



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC MISC.30 OF 2018**

**BENJAMIN KIRWA KEMBOI.....APPLICANT**

**VERSUS**

**WILLIAM BIRGEN.....1<sup>ST</sup> RESPONDENT**

**SAMWEL KIRWA BIRGEN.....2<sup>ND</sup> RESPONDENT**

**RULING**

This ruling is in respect of an application dated 3<sup>rd</sup> April 2019 brought by way of notice of motion by the respondent/Applicants seeking for the following orders:

- a) That there be a review and setting aside of the orders made on 17<sup>th</sup> December 2018.
- b) That in the alternative and without prejudice to the above that there be a transfer of the suit ELDORET COMC E & L NO. 322 OF 2018 BENJAMIN KIRWA KEMBOI VS WILLIAM BIRGEN AND SAMUEL KIRWA BIRGEN to this Honorable Court.

Counsel filed written submissions in respect of the application whereby Counsel for the applicant submitted that there was a mistake on the face of the record as the court lacked jurisdiction to determine the matter as it was for leave to file a suit out of time for recovery of land.

Counsel submitted that Section 27 as read with Section 28 of the Limitation of Actions Act Chapter 22 Laws of Kenya gives the court jurisdiction to extend time for filing suits in case of ignorance of material facts in actions for negligence and the procedure thereof. Further that the said section confers jurisdiction in actions of tort of negligence and only in respect of personal injuries and not recovery of land, contract or any other causes of action other than those in tort in respect of personal injuries.

Counsel cited the case of Marv Osundwa v Nzoia Sugar Co.Ltd [2002/ eKLR where the court held that "Section 27 does not give the court jurisdiction to extend time in any other suits. " as was also held in the case of Kenya Orient Insurance v Senenerro Ole Kurraro 7 others (2016/ eKLR .

Miss Tum also urged the court in the alternative to transfer Eldoret CMC E&L No.322 of 2018 to this Honourable Court for hearing and determination on the grounds that the applicant may still challenge the issue of time of filing the suit during the hearing. That it will be difficult to challenge the same in the Chief Magistrate's Court where the suit was filed because, the court will simply rely on the leave granted by this Honourable court. Counsel also faulted the citation of the order and sections which the application was brought and urged the court to allow the application as prayed.

**THE RESPONDENT SUBMISSIONS**

Counsel for the respondent opposed the application and submitted that it is trite law that the exercise of unfettered discretion by a judge in granting ex-parte orders under the Limitations of Actions Act cap 22 laws of Kenya can only be challenged during the trial of the suit. That the respondent filed the intended suit within fourteen (14) days as ordered by the court and that the applicant herein filed a defence to the suit and the respondent filed a reply to the defence hence what remains is for the parties to take directions on the hearing of the suit.

Counsel cited the English Court of Appeal case of COZENS VS NORTH DEVON HOSPITAL MANAGEMENT COMMITTEE AND ANOTHER (1966) 2 all EA. 799 it was held by the majority, lord Denning, M.R. and Dankwerts, L.J (Salmon, L.J.Dissenting) that "although it was a general principle in regard to ex-parte orders that the party affected by the order could apply for it to be discharged, yet it

would be contrary to the intention of the limitation Act of 1963 to allow a defendant to apply, before the trial of the aft(on, to set aside an ex-parte order obtained under S. 2(1) giving leave for the purposes of S.1(1)A.....”

Counsel submitted that the English decision was followed by the Court of Appeal in the case of YUNES K. ORUTA & another VS Samuel NYAMATO Nairobi Civil Appeal No. 96 of 1984 (1988) eKLR where Justice J.M. GACHUHI had this to say

*"The English decision has persuaded me to accept that interpretation as a correct interpretation of the intention of the legislature. The respondent having obtained leave to file action as required by the law that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex-parte will be rendered nugatory. In my view O 'Kubasu J was right in refusing the appellant's application to discharge the ex-parte order. Likewise I would refuse the appellant's appeal. The appellant can raise the objection at the trial and the trial judge will have to deal with the matter on the evidence to be adduced at the trial. "*

Mr. Birir further submitted that in the same case the Honourable Justice PLATT JA concurred with Justice Gachuhi and stated that:

*"I agreed that this court should respectfully adopt the reason in Cozen v North Devon Hospital Management Committee, (1966) 2 All ER 799. It follows that the defendant can only challenge the extension of time in the trial itself and not by a preliminary application. This is an exception to the general rule that the parties affected by an ex-parte order can seek to set it aside under the principles of natural justice. "*

On the issue that the application was brought under the wrong provisions of the law, Counsel cited the case of HORIDA WANJUKI NJERU IRERI EMBU ENVIRONMENT AND LAND COURT CASE NO. 75 OF 2015 where Justice Y.M. ANGIMA held that

"it is, however clear that the plaintiff's application was merely brought under the wrong provisions of Order 42 Rule 6 of the Civil Procedure Rules. In the opinion of the court, such a defect is not fatal. It has not misled or prejudiced the Defendant in any way. The Defendant was fully aware of the nature of the application before court and competently responded thereto. The provisions of Order 51 Rule 10 of the Civil Procedure Rules provides as follows in relation to titling of applications:

*10 (1) Every order, rule or other statutory provisions under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.*

*(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.*

"The court is of the view that the defect in the plaintiff's application is not fatal. It is curable under the provisions of Order 51 Rule 10 of the Civil Procedure Rules. Section 19 of the Environment and land Court Act and Article 159 (2) (d) of the Constitution of Kenya 2010."

Counsel therefore urged the court to dismiss the application and allow the suit to proceed as filed in the Chief Magistrates Court which has jurisdiction to hear and determine the matter.

### **Analysis and determination**

This is an application to review or set aside the orders granted by this court for leave to file a suit out of time and in the alternative to transfer the suit filed in the Chief Magistrates' Court to this Honourable court for hearing and determination.

The issues for determination are as to whether the court can entertain this application in the first place. The applicant faulted the court for lacking jurisdiction in allowing the application for leave to file a suit out of time.

I wish to refer to Civil Appeal NO. 216 OF 1997 between JOSEPH NJUGUNA MUNIU –V- MEDICINO GIOVANNI where Justices, PK TUNOI , A.A.LAKHA and G.S.PALL quoting the English authority referred to above had this to say

*"Now I quite agree that in general a party affected by an ex parte order can apply to discharge it. We applied this rules as of course in R V Morley ( VALUATION Officer (e. .p. Peachev Property Corporation Ltd recently; but the procedure under the limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think that we should allow it to be done at this stage. It must be remembered that, even when the judge grants leave, there is nothing final about it. It is merely provisional, The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expresses by the judge in chambers who gave leave. "*

Section 27 as read with Section 28 of the Limitation of Actions Act Chapter 22 Laws of Kenya gives the court jurisdiction to extend time for filing suits in case of ignorance of material facts in actions for negligence and the procedure thereof. Further that the said section confers jurisdiction in actions of tort of negligence and only in respect of personal injuries and not recovery of land, contract or any other causes of action other than those in tort in respect of personal injuries. The application must be made ex parte by way of originating summons and the court upon looking at the application together with the evidence adduced in the affidavit may grant such orders as per section 28.

I agree with the authorities cited above that the applicant can raise the issue of the limitation of action in the filed suit and not through an application for review or setting aside the orders for leave to file a suit out of time. The applicant is not estopped from raising the issue during the trial. The court cannot entertain this application.

On the issue that the application cited the wrong provisions, I am guided by the case of **Republic =VS= Anti- Counterfeit Agency & 2 others Ex- Parte Surgipharm ltd Nairobi High Court Miscellaneous application no. 11 of 2012 (2014) ECLR** where ODUNGA J. had this to say:

" However, in light of the provisions of Article 159 (2)(d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the court of a jurisdiction where such jurisdiction exists. As I have demonstrated above jurisdiction to review or set aside orders made in judicial review proceeding exist hence the mere fact that the instant application is expressed to be brought under order 45 in my view does not render the application fatally defective or incompetent".

It is good order to cite the correct provisions of the law while filing applications but if the wrong provisions are cited by mistake, then this can be rectified and may not be fatal to the applications as it does not go to the substance of the case. I find that this is a non-issue which cannot affect the jurisdiction of the court to handle an application.

On the last issue on transfer of the case I find that the Chief Magistrates Court where the suit was filed has jurisdiction to hear and determine the matter where the applicant can raise all the issues of law and limitation of actions within the trial. Having said that I find that the application lacks merit and is dismissed with no orders as to costs.

**DATED and DELIVERED at ELDORET this 8<sup>th</sup> DAY OF October, 2019.**

***M. A. ODENY***

***JUDGE***

**RULING READ** in open court in the presence of Miss.Tum for Respondent and Miss.Kibichy holding brief for Birir for Applicant.