



**Sabwami & another (Suing as the Legal Representatives of the Estate of Jennifer Njeri Butali - Deceased) v Archdiocese of Nairobi Kenya Registered Trustees & 2 others (Civil Suit 399 of 2010) [2024] KEHC 10204 (KLR) (Civ) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10204 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 399 OF 2010**

**TW OUYA, J**

**JULY 30, 2024**

**BETWEEN**

**PETER BUTALI SABWAMI ..... 1<sup>ST</sup> PLAINTIFF**

**IDA NEKOYE SABWAMI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JENNIFER  
NJERI BUTALI - DECEASED**

**AND**

**ARCHDIOCESE OF NAIROBI KENYA REGISTERED TRUSTEES .... 1<sup>ST</sup>  
DEFENDANT**

**DR. LILIAN WANGUI ..... 2<sup>ND</sup> DEFENDANT**

**DR. MUCHAI M. GACHAGO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Background**

1. This Application emanates from the HCCA No. 399 of 2010 which is pending before this court. The Appeal had been slated for hearing under the Rapid Results Initiative (RRI).
2. Upon mentioning the matter for directions on hearing, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed an Application vide Notice of Motion dated 16<sup>th</sup> May 2024 seeking extension of time.
3. Grounds: The grounds are as reflected in the notice of motion



4. Prayers: The prayer sought for is for extension of time for leave to the Applicants to issue third party notice against the Ministry of Health. Vide the same Application they also seek for leave to file an amended defense an additional witness statement and list of documents. They pray that the annexed draft amended Statement of defense and supplementary list of documents be deemed as filed.
5. The Application is supported by an Affidavit of the same date sworn by Dr. Lillian Wangui and Dr. Muchai Gachango the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein. At all material times the Defendants were employees of the Ministry of Health placed on secondment to offer services at the 1st Defendants facility. That by virtue of being employees, they are entitled to indemnity by their employer where a suit is instituted against them for actions done while in the proper cause of their duty. That the Ministry has at all material time been aware of these proceedings. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants depone that it is in the interest of justice that leave is granted and time expanded for issuance of third-party notice to the ministry of Health. That the granting of the leave sought is necessary to enable the court to effectively adjudicate and the dispute before the court.
6. They depone further that no prejudice will be occasioned to the plaintiff and that issuance of the third-party notice will save court time by avoiding multiplicity of suits. They aver that the Application is in the interest of justice for the determination of this suit, that it has been brought in good faith and that they stand to suffer irreparable harm and prejudice if this application is not granted.
7. The parties made oral submissions before this court. It was submitted for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that further to what is deponed to in their Affidavits, they were agents by virtue of being employees of the intended third-party on secondment to the 1<sup>st</sup> Defendant facility and that they therefore have a right to be indemnified.
8. They submit further that the reason for the delay is that upon being summoned each party wrote to the Ministry for assistance in the defence of this suit and the Ministry gave instructions to the Attorney General who has been on record till 16<sup>th</sup> May 2023 when they appointed Kioi and company advocates to act for them. It was upon this moment that it became apparent that the Ministry should be enjoined as a third-party in this suit hence this Application.
9. The cause of action arose on 13<sup>th</sup>/14<sup>th</sup> August 2008 and the limitation period expired. The Legal basis for this application
10. The Application is premised on Section 4 of the *Government Proceedings Act*, Section 1A and 3A of the *Civil Procedure Act*, Order 1 Rule 15, 16 Order 51 Rule 1 of Civil Procedure Rules. And Article 50 of *the Constitution*.
11. They rely on the case of Gibb Africa Ltd Vs David Kiplagat Rotich where the court relied on another case of Andy Forwarders Services & Another v Price Waterhouse Ltd & Another where the high court held that an application where a party is seeking to add another party into the suit, there are two tests to determine whether the third party is necessary.
12. It is acknowledged that it has taken a substantial period of time to seek for expansion of time but the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did so at the earliest opportunity when they discovered that joinder of Ministry as third-party was necessary.
13. The witness statement is in regard to an expert witness to be called by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and was in the initial list of witnesses filed on their behalf on 1<sup>st</sup> March 2012. The additional documents relate to the same expert witness and include letters and memos. The memos are documents which have all along been in the possession of the government.



14. That the defendants did not make the Application under Order 1 Rule 15 because in this case they are also seeking for an expansion of time.
15. The First Defendant supports this Application.
16. The plaintiff opposes this application and terms it as a delay tactic by the defendants. That the matter has delayed in court for the last 14 years and has been marked for RRI and that the Application lacks credibility and validity. The plaintiff submits that the defendants have always been aware of the possible impact of the outcome in this case but failed to take action. That the Defendants slept on their rights and that equity does not aid the indolent.
17. The plaintiff also contends that under Order 1 Rule 15 of the Civil Procedure Rules, the application ought to have been made 15 days after close of pleadings but the Defendant have come over 10 years later. They did not make the application vide chamber summons under certificate of urgency as provided by Order 1 Rule 16. They argue that timelines are not ornamental but are important for timely dispensation of justice.
18. On leave to file additional documents, the plaintiff reasons that one of the conditions to be met is that the documents must be newly discovered which is not the case. The documents which are correspondence have always been in the possession of the defendants. The witness statement is a mere analysis of the medical reports that are already before this court and does not add value to the issue before the court.
19. I have considered the application, supporting affidavit and submissions by parties herein. The issues for determination are thus:
  - i. Whether the application is merited in law
  - ii. Whether the reasons given by 2nd and 3rd Defendants are sufficient justification for granting the orders as prayed.
20. This application is for leave to enjoin a third-party and expansion of time to do so, leave to file amended statement of defense, supplementary list of documents and additional witness statement.
21. The requirement to enjoin a third party under Order 1 Rule 15 of the Civil Procedure Rules, is to ensure that the third party who has no notice of the proceedings and/or allegations against him is accorded an opportunity to take part in the hearing to avoid adverse orders being issued against him.
22. The basis for granting expansion of time was elucidated in the case of County Government of Kisumu SC Civil Application No. 3 of 2016.as here below:

It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
23. The applicants’ main reason for the delay is that they were represented by the Attorney General at the instance of their then employer the Ministry of Health who entered appearance on their behalf and prepared their statement of defence. That it only became apparent that they needed to enjoin the Ministry as third-party when they instructed a new Advocate. By virtue of being employees of the Ministry, they had no access to certain information and were not advised that it would be necessary to enjoin the Ministry as the third-party.
24. The matter has been in court for the last 14 years but there is no explanation from either party as to the reason why the matter has delayed in court this long and the circumstances cannot be attributed solely to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. This court takes note that the Applicants were not in control of the legal process and they were in a situation where their legal advisor the AG would have been conflicted to enjoin the Ministry as a third-party at that time and whose interest they had a duty to protect.
25. Having left the employment of the Ministry and engaged an Advocate, the parties now have the advantage of new information and legal advice which they did not have earlier. Indeed, they have submitted that they filed their application at the earliest opportunity when the need became apparent. This court also notes that the application to file the amended defense statements and supplementary list of documents is closely intertwined with the leave to enjoin third-party and expansion of time. The former prayer if not granted would make the latter prayer ineffective.
26. In the case of *Nation Media Group Limited & 2 Others v Margaret Kamene Wambua* [2021] eKLR and *Royal Media Services Ltd v Valentine Mugure Maina & Another* [2019] eKLR. The court held as was submitted by the Applicant through her counsel that the delay in instituting the suit within the statutory timelines was caused by the erstwhile advocates and that she should not be punished for their inadvertence, relying on the decisions rendered in *Alnoor Al Mustaqeen v officer Commanding Police Station Garbatulla & 2 others* [2014] eKLR and *In Re Joyce Wamuhu Gitau* [2015] eKLR. It was held that even without delving into the merits of the suit, it is clear that the Applicant has a valid claim against the Respondent.
27. In the instant case the Defendant Applicants were represented by the AG who did not give them legal counsel for the need to enjoin the third party.
28. It is the finding of this court that the reasons and explanation provided by the defendants are satisfactory and lay a basis that they are deserving of the expansion of time and leave to enjoin the third party.
29. On the legal basis for the application is section 27 as read with section 28 of the *Limitation of Actions Act*, this court has jurisdiction to expand the period beyond the limitation as the claim herein arises from a tort of negligence. I do not consider the matter as stale in that the case is still pending in court



and this application was the only way for the way for Defendant applicants to access justice and for the court to exhaustively adjudicate the issues in dispute before it.

30. It is also demonstrated that the plaintiff will not suffer any prejudice if the third-Party is enjoined. On the other hand, it is the Defendant Applicant who is likely to suffer irreparable harm and prejudice if the application is not granted.

### **Disposition**

- i. Expansion of time to Lodge third-party notice is granted
- ii. Leave to issue third-party notice is granted
- iii. Leave to file amended defence in accordance with the draft statement of defence
- iv. Leave to file additional witness statement in accordance with the draft
- v. Leave to file additional documents as part of list of documents in accordance with the draft supplementary list of documents
- vi. The Annexed draft amended statement of defence and the supplementary list of documents be deemed as duly filed upon payment of the requisite court fees
- vii. No orders as to costs

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF JULY, 2024**

ROA 14 days.

**HON. T. W. Ouya**

**JUDGE**

For Plaintiff Mr. Wanjau

For 1<sup>st</sup> Defendant Mr. Banji

For 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Mrs Irungu

Court Assistant Martin Korir

