



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO.357 OF 2015**

**PETER GICHUKI KABIO .....APPLICANT**

**VERSUS**

**JOSEPH MUTURI CHEGE .....RESPONDENT**

**RULING**

This ruling determines the application dated 18<sup>th</sup> August 2015 filed by the exparte applicant Peter Gichuki Kaboi. The application which is brought under the provisions of Section 27 of the Limitation of Actions Act Cap 22 Laws of Kenya and Order 37 Rules 7 and 14 of the Civil Procedure Rules 2010 seeks from this court orders that the court be pleased to grant the plaintiff an extension of time to file suit against the defendant Joseph Muturi Chege for injuries sustained by the plaintiff in a traffic accident on 19<sup>th</sup> March 2012 due to negligence of the defendant.

The application is supported by the affidavit sworn by the applicant Peter Gichuki Kaboi sworn on 18<sup>th</sup> August 2015 and annexures thereto. The application was argued orally in court by Mr Mureithi advocate for the exparte applicant relying on the detailed affidavit and annexures filed by the applicant.

It is contended that the failure to institute suit against the defendant within the statutory limitation period was due to the serious injuries which the plaintiff sustained in the road traffic accident on 19<sup>th</sup> March 2012 which injuries later became complicated and the plaintiff was admitted in hospital for a long time as a result he was incapacitated from giving instructions to an advocate to institute suit on his behalf. Further, that the complications were such that the plaintiff suffered a heart attack due to blood clots and that he therefore suffered a disability which this court should consider as shown by the medical documents annexed to this affidavit.

That he was in and out of several hospital facilities including Kenyatta National Hospital, Menelik Hospital, Marura Nursing Home, Aga Khan University Hospital, hence he was incapacitated for a long time. In the submissions, counsel for the applicant stated that it is the applicant's wife who went to the advocate's office seeking legal advice and that the advocate had to visit the applicant and take instructions and present to him documents for signature in support of this application. Counsel confirmed to court that indeed the applicant was under serious disability and hence the delay in filing of suit.

I have carefully considered the application by the plaintiff /applicant as filed by way of originating summons, the supporting affidavit, annexures thereto and the oral submissions in court by the plaintiff's advocate.

The law relating to extension of time to file suit outside the statutory limitation period is found in Sections 4,22,27,28,29, 30 and 31 of the Limitation of Actions Cap 22 Laws of Kenya. Under Section 4(2) of the Limitation of Action Act:

***“An action founded on tort may not be brought after the end of three years from the date on which the cause of action arose.”***

The above provision is however qualified by Section 22 of the same Act which enacts 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 prescribed period of limitation has expired. There are, however, some exceptions under the above section which are not material to this application. Section 4(2) of the Act is also qualified by Section 27(1) of the Act which provides that Section 4(2) of the Act 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 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 of the Act enacts that

“ (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 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 case, was a date not earlier than one year before the date on which the action was brought?

The above statutory provision was explained in the case of **Gathoni V Kenya Co-operative Creameries Ltd [1982] e KLR** where the Court of Appeal stated:

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 cession of the period during which the decisive material facts were outside his /her knowledge.

The above position echoed Mbiti J ( as he then was ) in **Lucia Wambui Ngugi V Kenya Railways & Another HCC Misc 213/1989**.

I have also considered the originating summons by the applicant in line with the decision by the Court of Appeal in **Oruta & Another Vs Nyamato [1988] KLR 590** that in cases of Limitation, the judge in chambers is required to form, on the plaintiff’s evidence before him, a prima facie view as the matters which the Act contemplates will be decided if leave were granted only on the action itself and these matters are:

- a. Whether the plaintiff has a good cause of action;

b. Whether the plaintiff has fulfilled the requirements of Section 27(2) of the Act.

In the above **Oruta V Nyamato** cases, the Court of Appeal also observed that from a close reading of the Act, it was not the intention of the legislature to allow a claim based on personal injuries on account of negligence and nuisance or breach of duty to be met with a defence of limitation. In this case, the cause of action arose on 19<sup>th</sup> March 2012 therefore the suit for damages arising from the tort of negligence ought to have been instituted in court by 19<sup>th</sup> March 2015 but it was not. This application for extension of the limitation period was filed on 20<sup>th</sup> August 2015. The delay was about five (5) months. That delay has been explained as being due to the disability state that the plaintiff found himself in following very serious injuries that he sustained in the accident as a result of which he suffered blood clots and hence a heart attack. The medical documents on record indeed reveal very life threatening complications that the plaintiff suffered as a result of the alleged accident. In addition, there is prima facie evidence that the plaintiff has since the material accident been in and out of hospital. No court of law can underestimate injuries that result into heart attacks as if a heart attack is anything to be taken lightly. I take judicial notice of the fact that a heart attack can lead to instant death. The plaintiff herein is lucky to be live though his life expectancy has no doubt been shortened by the debilitating complications arising from the multiple fractures that he sustained in the accident. In **Rawal vs Rawal [1990] KLR 275**, Bosire J (as he then was) held that:

***“ The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the other hand, and on the other hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”*** A similar holding though differently can be found in **Dhaneser Vs Mehta Manilal M. Shah [1965] EA 34** that; .....The effect of limitation enactment is to remove remedies irrespective of the merits of the particular case. In **Iga V Makerere University [1972] EA 65** the court held that

***“.....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.”***

From the above judicial pronouncement, it is clear that the Law of Limitations does not extinguish claims but operates to bar the claim sought for when the suit or claim is time barred. Thus, where the suit is statute barred, unless leave is granted to extend the limitation period, the court cannot grant the remedy or relief.

In this case, the applicant has sought for leave to extend the period for filing suit out of the statutory limitation period time of 3 years. The application is permissible under Section 27 and 28 of the Limitation of Actions Act. The cause of action arises from an alleged negligent acts of the proposed defendant(s) in the manner in which the motor vehicle registration No. KYJ 325 was driven along Thika Super Highway on 19<sup>th</sup> March 2012 at 6.45 pm thereby knocking the plaintiff / applicant and seriously injuring him. It is the extend of those injuries that disabled the applicant from filing suit in time as he has been in and out of hospital with various complication including an alleged heart attack.

Prima facie, this court is satisfied that the applicant herein has a good cause of action and that he has fulfilled the requirements of Section 27(2) of the Limitation of Actions Act. In addition, the applicant has satisfied this court that he was under a disability to personally from instruct an advocate to institute suit in his behalf for recovery of damages, within the stipulated period. The court notes that letter of demand was send to the proposed defendants Insurance on 10<sup>th</sup> March 2013. However, the special damages as at that time was shs 1,877,776.69 to file suit of that figure allow, one would require nearly 70 thousand as initial court fees. The applicant thereafter was hospitalized from 19<sup>th</sup> June 2014 when he suffered heart attack. He has notified the defendant's insurers of the intention to sue and there is evidence of correspondence between the insurance company and his advocates.

In my view, the applicant has satisfied this court that he merits to be granted the orders sought and to

deny him that chance is to oust him from accessing the seat of justice contrary to Article 48 of the Constitution.

Accordingly, I allow the applicant's originating summons dated 18<sup>th</sup> August 2015 and grant the applicant extension of time within which the suit as proposed, against the proposed defendant/respondent should have been filed.

I order that the applicant files suit against the respondent Joseph Muturi Chege or any other person connected with the motor vehicle registration No. KYJ 325 in relation to the road traffic accident which occurred on 19<sup>th</sup> March 2012. Such suit shall be instituted within 60 days from the date hereof. The applicant to bear his own costs of this application.

**Dated, signed and delivered at Nairobi in open court this 17th day of December 2015.**

**R.E. ABURILI**

**JUDGE**

**17/12/2015**