



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 178 OF 2018**

**RIOBA OBED NYASINGA.....APPLICANTS**

**VERSUS**

**THE HON. ATTORNEY GENERAL**

**NETCO MANAGEMENT LIMITED**

**TOTAL KENYA LIMITED.....RESPONDENTS**

**R U L I N G**

**Outline of facts**

1. The applicant filed the *ex parte*, Notice of Motion, dated 29/6/2018 praying that he be granted leave to file a suit for general damage on account of alleged cause of action for malicious prosecution.
2. The facts leading to the application as disclosed on the grounds on the face of the application and the Affidavit of the applicant are that on the 13/8/2014 he was arrested and charged with three counts of criminal offences of conspiracy to commit a felony, stealing by servant and neglect to prevent a felony. He was arraigned in court on 15/8/2014 when he pleaded not guilty but the matter did not proceed to conclusion on the merits because on the 16/12/2014, the charges were withdrawn by the prosecution pursuant to the provisions of section 87(a) Criminal Procedure Code and he was discharged.
3. Upon the discharge, the applicant says he did instruct the advocate who represented him in the criminal case to file a suit for malicious prosecution and was at all times assured that all was well till the month of October 2017 when he came to learn that the advocate had not acted on his instructions. He says in the application and affidavit that he is bound to suffer irreparable loss and damages unless the orders be granted.
4. The law mandates that an application for extension of time to file suit be heard *ex-parte*. In this matter the applicant did serve the Respondents who were represented by Ms. Okata advocate in court at the hearing. Her attendance was however made without having filed any responses to the Application. The matter therefore proceeded *ex-parte* and on the documents filed by the applicant only. This court will however have regard to the statement by Ms. Okata, made from the bar, that there was a suit filed at the ELRC and a judgment delivered.

**Determination and reasons**

5. The principles to be applied in an application for leave to file suit out of time are now well settled. They are that:- It is a discretion of the court which must be exercised for the ends of justice to be met and within the law when applied to the circumstances of the case. To file suit out of time, the guiding substantive law is enacted under the limitation of Actions Act and those provisions under Civil Procedure Act are merely procedural.
6. From the reading of the application the issue for determination is only one; has the applicant established a case for the court to exercise its discretion in his favour.
7. Whether or not to grant leave to sue out of time is basically a question of whether or not there is a reason for delay and if there is jurisdiction upon the court to extend time. The question of jurisdiction flows from the provisions of limitation of Action Act which provides in what circumstances a court may grant an extension of time.
8. Of note are the provisions of Part III of the Act. Those provisions are, in summary, to the effect that disability, concealed fraud,

acknowledgement of a debt suspend running of time and that for cases founded on tort of negligence, nuisance and breach of statutory duty where the damages claimed consist of and include damages in respect of personal injury the court has power to extend time.

9. So the question then arises, does the court have jurisdiction to extend time in all and every cause of action? The answer was provided by the Court of Appeal in *Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd [2014] eKLR* when the court said:-

**“Under Section 27, as can be gleaned from the provision cited above, time to file suit can only be extended where the action is founded on tort and must relate to the tort of negligence, nuisance or breach of contract and the damages claimed be in respect of personal injuries to the plaintiffs as a result of the tort”.**

**...In *Mary Osundwa vs Nzoia Sugar Company Ltd [2002] eKL, Osieno J*, had, with the consent of the parties, granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal, this court said of section 27(1) of the Limitation of Actions Act:-**

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

10. Being bound by that decision, I do note that herein the plaintiffs intended action will not be grounded on negligence, nuisance nor breach of duty but will be largely on the tort of malicious prosecution as deponed to in paragraph 9 of the Affidavit in support.

11. For that reason, I do find that there is no jurisdiction upon this court to extend time with the result that the application cannot succeed but must fail. In coming to this conclusion, I have taken into account the words of Ms Okata advocate that a suit was indeed filed at the Employment And Labour Relations Court and a judgment was entered

12. The application is dismissed but with no orders as to costs because it was dealt with *ex parte*, the attendance by Ms. Okata Advocate and her address to court, which I consider gratis, notwithstanding.

**Dated and delivered at Mombasa this 19th day of October 2018.**

**P.J.O. OTIENO**

**JUDGE**