



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. APPL. NO. 27 OF 2020

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME

JOHN KIMATHI GIKUNDA.....APPLICANT

VERSUS

RACHEAL MUTHONI NJERU.....1ST RESPONDENT

DAVID MWANIKI OBED.....2ND RESPONDENT

URSULA WANGARI MWANIKI.....3RD RESPONDENT

RULING

A. Introduction

1. The ex parte applicant herein has moved this Honourable court by way of an ex parte originating summons dated 27/07/2020 and seeking leave for extension of time to file a claim against **RACHEAL MUTHONI NJERI, DAVID MWANIKI OBED** and **URSULA WANGARI MWANIKI** out of time; that the draft plaint annexed to the application be deemed to have been filed within time and be admitted as a plaint for the purposes of the intended suit and that the costs be in the cause. The application is supported by the annexed affidavit of Stacy Jayo - an Advocate of the High court of Kenya.

2. The summary of the ex parte applicant's case as captured in the said affidavit is that the firm of J.K. Kibicho was instructed by Saham Assurance Company (K) Limited to institute a material damage claim against the Respondents herein on behalf of the applicants (its insured) and after which they proceeded to do the demand letter and preparing the draft plaint for filing. That however, due to inadvertent oversight, the file was overlooked and the plaint was never filed and summons were never extracted within the stipulated time and that the delay in filing the suit was neither inordinate nor deliberate.

3. At the hearing of the application the applicant relied on the application and the affidavit in support of the application.

4. I have considered the application herein and the supporting affidavit. From the perusal of the draft plaint annexed to the application, I note that the intended suit is based on tort of negligence and the date on which the cause of action accrued being 22.03.2017 and thus by virtue of Section 4(2) of the Limitation of Actions Act (Cap 22 Laws of Kenya) the time limited lapsed in March 2020. However, Section 27 of the Act allows for extension of limitation period limited under Section 4(2).

5. The effect of the statute of limitation is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation but does not necessarily extinguish such causes of action. In **Rawal vs. Rawal [1990] KLR 275, Bosire, J** (as he then was) stated: -

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”. See also **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321** and **Iga vs. Makerere University [1972] EA 65**

6. What this means is, a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya are fulfilled. That section provides as follows: -

(1) 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.

7. Therefore, extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from 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). This was confirmed in Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 where the Court of Appeal held: -

“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.

8. Further the requirements of subsection (2) must be fulfilled in relation to the cause of action. The said sub-section provides that:-

“(2) 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 that 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 action was brought.”

9. In the instant application, the applicant’s claim is on tort of negligence. However, the applicant would be seeking special damages as a result of damage to the applicant’s motor vehicle. It is my opinion that such damages are not personal injuries within the meaning of section 2 of the Limitation of Actions Act (which defines “**personal injuries**” to include a disease and the impairment of a person’s physical or mental condition). In my opinion, 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.

10. However, even going to the merits of the application, extension of time can only be granted only when the requirements of sub-section 2 have been complied with and which requirements are to the effect that the applicant must prove 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 either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and in either case, was a date not earlier than one year before the date on which the action was brought. The Applicant has failed to show or demonstrate that the material facts giving rise to the alleged claim were not within his knowledge within the Limitation period of three years as provided for under section 27 (2) of the Limitations of Action Act.

11. The applicant cited article 48 and 159(2) of the Constitution and Section 1A, 1B and 3A of the Civil Procedure Act as the provisions within which the application is premised. However, it is my opinion that the issue herein is not an issue of technicality or even an issue which can be cured under the overriding objectives of this court but rather an issue of substantive justice. 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 does not allow or where the requirements which are specifically set out have not been satisfied.

12. In the premises of the above, it is my opinion that the instant application ought to fail.

13. The same is hereby dismissed.

14. Orders accordingly.

Delivered, dated and signed at Embu this 2nd day of December 2020.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent