REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL DIVISION

CIVIL MISC APPL CASE NO. 86 OF 2015

GEORGE NGARUIYA KARIUKI .....APPLICANT

VERSUS

INSPECTOR GENERAL

KENYA POLICE SERVICE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The application dated 16th February, 2015 is expressed to be brought under Order 36 rule 3 Civil Procedure Rules and Section 27, 28 and 30 of the Limitation of Action Act. The application seeks orders that:

> **"1. That the Honourable Court be pleased to grant the Applicant leave to commence civil proceedings against Inspector General Kenya Police Service and the Attorney General out of time.**
>
> **2. That such proceedings be commenced within a period of sixty (60) days from the date leave is granted.**
>
> **3. That costs of the application be in the case."**

2. The application is premised on the grounds stated on its face and is supported by the affidavit sworn by the Applicant, George Ngaruiya Kariuki on 11th February, 2015. The Applicant's case is that on the 25th September, 2012 at about 10.40 a.m., he was a passenger in motor vehicle registration No. KBC 085C make Toyota when he was arrested purportedly for failure to fasten a seat belt. The Applicant was escorted to Githunguri Law Courts where he was confined for four hours. The Applicant was then arraigned in Court and was admitted to a cash Bail of Kshs.2,000/=. On 11th July, 2013, the Applicant was acquitted under Section 210 of the Criminal Procedure Code or after the prosecution failed to avail any witnesses in Court.

3. The Applicant's contention is that the arrest was unlawful, that he was falsely imprisoned for four hours and was maliciously prosecuted. The Applicant further stated that he instructed the firm of Sheilah Mugo & Co Advocates to file a claim for compensation against the Attorney General on behalf of the Inspector General and a demand Notice was issued 22nd November, 2013. That due to the delay in the

prosecution of the case, the Applicant instructed the firm of Ms Wamwayi & Co Advocates as his new advocates in the matter. The Applicant further deponed that he is a layman and did not know that there was limitation of time within which to file suit. It is further stated that the Applicant stands to suffer substantial loss if he is not allowed to sue.

4. In his oral submissions, the Applicant reiterated the contents of his supporting affidavit. I have considered the application and the said submissions.

5. Section 3(1) of the Public Authorities Limitation Act (Cap 39 Law of Kenya) provides as follows:

> **"No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued**."

6. The Applicant was acquitted on 11th July, 2013. The Applicant therefore ought to have instituted his case within one year, that is on 10th June, 2014 at the latest. The instant application was filed in 25th February, 2015. There was therefore about seven (7) months delay. I have computed the date the cause of action arose as the date of the acquittal. As stated by the court of Appeal for Eastern Africa in the case of Court of Appeal **Mbowa v Easy Mengo Administration(1972) EA:**

> **"The question is: at what stage does damage to the plaintiff result? In my opinion it must be at a stage in the criminal proceedings when the plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. In other words, the damage results at a stage when the criminal proceedings come to a legal end in his favour, whether finally or not."**

7. The explanation by the Applicant that the delay in filing suit was caused by his previous advocates is not satisfactory. The Applicant has not shown what steps he took as a litigant to show that he did not condone the delay (see for example the holding by the Civil Appeal in the case of **Rajesh Rughani v Fifty investments Ltd & another (2016) eKLR.**

8. As stated by Kimaru J in the case of **Savings & Loan Ltd v Susan Wanjiru**

> "**A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present application, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent. Taking into consideration her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for this court to exercise its discretion in favour of such a litigant."**

9. As to whether the Applicant's ignorance of the Law would come to his rescue, the proviso to Section 27(2) of the Limitations of Actions Act Cap 22 Law of Kenya states as follows:

> **" 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 ."**

The Applicant herein had the actual knowledge of the material facts relating to his cause of action.

10. Be as it may, I find the delay of seven (7) months is not inordinate. In the circumstances of this case I

am persuaded to exercise this court's discretion in favour of the Applicant. As stated by the Court of Appeal in the case of **George Mwai Mburu v Mary Wamaitha Kaitany & another [2016] eKLR** while quoting in view of Madan,JA in the case of **Murai v Wainaina(No.4)[1982] KLR:**

> **"A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made ....."**

11. In the upshot, the application is allowed. The costs of the application to be met by the Applicant.

Dated, signed and delivered at Nairobi this 9th day of Sept.,2016

B. THURANIRA JADEN

JUDGE