



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 254 OF 2013

HELLEN KIRAMANA.....PLAINTIFF

VERSUS

PCEA KIKUYU HOSPITAL.....DEFENDANT

RULING OF THE COURT

1. The Plaintiff filed a notice of motion dated 7th August, 2015 under Order 50 rule 6 of the Civil Procedure Rules, Section 26 and 27 of the Limitation of Actions Act and Article 159 (2) (d) of the Constitution of Kenya. She seeks from this court extension of time for filing this suit and have the plaint filed on 2nd July, 2013 and amended on 25th May, 2015 to be deemed properly on record.
2. The application is premised on the grounds on the body of the application and the supporting affidavit of the Plaintiff **HELLEN KIRAMANA**. The Plaintiff acknowledged that the cause of action arose in the year 1999 but averred that the material facts relating to the cause of action are facts of a decisive character which were at all material times outside the knowledge of the Plaintiff until the year 2012. She further contended that the Defendant stands to suffer no prejudice in the event time is enlarged.
3. Learned Counsel for the Plaintiff, Professor Wangai submitted that Order 37 rule 6 (2) of the Civil Procedure Rules allows for the filing of an ex parte application to extend time after the filing of a suit. He pointed out that the Plaintiff underwent a surgery for hip replacement in the year 1999 and it that was on 20th June, 2012 that it was discovered that there was a metal implant which was marked serial No. **D2992-89 size 3 “DO NOT IMPLANT”**, which metal was produced by the plaintiff during the hearing of this suit. He argued that the court has a mandate under Article 159 of the Constitution to ensure that substantive justice is arrived at.
4. The Defendant filed grounds of opposition dated 14th September, 2015. The grounds were that the application does not lie in law; that an application to seek leave to extend time for filing a suit is made prior to filing a suit and that the application is an admission on the part of the Plaintiff that the suit as filed is a nullity *ab initio*.
5. Learned Counsel for the Defendant, Miss. Kabita contended that the Plaintiff's move of seeking to validate this suit after filing it is an abuse of court process. She stated that the cause of action having arisen in the year 1999 lapsed after three (3) years pursuant to Section 4 of the Limitation of Actions Act. She contended that there was no good reason for filing this application at this stage. That Order 37 rule 6 of the Civil Procedure Rules required that this application be made before filing of the suit. She further contended that Section 28 of the Limitation of Actions Act provides that an application for leave must be

made before the filing of a suit and that Article 159 of the Constitution does not cure limitation.

6. In a brief rejoinder Professor Wangai argued that there was no delay in filing the suit since the surgery and discovery of the wrong implant was done in the year 2012 and the suit was filed in the year 2013.

7. The only issue for determination is whether the plaintiff is entitled to the order of this court extending time within which this suit should have been filed, and especially after the institution of suit.

8. The Defendant having filed grounds of opposition, is found to have basically made general averments and is therefore considered not to have responded to the issues of fact raised by the Plaintiff and has not rebutted the issues in the application. See **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR** where it was held as follows:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deposed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.

In this regard, the court held in Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil Case No. 2143 of 1999

..... From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit..... having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability....”

9. Even if I am to be found wrong on the above disposition, it is clear from the pleading that this suit arises from medical negligence which is founded in tort to which section 4(2) of the Limitation of Actions applies. The said section provide as follows:-

“An action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued.”

10. However, exceptions lie from the statutory limitation as to causes of action as follows:-

a) **time does not begin to run if, or upon, the claimant’s falling within Section 26 Limitation Act in the case where the action is for relief from the consequences of a mistake which the Plaintiff had not discovered or could with reasonable diligence have discovered; or**

b) **time is extended upon application in court in the case of the Plaintiff’s ignorance of material facts under Section 27 and 28 of the Limitation Act where the Plaintiff wholly complies with the conditions under those sections.**

11. On this point I share the holding in **Kenya Cargo Handling Services Limited Vs Ugwang KLR [1985] page 593** where the Court of Appeal held as follows:-

“Section 27 of the Limitation of Actions Act (Cap 22) does not lay down any period of limitation. All it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. That section does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort...” (Emphasis mine)

12. Considering that the Plaintiff discovered the wrong implant in the year 2012 after it was inserted in

1999, it follows that time only started running from the date of discovery of the implant which is 2012 and not from the date when the wrong implant was inserted in her hip. Time can therefore be extended. I need not emphasise that in any event, since time did not start running until 2012, then the issue of this suit having been filed out of time does not arise, as it was filed in 2013 within one year from the date of discovery of the wrong implant.

13. The next question that follows is whether time can be extended after filing and hearing of suit and before judgment. The defendant contended that time could not be extended at this stage of the suit and that it could only be extended before filing of suit.

14. Order 37 rule 6(1) and (2) of the Civil [Procedure Rules is clear and gives an applicant two options. Under Subrule 1:

a. an application under section 27 of the Limitation of Actions Act made before filing of suit shall be made ex parte by Originating Summons supported by affidavit.

b. Any such application made after filing of suit shall be made ex parte in that suit.

15. On the other hand, section 28 (3) of the Limitation of Actions Act too provides that an application for extension of time can be made after institution of suit and in the suit ex parte. It therefore follows that this application for extension of time can be made either before or after filing of suit –in the suit and ex parte. Nonetheless, the plaintiff herein brought this application inter partes since the plaintiff had already testified and it is therefore only fair and just that the defendant participates in the proceedings to challenge the leave, which can only be challenged during the trial.

16. Over time, Courts have held that the effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In **Rawal vs. Rawal [1990] KLR 275** it was observed 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 had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”. See also Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321.

17. **39.**The same position was taken in **Iga vs. Makerere University [1972] EA 65.** in which it was held:

a. “A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim...The Limitation 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.”

18. What this means is, a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the ***Limitation of Actions Act***, Cap 22 Laws of Kenya are fulfilled. That 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 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.

19. The above cited provisions clearly stipulate the circumstances under which the court may extend time for bringing an action barred by limitation statute. **Mbito, J** dealt extensively with the issue in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989** in which the learned Judge expressed himself 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 scrutinise 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 scrutinised, 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”.

20. Potter, J in Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104 similarly had this to say:

“The disability relied on by the applicant being a physical disability, the nature and the extent 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.”

21. Clearly, extension of time in claims made in tort must be in respect of personal injuries arising from 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).

22. The claim herein relates to the tort of negligence against the hospital for a wrong implant. Under section 28(3) of the Limitation of Actions Act, such an application for extension of time to file suit **can be made after the commencement of the suit. The only condition stipulated therein is –**

a. only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient to establish a cause of action, apart from any defence under section 4(2) of the Act; and

b. to fulfil the conditions of section 27(2) of the Act in relation to that action;

and it appears to the court that until after the commencement of the action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such date as (apart from section 27 of this Act) to afford a defence under section 4(2) of the Act.

23. Considering that the challenge to an application for extension of time can only be made at the trial and the Defendant failed to do so during the trial, they have nonetheless been given an opportunity to be heard

on the same since they did not raise it during the hearing albeit they had pleaded it in the defence.

24. The objection to the grant of leave to file a suit after expiry of the time limit is based on section 27 and 28 of the Limitation of Actions Act. The defendant's only objection is that the application ought to have been brought before filing of this suit. It never challenged the facts brought out at the trial, or by way of arguments at the trial. There is therefore no dispute as to facts relied on in bringing this application. As I have demonstrated above, section 28 of the Limitation of Actions Act and order 37 rule 6(2) allow the bringing of the application in the suit after commencement of the suit. It therefore follows that the objection raised to this application is misconceived. In the case of **Mary Wambui Kabugu v/s Kenya Bus Service Ltd C.A. Civil appeal No. 195 of 1995**, Justice Shah J.A. stated as follows:-

“...In my humble view the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts...”

25. The Court of Appeal in the case of **Yunes K. Oruta and Another v Samwel Mose Nyamato Civil Appeal No. 96 of 1984** (unreported). In his judgment in the case of **Bernard Mutenga Mbithi v Municipal Council of Mombasa and Another Civil Appeal No. 3 of 1992**, (unreported) Kwach, J.A. albeit, obiter dicta, set out the issue most succinctly thus:

“..... the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made can only apply to the court which made the order to set it aside.”

26. In addition, section 28(3) of the Limitation of Actions Act does permit the bringing of such application after commencement of suit. The only issue would be whether the applicant /plaintiff has satisfied the conditions set out in section 27(2) of the Act. In this case, I am satisfied that those conditions have been met. I say so because the plaintiff only discovered that she had a wrong implant which affected her hip and exacerbated the problem when she underwent an operation in 2012. There was no opportunity for her to know that she had wrong implant with clear inscriptions “do not implant” as she was never shown the implant at the time of insertion by the defendant in 1999. It would be a travesty of justice if any court denied the applicant leave extending time since it was not shown that she knew of the wrong implant.

27. The applicant, in my view, has satisfactorily shown that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive). Those material facts are that the applicant had been inserted a wrong metal implant in 1999 and the only time she came to learn of it was in 2012 during a second operation. She then filed suit in 2013 relying on the discovery. It is in the interest of justice that this application be allowed. I am on this point further fortified by the decision of **Divecon Limited v. Samani C.A. Civil Appeal Number 142 of 1997** (unreported).

28. Accordingly, having found that the cause of action arose in 1999 but time started running from the time of discovery of the wrong implant which was in 2012, and even if I was wrong on the above, I am persuaded that the applicant has satisfied the conditions for the extension of time for filing suit out of time. I therefore allow the application by the plaintiff as presented, extending the time within which the plaintiff should have filed this suit.

29. As the leave sought is in the suit, and the defendant having been given an opportunity to be heard on the application, I hereby order that the suit as filed and heard is deemed to have been filed within the statutory period of three years from the date when the cause of action arose.

30. I make no orders as to costs of this application.

Dated, signed and pronounced in open court at Nairobi this 27th day of October, 2015.

R.E.ABURILI

JUDGE