



In re application for leave to file suit out of time (Miscellaneous Civil Application E044 of 2022) [2023] KEHC 18070 (KLR) (Civ) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E044 OF 2022**

JN MULWA, J

MAY 25, 2023

BETWEEN

FREDRICK NTHIGA MWANIKI APPLICANT

AND

**THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
(ODPP) 1ST RESPONDENT**

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

(Judgment delivered on June 27, 2019 acquitted him of the offence.)

RULING

1. Before the court is the Applicant's Notice of Motion dated January 27, 2022 brought pursuant to Articles 28, 29, 50 and 51 of the Constitution, Section 5 of the Public Authorities Limitation Act, Cap 39 of the Laws of Kenya and all other enabling provisions of the law. The Applicant seeks leave to file a suit for malicious prosecution against the 1st and 2nd Respondents out of time. He also prays that the costs of this application be provided for.
2. The application is based on the grounds set out on its face and supported by the Applicant's Affidavit in which he averred that on July 4, 2014, he was charged in Nairobi High Court Criminal Case No 55 of 2014: Republic v Fredrick Nthiga Mwaniki with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He was accused of having murdered one Francis Ambundo that on June 28, 2014 at Dagoretti Corner in Dagoretti District of Nairobi County but he pleaded not guilty to the charge. After a full trial, the court by a judgment delivered on June 27, 2019 acquitted him of the offence.



3. The Applicant averred that the failure to file the suit in good time and the inordinate delay in bringing the instant application were occasioned by factors beyond his control; that after delivery of the judgement, he wrote a letter dated October 7, 2019 to the court requesting for the typed proceedings of the case which was very crucial in the institution of a malicious prosecution suit. He states that the said letter elicited no response and/or action, whereupon he wrote a follow-up letter dated November 7, 2019. However, by the time he was being supplied with the typed proceedings, the statutory time limit for institution of a suit for malicious prosecution had lapsed.
4. The Respondents opposed the application through Grounds of Opposition dated July 21, 2022 in which they contended that the Application is fatally and incurably defective as Section 27 of the [Limitations of Actions Act](#) does not contemplate the Orders sought in the Application.
5. The application was canvassed by way of written submissions which this court has duly considered alongside the authorities cited by the parties.
6. The Applicant in this case is desirous of instituting a malicious prosecution suit out of time against two government entities. Section 3(1) of the [Public Authorities Limitation Act](#) provides as follows regarding limitation of proceedings founded on tort against public authorities:

' (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.'

7. When did the Applicant's cause of action accrue?
8. In [Jacob Juma & another v Commissioner of Police & another \[2013\] eKLR](#), the court stated that for claims based on the tort of malicious prosecution, the right to bring the action only accrues when a Claimant secures his acquittal of a charge or on appeal. In [Mbowe v East Menjo District Administration \[1972\] EA 352](#), the East African Court of Appeal stated that time for the purposes of limitation begins to run as from the date when a plaintiff could first successfully maintain an action. In the instant case, the Applicant's cause of action accrued on June 27, 2019 when he was acquitted of the murder charge. Time therefore began to run on the said date and pursuant to the provisions of Section 3(1) of the [Public Authorities Limitation Act](#), the suit ought to have been brought by June 20, 2020, at the latest.
9. The law does not envisage extension of time within which to file a suit based on the tort of malicious prosecution. The Applicant however relies on Section 5 of the [Public Authorities Limitation Act](#) which provides for extension of limitation period in case of disability. It stipulates as follows:

' Notwithstanding the provisions of section 4 of this Act, if, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under a disability:

Provided that—

This section does not apply in respect of proceedings where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;

This section does not apply to an action to recover a penalty or forfeiture or a sum by way of penalty or forfeiture recoverable by virtue of a written law.'



10. The Applicant contends that he was under disability from instituting the claim because of the lack of the typed proceedings. Under Section 2 (2) (b) of the *Limitation of Actions Act*, the disability envisaged in limitation periods is not physical disability, illness, financial, family or social challenges. The said provision stipulates as follows;

' A person is under a disability while he is a minor or of unsound mind; and, without prejudice to the generality of the foregoing, a person is conclusively presumed to be of unsound mind while he is detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics'.

11. From the above provision, it is evident that the inability to obtain the typed proceedings does not qualify as a disability. In the court's view, the Applicant was not vigilant in pursuing the proceedings. After writing the two letters of October 7, 2019 and November 7, 2019, the Applicant took a step back until over two years later. He did not explain the silence and delay for the period.

12. For the foregoing, the court finds that the Applicant's application dated January 27, 2022 lacks merit. It is dismissed with no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH DAY OF MAY 2023.

JANET MULWA

JUDGE

