



**Nthamburi v Peter (Civil Appeal E093 of 2021)
[2022] KEHC 15945 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E093 OF 2021
EM MURIITHI, J
NOVEMBER 30, 2022**

BETWEEN

ERICK GITONGA NTHAMBURI APPELLANT

AND

MURITHI BUNDI PETER RESPONDENT

*(Being an appeal from the Ruling and order of Hon. S. N. Ndegwa
(SPM) delivered on 28/6/2021 in Githongo SPMCC No. 21 of 2019)*

JUDGMENT

1. The appellant, the plaintiff in the trial court, filed an application dated February 8, 2021 before the trial court seeking extension of time to file the suit, and that the suit therein be validated and be deemed to have been properly filed. The trial court by its ruling of June 28, 2021 proceeded to strike out both the application and the suit, for having been filed out of time in contravention of sections 4(2), 27 and 28 of the [Limitation of Actions Act](#).
2. Aggrieved by that decision, the appellant filed a memorandum of appeal in this court on July 23, 2021 setting out 3 grounds of appeal as follows:
 1. The learned trial magistrate erred in law by failing to appreciate that section 28 (3) of the [Limitation of Actions Act](#) allowed for the filing of an application to validate a suit filed out of time.
 2. The learned trial magistrate erred in law and fact by failing to find that the filing of the suit out of time was an advertent mistake since the police abstract had two dates of the occurrence of the accident and that the reliance on the wrong date by the advocate ought not to be visited upon the appellant.



3. The learned trial magistrate erred in law and fact by failing to interpret the provisions of section 30 (5) of the [Limitation of Actions Act](#), in favour of the appellant.

Duty of the court

3. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).

Submissions

4. The Appellant urges that section 28 (3) of the [Limitation of Actions Act](#) allows for the filing of an application to validate a suit filed out of time, and cites [Hellen Kiramana v PCEA Kikuyu Hospital \(2016\) eKLR](#) and [Eldoret Steel Mills Ltd v Evans Makori Michael \(2018\) eKLR](#). He urges that there was a genuine mistake on the police abstract filed by the police, whereby it gave two dates of the occurrence of the accident, which mistake was discovered when he sought leave to amend the plaint, and relies on [Peter Butali Sabwami and Ida Nekoye Sabwami v Registered Trustees, Archdiocese of Nairobi Kenya & 2 Others \(2016\) eKLR](#). He faults the trial court for erroneously striking out his application and the suit, yet the Respondent did not rebut the affidavit evidence he had adduced, and urges the court to allow his appeal. He urges that his reliance on the legal advice by his counsel, which advice constituted material facts envisaged by sections 27, 28 and 29 of the [Limitation of Actions Act](#), should not prejudice his suit for compensation due to the injuries he sustained, and cites [Bernard Njuguna Karanja & Anor v Hyness Mutavi Kivuva \(2016\) eKLR](#).
5. The respondent urges that the impugned ruling is legally sound and takes cognizance of the applicable facts and laws. He submits that the provisions of section 30 (5) of the [Limitation of Actions Act](#) are not a panacea for negligence and indolence of outright unreasonable conclusions by the appellant, and the award of extension of time is an equitable remedy, thus the pleader must satisfy the court's reasoning that they qualify under equity. He urges the court to uphold the impugned ruling and dismiss the appeal with costs.

Analysis and determination

6. The issue for determination is whether the striking out of the application dated February 8, 2021 and the suit by the trial court was proper.
7. Section 27 of the [Limitation of Actions Act](#) provides for extension of limitation period in case of ignorance of material facts in actions for negligence, etc as follows:
 - (1) Section 4(2) does not afford a defence to an action founded on tort where—
 - (a) The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
 - (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character



which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

- (a) Either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
 - (b) In either case, was a date not earlier than one year before the date on which the action was brought.
 - (3) This section does not exclude or otherwise affect—
 - (a) Any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) The operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.'
8. Section 28 of that Act provides for application for leave of court under section 27 as follows:
- (1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
 - (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
 - (a) To establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - (b) To fulfil the requirements of section 27 (2) of this Act in relation to that cause of action.
 - (3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—
 - (a) To establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - (b) To fulfil the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.
 - (4) In this section, 'relevant action' in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required. (5) In this section and in section 27 of this Act 'court', in relation to an action, means the court in which the action has been or is intended to be brought.'



9. Section 30 (5) of that Act provides for interpretation of sections 27, 28 and 29 as follows:

' In this section, 'appropriate advice' in relation to any fact or circumstances, means 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.'

10. In order to succeed in his quest for extension of time to file his suit, the appellant must prove that a material fact or facts regarding the cause of action were outside his knowledge and that he only came by it after the period of limitation had passed or within the last one year of that period.

11. The cause of action herein arose on March 19, 2016 when the accident occurred, and the suit ought to have been filed 3 years from that date which was March 19, 2019, but it was filed way later on July 19, 2019. The reason offered for the delayed filing of the suit is the discrepancy in the date of the occurrence of the accident as indicated in the police abstract to be March 19, 2018. It is contended that the appellant's counsel erroneously relied on March 19, 2018 as the date of the accident and the mistake was only discovered after leave to amend the plaint had been sought and granted. The respondent responded to the application by filing a notice of preliminary objection on March 17, 2021.

12. It is true that the date of the accident is captured in the police abstract to be March 19, 2018 which date was repeatedly used by the appellant in his pleadings as well as by the respondent in his statement of defence.

13. In dismissing the appellant's application dated February 8, 2021, the trial court rendered itself thus:

' In the instant case, the plaintiff filed this application almost two years after filing the suit in court. This court cannot act beyond the express provisions of the law and extend the period of filing the suit out of time for which the law does not allow or where the requirements which are specifically set have not been satisfied and more so, after the suit has already been filed. It is trite law that equity follow the law and equity aids the vigilant and not the indolent. I find that the plaintiff/applicant has failed to show or demonstrate that the material facts giving rise to his alleged claim were not within his knowledge and his advocate's claim that he only relied on the police abstract which stated the accident occurred on March 19, 2018 the documents annexed to the plaint proves the contrary that is:

- i. Receipt from Cottolengo Mission Hospital is dated March 15, 2017
- ii. P3 form indicates that the date and time the accident was reported to the police was on March 19, 2016 at 2110 hours and was reported vide OB No 14/19/3/2016
- iii. Discharge summary from Cottolengo Mission Hospital proves that the plaintiff was admitted on October 1, 2016 and discharged on November 11, 2016
- iv. Radiology report from Meru Medical Diagnostic Centre is dated February 21, 2017. Treatment sheet from Cottolengo Mission Hospital dated March 15, 2017.

It is therefore evident that the plaintiff/ applicant has not satisfied the requirements of the relevant section of the Law of Limitation of Actions Act nor has he given valid reasons which caused him to file the suit herein after the expiry of the three year period and file this application two years after filing the suit therein. The suit herein was filed out of time in



contravention of sections 4(2), 27 and 28 of the Limitation of Actions Act. It then follows that both the application and the suit herein are struck out in their entirety.'

14. This court agrees with the trial court that apart from the police abstract, all the other supportive documents annexed to the plaint bear the correct date of the accident to be March 19, 2016. Besides, it was expected that the appellant would without any difficulty remember the date he was involved in the subject accident and guide his advocate appropriately. The plaintiff could not demonstrate that a material fact as the occurrence of the accident which establishes the cause of action was unknown to him until the discovery of the error in the police abstract as to the date of the accident.
15. This court finds that the dismissal of the appellant's application of February 8, 2021 by the trial court was well founded on principle, and there is no occasion for exercise of the appellate court's jurisdiction to interfere with the exercise of discretion by the trial court.

Orders

16. Accordingly, for the reasons set out above, the court finds no merit in the appellant's appeal and it is, consequently, dismissed with costs to the respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF NOVEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Mwirigi Kaburu & Co. Advocates for the Appellant.

M/S Kiruki & Kayika Advocates for the Respondent.

