



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 119B of 2009

JULIUS MOMANYI NDEGE APPLICANT

VERSUS

1. TOWN COUNCIL KEROKA

2. THE ATTORNEY GENERAL..... RESPONDENTS

RULING

The Applicant Julius Momanyi Ndege has come to court under section 27 of the Limitation of Actions Act Cap.22 of the Laws of Kenya and Order XXXVI rule 3c of the Civil Procedure Rules for leave to bring a suit out of time. He has stated in the Supporting Affidavit that he was in July 2007 charged by Keroka Police Station with incitement to violence contrary to section 96(a) of the Penal Code in Keroka SRM Criminal Case No.458 of 2007. Following trial, he was acquitted under section 210 of the Criminal Procedure Code. On 7/8/08 he filed a civil suit against the Town Council of Keroka (the complainants) and the Honourable the Attorney General in Keroka SRM CC.NO.166 of 2008 for malicious prosecution and defamation. Each Defendant filed Statement of Defence. 1st Defendant pleaded, among other things, that the plaint filed was bad in law, inept, ambiguous and did not disclose proper particulars and should be dismissed.

The civil case was heard. During submissions, the 1st Defendant (through his advocates) raised the issue that the Verifying Affidavit had not been commissioned in accordance with **section 88** of the **Civil Procedure Act** and **section 5** of the **Oaths and Statutory Declarations Act, Cap 15** of the **Laws of Kenya**. It meant there was no Affidavit and, by dint of **Order VII rule 1(2)** of the **Civil Procedure Act**, the plaint was incompetent. The court agreed with the 1st Defendant and struck out the plaint with costs.

The argument by the Applicant is that when a suit is struck out it can be refiled. However, the time for such filing has since elapsed. By the time the suit was struck out the limitation period had caught up with it. Hence the present request for extension of time.

The Applicant concedes the Verifying Affidavit was indeed not commissioned. He calls it a technical inadvertence.

Minda & Co. Advocates represented the Applicant in the civil suit above and are the ones who drew the Plaint and Affidavit. They act for him in the present Application. The Applicant is simply saying he was failed by his advocates and that has caused him the present predicament. The commissioning of an affidavit is a basic requirement for any lawyer.

In **Ngari & another v. Odero, Civil Appeal No.233 of 1998 at Kisumu ([1998] LLR 823 (CAK)) and Mbithi v. Municipal Council of Mombasa & another, Civil Appeal No.3 of 1992 at Nairobi ([1992] LLR 2235 (CAK))** the Court of Appeal was dealing with the provisions of **sections 27 and 28** of the **Limitation of Actions Act**. It held that the requirements of the sections are stringent and if they are not met the application for extension of time has to be rejected. The Applicant must prove that a material fact of a decisive character was outside his knowledge. In the latter case, it was noted as follows:

“It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of decisive character, that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to them, would have regarded them as determining that an action would have been a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of action.”

In **Divecon Ltd v. Savani, Civil Appeal No.142 of 1997 at Nairobi** it was held that ignorance on the part of the applicant (of the statutory period of limitation) is not a material fact. In the High Court decisions in **Zachariah B. Shimechero v. The Attorney General & another, HC Misc. Civil Application No.60 of 2005 at Kakamega** and **Andrew Kiptek Tendet v. Simon Plukol Esokon, HC Misc. Civil Appl. No.153 of 2006 at Kitale** it was held that the negligence by an advocate was not a material fact.

In short, on the material available I am unable to extend time. The application is consequently dismissed.

Dated, signed and delivered at KISII this 15th day of July, 2009

A. O. MUCHELULE

JUDGE

15/7/09

A. O. Muchelule J

cc. Mongare

Mr. Minda for applicant

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE