



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE MISC. NO. 421 OF 2018

JOSEPH KIMANI MBUGUA.....APPLICANT

VERSUS

HON ATTORNEY GENERAL.....RESPONDENT

RULING

1. In the Notice of Motion dated 3rd August 2018, the applicant *Joseph Kimani Mbugua* seeks enlargement of time to enable him file suit against the *Hon. Attorney General* who is named as the respondent in the application. The draft plaint annexed to the affidavit supporting the motion shows that the applicant intends to sue the respondent on behalf of the Government of Kenya for general and special damages for false imprisonment and malicious prosecution following his arrest and prosecution together with eleven other persons in Nairobi Chief Magistrate's Court Criminal Case No. 469 of 2005 which resulted in his acquittal.

2. The application is supported by the grounds on its face and the affidavit sworn by the applicant on 3rd August 2018. It is the applicant's case that the one year limitation period for instituting suit against the Government has already expired since his cause of action arose on or about 10th January 2014 when he was acquitted in the aforesaid criminal case; that after serving the respondent with a notice to institute suit through the firm of Aming'a, Opiyo, Masese & Company Advocates, he instructed another advocate *Samuel Gathungu Mugambi*, now deceased, to file suit on his behalf; that the advocate prepared pleadings, the verifying affidavit and witness statements which he signed on 27th March 2014; that he subsequently visited the advocate's offices where he was informed that his case against the respondent had already been filed and was pending hearing; that upon hearing of the advocate's demise, he visited his offices on or about 30th July 2018 when he learnt with shock that his suit had in fact not been filed.

3. The applicant argued that if the application is allowed, the respondent will not suffer any prejudice since the respondent is the defendant in two other suits filed by his co-accused in Criminal Case No. 469 of 2005 namely HCCC No. 263 of 2014 and HCCC No. 7 of 2017 which have the same cause of action as cause of action in the intended suit and the two suits are pending hearing; that if the application was rejected, he will suffer injustice and irreparable damage. The applicant urged the court to allow the application as prayed.

4. Though applications seeking enlargement of time to file suit are supposed to be heard *ex parte*, the court record shows that the applicant served the respondent with the application and hearing notice but on the hearing date, there was no representation for the respondent. The respondent did not also file a response to the application.

5. I have carefully considered the application, the supporting affidavit and the annexures thereto. I have also considered the submissions by counsel.

6. I find that the applicant desires to file suit out of time against the Government through the respondent for damages for false imprisonment and malicious prosecution. These are actions founded on tort which under *Section 4 (2)* of the *Limitation of Actions Act* must be instituted within three years from the date the cause of action arose. The limitation period for the applicant's cause of action is therefore three years not one year as claimed by the applicant.

7. The applicant's cause of action accrued on or about 10th January 2014 when he was acquitted together with his co-accused persons in Criminal Case No. 469 of 2005. The three year limitation period thus expired on or about 10th January 2017 about one year and nine months ago.

The applicant has explained the reasons for his failure to file his intended suit within the time prescribed by the law. His explanation that he had instructed an advocate to file suit within time but that the advocate though assuring him that he had in fact filed the suit passed on without having executed his instructions appears plausible given that as early as 31st January 2014, he had already caused a notice of intention to sue the Government to be served on the respondent over the same subject matter.

The obituary annexed to the supporting affidavit marked as JKM4 confirms the death of the said advocate on 20th May 2018.

8. From the material placed before me, it is apparent that the applicant has a good cause of action. He has explained that despite visits to his late advocate's offices to ascertain the position regarding filing of his intended suit, he was ignorant of the fact that the suit had actually not been filed till after expiration of the limitation period. This in my view amounted to ignorance of a material fact concerning his cause of action.

9. In deciding this application, I think it is important to take into account the interests of substantive justice and to weigh the prejudice the parties are likely to suffer if the application was decided one way or the other.

If the application is allowed, the respondent is not likely to suffer any prejudice since there is evidence that the respondent is already defending other suits filed in this court arising from the same cause of action which are yet to be confirmed for hearing. On the other hand, if the application is dismissed, the applicant will suffer direct prejudice since he will have been locked out of the seat of justice for mistakes that were not of his own making.

10. In the circumstances, I find that the interests of justice will be better served if the applicant was given an opportunity to be heard on his grievances bearing in mind the constitutional principle of access to justice. In the premises, having taken into account all relevant factors, it is my finding that the application dated 3rd August 2018 is merited and it is hereby allowed on terms that the applicant shall file his intended suit within the next 14 days.

11. Costs of the application shall be costs in the cause.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 18th day of October, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Mr Morara holding brief for Mr Owino Opiyo for the applicant

N/A for the respondent

Mr. Fidel: Court Assistant