

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NUMBER 834 OF 2014

MARGARET NZILANI MUTETI. PLAINTIFF

VERSUS

THE ATTORNEY GENERAL. DEFENDANT

RULING

1. The motion before me is the one dated 23rd September, 2014. The same is expressed to be brought under Order 51 Rule 1, Order 8 Rules 3, 4, and 5 and Order 1 Rules 3 and 7 of the Civil Procedure Rules. Sections 1, 1A, 3 and 3A of the Civil Procedure Act are also invoked. The application seeks the enlargement of time within which to file suit against the Defendant.
2. The grounds upon which the application is predicated are set out in the body of the motion and in the Supporting Affidavit of the Applicant sworn on 23rd September, 2014. These are that 10 years ago, 13th January, 2005, to be exact, while innocently seated at her place of business at Huruma, the Applicant was shot in the knee by a police officer who was battling with some gangsters in the vicinity of her business; that she sustained serious bodily injuries whereupon she was rushed to hospital. The Applicant underwent surgery from which she incurred huge medical bills. That to-date, she still suffers from bouts of pain especially during cold weather.
3. The Applicant blamed her undergoing shock and trauma as a result of the incident for the delay in filing suit against the Defendant. She swore that she has a good claim against the Police Department for the injuries she suffered from the incident and stated that she would suffer irreparable loss if she were not allowed to file the suit out of time.
4. At the hearing of the application, Mr. Taliti Learned Counsel for the Applicant reiterated what his client had stated n oath and submitted that the Respondent will suffer no prejudice if the Orders sought were granted. Counsel urged the court to allow the application.
5. I have carefully considered the Affidavit in support and the submissions of counsel. This is an application for extension of time for filing suit. I think the principles applicable in such an application are the length of time, the reasons for the delay and the prejudice to be suffered by either allowing or declining the application.
6. As to the length of the delay, the cause of action arose on 13th January, 2005. This being a tortious claim, its life is three (3) years. Accordingly, the claim was caught up by limitation on or about the 12th January, 2008. The delay therefore, is from 13th January, 2008 and 1st December, 2014 when the application was filed. This is a delay of nearly seven (7) years less one (1) month. That to my mind is inordinately long.
7. Has the delay been explained? Under Sections 27 and 28 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, the law gives the grounds upon which such an application is to be granted. These are, where the Applicant is unaware of the circumstances constituting the claim or where the Applicant is prevented by any incapacity from bringing the claim.
8. According to paragraph 6 of the Supporting Affidavit, the Applicant was delayed in bringing the claim **“due to the fact that she was undergoing shock and trauma”**. The question that arises is what this undergoing shock and trauma means? Was the Applicant in continuous shock and trauma for seven (7) years or was the shock and trauma short-lived? One cannot tell from the record. In my view, the law is clear. It is he who alleges a fact that must prove the same. The Applicant wants the court to believe that she was under an impediment or incapacity for the period of Seven (7) years in which she delayed in bringing her claim against the Respondent. It was incumbent upon her to produce material to support that fact. This she failed.
9. To my mind, what the Applicant should have done was, for example, to present a Medical Report

which would have shown the sort of incapacity this “**shock and trauma**” was, its nature and duration. In the absence of such evidence, I do not think the court is inclined to exercise its discretion in her favour.

10. On prejudice, while I am alive to the fact that by declining to grant the orders sought the Applicant will forever be shut out from the seat of justice thereby suffering irreparable loss, I should also be alive to the possibility of the prejudice to be suffered by the proposed Defendant. Due to the passage of time, ten (10) years is a very long time for a court to require a Respondent to answer to a claim that has been lying in limbo without good cause. The possible lack of witnesses as well as memory lapse might be a high likelihood that will be prejudicial to a Defendant.
11. One other thing, the procedure for applications for extension of time is provided for under Sections 27 and 28 of the Limitation of Actions Act and Order 37 of the Civil Procedure Rules. They are supposed to be by way of Originating Summons if no suit has been filed or by Summons if a suit has already been filed. In this regard, what is before me is a Motion on an in-existent suit. In this regard, the Applicant did not even properly invoke the jurisdiction of this court.
12. Accordingly, the application is without merit and the same is hereby dismissed.

DATED, Delivered and Signed at Nairobi this 26th day of March, 2015.

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A MABEYA

JUDGE