

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 505 OF 2016

BINITON ZIMULI OMBEVA.....APPLICANT

VERSUS

GERISHON NJENGA.....RESPONDENT

RULING

1. The application dated 15th September, 2014 seeks the following orders:

“1. THAT the Honourable court be pleased to grant leave to the Plaintiff to file suit out of time.

2. THAT the Complaint annexed hereto be deemed as duly filed.

3. THAT costs be in cause.”

2. The application is premised on the grounds stated on the face of the application and is supported by the affidavits of the Applicant Bininton Zimuli Ombeva and that of his advocate, Everlyne Ndegwa. It is stated that the accident the subject of the application occurred on 2nd April, 2010. The delay in the filing of the suit is attributed to the necessity to obtain the Grant of Letters of Administration *ad litem* after the advocates for the Applicant were given instructions in June 2012. That further delay was caused by the unfortunate fire that gutted down the Advocates office on 5th January, 2013. That all the advocates' documentation was lost in the fire and by the time the advocates reconstructed their documents, the time within which to file suit had lapsed.

3. Section 4 of the Limitation of Actions Act cap 22 Laws of Kenya provides for actions founded on tort to be brought to court within a period of three years. As stated in the case of **Rawal vs Rawal (1990) KLR 275:**

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”

4. Under the provisions of Section 27, 28 and 29 of the Limitations of Action Act as read with Section 30 thereof, the court can give leave on account of the Applicants' ignorance of material facts relating to the cause of action which were of a decisive character. (See for example **Lucia Wambui Ngugi v Kenya Railways & another Nbi. HCCA 213 of 1989**)

5. In the case at hand, it is noted that the Applicant took steps to instruct his counsel within time. This is evident in the filing of H. C Succession Cause Nbi. 1182 of 2012 which is exhibited herein. The police abstract exhibited herein concerning the fire that is said to have razed down the advocate's offices however shows that the report of the fire was made at parliament police station on 4th January, 2013. The police abstract is reflected as having been issued on 4th January, 2012. Could this be a typographical error

as the new year had just been ushered in? The affidavit of the advocate, Everlyne Ndegwa reflects that the fire burnt down their offices on 5th January, 2013. That is one day after the report of the fire to the police!

6.The foregoing notwithstanding, the Applicant has demonstrated that he took steps within time and instructed counsel who applied for the Grant of Letters of Administration within time. The Applicants have exhibited copies of a police abstract in respect of the accident and a death certificate. The Applicant has demonstrated that he has a reasonable case against the Respondent.

7. *Prima facie*, I am satisfied that the requirements of the Limitation of Actions Act have been met. Consequently, I allow the application with the costs of the application to be met by the Applicant. This being a miscellaneous file, the plaint to be filed within 14 days from date hereof.

Dated, signed and delivered at Nairobi this 16th day of Feb., 2017

B. THURANIRA JADEN

JUDGE