



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC. CIVIL APPLICATION NO. 180 OF 2014

MATHEKA KITUTE.....APPLICANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

RULING

1. The application dated 11th November, 2014 is brought under Section 3A Civil Procedure Act (2010) and Section 22, Limitation of Actions Act, Cap. 22 Laws of Kenya.
2. The application seeks orders that the Applicant be granted an extension of time within which file suit against the Respondent and its agents within twenty one (21) days which other period as this Honourable court shall deem just and reasonable.
3. The Applicant has described himself in the affidavit in support as a 75 year old former employee of the Respondent. It is stated that in February 1995, the Applicant was working for the Respondent, when a locomotive driver negligently managed a locomotive and ran over the Applicant. The Applicant sustained serious injuries in his right leg thereby rendering him disabled. That sometimes in the year 1999, the Applicant retained the firm of Muoki & Co. Advocates to follow up the issue of compensation for him. That after making numerous visits to the said firm of Advocates, the Applicant was shocked to learn in the year 2014 that no suit had been instituted.
4. The Applicant attributes the failure to file the suit in time to the Advocate and to having been rendered immovable by the accident.
5. Section 22 of the Limitation of Actions Act, Cap. 22 Laws of Kenya provides for the extension of the period of limitation in case of disability. Under Section 2(2)(b) of the Act, disability is defined as follows:

“A person is under a disability while he is a minor or of unsound mind; and, without prejudice to the generality of the foregoing, a person is conclusively presumed to be of unsound mind while he is detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics.”

6. There is no evidence provided by the Applicant to establish that he was a minor or a person of unsound mind. The Applicants evidence is that he was injured on the leg. This was a physical disability. Can the Applicants case be revived under the provisions of Section 27 of the Limitation of Actions Act? The said section provides as follows:

27. (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) (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. 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 all reasonable steps had been taken. As stated by Potter JA in **Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR –**

“... the disability relied upon by the Applicant is a physical disability, the nature and extent of which in time is not revealed. The learned judge dismissed this ground, in my view quite rightly, because disability in this statutory context does not include physical disability. Section 2(2)(b) of the Act clearly limits the meaning of disability. It provides:

“(2) For the purposes of this Act ...

(b) a person is under a disability while he is a minor or of unsound mind; ...”

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 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 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:

(a) He did not know that fact; and

(b) 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 before that time for the purpose of ascertaining it; and

(c) 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 “the advice of a competent person qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be.”

In view of those provisions of the law, I do not see how the learned judge could have held that the applicant had taken all reasonable steps to ascertain whether before November, 1979, she had a cause of action. She consulted an advocate in September 1980, but no explanation is given, except that she was waiting to hear something from the police, as to why she did not consult an advocate for a year or more earlier. 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.”

7. In the instant case, it is quite clear that the Applicant was aware of his injuries. According to the affidavit evidence, the Applicant indeed instructed an advocate to follow up the matter of compensation on his behalf. In my view, the Applicant ought to have taken steps to follow up the matter with his Advocates. It was not reasonable for the Applicant to retain an advocate in the year 1995 and sit back until the year 2014 when he says he followed up the matter with the Advocates. It is also noted that the Applicant has not brought forth any evidence to prove that he had indeed retained the services of an advocate.

8. With the foregoing, I find no merits in the application and dismiss the same. Right of appeal explained.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 18th day of **June**, 2015

.....

B. THURANIRA JADEN

JUDGE