REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Misc Civil Appli 153 of 2006

ANDREW KIPTEK TENDET……..……APPLICANT

V E R S U S

SIMON PLUKOL ESOKON……...…….RESPONDENT

R U L I N G

The applicant is the father to Geoffrey Ngeiywa Tendet, who was killed on 7th December 2001.

It is his case that his said son met his death at the hands of the Respondent. Following the incident which led to the demise of Geoffrey Ngeiywa Tendet, the respondent was charged with the offence of manslaughter.

After going through a full trial, the respondent was convicted on the charge of manslaughter, and was then sentenced to two years imprisonment.

It is noteworthy that although the charges were preferred on 19th March 2003, it was not until 31st July 2006 that the case was concluded. Shortly after the trial was concluded, the applicant applied to court for a limited grant, which was issued on 31st October 2006.

Armed with the grant, the applicant now wishes to institute civil proceedings against the respondent. However, as the incident which led to the death of his son took place on 7th December 200l, the applicant acknowledges that a suit founded on tort would already be time- barred. It is for that reason that the applicant has brought this application, for extension of the limitation period.

In his considered view, he has a reasonable cause of action with overwhelming chances of success.

If it is true that the respondent did not lodge an appeal against the judgment in which he was convicted for manslaughter, there would be no doubt that the applicant's assessment of the intended civil case, is sound.

It is also my considered view that if the intended civil action was commenced against the respondent, at this moment in time, he would not be prejudiced.

But the question still remains whether or not in these circumstances, the court should grant leave to the applicant to institute proceedings notwithstanding the fact that the limitation period had lapsed.

Had the application been brought pursuant to sections 27 and 28 of the Limitation Of Actions Act, the court would have had no hesitation in dismissing it, because it would appear that there were no material facts which had ever been outside the knowledge of the applicant. In the case of **NGARI & ANOTHER V ODERO [199] 2 E.A. 241** the Court of Appeal emphasized that the requirements in those two sections are stringent, and that if they were not met, the court must reject an application for extension of the period of limitation. At page 244, the Court of Appeal said;

"***The next friend of the respondent and*** *Mr.Kasamani were fully aware of the material* ***facts of a decisive character to enable them to file the suit within the limitation period and they could not have relied upon sections 27 and 28 of the Act to say otherwise."***

Perhaps being aware of that legal position, the applicant brought this application pursuant to Sections 22 and 31 of the Limitation of Actions Act as read together with Order XXXVI rule 3C (l) of the Civil Procedure Rules.

Section 22 expressly stipulates, in the proviso thereto, that it is inapplicable to any case where the right of action first accrues to a person who is not under a disability.

In this case, the applicant has only made the point that he did not have legal capacity to institute proceedings until after he had obtained the limited grant on 31st October 2006. However, as the applicant did not demonstrate to the court the reasons why he was unable to apply for the limited grant soon after the demise of his son, I am not persuaded the applicant had any disability that could have precluded him from taking steps to bring the intended action within the time prescribed by law.

In any event, the moment that the applicant placed reliance upon the provisions of Order 36 rule 3C (l), he have should appreciated that that immediately brought into focus the provisions of section 27 of the Limitation of Actions Act. My reason for so saying is that Order XXXVI rule 3C (l) of the Civil Procedure Rules provides s follows;

"*An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made exparte by originating summons supported* ***by affidavit."***

From the aforegoing analysis, it would appear that the applicant has not made out a case to warrant the grant of leave. However, he did not move the court by originating summons, as stipulated.

In the result, the application before court is incompetent.

It is thus struck out. But, as there are yet no other parties to this action, I make no order as to costs.

Dated and Delivered at KITALE, this 5th day of June, 2007.

FRED A. OCHIENG

JUDGE