



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

MISC APPLICATION NO.177 OF 2016

IN THE MATTER OF SECTIONS 4(2),27(2),28 AND 30 OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 6(1) OF THE CIVIL PROCEDURE RULES 2010 CHAPTER 21 LAWS OF KENYA

DAVID AMBANI IKHUMWA.....APPLICANT

RULING

The applicant David Ambani Ikhumwa filed an Exparte application dated 19/9/2016 seeking the following orders;

1. That leave be granted to the applicant to file suit out of time against the owners and drivers of Motor-vehicle Registration No. KBS 506L and KAU 457 G over road accident that occurred on the 7/9/2016.

2. Costs be in the cause.

The application was supported by the affidavit of David Ambani Ikhumwa briefly stating;

- i. That on the 7/9/2012 the applicant was involved in a road traffic accident involving motor vehicle registration No. KAU and KBS 505L.
- ii. That on the 13/9/2012 a person purporting to be agent from M/S Invesco Assurance Co. Limited approached the Applicant and took over all treatment notes from the applicant promising to settle the claim without going to court. The applicant was passenger abroad Motor-vehicle Registration No. KAU 457G insured by Invesco Assurance Co. Limited which collided with Motor-vehicle Registration No. KBS 505L.
- iii. That on the 21/9/2012 the said agent took over from the applicant police abstract and P3 form promising further assistance and effort for applicant to find the said agent were futile until 13/9/2016 when the said agent assured applicant that the insurance was about to settle the claim.
- iv. That on 9/9/2016 the applicant's effort to know progress of settlement were futile and on 13/9/2016 the applicant instructed counsel Omundi Bw'onchiri who discovered that the claim was statute barred.
- v. That the delay to file the claim within time required by law was not deliberate but due to acts of the said agent.

when the applicant appeared before me, it was agreed that the application be canvassed by way of written submission. The applicant filed written submission through Counsel Bw'Onchiri. He submitted the applicant was misled by the insurance agent and the applicant only realized that time had lapsed on the 13/9/2016 when he visited counsel for advice. He submitted that had it not been the acts of the insurance agent the applicant could have acted within time. He submitted that the intended defendants will not suffer any prejudice at all having insured their motor vehicle. He submitted that this suit ought to have been filed by 7/9/2015 but it is until 9/9/2016 when agent returned the documents to him and that on 13/9/2016 he instructed counsel to file this application and thereof it is their submission that this application was filed without inordinate delay and prayed that this court allow the application.

Upon perusal of the case file it is my finding that the main issue for determination is whether this court should allow the applicant to file the suit out of time as prayed in the application.

An application for leave to file a suit out of time is found under section 4(2) of the Limitation of Actions Act which provides;

4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

Section 27 of the Limitation of Actions Act provides;

Extension of limitation period in case of ignorance of material facts in actions for negligence.

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; and

(d) the requirements of subsection

(2) are fulfilled in relation to the cause of action.

The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which— (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b. in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Further order 37 Rule 6 of Civil Procedure Rules 2010 provides;

[Order 37, rule 6.] 6. (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.

It is contention of applicant that deceased was passenger aboard Motor-vehicle Registration No. KAU 457G insured by Invesco Assurance Co. Limited which collided with Motor-vehicle Registration No. KBS 505L. On the 13/9/2012 a person purporting to be agent from M/S Invesco Assurance Co. Limited approached the Applicant and took over all treatment notes from the applicant promising to settle the claim without going to court.

It appears to me that applicant had intention of filing the suit but was misled by a purported agent of the insurance company that occasioned him delay in filing the suit within time and therefore the failure to file suit within time was not deliberate I allow application dated 19th September 2016 and applicant to file his suit within 21days from todays date.

Dated and Signed at Bungoma this 24th day of July, 2019.

S.N. RIECHI

JUDGE