



Magugu (Suing as the administratrix of the Estate of the Late Arthur Kinyanjui Magugu) v Karura Investments Limited & 2 others (Environment & Land Case E001 of 2024) [2024] KEELC 783 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 783 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E001 OF 2024
MD MWANGI, J
FEBRUARY 15, 2024
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22
&
IN THE MATTER OF AN EX PARTE APPLICATION
FOR LEAVE TO INSTITUTE SUIT OUT OF TIME

BETWEEN

MARGARET WAIRIMU MAGUGU (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE ARTHUR KINYANJUI MAGUGU) APPLICANT

AND

KARURA INVESTMENTS LIMITED 1ST INTENDED RESPONDENT

CHIEF LAND REGISTRAR 2ND INTENDED RESPONDENT

ATTORNEY GENERAL 3RD INTENDED RESPONDENT

RULING

1. The Applicant filed what she termed as an ex-parte Chamber Summons under certificate of urgency dated 2nd January, 2024 seeking for the Court to enlarge the time to file a suit against the Intended Respondents. The Applicant further seeks leave of court to file suit against the Respondents outside the prescribed statutory period.
2. The matter came up for directions before this court on 10th January, 2024. The court certified the matter urgent and directed the same to be heard during the Christmas vacation. The court further directed Counsel for the Ex Parte Applicant to appear before it virtually on 11th January, 2024 at 10.30 a.m. to argue the application.



3. When the matter came up on the said date for hearing of the application, Mr. Kimathi appeared alongside Messrs. Azdak, J.N Kariuki and Kago for the Applicant. Mr. Ahmednasir, Senior Counsel, though not served appeared for the Intended 1st Respondent while Mr. Allan Kamau, State Counsel, appeared for the Chief Land Registrar and the Attorney-General.
4. Counsel for the ex-parte Applicant objected that the appearance of the Intended Respondent's Advocates was not necessary and was premature. He argued that what was before the court was an ex parte application under Order 37. The Advocates for the Intended Respondents could only come after the grant of leave.
5. Mr. Ahmednasir SC contended that they had a right to be heard. He stated that there are numerous authorities on the issue and that hold that parties have a right to participate even on an application as the one before the court. Mr. Kamau supported the proposition by Mr. Ahmednasir and further informed the court that there had been a previous suit by the same parties over the same subject matter.
6. The Court then directed that the issue whether the proposed Respondents had a right of audience be dealt with first. The court directed parties to file their list of authorities and affidavits on whether the Intended Respondents had a right of audience. However, parties opted to submit orally but filed their List and Bundle of Authorities save for the 2nd and 3rd Intended Respondents.

Submissions by the Ex parte Applicant

7. Mr. Kimathi for the Ex parte Applicant submitted that the application before the court is under Order 37 Rule 6 (1) & (2) of the Civil Procedure Rules; which provides that an application for extension of time shall be made ex parte by an Originating Summons. He argued that at this stage, the Intended Respondents do not have a right of audience. He submitted that it is only the Applicant who has a right of audience at that point in time. Citing the case of *Mary Wambui Kabuga –vs- Kenya Bus Service Limited (1997) eKLR*, Counsel submitted that the court in the said case dealt in detail on what happens in such kind of an application. The question whether or not the Plaintiff was entitled to extension of time can only be challenged during the proceedings.
8. Counsel also referred to the case of *Nilam Doshi & Another –vs- Credit Agricole Indosuez Ltd. & 2 Others (2003) eKLR*. He also referred to the authority of *Synrenis Ltd. –vs- Christopher Omulele T/ A Omulele & Co. Advocates (2014) eKLR*. He submitted that at Paragraph 9, the court defined an ex parte application to mean, “to be heard alone”.
9. Mr. Kimathi submitted that at this stage, the Court only needs to establish a prima facie case and the only party with the right of audience is the Applicant. An application of this nature can only be invoked ex parte. Involving other provisions does not spell doom to an otherwise meritorious application. He argued that the issues raised are serious and have far reaching consequences.
10. On the earlier matter; ELC No. 159 of 2017, counsel stated that the same had been disclosed in the Supporting Affidavit. He argued that the instant application is not res judicata.

Submissions by the Intended 1st Respondent

11. Mr. Ahmednasir SC on the other hand argued that the Intended Respondents have a right of audience and should be allowed to fully participate in these proceedings. The Originating Summons before the court is grounded on both procedural and substantive provisions. He stated that Order 37 is a procedural provision. Order 37 Rule 6 (1) particularly specifies that an application under Section 27 of the *Limitation of Actions Act* shall be ex parte.



12. He submitted that the instant Originating Summons is not an application under Section 27; which applies to negligence and other tortious acts. He asserted that Prayer No. 2 of the Originating Summons discloses that the Applicant's right of action is premised on fraud and not negligence and other tortious acts. The application is based on Section 26 of the [*Limitation of Actions Act*](#).
13. He argued that the application is as framed is a mischievous way of obtaining leave for an action based on Section 26 of the [*Limitation of Actions Act*](#). The Applicant has already exhausted the right under Order 37 Rule 6 (1) having already filed a suit that was struck out. The Applicant therefore has no right. Senior Counsel averred that the Court of Appeal confirmed the striking out of the Plaintiff's suit. The Applicant cannot come back a second time and if he chooses to, he must notify the intended Respondents.
14. Counsel further pointed out that the Draft Annexed Plaint clearly demonstrates that the Applicant's cause of action is premised on a contract. He cited the case of Eunice Nduta & Another –vs- Lilian Chemutai & 2 Others (2021) eKLR, to argument his case.
15. It was his submission that the entire strategy of the Applicants is a fraud intended to deceive the court. He reiterated that the Intended Respondents have a right of audience as the application before the court is brought under Section 26 of the [*Limitation of Actions Act*](#).

Submissions by the Intended 2nd and 3rd Respondent

16. Mr. Allan Kamau for the 2nd and 3rd Intended Respondents submitted that the application before the court cites Order 37 Rule 6. It purports to be an application under Section 27 of the Limitation of Action Act yet it is premised on section 26 of the [*Limitation of Actions Act*](#).
17. Counsel argued that the proposed suit is a claim predicated on breach of contract or fraud as contemplated under Section 26 of the [*Limitation of Actions Act*](#). To the extent that this application has been brought under issues contemplated under Section 26, the Respondents have a right of audience. Counsel cited the case of Virginia Kairigo Runji -vs- Christopher Nthia Gacuthe & 17 Others [2020] eKLR, where the Court of Appeal at Paragraph 11, stated that for such an application to be ex parte, "it must be based on negligence, nuisance or breach of duty." However, that is not the case in this instance. The Respondents therefore have a right of audience.
18. In addition, Counsel referred the court to the case of Eunice Nduta (Supra) where the court cited with approval the case of Virginia Kairigo Runji (Supra) at paragraph 11. At Paragraph 13, the Court further cited the decision in Nzoia Sugar Co. Ltd v Kenya Ports Authority [1990] eKLR. Counsel too referred the court to the Court of Appeal decision in the case of Kisumu County Assembly at paragraph 72.
19. It was the 2nd and 3rd Respondent's submission that they are entitled to due process including the right to be heard as provided under Article 47 and 50 of [*the Constitution*](#).
20. In response to the Intended Respondents' submissions, Mr. Kago stated that it is settled principle of law that the law must be read wholesomely. He argued that the Intended Respondents have not cited any authority stating that the Respondents have a right of audience. He submitted that Order 37 Rule 6(1) & (2) provides that applications must be ex parte.
21. Counsel further submitted that there is no Defendant at the moment as there is no Plaint before the court yet. The Advocates on record are therefore not representing anyone. The suit is yet to crystalize. He argued that the authorities cited are not applicable to the issues in this matter.
22. He further admitted that the intended suit is premised on fraud. Section 27 of the [*Limitation of Actions Act*](#) does not exclude fraud. The Intended Respondents therefore have no right of audience.



Issues for determination

23. As stated from the outset, the only issue for determination at this point in time is whether the Intended Respondents have a Right of audience before this Court at this stage

Analysis and determination

24. I must state from the outset that I will be deliberately frugal with my words in this ruling for the reason that the main application is pending hearing in order not to prejudice its hearing.
25. It is settled law that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see the case of James Kanyiita and Another -vs- Marios Philotas Ghikas and Another (2016) eKLR.
26. Order 37 Rule 6 of the Civil Procedure Rules provides that:
1. An application under section 27 of the *Limitation of Actions Act* made before filing a suit shall be made ex parte by originating summons supported by affidavit.
 2. Any such application made after the filing of a suit shall be made ex parte in that suit.
27. The Applicant's objection is that the Intended Respondents do not have a right of audience at this stage. That it is only the Applicant who has a right of audience at this point in time. Counsel argued that the Court only needs to establish a prima facie case and that an application of this nature can only be invoked ex parte.
28. The Intended Respondents on the other hand contend that the Originating Summons herein has not been brought under Section 27 of the *Limitation of Actions Act*; which applies to negligence and other tortious acts, so as to be heard ex parte. They assert that Prayer No. 2 of the Originating Summons discloses that the Applicant's right of action is premised on fraud. The instant application is therefore based on Section 26 of the *Limitation of Actions Act*.
- It was their submission that proposed suit is a claim predicated on breach of contract or fraud as contemplated under Section 26 of the *Limitation of Actions Act*. To the extent that this application has been brought under issues contemplated under Section 26, the Respondents have a right of audience
29. Looking at the application before this court and more particularly the Supporting Affidavit and the annexed Draft Complaint, it is clear that the Applicant's proposed suit is based on fraud. In fact, the application is expressed to be brought under Section 26 of the *Limitation of Actions Act*.
30. It therefore follows that the Intended Respondents have a right of audience.
31. Based on the foregoing, the Applicant's objection is overruled and the Intended Respondents are hereby allowed to defend the substantive application.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms Khadijah holding brief for AhmedNasir S.C. for the Intended 1st Defendant.



Mr. Azdak for the Applicant (with Mr. Kago & Mr. Kimathi)

No appearance for the Attorney General

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

