



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 141 OF 2020

JOSEPH OMUSE ANG'OLEDOR.....APPLICANT

-VERSUS-

GENDER BASED VIOLENCE AND RECOVERY CENTRE (JOOTRH)....1ST RESPONDENT

CHIEF POLICE INSPECTOR – OBUNGA.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

The application before me is for leave to file suit out of time.

1. The Applicant said that he was arrested by the “Chief Police Inspector, Obunga” on 25th May 2018. Thereafter, he was detained at the Obunga Police Station for a period of 2 weeks.
2. He was later released from custody, without any charges being preferred against him.
3. The Applicant stated that he was never furnished with any reasons why he had been arrested. Therefore, he construed the actions of the 1st and 2nd Respondents as constituting a violation of his rights.
4. It was the Applicant’s case that on 28th August 2018 he duly instructed the Law Firm of **M/s M. I. WAFULA & CO. ADVOCATES** to institute proceedings against the Respondents.
5. Notwithstanding the said instructions, the Applicant says that his lawyers failed to take the necessary steps to file the suit within the prescribed statutory period of 12 months.
6. It was the Applicant’s plea that the mistake and delay of his lawyers should not be visited upon him, as he was an innocent litigant.
7. The facts cited above are drawn from the supporting affidavit which the Applicant swore on 30th June 2020.
8. When canvassing the application dated 30th June 2020, the Applicant reiterated his knowledge of the prescribed statutory period, during which proceedings may be instituted.
9. Pursuant to **Section 3 (1)** of the **Public Authorities Limitation Act**;

“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.”

10. However, the Applicant called to his aid, the following provisions of **Section 5** of the **Public Authorities Limitation Act**;

“Notwithstanding the provisions of Section 4 of the 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 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 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 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.”

11. He said that he had inability to file the case within time.

12. As far as the Applicant was concerned;

“It was upon the Advocates to act on the said instructions immediately, being conversant with the respective provisions on limitation of certain actions. The advocates failed to act on the same, costing the Applicant her suit and in turn, the benefits of justice.”

13. He went on to describe his disability as that of an innocent client, who relied wholly on the capabilities and understanding of his advocate.

14. Therefore, because it was his advocate who then made the mistake of not instituting the proceedings within time, the Applicant urged this Court not to visit the mistake of his advocate upon him.

15. He deems the mistake to be excusable, and requested the Court not to turn its back to him.

16. The Applicant also invoked the provisions of **Section 27** of the **Limitation of Actions Act**, and cited the decision in

RE: JOYCE WAMUHU GITAU, MISC. APPLICATION NO. 348 OF 2014, to support his case.

17. In that case Onyancha J. held that a Court has the discretion to allow the extension of time to file suit, where the Applicant satisfies the court that he had good and sufficient cause for not filing the suit in time. In the said case, the learned Judge quoted with approval, the following words of the Court of Appeal in **GATHONI Vs KENYA CO-OPERATIVE CREAMERIES LIMITED (1982) KLR 104**;

“2. For an application for leave to be allowed under section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the court, that the failure to apply within time was due to lack of knowledge of certain material facts.

The applicant must show to the satisfaction of the court that she had taken all reasonable steps and sought appropriate advice in respect of the facts. Here the applicant failed to satisfy the court.

3. An applicant for leave under section 27 must bring action within one year of the cessation of the period during which the decisive material facts were outside his knowledge.”

18. In this case, the Applicant has not demonstrated to the Court that there were any material facts that were outside his knowledge at the material time.

19. Secondly, I find that the Applicant did not take all reasonable steps to pursue his claim. I so find because it is not enough for a person to simply sign a form through which he was retaining the services of an advocate, and thereafter fail to follow-up on such instructions. The person ought to demonstrate that he had not only given full instructions to his advocate, but he should also show that thereafter he made inquiries to ascertain the status of action taken by the advocate.

20. Thirdly, the Applicant has not demonstrated that he was under any disability, that precluded him from instituting proceedings within the prescribed period.

21. **Black’s Law Dictionary** defines disability thus;

“1. The inability to perform some function; esp. the inability of one person to alter a given relation with another person.

2. An objectively measurable condition of impairment, physical or mental, esp one that prevents a person from engaging in meaningful work.”

22. The applicant has not shown that he had any inability to file suit, or any objectively measurable condition of impairment, which prevented him from filing suit within the prescribed time.

23. I also find that the facts deponed to in the Applicant's supporting affidavit are at variance with the assertions in the draft Plaintiff.

24. For instance, at paragraph 4 of his affidavit, the Applicant deponed that he was never charged or arraigned in court: however at paragraph 9 of the draft Plaintiff he said that he was charged before a court of law, but was later acquitted of the charges of rape.

25. I find that the inconsistency in the facts being put forward by the Applicant gives rise to uneasiness on the court's part, in relying on assertions being made by the Applicant.

26. The court finds it extremely difficult to exercise its discretion in favour of the Applicant when he has struck the court as being someone who was not altogether straight forward.

27. Finally, I find that the delay has been inordinate, and I therefore decline to come to the aid of a person who has been indolent.

28. The application dated 30th June 2020 is dismissed, with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE