time barred as it was filed out of time limited by the order of the court.

The Preliminary Objection was argued before Hon. Justice Aburili and in her ruling delivered on the 8th May, 2015, she granted leave to the Plaintiffs to file an Application for enlargement of time, which she ordered should be made within 14 days from the date of the ruling and in default, the suit shall stand struck out with costs. The Plaintiffs complied and filed the Application herein.

I have carefully considered the Affidavits on record and the oral submissions made by the learned counsels for the respective parties. The suit herein was filed out of time, leave was granted by Hon. Justice Aluoch which order the Plaintiffs failed to comply with. This being an Application for leave to file suit out of time, the Plaintiffs were under an obligation to give sufficient reasons why the suit was not filed on time.

Section 27 of the Limitation of Actions Act Cap 22 is the pertinent provision in dealing with extension of Limitation period in case of ignorance of material facts in actions for negligence. The requirements of this Section are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the Plaintiff until a date which was either after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period. The limitation period in this case is three years. This being a tort based on negligence.

In the Affidavit in support, no material facts were disclosed that prevented the Plaintiffs from filing the suit as required under Section 27 of the Limitation of Actions Act. Inadvertence on the part of the Plaintiff's counsel is not a ground for extension of time under Section 27 Cap 22.

The Court of Appeal at Nyeri in Civil Appeal No. 253 of 2011, **Tana and Athi Rivers Development Vs Joseph Mbindyo & 3 others** dealing with Section 27(2) of the Limitation of Actions Act observed: -

“From the foregoing provision it is clear that before the court granted ex-parte leave to the Respondents to file suit out of time it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing of the suit had expired.”

In that case the Respondents argued that the reason for the delay was due to the negotiations between the parties but the Court of Appeal held that the aforesaid reason does not constitute material facts which were not within the knowledge of the Respondents as envisaged under Section 27(2) of the Limitation of Actions Act.

In the case of **Ngari & another Vs Odero (1999) 2EA 24**, the court held that the requirements for extension of time are stringent and the court must be satisfied that they are met before granting the Application.

In the case of **Rawal Vs Rawal (1990) KLR 275** the court stated that: -

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time.”

And the same position was taken in the case of **Iga Vs Makerere University (1972) E.A. 65** in which it was held: -

“A plaint which is barred by Limitation is a plaint “barred by law”. A reading of the Provisions of Sections 3 and 4 of the Limitation Act (Cap 70) together with order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the Appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim....”

What it means is, a cause of action that is time barred may in certain cases be revived if the conditions set out in Section 27 of the Limitations of Actions Act Cap 22 Laws of Kenya are fulfilled which in the case herein have not been met.

This court has noted with a lot of concern that no reasons were given by the counsel for the Plaintiffs why the orders of Justice Aluoch were not complied with. The counsel for the Plaintiffs has handled this matter in a rather casual manner to the detriment of the Plaintiffs which is very unfortunate. Failure by the Plaintiffs to comply with the Order of Justice Aluoch and later file the present application is clearly an abuse of the court process and unacceptable.

In the result, this Application is dismissed with costs to the Respondent and as a consequence thereof, the suit is struck out with costs to the Defendant.

Dated and delivered at Nairobi this 5th day of November, 2015.

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LUCY NJUGUNA

JUDGE

In the presence of

..... For the Plaintiff

..... for the Defendant