



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC. APPLI. 594 OF 2005

IN THE MATTER OF STEPHEN KITHEKA MUIYA

AND

IN THE MATTER OF FILING SUIT OUT OF TIME UNDER THE LIMITATIONS OF ACTIONS ACT

EX PARTE

RULING

The applicant herein has moved the Court by way of an Originating Summons dated 26th April 2005 brought under Sections 27 and 28 of the Limitations of Actions Act Cap 22 of the Laws of Kenya, Order XXXVI Rule 3C (1) OF THE Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya and all other enabling provisions of the law. He seeks orders for leave to file suit, out of time, against the Ex parte Defendant for damages in respect of personal injuries sustained in an accident involving a motor vehicle registration Number KAB 985A. The application is supported by the applicant's affidavit sworn on 26th April 2005 and based on the grounds that: 1. The delay in bringing up the action was caused by the fact that the applicant was undergoing treatment and was not in any way calculated and/or meant to delay or abuse the process of the Court.

The applicant relies on the authority of Kenya Cargo Handling Services Ltd –vs- Ugwang (1982-88) 1 KLR 672 in which it was held that Section 27 (1) of the Limitation of Actions Act provides only that S.4 (2) does not afford a defence in actions of tort and that it is not a substantive provision laying down any period of limitation.

The effective part of Section 27 reads as follows: 27(1) Section 4(2) does not afford a defence to an action founded in 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 or 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 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 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 included facts of a decisive character which were at all material 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.

From the pleadings filed herein as well as submissions made by Counsel herein I am unable to see how the Applicants claim qualifies for the above provisions to apply. The applicant does not state what facts of a decisive character were outside his knowledge until the expiry of the statutory period. The applicant has also not made any connection between the intended Defendant and the accident complained about for the Court to conclude that indeed he has a cause of action against the intended Defendant.

The serious injuries alleged to have contributed to the delay in filing suit have also not been substantiated. I find that the Applicant has not fulfilled the requirements of Section 27 (1) and (2) to warrant the orders sought. The application fails and is dismissed with no order as to costs.

Dated and Delivered at Nairobi this 10th day of June 2005

M.G. Mugo

Judge

In the presence of:

N/A For Applicant

Ex parte