



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. CIVIL APPLICATION NO. 220 OF 2002 (O.S.)
IN THE MATTER OF: LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF: AN APPLICATION FOR EXTENSION OF
TIME TO FILE SUIT
HANNAH NJERI GACHAU
(Legal Representative of the Estate of JOSEPH GACHAU KANYONI).....APPLICANT

RULING

This is an ex parte Originating Summons under Section 27 of the Limitation of Actions Act (Cap. 22) and Order XXXVI Rule 3C(1) of the Civil Procedure Rules. In it the Applicant seeks in pertinent the following order:

“1. THAT the Applicant be granted leave to institute and file suit against Livingstone Waweru Nganga and/or his driver or agent for the wrongful death of Joseph Gachau Kanyoni (hereinafter referred to as “the Deceased ”) in a road traffic accident on February 14, 1999. ”

The Summons was stated to be grounded, in relevant part, on the facts that the default in filing the suit within the stipulated period was occasioned by an excusable mistake and that the Applicant had a good claim against the said Livingstone Waweru Nganga.

In her Affidavit in Support of the application the Applicant stated as follows: She was not at the scene of the accident at which the Deceased was knocked down by a motor vehicle allegedly owned and/or driven by the intended Defendant. She reported the matter to the police and was advised that the matter was pending under investigation. She did not know any of the witnesses whose names were given to her by the police. She was unable to trace them at once to tell her what had exactly happened. The intended Defendant (or his driver) was later charged with a traffic offence. The outcome of the case was expected in October 2002. According to her, the testimony tendered led her to believe that the driver of the offending motor vehicle “*was guilty of culpable negligence* ” which facts only came into her possession recently.

The Applicant did not annex a draft Complaint to her affidavit to assist this court to establish the proposed cause of action but it is obvious that her intended claim is based in a claim for damages for negligence leading to the death of the Deceased. This is a claim based on tort. According to Section 4(2) of Cap.22 such a claim is required to be brought within 3 years from the date on which the cause of action accrued. In this case, the action ought to have been brought by February 14, 2002. The Applicant filed this

Summons on July 8, 2002 – above five months after the stipulated period. On September 30, 1999 she obtained a Limited Grant of Letters of Administration ad Colligenda bona under Section 67(1) of the Law of Succession Act (Cap. 60) “*limited to filing a Civil Suit to recover damages arising from the death of the deceased in a road traffic accident*”.

According to Section 27(1) of Cap. 22 the period for filing an action based on tort may be extended in the following cases only:-

- (a) where 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 of a contract or written law); and
- (b) the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect 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 subsection (2) are fulfilled in relation to the cause of action.

From these provisions, it is apparent that the court’s discretion in extending time for filing actions based on contract is strictly governed by the statute. The Act sets out perimeters within which the court may exercise the discretion. In the case of *Mweu v. Kabai & Another* [1972] E.A. it was said that once one satisfies the statutory conditions under Section 27(1) the court will retain no further discretion in the matter but must grant the leave sought. Where the said statutory conditions are not fulfilled, the discretion is absent and any application for extension must then be refused. (see detailed discussion also in *Divecon Ltd v. Shirinkhanu Sadrudin Samnani Civil Appeal No. 142 of 1997*).

The question before this court is, therefore, whether the Applicant has fulfilled the statutory conditions set out in Section 27(1) of Cap. 22 to entitle him to the discretion sought.

It is not hard to see that the Applicant has fulfilled conditions (a), (b) and (c) set out above. The Deceased, it was stated, was knocked down by a motor vehicle owned and or driven by the intended Defendant. It is obvious that the Applicant intends to set up an action for damages in respect of personal injuries sustained by the Deceased as a result of the negligence of the intended Defendant. The Summons under consideration is a process in fulfillment of condition (c). What, therefore, remains to be determined is whether the Application has fulfilled the requirements of Section 27(2) of Cap.22. What are those requirements? They are as follows:

“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 or included facts of a decisive character which were at all 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 the 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 cause of action was brought. ”

The Applicant said that “*material facts ... were hitherto unknown to me ,*” but does not disclose when those material facts came to her knowledge. By reason of that failure, the Applicant has not satisfied the conditions set out in subsection 27(2) of Cap. 22.

The court has also noted that the Applicant obtained the Limited grant of letters of administration on September 30, 1999. In the letters of administration, it was expressly stated that the same were being taken out to enable the Applicant file suit to recover damages arising from the death of the Deceased. This meant that as at September 30, 1999, she had made up her mind to sue. How did she do this? She must

have had in her possession material facts. The material facts were therefore within her knowledge more than one year before the date of action was brought – which has incidentally yet to be brought! On this conclusion, it is apparent that the Applicant has not fulfilled the statutory conditions to entitle her to the discretion sought.

I, therefore, dismiss the Applicant's Originating Summons dated July 4, 2002 and because the same was ex parte, I make no order as to costs.

Dated and Delivered at Nakuru this 1st day of April, 2003.

ALNASHIR VISRAM

JUDGE