REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Misc Application 585 of 2005
IN THE MATTER OF AN APPLICATION TO FILE LEAVE OUT OF TIME BY

MALICHA DIBA WAKO IYA……PLAINTIFF/APPLICANT

VERSUS

HABADO HARO……..…….……1ST DEFENDANT/RESPONDENT

ATTORNEY GENERAL……...2ND DEFENDANT/RESPONDENT

RULING

The applicant herein has moved the Court under Order XXXVI 3C (1) of the Civil Procedure Rules and Sections 26, 27 and 28 of the Limitation of Actions Act. Although, as intended under the Rules the application is expressed to have been made ex parte the same was, for some reason, erroneously served upon the Attorney General who thereafter entered appearance and filed a Notice of Preliminary Objection to the application.

Parties attended before the Duty Judge on 30th May 2005 and took a hearing date by consent. Thus the parties appeared before me on 15th June 2005 and the preliminary objection was argued. The preliminary objection as filed under the Notice dated 26th May

2005 is based on the grounds that:

1. **The Court lacks jurisdiction to hear the application.**

2. **The matter is res judicata**

3. **The application is fatally defective.**

In his submissions, Mr. Kaka for the Attorney General argued that, as admitted by the Applicant in paragraphs 6 and 7 of her supporting affidavit, a previous suit in respect of the same cause of action was filed herein and settled, thereby rendering the intended suit res judicata. Mr. Wamae in reply submitted that although the applicant herein admits the previous suit the same cannot be relevant herein on the ground that, even if the applicant's name appears in the suit no claim for compensation for the applicants own injuries was made in that suit although the applicant was made to believe that the same was done. Mr. Wamae claims to have been somewhat incapacitated by having not seen the pleadings in that suit.

The other objection by the Attorney General is that the application as worded does not pray for leave to file suit outside the Limitation period but merely for an order

"for leave to file suit against the Government through the Attorney General for recovery of damages."

Counsel submitted that there is no provision for such an application or orders under Kenyan law which makes the application incurably defective. Mr. Wamae's response to this is that since the application is stated to have been brought under Order XXXVI Rule 3C (1) it ought to be understood that the same seeks extension of time and leave to file suit since the same is late.

The last objection as submitted by the Attorney General is that under the Civil Procedure Rules, as well as the cited section of the Limitation of Actions Act leave to file suit outside the Limitation period cannot be obtained on the ground that failure or delay in filing suit was caused by mistake of facts, to which Mr. Wamae replied that the Applicants' disability caused by lack of knowledge that her suit was not filed falls within the statutory exemptions.

The issue of jurisdiction herein is tied to the Attorney General's objection that this matter as presented in the application and indeed the intended suit is res judicata as the issues in dispute have already been determined in a prior suit, namely, H.C.C.C. No. 4594 of 1989, **ADAN DIBA WAKO AND MALICHA DIBA WAKO –vs- THE HONOURABLE ATTORNEY GENERAL** which suit is not disputed but admitted by the Applicant. The outcome of the same is also not disputed. It is also an undisputed fact that the Applicant did on 8th December 1987 serve a Notice upon the Attorney General intimating that she would file suit in respect of the injuries suffered in the attack of 12th June 1987 wherein the Applicant's husband was killed and the Applicant injured. The said notice is annexed to the Applicant's affidavit of 25th April 2005 and states in paragraph 2 as follows:

"THE CIRCUMSTANCES giving rise to liability are that on 12th June 1987 while MALICHA DIBA WAKO IYA (the Applicant) was lawfully at her home an administration policeman MR. ABADO HARO, in official uniform and armed with a rifle came to the deceased's (applicants' husband) home and without any lawful cause shot and injured her seriously causing her pain, suffering and loss and damage."

Mr. Kaka submitted that H.C.C.C. No. 4594 of 1989 was then filed pursuant to the above notice and no other. Indeed the Applicant depones in her affidavit that being illiterate she instructed her step son MR. DIBA WAKO IYA to follow the matter on her behalf. He confirms in his affidavit of 25th April 2005 filed herein as an annexture to the Applicant's own affidavit as annexture "MDW16" that indeed H.C.C.C. No. 4594 of 1989 was filed pursuant to those instructions and judgment entered by consent on 18th October 2001.

The applicant does not dispute that a sum of shs.1,255,000 was paid to her step son pursuant to the consent judgment. All she says in her affidavit at paragraph 14 is that her step-son did not make any payments to her, which he also confirms in his affidavit. It is difficult to understand, in the light of the documentary evidence herein how the Applicant can claim that the suit which was to be filed on her behalf was not so filed when she has clearly admitted that H.C.C.C. No. 4594 of 1987 was filed pursuant to her notice of 8th December 1987 and pursuant to the instructions she gave to her step-son and co-plaintiff in that suit. Having been a party in that suit there is no basis for her to claim that the judgment did not include her award for the injuries in respect of which she had issued a notice of intention to sue. The award in my considered opinion must be taken to have included a settlement on her behalf. If as it would appear from the applicant's affidavit there was a problem of apportionment then the people to blame for that are her advocates and the step son. Her portion of the award could not and ought not to have formed part of other dependant's share.

The essence of res judicata doctrine as stipulated in Section 7 of the Civil Procedure Act is that

"No Court shall try any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between parties whom they or any of them claim, litigating

under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has finally been decided by such Court."

I am satisfied from the submissions made on behalf of the Attorney General that the injuries in respect of which the notice of 8th December 1987 was issued upon the Attorney General did form part of the matters directly and substantially in issue in H.C.C.C. No. 4594 of 1989 and that the same were considered in the conduct of the said suit and in the recording of the consent judgment of 12th October 2001. The issue of such damages was in my view finally decided in the recorded judgment in the said prior suit and cannot be raised or litigated afresh. He who alleges must prove. For this reason I do not accept Mr. Wamae's submission that the Attorney General must prove that the applicant's claim for damages was made. It is for the applicant to prove that the same was not the case which she has failed to do. She has failed to dislodge the plea of res judicata and I must for the reasons previously stated uphold the objection on this ground. Having done so, it follows clearly from the wording of Section 7 of the Civil Procedure Act that this Court has no jurisdiction to entertain the application for leave or any suit relating to the issue of a claim damages in respect of the Applicant's injuries.

As regards the second objection, I find that the prayer herein, being inconsistent with the provisions under which the application is brought cannot be entertained. The said provision is specifically intended for the extension of Limitation period under Section 27 of the Limitation of Actions Act and not for "leave to file suit against the Government through the Attorney General" as stated in prayer 1. Nothing should be left for inference where the law expressly provides for the same and parties must always be taken to be bound by their pleadings. I must in the circumstances uphold the objection as relates to the procedural defect. I make no finding regarding Counsel's submissions in regard to the ground upon which the application is founded since the same go to the merits of the application itself.

In the circumstances and in view of my various findings the preliminary objection is sustained with the result that the application fails at the threshold.

Dated and Delivered at Nairobi this 7th day of July, 2005

M.G. Mugo

Judge

In the presence of

N/A For the Plaintiff

N/A For the 1st Defendant

Kaka For the 2nd Defendant