



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 650 OF 2019 (O.S)**

**SIMON OIRO ONYANGO (Suing as a personal representative of the estate of**

**ANJELLA ADHIAMBO ONYANGO-Deceased),.....PLAINTIFF/APPLICANT**

**VERSUS**

**PATRICK GATHOGO.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is the product of the ex parte Originating Summons taken out by the plaintiff/applicant in the present instance whereby he sought for the orders hereunder:

*(i) THAT leave be granted to the plaintiff/applicant to file a suit against the defendant/respondent after the expiry of the limitation period.*

*(ii) THAT the time for filing the suit be provided for upon the granting of prayer (i) hereinabove.*

*(iii) THAT costs of the application abide the results of the intended suit.*

2. The Summons is supported by the grounds set out on its face and the facts stated in the affidavit of the applicant.

3. The applicant asserted that he is the father to Anjella Adhiambo Onyango (“the deceased”) and the personal representative of her estate.

4. The applicant went on to explain that he was unable to bring the Summons within the statutory timelines for the reason that the letters of administration were issued on 24<sup>th</sup> December, 2018 and that he only recently managed to obtain a copy of the same on 28<sup>th</sup> January, 2019.

5. The applicant further explained that following his obtainment of the letters of administration, he was unable to get a hold of his advocate since he had misplaced the said advocate’s contacts and also due to the fact that he had been deployed by his employer, the Kenya Defence Forces, to Boni Forest and later to Kismayu.

6. It was equally the applicant’s averment that there was an ongoing criminal case being Traffic Case No. 1329 of 2016 in which some of the relevant documents he intends to rely on presently were used as exhibits, adding that in any event, no party stands to be prejudiced should the Summons be allowed.

7. At the hearing of the Summons, *Miss Okweto* learned counsel for the applicant opted to rely on the averments made in the Summons.

8. I have considered the grounds set out on the face of the Summons and the facts deponed in the supporting affidavit.

9. To begin with, I have perused the draft plaint attached to the Summons and I have established that the nature of the intended suit is a fatal accident claim wherein the applicant is attributing the accident to negligence on the part of the defendant/respondent. The draft plaint also discloses that the accident occurred sometime on or about 12<sup>th</sup> January, 2016.

10. The law on limitations is clear that an action founded on tort shall be brought within a period of three (3) years from the date on which the cause of action arose. It is thus apparent from the foregoing facts that the limitation period lapsed sometime on or about the 12<sup>th</sup> of January, 2019.

11. That said, **Section 27** of the **Limitation of Actions Act, Cap. 22 Laws of Kenya** (“*the Act*”) provides thus:

**“(1) Section 4(2) does not afford a defence to an action founded on tort where—**

**(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and**

**(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and**

**(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section...”**

12. Further, **Section 28(1)** of the Act expresses that:

**“An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.”**

13. The aforementioned provision is reinforced by **Order 37, Rule 6** of the **Civil Procedure Rules, 2010** which stipulates that an application brought under Section 27 of the Act shall be made ex parte by way of Originating Summons supported by an affidavit. It therefore follows that the applicant has approached this court in the proper manner.

14. Having settled the above, it is now upon me to determine whether the circumstances presented before me are suitable enough to convince me to extend the time for filing the suit. I am persuaded by the court’s reasoning in **Rawal v Rawal [1990] KLR 275** as laid out in the case of **Kenya Orient Insurance Ltd v Senenerro Ole Kurraro & 7 others [2016] eKLR** thus:

**“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after lapse of time. It is not to extinguish claims.”**

15. In addressing the question to do with the courts’ jurisdiction to extend the time for instituting a claim as set out under **Section 27(1)** (*supra*), I am both guided and bound by the Court of Appeal’s analysis in **Mary Osundwa v Sugar Company Limited [2002] eKLR** where it rendered itself as follows:

**“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”**

16. Having established that the claim in question is founded on the tort of negligence, I am satisfied that this court has jurisdiction to extend the time required if sufficient reasons have been given.

17. I have looked at a copy of the limited grant of letters of administration ad litem issued on 24<sup>th</sup> December, 2018 annexed to the Summons and ascertained that the applicant herein is named as the personal representative for the purpose of filing suit. There is no indication that any further representations have been granted in respect to the estate of the deceased.

18. That said, I noted that the applicant did not avail any evidence or documentation to support his averments that he is an employee of the Kenya Defence Forces or that he was deployed to the aforementioned areas. Similarly, the applicant has not availed any evidence before this court to confirm the existence of the abovementioned traffic case relating to the accident in question or to show that the documents he intends to rely on were applied as exhibits in the said case.

19. Suffice it to say that and in consideration of the applicant’s status as personal representative ad litem coupled with the fairly recent age of the accident, I will exercise substantive justice in favour of the applicant.

20. Consequently, the Summons is allowed and the following are the orders made:

- a) Leave is hereby granted to the plaintiff/applicant to institute the suit out of time.
- b) The applicant shall file the plaint within 14 days from this day and ensure to comply with the procedure for taking out and service of summons to enter appearance upon the defendant.
- c) Costs of the Summons to abide the outcome of the suit.

**Dated, Signed and Delivered at Nairobi this 30<sup>th</sup> day of January, 2020.**

.....

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendant