



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 811 OF 2017 (O.S)

ARTHUR SISA MUKUSA & BRIGITTE LANDJAKIYE

(Both suing as legal guardians

of and on behalf of Ellie Intumwa Mukusa).....APPLICANTS

VERSUS

AGA KHAN HEALTH SERVICES KENYA

COMPANY LIMITED TRADING AS

AGA KHAN UNIVERSITY HOSPITAL NAIROBI.....RESPONDENT

RULING

1. The Applicants, being the legal guardians of ELLIE INTUMWA MUKUSA (the “**Patient**”) filed an Originating Summons dated 19th December, 2017 under the provisions of Order 37 Rule 6 (1) of the Civil Procedure Rules and sections 27 & 28 of the Limitation of Actions Act (Cap 22) seeking leave to file suit out of time and that costs of the application be in the cause.

2. The reason for the delay is explained in the Supporting Affidavit of **ARTHUR SISA MUKUSA** wherein she depones that the patient was taken to the Respondent’s facility while pregnant and suffering from head ache and dizziness. That she was attended to at the Respondent on 15th July, 2013 and admitted for observations and tests which tests revealed that her blood pressure was high. It is deponed that on 23rd July, 2013, while still in hospital, the Patient collapsed and was subsequently admitted to intensive care unit and treatment commenced for extremely high blood sugar. The Applicant further depones that the delay to offer treatment led to development of respiratory arrest, kidney injury and major neurological injury leading to the patient’s vegetative condition. The Applicants have been attending to the patient since then to date as she is completely dependent on them in the hope that she would recover thus causing the delay. They intend to sue for compensation since, as deponed, the injuries suffered were due to the Respondent’s professional and medical negligence. It is therefore deponed that the Patient’s current state is as a result of the Respondent or its agent’s negligence and leave to file the suit out of time is necessary to enable the patient recover damages, costs and expenses.

3. This is an ex parte application which is properly instituted under Order 37 Rule 6 (1) of the Civil Procedure Rules and section 27 of the Limitation of Actions Act. **Order 37 Rule 6 (1)** provides that “*An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit,*” while section 27 of Cap 22 gives the court the power to extend time where the action is for damages for negligence, nuisance or breach of duty and the damages sought are in respect of personal injuries.

4. The effect of section 27 of the Limitation of Actions Act was elaborated in the case of **Mary Osundwa v Sugar Company Limited [2002] Eklr** where the Court of Appeal held that: “*This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort...*”

5. In this Application, the cause of action is founded on the tort of negligence and the Applicant, if leave is granted, will be seeking compensation for medical and professional negligence. The applicant has explained the reasons for the delay in filing the Suit being that the Patient has been ill since hospitalisation and even after discharge. The Patient is in need of constant attention due to her vegetative nature and the Applicant has been taking care of her in the hope that she would recover. They wish to file the suit on the Patient’s behalf since it appears to them the condition could be a life one.

6. The Supreme Court laid down the underlying principles that a court should consider in exercising jurisdiction to grant extension to file suit out of time in the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR**, being that;

(i) *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*

(ii) *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*

(iii) *whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*

(iv) *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*

(v) *whether there will be any prejudice suffered by the respondents, if extension is granted;*

(vi) *whether the application has been brought without undue delay; and*

(vii) *whether in certain cases, like election petitions, public interest should be a consideration for extending time”.*

7. The cause of action arose in July, 2013 and the three year period expired in July 2016. The delay in filing this application is therefore not unreasonable considering the reasons advanced that the Applicants have been attending to the patient’s medical needs in the hope that she would recover. It is due to the continued illness that the Applicants did not get to file the suit in time and since it appears that she might not recover anytime soon or at all as deponed in the Supporting Affidavit, it is just and fair that the Applicants be granted leave to institute the suit. I find that the Applicants have laid a basis to the satisfaction of this Court for the extension of time.

8. The application dated 19th December, 2017 is therefore granted as prayed. The suit to be filed within 21 days from the date of this ruling. Costs of the application shall be in the cause.

Dated, Signed and Delivered at Nairobi this 7th Day of June 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*