



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

HCC NO 193 OF 2010 (O/S)

DAVID MAKEWA KASIKEPLAINTIFF

VERSUS

HON ATTORNEY GENERALDEFENDANT

RULING

David Makewa Kasike filed the Originating Summons dated 25/7/2010 seeking leave of the court to extend time to enable him file a suit for recovery of damages out of time. The reasons for the application are that the cause of action arose on 2/4/2009 when the appellant was acquitted in PMC 1151/06 REPUBLIC VRS DAVID KASIKE MAKEWA, where he had been charged with the offence of fraudulent false accounting contrary to section 330 (b) of the Penal Code and stealing by servant contrary to section 281 of the penal code. He exhibited the judgement of the court dated 2/4/2009. He applied for certified copies of judgement on 5/5/09 and the same were not availed to him till 23/7/2010 (DKM2). Soon after counsel got a copy of the judgement, he filed this application without undue delay.

In opposing the application, the learned State Counsel, Mr Kipkogei filed a notice of preliminary objection on 8/3/2011, to the effect that the application does not satisfy the conditions set out under section 27 of the Limitation of Actions Act. Counsel urged that under section 29 of the said Act, the applicant required to demonstrate the fact relating to a certain matter were not within his knowledge when time lapsed . He submitted that for a claim in malicious prosecution, he can not say that the facts relating to the cause of action, were not within his knowledge because he became aware of the facts when judgement was delivered and time began to run then. He relied on the case of *DIVECON LTD vs SAMANI (1995-1998) EA 48* where the court of appeal made such a finding.

I have considered all the submissions made by both counsel authorities and the sections referred to by Mr Kipkogei. I would have expected that the applicant would exhibit to this application, a draft plaint for the court to consider whether it discloses a cause of action or not. None was exhibited .

Mr Kipkogei purported to rely on section 29 of the Limitation of Actions Act but a reading of that section clearly shows that it relates to actions relating to fatal injuries. That section would not be applicable to this case because the applicant intended to commence on action for malicious prosecution, not personal injuries.

In the decision of *DIVECON LTD* the Court of Appeal held that “under section 28(2) of the Limitation of Actions Act, where an ex-parte application for the extension of

time was made before commencement of an action, leave would only be granted where a cause of action had been established and the requirement of S27(2) and 29 had been fulfilled. Section 27 (2) and 29 provide that where the period of limitation had elapsed, it had to be proved that the material facts relating to the cause of action were or included facts of decisive nature, were at all times outside the knowledge of the plaintiff.

In the instant case, the cause of action arose when the lower court read its judgement and therefore the facts were known to the appellant on 2/4/2009. Time started to run on that date. The application should have been filed within one year. The applicant's excuse was that he was awaiting the copy of the judgement without which he could not have filed the application. I do agree that it was the judgement of the lower court that gave rise to the cause of action and was a necessary document.

The applicant claims to have written to the lower court requesting for the ruling and the court's proceedings on 5/5/2009. However, there is no evidence that the said letter was ever received by the Court in Molo.

It is also interesting that even after the applicant was made aware of the judgement on 2/4/2009, it was not until a month later that he purportedly wrote the letter to the court requesting for proceedings. But even with the knowledge that he intended to file civil proceedings in another court, no further steps were taken towards procuring of the lower court proceedings/judgement for example a memorandum to the court. A copy of the ruling was allegedly received on 23/7/2010. There is no evidence from the court, the executive officer or Deputy registrar forwarding the said judgement to the applicant. I find that the applicant has not shown when the copy of judgement was received.

I find that the applicant has not demonstrated that he acted with due diligence towards his claim within time.

Apart from failing to demonstrate that he has a cause of action by exhibiting a draft plaint, he has not demonstrated the delay in procuring the judgement was occasioned by the Court. For all these reasons, this court declines to grant the order sought from Originating Summons dated 25/7/2010. It is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 3rd DAY OF JUNE 2011

**R.P.V WENDOH
JUDGE**

**PRESENT
MS Njoroge Holding brief for Ndolo for Applicant
CC: Kennedy**