



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 303B OF 2019

ANTHONY AMBAKA KEGODE.....PLAINTIFF/APPLICANT

-VERSUS-

ATTORNEY GENERAL.....1ST DEFENDANT/RESPONDENT

SBM BANK LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has taken out the Notice of Motion dated 3rd April, 2019 and supported by the grounds laid out on its body and the facts deponed in the affidavits sworn by both the applicant and *Patrick Kahonge*. The applicant is seeking the substantive order for leave to file his suit out of time in addition to costs of the Motion.
2. The Motion is opposed by way of Grounds of Opposition filed separately by the 1st and 2nd defendants/respondents on 8th May, 2019 and on 16th May, 2019 respectively.
3. When the parties appeared before this court on 30th May, 2019 it was agreed by consent that the application be disposed of through written submissions, which the parties have since filed.
4. I have considered the grounds set out on the face of the Motion; the respective Grounds of Opposition and the rival written submissions alongside the cited authorities.
5. A brief background of the matter as presented before this court is that sometime in 2004, criminal proceedings were instituted against the applicant vide Nairobi Chief Magistrate's Criminal Case No. 2651 of 2004 wherein he was charged with various counts of obtaining credit by false pretenses and making a false document. Ultimately, the applicant was acquitted of the criminal charges sometime in 2010.
6. Thereafter, the applicant on or about 25th March, 2011 instructed the firm of Ochieng, Onyango, Ohaga & Kibet Advocates to institute a malicious claim against the 1st and 2nd respondents herein but that the instructions were not acted upon, which prompted the applicant to file Civil Case No. 121 of 2013 against the said firm of advocates, seeking damages for professional negligence.
7. The proceedings were decided in favour of the applicant, who was granted Kshs.300,000/= as general damages plus costs of the suit. The applicant is now before this court seeking leave to file the aforementioned malicious prosecution claim against the 1st and 2nd respondents out of time.
8. The 1st respondent through its brief submissions argues that the application is defective owing to the fact that it was filed by way of a Notice of Motion as opposed to an Originating Summons as is required pursuant to Order 37, Rule 6 of the Civil Procedure Rules, adding that the supporting affidavit of *Anthony Ambaka Kegode* was not witnessed by a Commissioner for Oaths. It is also the 1st respondent's submission that the applicant ought to have brought the action against the Attorney General within a period of 12 months from the date of the cause of action but did not.
9. On its part, the 2nd respondent submits that according to Sections 27 and 28 of the Limitation of Actions Act, the court cannot extend the time required for filing malicious prosecution cases and therefore lacks jurisdiction, citing the Court of Appeal decision of *Mary Ofundwa v Nzoia Sugar Company Limited Kisumu CA No. 244 of 2009* which reinforced the position.
10. The applicant argues that under Section 26 of the Limitation of Actions Act, the time would begin to run from the period he came to learn of his advocates' mistake of failing to institute the suit on his behalf, which explains why he instituted a suit against the said advocates on the premise of professional negligence.

11. On the issue of competency raised by the 1st respondent, I turn to **Section 28(1)** of the **Limitation of Actions Act** providing that a party approaching the court under Section 27 ought to do so by way of an *ex parte* application. **Order 37, Rule 6** of the **Civil Procedure Rules** goes further to express that such application should be by way of Originating Summons.

12. The applicant brought his application by way of a Notice of Motion and the same was not brought *ex parte*. Going by the legal provisions, this was not the proper manner of lodging the application.

13. On the issue of the affidavit, I have looked at the same and confirmed that it was witnessed by an advocate as opposed to a Commissioner for Oaths.

14. **Section 4(1)** of the **Oaths and Statutory Declarations Act, Cap 15** makes a proviso that:

“A Commissioner for Oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya ...”

15. It is clear from the foregoing that an affidavit can only be commissioned by a Commissioner for Oaths and not by an advocate as was the case here. The supporting affidavit is therefore improperly commissioned and it is ordered struck out.

16. In addressing the issue of jurisdiction, I am guided by the provisions of the Limitation of Actions as opposed to the Civil Procedure Act and the Rules, given that the matter constitutes a malicious prosecution claim.

17. **Section 4(2)** of the **Limitation of Actions Act**, is clear that claims based on tort are to be brought within a period of three (3) years from the date on which the cause of action arose. Further on, **Section 27(1)** of the said Act stipulates as follows:

“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.”

18. From the foregoing, it is clearly brought out that the instances in which a court can extend the time required to file a suit are in cases involving negligence, nuisance or breach of duty. Malicious prosecution claims such as the one currently before this court are not catered for under the above provision.

19. While it is unfortunate that the applicant had previously instructed a firm of advocates to file a claim under the head of malicious prosecution on his behalf but this was not done. This court’s jurisdiction to extend time for filing suits out of time does not and cannot extend to malicious prosecution claims. The Court of Appeal decision in the case of **Mary Ofundwa v Nzoia Sugar Company Limited Kisumu CA No. 244 of 2009** held inter alia:

“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.”

20. The motion is found to be incompetent. The same is ordered struck out with no order as to cost.

Dated, Signed and Delivered at Nairobi this 27th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st Defendant/Respondent

..... for the 2nd Defendant/Respondent