



No. 27

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 553 OF 2012

ISABELLA G. MOTARI APPLICANT

-VERSUS-

STEPHEN G. NDIA RESPONDENT

RULING

1. This is an application dated 13/12/2012 for enlargement of time for the applicant to seek out of time for damages arising out of a road traffic accident shown to have occurred on 22/3/2009. The three year statutory period for lodging claims founded on tort under section 4 (2) of the Limitations of Actions Act therefore expired on 22/3/2012.
2. In support of the application, the applicant cited three grounds as follows:-
 - a. ***THAT the applicant instructed the advocate on record to file her case in the lower court but the advocate could not proceed to institute the same for want of adequate instructions.***
 - b. ***THAT the delay in filing the suit was also due to inadvertent mix-up on the part of the plaintiff's advocates with the result that the draft plaint together with other documents were misfiled and duly discovered recently.***
 - c. ***THAT applicant has been and is still undergoing treatment arising from injuries occasioned as a result of the accident.***
3. In her supporting affidavit, the applicant explains the reasons for the default in filing the suit within the prescribed time as follows:-

“2. THAT I instructed the firm of Bosire Gichana & Co. Advocates to act for me in a road traffic accident case and pursue the claim on my behalf.

3. THAT I was still unwell and did not visit my advocate often to establish the status of my case who asked me to see another doctor for purposes of preparing another medical report in view that the doctor who had prepared the 1st medical report had passed on sometime in the month of December 2010. Annexed herewith is a medical report marked as exhibit 1KM-1.

4. THAT in the month of March, 2012 when I visited their office and I was informed that my pleadings and some documents were missing from the office file the same

having been misplaced initial treatment chits.

5. THAT the situation worsened hence I opted to travel to India for specialized treatment as I was suffering from severe pain.

6. THAT it took me upto the month of September, 2012 to obtain all the relevant information and documents which enabled me travel to India on 16th September, 2012. Annexed herewith are the relevant pages of my passport marked as 1KM-2.

7. THAT I was operated on 24th September, 2012 and the metal placed on my hip running down to the knee joint and a plastic material placed. Annexed herewith is the photographs showing metal removed held by myself and marked as exhibit 1KM-3.

8. THAT I verily state that whatever was administered during the operation was duly stated in the hospital sheet marked as exhibit 1KM-4.

9. THAT I verily state that I am still undergoing treatment as I am required to return for check up of the knee within 6 months from the date of operation.

10. THAT the severe pain that I underwent for the period of more 3 years has now reduced drastically hence I am now in the position of proceeding with legal proceeding against the owner of motor vehicle registration no. KAW 907A Toyota Hiace at the 22nd March 2009 when I was knocked down by the said Motor Vehicle. Annexed herewith is the draft plaint marked as exhibit 1KM-5”.

4. Counsel for the applicant, Mr. Bosire, made oral submissions on 28/5/13 as follows, and ruling was reserved for the 27/6/2013.

“Application has been wrongly listed before the Environment and Land Court. It is an ex parte application for leave to file suit out of time. The applicant was hospitalized at various hospitals and she was implanted with a metal plate. She was required to have come to court within 3 years of 23/3/2009. Time expired on 23/3/12. I refer to the affidavit in support shows prevented from filing the suit within the prescribed time because of her health and the need to seek further treatment in India.”

5. The criteria for the exercise of the power of the court to extend time for the filing of suits on tort out of time is set out in section 27(2) of the Limitation of Actions Act in these terms:-

“(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to a cause of action were or included facts of a decisive character which were at all 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.”*

See *Gathoni v. Kenya Cooperative Creameries Ltd* (1982) KLR 104, 107.

6. Section 28 (2) of the Act provides for a situation where an application for extension of time pursuant to section 27 of the Act is made before the commencement of the relevant action, as follows:-

“28 (2) Where such an application is made before the commencement of a relevant

action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action, that evidence would in the absence of any evidence to the contrary, be sufficient:-

- a. *To establish that cause of action apart from any defence under section 4 (2); and*
- b. *To fulfill the requirements of section 27 (2) in relation to that cause of action.*

- 7. Accordingly, the applicant herein must demonstrate a cause of action in negligence, the relevant tortious cause of action in her case for the injuries, and that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside her knowledge until a date after the three year period or not earlier than a year before expiry of the period and not earlier than one year before the action was brought/or in this case before the application for leave was filed.
- 8. The applicant has obviously a claim in negligence for damages from personal injuries arising out of the motor vehicle accident pleaded in the draft plaint attached to the application for leave. The application does not set out the material facts relating to that cause of action which were outside her actual or constructive knowledge until after the expiry of the Limitation period. The only material fact that would have been outside her knowledge is the special damages from her operation in India which was conducted in September, 2012. Although, this aspect of the cause of action is not specifically pleaded in the draft, with only references in paragraphs 10 and 13 thereof to special and general damages, the plaintiff/applicant may specifically plead the special damages in the Plaint actually filed before the court.
- 9. In these circumstances, pursuant to provisions of sections 27 and 28 of the Limitations of Actions Act, I extend the time for lodging of the applicant's claim in the tort of negligence for the filing the Plaint within the next Fourteen (14) days.
- 10. For the reasons set out above, the applicant's application dated 13/12/2012 is granted with costs in the cause.

Dated and delivered this 27TH day of JUNE 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

Mr. Edwin Mongare – Court Clerk