



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CoramPotter JA)**

**CIVIL APPLICATION NO NAI 22 OF 1981**

**BETWEEN**

**GATHONI.....APPLICANT**

**AND**

**KENYA CO-OPERATIVE CREAMERIES LTD.....RESPONDENT**

**RULING**

The applicant suffered personal injuries on November 6, 1976 when travelling in a *matatu* which was involved in an accident. She was admitted to hospital, where she remained for a period not disclosed in her advocate's affidavit. But her attendance for "check-ups" as an outpatient apparently extended beyond the period of three years following the accident.

The appellant made a statement to the police and she claims that the police told her that she would be informed of the result of their inquiries, but she never was. Mr Mirugi Kariuki, who now represents the applicant, states that he (on an undisclosed date), obtained an abstract from the police which was favourable to the applicant's case.

In September, 1980, just over three years after the accident, the appellant instructed Mr Kariuki to file an action. On January 30, 1981, when it became apparent that the proposed defendants would not waive their defence under the Limitation of Actions Act (Cap 22), the applicant's advocate applied to the High Court for leave under Section 27 of the Act to file the action outside the three-year period of limitation, on the ground of ignorance of material facts.

Mead J at Nakuru dismissed the application and granted leave to appeal from his decision on June 30, 1981. On that day the advocate applied for certified copies of the order, which he received on July 9, and on July 24, he initialled the appeal to this court. The applicant's case before the learned judge was based on two grounds, the first being that the applicant was under a disability to which Section 22 of the Act applied, throughout the three-year period, and was entitled (without leave of the court) to bring the action within a period of three years from the date of the cessation of that disability (see Section 22 (v)). That date was not revealed to this court. However that may be, the disability relied upon by the applicant is a physical disability, the nature and extent of which in time is not revealed. The learned judge dismissed this ground, in my view quite rightly, because disability in this statutory context does not include physical disability. Section 2(2) (b) of the Act clearly limits the meaning of disability. It provides:

“(2) For the purposes of this Act ...  
(b) a person is under a disability while he is a minor or of unsound mind; ...”

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 decisive character being outside her knowledge (actual or constructive).

Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if, but only if: “

- (a) he did not know that fact; and
- (b) 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 before that time for the purpose of ascertaining it; and
- (c) 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”.

In Section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “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”.

In view of those provisions of the law, I do not see how the learned judge could have held that the applicant had taken all reasonable steps to ascertain whether before November, 1979, she had a cause of action. She consulted an advocate in September, 1980, but no explanation is given, except that she was waiting to hear something from the police, as to why she did not consult an advocate a year or more earlier. 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 the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

In my considered view, the learned judge had no alternative but to dismiss the application before him. Accordingly, the appeal against his decision is dismissed. Apart from the foregoing, it would seem that the application for leave under Section 27 would fail because the requirements of subsection (2) of the section were not fulfilled. Under the subsection, as amended in 1973, those requirements include the requirement that the action be brought within one year of the cessation of the period during which the decisive material facts were outside the plaintiff's knowledge.

**Dated and delivered at Nairobi this 30th day of January, 1982.**

**K.D POTTER**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**