



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT

CIVIL MISC. APPL. NO. 262 OF 2019

OMARI ISMAEL MAZZHA.....APPLICANT

VERSUS

THE OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTION(ODPP) 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE..... 2ND RESPONDENT

RULING

1. The application dated 15/3/2019 seeks orders that the Applicant be granted leave to file suit for malicious prosecution against the 1st and 2nd Respondents out of time.

2. The application is premised on the grounds set out in the application and the supporting affidavit sworn by the Applicant. It is stated that the Applicant was arrested on 31/7/2007 and subsequently charged with the offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act. That the Applicant remained in custody for the duration of the trial. That on 13/8/2010 the Applicant was convicted and sentenced to 20 years imprisonment.

3. It is further stated that the Applicant appealed against the said conviction and on 9/5/2017 the conviction was quashed by the High Court. That the Applicant returned home but found his family scattered, his business ruined and he had lost essential contacts. That due to his deteriorated health and financial challenges, by the time he sought legal advice the time within which to file suit had lapsed. It is further contended that the Applicant has a strong case against the Respondents.

4. In support of the application, the counsel for the Applicant in his submissions referred the court to several authorities and the following provisions of the Law:

(a) Section 3 of the Public Authorities Limitation Act Cap 39 which provides as follows: -

(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—

(a) twelve months, in the case of proceedings founded on tort or;

(b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.

(b) Section 5 of the Public Authorities Limitation Act Cap 39 which provides for: -

Extension of limitation period in case of disability as follows; **Notwithstanding the provisions of section 4 of this Act, if, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under a disability:**

Provided that—

(i) this section does not apply in respect of proceedings where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;

(ii) this section does not apply to an action to recover a penalty or forfeiture or a sum by way of penalty or forfeiture recoverable by virtue of a written law.

(c) Section 22 of the Limitation of Actions Act which provides;

If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:

Provided that—

(i) this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;

(ii) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;

(iii) an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;

(iv) this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law;

(v) in actions for damages for tort—

(a) this section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and

(b) this section has effect as if the words “six years” were replaced by the words “three years”.

5. In the case at hand, the Applicant's position is that he was acquitted on 9/5/2017. That is when time started running. The instant application was filed on 18/3/2019. The time within which to file suit had lapsed by 9/5/2018. Thus the Applicant was late in filing suit by a period of about ten months. Section 5 of the Public Authorities Act provides for 12 months for filing suit after the disability ceases. The Applicant who has relied on grounds of disability would therefore not be time barred within the twelve months provided.

6. Under Section 2(2)(b) of the Limitation of Actions Act, the disability envisaged is not physical disability, illness, financial, family or social challenges. The said provision refers to persons who are minors or persons of unsound mind. The said provision stipulates as follows;

“a person is under a disability while he is a minor or of unsound mind; and, without prejudice to the generality of the foregoing, a person is conclusively presumed to be of unsound mind while he is detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics”.

(See for example Kenya Power & Lighting Company Ltd Vs. Collins Agumba Aboge [2016] eKLR)

7. Section 27 of the Limitation of Actions Act gives the court the jurisdiction to extend time when a suit is time barred. The said section provides as follows: -

Section 4(2) does not afford a defence to an action founded on 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 of a contract or written law)

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person;

(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.

8. To qualify for extension of time within which to file suit for actions founded on tort, the claim should be for damages for negligence, nuisance, breach of duty and in respect of personal injuries. As espoused by the Court of Appeal in **Mary Osundwa Vs. Nzoia Sugar Company Ltd;**

“This section clearly lays down the circumstances in which the court, would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the Plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.”

(See for example The court of Appeal decisions in Willis Ondili Odhiambo Vs. Gateway Insurance Co. Ltd [2014] eKLR)

9. In the case at hand, the Applicant is seeking damages in respect of the tort of malicious prosecution which is not covered by Section 27 of the Limitation of Actions Act. In that regard I am persuaded by the holding in the case of **Peter Gichuki Mwangi Vs. Kenya Copyright Board & 3 others [2018] eKLR where it stated: -**

“In the instant application, the Applicant’s claim would be seeking damages for malicious prosecution for which Section 27 and 28 of the Limitation of Actions Act (Cap 22) Laws of Kenya, a claim for damages based on malicious prosecution is not included. The extension of time is limited to the nature of claims for damages limited under Section 27 of the Limitation of Action Act and no other. This court cannot act beyond the express provisions of the law and extend the period of filing suit out of time for which the law do not allow or where the requirements which are specifically set out have not been satisfied.”

(See also Rioba Obed Nyasinga Vs. Attorney General & 2 others [2018] eKLR)

10. With the foregoing, in the upshot I find no merits in the application and dismiss the same.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2021

B.THURANIRA JADEN

JUDGE