



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC APP. NO. 39 OF 2013

JACINTA WANJIKU MARINGA Alias WANJIKU MARINGA.....APPLICANT

V E R S U S

ASLAM GANATRA.....1ST RESPONDENT

MBUCHI MWATHI.....2ND RESPONDENT

RULING

The application before court is the originating summons dated 26/09/2013 seeking leave to file suit out of time.

The applicant states that she was involved in an accident on 24/11/2009 involving motor vehicle KAL 994C along Mwea-Embu road. She was admitted at Kerugoya District Hospital from 24/11/2009 to 07/06/2009, at AIC Kijabe Hospital from 08/08/2010 to 25/10/2010, 28/02/2011 to 08/03/2011 and later from 11/03/2013 to 29/04/2013. That she has been on continued medication and physiotherapy therefore she was unable to identify an advocate to whom she would give instructions to institute the suit. That she tried to institute the suit by issuing Statutory Notice to Directline Assurance Company dated 27/10/2010 but fell ill again.

In response, the 1st respondent stated that he would not begrudge the applicant's right to pursue compensation but that he was wrongly sued since he was not the owner of the motor vehicle KAL 994C at the time of the accident having sold it on 21/08/2000. That the same is confirmed by the police abstract and at no time did he ever insure the vehicle with Directline Assurance Company. In addition, neither the 2nd respondent nor Teraso Mbuka has ever been his agent.

For the applicant it was submitted that she was indeed involved in a road traffic accident as shown by the annexed police abstract and sustained serious injury. This is shown by a medical report which is annexed. The applicant was admitted to various hospitals and upon discharge, she could not walk and hence the delay in filing the suit. Counsel relied on the case of *Catherine Mwendu –vs- Elija Musyimi & Another(2016) eKLR* where the court while allowing the applicant to file suit out of time found that the circumstances were beyond her control. He urged the court to reach the same finding in view of the circumstances of this case.

For the respondent, it was submitted that the respondent is not the owner of the said motor vehicle KAL 994L as it belongs to Shikira Enterprises as shown on the police abstract secondly the 1st respondent had never employed the 2nd respondent.

It is further submitted that the accident occurred nine years ago and limitation is to prevent evidence loss and prevent prejudice against the defendant. That the discharge summary shows there was a delay of five years after she was discharged from hospital. That the application is an abuse of court process.

In response, it was submitted that the issue of ownership can only be raised at the trial. That the reason for the delay was beyond her control.

I have considered the originating summons, the affidavits and the submissions. The jurisdiction of the court to extend time is discretionary. The exercise of court's discretion is not fettered. However the court is supposed to exercise the discretion judiciously and on defined principles of law.

In putting time limits within which suits should be filed the intention was to prevent prosecution of stale claims and to protect defendants from being sued after the evidence has been lost due to lapse of time and from being disturbed long after the cause of action arose. This was stated by the Court of Appeal in the case of *Dhanesvar Mehta –v- Manila M. Shah (1965) E.A 321* as follows:-

“The object of any limitation in 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.”

The claim is not extinguished. It behoves the court to consider the circumstances of the case and determine the merits of the application.

The accident having occurred on 24/11/2009, the applicant was required to file the suit within three years, that is, by 24/11/2012. A cause of action that is barred may in certain cases be revived if the conditions set out in **Section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya** are fulfilled, the section provides as follows:

(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 of a written law or independently of a contract or 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 purposes 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 times outside the knowledge (actual or constructive) of the plaintiff until a date which -

(a) either was after the three-year 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 case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect -

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Extension of time applies in claims based on tort and more so those claims or damages relating to personal injuries arising from negligence, nuisance or breach of duty.

This was affirmed in Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 where the Court of Appeal held:

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

However, even if the foregoing conditions are satisfied time will not be extended unless the applicant proves 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. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

This claim is founded on tort and is in respect of personal injuries to the applicant therefore the conditions under **Section 27(1) of the Limitation of Actions Act** are satisfied. In addition, the applicant has proven through her annexed supporting documents, that she was admitted at various hospitals for periods between 24/11/2009 to 29/04/2013. It is clear that the applicant was prevented from filing the suit owing to circumstances which were beyond her control. She deserves the court’s exercise of discretion in her favour.

In Conclusion:

I find that the Originating Summons has merits.

1. The O.S is allowed.
2. Time for filing suit is extended with effect from today’s date.

3. The suit be filed within 30 days.

4. I make no orders as to costs.

Dated at Kerugoya this 14th day of December 2018.

L. W. GITARI

JUDGE