



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 477 of 2012

MWANIA KISAVI MUSAU MARY NDINDA

(suing as the legal representative of the estate of

MUSYOKA MWANIA, MBETI MWANIA & KISAVI MWANIA).....APPLICANTS

VERSUS

LANDMARK HOLDINGS LIMITED.....RESPONDENT

RULING

By a Miscellaneous Application brought by way of Notice of Motion dated 28th August 2012 expressed to be brought under the provisions of Section 3A of the Civil Procedure Act, Order 51(1) of the Civil Procedure Rules, S. 4(2) & 22 of the Limitation of Actions Act Cap 22 Laws of Kenya and all other enabling provisions of the law, the applicant herein seeks the following orders:

- 1. That the Application be heard exparte, pending service on the Respondent.**
- 2. That this Honourable Court be pleased to grant the applicants leave to file suits out of time in respect of a claim for damages arising out of fatal accident.**
- 3. That the costs of this application be costs in the cause.**

The application is based on the following grounds:

- a) That the accident occurred on 9/6/2007 causing fatal injuries from which all the 3 deceased persons died.**
- b) That the deceased persons are biological children of the Applicants herein.**
- c) That the Applicants herein did not file suits within three years as provided by the Limitation Act Cap 22 Laws of Kenya.**
- d) That the impact of death of the Applicants' 3 children was disastrous in that the Applicants underwent severe depression hence they were under a disability.**
- e) That the delay was occasioned by the period of mourning & shock/severe depression coupled**

with the process of obtaining all the required documents in order to petition for Letters of Administration.

f) That it is therefore in the interest of justice that this Application is allowed.

The said application is supported by an affidavit sworn by **Mwania Kisavi Musau** and **Mary Ndinda**, the administrators of the estate of **Musyoka Mwanja, Mbeti Mwanja & Kisavi Mwanja** (hereinafter referred to as the deceased) on 28th August 2012. According to the deponents, the deceased were involved in a fatal accident on 9th June 2007 at **Mukuru Kwa Reuben** in Industrial Area Nairobi when a stone wall collapsed. Thereafter the deponents underwent through burial arrangements and mourning period which took long as a result of the loss of the deceased children. By the time they recovered from the said trauma the case already time barred owing to the provisions of the Public Authorities Limitation (sic) Act Cap 22, Laws of Kenya. This, it is deposed has necessitated the filing of this Originating Summons (sic) seeking extension of time to file the suits. According to the deponents, they have not been indolent but were seriously traumatised by the death of the said three children thus it is in the interest of justice that the application be allowed.

Although there was a replying affidavit sworn by **Zablon Amugano Mazigo**, who described himself as the respondent's Operations Manager on 2nd November 2012, under the provisions of Order 37 rule 6 of the Civil Procedure Rules an application under section 27 of the Limitation of Actions Act made before filing a suit shall be made *ex parte* by originating summons supported by affidavit. Accordingly, I will ignore the contents of the said replying affidavit.

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 claim which is barred by limitation is a claim “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”.

In this case, it is alleged that the cause of action arose from a fatal accident in which the deceased passed away. Although the applicants have not stated the grounds on which they blame the respondent, I am prepared to give the applicants the benefit of doubt and make a peremptory finding that the cause of action fall within the foregoing section. Under subsection (2) of section 27 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 applicants were due to trauma caused by the death of the deceased did not file the suit within the time limited for doing so. The question that falls for determination is whether traumatisation resulting from an accident may constitute a ground for extension of time to file a suit. Here, there is no allegation that the applicants were under disability. For one to be termed to be under disability one has either to be a minor or a person of unsound mind. No allegation has been made that the applicants fell within either of these categories. Consequently, the only issue is whether the applicant's mental condition led 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”**. It cannot be doubted that the loss of three children may traumatise the parents to an extent that they may not be in a position to readily appreciate the legal recourse available to them immediately. This, I must confess, is not a clear cut matter. However, where a party, due to a state of mind, is unable or is disabled from making an informed opinion whether or not he has a cause of action, it is my view, that that may justify extension of time within which to file the suit. It must be remembered that at this stage, the court is required to take the averments in the supporting affidavit to be true. This decision, however, is a peremptory decision which 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 applicants have, at this stage of the proceedings, fulfilled the conditions necessary to enable them move to the next stage of the proceedings.

I, however, wish to draw the applicants' attention to the fact that in seeking extension of time before the suit is filed, the applicants are required to approach the Court by way of Originating Summons and not by way of Miscellaneous Application as they have done in this application. That, however, is a procedural lapse which is curable under the provisions of Article 159(2)(d) of the Constitution.

In the result, time is hereby extended to the applicants to file a suit as sought in the Notice of Motion dated 28th August 2012. 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 27th day of November 2012

**G.V ODUNGA
JUDGE**

Delivered in the presence of Miss Ouko for Mr Kabue for the Respondent.