



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Suit 186 of 2012**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22**

**SECTION 27**

**IN THE MATTER OF AN APPLICATION FOR EXTENSION OF LIMITATION PERIOD**

**ASKAH MOGENDI.....1<sup>ST</sup> PLAINTIFF**

**TIMOTHY CHOTI ONCHOKE(Personal Representative**

**of Job Mogendi Onchoke Deceased)..... 2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**SHEM MAGARA.....DEFENDANT**

**R U L I N G**

By an Originating Summons dated 19<sup>th</sup> March 2012 expressed to be brought under the provisions of Order 37 Rule 6(i) of the Civil Procedure Rules 2010 and section 27 of the Limitation of Actions Act, the plaintiffs herein seek the following Orders:

- 1. That the Honourable court be pleased to grant the Plaintiff (sic) leave to file plaint/suit out of the limitation period as per copy annexed herein.**
- 2. That the draft annexed hereto be deemed to be duly filed upon payment of the requisite filing fees.**
- 3. That the costs of this application be in the cause.**

The Summons are based on the following grounds:

- 1. The time for filing suit expired on 27<sup>th</sup> October 2011.**
- 2. The plaintiffs were prevented from filing suit as the 1<sup>st</sup> Plaintiff has been out of the country since the year 2009**
- 3. The delay in filing suit has been occasioned by the circumstances beyond the plaintiff's control.**

The Summons are supported by **Askah Mogendi** on 19<sup>th</sup> March 2012. According to the deponent, at the time of the death of the deceased, the deponent was domiciled and working for gain in the United Kingdom and did not return to Kenya until October 2011. Since the accident the subject of the suit occurred on 27<sup>th</sup> October 2008, the deponent was unable to file the suit within the limitation period while the 2<sup>nd</sup> plaintiff, though present in the country lacked adequate details pertinent to the institution of the suit. Although the deponent wanted to file the suit within the limitation period, the suit could not be filed due the said factors. In her view, she has a good case and ought not to be penalised for not residing within the country. It is the deponent's view that the delay in filing the suit is not inordinate, deliberate or inexcusable and she stands to suffer damage if leave is not granted and it is only just, fair and reasonable in the circumstances that the plaintiffs be allowed to file he suit out of time. In a further affidavit sworn on 28<sup>th</sup> September 2012, the same deponent deposed that while away she had sought legal advice from the firm of **Meshack Okoth Obura & Co. Advocates** and was informed that the suit could not be filed in her absence. Until she came back to the country, the deponent was not aware of who was to blame for her husband's death and only obtained information from Narok Police Station in October 2011. She contends that she was prevented from filing suit within the limitation period due to lack of material facts regarding the accident in which her husband died and wrong advice given by the said advocates

The Summons were prosecuted by way of written submissions. In the said submissions it is contended that had the plaintiffs' then advocates taken appropriate steps to file the claim without insisting on waiting for the return of the 1<sup>st</sup> plaintiff, the claim would have been filed within the limitation period. In the plaintiffs' view they have fulfilled the conditions set out in section 27(2) of the Limitation of Actions Act and therefore there are reasonable grounds for extending the time for filing suit more so as they have an action with reasonable prospects of succeeding and resulting in the award of damages.

The effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In **Rawal vs. Rawal [1990] KLR 275, Bosire, J** (as he then was) stated:

**“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”.** See also **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321.**

The same position was taken in **Iga vs. Makerere University [1972] EA 65** in which it was held:

**“A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim...The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief”.**

What this means is, a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya are fulfilled. That section provides as follows:

***(1) Section 4 (2) does not afford a defence to an action founded on tort where -***

***(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and***

***(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and***

*(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and*

*(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.*

*(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that 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.*

*(3) This section does not exclude or otherwise affect -*

*(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or*

*(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.*

The above cited provisions clearly stipulate the circumstances under which the court may extend time for bringing an action barred by limitation statute. **Mbito, J** dealt extensively with the issue in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989** in which the learned Judge expressed himself as follows:

**“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 scrutinise 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 scrutinised, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the 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 *ex parte* application that the affidavit 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 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 appellant’s 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 section 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”.**

Potter, J in Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104 similarly had this to say:

**“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability...Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant’s application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)...Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances....In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be...The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.**

Therefore extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law).

This was confirmed in Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 where the Court of Appeal held:

**“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.**

However, even if the foregoing conditions are satisfied time will not be extended unless the applicant proves that material facts relating to that 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. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be”.

Although the plaintiffs have not come out clearly on the cause of the deceased death, it appears that it arose from an accident. Accordingly I am satisfied that the first condition that the action must be one for

damages for negligence, nuisance or breach of duty has been met. Secondly, the damages claimed by the plaintiff must consist of or include damages in respect of personal injuries of any person. Again, I am prepared to believe that the accident prima facie resulted into personal injuries to the deceased from which damages are being claimed. The third condition that leave must then have been sought and obtained is what we are dealing with at this stage. The last requirement is the fulfilment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant's knowledge and that he became aware of these facts after the limitation period or within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.

In this case the grounds upon which the extension of time is sought are that the plaintiffs were disabled from filing the suit due to the fact that they had no knowledge of the particulars of the culprit. The question then is whether the failure to know the particulars of the person to be sued amounts to ignorance of a material fact of a decisive character. As held above **“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”**. Where a party does not know the identity of the tortfeasor, in my view, it cannot be said that he is seised of facts from which he can conclude that he has a reasonable chance of succeeding and getting damages. Without a defendant in an action in tort it is impossible to see how one can be expected to succeed. Accordingly I am satisfied at this stage that plaintiffs were unaware of all the facts that could enable them mount a successful litigation. The next issue is whether the plaintiffs took reasonable steps to ascertain the said facts. The reasonable steps in the circumstances of this case, in my view, would have been to make inquiries from the police station concerned in order to retrieve information relating to the ownership of the vehicle concerned. The plaintiff's contend that they instructed a firm of advocates who misled them into believing that in the absence of the first plaintiff no successful suit could be mounted. I therefore accept that by seeking the said legal advice the plaintiff took the necessary steps in the right direction.

Having fulfilled the foregoing conditions the next hurdle is to be found in section 27(2)(b) of the Act under which an application for extension of time ought to be brought within a year of discovery of the fact. According to the plaintiff's the discovery was not done until October 2011 when the 1<sup>st</sup> plaintiff came back to the country. The present application as already indicated was filed on 22<sup>nd</sup> March 2012. Accordingly, the application was filed within the said one year.

At this stage of the proceedings I am required to take the averments in the supporting affidavit to true. Of course my decision is not final as the same is subject to challenge at the hearing. See **Yunes K. Oruta & Another vs. Samwel Muge Nyamato Civil Appeal No. 96 of 1984 [1988] KLR 590.**

I am therefore satisfied that the plaintiffs have, at this stage of the proceedings, fulfilled the conditions necessary to enable them move to the next stage of the proceedings. The plaintiffs have, however, sought that the draft annexed to the summons be deemed as duly filed on the payment of requisite fees. A suit for damages can only properly be instituted by a plaint as stipulated under Order 3 rule 1(1) of the Civil Procedure Rules. It follows that it is not possible for the draft plaint annexed to the Originating Summons to be deemed duly filed as sought herein.

In the result, time is hereby extended to the plaintiff to file a suit in terms of the said draft. The said plaint to be filed within ten days from the date hereof. There will be no order as to costs.

**Dated at Nairobi this 19<sup>th</sup> day of October 2012**

**G V ODUNGA  
JUDGE**

Miss Ndisho for the Applicant