



REPUBLIC OF KENYA

High Court at Meru

Miscellaneous Application 72 of 2012

(under Section 5 of the Public Authorities Limitation Act, Cap.39 Laws of Kenya and Section 1A and 1B of the Civil Procedure Act,Cap.21 L.O.K and any other provision of the law.

A.G.R (suing on his own behalf and as the next friend

and father of A.M. R (Minor).....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE PERMANENT SECRETARY-Ministry of Medical Services.....2ND RESPONDENT

MEDICAL SUPERITENDENT. AT MERU GENERAL HOSPITAL.....3RD RESPONDENT

RULING

This is an application by applicant Ashford Gerrard Riungu(suing on his own behalf and as the next friend and father of A.M.R (minor) to be granted leave to sue the defendants out of time. The application is brought by way of Notice of Motion. It is brought under Section 5 of the Public Authorities Limitation Act(Cap.39) Laws of Kenya, Section 1A and 1B of the Civil Procedure Act and Section 50 Rule 6 of Civil Procedure Rules 2010 and any other enabling provisions of the law.

During the hearing of the application court heard very brief oral submissions by the applicant Mr. A.G.R, who is an Advocate of the High Court of Kenya and the applicant in this Notice of Motion. It has also read the application supportive affidavit sworn by the applicant and annexures thereto.

The applicant case is that the applicant is legal representative of the estate of R.M.M (deceased) and that the issue of the applicant and the late R.M.M, A.M.R is a minor. That the applicant and his minor son intend to file a suit based on tort against the respondents herein. That the said tort was committed by State organs, namely Meru General Hospital on 5th/6th January, 2011 which culminated to the death of the deceased.

The applicant though aware of one(1) year limitation period to file the intended suit, he did not do so because he was unable to obtain the necessary letters of administration within the prescribed period. That the applicant was issued with the letters of administration of the estate of R.M.M on 11th June, 2012 and the same was confirmed on 21st June, 2012. The said grant of letters of administration were attached to the applicant's affidavit and marked as "AGRI" and "AGR2" retrospectively.

Section 3(1) of the Public Authorities Limitation Act(Cap.39) prescribes a time limit of years from the date of cause of action for the filing of a suit against Government of the Republic of Kenya, arising out of an action based on tort.

In the instant application cause of action arose on 5th/6th January, 2011 and this application was not made until 3rd August, 2012 after a lapse of 1 year and 8 months. The only reason provided for delay in filing suit is:-

- 1. That despite being quite aware of the one (1) year limitation period to file the intended suit, we were unable to obtain the necessary letter of Administration within the prescribed period hence this application.**
- 2. That it was only on 11th June, 2012 that I was issued with the letters of Administration and the same was confirmed on 21st June, 2012. Copies of the Grant of Letters of Administration and Certificate of Confirmation of the Grant of Letter of Administration are attached and marked “AGR1 and “AGR 2” respectively.**

The application is brought under Order 50 Rule 6 of Civil Procedure Rules which provides:-

“6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

The Section relied upon deal with enlargement of time where a limited time has been fixed for doing any act or taking of proceedings under Civil Procedure Rules but not for leave to sue out of time after lapse of the Limitation period set out under the Limitation of Actions Act.

Under Order 51 Rule 10(1) and (2) of Civil Procedure Rules it is provided:-

“10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

Further under Article 159 (2) (d) of the Constitution of Kenya, 2010 it is provided:-

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

—
(d) justice shall be administered without undue regard to procedural technicalities; and.....”

In the instant application the applicant did not quote the relevant provisions of the law and in view of Order 51 Rule 10(1) (2) of Civil Procedure Rules and the provisions of Article 159(2) (d) of the Constitution of Kenya,2010 this court is obliged to do substantive justice by ignoring the applicant’s failure to quote the relevant order or section or provision of law. The court is obliged to ignore technicalities which do not affect the substance of the application. I find the omission to quote the

relevant Section of the relevant law do not affect the substance of the application and I shall proceed to consider the application on merits

Section 3(1) of the Public Authorities Limitation Act(Cap.39) prescribes a time limit of 12 months from the date of the cause of action for filing of the suit against Government of the Republic of Kenya, arising out of an action founded on tort.

The applicant did not in his application disclose whether or not notice of intention to sue the Attorney General was issued within the prescribed period or not.

The applicant relied on Section 5 of the Public Authorities Limitation Act which deals with disability. The Section is not relevant in the instant application. The relevant Section in this application is Section 27 and 28 of the Limitation of Actions Act. The delay in filing suit was failure to the applicant's not to have obtained grant of letters of administration till the period of 1 year which is allowed to bring a suit based on tort had lapsed.

In the instant case the applicant has given reasons for delay for a period of 1 year and 8 months. The applicant's ought to have been filed within 1 year from the date of action and after having given the respondent notice of intention to sue within 12 months from the date of the cause of action. The reasons given for delay are supported by annexed grant of letters of administration marked as "AGRI" and AGR2".

Further failure to have annexed notice of intention to sue is not fatal to this application as that is a matter of procedure and do not go to the substance of the application. The applicant's claim is founded on tort which is covered in application for extension of limitation period in case of ignorance of material facts in actions for negligence.

Having considered all facts of this application and oxygen principles which the applicant has relied upon and which obliges this court to do substantive justice, I find that by refusing this application this court would be doing injustice to the applicant, I therefore find the application to be merited and the same is allowed. The applicant is granted 30 days from today to file and serve the claim upon the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF NOVEMBER, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of:

1. Mr. Riungu- applicant

J. A. MAKAU
JUDGE