



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NUMBER 283 "A" OF 2015

**IN THE MATTER OF SECTION 38 OF LIMITATION OF ACTION ACTS CAP 22 LAWS OF
KENYA**

AND

IN THE MATTER OF THE APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME.

JOHN MWANGI NG'ANG'A alias

JOHN DE MATTHEW. EX PARTE APPLICANT

RULING

The ex parte applicant herein has moved this Honourable court by way of an amended ex parte originating summons, amended on the 26th day of February, 2016 which is expressed to be brought under Sections 3 and 6 of the Public Authorities Limitation of Actions Act Section 28 as read together with part III of the Limitation of Actions Act, Order 37 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law.

The Applicant has sought the following orders: -

- 1. That the Honourable Court be pleased to grant the ex-parte applicant leave to commence civil proceedings against the Honourable Attorney General out of time.***
- 2. That costs of this application be provided for.***

It is supported by the annexed affidavit of John Mwangi Ng'ang'a sworn on the 26th February, 2016.

The summary of the ex parte applicant's case as captured in the said affidavit is that he was acquitted on the 20th June, 2014, in Criminal Case Number 932 of 2012 at the Chief Magistrate's Court at Nairobi, following which he applied for a certified copy of the proceedings on the 10th October, 2014 which proceedings were supplied to him on 13th May, 2015.

That upon receipt of the proceedings, a Notice of Intention to Sue the Attorney General was done on the 26th May, 2015 which as the law requires, was to run for 30 days before the suit could be instituted.

It is averred that the delay in filing the suit was occasioned by the delay in getting the certified copies of the proceedings and as the Applicant awaited communication from the Attorney General after he issued a Notice of Intention to Sue.

He further avers that upon receipt of the proceedings, his advocate had to peruse through them to ascertain whether he could maintain a cause of action and that also took a bit of time.

The court has duly considered the application and the Affidavits filed herein. The Power to extend time is discretionary and not fettered at all, save that the said power should be exercised judiciously and upon defined principles of law. In the case of **Aviation Cargo Support Limited Vs St Mark Freight Services Limited**, Civil Application No. 98 of 2013, the Court of Appeal in determining an application to file and serve a record of appeal out of the stated: -

***“The order whether or not to grant extension of time or leave to file and serve a record of appeal out of time is discretionary. Such discretion is exercised judiciously with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an Applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the Applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the Applicant took to ensure that it came to court as soon as was practicable.*”**

In the normal vicissitudes of life, deadline will be missed even by those who are knowledgeable and zealous. The courts are not blind to the fact when this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.”

In the case **Rawal Vs Rawal (1990) KLR 275** the court stated: -

“The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time.”

The court has noted the reason for the delay in filing the suit and the explanation given by the Applicant which in my view is plausible. It was caused by circumstances beyond his control and the delay is not inordinate. Courts of justice should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had, despite the delay.

In the premises foregoing, the application herein is allowed and the Applicant is granted leave to file suit out of time. The suit to be filed within fourteen (14) days from today. Costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 22nd day of September, 2016.

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L NJUGUNA

JUDGE

In the presence

..... for the exparte applicant.