



Munyoki & another (As the Legal Representatives and Administrators of the Estate of Joseph Sukure Sukuer - Deceased) v Wekesa (Legal Representative & Administrator of the Estate of Peter Mukhwana Wekesa - Deceased) (Miscellaneous Civil Cause E150 of 2023) [2023] KEHC 27588 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 27588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL CAUSE E150 OF 2023**

F WANGARI, J

SEPTEMBER 29, 2023

BETWEEN

RHODA KAVUTHA MUNYOKI 1ST APPLICANT

BENEDICT OIPAKI SUKUMER 2ND APPLICANT

**AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE
ESTATE OF JOSEPH SUKURE SUKUER - DECEASED**

AND

**VICTOR KHISA WEKESA (LEGAL REPRESENTATIVE & ADMINISTRATOR
OF THE ESTATE OF PETER MUKHWANA WEKESA -
DECEASED) RESPONDENT**

RULING

1. The Applicant being the legal representatives of the deceased passenger, via the Ex-Parte Originating Summons dated 15/6/2023 sought for the leave to file suit out of time against the Respondent who is the legal representative of the deceased driver.
2. The background of this application is that on 5/11/2017, Joseph Sukure (deceased) was a passenger in the vehicle being driven by Peter Mukhwana (deceased) when they got involved in an accident causing fatal injuries to both. The Applicants explained the challenges that they faced which were beyond their control, before Grant of Letters of Administration were issued on 3/3/2020.
3. Pleadings were lodged in Kajiado High Court on 26/8/2020 since the Respondent had been issued with the Grant of Representation Intestate, but they were rejected and directed that they file in Mombasa High Court, as the accident occurred within the jurisdiction of the court.



4. The Applicants filed a suit against the Respondent for recovery of damages, both special and general, under the *Law Reform Act* and the *Fatal Accidents Act*, in Mombasa High Court Civil Suit No. 65 of 2020. The matter proceeded for hearing and judgment delivered on 24/2/2023 by Hon. Lady Justice D.O. Chepkwony.
5. The suit by the Applicants was struck out on grounds that it was time barred and it offended the provisions under Section 2(3) of the *Law Reform Act* and Section 9(b) of the *Fatal Accidents Act* by filing the suit 5 days past time. The judge ruled that the Applicants were at liberty to ‘properly move the court’ hence the filing of this application.

Analysis and determination

6. The Supreme Court in the case of County Executive of Kisumu vs. County Government of Kisumu and 8 Others (2017) eKLR delineated the principals that a court should consider in exercise of the discretion to extend time as held in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR, and they are as follows;
 - a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like the election petitions, public interest should be a consideration for extending time.
7. As stated earlier, the Applicant explained the reason as to why there was a 5 days’ delay in filing the Mombasa High Court suit that was struck out. I find that the reasons given are reasonable considering that a suit had been filed in Kajiado within the time given, but after they were redirected to file the suit in Mombasa.
8. Further, the suit was not heard and determined on merit. The trial court found that it had no jurisdiction to deal with the issues identified for identification as the suit was time barred by 5 days at the time of filing the suit.
9. On the issue of costs, it is settled that the same follows the event. That is the import of Section 27 of the *Civil Procedure Act*. This being an ex-parte application, there shall be no orders as to costs.
10. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The ex-parte application dated June 15, 2023 is hereby allowed on the following terms;
 - i. Leave is hereby granted to file suit out of time
 - ii. The suit be filed and served within the next 30 days



b. No orders as to costs

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 29TH DAY OF SEPTEMBER, 2023.

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F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of;

Muyaa Advocate for the Applicants

Barile, Court Assistant

