



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL CASE NO 1 OF 1990

NZOIA SUGAR COMPANY LTDAPPLICANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

This is an application that the applicant be granted leave to file suit out of time in respect of recovery of special and general damages. The application is brought under section 27 of the Limitation of Actions Act and section 3 of the Civil Procedure Act.

The affidavit to support the application and the annexed investigation report of the Criminal Investigations Department show that the respondent received in its custody the applicant's spare parts for its factory sometime in 1984. The spare parts were worth shs 795,907.65. The applicant had also to pay additional Customs and Sales Tax of shs 341,476/-. The respondent did not however deliver the spares to the applicant but instead by its negligence sold the applicant's spares to a third party in a public auction. The applicant had to spend shs 1,684,000/- to re-buy the same spares from the third party.

If this application is allowed, the applicant intends to file a suit against the respondent for recovery of special and general damages for the loss of the spares.

The applicant states that the intended suit is time-barred. It is true that as regards suits against the respondent, section 66 of the Kenya Ports Authority Act provides for a limitation period of 12 months within which the suits should be commenced.

Section 31 of the Limitation of Actions Act provides that where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of the Limitation of Actions Act were incorporated in it. The effect of that provision is that section 66 of Kenya Ports Authority Act is deemed to have incorporated Part III of the Limitation of Actions Act.

Part III of the Limitation of Actions Act provides for extension of the limitation period in three instances viz:-

- (i) as provided in section 22, in case of disability.
- (ii) as provided in section 26 in case of fraud or mistake and
- (iii) as provided in section 27 in case of ignorance of material of acts in action for negligence.

The period of limitation in section 66 of the Kenya Ports Authority Act can there be extended if the application falls in any of the three categories.

The affidavit does not disclose any disability as the reason for failure to file the suit in time.

The application seeks for extension of time under section 27 of the Limitations of Actions Act but that section does not assist the applicant because the conditions in section 27(1)(b) has not been fulfilled. That condition is that the damages claimed by plaintiff for negligence should consist of or include damages in respect of personal injuries to the person. The damages intended to be claimed by the applicant are not in respect of personal injuries of any person.

Although section 22 and 26 of the Limitation of Actions Act refer to extension of the limitation period in case of disability or fraud or mistake respectively, it seems to me that these sections do not envisage an application for leave to extend the limitation period and an application based on those sections would be incompetent. Rather these provisions empower a party to file a suit despite the expiry of the limitation period prescribed for the action and give the court jurisdiction to disregard the limitation period prescribed for the action if the suit falls within the scope of section 22 and 26 of the Limitation of Actions Act. If it was intended that applications under section 22 and 26 of the Limitation of Actions be made in court, then enabling rules similar to order XXXVI rule 3C providing for application for extension of limitation period under section 27 of Limitation of Actions Act could have been made.

More importantly, provisions similar to section 26 of the Limitation of Actions Act could have been made in the Limitation of Actions Act to cater for applications under section 22 and 26 of the Limitation of Actions Act.

For those reasons, I dismiss the application.

Dated and Delivered at Mombasa this 14th Day of March, 1990

E.M.GITHINJI

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JUDGE