



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 676 OF 2014

JANET DANA KITSAO.....APPLICANT

VERSUS

BONIFACE MUOKI.....1ST DEFENDANT

JARED NYAMWEYA.....2ND DEFENDANT

GOEFREY NJUGUNA.....3RD DEFENDANT

RULING

1. By an originating summons dated 30th September 2014, brought under the provisions of Sections 4(2) 27 and 28 of the Limitation of Actions Act, Sections 1A,3A of the Civil Procedure Act and Order 37 Rule 6(1) of the Civil Procedure Rules, the applicant **Janet Dama Kitsao** seeks from this court leave extending the limitation period for the purposes of filing a suit which is statute barred.
2. The originating summons is supported by 7 grounds and the affidavit of Janet Dama Kitsao the applicant. It is alleged that the applicant was involved in a road traffic accident on 21st April 2011 involving motor vehicles KAX 386L belonging to Jared Nyawayaya and motor vehicle KBK 746A belonging to Geoffrey Njuguna and motor cycle No. KMCN 938 Q as a result of which she was injured. It is also stated that the delay in filing suit within 3 years was occasioned by circumstances beyond her control as she lacked adequate details pertinent to the institution of the suit; that no prejudice will be occasioned on the intended respondent if leave is granted and that it is only fair and just that the orders sought are granted.
3. In her supporting affidavit, the applicant deposes that she has had financial difficulties and health problems that hampered her pursuing the anticipated legal action against the intended defendants and that she spend time trying to settle medical bills as she was a student in High School at the material time of the accident and only learnt recently that her claim was statute barred after leaving school as per annexed leaving certificate dated 18th April 2014. She deposes that she suffered serious injuries making her to attend physiotherapy due to incapacitation, hence the delay in bringing suit and further, that she only recently learnt of the ownership of the offending motor vehicles and motor cycle after seeking assistance from the police.
4. The annexed medical treatment notes show that the applicant was admitted in Aga Khan University Hospital on 21st April 2011 and discharged on 1st May 2011. She had tear of left middle finger tendon, fracture of right maxilla left foot and fracture of left clavicle and she was 18 years then. Her leaving certificate also show that she was born in 1993 and left school on

12th November 2012 in form four.

5. The treatment note/discharge summary dated 1st May 2011 also shows that she sustained very serious injuries involving multiple skull fractures and had to undergo reconstruction of multiple facial fracture tendon repair among others. The police abstract issued on 16th May 2011 shows that she was a passenger and her nature of injury as grievous harm.
6. The draft plaint lists about 8 fractures and other soft tissue injuries and medical expenses of kshs 854,487.18. The plaintiff alleges that she was a passenger in motor vehicle KBK 746A which collided with KAX 386 L and Motor Cycle KMCN 938Q and blames them for the accident.
7. The law relating to extension of time is contained in Sections 4,27,28,29, 30 and 31 of the Limitation of Actions Act. Section 4(2) of the Limitation of Actions Act provides that:

(2) An action founded on tort may not be brought after the end of three years from the date of which the cause of action arose.

8. The above provision is however qualified by Section 22 of the said Limitation of Actions Act which provides that if on that date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of 6 years from the date when the person ceases to be under a disability or dies, whichever event occurs first, notwithstanding that the prescribed period of limitation has expired. The section nonetheless sets out exceptions.
9. Section 4(2) is also qualified by Section 27(1) of the Act which provides that Section 4(2) does not afford a defence to an action founded on tort where-

- a.
- 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.

Subsection 2 of section 27 provides that:

(2) The requirements of this Sub-Section 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 material 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 cases, was a date not earlier than one year before the date on which the action was brought.

10. The above law was set out in **Gathoni Vs Kenya Co-operative Creameries Ltd (1982) eKLR** where the Court of Appeal held:

1.
2. ***For an application to be allowed under Section 27 of Cap 22 Laws of Kenya, 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.***
3. ***Must bring such action within one year of the cessation of the period during which the decisive material facts were outside his/her knowledge”***

11. In **Lucia Wambui Ngugi vs Kenya Railways & Another HC Miscellaneous Application**

213 of 1989, Mbitio J observed that:

“ It must of course be assumed that for purposes of the exparte application, the 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 exparte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done to him by obtaining an order for the trial. Consequently, this application can only succeed if the applicant can avail herself of the provisions of Section 27 as read with Section 31 of the Act 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 the 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 Act, when read with Sub-Section (2) thereof, material facts of a 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.”

12.In **Rawal V Rawal [1990] KLR 275**, Bosire J (as he then was) stated that:

“ 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 has lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims.”

13.In **Dhanesvar V Menta Manilal M.Shah [1965] EA 321** the court stated that ;

“.....the effect of limitation enactment is to remove remedies irrespective of the merits of the particular case.”

14.In **Iga v Makerere University [1972] EA 65** the court held:

“.....unless the appellant in this case had put himself within the limitation period showing the grounds upon which he could claim exemption the court ‘shall reject’ his claim.....”

15.From the above judicial pronouncements, it is trite that the Limitation of Actions Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief. The extension of time to file suit where such time has lapsed can however, be brought under Section 27 of the Limitation of Actions Act in tort in respect of claims for personal injuries arising from negligence, breach of duty or nuisance.

16.In the instant case, it is clear from affidavit evidence availed that the cause of action allegedly arises from an alleged negligent acts of the proposed defendants in the manner in which they drove/rode, managed and or controlled the accident motor vehicles/cycle, as a result of which the applicant sustained serious personal injuries as shown by the discharge summary from Aga Khan University Hospital.

17.Nonetheless, even where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves that she was ignorant of material facts relating to the cause of action which material facts must be of a decisive character and which were, at all times outside her knowledge, whether actual or constructive(see **Republic vs Principal Magistrate P. Ngare Gesore & 2 Others Exparte Nation Media Group Ltd[2013] e KLR**).

18.In order to prove the above position as espoused in section 27 of the Limitation of Actions Act, the applicant is expected to demonstrate that she did not know that those facts were capable of

being ascertained by her; she had taken all such steps if any, as it was reasonable for her to have taken that time for the purpose of ascertaining the facts; and that so far as they existed, and were known to her, circumstances from which, with appropriate advise, that fact might have been ascertained or inferred, she had taken all such steps (if any) as it was reasonable for her to have taken before that time for the purpose of obtaining appropriate advise with respect to those circumstances. In Section 30(5) “appropriate advise” is defined as meaning in relation to any facts or circumstances **“advise of a competent person qualified in their respective spheres, to advise on medical, legal or other aspects of that fact on those circumstances, as the case may be.”**

19. In the present case, the applicant deposes in her affidavit that at the material time of the accident, she was a student in High School. Annexure JAK 2 is School Leaving certificate from Angaza Nguluni Academy showing that she left form four on 12th November 2012. The accident occurred on 21st April 2011 a year and a half before she left school. She also deposed that she did not know the owners of the accident motor cycle. However, a copy of a police abstract issued to Kitsao Ngala Chome who is recorded as (father) on 16th May 2011 less than one month after the accident shows that all the particulars of the accident and owners of the two motor vehicles KBK 746A and KAX 386L and Motor Cycle KMCN 938Q were recorded therein. It cannot therefore possibly be true that the applicant herein had any difficulty tracing owners of the accident motor vehicles/Motor cycle. The applicant was in hospital from 21st April 2011 to 1st May 2011 and discharged to continue for outpatient at Mr Bodo’s clinic according to the discharge summary dated 1st May 2011.
20. This court does appreciate that the applicant at the time of the accident was a student then and had to undergo medication including physiotherapy. This court also appreciates that the applicant sustained serious injuries and heavy medical expenses were incurred by her father as shown by the attached receipts some cleared by Kenya Power & Lighting Company Ltd, others by cash and others by Medicins Sans Frontiers France/Kenya.
21. What this court does not appreciate is the fact that the applicant has not been candid with this court. Her depositions are not in accord with the documents which she annexed to the affidavit in support. This court, on the first occasion when this application came up for hearing had to satisfy itself as to the merits of the application. The first batch of documents had no copy of police abstract which was filed later on demand by the court and which clearly show that it was obtained hardly a month after the accident and had all the details and particulars of ownership of the accident motor vehicles and motor cycle involved.
22. In addition, all the invoices and or receipts for payment of hospital bills were for the year 2011. It can therefore not be true that the application concentrated on settling her hospital bills between 2011 and 2014 October 6th when this application (OS) was instituted and when she was a school leaver that had not disclosed from what sources she was raising the alleged hospital charges.
23. In my view, the applicant has failed to demonstrate to this court the reasons for her failure to file suit within three years. She has not been sincere in her depositions and neither has she demonstrated that she was ignorant of material facts of a decisive character, relating to the cause of action. In **Mary Wambui Kabugu V Kenya Bus Service Ltd CA 195/95, Shah JA** was categorical that:

“ The requirements under Section 27 of the Act are explicit and the court cannot go beyond the scope of the requirements for instance out of sympathy because the applicant did not know the law. If the evidence showing prima facie that the requirements of the Act are satisfied leave should be granted leaving the defendant to challenge the facts in the action in due course. The statute does not seem by its language to confer a discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may differ.”

24. What the above decision of the Court of Appeal and others like **Yunes K. Oruta & Another V Samuel Mose Nyamato CA 96/84** establish is that where an order has been made extending time, such order is not final but is merely provisional and that the defendant will have every

opportunity of challenging the facts and the law afterwards at the trial of the suit. It is the trial judge who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar and he is not in the least bound by the provisional view expressed by the judge in chambers who granted leave. I would, for the aforesaid reasons dismiss this application. However, I note that all the decisions I have relied on are prior to August 27th 2010. In this era and times, I am enjoined to apply the principles espoused in the Constitution of Kenya 2010 which did not exist when the decisions I have relied on were made, on the right to be heard pursuant to Article 50(1) of the Constitution which enacts that 50(1) every person has the right to have any dispute that can be resolved by the application of law decided on a fair and public hearing before a court or, If appropriate, another independent and impartial tribunal or body.

25. The right to a fair hearing as espoused above cannot be limited, albeit it should not be construed to mean that it ousts the jurisdiction of the court to grant or refuse to grant leave based on the conditions set out in the Limitation of Actions Act. The right, in my view is invoked in the circumstances of this case to accord the applicant an opportunity to ventilate her grievances before the trial court so that she does not feel ousted from the judgment seat.
26. In addition, if the right to access to justice under Article 48 of the Constitution is to be realized, then persons who have failed to meet the statutory timelines of filing suit, where there is room for extension of such period, should not be denied an opportunity to access the court and ventilate their grievances since the Law of Limitation of Actions does not extinguish claims but bars the filing of stale claims. It is for the above reasons that I grant the applicant herein Janet Dama Kitsao extension of time within which to file suit arising from a road traffic accident which occurred on 21st April 2011.
27. The suit shall be filed within 21 days from the date hereof in default, such leave will automatically lapse. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 28th day of October 2015

R.E. ABURILI

JUDGE