



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Miscellaneous Civil Application 61 of 2009

JENNIFFER MWONJARU NGARUTHI.....APPLICANT

VERSUS

**SHADRACK THIAINE & 4
OTHERS.....RESPONDENT**

LIMITATION OF ACTIONS

o Application of the Limitation of Actions Act- (Cap 22, Laws of Kenya) – where cause of action is based on the tort – Limitation of Actions Act, s.4(2)), - 27 – whether s. 27 affects actions in contract for damages for personal injuries-

R U L I N G

This Ruling relates to an ex-parte Originating Summons dated 18th May 2009 and filed on 19th May 2009 under the provisions of Order XXXVI, rule 3C of the Civil Procedure Rules and Sections 3, 3A of the Civil Procedure Act, (Cap 21 Laws of Kenya), and Sections 27 and 28 of the Limitation of Actions Act (Cap. 22 Law of Kenya). The Applicant seeks to be granted an order extending time for filing suit against the Respondents. The Application is supported by the Supporting Affidavit of the applicant and the grounds on the face of the Application.

Section 3 of the Civil Procedure Act reserves the application of the procedure prescribed in other statutes. Section 3A given expression to the court's inherent power to make orders to meet the ends justice. Rule 3 C of Order XXXIV provides for the procedure for making applications under section 27 of the Limitation of Actions Act.

(i) 3C (1) An application under Section 27 of the Limitation of Actions Act made before filing suit shall be made ex-parte by originating summons supported by affidavit.

(2) Any application made after the filing of a suit shall be made ex-parte by summons in that suit supported by affidavit

Section 27 of the Limitation of Action provides-

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 or 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 purpose of this action; and

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

(2) the requirements of this subsections are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all material times outside the knowledge (actual 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) in either case, was a date not earlier than one year before the date on which the action was brought.

Section 28 of the Limitation of Action Act lays down the procedure for making application for leave under Section 27 and says-

28(1) An application for the leave of the court for the purposes of section 27 shall be made ex-parte except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action;

(2) where an application is made before the commencement of a related action, the court shall grant leave in respect of the action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff if it appears to the court, if such an action was brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under section 4(2) and

(b) to fulfill the requirements of Section 27 (2) in relation to that cause of action.

(2) Applies where the application is made after the commencement of the action.

(3) Defines “relevant action” to mean any action in connection with which leave sought by the application is sought.

(4) Defines “court” to mean the court in which the action has been brought or intended to be brought.

Considering section 27 of the Limitation of Action Act in the case of **KENYA CARGO HANDLING SERVICES LTD VS OGWANG [1985] KLR 593**, the Court of Appeal held inter alia that Section 27 of the Limitations of Actions does not lay down any period of limitation. All that it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. The section does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort.

The overriding provision of Section 27 is subsection (2) thereof. An applicant must show that material facts relating to the cause of action were or included facts of a decisive character which were at

all material times outside the knowledge (actual or constructive) of the plaintiff.

In this application the applicant pleads that-

- (a) **the Respondents assaulted applicant on 23.09.2005 and were charged with assault in Tigania Cr. Case No.466 of 2006,**
- (b) **the 5 respondents were convicted and sentenced to various spans of community service work on 20.02.2007,**
- (c) **the applicant applied for the proceedings to enable her sue but managed to get proceedings on the 30.09.2008,**
- (d) **the delay was occasioned by the failure to supply the proceedings and judgment in time,**
- (e) **by the time the proceedings and judgment were supplied on 30.09.2008, the time of filing suit had lapsed;**
- (f) **the applicant is ready, able and willing to sue.**

It is noteworthy that the requirement in section 27(2) of the Limitation of Actions Act is not about notice but about knowledge (actual or constructive). “**Knowledge**” is an awareness or understanding of a fact or circumstance, a state of mind in which a person has no substantial doubt about the existence of a fact.

Actual knowledge is direct and clear knowledge, as distinguished from constructive knowledge – for example the supervisor of a manufacturing factory having witnessed an accident, to a factory hand had actual knowledge of the workers injury, sometimes referred to as “**express actual knowledge**” is knowledge of such information as would lead a reasonable person to inquire further.

“**Constructive knowledge**” is knowledge that a person is using reasonable care or diligence should have, and that knowledge is therefore attributed by law to a given person.

So a fact of a decisive character merely means a fact which was conclusive of the existence or otherwise of a cause of action.

The issue in this application is whether the delay by the court to supply certified copies of the judgment was a fact material and of a decisive character at all times outside the knowledge (actual or constructive) of the applicant in relation to the action.

The answer to this issue must be emphatic negative, **no**. It is **neither** the fact of the prosecution of the Respondents which gave rise to the cause of action nor the delay in providing certified copies of proceedings and judgment which gave rise to the applicant’s cause of action. The material and fact of a decisive character is not the prosecution of the Respondents. The material and fact of a decisive character is the fact that the applicant was attacked or assaulted on 23.05.2005. That is the fact which gave rise to the cause of action. That material and fact of a decisive character was always within the actual (not constructive) knowledge of the applicant.

Besides under section 193A of the Criminal Procedure Code concurrent criminal and civil proceedings may be maintained. The section provides that “**the fact any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings**”. In other words there was nothing to stop the applicant from instituting suit against the respondents. If she had any cause of action she did not have to wait for the completion of the criminal prosecution.

The Application herein is therefore not merely mischievous but is also an abuse of the process of court. The Appellant is abusing the process of court by misusing it in order to hand over to her a cause of

action which she knows is already barred by section 4(2) of the Limitation of Actions Act as three years within which to bring an action which occurred on 23.09.2005 ought to have been instituted latest by 22.09.2008. The fact of the assault the basis of the action was always within the actual knowledge of the applicant. It has absolutely nothing to do with the delay in the supply of the proceedings or judgment from the lower court.

For those reasons, the applicants application is misconceived, is an abuse of the court's process. The court will jealously guard its process. The application dated 18th May 2009 and filed on 19th May 2009 is therefore dismissed with no order as to costs.

Dated, delivered and signed at Meru this 31st day of July 2009

ANYARA EMUKULE

JUDGE