



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**MISCELLANEOUS CIVIL APPLICATION NO. 18 OF 2019 (OS)**

**IN THE MATTER OF SECTIONS 27 AND 28 OF THE LIMITATION OF ACTIONS ACTS CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME**

**BETWEEN**

**AMBALE ELIZABETH AMISI.....PLAINTIFF/APPLICANT**

**VERSUS**

**SIAYA COUNTY REFERRAL HOSPITAL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DR ALLAN.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

***In an application for extension of time to file suit***

1. The ex parte applicant herein has moved this Honourable court by way of an amended ex parte originating summons, amended on the 29<sup>th</sup> July, 2019 which is expressed to be brought under Order 37 Rule 6 of the Civil Procedure Rules, Section 3A of the Civil procedure Act, Sections 27 and 28 of the Limitation of Actions Act and all other enabling provisions of the Law.

2. The Applicant has sought the following orders: -

***1. That the Honourable Court be pleased to grant the ex-parte applicant leave to file suit out of time as per the annexed draft plaint;***

***2. That the court be pleased to order the first defendant to supply the plaintiff with all relevant medical records pertaining to the caesarian section surgery conducted on 25<sup>th</sup> December, 2014 and for the second surgery conducted at the 2<sup>nd</sup> defendant's facility on 6<sup>th</sup> January 2015 as recommended in the medical report dated 5<sup>th</sup> August 2019;***

***3. That costs of this application be in the cause.***

4. The application is predicated on the grounds on the face of the Originating Summons and supported by the annexed affidavit of **AMBALE ELIZABETH AMISI** sworn on the 29<sup>th</sup> July 2019.

5. The exparte applicant's case in summary is that on or about the 25<sup>th</sup> December 2014 she was admitted at the 1st defendant's facility for surgery during delivery of a baby and that the said surgery was performed by the 2<sup>nd</sup> defendant Doctor Allan. However, it is alleged that during the said surgery and thereafter, the 2<sup>nd</sup> defendant negligently failed to professionally discharge his duties as assigned in conducting the said operation by failing to exercise duty of care expected of Doctors by failing to remove surgical instrument (razor blade used in conducting the surgery from the plaintiff's abdomen and that the 1<sup>st</sup> defendant also failed to supply the plaintiff with medical records relating to the said operation.

6. That further, the plaintiff was unable to secure an expert witness from Nairobi and neither could she afford an advocate's legal fees as she

had no means until recently.

7. That in the meantime time for filing of suit elapsed hence the delay which was not deliberate and that therefore it is in the interest of justice that leave to institute suit against the defendants for damages for medical negligence be granted as the orders sought will not prejudice the defendants in any way.

8. The application was argued orally by Mr. Ochanyo advocate holding brief for Mr. Ochieng Mumbo, reiterating the grounds and the plaintiff/applicant's depositions in the supporting affidavit.

#### **DETERMINATION**

9. I have considered the application and the Affidavit filed herein. I have also considered the annexures thereto. The issue for determination is whether the application has merit.

10. The law provides for time frames within which suits should be initiated. Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya provide that:

***“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.*”**

11. Negligence is a tort therefore the action ought to have been brought within three years from the date when the cause of action arose.

12. In **Dhanesvar v Mehta V Manilal M. Shah (1965) EA 321** the court 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 to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”***

13. Citing the above decision with approval, the court in **Rawal v Rawal (1990) KLR 275** stated: -

***“The object of any Limitation enactment is to prevent 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 long lapse of time.”***

14.

15. However, the law permits for enlargement of time for filing suits which are statute barred, and on conditions that must be fulfilled before leave to file suit out of time can be granted and these criteria can be found in sections 27 and 28 of the Limitation of Actions Act. Section 27 provides:-

***“27(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 ...***

***(b) the damages claimed by the plaintiff for the negligence, nuisance or 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 section 2 are fulfilled in relation to the cause of action.***

***(2) The requirements of this section 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 .....”.***

16. From the foregoing, it is clear that the said section is applicable where the claim is for negligence, nuisance or breach of duty and that the claim consists of or includes damages for personal injuries.

17. However, the plaintiff must prove that the material facts relating to the cause of action are of a decisive character and were not within his knowledge and that he became aware of it after the limitation period had elapsed or at least within one year of lodging the suit.

18. It is mandatory that the provisions of subsection 2 of section 27 are established for the leave that is granted ex parte to stand as such leave can successfully be challenged at the trial of the main suit. Section 27 (1) (d) is clear that for time limitation to be suspended, one of the conditions to be fulfilled is the material facts relating to the cause of action was not within the knowledge of the applicant. That objection once raised by the defendant, the incidence of proof shifts to the him or them to show that the plaintiff was not deserving of the leave as granted. It is only after one successfully mounts such a challenge that the incidence of proof shifts back to the Plaintiff to defend the

leave obtained exparte. See **Cozens v. North Devon Hospital Management Committee and Anor [1966] 2 ALL ER 799** and in **Yunes K. Oruta v. Samuel Mose Nyamato [1988] KLR 490**.

19. In **Aviation Cargo Support Limited vs St Mark Freight Services Limited, Civil Application No. 98 of 2013**, the Court of Appeal in determining an application to file and serve a record of appeal out of the stated: -

***“The order whether or not to grant extension of time or leave to file and serve a record of appeal out of time is discretionary. Such discretion is exercised judiciously with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an Applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the Applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the Applicant took to ensure that it came to court as soon as was practicable.*”**

***In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to the fact when this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.”***

20. The Court of Appeal in **Mary Osundwa Vs Nzoia Sugar Company Limited (Civil Appeal NO. 244 of 2002)** stated:

***“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time of filing a suit, the action must be founded on tort and must relate to the tort 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.*”**

21. The Court of Appeal in **Willis Onditi Odhiambo Vs Gateway Insurance Co. Ltd Civil Appeal No. 37/2013** held:-

***“Under Section 27 as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is founded on tort and must relate to the tort of negligence, nuisance or breach of duty and damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort.”***

22. Thus, the power to extend time is discretionary and not fettered save that it should be exercised judiciously and upon defined principles of law.

23. The plaintiff in her draft plaint claims for damages for professional negligence when operating on her. She has however not stated the personal injuries which she suffered as a result of the said negligent acts of the defendants.

24. However, the applicant has an opportunity to draft and include in her final plaint particulars of injuries that she suffered as a result of the alleged acts of negligence hence I shall not dismiss her at this stage. I will give her the benefit of doubt, noting that every claim is subject to plausible facts and proof by way of credible evidence.

25. The court has noted that there has been delay in filing the suit and the reason for the delay as explained by the Applicant which in my view is acceptable. The applicant did not have her medical records from the subject hospital and the fact that the discovery of the negligent acts was made much later after the applicant developed complications following the caesarian section are matters that were not within the control of the applicant. The applicant also required an expert Doctor to assist her prepare for the case. This court is alive to the fact that many people in this country cannot afford medical care whose cost is exorbitant. In my humble view, the delay though inordinate, has been explained to the satisfaction of the court and justice can still be done despite that delay, as Courts of justice should strive to ensure that parties access justice and are accorded an opportunity to ventilate their grievances before a court of law as stipulated in Articles 48 and 50(1) of the Constitution. They should therefore not be denied the opportunity to access to the courts, unless the circumstances so demand.

***26. In the premises the Applicant is granted leave to file suit out of time. The intended suit shall be filed within fourteen (14) days of today’s date.***

27. On whether I should order the 1<sup>st</sup> defendant to supply to the applicant her medical records relating to the alleged surgery, I find that the application is brought in the wrong forum.

28. The 1<sup>st</sup> defendant is a public Hospital and therefore an order directed at it to perform a public duty must emanate from proceedings commenced under Article 47 of the Constitution and the Fair Administrative Action Act, being judicial review proceedings. There is no Judgment or decree of the court for mandamus and therefore this court cannot direct or compel the 1<sup>st</sup> defendant to supply documents to the applicant, without an appropriate motion being paced before the court for consideration.

29. Furthermore, this application is brought exparte and it would be against the rules of natural justice if this court were to issue prayer 2 exparte without giving the defendants an opportunity to be heard, contrary to the established rule of law that no one should be condemned unheard.

30. Procedural Law is a handmaiden to substantive justice and this court in being asked to order or direct the 1<sup>st</sup> defendant to supply documents to the applicant, is being asked to invoke its supervisory jurisdiction over persons, bodies or authorities as stipulated in Article 165(6) and (7) of the Constitution. That power must be exercised in a judicious manner that does not lead to abuse of power.

***31. Accordingly, that prayer No. 1 is allowed whereas prayer No. 2 of the Originating Summons dated 29<sup>th</sup> July 2019 is declined.***

32. Costs of the application shall be in the cause.

**Dated, signed and delivered at Siaya this 6th Day of November, 2019.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Ochanyo Adv. h/b for Ochieng Mumbo Adv. for the Applicant

Brenda and Modestar