



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 804 OF 2011 (OS)**

IN THE MATTER OF: THE LIMITATION OF ACTIONS CHAPTER 22 LAWS OF KENYA  
AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR EXTENSION OF  
TIME TO FILE SUIT OUT OF TIME

BETWEEN

LEONARD ODINDI.....PLAINTIFF

VERSUS

1. DR. YUSUF KARIM

2. DR. L. G. GATHUA

3. DR. C. E. MUYODI.....DEFENDANTS

**RULING**

**Coram:** Mwera, J.

Applicant in person

N/A for Defendants

The applicant herein, Leonard Odindi in person brought an

Originating Summons under Order 37 rule 6 CPR and sections 27, 28 of the Limitation of Actions Act, the Act, with the main prayer:

i) that he be granted extension of time within which to file a suit.

He intends to sue three doctors: Yusuf Karim, L. G. Gathua and C. E. Muyodi on account of what appeared from the supporting affidavit to be negligence. It was deponed that the applicant was an employee of Kenya Ports Authority. His employment was terminated there on 4<sup>th</sup> November, 2002 following the recommendation of the said three doctors sitting as a medical board. That the medical report had been referred to in the letter of dismissal. So, on 6<sup>th</sup> March, 2003 and 9<sup>th</sup> November, 2003 he wrote to his former employer requesting to be supplied with a copy of that medical report. There was no response. But on visits later to the relevant office in 2004, 2005 and lastly in July, 2011, a certain clinical officer gave him a copy (annexture L.O. 4). So because of that delay in obtaining the report the applicant

could not decide to sue the doctors in negligence and then the time within which to sue, passed – hence this application.

In his verbal explanation to court the applicant said that he was not able to sue the intended three defendant/doctors in time because he had a related case MBA HCCC 128/2003 against his employer for wrongful dismissal. It ended in the Court of Appeal MBA C.A. 156/2007 with judgment delivered on 28<sup>th</sup> December, 2011. He lost. He intended to sue the three doctors in negligence because without seeing/examining the applicant, they signed a medical report on which Kenya Ports Authority relied to dismiss him as being UNFIT to continue in employment.

The applicant invoked the powers donated by Order 37 CPR which provides for suing by way of originating summonses. And sections 27, 28 of the Act state as follows below.

Beginning with section 27, it begins by proclaiming:

**“27.(1) Section 4(2) does not afford a defence to an action founded on tort where –**

**(a) .....**”

That S.4 (2) of the Act says:

**“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided .....**”

Thus after three years expire from the time a cause of action accrued in tort one’s right to sue on it is extinguished. The applicant here desires to sue the three doctors in negligence – a tort. He did not so state/depone but he appears to say that since Kenya Ports Authority acted on the said report to dismiss him, then his time – 3 years to sue, began to run with effect from 4<sup>th</sup> November, 2002. It expired on/about 4<sup>th</sup> November, 2005. That in the meantime by writing or visits to Kenya Ports Authority offices he did not lay his hands on the questioned medical report until July, 2011. But court may observe at this point that if the applicant wishes to sue the three doctors in negligence, claiming that they did not sit together as a board to interview and examine him before they signed his report of unfitness, he had that information as early as 3<sup>rd</sup> May, 2006 when Dr. Yusuf Karim, one of the three doctors, testified before Sergon J. (DW 1) in HCCC 128/2003. There Dr. Karim with the report (Annexure L.O 4) before the court admitted that he did not know the applicant and the three did not meet as a board to interview/examine the applicant, although they all signed the report. However, back to section 27 of the Act.

One can get extension of time or limitation period beyond that stated in section 4 (2) in case of ignorance of material facts in actions of negligence, etc to seek damages. And those damages should consist of or include damages of personal injuries of any person and the court has granted leave before or after commencing the action (section 27 (1)) and the requirements of sub-section (2) have been fulfilled. Sub-section 2 says in its pertinent part:

**“(2) The requirements of this sub-section are fulfilled in relation to a cause of action if it is proved that material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or construction) of the plaintiff until a date .....**”

after the limitation period, here three years for tort had expired.

The application for leave to sue after the three year period as the applicant desires here, shall be *ex parte* (section 28 (1)). That section adds:

**“(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 was brought forthwith and the like evidence were adduced in that action, the evidence would in the absence of any evidence to the contrary, be sufficient – ”**

to establish a cause of action.

In this matter the applicant or his lawyer had the medical board proceedings (annexture L.O 4) before Sergon J. This court should assume so because exchanging lists/copies of documents before a trial begins, is part of preparation for trial. And although the applicant did not place before this court the part of proceedings before Sergon J. which contained his own testimony, it can be assumed that he referred to it when he was testifying that he was prematurely retired or dismissed from Kenya Ports Authority. And that the three doctors did sit to interview/examine the applicant. However, the part of proceedings placed before this court indicate that when Dr. Karim (DW 1) was testifying he produced the medical board proceedings (Exhibit D1) and he was cross-examined on it. So as early as 3<sup>rd</sup> May, 2006 the applicant had possession of or knew the contents of the medical board proceedings upon which he wants to base his case to sue the three doctors. The applicant was thus not being truthful when he claimed that he saw those proceedings for the first time in July, 2011. He should have moved the court that early to seek to sue (s. 27 (2)). His on-going case against Kenya Ports Authority was for pre-mature retirement or whatever. He has not shown here why he did not sue the three doctors earlier.

As under section 28 (2), this court is not satisfied that the evidence the applicant desires to adduce against the three doctors, would suffice to prove his action in negligence. If the doctors owed a duty of care to any party between the applicant and Kenya Ports Authority, it was to the latter. It appears that Kenya Ports Authority had a contract or arrangement for the three doctors to sit as a medical board and assess/recommend appropriately any employee Kenya Ports Authority referred to it in matters of health. If the doctors failed to discharge that duty properly whereupon Kenya Ports Authority suffered loss/damage, then only Kenya Ports Authority could sue in negligence. The applicant has not demonstrated to this court that the three doctors he intends to sue owed him a duty of care which they breached and as a result he suffered damage. For that is the basis of actions to claim damages in negligence. A party is liable only if it had a duty of care to the other, which it breached. That not being the case here between the applicant and the intended defendants, his summons also fails.

In sum, on the two grounds canvassed above, the applicant's prayer is refused.

**Dated, signed and delivered this 8<sup>th</sup> day of March, 2012.**

**J. W. MWERA**

**JUDGE**