



**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) On 1<sup>st</sup> October 2021, this court dismissed the applicant's originating summons dated 5<sup>th</sup> May 2021. However, the applicant has now taken out the motion dated 13<sup>th</sup> October 2021 seeking to have the dismissal order reviewed and set aside. The motion is supported by the affidavit sworn by PAB. The respondent filed grounds of opposition to oppose the motion. Learned counsels appearing in this matter made oral submissions.
- 2) I have considered the grounds stated on the motion and the facts deponed in the supporting affidavit. I have further considered the grounds of opposition and the rival oral submissions made by learned counsels. The main ground argued by the applicant in support of the motion is that this court made its decision dismissing the originating summons without considering the applicant's written submissions.
- 3) It is argued that had this court considered the applicant's Submissions, it would have allowed the motion. The respondent conceded that the ruling shows that the court did not take into account the applicant's written submissions.
- 4) The respondent further argued that the applicant having failed to annex a copy of the order sought to be reviewed made the application incompetent and frivolous. It is also pointed out that the court considered all the material placed before it and determined the application on its merit.
- 5) It is not in dispute that this court in its ruling noted that the applicant did not file her submissions. It has now emerged that the applicant had actually filed and served her written submissions upon the respondent. In my humble view that is a good ground which a court can rely on in reviewing its decision. It would appear the written submissions were not printed and placed in the court file. The question is whether the aforesaid submissions can bring in a new dimension that can convince this court to rule otherwise.
- 6) In the aforesaid submissions the applicant clearly aver that the delay in bringing the case within the statutory period is excusable in that the minor is still undergoing stem cell therapy and is still in need of more stem cell, speech and occupational therapies. This averment was also noted in this court's ruling the subject matter of the instant application for review.
- 7) The court also noted that the minor took no action until the year 2020 when she lodged a complaint with the Medical Practitioners and Dentists Board. This court stated that the delay of three (3) years in between has not been explained. In the submissions, the applicant has clearly explained that she became aware of her rights in the year 2020 when she acted diligently by lodging a claim against the respondent at the medical practitioners and dentists board in 2020 by which time the claim was time barred.
- 8) It is apparent that court mistakenly read paragraphs 12 and 13 of the supporting affidavit of PAB to mean that the applicant became aware of the acts of negligence of the respondent in the year 2018 and took no steps to seek for leave to file a suit out of time until three (3) years lapsed.
- 9) It is now abundantly clear that the applicant stated that she became aware of the respondent's acts of negligence after the month of December 2017. In the submissions, the applicant clarifies and states that she actually became aware of those acts of negligence in the year 2020. It is therefore clear that the applicant took a few months after becoming aware to file the originating summons and not three years as alluded in this court's ruling.
- 10) It is clear from the ruling that this court concluded that the applicant did not explain the delay in filing the originating summons. A

Careful perusal of the affidavit sworn by the applicant will reveal that the applicant explained that she was bogged down process of taking the minor to undergo medical procedures and by the fact that the Medical Practitioners and Dentists Board took a long time to determine her complaint. The respondent has argued that the instant application for review is incompetent because the order sought to be reviewed has not been annexed to the application.

11) It is a requirement of the Civil Procedure Rules that the order or decree sought to be reviewed should be attached to the application. However, in my view, failure to comply with such a rule is not fatal in cases where the ruling and or judgment is in the court file.

12) The learned advocates appearing in this matter have each been supplied with the court ruling therefore they are aware of order being sought to be reviewed. Under Section 27(1) of the Limitations of Actions Act, the circumstances which the court can extend time are given. The action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and that the claim of damages are in respect of personal injuries as a result of the tort.

13) I am satisfied that the originating summons satisfies the requirements of Section 27(1) of the Act. I am convinced that the instant application has merit. The motion dated 13<sup>th</sup> October 2021 is allowed. Consequently, the order issued on 1<sup>st</sup> October 2021 dismissing the originating summons dated 5<sup>th</sup> May 2021 is reviewed and set aside and is substituted with an order allowing the summons. The applicant is hereby granted leave of 15 days to file an action out of time. Costs of the motion and summons to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

**IN THE PRESENCE OF:**

..... **FOR THE APPLICANT**

..... **FOR THE RESPONDENT**