



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**MISC. CIVIL APPLICATION NO. 176 OF 2016.**

**IN THE MATTER OF SECTION 4(2), 27(2), 28 & 30 OF THE LIMITATION OF  
ACTIONS ACT CHAPTER 22 LAWS OF KENYA.**

AND.

**ORDER 37 RULES (6) (1) OF THE CIVIL PROCEDURE RULES 2010**

**CHAPTER 21 LAWS OF KENYA.**

**HARON BAKARI WEKESA**

(Suing as the Personal and Legal representative

of the Estate of **OSCAR MUKANDA BAKARI**).....**APPLICANT**

**RULING.**

By Exparte originating Summons dated 15<sup>th</sup> September, 2016 brought under Order 37 rule (1) 1 of the Civil Procedure Rules, the Exparte applicant prayed for orders;

(a) That leave granted to the Applicant to file suit out time against the owners of Motor vehicle Registration No. KAM 018D make Peugeot Type 504 Station Wagon over a road Traffic accident that occurred on the 7/8/2010.

The grounds for the applicant are that the applicant son Oscar Mukanda Bakari died in a Road traffic accident along Bungoma – Webuye road involving Motor vehicle KAM 018D on 7.8.2010. The applicant thereafter instructed the firm of Morgan Musundi & Co. Advocates to institute a claim for damages against the owner due to negligence the said firm did not file the same and did not disclose that fact until 3.9.2016 when the applicant discovered. He thereafter instructed another firm who have now filed this application to enable the applicant sue.

Applicant states that the mistake was that of an advocate which should not be visited on the applicant. The applicant has filed supporting affidavit deponing on the grounds of the application. The applicant has annexed copies of the death certificate and police abstract and draft plaint by the said Morgan Omusundi which was never filed. The defendants were served by way of substituted service but did not file Response.

An exparte applicant in an application like this must meet the requirements of Sec. 27, 28, 30 of the Limitation of Actions Act Cap 22 Law of Kenya. As for Section 27, the same 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 (whether the duty exists by virtue of a contract or a written law) and***

***(b) The damages claimed by the plaintiff for the negligence, nuisance or breach of 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 purpose of this section; and***

*(d) The requirements of subsection (2) are fulfilled in relation to the cause of action.*

*(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 time outside the knowledge (actual or constructive) of the plaintiff until a date which –*

*a) either was after three yea 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 than one year before the date on which the action was brought.*

This is a claim for damages arising from the negligence of the defendants. The applicant has demonstrated that he has case for which he can sue the defendants. He has demonstrated to the satisfaction of this court the reason for the delay to this indolence. I am satisfied that the applicant has merit; I grant leave to applicant to file suit out time against the intended defendants within 14 days from todays date. Costs be in the cause.

**Dated, Signed and Delivered at Bungoma this 7<sup>th</sup> day of November 2018.**

**S.N. RIECHI**

**JUDGE.**