

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO 348 OF 2014

JOYCE WAMUHU GITAU.....APPLICANT

R U L I N G

The application before the court for determination is the Plaintiff's Notice of Motion dated 3rd April 2014 seeking leave to file suit out of time. The applicant claims that she did not bring the intended suit within three years as required by law because of the mistake on the former advocate she instructed in 2010.

The application is also supported by the affidavit of Joyce Wamuhu Gitau, the applicant. She stated that she was involved in a road accident on 28th January 2010 and as a result, suffered severe injuries that led to her being admitted to the hospital for five days. She instructed the firm of Musyoka- Annan & Co. Advocates to act on her behalf to institute a suit against the owner of the motor vehicle. The applicant furnished the firm with the relevant document relating to the alleged accident including a copy of the records and P3 form. Her advocate did a demand letter to the owner of the motor vehicle requiring an admission of the liability within 14 days. She later contacted the same firm to know the progress and she was told to wait. After four years of waiting she decided to instruct the firm of Kamau Kuria & Company Advocates. The applicant blames her former advocates for failure to institute the suit within time.

The application was prosecuted by way of a written submission. The applicant submitted that Section 27 and 28 of the Limitation of Actions Act gives the court the discretion to grant leave to file suit out of time if the intended suit is founded on tort or negligence and it is for personal injuries. The applicant referred the court to the decision in the case of **Re In The Matter of Joseph Opwoyo Okun (2013) eKLR**.

The applicant further submitted that it was the fault of her advocate that the suit was not filed in time. On her part she gave instructions to the firm of advocates but they failed to take the necessary action. She claims to be a lay person who did not have any idea that there is time limitation in instituting suits. The applicant further submitted that the mistake of an advocate should not be visited on his client. The applicant relied on the case of **Alnoor Al Mustaqeen Vs Officer Commanding Station Garbatulla & 2 Others (2014) eKLR, Commercial Bank Africa Limited Vs Martin Fares Miyesa (2004) eKLR, Paul Asin t/a Asin Supermarket Vs Peter Mukembi (2013) eKLR**. Where the court held that the mistake of counsel should not be visited on the client.

I have considered the applicant's application and the brief submissions by the applicant together with the contents of the supporting affidavit in detail.

Whether or not the order for extension of time should be granted lies entirely in the discretion of the court. A court will allow the extension of time to file a suit where the applicant satisfies the court that he/she had good and sufficient cause for not filing the suit in time. The law relating to extension of time was set out in the case of **Gathoni Vs Kenya Co-operative Creameries Limited (1982) KLR 104** where the Court of Appeal held as follows;

"2. For an application for leave to be allowed under Section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the court, that failure to apply within time was due to lack of knowledge of certain material facts. The applicant must show to the satisfaction of the court that she had taken all reasonable steps and sought appropriate advice in respect of the facts. Here the applicant failed to satisfy the court.

3. An applicant for leave under Section 27 must bring the action within one year of the cessation of the period during which the decisive material facts were outside his knowledge.”

In the instant application, I find the reasons given by the applicant for failing to file the suit out of time to be satisfactory. The applicant attributed the failure to her former advocate who did not file the matter within time. The applicant has also explained the steps she took to make sure the matter was filed in court. The intended suit is found on the tort of negligence and in my view the applicant has satisfied the requirements of Section 27(2) and 28 of the Limitation of Action Act. Notwithstanding the fact that the Defendant will still be entitled to raise the issue of limitation to the trial court, I am in the meantime persuaded to grant the leave to file the suit out of the limitation period.

ORDER

The Applicant is hereby granted 21 days leave to file his intended suit with no order as to costs.

Date and delivered at Nairobi this 25th day of May, 2015.

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D A ONYANCHA

JUDGE