



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MIAC.CIVIL APPLICATION NO.196 OF 2012**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT**

**HEAVENLY NJERI GATHU.....APPLICANT/INTENDED PLAINTIFF**

**VERSUS**

**IRENE WALUSE.....RESPONDENT/INTENDED DEFENDANT**

**RULING**

The application before me for determination is the ex-parte originating summons brought under Order 37 Rule 6 (1) and (2) of the Civil Procedure Rules cap 21 and section 27 of the Limitation of Actions Act cap 22 Laws of Kenya. The applicant is seeking for orders that the applicant be granted leave to file suit out of time and costs of this application be in the cause. This application is grounded on the affidavit of Heavenly Njeri Gathu which she deposes that she had instituted this suit through her next of friend in Nairobi HCCC No. 6500 of 1990 which was later transferred to the Chief Magistrates court and allocated case No. CMCC No. 3159 of 2003. That the lower court suit arose from a road traffic accident which occurred on or about 6<sup>th</sup> May 1989 when I was five years old and that the suit was heard by Hon A.Ongeri and determined in her favour on 14<sup>th</sup> February 2007. That the insurers being dissatisfied with the said finding lodged an appeal in HCCA 121 of 2007 which was heard and determined by Hon. Angawa J on 25<sup>th</sup> November 2007 leading to the striking out of the original suit as filed. That the court's judgment was that she was not given the opportunity to elect whether to proceed by acting on her own behalf and discharge the next friend upon attaining the age of majority. She averred that the said case addressed the technicalities in the initial suit and did not address the merits of the case. She says that it was not in dispute that she was involved in the accident on 6<sup>th</sup> May 1989 as a result of which she sustained serious injuries which she is entitled to compensation and as a result of the said technicality she has not been compensated and therefore seeks leave to file suit out of time to enable her seek justice for injuries sustained. That the respondent who was insured at the material time shall not suffer any prejudice that cannot be compensated by way of an award for costs should the suit be allowed to proceed on its merit and that there has been no delay in bringing this application and in view of the circumstances of the case justice and fairness shall be achieved once the matter is heard and determined on its merits.

This case was heard before Khaminwa J in which the applicants advocate submitted that the application was for leave to file suit out of time stating that there was a suit filed by a next of friend which was eventually struck out. He submitted that the suit was on the issue of personal injuries caused to the plaintiff and there asks for time for extension of time.

I have read the pleadings and submissions of the advocate in court. The issue for determination is whether the applicant should be granted leave to file suit out of time.

This court has unfettered discretion to exercise its discretion in considering the application but there are principles which must guide it. The applicant is required to satisfy the court, among other things, that the intended suit is not frivolous; that the delay in bringing the application has not been inordinate and that the respondent would not suffer undue prejudice if the application is allowed.

I note that the applicant has not attached the proceedings and judgment of CMCC 3159 of 2003 and also the judgment of Angawa J. that struck out the lower courts suit in HCCC No 121 of 2007. The applicant in her affidavit aver that the judgment at the Magistrates court made a determination in her favour. The same

is also not annexed. In the absence of these documents which counsel should have annexed in the application I am unable to ascertain whether there was injustice caused to the applicant by striking the suit in its entirety. Further the reason for the delay is not explained by the applicant in her application. What she has just stated is that her suit was struck out but after the striking out of the suit in 2007, what impeded her from filing suit five years later? The delay should be explained so that the court can weigh on whether it will prejudice the respondent if the court grants the applicant leave to file suit.

From the foregoing this application lacks merit and in the upshot I dismiss it with costs.

Orders accordingly.

Dated, signed and delivered this 14<sup>th</sup> day of May 2013

**R.E OUGO**

**JUDGE**

In the presence of :-

.....Applicant/Intended plaintiff

.....Court Clerk