



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISC. CIVIL NO. 37 OF 2016
IN THE MATTER OF LEAVE TO FILE SUIT OUT OF TIME
BETWEEN
SAMMY SAWE KORIR APPLICANT
VERSUS
CABINET SECRETARY (MINISTRY OF DEFENCE).....1ST RESPONDENT
EX-PARTE ATTORNEY GENERAL2ND RESPONDENT

RULING

1. By an originating summons dated 25th May, 2016, the applicant moved this court seeking leave to file suit against the respondents out of time to claim for additional compensation for injuries sustained in the course of his employment as a soldier in the Kenya Armed Forces. The application is expressed to be brought under *Sections 27 and 28 of the Limitation of Actions Act* and *Sections 1 A; 1B and 3A of the Civil Procedure Act*.
2. The applicant's cause of action as can be discerned from depositions in his supporting affidavit is that on 14th February 1984, while in a training session, one *Sergeant Guracha* negligently hit him on his crotch with a stone causing epididymal abscess in the right testis and swelling of the scrotum and that on 16th January, 1996 when he was training military cadet recruits at Chepkoilel river, he fell into the river when the rope chapped as a result of which he sustained serious injuries. He suffered lumber spine, spondylosis, greenfinch fracture of tibia bone on the right leg, arthritis of IPJ on both hands and partial ulna nerve palsy. He claims that he was discharged from the Army on 31st December, 2000 due to disability occasioned by injuries sustained in the two incidents and in his view, he was not adequately compensated.
3. The applicant contends that since his discharge from the Armed Forces, he has been undergoing treatment in different hospitals. To prove this claim he has annexed some treatment records marked as SSK 3. It is also his case that he has been corresponding with the Respondents for an out of court settlement.
4. At the hearing of the summons, learned counsel *Ms. Tum* urged the application on behalf of the applicant. Counsel submitted that the applicant was unable to file the intended suit within the prescribed statutory time because the injuries he sustained partially disabled him for a long time; that he has been exploring an amicable settlement with his employer but that the negotiations have collapsed; and, that the intended suit has high chances of success.

5. I have considered the application, the supporting affidavit together with its annexures and the submissions made on behalf of the Applicant.

6. Having done so, it is my understanding that the applicant's intended claim is an action on tort seeking compensation for injuries sustained in the course of his employment owing to the 1st Respondents and or its servant's negligence. The applicant has stated on the face of the originating summons that the limitation period for filing a claim on tort is one year but this is not the legal position. Under *Section 4(2)* of the *Limitation of Actions Act*, the Limitation period for an action founded on tort is three years from the date the cause of action occurred.

7. In this case, the applicant has pleaded two causes of action. The first one is the alleged injury to his crotch on 14th February, 1984 due to the negligence of the 1st Respondent's servant or Agent one *Sergeant Guracha*. The second one is founded on the incident of 16th January, 1996 when he fell into a river when training military cadet recruits. The three year limitation period for the first cause of action expired on 14th February, 1987 or thereabouts while for the second cause of action, it expired on or about 16th January, 1999.

8. A close reading of *Section 4(1)* and *Section 27* of the *Limitation of Actions Act* (the Act) reveals that though a plaintiff is barred from instituting a suit based on tort for the recovery of damages as compensation for personal injuries after the expiry of three years since accrual of the cause of action, such a cause of action is not automatically extinguished upon expiry of the limited period. It can be revived if the court extended the limitation period where the conditions enumerated under *Section 27* are shown to exist. That Section provides as follows;

(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 a written law or independently or a contract or 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 times outside the knowledge (actual or constructive) or 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....

9. The above Section sets out the circumstances under which the court may extend time for bringing an action which is statutorily time barred. The court should only extend time if the applicant demonstrated or proved that material facts related to the cause of action which were of a decisive character were at all material times not within his knowledge (actual or constructive) until after the expiration of the three year limitation period or that those facts came to his knowledge not earlier than a year before expiry of the limited period.

10. For an applicant to succeed in an application of this nature, he must prove that the facts constituting the cause of action were outside his knowledge by establishing that he did not know the facts in so far as the fact were capable of being ascertained by him; that he had taken all such steps (if any) as was reasonable for him to have taken for the purpose of ascertaining them; and that in so far as there existed and were known to him circumstances from which, within appropriate advice, that facts might have been ascertained or inferred, he had taken all reasonable steps for the purpose of obtaining appropriate advice with respect to those circumstances.

Under Section 30(5) of the Act, “appropriate advice” in relation to any fact or circumstances is defined to mean “the advice of a competent person qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be”.

11. In addition to the court being satisfied that an applicant was ignorant of the material facts constituting the cause of action until after the expiration of the limitation period, the court before exercising its discretion in favour of the applicant must scrutinize the evidence presented before it to satisfy itself that if the action was instituted, such evidence was sufficient to establish the cause of action in question – See Section 28 of the Act.

12. The rationale for the above requirement was expounded by Mbiti J in Lucia Wambui Ngugi V Kenya Railways & Another Nairobi HMCA No. 213 of 1989 cited with approval by Odunga J in Mwana Kisavi Musau Mary Ndinda V Landmark Holdings Limited (2012) eKLR where the Hon. Judge stated as follows;

“when an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendant have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitation Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the ex parte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the defendant of a very valuable statutory right...”

13. In this case, the applicant has sought enlargement of the statutory limitation period for his intended action on grounds that he was unable to file suit within time due to partial physical disability occasioned by the injuries he sustained which required him to be hospitalized for a long time. He also claimed that he had been pursuing negotiations for an out of court settlement which had collapsed. In my considered view, these are not the conditions or reasons that are contemplated under Section 27 of the Act on the basis of which a court can extend time within which a suit can be filed. Time can only be extended if the applicant proved that he was ignorant of material facts constituting the cause of action. The applicant in this case did not claim that he was ignorant of the material facts constituting his alleged cause of action against the 1st respondent either before or after the limitation period expired. He did not also avail to the court any evidence to support his intended claim against the respondents which the court could have scrutinized to ascertain whether it established a cause of action capable of sustaining a suit against the respondents.

14. In addition, the annexures to the supporting affidavit show that the last time the applicant attended his doctor was admitted in hospital for treatment was in March 1994. There was therefore an unexplained delay of about twelve years in filing the instant application such delay is excessive and inordinate. It disentitles the applicant to an exercise of this court’s discretion in his favour.

15. Lastly, the applicant’s claim that he was prevented from filing his intended action within the time prescribed by the law by negotiations with the respondents for an out of court settlement is not

substantiated by any evidence. He did not attach to his application any correspondence between the parties to that effect. The only letter he annexed as exhibit SSK 4 is a letter dated 15th October, 2015 addressed by his advocates to the Principal Secretary of the 1st Respondent seeking to initiate an amicable settlement of the matter whose response if any, was not availed to the court.

16. For all the foregoing reasons, I am not satisfied that the applicant has established sufficient cause to warrant the exercise of this court's discretion in his favour by granting him the order sought. In the premises, I do not find merit in the originating summons dated 26th May, 2016 and it is hereby dismissed.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 15th day of November, 2016.

In the absence of:-

Ms Tum for the applicant

Nomi Chonde court clerk