

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 72 of 2006

JOHN MARTIN A. ONYANGO.....PLAINTIFF

VERSU

HENRY MSINGA

ROY PARCEL LIMITED.....DEFENDANTS

R U L I N G

1. By a notice of motion dated 11th December, 2006 amended on 1st July, 2008, John Martin A. Onyango, the plaintiff/applicant, seeks leave of this court to file his suit against the defendant out of time. The plaintiff also seeks to have the suit as earlier filed deemed to have been filed out of time but with court's leave.
2. The grounds upon which the application is based, is that the plaintiff had given instructions to the firm of Khamati Akhaabi & Company Advocates in the year 2002. He was under the impression that the suit had been filed, only to learn later that the firm split up and that the plaintiff's file was retained by Mr. Akhaabi who failed to file the suit. Consequently the plaintiff withdrew instructions from Mr. Khaabi and instructed the firm of Khamati, Minishi & Company Advocates in December, 2005. Since it was more than 3 years from the cause of action arose, leave of the court became necessary.
3. The defendants, Henry Msinga & Roy Parcels Limited, filed grounds of opposition objecting to the plaintiff's motion on the grounds that the same was incompetent as it had no basis in law and was against the Limitation of Actions Act. The defendants further contended that there was inordinate delay in the filing of the application and that the application was an afterthought.
4. I have considered the application and do find it unclear as to the provisions of the law under which it is brought. Order XLIX of the Civil Procedure Rules has been cited. Although no specific rule of that order was cited, the presumption is that the applicant intended to invoke Order XLIX Rule 5 of the Civil Procedure rules, which gives the court a general power to enlarge time for doing any act or taking any proceedings under the rules. If that be so, that rule cannot provide any assistance to the plaintiff as there is a clear specific substantive law which provides a statutory period for the filing of suits and also the circumstances under which time may be enlarged. These substantive provisions provided under the Limitations of Actions Act, take priority over the Civil Procedure Rules.
5. In this case the plaintiff's cause of action being one founded on tort, Section 4(2) of the Limitation of Actions Act Cap 22 provides that such an action cannot be brought after 3 years from the date the cause of action accrued. Section 27 of the Limitation of Actions Act provides for extension of time for filing a suit founded on tort, where the action is for damages for negligence, and the damages is in respect of or includes personal injuries. Such extension can only be granted where it is proved that material facts relating to the 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 this case the plaintiff's cause of action arose on 19th December, 2002 which means the plaintiff's suit should have been filed by 18th December, 2005. However, the suit was filed on 24th January, 2006. The plaintiff's explanation for the delay, is the fact that the partners in the firm of Khamati & Akhaabi & Company Advocates split and that the advocate who took his file failed to take action to file the suit within time.

6. That explanation cannot however hold as the alleged facts are not material facts relating to the plaintiff's cause of action. They are facts relating to the filing of the plaintiff's cause of action. Moreover, the firm of Khamati Akhaabi & company Advocates is said to have split in the year 2003. It was thereafter upon the plaintiff to give specific instructions as to who was to handle his file. If there was negligence on the part of the advocates, that would provide an appropriate cause of action for the plaintiff's as against the advocates. It cannot however provide a basis for extension of time for filing the plaintiff's suit as the limitation period was within the plaintiff's constructive knowledge.

7. I find that the plaintiff's application is incompetent as the plaintiff has failed to fulfill the requirements of Section 27(2) of the Limitation of Actions Act. Accordingly, his application is dismissed with costs.

Dated and delivered this 2nd day of February, 2009

H. M. OKWENGU

JUDGE

In the Absence of: -

Advocate for the plaintiff

Advocate for the defendants