



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 354 of 1998 (O.S)

CRESENT CONSTRUCTION CO. LTD. PLAINTIFF

VERSUS

KABUGO MUSONI

TRANSPARES TRANSPORTERS DEFENDANTS

RULING

This is a Chamber Summons dated 5/3/01, brought pursuant to Order VI Rule 13 (1) (d) of the Civil Procedure Rules, Section 3 A Civil Procedure Act, Sections 4 (2), 27 and 28 of the Limitation of Actions Act. The applicant prays that the court do set aside the order for leave to file this suit out of time and the plaint be struck out with costs to the applicant. The application is premised on grounds found in the body of the application and an affidavit sworn by Caleb Odhiambo Jaoko who acts for the 2nd defendant/applicant.

Grounds of opposition were filed by the plaintiff/Respondent's counsel, Mohamed and Muigai Advocates dated 8/7/05. Though the said counsel for the Respondent had been served with Hearing Notice as far back as 25/2/05 as evidenced by the affidavit of service dated 12/7/05, there was no appearance on behalf of Respondents at the hearing of the application. The court will go ahead and consider the application as well as their grounds of opposition.

It was submitted on behalf of the applicant that the claim giving rise to this suit arises out of a road accident that occurred on 9/12/94 along Nairobi-Mombasa Road at Salama market and the claim is one of material damage to a vehicle (power machine). That the plaintiffs filed this suit on 15/10/98, which was about 4 years after the occurrence of the accident. The 2nd defendant filed the amended defence on 24/10/98 in which they pleaded that the suit was barred by time and that there is therefore no basis upon which this suit can be filed and it amounts to an abuse of court process and should be dismissed.

The Respondent filed 5 grounds in opposition to the application which are to the effect that the delay in filing of the plaint is not inordinate and is excusable; that the advocate's mistakes should not be visited on the plaintiffs; that the plaintiff has a good claim against the defendants; that the court has a discretion to allow the plaint to be filed out of time and that this application is brought after inordinate delay.

As pleaded at paragraph 8 of the plaint, the accident giving rise to this claim arose on 9/12/94. The suit should have been filed by 8/12/97. It was filed about a year later on 15/10/98. At

paragraph 4 of the said plaint it was pleaded that the applicant had leave granted to them to file suit out of time in H.C.C. 111/98 (O.S.). From paragraph 10 of the plaint it is clear that the claim is for material damage to a vehicle (power machine). The question is whether the court had jurisdiction to grant leave to file this suit out of time. Section 4 (2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action occurred. Under Section 27 of the same Act, time can only be extended for an action for personal injuries but not material damage to a vehicle. I do agree with the finding of Justice Mbaluto in the case of *BISAI & ANOTHER versus POST BANK CREDIT O.S. 237/03* in which the Judge held that extension of time only relates to an action in respect of personal injuries.

One of the grounds of opposition is that this application is brought after inordinate delay but I do not agree. The 2nd defendant had pleaded it in his defence at paragraph 1 and 2. The plaintiffs were notified.

As to whether this court can exercise its discretion and allow the claim to proceed to hearing, I find that is not possible. Section 27 is a specific statutory provision which the court has to apply strictly. Discretion cannot come into play here. Whether the Respondent's claim is good or not, and whether it is the negligence of the Advocate that it was not filed in time, then this court is bound by that statutory provision and the party aggrieved has an option to pursue his advocate for negligence.

The application for leave to extend time for filing the suit was misconceived and should have been struck out and since it was not, this court sets aside the order for leave to file suit out of time. The plaint is irregularly before the court. It is hereby struck out with costs to the Defendants. Costs of this application will also be borne by the plaintiff/Respondent

R.V. WENDOH

JUDGE

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE