



**Kaptingei & another v Kimuyu & another (Civil Appeal E024 of 2023)
[2024] KEHC 17212 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 17212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E024 OF 2023**

TM MATHEKA, J

AUGUST 20, 2024

**CITATION: ROSE JEPKEMBOI KAPTINGEI AND EDWIN ODHIAMBO
OMONDI VS JAMES NZYOKA KIMUYU AND JACKSON MATELI MUILU**

BETWEEN

ROSE JEPKEMBOI KAPTINGEI 1ST APPELLANT

EDWIN ODHIAMBO OMONDI 2ND APPELLANT

AND

JAMES NZYOKA KIMUYU 1ST RESPONDENT

JACKSON MATELI MUILU 2ND RESPONDENT

JUDGMENT

1. On 29/6/2019, an accident occurred along Nairobi/Mombasa Road involving motor vehicle Reg No. KCR 888F and Peter Muthini Kimuyu (deceased).
2. The respondents filed Kilungu PMCC E191/22 on 15/7/2022 vide plaint dated 30/6/2022.
3. In the plaint, the respondent contended that the motor vehicle was at the material time registered in the names of the 1st defendant Rose Jepkemboi Kaptingei and was driven by the 2nd defendant Edwin Odhiambo Omondi - so carelessly that he knocked down the deceased Peter Muthini Kimuyu - causing him fatal injuries which resulted in loss and damage to the beneficiaries, and his estate - hence the claim for damages under the *Fatal Accidents Act*, & *Law Reform Act*.
4. Upon service of the plaint - the defendants vide statement of defence dated 1/9/2022 gave notice of a preliminary objection of the filing of an application to have the suit struck out or dismissed on account that the claim was fatally defective for being time barred pursuant to Section 4(2) of the *Limitation of Actions Act* Cap 22 Laws of Kenya - in that the cause of action arose on 29/9/2019, and suit was filed on 15/7/2022 without leave of court.



5. On 6/10/2022 the plaintiffs filed an ex parte originating summons seeking leave for the applicant “ to file suit out of time against the respondent ... the suit Kilungu CMCC E191/22 filed on 15/7/22 be deemed to have been properly filed.”
6. The summons was opposed - and upon hearing the learned trial court following the reasoning in Rawal vs Rawal [1990] KLR 275 as adopted in Nairobi High Court Misc Civil Application No. 376/2012 Francis Mugo Ndegwa vs Amboseli Court Ltd found merit in the application and allowed it as prayed.
7. The defendant were aggrieved and fled this appeal on 6 grounds set out in the memorandum of appeal filed on 4/4/2023. The main ground being that the learned trial magistrate erred in not finding that the plaintiffs had not given sufficient explanation for not filing the suit within the time permitted by law - and that he did so because he “failed to consider, fathom or give weight to the appellant’s written replying affidavit; considering extraneous matters; to give due weight to the appellant’s written submission.”
8. The appellant’s seek that the appeal be allowed , the ruling of the subordinate court be set aside and the respondent’s application be dismissed with costs to the appellant.
9. The appeal was heard by way of written submissions.
10. For the appellant - relying on County Executive of Kisumu vs Count Government of Kisumu & others [2017]eKLR, Mombasa County Government vs Kenya Ferry Services & Anor [2019]eKLR where the court emphasized that in an application for extension of time, the applicant must declare the whole period of delay and satisfactorily explain it to court.
11. In this case the respondent’s reason was that when the Road Traffic Accident happened, the police did not supply them with the particulars of the insurance of the motor vehicle and they had to make several visits to the police station to obtain the same. That the details were obtained on 11/5/2022 and they were able to file suit on 15/7/2022.
12. It is also submitted - and relying on YH Whole Salers Ltd vs Kenya Revenue Authority [2021] eKLR - that though the Originating Summons was ex parte, there was no objection to the participation of the appellant in the originating summons - and in any event there is no cross appeal - that though there are positions to the effect that a challenge on this issue ought to come during trial however this applies where the application is for filing suit out of time made ex parte before suit is filed , and before involvement of the defendant. In this case the plaintiff filed suit without leave, and filed the application in reaction to the defence.
13. For the respondent – it is submitted that the ex parte nature of the application to file suit out of time is that it is meant to be unopposed - but in this case - the appellants filed response and parties took directions on submissions.
14. The respondent set out 2 issues for determination:- The 1st one - whether an application to file suit out of time is appealable.

It is submitted that Order 37 rule 6 (1) & (2) of the Civil Procedure Rules provides for the application to be ex parte by way of Originating Summons - in the two abiding circumstances. When made before filing the suit – ex parte by originating summons; when made after filing the suit - ex parte by originating summons within the suit. It is submitted that no response is expected, neither is an appeal anticipated. This court is referred to the Court of Appeal decision in Oruta & Anor vs Nyamato (Nairobi) Civil Appeal No. 96 of 1984; that the intention of legislature in making the law the way it did was to prevent “any possible defence of limitation”



15. On the 2nd issue - whether the trial court misdirected itself in granting the order to file suit out of time - it is submitted that there is no ground to support this ground. The respondent reiterates the arguments before the subordinate court - that the plaintiffs needed to be aware who the insurer was, that they needed to comply with Section 10(2) of the Insurance (Motor Vehicle 3rd Party Risks) Act Cap 405 Laws of Kenya and relied on Gateway Insurance Co. Ltd vs Geoffrey Kariuki Githinji [2022]eKLR - for the requirement that the statutory notice ought to be served 30 days before the commencement of proceedings.
16. It is also submitted that the delay in filing the matter after the last day of the 3 year limit was not unreasonable - the case of Edward Kamau Ndungu vs Peter Njogu Gitau is cited - here the judge was of the view that 9 months was not unreasonable - and Veronica Gathoni Mwangi & Anor vs Samwel Kagwi Ngure & Anor [2016] eKLR where it was held that a period of less than 3 months could not be inordinate.
17. I have carefully considered the submissions by counsel. The 1st issue is whether the appellant can appeal the decision by the trial court. Order 37 rule 6 of the Civil Procedure Rules clearly states that the application to extend time under Section 27 of Cap 22 Law of Kenya shall be by ex parte originating summons, and where there is a suit, shall be by ex parte origination summon within that suit. Clearly the appellant had no business participating in the ex parte originating summons, and even though they did participate the trial court found in favour of the respondent.
18. That besides – a look at Section 75 of the [Civil Procedure Act](#) and order 43 rule 1 of the Civil Procedure Rules on the orders and rules form which an appeal shall be as of right reveals that right, to appeal from an order under Order 37 Rule 6 does not exist. Evidently no appeal is contemplated as of right from an order made under Order 37 rule 6 of the Civil Procedure Rule. I am guided by the decision in Oruta & Anor vs Nyamato

“Reading the Act closely, it is not the intention of the legislature to allow a claim based on personal injuries on account of negligence, nuisance or breach of duty to be met with a defence of limitation. To prevent any possible defence of limitation as an exception to Section 4(2) of the Act an ex parte order for leave to file an action has to be obtained.

Although it was a general principle in regard to ex parte orders that the party affected by the order could apply for it

to be discharged , yet it would be contrary to the intention of the Limitation Act ... to allow a defendant to apply, before trial of the action, to set aside a ex parte order obtained ... for leave ...”
19. From the foregoing, I need not add more save that the appellant has no right of appeal from the order made under Order 37 rule 6 of the Civil Procedure Rules.
20. Did the trial court err in granting the order? In my view the trial court considered all the factors - the reasons for the delay, the length of delay and determined that it was sufficient to warrant the Plaintiffs’ leave to proceed with their suit.
21. Having stated that - it is not in the place of this court to reanalyze the evidence & draw its own conclusion on that issue.
22. In the circumstances the appeal is dismissed with costs to the respondents - and with it the stay of proceedings granted pending the hearing and determination of this application be and is hereby set aside.



23. The matter mentioned before the Deputy Registrar within 7 days hereof for onward transmission of the order to the subordinate court to hear and determine the matter.

DATED SIGNED AND DELIVERED VIS CTS THIS 20/8/2024

MUMBUA T MATHEKA

JUDGE

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-08-20 20:29:34

