



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NUMBER 776 OF 2014

TOYOTA KENYA LIMITED. APPLICANT

VERSUS

BEATRICE NJOKI. 1ST RESPONDENT

JACOB MEHARI ABAY. 2ND RESPONDENT

R U L I N G

This is an ex parte originating summons dated 3rd November, 2014, brought pursuant to the provisions of Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 37 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 27 of the Limitations of Actions Act.

It is supported by the Affidavit of **Onkoba R Kemunto**, an Advocate of the High Court of Kenya which was sworn on 3rd November, 2014.

The Applicant prays that it be granted leave to file suit out of time and that it be granted leave to file plaint within 14 days from the date of the grant of the leave.

In the Affidavit in support, the deponent avers that the Applicant instructed the firm of Mose, Mose & Millimo Advocates to file suit in the matter.

Following the instructions, demand letters were done and the Advocate instructed his clerk, a certain Peter Musyoka to file plaint but instead of filing the plaint, the clerk filed the file back to the docket and consequently failed to bring the file back to the attention of the advocate for the necessary action.

It was not until the 10th October, 2014 that the Advocate realized that the Plaint had not been filed when he accidentally came across the said file which had been misfiled in the docket by which time the statutory period within which to file the suit had expired and hence the Application herein.

The Advocate seeks the indulgence of the court as the mistake was inadvertent and unintentional. He argues that the Applicant has a meritorious claim and in the circumstances of the case, it is only just and mete that the Application is allowed.

I have looked at the plaint annexed to the Affidavit and the claim is a material damage claim as pleaded in Paragraph 8 of the same. The cause of action herein arose out of a road traffic accident that occurred on the 4th October, 2011 as a consequence of which the Plaintiff's motor vehicle registration Number KAY

189A was damaged. The Plaintiff has pleaded the particulars of special damages as follows: -

a) Repair costs – Kshs.54,673/-

b) Motor Vehicle – Search – Kshs. 500/-

c) Assessment Fees – Kshs. 4,000/-

Total **Kshs.59,173/-**

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which he claims against the Defendants on behalf of its Insurers ICEA Lion General Insurance Company Limited who are entitled to all the benefits of the claim under the doctrine of subrogation.

As pleaded in the plaint, the accident the subject matter of the Application occurred on the 4th October, 2011. The suit should have been filed by latest 3rd October, 2014.

The question that the court will have to consider is whether it has jurisdiction to grant leave to file the suit out of time. Section 4(2) of the Limitation of Actions Act provides that an action founded on Tort may not be brought after the end of three years from the date the cause of Action occurred. Under Section 27 of the same Act, time can only be extended for an action for personal injuries but not for material damage to a vehicle.

In the case of **Bisai & Another Versus Post Bank Credit (OS) 237 of 2003** the Judge held that extension of time only relates to an action in respect of personal injuries.

In **Mary Ojundwa Vs Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000** the Court of Appeal when dealing with a similar Application held and I quote: -

“Section 27 of the Limitations of Actions Act clearly lays down that in order to extend time for filing a suit, the action must be founded on tort and must relate to the tort of negligence nuisance or breach of duty and the damage claimed must be in respect of personal injuries to the Plaintiff as a result of the Tort”.

Section 27 is a statutory provision which the court has to apply and adhere to whether the Plaintiff has a good claim or not and whether the delay in filing the same was sufficiently explained. It’s unfortunate but the court is bound by that legal provision.

For the foregoing reasons, the Application is misconceived and the same is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 12th day of November, 2015.

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L NJUGUNA

JUDGE

In the Presence of

..... for the Applicant.

..... for the 1st Respondent.

..... for the 2nd Respondent.