



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. E208 OF 2021 (O.S.)**

**PAB (Suing as the mother and next friend of RM, A Minor).....APPLICANT**

**-VERSUS-**

**THE AGA KHAN UNIVERSITY HOSPITAL.....RESPONDENT**

**RULING**

1. PAB who is the applicant herein has taken out the Originating Summons dated 5<sup>th</sup> May, 2021 on her behalf and on behalf of RM (“the minor”). The Summons is supported by the grounds laid out on its body and the facts stated in the affidavit of the applicant. The order sought therein is that of leave to file a suit out of time.
2. The Motion is opposed by the respondent who filed the replying affidavit sworn by **Valentine Situma Achungo** dated 8<sup>th</sup> July, 2021.
3. When the parties appeared before this court on 1<sup>st</sup> July, 2021 they were directed to dispense with the Summons through written submissions. At the time of writing this ruling, the respondent was the only party which had filed its submissions.
4. The applicant avers that she has satisfied the conditions to warrant an extension of time within which to file a suit against the respondent.
5. In response, the respondent contends that in order for the applicant to succeed in her application, she ought to demonstrate that there is sufficient evidence to support her claim and that the material facts pertaining to the cause of action were outside of her knowledge at the time but that the cause of action is being brought within one (1) year of discovery of such material facts.
6. The respondent is of the view that the applicant has not satisfied the conditions to warrant the extension of time to file her suit out of time and further, that the applicant has not shown the existence of sufficient evidence to sustain her claim.
7. To echo its sentiments above, the respondent has cited among others, the case of **Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR** where the court held that the law on limitation of actions is aimed at protecting defendants against stale claims being brought following an unreasonable delay.
8. I have considered the grounds set out on the face of the Summons; the facts deponed in the replying affidavit and the rival written submissions alongside the cited authorities.
9. It is clear that the sole issue for determination is whether or not to extend the time required for the applicant herein to file her suit.
10. In her affidavit in support of the Summons, the applicant states that though the cause of action on medical negligence arose in the year 2010 she only became aware of the same after December, 2017 when she took the minor to India for further medical treatment, upon which she lodged a complaint with the Kenya Medical Practitioners and Dentists Board (“the Board”) in 2020 but which complaint was dismissed for being time barred.
11. In reply, Valentine Situma Achungo who is the Head of the Legal Department for the respondent states that even after the discovery of the cause of action in 2017 the applicant took no action until 2020 and yet she ought to have filed a suit instantly but did not.
12. The deponent also states that should the order for extension of time be allowed, the respondent stands to be greatly prejudiced since its efforts to trace the medical records and file pertaining to the minor have been futile given the time that has since lapsed. This was echoed in the respondent’s submissions.

13. Upon my perusal of the draft pleadings annexed to the Summons, it is clear that the cause of action which the applicant is desirous of lodging is in the nature of medical negligence, in which the applicant is attributing certain injuries/medical complications suffered by the minor to negligence on the part of the respondent during the time the said minor was under the care of the respondent between the months of March, 2010 and July, 2010.

14. Turning to the provisions of **Section 4(2)** of the **Limitation of Actions Act (“the Act”)** the same is clear that claims based on tort are to be brought within a period of three (3) years from the date on which the cause of action arose. Going by the facts presented by the applicant, it is apparent that the cause of action arose sometime between the months of March, 2010 and July, 2010 and would therefore have lapsed three (3) years therefrom.

15. Further on, **Section 27(1)** of the Act stipulates 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); and*

*(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; 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.”*

16. Having settled the above, it is now upon this court to determine whether the circumstances presented before me are suitable enough to convince me to extend the time for filing the suit. I am persuaded by the conditions set out in the case of **Royal Media Services Ltd v Valentine Mugure Maina & another (supra)** and which I will address hereunder.

17. I am equally persuaded by the court’s reasoning in **Rawal v Rawal [1990] KLR 275** as laid out in the case of **Kenya Orient Insurance Ltd v Senenerro Ole Kurraro & 7 others [2016] eKLR** thus:

*“The object of any limitation enactment is to present a plaintiff from prosecuting stale claims on one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after acting lapse of time. It is not to extinguish claims.”*

18. On the length of delay, it is not in dispute that there has been a prolonged delay of over 10 years since the cause of action arose.

19. Concerning the reasons for the delay, upon considering the explanation given by the applicant that she only came to learn of the facts of the alleged negligence when she took the minor for a stem cell therapy in India in November 2017 to December, 2017, I note that it is apparent that the minor took no action until the year 2020 when she lodged a complaint with the Board. The delay of about three (3) years in between has not been explained. In my view, the applicant ought to have acted promptly upon obtaining knowledge of the alleged acts of negligence but there is nothing to indicate that she did.

20. I find the Summons to be lacking in merit and I hereby dismiss it. There will be no order on costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 1<sup>st</sup> day of October, 2021.

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Applicant

..... for the Respondent