



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI
MISC. APPLICATION NO.45 OF 2014

(Before D.K.N. Marete)

CAPTAIN (RTD) CHARLES K.W. MASINDE.....CLAIMANT/APPLICANT

Versus

INTERGOVERNMENTAL AUTHORITY ON DEVELOPMENT.....RESPONDENT

RULING

Before court is an application by *ex parte* originating Summons dated 25th March, 2014 and filed on 7th May, 2014. It is brought under order 37 rule 6(1) of the Civil Procedure Rules and Sections 3,27 and 28 of the Limitation of Actions Act and all other enclosing provisions of the law. It seeks the following orders of court;

1. **THAT** the Honourable Court be pleased to grant the Claimant/Applicant leave to file the instant suit out of time.
2. **THAT** the annexed draft Statement of Claim be deemed to have been duly filed upon payment of the requisite court fees.
3. **THAT** cost of this application be provided for

And is grounded on the basis that

- a. **THAT** delay in filing the suit in time was not intentional nor inordinate as the same was caused by delay in obtaining the appropriate waiver of Jurisdiction/Authority from the Ministry of Foreign Affairs.
- b. **THAT** further necessary documentation touching on logistics relating to the filing of the suit took quite time to resolve.
- c. **THAT** the Applicant has also tried to negotiate with the Respondent through diplomatic channels for settlement of this matter which has not borne fruit.

The application is supported by the supporting affidavit of Charles K.W. Masinde sworn on the same date.

In the supporting affidavit the applicant avers that the delay in filing this suit was not intended or

inordinate but on grounds that he has been awaiting waiver on authority from the Ministry of Foreign Affairs to institute a suit against a foreign body in a Kenyan Court. Two, the documentation in support of his claim was held in his possession in Liberia where he is out on assignment and this delayed instructions and delivery to counsel. He further intimates that he has been making attempts at negotiations through diplomatic channels which efforts are fruitless.

The claimant annexes a statement of claim with the application.

The law relating to extension of time was set out in the case of **Gathoni Vs Kenya Co-operative Creameries Limited [1982]eKLR**, where the Court of Appeal held as follows;

1. ...

2. *For an application for leave to be allowed under Section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the court, that failure to apply within time was due to lack of knowledge of certain material facts. The applicant must show to the satisfaction of the court that she had taken all reasonable steps and sought appropriate advice in respect of the facts. Here the applicant failed to satisfy the court.*

3. *An applicant for leave under Section 27 must bring the action within one year of the cessation of the period during which the decisive material facts were outside his knowledge.*

4. ...

Similarly, in the authority of **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989**Mbito, J.(as he then was)observed as follows;

“When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the ex parte application that the evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done him by obtaining an order for the trial of a preliminary issue....Section 27 of the Limitation of Actions Act....provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant’s ignorance of material facts relating to the cause of action which were of decisive character....Although what amounts to “ignorance of material facts of decisive character” is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action’.

The criterion laid out in the above cited authorities is met in the circumstance of this case. The applicant has laid out a convincing case for grant of leave to file suit out of time. I find that this is a good case for extension of time to file a claim and grant the same. This application is therefore allowed. The costs of

the application shall be on cause.

Delivered, dated and signed the 23rd day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mrs. Guserwa instructed by J.A. Guserwa & Company Advocates for the Applicant.