



IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPL. NO. 237 OF 2011

GEORGE NJOROGE MBURUAPPLICANT

VERSUS

S.S. MEHTA & SONS LTD & ANR RESPONDENTS

RULING

Coram: Mwera J.
Muchiri for applicant
Court clerk Kajuju

The originating summons (OS) filed here on 25.5.11 was brought under sections 4 (2), 27, 28 of the Limitation of Actions Act (Cap. 22), the Act, and Order 37 rule 6 (1) Civil Procedure Rules. The main prayer therein was:

i) that the applicant have leave to file a claim out of time.

In the grounds it was stated that a road traffic accident occurred on 10.3.08 along KIAMBU-KIAMAIKO ROAD involving motor vehicles registration no. KAN 206 Q and KAH 451H. The applicant's motor vehicle no. KAN 206Q sustained extensive damage resulting in its being written off. He held the respondents responsible and so he seeks to recover the value of the motor vehicle from them. Three years have since elapsed, and the time to sue has expired as at 10-3-11. It was added that when the accident occurred, the applicant made a report to his insurers and assumed that they could proceed to take up the matter. They did not do so but later advised him to file a claim – long after time to sue expired. Therefore this was a deserving case.

The supporting affidavit expounded on the grounds adding that it was only on 7.4.11 that the applicant's insurers M/s Blue Shield, advised him to institute a suit to recover the value of the subject motor vehicle.

Asked to submit Mr. Muchiri Advocate stressed the circumstances leading to the whole state of things including the aspect that the applicant had come to court barely two months after the limitation period ended. He proceeded to propound on the principle of subrogation in insurance law urging the court to find that since the applicant had reported the accident to his insurers that principle kicked in and should be considered so that the leave sought is granted. The cases of *Mbithi Vs Municipal Council of Mombasa* (1992) LLR 2235 (CAK) copy not availed) and *Divecon Ltd Vs Samami EA* [1995-1998] 1 EA 48, and *Kanyenyaini Tea Co. Ltd Vs Stanley Gichure* (2008) e KLR were cited to put the point that

extension of time to sue can be challenged in the proceedings.

Such proceedings i.e. to enlarge time to sue under the Act, are *ex parte*. But if the application is granted, it can be challenged by the defendant during the proceedings that ensue. That is perfectly in order as Mr. Muchiri quoted from the unavailed *Mbithi* case.

As the Act states in S(4) regarding time limits to sue in matters of contract, tort etc but specifically section 4(2) regards tort:

“4. (1)

(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;”

and the proviso thereto specifically states that causes founded on defamation cannot be brought after 12 months from the date the cause of action arose.

Moving to section 27, it reads in the pertinent parts:

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

(a).....

(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;

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

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

(underlining supplied)

And subsection (2) has the following:

(2) The requirements of this subsection are fulfilled in relation to the cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (factual 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)”

Then section 28 goes on to set out that an application for leave shall be brought *ex parte* etc.

This application is about an intention to sue and recover material damages namely the value of the damaged motor vehicle reg. no. KAN 206 Q. Yet section 27 (1) (b) of the Act specifically states that the application to seek damages arising from an act of tort should relate to:

“..... damages in respect of personal injuries of any person;”

Accordingly, this application is misconceived and dismissed. Leave sought shall not issue.

Orders delivered on 17.6.11.

J. W. MWERA
JUDGE