



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 399 OF 2010

P B S AND I N S

(suing as the legal representatives of the estate of the late

J N B (Deceased).....PLAINTIFFS

VERSUS

REGISTERED TRUSTEES, ARCHDIOCESE OF NAIROBI KENYA1ST DEFENDANT

DR. LILLIAN WANGUI.....2ND DEFENDANT

DR. MUCHAI M. GACHAGO.....3RD DEFENDANT

RULING

1. By an application dated 15th July 2015 the plaintiffs Peter Butali Sabwami and Ida Nekoye Sabwami seek from this court orders;
 - i. That this court deem it just and fit to extend the period within which this suit should have been filed for purposes of Section 29(4) of the Limitation of Action Act.
 - ii. That this suit be deemed, the period for its filing has been so extended, to have been duly filed within time.
 - iii. That the suit having proceeded to hearing and the period for its filing having been so extended, all documents s duly filed and all procedure steps and proceedings to have been duly taken and conducted from the date of filing suit.
 - iv. Any other or further orders as the court may deem just in the circumstances.
 - v. Costs be provided for.
2. The application is supported by the affidavit of Peter Butali Sabwami sworn on 15th July 2015 and the grounds on the face of the application.
3. When this application was first brought before me for determination exparte, I directed that the same be served upon the defendants to accord them an opportunity to be heard on the issue of

extension of time within which the suit herein ought to have been filed since they would not have any other opportunity to be heard challenging leave if granted in the suit. This was in line with the general rule that the parties affected by an *ex-parte* order can seek to set it aside under the principles of natural justice. Reading the Act closely, it is not the intention of the legislature to allow a claim based on personal injuries on account of negligence nuisance or breach of duty to be met with a defence of limitation. To prevent any possible defence on limitation as an exception to section 4(2) of the Act an *ex-parte* order for leave to file an action has to be obtained. However, since the same Act does permit the application for leave after filing of suit, and as the defendants by choice did not participate in the hearing of this suit before such discovery was made, for they did not raise that defence of limitation in their defenses, the only opportunity that they had to challenge such leave if they so wished would be now Rule 3C of Order 37 of the Civil Procedure Rules provides:

“ 3(c) (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.

(3) Any such application made after the filing of a suit shall be made ex-parte by summons in that suit supported by affidavit.”

4. Today, I have seen the affidavit of service filed and sworn by a court process server one Carolyne Mbithi on 11th April 2016 with an acknowledgement on a hearing notice for today dated 22nd February 2016 showing that the application dated 15th July 2015 and hearing notice dated 22nd February 2016 were on 22nd February 2016 served upon the Attorney General who entered an appearance and filed defence on behalf of the 2nd and 3rd defendants Dr Lilian Wangui and Dr Muchai M. Gachago but who never participated in the hearing of this matter.

5. The Attorney General has not filed any replying affidavit to challenge the application for extension of time within which this suit ought to have been filed and validation of the proceedings on record.

6. The plaintiff's counsel submitted in support of the application relying on the grounds and the supporting affidavit of the 1st plaintiff contending that the failure to lodge the suit herein out of time was occasioned by the process through which the plaintiff had to undergo a hearing on the complaint he lodged before the Medical Practitioners and Dentists Board, which was to determine whether the death of Jennifer Njeri Butali at the 1st defendant's Hospital while being attended to by the 2nd and 3rd defendants was as a result of the negligence of the defendants. That the process was lengthy which had great emotional, physical and financial strain on him and that he believed that he could only have filed suit based on negligent acts of the defendants if it was indeed established by the Medical Practitioners and Dentists Board that the defendants were negligent in the manner in which they handled the deceased Jennifer Njeri Sabwami leading to her death on 14th August 2008.

7. Further, that it was only after the determination of the said inquiry and the finding that the deceased died due to the negligence of the defendants that he instituted this suit on 17th August 2010 which was about two years later and therefore beyond the one year period allowed by section 29 of the Limitation of Actions Act. Finally, that it is in the interest of justice that this application be allowed since the discovery was made after the hearing of the plaintiff and his witnesses.

8. I have carefully considered the plaintiff's application and the submissions by their counsel. Indeed this suit was heard and before judgment, the court made a discovery that the suit was instituted out of the prescribed Limitation of Actions Act and granted the plaintiffs leave to file an application for extension of time which they have dutifully done. The defendants have not opposed the application although they were given an opportunity to challenge the same.

9. The law relating to extension of time for filing of suit or for validating a suit that if filed out of the statutory limitation period is Sections 4,22,27,28,29,30 and 31 of the Limitation of Actions Act. Section 4(2) of the said Act stipulates that an action founded on tort may not be brought after the end of three years from the date when the cause of action arose. However, the above provision is qualified by

Section 22 of the said Act which enacts that if on the date when a right of action accrues for which a period of limitation is prescribed by the Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event occurs first, notwithstanding that the prescribed period of limitation has expired. Pursuant to Section 27(1) of the Act, Section 4(2) does not afford a defence to an action founded on tort where

- a.
- 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.

10. The procedure in cases of limitation as discussed in **Cozen v North Devon Hospital Management Committee: Hunter v Tarness (Soham) Ltd [1966] 2 AER 276** a decision that was upheld by the Court of Appeal at page 280 letter F Thompson J said:

“The Judge in chambers accordingly is required to form, on the evidence laid before him on behalf of the plaintiff, a prima facie view as to matters which the Act contemplates will be decided (if leave be granted) only in the action itself. These matters are (i) has the plaintiff a good cause of action (ii) does the plaintiff fulfill the requirements of sub sec (3) of sec 1?” (Sub-section (3) of sec 1 is the same as Sub-Section (2) of sec 27 of the Limitation Act Cap 22).

11. In the instant case, it is clear that the cause of action arises from the alleged negligence of the defendants in the manner in which they handled the deceased Jennifer Njeri Butali resulting in her untimely death. The Medical Practitioners and Dentists Board received a complaint from the 1st plaintiff (spouse) and carried out investigations which revealed that the deceased’s death was due wrongful and illegal use of Cytotec drug on the deceased. The defendants were found liable and reprimanded. He 2nd defendant also received suspension for six months. The Cytotec drug was ordered to be destroyed.

12. The final report of the Board was released to the plaintiffs vide letter of 20th July 2009 when the time for filing suit was nearly expiring and the plaintiffs had to petition for grant of letters of administration which were granted on 20th April 2010 by which time one year was over.

13. In my view, the plaintiffs could not have instituted suit herein without knowing whether or not the defendants could have been negligent especially, bearing in mind the circumstance under which the deceased died while she had gone for pre-natal check up. Determination of wrongful and or illegal administration of the drug Cytotec on the deceased could only have been determined by a technical professional body like the MPDB and not by this court in the first instance. In my view, therefore, the applicant has satisfied this court that delay in filing suit within the statutory limitation period was due to ignorance of due to lack of knowledge of certain material facts, and has shown to the satisfaction of the court that he had taken all reasonable steps and sought appropriate advise in respect of the facts.

14. In **Rawal V Rawal [1990] KLR 275**, Bosire J (as he then was) stated that:

“ 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 has lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims.”

15. Accordingly, I find the application for extension of time within which suit herein ought to have been filed merited and meeting the conditions under Section 27(2) of the Limitation of Actions Act. I therefore grant leave extending the period within which the suit herein should have been filed. As the leave sought is within the suit, I hereby order that the suit as filed is deemed to have been filed within the prescribed statutory period of one year from the date when the cause of action arose.

16. Further, as the suit has been heard and concluded and is only pending delivery of judgment, I order that the proceedings are hereby deemed to have been validly taken within the validated suit. I make no orders as to costs of this application.

Dated, signed and delivered in open court at Nairobi this 14th day of April, 2016.

R.E. ABURILI

JUDGE

In the presence of :

Miss Chege for the applicants/plaintiffs

1st Plaintiff/applicant Mr Peter Butali Sabwami present

N/A for the Defendants/ Respondents

Henry: Court Assistant