



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL MISC APPL. CASE NO. 138 OF 2016

**IN THE MATTER OF: APPLICATION BY JOHN KIPKEMBOI MUTAI FOR EXTENSION OF
LIMITATION PERIOD ALLOWED UNDER LIMITATION OF ACTIONS ACT, CAP 22 LAWS
OF KENYA**

AND

**IN THE MATTER OF: THE ACCIDENT INVOLVING JOHN KIPKEMBOI MUTAI DURING
EMPLOYMENT**

RULING

[1] The application dated 23rd March, 2016 seeks orders that:

“1. That the court be pleased to extend the period within which the Applicant ought to file the suit against SWISS PORT KENYA LIMITED, AIRSIDE LIMITED the registered owner of motor vehicle registration number KAY 760X, MASSEY FURGUSON TRACTOR and AMADI ABALLA UMARI its authorized driver, servant and/or agent that caused an accident that resulted in serious injuries caused to JOHN KIPKEMBOI MUTAI.”

[2] The application is premised on the grounds stated on its face and is supported by the affidavit sworn by the Applicant, John Kipkemboi Mutai. The background facts are that the Applicant was on duty as a security agent when he was involved in an accident on 23rd November, 2009 involving motor vehicle registration Number KAY 760X which belonged to his employer, Swiss Port Kenya Ltd. The Applicant’s contention is that the motor vehicle was negligently driven by one Amadi Abdalla Umar who was a servant, agent or employee of Swiss Port Kenya Ltd. That as a result of the accident, the Applicant sustained severe chest and head injuries and later developed a deformity of the left clavicular fracture. That the Applicant’s permanent disability was assessed under the Work Injuries Benefits Act No. 13 of 2007 as 5%

[3] The Applicant attributes the delay in filing suit as due to circumstances beyond his control as he was still recovering. The Applicant has exhibited a bundle of medical documents. He further stated that he is still pursuing the issue of the review of the assessment done under the Work Injury Benefits Act. The Applicant also stated that he has been making inquiries regarding the whereabouts of the driver, Amadi Abadalla Umari and has established that the said driver had left the country for employment in Qatar but has now returned to the jurisdiction of the court. The Applicant urged the court to exercise its discretion in his favour and stated that he stands to suffer great prejudice if the orders sought are not granted.

[4] I have considered the application. It is noted that the cause of action arose on 23rd November, 2009.

By the date the application at hand was filed on 30th March, 2016, the limitation of time had caught up with him. Section 4 of the Limitation of Actions Act Cap 22 Law of Kenya provides for actions founded on tort to be brought to court within a period of three years. The Applicant came to court after about four (4) years after the lapse of time.

[5] As stated by Bosire, J (as he then was) in the case of **Rawal vs Rawal (1990) KLR 275**:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims.”

[6] Under Section 27 of the Limitation of Actions Act Cap 22 Law of Kenya, a cause of action that is barred may in certain cases be revived. The said section provides as follows:

“(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 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.”

[7] In the case of **Lucia Wambui Ngugi vs Kenya Railways & Another Nairobi HCMA 213 of 1989** Mbiti, J dealt with the question of extension of time for bringing an action barred by limitation of statute as follows:

“When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in

support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the *ex parte* application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have to done him by obtaining an order for the trial of a preliminary issue....Section 27 of the Limitation of Actions Act.... provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellant's ignorance of material facts relating to the cause of action which were of decisive character...Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action."

[8] In the case at hand, the Applicant has talked about his injuries and treatment. If the disability alluded to prevented the Applicant in filing his suit in time, then the provisions of Section 22 of the Limitation of Actions Act would come into play. The issue of disability would then be raised as a preliminary point during trial. As stated by Potter, J in the case of **Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104:**

"The disability relied on by the applicant being a physical disability, the nature and the extend of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2) (b) of the Limitation of Actions Act does not include physical disability..... Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)...Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the Knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances...In section 30(5)"appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be.... The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

[9] The Applicant has not established any ignorance of material facts of a decisive character relating to the cause of action to bring himself within the provisions of Section 27 of the Limitation of Action Act. The issue of the driver having left the country would not have been material in filing suit. The drivers employer was known to the Applicant. If the Applicant wished to enjoin the driver to the suit, the Civil Procedure Act provides for substituted service of summons.

[10] The Applicants pursuit of the review of the assessment under the Work Benefits Act could not have stopped the complainant from coming to court. The complaint has not shown what steps he took in that regard to obtain advise on e.g. medical, legal etc.

[11] With the foregoing, I find that delay by the Applicant in filing suit was inordinate. Filing suit seven (7) years after the date of the cause of action may become a stumbling block in the gathering of evidence by the intended Defendants. Consequently, I find no merits in the application and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 16th day of Sept, 2016

B THURANIRA JADEN

JUDGE