



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 344 OF 2009

THE HON. ATTORNEY GENERALAPPLICANT

AND

SAMUEL CHEGE GITAU & 283 OTHERSRESPONDENTS

(An application for an injunction pending the outcome of applicant's appeal, C.A. No. 140 of 2007, Nairobi against the order and ruling of the High Court of Kenya at Nairobi (Nambuye, J) dated 15th August, 2008

in

H.C.C.C. NO. 40 OF 2003)

RULING OF THE COURT

In originating summons dated 1st February, 1995 and filed in the superior court on 2nd February, 1995, the first 21 respondents in this notice of motion before us sought an order to be granted to them to file suit out of time against Attorney General, the applicant, in this notice of motion. They were all former junior officers and an ex-captain in the armed forces and particularly serving in the Kenya Air force. They wanted leave to file suit against the Attorney General to enable them seek judgment for full retirement benefits, terminal benefits and general damages on grounds first that their services with the armed forces were illegally and summarily terminated on 14th March 1983, by a non existent entity referred to as “**82 Air Force**” which was neither their employer nor in existence and secondly that they were wrongfully arrested and confined in prison custody without trial for 7½ months on allegations that were never proved or for which they were never put on trial. Thus they claimed full retirement benefits and terminal benefits on account of breach of their contract of service by the applicant and general damages for wrongful arrest, false imprisonment and loss of their liberty. That application for leave to institute a suit out of time, which was an ex parte application, was placed before Aluoch J. (as she then was). On 14th February 1995, the learned Judge granted it ex-parte and those 21 respondents filed plaint against the applicant out of time but with the leave granted. Later, vide chamber summons dated 27th January, 2005, and filed on 28th January, 2005 brought under **Order 1 rules 10(2)** and **22** of the Civil Procedure Rules and **sections 3A**

and **63(e)** of the Civil Procedure Act (Cap 21), 58 other respondents sought leave to be enjoined in the suit that was already filed by the first 21 respondents, on grounds that they were at all material times to that suit, servicemen and officers of the Kenya Air Force like the first respondents; that their claims were identical to those of the 21 respondents as they too suffered the same injuries as the 21 respondents. That application was opposed by the first 21 respondents and the Attorney General. It was placed before Ojwang' J. for hearing. During the hearing of that application, submissions were made on the issues such as limitation of actions and non compliance by the applicants with the provisions of **section 13A** of the Government Proceedings Act (Cap 40), and the learned Judge considered those aspects as well. We observe at this juncture that although those matters were raised and certain observations made on them by the Judge, the main application that was before the learned Judge for consideration was whether or not the 58 respondents could be joined as co-plaintiffs in the suit that was filed by the 21 respondents earlier. Ojwang' J. having considered the application, made the following orders:-

- “1. That, the applicants be and are hereby granted leave to be enjoined in the suit as co-plaintiffs.**
- 2. That the counsel for the applicants shall act together with counsel for the plaintiffs to prepare a further amended version of the plaint, which shall be drawn, filed and served by Friday, 29th April, 2005.**
- 3. That all counsel now on record for the plaintiffs and applicants shall take appropriate instructions on the best mode of representing the enlarged number of plaintiffs, and shall file a memorandum in court on the agreed format of representation.**
- 4. That this matter shall be listed for mention and directions before the duty Judge on Thursday 12th May, 2005 at 9.00 a.m. Hearing shall take place before any Judge in the Civil Division, as may be appropriate.**
- 5. That there shall be no order as to costs.”**

We have set out the orders made by Ojwang' J. on the application that was before him mainly to appreciate that although he may have made some comments touching on the allegations on limitations of actions as concerns the matter that was before him, he never made any orders on the same and in our minds, that was advisedly done as that was in our view, probably not an issue upon which he could have made orders at that stage when he was dealing with whether or not to join the new parties to the suit that was already filed by the first 21 respondents (then and still plaintiffs in the superior court).

Be that as it may the number of plaintiffs in that case in the superior court went up from time to time till by the time the matter came up for hearing, they were 284. The additional plaintiffs came with several amendments to the plaint. Defences and amendments to the defences were filed as well. The hearing then commenced before Nambuye J. on 26th June 2008 and proceeded on 27th and 28th June 2008. The first witness gave evidence in chief. On cross examination, the applicants' counsel in this application raised questions touching on the limitation of actions. One of the learned counsel for the respondents who were plaintiffs in the court objected to that line of cross examination contending that the issue of limitation had been dealt with and decided upon by the decision of Aluoch J. that allowed the respondents to file the suit out of time. The learned trial Judge did not deal fully with that objection at that time, but directed the applicant to file a formal application on the issue. In compliance with that direction, the applicant filed notice of motion dated 10th July 2008 on 14th July 2008. In that application the applicant sought two orders which were that:-

- “1. The defendant be allowed to cross examine PW1, Ex-Major Josphat Nathan Irungu on the issue of limitation notwithstanding the leave granted by the Honourable Court on 14th February, 1995.**
- 2. Costs of this application be in the cause.”**

The main ground advanced in support of that application was that the law is well settled that the question

whether or not the plaintiff was entitled to the extension of time to bring a suit can only be challenged at the full trial. The respondents in this notice of motion before us who were the plaintiffs in the suit before the trial court opposed the application and in their various grounds of opposition stated that the application could not stand as the issue of limitation was *res judicata* in the suit and that the provisions of **sections 27, 28 and 29** of the Limitation of Actions Act Chapter 22 Laws of Kenya did not apply to the matter before Court. Further they felt it was a delay tactic and was thus mischievous, deceitful and abuse of court process.

That application came up for hearing before the trial court (Nambuye J.). After full hearing, the learned Judge dismissed that application in a ruling delivered on 15th August, 2008. In doing so, the trial court relied heavily on the ruling delivered earlier by Ojwang' J. which, as we have stated was an application seeking that more parties be joined to the original plaintiffs (respondents in this notice of motion) as co-plaintiffs. The learned trial Judge felt that Ojwang' J. had dealt exhaustively with the matter of limitation in his ruling and thus the issue of limitation was no longer available to the applicants and thus no cross examination of witnesses could proceed in an attempt to raise it again. That is the decision that prompted this application before us.

The applicant felt aggrieved by that decision. He is appealing against it and has filed Civil Appeal No. 79 of 2009 to that effect. In the meantime, he has come before us seeking orders:-

“1. That this application be certified urgent by this Honourable Court and so be heard on a priority basis.

2. That this Honourable Court be pleased to grant a stay of proceedings in Nairobi High Court Civil Suit Number 548 of 1995 and stay of execution of the orders of Lady Justice R. N. Nambuye delivered on 15th August, 2008 in the same suit: Nairobi H.C.C.C. No. 548 of 1995 pending the hearing and determination of the intended appeal herein.

3. That the costs of this application be provided for.”

The reasons upon which the notice of motion is premised are that the appeal already filed is arguable but the results of the success of the same appeal would be rendered nugatory if an order of stay of the proceedings is not issued as the substratum of the applicant's appeal which is the right to cross examine the plaintiffs in that case on facts relating to why they filed that case out of time and how they obtained leave to file the said suit out of time, would have been lost if the case proceeds to further hearing and the appeal eventually succeeds thereafter. In his submissions before us in support of the notice of motion, Mr. Waigi Kamau, the learned counsel for the applicant stated that the issue as to whether a party who has obtained leave to file a suit through an ex-parte application would in law be subjected to cross examination at the trial by a party challenging the legal efficacy of that ex-parte order granting leave and thus to rely on the defence that the suit is time barred by the provision of limitation of Actions Act is an arguable point. He referred us to several authorities on the matter and also contended that Ojwang' J's ruling relied on at length by the trial Judge, did not decide on that issue and thus the issue is still alive and is arguable. On the nugatory aspects, Mr. Kamau submitted that if the proceedings are not stayed, the hearing will proceed without cross-examination of the respondents on that issue and thus the applicant will have lost the mainstay of his case which is that the suit is time barred. The success of the appeal will be thus rendered nugatory as the case will have been heard and determined without the issues that would have been raised in cross-examination being considered. Mr. Osoro, the learned counsel for the first to sixteenth and the 18th to 21st respondents and holding brief for Mr. Agina for the other respondents opposed the application, seeing it as a delaying tactic. In his view, limitation is a legal matter that need not be raised through cross examination as it can be raised in the submissions without any need to cross-examine the witnesses on it. He further urged us to dismiss the application on grounds that the orders sought would result in stagnating the hearing of this old suit unnecessarily.

The notice of motion is brought under **rule 5(2)(b)** of this Court's Rules. For an applicant to benefit under that Rule, he has to demonstrate to the satisfaction of the court, two matters. First, he has to show that the appeal filed or intended appeal, is arguable. In this case, where the appeal is already filed, the

applicant needs to demonstrate that the appeal is arguable. Secondly, he also needs to show that if the application is refused and the appeal eventually succeeds, the success of the appeal will be rendered nugatory. See the well known case of ***Reliance Bank Ltd vs. Norlake Investments Ltd (2002)1 EA 227 (CAK)***.

We have considered this notice of motion with the above principles in mind. We have considered the record, the submissions by both learned counsel, the law together with the several useful legal authorities to which we were referred. In our view, whether in law a defendant can cross-examine plaintiff in a matter filed by the plaintiff outside the time limited by law but with the ex-parte order obtained from a court of law i.e, whether after leave is granted ex-parte to the plaintiff to file a matter, a defendant can challenge that leave and still plead limitation and in order to do so seek to cross-examine the plaintiff on circumstances leading to the grant of such leave is an arguable issue. We have no hesitation in coming to that conclusion and thus the appeal already filed i.e. Civil Appeal No. 79 of 2009 is arguable.

The appeal seeks to set aside the orders of the trial court which dismissed applicant's application to cross-examine the respondents on the issue of limitation. If the application is refused, the hearing will proceed and the applicant will not cross-examine the respondents possibly till the hearing is finalized and judgment delivered. If thereafter the appeal, which we have said, is arguable, eventually succeeds, and the applicant's right to cross-examine the respondents on that issue is restored, the hearing will have been concluded and that victory will be no more than a pyrrhic victory. The matter will have been heard and concluded without that input of the answers that would have ensued from such cross-examination. In short the decision in the superior court will have proceeded without such facts being incorporated in considering whether or not indeed the suit was time barred. That success of the appeal, if it succeeds at all, will be rendered nugatory.

The sum total is that this application has merit. It is allowed. The proceedings in the High Court at Nairobi Civil Suit Number 548 of 1995 are hereby stayed till the Civil Appeal No. 79 of 2009 in this Court is heard and

determined. We cannot grant stay of execution of the orders of Nambuye J. delivered on 15th August 2008 as the same orders never directed anything to be done. All it did was to refuse the applicant's application for leave to cross-examine the first witnesses in that Civil Suit No. 548 of 1995. However, as **rule 5(2) (b)** allows this Court to stay proceedings, we have done so as stated hereinabove.

As the proceedings we have ordered to be stayed relate to a matter filed way back in 1995 and is therefore a very old matter, we would not wish the orders made herein to be a reason for further delay in finalizing the matter before the superior court. We therefore direct that the Civil Appeal No. 79 of 2009, which is already filed be fixed for hearing at the Registry on priority basis.

Because of the peculiar nature of the notice of motion, we make orders that the costs of the notice of motion will abide the appeal. Orders accordingly.

Dated and delivered at Nairobi this 26th day of February, 2010.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true
copy of the original.

DEPUTY REGISTRAR