



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**MISC. APPLICATION NO. 469 OF 2016**  
**SAMUEL OTIENO OKOMBO.....EXPARTE APPLICANT**

**RULING**

**INTRODUCTION**

1. The application herein dated 22<sup>nd</sup> August, 2016 is brought pursuant to Order 37 Rule (6) Civil Procedure Rules and section 4 (2) of the Limitation of Actions Act Chapter 21 Laws of Kenya. The ex-parte applicant seeks leave to file suit out of time against JOSEPH NGUTU NYAKOYI and SAMMY OLUSAKHA SHIUNDU who are owners and driver respectively of motor vehicle Registration Number KBM 757Y Toyota Station Wagon which hit him on the 2<sup>nd</sup> March, 2012.
2. He claims that on the 2<sup>nd</sup> March, 2012 while he was walking along KFA-MARABA road within Kakamega Township he was injured by motor vehicle registration No. KBM 757Y, owned by JOSEPH NGUTU NYAKOYI and driven by SAMMY OLUSAKHA SHIUNDU. He ought to have filed the claim by 2<sup>nd</sup> March, 2015 i.e. within the stipulated period of 3 years but by 11<sup>th</sup> August, 2016 when he instructed counsel now on record the time of filing his claim had lapsed.
3. The reason for the delay in lodging his claim within the time prescribed by law was occasioned by an agent of British America Insurance and Mr. Johnstone Simiyu who he claims took away all the treatment notes from him after the accident. His efforts to have those documents back were futile until the 8<sup>th</sup> August, 2016. His claim is against the owner and the driver of the above motor vehicle KBM 757Y which was insured by British American Insurance Co. Ltd and therefore he opines that they will not suffer any prejudice in case leave is granted and the claim filed. He claims that the delay in filing the instant application is not inordinate.
4. The application is supported by the expartes own affidavit sworn on the same date wherein he adds more emphasis to the grounds set out above. He has also annexed copies of the police abstract, Treatment notes and the P3 form.
5. The application first came before the Deputy Registrar of this court on the 2<sup>nd</sup> September, 2016 and it was ordered that the application dated 22<sup>nd</sup> August, 2016 be fixed for hearing on 20<sup>th</sup> September, 2016 and Bwonchiri Advocate to serve. There is no affidavit of service on record to show whether the applicant served the application or not. The applicant's advocate went ahead to file submissions without directions to that effect. These are issues of procedure which the advocate for the applicant is well aware of and which he ought to follow for justice to be seen to be done. This court is also aware of the provisions in the constitution in Article 159 (2) (d) which provides that justice shall be administered without undue regard to procedural technicalities.

## **Submissions & Determination.**

6. Be that as it may the main issue for determination herein is whether this court should grant the ex-parte applicant leave to file his suit/claim out of time for the reasons given on the grounds on the face of the application and as supported by the annexed affidavit. For the applicant to be granted the orders sought he has to meet the requirements of section 27, 28 and 30 of the Limitation of Actions Act Cap 22 Laws of Kenya.

7. As for section 27, the same provides :-

***“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 a written law) and***

***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.***

***(2) 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 time outside the knowledge (actual or constructive) of the plaintiff until a date which –***

***(a) either was after 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 than one year before the date on which the action was brought.***

***(3) This section does not exclude or otherwise affect –***

***(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or***

***(b) the operation of any law which apart from this section would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”***

8. The plaintiff's action is for damages of personal injuries arising out of alleged negligence of the intended defendants. The plaintiff has shown that the documents which could have helped him file the cause against the intended defendants were taken by the intended defendants themselves and that he only managed to access the same after the expiry of the period within which he should have lodged the case. I have no reason to doubt the allegations or claims by the applicant. Section 28 provides that applications of this nature shall be made ex-parte. Clause (2) of Section 28 is relevant to this application because the application has been made before the commencement of the relevant action.

9. From the evidence produced by the applicant, I am satisfied that the same in the absence of any evidence to the contrary is sufficient to establish a cause of action. I also find that the provisions of section 30 of the Limitation of Actions act Cap 22 have been met. The applicant has stated that he made effort to get back his documents from the Insurance Broker/Agent. He was infact a victim of ambulance chasers who promised him that they will follow up his claim but didn't.

10. In the circumstances, the application is allowed. Leave is granted to the applicant to bring his suit out of time against the intended defendants. The applicant shall file his plaint within fourteen (14) days of this ruling. Costs of the application shall be in the cause.

**SIGNED, DATED AND DELIVERED at KAKAMEGA this 5<sup>TH</sup> day of OCTOBER, 2016.**

**C KARIUKI**

**JUDGE.**

**In the presence of:-**

..... **for the Exparte Applicant.**

..... **Court Assistant.**