



**Cheruiyot v Mediamax Network Limited & 4 others (Civil Appeal
E017 of 2022) [2024] KEHC 13488 (KLR) (Civ) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13488 (KLR)

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

CIVIL

CIVIL APPEAL E017 OF 2022

RC RUTTO, J

OCTOBER 31, 2024

BETWEEN

BRENDA JELAGAT CHERUIYOT APPELLANT

AND

MEDIAMAX NETWORK LIMITED 1ST RESPONDENT

IAN FERNANDES 2ND RESPONDENT

PETER OPONDO 3RD RESPONDENT

ERICK OBONO 4TH RESPONDENT

NOAH CHEPLEON 5TH RESPONDENT

*(Being an appeal from the Ruling delivered by Hon. P. Muboli (PM) on
17TH November 2021 in Milimani Commercial Court No. E3531 of 2020)*

JUDGMENT

1. This is an appeal seeking to set aside the ruling of the trial court that dismissed the Appellant's application seeking to enlarge time to file a suit out of time.
2. The fact of the case is that the Appellant herein by way of a plaint dated 17/7/2020 sought numerous orders on account of defamatory statements published by the Respondents.
3. In response to the claim, the Respondents filed their defence and a Notice of Preliminary Objection all dated 13/10/2020. The Preliminary Objection sought *inter alia* to have the Appellant's suit dismissed with costs for being time barred by virtue of Section 4 (2) of the [Limitations of Actions Act](#).



4. Subsequently, vide the Notice of Motion dated 23/06/2021, the Appellant filed an application seeking enlargement of time of filing the suit out of time. The Preliminary Objection and the Application were canvassed by way of written submissions. After considering the application and submissions filed by the parties, the trial Magistrate rendered his ruling on 17/11/2021. In this Ruling, the trial court upheld the Preliminary Objection and dismissed the Application.
5. The grounds for dismissal of the Application with costs were that the Application was only filed after the Respondent raised the objection; the delay in seeking leave has not been explained and there are no sufficient reasons advanced as to why the court should extend and enlarge time to file.
6. Aggrieved by the said ruling the appellant lodged this Appeal seeking that the entire ruling against the Appellant be set aside ex dubito justitiae and costs of this Appeal be awarded to the Appellant. The Appeal is based on the following grounds:
 - a. That the learned trial Magistrate misdirected himself and erred both in fact and in law in dismissing the Plaintiff's Notice of Motion Application dated 23/06/21 for the reason that no sufficient reasons were advanced to the court on why time to file suit should be enlarged.
 - b. That the learned trial Magistrate misdirected himself and erred both in fact and in law by allowing the Preliminary Objection dated 13/10/2020.
 - c. That the learned trial Magistrate misdirected himself and erred both in fact and in law in dismissing the Plaintiff's Notice of Motion Application dated 23/06/21 and effectively denying the Plaintiff the opportunity to be heard on merit despite having triable issues.
 - d. That the learned trial Magistrate misdirected himself and erred both in fact and in law by totally ignoring the Appellant's submissions and authorities cited and provided.
 - e. That the Learned trial Magistrate misdirected himself and erred both in fact and in law by failing to uphold precedent and doctrine of stare decisis.
 - f. That the impugned ruling contravenes and contradicts established case law.
7. The Appeal was canvassed by way of written submissions. The Appellant's submissions were dated 21/5/2024 while the Respondents' submissions were dated 12/6/2024.
8. It is important to also note that on 26/6/2024 when the matter came up for highlighting of submissions, the Appellant's counsel only sought to rely on the written ones while the Respondents' counsel highlighted his submissions.

Appellant's submissions

9. The Appellant sets out three issues for determination, namely: what are the principles for enlarging time to file a suit out of time; whether the ruling effectively considered these principles; and who should bear the costs of the suit.
10. On the first issue, regarding the principles for enlarging time to file a suit out of time, the Appellant urged that this court has discretion to extend time even on claims based on defamation. Reliance was placed on the case of *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe* [2017] eKLR, which was also referred to in the case of *Royal Media Services Ltd v Valentine Mugure & Another* [2019] eKLR, and *Nation Media Group Limited & 2 others v Margaret Kamene Wambua* [2021] eKLR where the courts examined Section 4(2) of the *Limitations of Actions Act* and held that the courts have discretion to extend time, even when the claim is based on defamation.



11. On the second issue, it was argued that the trial court did not effectively consider the principles of enlarging time to file the suit out of time. The Appellant contended that her justification for filing the suit 46 days after the prescribed period of 12 months was due to Covid-19 restrictions. Further, that although the suit was filed out of time, the Respondents did not suffer any injurious prejudice, and therefore the jurisdiction of the trial court should not have been ousted. They urged the court to exercise its power under section 3A of the *Civil Procedure Act* and grant the prayers sought. To support this argument reference was made to the case of *Ratnam v Cumarasamy* (1964) 3 ALL ER.
12. On the issue of costs, the Appellant submitted that, the ruling in the lower court was arrived at without correctly applying the law as a result of which the Appellant's quest for justice, was delayed thus the costs of the appeal should be awarded to them.

Respondents' submissions

13. The Respondents, in opposing this appeal, submitted that the *Limitation of Actions Act* provides a limitation period of one year within which a defamation suit ought to have been filed. They submitted that the cause of action arose on 31st May 2019, the limitation period lapsed on 30th May 2020, yet the Appellant filed her suit on 31st July 2020.
14. The Respondents further submitted that a Defence and Preliminary Objection raising the issue of limitation of time was filed on 15th October 2020, and thereafter, on 24th June 2021, the Appellant filed an application seeking orders for enlargement of time to file the suit out of time. It was the Respondents' submission that the Appellant ought to have filed the application before filing the suit. The Respondents argued that that the reason for the delay, being attributed to Covid-19 and the summer vacation, would have been excusable if the application had been filed first.
15. Reliance was placed in the Supreme court case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR setting considerations to guide courts in exercising its discretion to extend time. The Respondents also relied in the case of *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC 22.
16. The Respondents submitted that the authorities cited by the Appellant in their submissions are irrelevant to the facts of this case and are distinguishable from the present case. Consequently, they do not bear relevance.
17. The Respondent further submitted that the trial court was correct in dismissing the application for an extension of time and upholding the Preliminary Objection based on the principles governing the extension of time. They urged that the appeal lacks merit, and the same be dismissed.

Analysis and Determination

18. Having considered the grounds of appeal, submissions, and the entire record of appeal, the only issue for determination is whether the trial court erred in failing to enlarge the time for filing suit out of time.
19. The facts of this case are that the Appellant by way of a plaint dated 17th July 2020 and filed on 22nd July 2020 sought compensation against the Respondents for published defamatory statements. From the particulars of the claim, the cause of action is alleged to have been defamatory statement said to have been published on the 31st May 2019.
20. Section 4(a) of the Limitation Actions Act require defamatory claims to be filed within one year of their occurrence. Therefore, in principle, it is undisputed that the Appellant's claim before the lower court was filed 46 days beyond the prescribed statutory time.



21. A perusal of the record show the following chronology of events; the alleged defamatory statement/libel was printed out on 31/5/2019; the Appellant filed a plaint dated 17/07/2020 together with the accompanying documents; the Respondent filed a Statement of Defence dated 13/10/2020 together with a Preliminary Objection that the suit is time barred; the Appellant filed his Application dated 23/6/21 seeking to extend time to file the claim.
22. A further perusal of the record show that leave was being sought after the suit had been filed and an objection that it was time barred raised by the Respondent. Consequently, this creates a legal conundrum where a substantive matter is filed, then the party filing by way of an Application filed in the substantive suit seeks that extension of time be granted for the filing of the suit. The question that then arise is whether an application for extension of time to file suit out of time can be brought within the suit filed after the time has lapsed or whether this is an acceptable process sought to sanitize the process.
23. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. (Nick Salat Case) in addressing the issue of extension of time, held as follows:

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record. (Emphasis added)
24. Outrightly, drawing analogy and guidance from the above case where the supreme court frowned upon the untidy practice where a party files a matter out of time and without leave, and then moves the court to seek leave to file the same. This is akin to anticipating court orders where parties hold this notion that the court will sanitize their errors by issuing extension as a matter of course.
25. This court notes that the Appellant acknowledges that his claim was time barred hence the need to file the application for extension. This procedure adopted by the Appellant is not correct. An act done beyond the time set out and without leave of court is a nullity. It is worth emphasizing that where time has lapsed, a party has to first seek extension of time and only after such extension has been granted, that which ought to have been done within the lapsed timeframe can now be done. Any act done without leave is a nullity.
26. Consequently, the substantive claim before the trial having been filed without leave of court is improper before court. The claim is a nullity and of no legal consequence since it was filed without seeking leave to file it out of time. What is more, the Appellant filed his application as a reaction to the Respondent’s objection on the same issue. The same is struck out with costs. Having struck out



the suit upon which the Application for extension of time was sought, to sanitize the illegality, the Application has no base and grounds to stand. The same is also struck out.

27. In the circumstances therefore and guided by the Supreme Court decision, I do agree with the Respondents' submissions that the appellant ought to have first filed the application to extend time before filing the plaint. This Appeal therefore lacks merit and is dismissed with costs
28. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER 2024

For Appellant:

For Respondents:

Court Assistant:

