REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. 538 OF 2006

JAMES MBOYA ONYWERA ..... APPLICANT

V E R S U S

ATTORNYE GENERAL..... RESPONDENT

R U L I N G

This **originating summons dated 18th May, 2006** brought under **sections 27** and **28** of the **Limitation of Actions Act, Cap. 22** has now been heard twice. The application is *ex-parte* by law under **Order XXXVI, rule 3C** of the **Civil Procedure Rules** (the **Rules**).

The application was originally heard and dismissed on 21st July, 2006 (Kihara, J). The learned Judge found no justifiable grounds for exercise of his discretion in favour of the Applicant. The application had been filed through and prosecuted by counsel.

Nearly four years later, the Applicant applied, through a different firm of advocates, and by **chamber summons dated 23rd March, 2010**, for an order to review or set aside the dismissal order of 21st July, 2006, and for the originating summons to be reinstated and heard afresh.

The grounds for the application appearing on the face thereof were:-

1. That the Applicant had a good and valid claim against the Respondent.

2. That the Applicant stood to suffer irreparable loss if his application was not reinstated.

3. That the Respondent would not be prejudiced in anyway that could not be remedied.

There was a supporting affidavit sworn by the Applicant to which he had annexed some documents. This application was allowed on 19th January, 2011 (Mwera J). Hence this second hearing of the originating summons.

At the hearing of the application, the Applicant was acting in person. No supplementary affidavit in respect to the originating summons was filed. Beyond introducing the application, the Applicant had nothing else to say.

The documents annexed to the affidavit sworn in support of the application for review of the dismissal

order mentioned above, and indeed anything else the Applicant stated in that affidavit, does not add anything useful to his case as to why he did not file his suit in time.

The intended suit is for, *inter alia*, terminal benefits of KShs. 1,198,080/00 which the Applicant says is due to him upon his premature retrenchment on 30th August, 2000 from employment (as a driver) with the Government.

As already seen, the present application is under section 27 of Cap. 22. Subsection (1) of that section provides as follows:-

"27. (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 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."

As can be seen, section 27 of Cap. 22 can be of assistance to the Applicant only if his intended action is for damages for negligence, nuisance or breach of duty. Further, such damages would have to be in respect of personal injuries.

The Applicant's intended suit is not such as is envisaged under section 27 aforesaid. He therefore cannot obtain the extension of time sought, even assuming that he would have been able to surmount the hurdles raised by subsection (2) of section 27 and also by section 28.

In the result, and regrettably, the application must fail this second time round. The originating summons dated 18th May, 2006 is hereby dismissed with no order as to costs. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF MARCH, 2011

H.P.G. WAWERU
JUDGE

SIGNED AND DELIVERED THIS 8TH DAY OF APRIL 2011.