



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

Misc. Appli. 406 of 2008

GRACE MUMO.....APPLICANT

VERSUS

MATILDA MAGIO MBINDA.....1ST RESPONDENT

HON. THE ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. The application before me is the Originating Summons dated 1/07/08 and filed in court on 7/08/08. The same is brought under the provisions of sections 27 and 28 of the Limitation of Actions Act, Cap 22 Laws of Kenya Section 3A of the Civil Procedure Act and all other enabling provisions of the law, seeking orders:-

1. *THAT this Honourable Court be pleased to grant the applicant leave to file suit out of time against the respondents.*

2. *THAT the costs of this Application be in the cause.*

2. The application is premised on 7 grounds on the face thereof, one of which is that the applicant's former advocates caused the delay in filing the suit within the statutory time. Under the ground numbered (d) the applicant acknowledges that the time for filing suit for damages for wrongful arrest, false imprisonment and defamation expired on 2/07/07 while the time for filing suit based on malicious prosecution expired on 21/03/08. The applicant avers that she has a good claim against the respondents herein and she should thus be given a chance to pursue the same.

3. There is also an affidavit in support of the application sworn on 1/07/08. In it the applicant avers as follows at paragraph 4 thereof:-

“4. *THAT failure to file the claims in time was caused by inadvertence on my part, I had duly instructed my advocate on record in time as shown by the demand letter to the 1st Respondent and the Notice of Intention to institute proceedings issued upon the 2nd Respondent marked “GM-2”. The said advocate never took action and I only learnt after the suit had become time-barred.”*

4. She also depones that it was only in the month of June 2008 that she confirmed the fact that her former advocate had not filed suit on time as instructed. She asks the court not to shut the doors of justice on her for the mistake of her advocate, and to find that this application has been brought timeously upon discovery of the applicant's former advocates' failure to file suit within time.

5. The application was canvassed before me *ex parte* by Miss Kiniti for the applicant. Miss Kiniti contended that the applicant's former advocate failed the applicant by not acting according to instructions.

6. The issue that arises for determination is whether the applicant has satisfied the conditions set out in Sections 27 and 28 of Cap 22. The Limitation of Actions will not apply 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 of the plaintiff until *inter alia*, after the expiry of the limitation period. Section 28 provides the procedure for applying for leave of court for extension of limitation period under section 27 of Cap 22. Under Section 28, the court can only grant leave if it appears to the court that there is a *prima facie* cause of action on the strength of the available evidence and that the requirements of section 27(2) have been fulfilled.

7. After carefully considering the application as filed, the law and the submissions made to me by counsel for the applicant, I am not persuaded that the applicant has fulfilled the two conditions set out by section 28 of Cap 22 as to entitle her to the orders sought. The main ground in support of the applicant's application is that her former advocate, M/s Wangechi Munene & Co. Advocates did not act expeditiously as per the instructions given to them by the applicant. I do not think that that really is the issue. The point is that the applicant has not adduced any evidence to show that there were facts pertaining to this matter that were not within her knowledge. The court is also not satisfied that the applicants former advocates had indeed been duly instructed to file plaint as alleged. There is no evidence laid before me to prove that fact. It may therefore very well be that it is the applicant herself, who caused the delay. I find that a year's delay in this case was inordinate and the same has not, in my view, been adequately explained.

8. For the above reasons, I do find and hold that the applicant's application lacks merit. The same is hereby dismissed. Costs of the application shall be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 19th day of September 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-