

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO 272 OF 2018

GEORGE KITHEKA.....APPLICANT

VERSUS

1. ANTONINA NYOKABI.....1ST RESPONDENT

2. NICHOLAS KIHARA.....2ND RESPONDENT

RULING

1. The Applicant has filed an application dated 31/7/2018 pursuant to the provisions of Sections 27 and 28 of the Limitations of Actions Act Cap 22 of the Laws of Kenya, Order 37 Rule 6 of the Civil Procedure Rules 2010 and Section 34 of the Civil Procedure Act. He seeks for the following reliefs namely:

a) *That this Honourable Court be pleased to issue an order for extension of time for filing suit for compensation for grievous injuries sustained by the Applicant in a road accident that occurred on 29th June 2009 along Kajiado –Isinya Road involving Motor vehicle Registration Number KBG 987K.*

b) *That costs of the application be in the cause.*

2. The application is supported by the grounds on the face of the summons as well as an affidavit of the Applicant sworn on even date.

3. The Applicant's case is that he was a victim of a road traffic accident involving motor vehicle registration number KBG 987K along Kajiado-Isinya road on the 29/6/2009 and that upon recovering from the injuries he sent out demand notices to the registered owner and driver of the said vehicle as well as their insurer Blue Shield Insurance Co. Ltd in preparation to commence civil suit for compensation only for the said insurer to obtain a moratorium. The moratorium was vide Nairobi High Court Civil Case No. 465 of 2011 in which all suits and those intended to be filed were stayed. As a result, the Applicant could not institute the suit and thus the limitation period lapsed. It was not until the 13/11/2017 when the said moratorium was lifted. It was the Applicant's case that he is desirous of filing suit against the Respondents for compensation. Finally, it was the Applicant's case that it is in the interest of justice that the orders sought be granted. The Applicant annexed the copies of the demand letters, moratorium order staying suits and the order lifting the moratorium to the supporting affidavit.

4. I have considered the Applicant's originating summons as well as the affidavit and annexures in support. The summons have been properly filed under the provisions of Order 37 Rule 6 of the Civil Procedure Rules, which provides that applications under Section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons. It is also not in dispute that the cause of action arose on the 29/6/2009 and that this being an action in tort the limitation period as per Section 4 (2) of the Limitation of Actions Act is three years and hence the same lapsed on the 29/6/2012. It is also noted that the moratorium was issued on the 28/11/2011 before the limitation period to lodge suit had lapsed and that the moratorium was in force until the 13/11/2017 when it was lifted. It is also not in doubt that at the time of the lifting of the moratorium, the period to institute the suit had lapsed.

5. It is noted that the moratorium issued on the 23/10/2011 stayed all suits filed and those yet to be filed and as such the Applicant herein was bound by the said order and could not lodge the suit. Hence the application being brought pursuant to the provisions of Section 27 of the Limitation of Actions Act by the Applicant is quite legitimate. The Applicant has presented sufficient reasons for the delay in filing suit which reasons are in my view legitimate. The Applicant had no option but to obey the court order like other Applicants affected by the moratorium. It would therefore be unjust to shut him out from pursuing his claim against the tortfeasors for recovery of damages in regard to the injuries sustained in the road accident which took place on the 29/6/2009. Under Section 3A of the Civil Procedure Act, this court has inherent power to make such orders as may be necessary to meet the ends of justice. The Applicant was not a policy holder or insured or even a creditor of the 1st Respondent's insurer and therefore it would be unjust and unfair to be denied an opportunity from pursuing claims for compensation from the tortfeasors. I find the delay to file suit was beyond his control and is thus excusable.

6. In the result, I find the Applicant's application dated 31/7/2018 merited. The same is allowed as prayed save only that the Applicant is directed to file the requisite suit within the next sixty (60) days from the date thereof.

Dated and delivered at Machakos this 9th day of November, 2018.

D. K. KEMEI

JUDGE