



**Ng'ang'a ((Suing as the personal representative of the estate of Peter Kariuki
Ng'ang'a (Deceased)) v Waithanji & another (Miscellaneous Civil Suit E523 of 2021)
[2022] KEHC 16460 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL SUIT E523 OF 2021
DO CHEPKWONY, J
NOVEMBER 24, 2022**

BETWEEN

**PATRICK NDUNG'U NG'ANG'A APPLICANT
(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER
KARIUKI NG'ANG'A (DECEASED)**

AND

**JAMES WAIKABA WAITHANJI 1ST RESPONDENT
JOHN KAIRO 2ND RESPONDENT**

RULING

1. Before this court for determination is an originating summons application dated October 15, 2021, seeking for orders that;
 - a. This honourable court be pleased to grant the applicant herein leave to file a suit out of time against the 1st and 2nd respondents;
 - b. This honourable court be pleased to give further orders and/or directions as it may deem fit and just to grant in the circumstances;
 - c. The costs of this Application be in the cause.
2. The application is premised on the grounds on its face and the depositions in the supporting affidavit of Patrick Ndungu Ng'anga sworn on 1 October 5, 2021. The Applicant's case is that on or about the 17th day of June, 2018 at about 8:40 pm along Race Course Road Nairobi, the 2nd respondent while driving Motor Vehicle Registration Number KCN 037Y belonging to the 1st respondent, fatally injured Mr.



Patrick Kariuki Ng'anga (the deceased) who was then a lawful passenger. That the applicant filed as Succession Cause No. 1366 of 2019 but it was not until the 25th of August, 2021, that the Limited Grant of Letters of Administration Ad Litem were issued by the High Court. Nonetheless, the three (3) year limitation period for filing suit on behalf of the deceased's estate ended on June 17, 2021 for reason beyond the applicant's control. He avers that it was until the 15th day of October, 2021 that he was able to get into consensus with his parents and siblings on instructing an advocate given that they do not reside in one place but in far apart places. The applicant prays that this honourable court exercises its inherent discretion to his favour and allow the Application as prayed since as he thinks the delay was caused by factors beyond his control.

3. On March 28, 2022, parties were directed to dispose of the application dated October 15, 2021 and the applicant filed submissions dated 1st April, 2022 in support of his application.

Analysis and Determination

4. I have read through the grounds set out in support of the application, the written submissions filed by each party alongside cited statute and case law in determining the issue of whether the applicant has made a case for extension of time as sought.
5. The Supreme court of Kenya in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* (2017) eKLR [Civil Application No.3 of 2016] laid down the principles to be considered with regard to extension of time 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.
6. In the present case, the Applicant intends to file a tortious claim of negligence whose time limit is capped at three years as per section 4 (2) of the *Limitation of Actions Act*, cap 22 Laws of Kenya, which provides as follows:-

“4 (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

7. In addition, section 27(1) of the said Act gives this court the jurisdiction to extend time. It provides;

(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.

8. The Court of Appeal in the case of *Willis Onditi Odhiambo v Gateway Insurance Co Limited* [2014]eKLR gave more meaning to Section 27 and thus held;

“Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort”

9. Similarly, the court in the case of *Mary Osundwa v Nzoia Sugar Co Ltd* [2002] eKLR considered section 27 of the *Limitation of Actions Act* and held as follows:-

“This Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and claimed are in respect of personal injuries to the Plaintiff as a result of the tort”.

10. Therefore, this being a tortious claim of negligence arising from a road traffic accident, the question begging an answer is the extent and cause of delay attributed by the applicant. He submitted that there was delay in getting the Grant Ad Litem for purposes of filing the tortious suit. In that regard, I have perused the annexed Petition of Letters of Administration Ad Litem dated October 15, 2019 and marked as PNN-2. I can confirm that on October 24, 2019, the court was moved when the period to file the suit was still open. The attached grant of letters of administration also confirm that it was issued on August 25, 2021 way after the time of filing the tortious suit had lapsed on June 17, 2020. Equally, as sought, judicial notice is taken of the impact and consequences of Covid-19 pandemic on court operations for the better part of the year, 2020 when the applicant was in the process of obtaining the letters.

11. Owing to the above discussion, I am persuaded that the circumstances leading to the lapse of time in filing the tortious suit were beyond the control of the applicant. I therefore find merit in the instant Application and the same is hereby allowed as prayed in the following terms:-

- a. The applicant be and is hereby granted leave to file and serve a suit out of time against the 1st and 2nd defendants.
- b. The respondent is granted costs of the Application or suit.

It is so hereby ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF
NOVEMBER, 2022.**

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Nyaseme holding brief for Mr. Kibet for Applicant

Court Assistant - Sakina

