



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Civ. Appli. 367 of 2007

AGGREY AMUGUNE AKWIYANGA.....APPLICANT

VERSUS

INDERPAL SINGH (K) LIMITED.....RESPONDENT

R U L I N G

1. Aggrey Amugune Akwiyanga is the proposed plaintiff and applicant herein. By his application brought by way of Notice of Motion under Order 50 Rules 1 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law, the applicant prays for the following orders:-

1. *THAT leave be granted to file suit herein out of time.*
2. *THAT the filed plaint herein be deemed as duly filed.*
3. *THAT the cost of this application be in the cause.*

The applicant has given the following grounds in support of the application:-

- (a) *That the Plaintiff filed a case against the Defendant in 1996 at the Magistrate's Court and his advocate on record at that time transferred the matter to the High Court and the suit was on 16th December 2004 struck out having been originally filed in a court that had no jurisdiction.*
- (b) *That the mistake of filing the matter in a wrong court was caused by the Plaintiff's advocate on record.*
- (c) *That the amount involved in the claim herein is substantial and the applicant has a good case with overwhelming chances of success.*
- (d) *That the Defendant herein are not likely to suffer any prejudice if leave to file out of time is granted.*

2. The application is also supported by the sworn affidavit of the applicant dated May 23, 2007 in which he says that on or about August, 25, 1994, while working for the Defendant, he was involved in an industrial accident which left his left eye completely damaged and that thereafter he filed a suit at the Senior Principal Magistrate's Court being Civil Case No. 4923 of 1996. He also says that before the suit

was heard, his former advocate applied to and did transfer the suit to the High Court for hearing and final disposal and the same was registered as HCC No. 1802 of 1999. The applicant says further that on December 16, 2004, Lady Justice M.A. Ang'awa struck out the said High Court Case and it is as a consequence of the order striking out the suit that the applicant has now filed this application. He pleads that because his suit was struck out for reasons beyond his control, this application should be allowed to enable him recover damages for his lost eye.

3. The application is opposed. The Replying Affidavit was sworn by Inderpal Singh saying that if this application is allowed the respondent would suffer great prejudice for reasons that the respondent's witnesses have since left its employment and as such it would not be able to call witnesses. The deponent also says that since this is a very old case, it must come to an end and that in any event, and according to advice received from his counsel, the applicant has not satisfied the conditions for extension of time under Section 27 of the Limitation of Actions Act. The said section reads as follows:-

“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 purposes of this section; and

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

(2) The requirements of this subsection 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 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

(3) This section does not exclude or otherwise affect

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”

4. In his view, the deponent says that the applicant herein was always aware of the facts leading to his (applicant's) claim and that therefore, the applicant is in abuse of the court process by bringing this application.

5. The application was canvassed before me by both parties, with Mr. A.G. Kamau appearing for the applicant while M/s M. Muema appeared for the respondent. Mr. Kamau reiterated the averments as per the grounds on the face of the application and the affidavit in support. He contended on behalf of the applicant that the mistake of the applicant's former counsel of transferring the applicant's suit from the subordinate court to the High Court and the eventual striking out of the suit should not be visited upon the applicant. Mr. Kamau also urged the court to find and to hold that the draft plaint annexed to the

supporting affidavit marked 'AAA 2' be deemed as duly filed.

6. Miss Muema opposed the application and urged the court to find and to hold that the applicant had not satisfied the conditions set out in sections 27(2) and 30 of the Limitation of Actions Act (the Act) to warrant the granting of the orders sought. She argued that under section 30 of the Act, material facts in the instant suit would include the following:-

(a) *the fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;*

(b) *The value or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;*

(c) *The fact that the personal injuries so resulting were attributed to that negligence, nuisance or breach of duty or to the extent to which any of these personal injuries were so attribute.*

7. Miss Muema submitted that at all times material to this application, the applicant was seized of all the facts relating to his claim and that the excuse the applicant now seeks to find in the dismissal order by Ang'awa J is not one of those situations envisaged by section 30 of the Act. In any event, Miss Muema argued that the applicant has not acted with alacrity following the dismissal of his former suit on December 16, 2004. Miss Muema also submitted that the same lack of diligence was exhibited by the applicant when he failed to prosecute his appeal to the Court of Appeal against the ruling by Ang'awa J on December 16, 2004. On a point of law and procedure, Miss Muema contended that the applicant's application is defective in the sense that the same was not brought under the relevant provisions of the law namely section 28 of the Act and also Order 36 Rule 3c of the Civil Procedure Rules. She also contended that even assuming that the application was properly before court, the applicant must satisfy the court that

(i) *he has a good cause of action*

(ii) *he has met the conditions of section 27(2) of the Act.*

8. In Miss Muema's view, the applicant has failed to satisfy the two conditions above. Miss Muema cited the following authorities in support of her client's case:-

(a) *Gathoni –vs- Kenya Co-operative Creameries Ltd. [1982] 2 KLR 104*

(b) *BOC Kenya Ltd. –vs- Joseph Kinuthia Karanja & Another – HCA No. 700 of 2007 [2007]e KLR*

(c) *Divecon Ltd. –vs- Samani [1995-1998] I EA 48*

9. In all the above cases, the applications were dismissed on grounds:- (i) that the applicants had not fulfilled the conditions set out in the Act and (ii) that ignorance of the statutory periods of limitations was not a material fact under the Act, nor was ignorance of jurisdiction of the court or the negligence of an advocate material facts under the Act. The respondent also cited two other authorities:-

(d) *Zachariah B. Shimechero –vs- The A.G. and Another [2006]e KLR – HCC Misc. Application No. 66 of 2005 and*

(e) *Oruta & Another –vs- Nyamato [1988] KLR 590.*

10. In the Ovuta case, it was held, inter alia, that an application for extension of time for the purposes of section 27 of the Act is to be made *ex parte* and the defendant is not in a position to oppose it.

11. What then is the fate of the instant application in light of the law as cited above? There is no dispute here that the cause of action herein arose on August 25, 1994. There is also no dispute that the applicant

filed SPMCC No. 4923 of 1996, which suit was later transferred to the High Court at the instance of the applicant and was registered as HCCC No. 1802 of 1999. It is also not in dispute that the said HCC No. 1802 of 1999 was struck out on December 16, 2004 on the ground that the suit was a nullity since it had been instituted in a court that lacked the jurisdiction to hear and determine it. The applicant did not appeal against the order striking out.

12. I have carefully considered the facts and the law relating to this application I am of the considered view that the applicant does not have a good cause of action and secondly that he has not fulfilled the conditions set out in section 27(2) of the Act. It is my view that the applicant has all along had all the material facts within his possession, and it is from such possession that he filed HCCC No.1802 of 1999. It is also not enough for the applicant to argue that his former advocate was negligent in handling his case which was initially filed in the Senior Principal Magistrate's Court. Further, I am persuaded that the instant application was brought under the wrong provisions of the law. Order 36 Rule 3C(1) of the Civil Procedure Rules provides as follows:-

“3 (C) (1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made by originating summons supported by Affidavit.”

13. The instant application was made before filing of the suit. The application was served upon the respondent. In the Oruta case (supra), the court said in part at page 595 of the judgment:-

“Whether the application was made before or after filing the suit there is no provision for the defendant to be heard before the order authorizing the extension of time is granted because the application is meant to be unopposed.”

14. In the instant case, the procedure was all wrong. However, the respondents who were served with the application proceeded to file a Replying Affidavit and consequently they were heard, but they pointed out that the application ought to have been made *ex parte*. For this reason, the application must fail.

15. I have also said earlier that the applicant has not shown that he did not have all the material facts before filing this application. The affidavit in support of the application basically talks about the suit that was struck out on December 16, 2004. The applicant does not, in his affidavit demonstrate that failure to file suit in time was due to lack of certain material facts, and that he had taken all reasonable steps and sought appropriate advice in respect of the facts (see Gathoni –vs- Kenya Co-operative Creameries Ltd. – above). If anything the applicant had already sought the advice which enabled him to file HCCC No. 1802 of 1999. Those facts are not now relevant to this application. As was observed in the Gathoni case,

“The law of limitations of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

15. In the instant case, the applicant has not been diligent. He took about 3 years to bring this application after his suit was struck out on December 16, 2004. The Act is not intended to help persons of the likes of the applicant. He did not act reasonably in this case.

16. In the result, the application dated May 23, 2007 be and is hereby dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of September, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Kioko holding brief for Mr. Kamaru (present) for the Applicant

Mr. Kiragu Kimani (present for the Respondent