



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL CASE NO. 562 OF 2016

EMMANUEL KIDAHU RUHENGRI.....PLAINTIFF

VERSUS

SADRY DHALA.....DEFENDANT

RULING

1. There is before the court an originating summons dated 29/8/2016 seeking in the main that leave be granted to the applicant to file suit out of time and claim damages being repair costs arising out of an alleged road traffic accident which is alleged to have occurred on the 25.10.1995.
2. The application is supported by the affidavit of the applicant which sets out the grounds for delay to be the fact that between the date of the accident till 12/2/2016, the applicant had sued and was litigating with one Faisal Sadrudin Hessein as the registered owner of the motor vehicle he blames for the accident but that suit, CMCC No. 1518 of 1995 was dismissed on the 12/2/2016 on the basis that the sued defendant was not the registered owner of the motor vehicle.
3. It is further deponed that it was after the dismissed that the applicant carried out a search at the Registry of motor vehicles and came to establish the true defendant now sought to be sued.
4. The application is principally premised on the provisions of section 27 of the Limitations of Debtors Act. The all important question this court must ask and answer is whether or not the applicant has met the thresholds for grant of extension of time under that provision and secondly, if that be established, if the reasons advanced merit the courts discretion being exercised in favour of the applicant.
5. Section 27 of the Limitation of Actions Act provide:-

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

(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; and

d. The requirements of subsection(2) are fulfilled in relation to the cause of action.

(2) 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.

6. It is clear to me that for one to be entitled to seek the remedy of extension of time the important considerations are that the intended suit must be seeking damages for personal injuries and there is availed proof that material facts relating to the cause of action were or included facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff.

What is the applicants intended cause of action?

7. According to the plaint exhibited as annexure “EKRI” the suit to be filed claims material damage, being cost of repairs of a motor vehicle registration IT 3995 and general damages for loss of use at Kshs.1,200 per day. To me the claim is not one seeking damage for personal injury and therefore whether or not the facts were without the knowledge of the applicant would be immaterial if the cause of action is not one of these for which extension of time is permissible under the provision of the law.

8. I would therefore hold that no purpose would be served by considering the second issue now that the very foundation of the application for leave cannot be established. The law was well settled by the court of Appeal in *Mary Osundwa vs Nzoia Sugar Co. Ltd Civil Appeal No. 244 of 2000*, cited in *Tom Onyango vs Kenyatta National Hospital [2016] eKLR* with approval to the effect that:-

“Section 27(1) of the limitation of Actions Act clearly lays down that in order to extend time for filling a suit, the action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”

9. It follows that damages for material damage does not fit for consideration for extension of time under the law cited and it leads me to the inevitable conclusion that the application lacks merit, it must fail and I therefore dismiss it. As the matter was dealt forth *exparte*, I make no orders as to costs.

Dated at Mombasa this 23rd day of February 2017.

HON. P.J.O. OTIENO

JUDGE