



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
MISC. APPLICATION NO. 25 OF 2015

S C N (suing as mother and next of kin of

G O O (Minor)..... 1ST APPLICANT/PLAINTIFF

M O (Minor)..... 2ND APPLICANT/PLAINTIFF

VERSUS

ZABLON CHAMRELA.....DEFENDANT

RULING

1. By Originating Summons dated 10.9.15, G O O M O O the Applicants herein through their mother S C N seek the leave of this Court to file suit out of time. The Application is supported by the Affidavit of Lucy Nyamoita Momanyi, counsel for the Applicants. Counsel claims that she was pursuing an out of court settlement with the Defendant's insurer and while doing so, her clients' file got misplaced in her office. That unless the leave sought is granted, her clients will suffer irreparable harm and damage.

2. In a Supplementary Affidavit sworn on 14.9.16 S C N swore an Affidavit She avers that the Applicants were involved in a road accident on 10.6.10 along the Mombasa-Nakuru highway while on board motor vehicle KAN 156 L and sustained physical injuries. She instructed he counsel in July 2011 to institute proceedings against the owner and driver of the said motor vehicle. She was informed by her advocate that a demand letter and statutory notice had been sent to the Defendant and Directline Assurance Company Limited respectively. She herself was involved in the same accident and CMCC No. 1798 of 2011 was filed on her behalf. That delay was occasioned by the misplacement by her Counsel of the Applicants' treatment notes which were necessary for filing suit. She avers that delay in filing suit was the mistake of her Counsel and mistake of counsel should not be visited upon an innocent client.

3. In submissions on behalf of the Applicants, it was contended that the Court has powers to extend time under Section 59 of the Interpretation and General Provisions Act and Section 27 of the Limitation of Actions Act. That Order 50 Rule 5 of the Civil Procedure Rules also grants the Court power to extend time upon terms.

4. It was argued that the Defendant led the Applicants to believe that the claim would be settled and on reliance of this belief, they did not file suit. By the time the Applicants realized there would be no settlement, the limitation had caught up with them. It was contended that the Defendant confirmed that

there were negotiations and has not stated reasons why the Application is defective. It was further submitted that the Defendant settled the Applicants' mother's claims and would therefore not suffer any prejudice if application is allowed.

5. On failing to file suit on time, it was submitted that the Applicants have a good and satisfactory reason for Applicants' mother instructed her counsel to file suit but counsel failed to take necessary action. That she is a lay person who knows nothing about limitation of time in filing suits. That mistake of counsel should not be visited upon the Applicants. It was further submitted that justice should be done without undue regard to procedural technicalities. The Court was urged to allow the Application as it is not an abuse of the Court process and allowing the same will be in the best interests of justice.

6. The Defendant filed grounds of opposition dated 16.5.16 and submissions dated 27.9.16. I will however disregard the same as, this Application is supposed to be *ex parte* having been made before the filing of the intended suit as provided by Order 37 Rule 6 which states:

“6. Extension of limitation period

(1) An application under [section 27](#) of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit”.

7. The Applicants intend to file a suit against the Defendant for damages for injuries sustained in an accident that occurred on 10.6.10. The grounds upon which the Applicants seek leave to file suit out of time are that first that there were negotiations between the Applicants' counsel and the Defendant's insurer and that by the time it became apparent that no settlement was forthcoming, the suit had become time barred. Secondly, that the Applicants' counsel misplaced her file and the Applicants' treatment notes and by the time the same were recovered, the suit had become time barred.

8. The Limitation of Actions Act under which the Application is brought is an Act of Parliament to inter alia prescribe periods for the limitation for actions and arbitrations. Section 4(2) of the Act provides:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

9. The accident in respect of which the Applicants seek to file suit occurred on 10.6.10. The time allowed by law within which the Applicants ought to have filed the suit lapsed on 9.6.10. However the lapse of time does not of itself extinguish the claim. In **Rawal vs. Rawal [1990] KLR 275**, Bosire, J. (as he then was) opined:

“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”

10. Section 27 of the Act stipulates the circumstances under which the Court on application may extend the time for bringing an action that is time barred.

“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 of written law independently of contract or written law; and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries or 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) 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”.

11. For the Court to allow an application to extend time, the requirements for extension of time as stipulated in Section 27(2) must be met. The Court must be satisfied that material facts relating to the 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 the instant case, it was submitted that the Applicants’ counsel was negotiating with the Defendant’s insurer till the claim became time barred. This in my view speaks of gullibility. Negotiation while having filed suit would in fact have given the Applicants leverage. It was further submitted that the Applicants’ counsel lost her file and treatment notes of the Applicants. This to my mind demonstrates recklessness. It was further argued that mistake of counsel should not be visited upon the Applicants. The above grounds are not the specific grounds contemplated in Section 27(2) of the Act.

12. It is unfortunate that though Counsel filed suit on behalf of the Applicants’ mother, she neglected to file suit on behalf of the Applicants yet they were all involved in the same accident. That Court was urged to overlook the limitation of time to file suit as a procedural technicality as envisaged in Article 159(2)(d) of the Constitution. As held in Rawal case (Supra) the **object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims and to protect a defendant from being disturbed after a long lapse of time. Limitation of actions is not a procedural technicality and failure to file suit on time cannot be remedied by Article 159(2)(d) of the Constitution.** The requirements of Section 27 of the Limitations of Actions Act are stringent and since they have not been met, the Court must reject the Application herein. While I sympathize with the Applicants more so because they are minors I have no option but to reject the Application.

13. Accordingly, for the reasons set out above, I am not satisfied that the Applicants have made out a case for grant of the prayers sought in the Originating Summons dated 16.9.15 and the same is hereby dismissed. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 3rd February 2017

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicants**

.....**Court Assistant**