



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 306 OF 2015**

**ONESMUS NGEMI KYALO.....APPLICANT/APPELLANT**

**- V E R S U S -**

**PRADEEP MARU ..... 1<sup>ST</sup> RESPONDENT**

**BONIFACE KIHHEREKO ..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the ruling of the Chief Magistrate's Court of Nairobi by Hon. L. Gichohi (Ms)  
RM delivered on 5<sup>th</sup> June, 2015 in Misc. Application no. 46 of 2015)***

**JUDGEMENT**

1. Onesmus Ngemi Kyalo, the appellant herein took out the Originating Summons dated 27.1.2015 in which he sought for extension of time to file an action for damages against Pradeep Maru and Boniface Kihereko, the 1<sup>st</sup> and 2<sup>nd</sup> respondents for the injuries the appellant allegedly suffered as a result of a road traffic accident involving the appellant and motor vehicle registration no. KAL 399A. The aforesaid accident is said to have occurred along Komarock road on 4/6/2009. The aforesaid summons which is exparte in nature was heard and dismissed by Hon. L. Gichohi, the learned Resident Magistrate. Being dissatisfied, the appellant preferred this appeal.

2. On appeal, the appellant put forward the following grounds:

***1. The honourable magistrate erred in law and fact by finding that the appellant knew who the defendants were and that he could serve them through substituted service.***

***2. The honourable magistrate erred in law and fact by finding that the appellant's witnesses have been available.***

***3. The honourable magistrate erred in law and fact by finding that the application did not meet the threshold set out in Sections 27 and 28 of the Limitation of Actions Act, Chapter 22, and Laws of Kenya.***

***4. The honourable magistrate erred in law and fact by failing to recognize that it is interest of substantive justice that the prayers sought in the application be granted and that dismissing the application meant driving the applicant from the seat of justice which would occasion great injustice and prejudice to the applicant and that granting the prayers sought would not prejudice the respondents.***

3. When the appeal came up for hearing, the appellant's counsel filed written submissions. I have re-

evaluated the arguments which were presented before the trial court. I have also considered the written submissions filed by the appellant. The record shows that the appellant had put forward the following grounds in support of the summons. First, that he had not obtained relevant documents and that the crucial witnesses were unavailable but are now available and willing to testify. Secondly that the appellant had not known the whereabouts of the owner of the motor registration no. KAL 399A but he has now successfully managed to obtain important information from the Registrar of Motor vehicles upon the advice of his advocate.

4. The learned Resident Magistrate considered the aforesaid grounds and came to the conclusion that the appellant took more than five years before obtaining records from the Registrar of motor vehicles yet the office of the Registrar of motor vehicles has always been there but the appellant did not bother.

Secondly, that the appellant should have served the defendants through substituted service.

Thirdly, that witnesses were readily available.

5. For the above reasons the learned resident magistrate proceeded to dismiss the summons.

6. On appeal, the appellant argued near similar grounds like those presented before the trial court. It is the submission of the appellant that he lacked relevant documents and witnesses who were unknown to the appellant before the lapse of the limitation period hence he could not rely on them in support of the intended action against the respondents. This court was also beseeched to find that the facts alleged to be outside the appellant's knowledge are facts falling within the description of decisive character. In my humble view, I think, the learned Resident Magistrate appears to have misapprehended the point. The appellant had specifically stated that he could not file the action in time because he had no knowledge of important evidence and information which would assist him. The trial magistrate appears not to have believed the appellant. She however failed to attach any reasons for disbelieving the appellant. After a careful reconsideration of the appellant's arguments, I am convinced that the appellant gave genuine reasons falling within the prescription of Section 27(I) of the Limitation of Actions Act. The action contemplated by the appellant is an action for damages related to a claim for personal injuries and the material facts relating to the cause of action which are of a decisive nature were outside the knowledge of the appellant until the statutory period fixed to file an action lapsed. In my view, the lack of access to crucial documents and information impeded the ability of the appellant to institute a suit against the respondents with probability of success. It is also important to note that the *ex parte* order of leave if granted is subject to challenge by the other side when defending the intended action.

7. In the end and on the basis of the above reasons, the appeal is found to be meritorious. It is allowed. The order issued by the trial court dismissing the Originating Summons dated 27.1.2015 is set aside and is substituted by an order allowing the Originating Summons. Consequently the appellant is given an extension of time of 21 days to institute the action proposed in the summons. Cost of the summons to be in the cause.

**Dated, Signed and Delivered in open court this 31<sup>st</sup> day of March, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent