REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPLICATION NO. 34 OF 2014

LESIIT, J

IN THE MATTER OF EXTENSION OF TIME TO INSTITUTE SUIT

AND

IN THE MATTER OF CLAIM

BETWEEN

ALNOOR AL MUSTAQEEN.....APPLICANT

V E R S U S

OFFICER COMMANDING POLICE STATION GARBATULLA.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT.

RULING

1. The Applicant **ALNOOR AL MUSTAQEEN** has approached court by way of an ex-parte originating summons brought under Order 37 rule 6(1)of the Civil Procedure Rules and Section 1A, 1B, 3A of the Civil Procedure Act Sections 27 and 28 of the Limitations of Actions Act.

2. One order is sought in the application which is an order extending time of instituting suit against the Respondents with costs abiding the result of the main suit.

3. Ms. Kiome urged the application on behalf of the Applicant. Counsel urged that the application had been brought within one year after lapse of time to file the suit. Counsel urged that limitation of time was a technicality of procedure which was curable under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.

4. Ms Kiome cited **James Mangeli Musoo V. Ezeetec Ltd,** industrial court **Case No. 263 of 2012**. This case is not applicable to the instant case as the application before the Industrial Court was for amendment of pleadings.

5. Ms Kiome cited **Cpt. (Rtd) Charles Masinde v. Intergovernmental Authority on Development.** The authority was provided but it has no citation. It was an application for leave to file suit out of time before the Industrial court. In that case, Marete, J. cites a case by Mbito J. in **Lucia Wambui Ngugi V. Kenya Raibwaysa** and Another Nairobi **HCRA No. 213 of 1989** where the Judge observed:

> "**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 scrutinize 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 scrutinized and if that evidence does not make quite clear that the plaintiff comes within the terms of 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 exparte application that 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 ex-parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be 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 appellants 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 sections 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.**

6. I have considered the applications together with the written and oral submissions by Ms. Kiome for the Applicant.

7. This case has a background which I will briefly outline. The Applicant filed a Constitutional Petition No. 1 of 2012 against the Respondents seeking interalia compensation for Loss of earnings and loss of use of Motor vehicle and any other order for ends of justice. The case was heard by myself. In my judgment delivered on 13th June, 2013 I awarded damages to the Petitioner for deprivation of the vehicle and goods for a period of 33 days which was a contravention of Article 40 of the Constitution.

8. In regard to the claim for loss of user of vehicle, Loss of profits for goods and compensation I ruled that the claim lay elsewhere and not in a Constitutional Petition. Both the Petitioner herein and the Respondent took the (my) judgment to the Court of Appeal. The Applicant herein challenged the failure to award damages for loss of user and earnings and the entire judgment. In brief the Court of Appeal agreed with this court that the Petitioner's claim for damages apart from general damages for breach of the Petitioner's fundamental right to property could not be properly, granted in the Constitutional Petition.

9. The Petitioner therefore moved back to this court seeking leave to file suit out of time.

10. That is the background of the application now before me. I am well versed with the facts of the case having heard the earlier suit. Even without stretching issues very far let me say that the Constitutional Petition was correctly filed because it is on that basis alone that damages for breach of Constitutional rights could be awarded.

11. The Constitutional Petition could not however, be used for claim to damages for tortuous acts. That ought to have been the subject of a Civil Suit. The Petitioner was therefore ill informed by his counsel to claim damages of a tortuous nature in a Constitutional Petition.

12. Should a party be allowed to suffer due to errors or mistakes of his counsel? It is trite law that a party ought not to suffer injustice or hardship resulting from excusable errors, mistakes or but not to assist a party who has deliberately sought to obstruct or delay the cause of justice. See **Shah V. Mbogo and another 1967 EA 116**.

13. The Petitioner has a good claim. He was ill advised by his counsel to seek damages in tort in a Constitutional Petition. The Petitioner now seeks to correct the mistake by filing the appropriate suit.

14. The application for leave to file suit out of time has been brought three weeks after the Court of Appeal decision in which that court agreed with this court that claims of a tortuous nature could only be considered in a civil suit. The delay in filing suit is within one year. The Applicant has acted with expedition since becoming aware that a Civil Suit was necessary for his civil claim.

15. In conclusion and for the reasons given herein above I will allow the Ex-parte Originating Summons dated 27th June, 2014 as follows:

1. **An order be and is hereby given extending time of instituting suit to the Applicant.**

2. **Leave be and is hereby granted to the Applicant to file suit out of time.**

3. **The Applicant to bear his own costs of this summons**.

4. **Leave granted in (2) above lapses in 30 days from date hereof.**

DATED SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF SEPTEMBER, 2013.

J. LESIIT

JUDGE