



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO. 28 OF 2011(O.S)

PENINAH SANGANYI.....PLAINTIFF

VERSUS

RAM HOSPITAL.....1ST RESPONDENT

DR. A.M. TAYLOR.....2ND RESPONDENT

DR. JAMES GER.....3RD RESPONDENT

RULING

1. The plaintiff herein **Peninah Sanganyi** had filed a previous suit in this court vide Kisii HCCC.NO. 98 OF 2007 whereby she sued through a next of kin friend Peter Sanganyi. She sought inter alia General and Special Damages as against the Defendants herein Ram Hospital Limited, Dr. A.M. Taylor and Dr. James Ger. The cause of action was premised on the fact that on or about 18th July, 2006 the plaintiff was allegedly admitted at the 1st defendant's hospital for purposes of treatment and she (plaintiff) who was a (plaintiff) was attended to by the 3rd defendant(who was a gynecologist).
2. Pursuant to the plaintiff's admission to the 2nd defendant's hospital the plaintiff contended that the same was mismanaged and thus leading to the death of her ne natal infant child. Thus the plaintiff contended that the death of her ne natal child, arose and or was occasioned by the negligence of the defendant's herein.
3. At the time of filing the previous suit the plaintiff herein stated and confirmed that she was a female adult of sound mind and disposition working for gain and residing within Nairobi area. However in a ruling, the same was disposed off on 12th March, 2010 where the Honourable Judge Musinga J (as he then was) held that the plaintiff's suit was incompetent, invalid and on reasons that:-
 1. *The plaintiff being an adult of sound mind, the suit could not be filed and maintained through a next friend. That could only be done if the plaintiff is a minor or of unsound mind. The suit is therefore misconceived and invalid.*
 2. *The plaintiff being an adult of sound mind, was obliged to swear a verifying affidavit to the plaint. However, the verifying affidavit had been sworn by Peter Sanganyi who is not the plaintiff. As such the plaint is not therefore verified as by law required and ought to be struck out.*
 3. *If the plaintiff was contending that she suffers from any mental or physical infirmity that presented*

her from acting on her own, an application ought to have been filed under order XXXI Rule 15 of the Civil Procedure Rules. No application to that effect was filed and there is no court order that allowed the suit to be filed through the next friend.

4. *Prior to the filing of this case or immediately thereafter the plaintiff did not invite this court to make any inquiry into her mental status.*
5. *By dint of the provisions of section 2 of the Age of majority Act, the plaintiff is deemed to be under no disability on account of age.*
4. For the above reasons the plaintiff's suit was struck out with costs to the defendant on 12th March, 2010. The plaintiff being aggrieved or dissatisfied with the above ruling filed a Notice of Motion Application dated 19th April, 2010 seeking for review/variation of the orders of the court made on 12th March, 2010. The same was found to be devoid of merit and was thereby dismissed. However, in the course of mounting the application herein the plaintiff's advocate considered and acknowledged that unless the application is granted, the suit by the plaintiff would be caught by the provisions of the Limitations of Actions, Chapter 22, Laws of Kenya and hence the plaintiff will not have any other remedy available.
5. As a consequence of the above fears expressed by the plaintiff's counsel in the previous suit, the plaintiff has now filed an originating summons under order 37 Rule 3(1) and 2 and order 31 rule 3(2) of the Civil procedure Rules seeking:-
 1. *That this Honourable court be pleased to extend the limitation period to file a suit against, the 1st and 3rd Defendants herein and deem it as duly filed subject to such extension.*
 2. *That this Honourable court be pleased to appoint Mr. peter Sanganyi as a next friend and guardian ad litem for the plaintiff Peninah Sanganyi.*
 3. *That the costs of this application be costs in the cause.*
6. The above application was supported by a supporting affidavit by Peninah Sanganyi(plaintiff) averring that on or about 18th July, 2006, she was admitted to RAM Hospital with labour pains which ended up with a caesarian section through spinal anesthesia and analgesia performed by an unqualified, incompetent, negligent and inexperienced anesthetist as a result of which she suffered pain, loss and damages. At the same time, she also suffered the death of her new natal infant child, post operative brain damage, global amnesia, loss of memory, inability to talk when spoken to, paralysis of the lower limbs, lower limb weakness, post operation amnesia, organic brain syndrome and personality change hence it necessitated filling of the suit through a next friend.
7. Furthermore, she blamed the mistake of her previous suit on inadvertently which was only discovered when the application to strike out the suit was brought on her counsel and for the sake of justice the same should not be visited on her.
8. Lastly she contended that this application had been brought without delay and if there was any delay, it can be attributed to the misfortunes that have bedeviled this matter because at one point in the suit the court file had gone missing and file had to be reconstructed afresh after an application vide a Notice of Motion dated 17th July, 2007 consuming a great deal of times.
9. The above application was opposed by the defendants. The 3rd Defendant herein Dr. James Ger filed grounds of opposition dated 10th October, 2011 stating that:-
 1. *The instant originating summons is pre-mature, misconceived and otherwise bad in law.*
 2. *The plaintiff herein has failed to satisfy and/or meet the requisite conditions to warrant the extension of time, within which to file and/or mount the suit, either as sought or at all. Consequently, the originating summons is legally untenable.*
 3. *At any rate, the plaintiff has always been aware and/or knowledgeable of all the material facts, attendant and/or necessary to facilitate the filing of the suit within the statutory period.*

4. *The instant originating summons is barred and/or prohibited by dint of the provisions of sections 27 and 28 of the Limitation of Actions Act Chapter 22 Laws of Kenya.*
5. *The plaintiff herein is of sound mind and disposition consequently the application by the plaintiff for appointment of Guardian Ad Litem is misconceived and/or mistaken. At any rate, the plaintiff is guilty of approbating and reprobating, at the same time.*
6. *The application for appointment of Guardian Ad litem ought to be made and/or mounted by the proposed Guardian and not the person alleged to be suffering from infirmity and/or(sic) mental capacity.*
7. *In the premises, the plaintiff herein is non suited.*
8. *The instant application/suit has been lodged mounted with unreasonable and inordinate delay consequently, the plaintiff is guilty of laches.*
9. *The originating summons is at variance with the supporting affidavit, to the extent that the plaintiff is seized and conversant of the facts of the suit and hence the application is untenable.*
10. *The instant application/suit constitutes and/or amounts to abuse of the due process of the court.*
10. *On the other hand the 1st & 2nd defendants filed joint ground of opposition dated 10th December, 2012 averring that:-*
 1. *It has not been proved by affidavit or otherwise in the present proceedings in relation to the alleged cause of action that the material facts relating to the cause of action were not included fact of a cleasive character which were at all material times during the pendency of the cause of action outside the knowledge, actual or constructive of the plaintiff.*
 2. *The striking out of a defective suit and in dismissal of a suit otherwise than on the merits is not one of the grounds which can be used to extend time under section 27 (1) and (2) of the law of Limitation of Action Act.*
 3. *The provisions of section 27 (1)(2) (a)(b) and 3 (a) or (b) of the law of Limitation of Action Act which can entitle a court to extend time under the law in the circumstances of this case have not been met at all.*
 4. *The plaintiff's claims herein is thus resjudication the proceedings between the parties undertaken in Kisii HCCC.NO. 98 of 2007.*
 5. *The suit as filed is both frivolous, vexatious and amount to an abuse of the process of the court and does not lie at all.*
 6. *The plaintiff, since 25th August, 2007 when she filed the previous suit, which had been determined according to law, Kisii HCCC.NO. 98 OF 2008 has been seized of all the relevant facts and circumstances regarding her case and well over five (5) years have lapsed since then and she never moved the court for extension.*
 7. *This application has been made, filed and prepared after an ordinally long period of delay which has not been explained at all.*
 8. *The previous suit filed was struck out on 12th March, 2010 and since then, the plaintiff had been aware of the fact that she no longer had a suit out of time which she did not earlier.*
 9. *The present suit therefore is calculated simply to vex and annoy the 1st and 2nd defendant.*

11. When the matter came before Sitati, J. on 7th July, 2014, it was ordered that the above application proceed by way of written submissions to be filed and exchanged within 21 days. When the matter came before me on 7th October, 2014, it was confirmed that all submissions had been duly filed and I have read them.
12. The issue for determination is whether the plaintiff's claim is time barred. In *Rawal V. Rawal* {1990} KLR 275 it was stated:-

“the object of any limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time?”

13. However, a cause of action that is barred may in certain cases be revived if the condition set out in Section 27 of the Limitation of Actions Act Cap 22 Laws of Kenya are fulfilled. That section provides as follows:-

1. Section 4(2) does not afford a defence to an action founded in that 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 of 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 not included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of 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.*

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.*

14. In **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA NO. 213 of 1989 Mbitio J** dealt extensively with the issue of Limitation of Actions and expressed himself thus:-

“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 defendants 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. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done to him by obtaining an order for the trial of a preliminary issue.....Section 27 of the Limitation of Actions Act.....provides that limitation period under Section 4(2) of the said Act can be extended in certain circumstances and by the provisions of Section 31 of the said Act, all limitations periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently, this application can only succeed if the applicant can avail herself of the provisions of Section 27 of the Act as read with Section 3 thereof which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the applicant's ignorance of material facts relating to the cause of action which were of decisive character.....Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof decisive character are said to be those relating to a cause of action which would enable a person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action".

15. Similar sentiments were expressed by Potter J, in *Gathoni Vs. Kenya Co-operative Creameries Ltd* {1982} KLR 104 where he had this to say:-

"the disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability.....of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant's application for leave was made under section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge(actual or constructive) of a person, if but only if:

1. *He did not know that fact.*
2. *In so far as that fact was capable of being ascertained by him he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining.*
3. *In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.*

16.....In section 30(5) “appropriate advice” is defined as meaning

in relation to any facts or circumstances. Advice of a competent person qualified in their respective spheres to advice on medical, legal or other aspects of that fact or those circumstances, as the case may be.....”

The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for mentally unsound. But rightly or wrongly, the act does not help persons like the appellant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done?

17. Applying the above law to the facts in this case, I now turn to answer the question as to whether or not the plaintiff’s case meets the above threshold of the conditions laid down under Section 27 of the Limitation of Actions Act so as to allow the plaintiff to revive her case against the defendant.
18. It is an undisputed fact that indeed the cause of action against the defendant by the plaintiff is that of negligence. In the plaint dated 27th August, 2007 in the previous suit (Civil Suit No. 98 of 2007) the plaintiff particularized negligence of the 1st and 2nd defendants, the negligence of the 3rd defendant, the injuries she sustained both physical and psychiatry and the loss and damage she suffered. As I indicated above, the said plaint was struck out by Musinga, J on grounds that the plaint described the plaintiff as an adult of sound mind while the verifying affidavit was sworn by somebody else and there was no attempt to file an amended plaint or an application under order XXX1 rule 15 of the Civil Procedure Rules to have the plaintiff adjudged to be of unsound mind.
19. Once the plaint was struck out, the plaintiff’s advocates made an application to review the ruling striking out the plaintiff’s plaint but the same was also dismissed.
20. At this point it is worthy to note that the plaintiff was represented by counsel from on set. Once the above plaint was struck out in the ruling by Musinga, J, the learned counsel was free to file a fresh plaint as had been in Musinga, J’s ruling correcting the errors in the previous one. Why he opted to apply for review of Musinga, J’s decision to me still remains a mystery.
21. Now the same advocate has come to this court with an originating summons application under section 27 of the Limitation of Actions Act seeking leave out of time to file a suit against the defendants. From the authorities I have cited above, all concur on the fact that time will not be extended unless the applicant in this case the plaintiff proves that material facts relating to her cause of action were included facts of a decisive character which were at all times outside the knowledge actual or constructive of the plaintiff. Furthermore, that she had taken (Plaintiff) all such steps (if any) as it was reasonable for her to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.
22. In my humble view, there is nothing new that the plaintiff’s originating summons establishes. By the time plaintiff’s plaint was struck out by Musinga, J, the court was aware of the fact that the plaintiff had suffered physical and psychiatric injury in the hands of the 1st, 2nd and 3rd defendants. Musinga J, himself regretted striking out the plaintiff’s plaint but due to the fact that it was fatally defective it had to be struck out. At this juncture what plaintiff’s counsel needed to do in my humble view was file a fresh plaint and had they taken that direction the plaintiff’s action against the defendant would not be statute barred.
23. What the current application seeks to in my mind do is to amend the plaint that was struck out by Musinga J, albeit outside the 3 year period for actions of negligence. As held in **Rawal Vs. Rawal (supra)**, the object of any Limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand, and in the other hand protect a defendant after he had lost evidence for his defence from being disturbed after long lapse of time. In my humble view therefore, the plaintiff’s originating summons cannot stand as she had not presented anything new before this court which had not already been established when her plaint was struck out by Musinga J. It is regrettable because from the documents filed by the plaintiff, they squarely point at the defendants

as being responsible for her current health status. However, the law must be applied and were it not for the delay in filing the case against the defendants, plaintiff would have had a valid case.
24. For the foregoing reasons, the originating summons dated 10th February, 2011 is dismissed with costs to the respondents..

Dated and delivered at KISII this 14th day of November, 2014.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Abisai holding brief for Nyasimi for the plaintiff

Oguttu Mboya not in court for the defendants

Edwin Mongare Court Clerk.