



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO.391 OF 2018

JOHN PETER MWANGI KAGIRA.....PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

Before the court for determination is the originating summons dated the 11th day of July 2018, seeking orders that the applicant/ plaintiff be granted leave to file suit against the Respondents out of time and that the plaint annexed to the supporting affidavit together with the respective documents in support of the suit be deemed as dully filed upon payment of the requisite fees.

It is made on the grounds that the plaintiff has suffered financial loss as a result of the malicious prosecution in Criminal Case No.2135/2006 which was instituted by the 1st defendant, his former employer.

That after the case was finalized, the applicant was misled by his former Advocate who informed him that he had filed the case only for the plaintiff to learn later on that no case had been filed. It is upon establishing the truth that the plaintiff instructed the firm of Walubengo Waningilo & Co. Advocates who upon receipt of instructions, moved with haste and obtained the proceedings in the criminal case and the same were availed to them on the 13th February, 2015.

In the supporting affidavit sworn by John Peter Mwangi Kagira, the plaintiff herein, on 11th July 2018, he avers that he was employed by the 1st defendant/Respondent up and until the 28th September 2006 when his services were terminated without following the due process. He was charged in Criminal Case number 2135 of 2006 which case dragged on for four (4) years as a result of which he was exhausted financially and his health equally deteriorated. This partly contributed to his inability to pursue any suit against the defendant even long after he was acquitted of the charges.

That, immediately after his acquittal, he instructed the firm of P.G. Wanyonyi & Co. Advocates to file a case on his behalf who kept informing him that they had filed but only came to discover that they had not filed, despite having paid them legal fees for the case.

He avers that the delay is not inordinate having regard to his situation as above explained and that in any event, the delay does not prejudice the defendant if the application were to be allowed.

He further avers that the court has discretion to disregard procedural lapses not amounting to abuse of its process and that no prejudice will be suffered by the Respondents.

The court has considered the originating summons and the affidavit in support. The application proceeded exparte as the defendants failed to file a response to that application. They also did not attend during the hearing of the application.

The application has been brought under Sections 1A, 1B and 3A of the Civil Procedure Act and the provisions of Cap.22 Laws of Kenya. It is trite that granting of leave to the applicant to file a suit out of time is a discretionary remedy but the same should be exercised judiciously. For the court to exercise its discretion in favour of a party, it has to be shown that there exists plausible reasons why the suit was not filed on time as required under the law and in particular under the Limitations of Actions Act and under the Public Authorities Act.

The plaintiff herein has deponed that the criminal prosecution exhausted him financially and left him with no money to hire a lawyer to pursue the claim for him. He also contends that he was misled by his Advocate who despite having been given instructions on time failed to file the case as instructed by the plaintiff.

The court has considered the reasons given for the delay in filing this suit. The plaintiff was misled by the Counsel whom he had previously instructed and by the time he got to know of it, time within which to file the suit had expired. The defendants herein did not participate in the hearing of the application and therefore the court finds that the defendants will not suffer any prejudice. It is only fair and just that the plaintiff be granted leave to file suit out of time. Further, the plaint annexed to the affidavit in support together with the respective documents will be deemed as filed upon the payment of the requisite court fees.

Costs of the application shall be in the cause.

Dated, Signed and Delivered at Nairobi this **25th** day of **October, 2018**

L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Plaintiff/Applicant**

..... **For the Defendant/Respondent**