



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISC. APPL. NO.26 OF 2014

IN THE MATTER OF APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME

CHRISTINE AMOIT BARASA

(suing as a persona representative and

next of kin of the estate of the late:

MICHAEL AMBUCHI PLAINTIFF/APPLICANT

V

ABIKAR MOHAMED DEFENDANT/RESPONDENT

RULING

1. The application before court is an Ex-parte Originating Summons that was brought under sections 27 & 28 of the Limitation of Actions Act Cap.22, Order 37 rule 6 of the Civil Procedure Rules and sections 3 & 3A of the Civil Procedure Rules and seeks one substantive order; leave to file suit out of time.
2. The application is based on the grounds that; the failure to file suit was not malicious or a witch-hunt, that it took time for the applicant to be issued with a grant, an advocate instructed to file suit on time failed to do so and the claim has high chance of success.
3. The only issue for the court is whether or not to grant leave for the suit to be filed out of time.
4. The facts herein as demonstrated by the documents on record are that the deceased one Michael Ambuchi was involved in a fatal accident on the 2nd day of August 2010 along Malaba -Bungoma road. A Limited Grant was issued to the applicant on the 4th day of December, 2013. The current application on the other hand was filed on 14th March, 2014. There is also a receipt from Mutenyo Wattimah for Kshs.2,000/= for opening a file dated 7th February, 2013. I suppose this receipt is proof of engagement of a lawyer for purposes of taking action.
5. On its own motion, the court perused Succession Cause No.460 of 2013 in which the application for Limited Grant was made. The court notes that the petition for Limited Grant ad litem was filed in court on 11th November, 2013 and was issued on 4th December, 2013. It took about 3 weeks for the court to issue the Limited Grant. It is noteworthy that the application for Limited Grant was filed 3 years after the accident. The lawyer on the other hand was instructed 2 years and 6 months after the death of the deceased. The court also notes that upon receipt of the grant, it again took 4 months before the

application for extension was filed.

6. Section 27 of the Limitation of Actions Act deals with extension of limitation period in cases of ignorance of material facts in action of negligence etc. Section 28 on its part deals with the mode of application to be preferred to court.

7. In her application, the applicant cites 3 reasons why the suit was filed that is, it took time for the grant to be issued. A look at the file; Succession Cause no.460 of 2013 gives contrary facts as enumerated above. That an advocate instructed did not file suit on time. A receipt annexed indicates opening of a file 2 years and 6 months down the line. However, it is not obvious that counsel was facilitated in order to file suit. Opening a file *per se* is no proof of instructions to file suit, the third party states that there is no malice in filing of the suit out of time.

8. Section 4 (2) of the Limitation of Action Act states:-

“2 An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued...”

The application before court was brought 4 years and 4 months after the cause of action contrary to the section above quoted. It is also my view that, this is not a proper case to apply section 3 & 3A of the Civil Procedure Act. The delay herein is inordinate and indeed does not fall under section 27 of the Limitation of Actions Act.

In the circumstances, I decline to grant the application. Costs in the cause.

Dated and delivered at Bungoma this 10th day of February 2015.

A. ARONI

JUDGE