



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPL. NO. 31 OF 2013

FRANCIS KINYUA KABANGAAPPLICANT

RULING

By an originating summons brought under sections 27 and 28 of the Limitations of Actions Act Order 32 Rule 6 of the Civil Procedure Rules the ex parte applicant moved the court for orders

THAT this honourable be pleased to grant leave to FRANCIS KINYUA KABANGA on behalf of the Estate of SUSAN WANJIRA KINYUA to institute civil proceedings against LUCY WANJIRU MURIITHI and JOHN KABANGA KINYUA for recovery of general and special damages arising from fatal injuries occasioned as a result of road traffic accident for the intended defendants negligence.

The application was supported by the evidence of Francis Kinyua Kabanga wherein he deponed that the deceased was involved in road traffic accident on 15th November 2009 in which she suffered fatal injuries and that he is illiterate and lacked knowledge that the suit was time barred by law and could not bring the suit within the statutory period due to financial difficulties which did not enable him to contact an advocate.

It was further deponed that as a consequence to the accident he suffered emotional distress and could not therefore follow up the matter in time and that the deceased defendants are likely to suffer irreparable harm if leave is not granted.

Section 127 of the Limitation of Acts Act give the courts jurisdiction to extend limitation period in cases of this nature when the following conditions are met.

- a) The suit is for damages.***
- b) The damage claimed include or relates to claim for personal injuries.***
- c) The material facts relating to the cause of action were or included facts of a decisive material nature which were at all material times outside the knowledge of the applicant until a date which was either after the three (3) years limitation period.***

Under section 28(2) when the application is made before the commencement of the relevant action the court shall grant leave in respect of any cause of action to which the application relates if but only if from the evidence adduced by or on behalf of the plaintiff it appears to court that if such action were brought forthwith and the like evidence were adduced in that action that evidence would be in the absence of any evidence to the contrary by sufficient to

- a) To establish the cause of action apart from any defence under section 4(2) and***

b) To fulfill the requirement of section 27 (2).

I have looked at the affidavit in support of the application and whereas am of the view that those do not constitute facts required under section 30(3) of the Act, in view of Article 159 of the constitution which demands substantive justice and on the authority of DIVECON LTD vs SHIRINKHAN SADRUDIN SAMNANI CIVIL APPEAL NO. 142 OF 1992 which give the intended defendant an avenue to challenge this exparte order from herein at the hearing, the intended defendant shall suffer no prejudice.

I will therefore allow the application herein and grant leave to the applicant to file suit out of time.

Dated and delivered at Nyeri this 23rd day of May 2014

J. WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Miss Mumbi.

J. WAKIAGA

JUDGE

23/5/2014