REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.62 OF 2014

JANE MWIKALI.....PLAINTIFF

VERSUS

SHIMANZI AUTOWORLD AGENCIES LTD.....DEFENDANT

R U L I N G

By an exparte originating summons dated 10th March 2014 and filed in court on 20th march 2014, the applicant Jane Mwikali seeks orders that leave be granted to her to file suit against Shimanzi Auto World Agencies Ltd the defendant after the limitation period and that costs of the application to abide by the results of the intended suit. The application (OS) is grounded on the annexed affidavit of Jane Mwikali the plaintiff sworn on 10th March 2014 mainly that she was involved in a road traffic accident on 1st January 2010 along Mahiu – Thika Road at Kwa Makaa area while travelling in motor vehicle registration No. KAY 595S which accident she attributes its occurrence to the negligence of the defendant's driver in the manner he drove, steered or managed the said motor vehicle, as per a copy of the annexed draft plaint to be filed in the Chief Magistrate's Court at Thika.

The plaintiff also allegedly sustained serious injuries involving the head, deep cuts wound on the forehead and a big laceration left leg. She also incurred special damages including medical expenses to the tune of Sh. 131,959. She also attached a medical report by Dr. Jacinta Maina and notices issued to the owner of the accident motor vehicle and a statutory notice to the Direct Line Insurance Co. Ltd, the defendant's insurers of the accident motor vehicle.

On the reasons for the delay in filing suit within the statutory period of 3 years from the date of accident, she deposes that she instructed her advocates T.T. Nganga & Associates on 17th January 2012 to file suit and they proceeded to issue notices of intention to sue but never filed suit, in time hence she was compelled to terminate her instructions from them and instruct the current advocates Owaga & Associates only to discover and be advised that her suit was statute barred.

The application was argued by Mr. Ogwe advocate on the plaintiff's behalf reiterating the contents of the Originating Summons and the plaintiff's supporting affidavit thereof.

The law relating to extension of time as contained in Section 27 of the Limitation of Actions Act was set out in **Gathoni – Vs – KCC Ltd (1982) eKLR** where the Court of Appeal held that

2 For an application for leave to be allowed under Section 27 of Cap 22 Laws of Kenya, it must be shown to the satisfaction of the court that failure to apply within time was due to lack of knowledge of certain material facts. The applicant must show to the satisfaction of the court that she had taken all reasonable steps and sought appropriate advise in respect of the facts.

3. Must bring such action within one year of the cessation of the period during which the decisive material facts were outside his/her knowledge.

Similary, in **Lucia Wambui Ngugi – Vs – KR & Another HC Misc App 213/89**, **Mbito J** observed that:

> ***"…It must of course, be assumed that for purposes of the exparte application, the 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 exparte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done him by obtaining an order for the trial of a preliminary …***
>
> ***consequently, this application can only succeed if the applicant can avail herself of the provisions of Section 27 as read with Section 31 of the Act 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 appellant's ignorance of material facts relating to the cause of action which were of a 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 Act, when read with subsection (2) thereof. Material facts of a decisive character are said to be those relating to a cause of action which would enable a reasonable 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."***

In **Rawal – Vs – Rawal (1990) KLR 275** **Bosire J** as he then was stated that:

> ***"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."***

And in **Dhanesvar – Vs – Mehta Manilal M Shah (1965) EA 321** it was stated

> ***"… the effect of limitation enactment is to remove remedies irrespective of the merits of the particular case."***

In **Iga – Vs – Makerere University (1972) EA 65** it was held that

> ***"… Unless the appellant in this case had put himself with the limitation period by showing the grounds upon which he could claim exemption the court 'shall reject' his claim… The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief."***

The extension of time can be made, under Section 27 of the Limitation Act in tort in respect of claims for personal injuries from negligence, breach of duty etc.

In this case, I have no doubt that the cause of action arises from an alleged negligence in the manner in which the defendant's driver, agent or servant drove the accident motor vehicle, and that the damages sought are in respect of personal injuries to the plaintiff as a result of the tort. (See **Mary Osundwa – Vs – Nzoia Sugar Co. Ltd CA 244/2000 CA**).

But even in cases where the claim falls under the aforesaid provisions, time will not be extended unless the applicant proves that material facts relating to the cause of action where or included facts of a decisive character, which were at all times outside the knowledge (actual or constructive) of the plaintiff. See **Republic – Vs – Principal Magistrate P. Ngare Gesore & 2 Others Exparte Nation Media Group ltd (2013) eKLR**.

In order to prove this, the applicant is expected to show that he did not know that fact; that 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 it; and that so far as there existed, and were known to him, circumstances from which, with appropriate advise, 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 advise with respect to those circumstances. In Section 30 (5) *"appropriate advise"* is defined as meaning in relation to any facts or circumstances *"advise 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."*

In the instant case, the applicant complains that she had instructed an advocate who for reasons unknownto her, failed to file suit within time as stipulated under the law. In **Mary Wambui Kabugu – Vs – KBS Ltd CA 195/95 Shah JA** held:

> ***"The requirements under Section 27 of the Act are explicit and the court cannot go beyond the scope of the requirements for instance out of sympathy or because the applicant did not know the law. If the evidence showing prima facie that the requirements of the Act are satisfied, leave should be granted leaving the defendant to challenge the facts in the action in due course. The statute does not seem by its language to confer a discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may differ …"***

What the above decision and others like **Yunes K. Oruta & Another – Vs – Samwel Mose Nyamato CA 96/84** establish is that where an order has been made extending time, such order is not final but is merely provisional and that the defendant will have every opportunity of challenging the facts and the law afterwards at the trial. It is the trial Judge who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar and he is not in the least bound by the provisional view expressed by the Judge in chambers who gave leave.

Mr Ogwe urged the court to grant the orders sought as the applicant relied on her advocates to file suit upon instructing them – T.T. Nganga & Associates. The letter head used for notifying the owner of the motor vehicle demanding for admission of liability for the accident indicates that Mr. R. J. Ogwe advocate is or was one of the associates of the said law firm instructed to file this suit as at 30th January 2012. He did not disclose this fact to the court and neither did he explain why the suit was not filed by his associate firm within time. He now appears for the claimant under the cover of a totally different law firm M/s Owaga & Associates, holding brief for Mr. Owaga.

In my view, failure by the advocate to file suit within the statutory limitation period is not one of those grounds upon which leave may be granted extending the limitation period. The claimant can sue the advocate for professional negligence – failure to file suit in time if she truly is convinced that she gave all the necessary instructions including the necessary expenses for filing suit. It has not been shown to the satisfaction of the court.

That therefore leaves me with little option but to dismiss the application for failure to meet the conditions set out in Section 27, 30 of the Limitation of Actions Act. However, I am enjoined to adopt the principle espoused in the Constitution on the right to be heard, which in this case should not be construed to mean that it ousts the jurisdiction to grant leave based on the conditions set out in the Act, but which I find useful to enable a party ventilate their grievances before a court or tribunal and which does not oust the claimant from the seat of justice. This right to a fair hearing is provided for in Article 50 (1) of the Constitution that

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body."

In addition, if access to justice under Article 48 of the Constitution is to be attained for all persons, then the person must not be ousted from the judgment seat by virtue of his or her advocates failure to file suit or explain why such suit was not filed within the limitation period. And as the Law of Limitations permits extension of time and does not extinguish the claim, for the above reasons, I grant the applicant leave to file suit out of time.

Such leave is for 30 days from the date hereof failure to which it lapses.

I make no order as to costs of this application.

Dated, signed and delivered at Nairobi this 1st Day of December, 2014.

R.E. ABURILI

JUDGE