



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

MISC. CIVIL APPLICATION NO. 149 OF 2015

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME
UNDER SECTION 27 OF THE LIMITATION OF ACTIONS ACT.

JOSHUA MUTUKU NYAMAI.....APPLICANT

VERSUS

ATHI RIVER MINING LTD.....RESPONDENT

JUDGMENT

INTRODUCTION

1. By Originating Summons dated **22nd June 2015**, the applicant seeks an order for extension of time to file suit under section 27 of the Limitation of Actions Act on the grounds set out on the application:

1. That this Honourable Court does extend time and leave be granted to the applicant a civil suit against Athi River Mining Ltd. out of time.

General Grounds:

1. That the intended suit arises out of an occupational disease.

2. That the occupation disease must have been contracted by Joshua Matuku Nyamai while working for Athi River Mining Ltd. between August 2007 and November 2009.

3. That Joshua Matuku Nyamai remained unaware of what ailed him until 17/07/2014 when a chest specialist identified the occupational disease.

4. That the applicant has not filed suit to date.

5. That the applicant is intent on filing suit to recover damages in respect of personal injuries.

2. The applicant seeks to file a suit for recovery of general damages for pain, suffering, loss of amenities, future medical expenses and loss of earning capacity and special damages of Ksh.16,000/- for medical expenses and medical reports arising from disease resulting from exposure to silica dust while in employment of the respondent between December 2007 and November 2009, in breach of statutory duty,

the law of negligence and contract of employment.

3. The application is supported by the affidavit of the applicant sworn on 22nd June 2015 indicating that the applicant “conclusively confirmed that I was suffering from silicosis” after medical reports from Dr. Kinuthia of 3/10/2013, following chest scan report from Machakos Imaging Centre dated 19/4/2013, and of Dr. C.J.M. Mureithi dated 17/7/2014..

4. In urging the application counsel relied on the provisions of section 27 of the Limitation of actions Act and the caselaw authority of *Divecon Limited (otherwise known as Diving Contractors Ltd) v. Shrinkhanu Sadrudin Samani* Court of Appeal Civil Appeal No. 142 of 1997 to support his case that extension of time will be granted in a negligence cause the material facts are unknown to the applicant until after the lapse of time prescribed for the filing of such causes. The case is also an authority for the proposition that there is no power to extend time for filing of contractual claims beyond the 6 years prescribed under the Limitation of Actions Act.

5. Section 27 of the Limitation of Actions Act cap.22 is in the following terms:

“27. 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.” [emphasis added]

6. As pleaded, the cause of action must have arisen between December 2007 and November 2009 when

the respondent allegedly breached his contractual and statutory duty and acted negligently towards the welfare of the applicant for whom it had a duty of care. As a claim in contract the six year period would expire on the date between December 2007 and November 2009 when the applicant first suffered disease as a result of the silicon poisoning on account of conditions made possible by alleged breach of the contract of employment, and no extension of time is tenable.

7. Paragraph 8 of the Complaint attached to the affidavit in support pleads the cause of action, that –

“By reason of the matters aforesaid from around May 2009 the plaintiff started experiencing dry coughing episodes and sneezing. This later developed to general exhaustion, shortness of breath with inability to exert, serious continuous coughing, tuberculosis and pneumoconiosis. The plaintiff has suffered damage.”

8. Even, if this date of the cause of action is taken as the 31st May 2009, the last day of the month when the Plaintiff claimed the applicant started suffering, the period of six years would end on the 30th May 2015, which is past and cannot be extended, and therefore the plaintiff is non-suited on any claim based on breach of contract.

9. However, as the Originating Summons is brought under section 27 of the Limitation of Actions Act the extension of time to file suit can only apply to a claim in negligence. Applying the law as set out in section 27 of the Limitation of Actions Act and the decision in **Divecon** to this case it appears to the court that the fact of the causation of the applicant’s ailment is a material fact to establish the connection between the injury and the respondent’s alleged negligent action and breach of statutory duty as set up by the applicant in the draft complaint annexed to the affidavit in support of the application for extension of time to file suit. The question for determination is whether the fact of causation of the applicant’s ailment, or the nexus between the ailment and the conditions of work while at the respondent’s employment, which would support a suit for damages, was established after the expiry of the prescribed time of three years from the date of the cause of action given as May 2009.

10. The three year period of limitation expired on the 30th May 2012.

11. The information which the applicant claims was obtained late is set out in two reports of Dr. Moses Kinuthia of 16th October 2013 and Dr. Christopher J. M Mureithi of 17th July 2014. The Opinion/impression of the two doctors are set out in the respective reports as follows:

“Report dated 16th October 2013 by Dr. Moses Kinuthia

Opinion

Joshua was continuously exposed to silicon dust in the normal course of duties for several years. He subsequently developed silicosis due to inhalation of silica dust. Silicosis usually causes gradual and permanent destruction of lung tissue ie. Bronchiectasis and Chronic Obstructive Airway Disease. This will permanently hamper his health and productivity and will require prolonged follow up by a chest physician. Total permanent incapacity is assessed at 50% (fifty percent)

Report dated 17th July 2014 by Dr. Christopher J.M. Mureithi

Impression

CT scan chest is old PTB with bronchiectasis and chronic interstitial lung disease. This is consistent with silicosis from exposure to quartz. The disease is progressive even after stopping exposure. Opinion. Degree of disability is 55%”

Conclusion

12. It is clear that as at 16th October 2013, the connection between the applicant's silicosis and his long exposure to 'silicon dust in the normal course of duties' had been established, and the applicant ought to have filed suit within one year under section 27 (2) (b) of the Limitations of Actions Act. I find that the outermost date for the filing of a suit for damages in negligence in this case was the 15th October 2014, being one year after the report by Dr. Moses Kinuthia establishing the connection between the applicant's ailment to his employment with the respondent. Had the time reckoning been from the date of the second Report of Dr. Christopher J. M. Mureithi of 17th July 2014, the filing of the application for extension of time on 14th July 2015 was just one week shy of one year. However, time must be reckoned from the date when the applicant **first** had information of the material fact of decisive character, in this case the establishment of the causal connection between his disease and the employment by the respondent, which happened as shown on the report by Dr. Moses Kinuthia.

13. Accordingly, I find and hold that the applicant's application is outside the permitted limits of extension of time to file suit for recovery of damages for negligence under section 27 of the Limitation of Actions Act.

Orders

14. The applicant's Originating Summons herein dated 22nd June 2015 and filed on the 14th July 2015 is dismissed with no order as to costs.

DATED AND DELIVERED THIS 11TH DAY OF JANUARY, 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kibunja for the Applicants

Mr. Ndola- Court Assistant.