



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, J.A.)**

**CIVIL APPLICATION NO. NAI. 246 OF 2013**

**BETWEEN**

**AINEAH LIKUYANI NJIRAH ..... APPLICANT**

**VERSUS**

**AGA KHAN HEALTH SERVICE ..... RESPONDENT**

*(Application for extension of time to file Notice and record of appeal out of time in the intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mutungi, J.) dated 22<sup>nd</sup> July, 2008*

**in**

**H.C. Appeal No. 275 of 2004)**

**\*\*\*\*\***

**RULING OF MUSINGA, J.A.**

1. In his application dated 3<sup>rd</sup> September, 2013 the applicant sought leave to file a notice of appeal as well as record of appeal out of time. The background to the application is well set out in two rulings delivered by this Court on 17<sup>th</sup> December, 2009 and 12<sup>th</sup> July, 2013 and I need not go through the details thereof. Suffice to say that the judgment that is intended to be appealed against was delivered on 22<sup>nd</sup> July, 2008.
2. The applicant avers that the delay in filing the notice of appeal was occasioned by the failure of his advocate whom he had instructed to do so. When the applicant realized that the notice of appeal had not been filed in time he decided to move to this Court on his own and his first application for leave was heard before Githinji, JA. who dismissed it on 17<sup>th</sup> December, 2009. Thereafter the applicant made a reference to the full Court and vide a ruling delivered on 12<sup>th</sup> July, 2012 the Court found that there was a copy of an insurance policy that had not been presented to it by the applicant and granted him an opportunity to file a fresh application for enlargement of time so that he could exhibit the said document for consideration by a single Judge.
3. The applicant filed a supplementary affidavit sworn on 17<sup>th</sup> December, 2013 and annexed thereto various documents including a sample of a Medical Insurance Plan of the United Nations. The applicant was an employee of United Nations (UN) in Nairobi. The UN operated a medical

scheme with Aga Khan Hospital under which employees of UN and their families would get medical services at Aga Khan Hospital, pay for the services and thereafter make claims for reimbursement.

4. In **C.M.C.C. No. 709 of 2002**, the applicant sued the respondent stating, *inter alia*, that he and members of his family visited the respondent's Aga Khan Hospital on **10<sup>th</sup> and 17<sup>th</sup> August, 1996** and after treatment the applicant paid the medical fees and submitted a claim to his employer for reimbursement. Thereafter, by a letter dated 27<sup>th</sup> August, 1996, the respondent recklessly and maliciously misrepresented to the applicant's employer that the applicant and his family did not attend the respondent's hospital on **13<sup>th</sup> August, 1996** for any treatment which implied that the applicant had presented the claim fraudulently.

5. As a result of the misrepresentation the applicant was summarily dismissed from his employment. The applicant sought a declaration that the respondent's letter dated 27<sup>th</sup> August, 1996 was a misrepresentation, wrongful and void. He also sought general damages.

6. The respondent filed a defence in which it admitted having written the letter dated 27<sup>th</sup> August, 1996. It however denied liability, averring that the applicant's claim was time barred as per the **Limitation of Actions Act**.

7. The respondent filed an application to strike out the plaint on the ground that it did not disclose any reasonable cause of action. The application was dismissed. The respondent appealed against the dismissal order vide **High Court Civil Appeal No. 275 of 2004**. The appeal was allowed on 22<sup>nd</sup> July, 2008.

8. In allowing the appeal, the High Court ruled that in so far as the applicant's claim was based on tort, the same was time barred. The court further held that the dispute, if any, could only be hinged on contractual relationship, if at all it existed. The court however held that the applicant was a beneficiary of the medical scheme between the respondent and his employer. In other words, the court's position was that the applicant was not a party to the medical scheme cover; the parties thereto were the respondent and the United Nations and therefore the applicant could not base any claim on the same.

9. In the supplementary affidavit filed by the applicant, he annexed a copy of the medical insurance cover aforesaid. The applicant submitted that it was evident that he was a subscriber thereto and not a mere beneficiary. The applicant and his family members were covered as long as he remained in employment of the United Nations.

10. In the draft memorandum of appeal annexed to the application, the applicant intends to argue, *inter alia*, that the United Nations and the respondent violated his basic fundamental human rights granted to him by the Constitution and by the law. The rights that were allegedly violated have not been specified. Further, that issue was not raised in the two courts below. The applicant also intends to argue that the medical insurance plan is a health insurance scheme operated by the United Nations and he was a subscriber thereto. The applicant has listed 13 other proposed grounds of appeal, all related to the respondent's letter to his employer and his subsequent loss of job.

11. The application was opposed by the respondent and in a replying affidavit filed by **Judith Oduge-Otieno**, the respondent's Company Secretary, she deponed, *inter alia*:

- That the applicant had not demonstrated any good reason for failing to file an appeal in time.
- That the intended appeal has no merits.
- That the medical insurance plan annexed to the applicant's supporting affidavit is of no relevance and does not advance the applicant's cause.
- That the respondent will be prejudiced if the applicant is allowed to file an appeal at this late hour,

considering that the cause of action arose nearly seventeen (17) years ago.

12. In an application for extension of time under **rule 4** of this Court's Rules, this Court exercises an unfettered discretion but such discretion must be exercised judicially. In such an application the Court has to consider the length of the delay, the explanation for the delay, the prejudice that may be occasioned to the respondent if the application is allowed and the merits of the intended appeal. See **SHAH vs. SOUTHERN CREDIT BANKING CORPORATION [2008] KLR 173.**

13. Turning to the first guideline, that is, the length of the delay, the High Court judgment was delivered on 22<sup>nd</sup> July, 2008. The application for extension of time was filed on 3<sup>rd</sup> September, 2013. It is however evident that on 2<sup>nd</sup> July, 2009 the applicant had filed the application that was heard and dismissed by Githinji, J.A. on 17<sup>th</sup> December, 2009. The reference before the full court was also rejected. The delay is therefore for a period of nearly six years.

14. The reasons for the delay were considered by Githinji, J.A. and he came to a considered finding that they were not sufficient. I need not re-consider the same as they were well documented in the ruling delivered by the learned Judge on 17<sup>th</sup> December, 2009 and I cannot sit on appeal against that finding.

15. The cause of action arose in 1996 and the respondent will be prejudiced if the application were to be granted because it may not be possible to trace its witnesses and records after nearly 18 years.

16. Regarding the merits of the intended appeal, I am also not satisfied that the same is arguable. The cause of action having arisen on 27<sup>th</sup> August 1996 and considering that it was based on the tort of negligence that was alleged against the respondent, the suit ought to have been filed within 3 years from the aforesaid date. However, the applicant did not file the suit until 4<sup>th</sup> February, 2002. In the plaint the applicant claimed:

***“(a) A declaration that the defendant’s letter dated 27.8.96 addressed to the United Nations is false in content, injurious in effect, steeped in negligent and/or reckless misrepresentations regarding the conduct, character and integrity of the plaintiff and is therefore wrongful, null and void.***

***(b) General damages.”***

In the judgment delivered by the High Court, the learned Judge held that the applicant was not a party to the medical scheme cover.

17. But the applicant now argues that the Judge's finding was erroneous because he was a subscriber thereto. Whether that is correct or not, it does not change the fact that the applicant's claim was not in any way directed against his former employer. The applicant intended to recover damages for the loss and injury occasioned to him due to termination of his employment by the United Nations following the negligent letter that was written to his former employer by the respondent. That claim was clearly unsustainable considering that the suit had been filed out of time and it was rightly abandoned.

18. The other claim that was made by the applicant was that the respondent's letter breached the contractual doctor-patient relationship based on trust and confidence. Whether that was true or not, I do not see how the documents annexed to the applicant's supplementary affidavit can salvage the claim. I agree that the applicant was a subscriber to the medical insurance cover but that in itself cannot entitle him to make a tort based claim against the respondent after the statutory period of three years. The respondent would not have been in breach of the doctor-patient relationship by responding to the U.N.'s inquiry whether the applicant had actually been treated at

its hospital. What was not right was to cite a wrong date.

19. If the applicant had filed his suit on time and pursued the claim for damages as a result of negligence on the part of the respondent, I think the claim would have had high chances of success. But considering the reasons for dismissal of the applicant's claim by the High Court, I am not persuaded that the intended appeal has any chance of success. Consequently, this application is dismissed. Each party shall bear its own costs of the application.

***Dated and Delivered at Nairobi this 4<sup>th</sup> day of April, 2014.***

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

*/dkm*