



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.159 Of 2017

BETWEEN

MNM.....APPELLANT

AND

GURJAL SANDEEP.....RESPONDENT

(Being an Appeal from the Ruling and Order in Kiambu CMCC No. 278 of 2017 by Hon. P.Gichohi (CM) on 19th September, 2017)

JUDGMENT

1. **MNM (hereinafter referred to as Appellant)** filed an Originating Motion dated 06th June, 2017 in the lower seeking extension of time to file suit against **GURJAL SANDEEP (hereinafter referred to as Respondent)** for personal injuries she suffered when M/V GKA 444L she was travelling in on 07th October, 2010 collided with Respondent's M/V KAV 449R allegedly due to the negligence of the Respondent.
2. In a ruling dated **19th September, 2017**, the Notice of Motion was dismissed.
3. This appeal raises the question whether the lower court's refusal to grant the appellant leave to appeal out of time under Section 27 of the Limitation of Actions Act was justified.
4. The record shows that on or about 07th October, 2010, the Appellant was injured in a road accident involving M/V GK A444L and Respondent's M/V KAV 449R.
5. On 06th June, 2017, which is about 7 years after the road traffic accident occurred, the Appellant applied for leave to file suit out of time. The Appellant invoked the jurisdiction of the court under Section 3A of the Civil Procedure Act explaining that it took her that long to initiate action for the reason that she suffered drop attacks and memory loss. In support thereof, she attached a copy of letter dated 19th April, 2017 from the Prison Health Services which states that she had been suffering from drop attacks and memory loss for the last 6 years.

The appeal and submissions by counsel

6. In her memorandum of appeal the appellant complains that the trial magistrate was wrong in finding that there were no material facts relating to the cause of action and that the trial magistrate failed to correctly interpret Section 27(1) of the Limitation of Actions Act.

Analysis and Determination

7. **I** have considered the appeal and the submissions by learned counsel for the Appellant. The sole question for determination is whether the learned trial magistrate erred in rejecting the appellant's application, made under Section 27 and 28 of the Limitation of Actions Act, for leave to file suit out of time.
8. The reasons why the trial magistrate declined to grant the appellant leave to file suit out of time are stated in the ruling dated **19th September, 2017** that the letter dated 19th April, 2017 from the Prison Health Services was not supported by treatment notes and was purposely made to support the application for leave to appeal out of time.
9. In the case of **Dominic Njuguna Wairimu v Joseph Wambugu Kibe [2018] eKLR**, the Court of Appeal held that:

“In order to surmount the defence of limitation on grounds of ignorance of material facts under Section 27 of the Limitation of Actions Act, in addition to fulfilling the requirements under Section 27(1)(a), (b) and (c), namely that the action is for damages for negligence, nuisance or breach of duty; that the damages claimed consist of or include damages in respect of personal injuries, the applicant must demonstrate that the requirements of Section 27(2) are fulfilled in relation to the cause of action. Section 27(2) of the Limitation of Actions Act 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.”

Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive).”

10. Expounding on those provisions, Kwach, JA (as he then was) in **Bernard M. Mbithi vs Mombasa Municipal Council & another [1993] eKLR**, stated that:

“The Court will grant an application for leave to bring an action after the expiry of the normal three-year limitation period if the plaintiff proves that material facts relating to his cause of action were or included facts of a decisive character which were at all times outside the knowledge of the plaintiff until a date which was either after the end of the three-year period or not earlier than twelve months before its end and was, in either case, not more than twelve months before the date on which the action was brought. Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action; (b) the nature or extent of the personal injury so resulting; and (c) the fact that the personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable.

It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character, that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action.

Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive).”

11. In **Ngari & another Vs Odera (1999) 2EA 24**, the Court of Appeal stated that the requirements of Section 27(2) are stringent and that if the same are not met, the application for leave to file suit out of time must be rejected.

12. From the totality of the evidence, the evidence presented before the trial court did not establish that material facts relating to the accident were at all times outside the knowledge of the plaintiff until a date after the time limited for filing suit had lapsed.

13. Consequently, I find and hold that the trial court rightfully found that the contents of the letter dated 19th April, 2017 from the Prison Health Services did not constitute material particulars relating to the suit and was correctly rejected.

14. Despite the unfortunate circumstances and the compassion I might have for the Appellant; I am unable to find fault in the ruling of the lower court. As a result, the appeal fails and the same is hereby dismissed with no order for costs.

DATED, DELIVERED AND SIGNED IN KIAMBU THIS 13th DAY OF September, 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - Nancy & Morris

For the Appellant - Ms. Njoka hb for Ms. Wahito

For the Respondent - N/A