

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 62 of 2007 (OS)

PETER MWANGI MBATARU PLAINTIFF

Versus

JOSPHAT WAGUKA GIKANDI..... DEFENDANT

JUDGMENT

The plaintiff has moved this court by way of an ex parte originating summons brought under **Order XXXVI Rule 36** of the Civil Procedure Rules. The plaintiff seeks the leave of the court to file a suit out of time. In the affidavit in support of the application the applicant stated that the accident the subject of the proposed suit occurred on 10th January 2004. That his father died in that accident. Letters of administration were issued to him in respect of that estate. Following those letters being issued he filed a case in the lower court on 12th October 2005. An application was subsequently filed whereby the defendant sought the striking out of the suit on the basis that the verifying affidavit had an error. Without stating the date of the ruling the applicant stated that the court ruled that the affidavit had an error and proceeded to strike out the plaint. That by the time that ruling was delivered the three years period of limitation had passed.

As stated before the application was ex parte. My initial response to the application is that the same was wrongly brought under the Civil Procedure Rules. The applicant should have moved under Cap 22. Section 4(2) of Limitation of Actions Act provides that the period within which an action for negligence should be brought is three years. Section 22 provides that the court may extend that period if the applicant can show that he was suffering from a disability. Disability is defined under Section 2(2) of the Act. In the case of **GATHONI vs KENYA COOPERATIVE CREAMERIS LTD (1982)KLR** the Court of Appeal in considering a similar application held as follows;-

- 1. "Disability" within the meaning of section 22(v) of the limitation of Actions Act (Cap 22) does not include physical disability. The definition of disability is clearly provided in section 2(2) of the Act which refers to persons who are minors or are of unsound mind.***
- 2. for an application for leave to be allowed under section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the court, that failure to apply within time was due to lack of knowledge of certain material facts. The applicant must show the satisfaction of the court that she had taken all reasonable steps and sought appropriate advice in respect of the facts. Here the applicant failed to satisfy the court.***

The applicant did not indicate in his application the disability if any that he suffered which caused him not to file the suit within the state period. Even under Section 27 of that Act the applicant needed to show that failure to file the case in time was due to ignorance of material facts. I find that the application cannot succeed for it fails to satisfy the requirement of the Limitation of Actions Act. Accordingly the originating summons dated 3rd June 2007 is hereby dismissed.

MARY KASANGO

JUDGE

DATED AND DELIVERED THIS 4TH DAY OF JUNE 2008

M. S. A. MAKHANDIA

JUDGE