



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO. E21 OF 2020

JULIANA ELIZABETH ATIENO &

ALPHONCE OMONDI MBOGO

(Suing as the personal representatives and

Legal administrators of the estate of

IRENE AKOTH MBOGO (Deceased).....APPLICANT

VERSUS

MAYFAIR HOLDINGS LIMITED.....RESPONDENT

RULING

The application before me has been brought pursuant to **Sections 1B (1) and 3A of the Civil Procedure Act**, as read together with **Order 50 Rule 6 of the Civil Procedure Rules**.

1. The Applicant was seeking leave to file suit out of time.
2. The claim is said to have arisen from a fatal road traffic accident which happened on 5th June 2017.
3. The accident in question claimed the life of **IRENE AKOTH MBOGO**. Following her demise, the Applicants, **JULIANA ELIZABETH ATIENO** and **ALPHONCE OMONDI MBOGO**, (have moved this Court in their capacities as the Personal Representatives and Legal Administrators of the estate of **Irene Akoth Mbogo**).
4. The Applicants say that they are desirous of filing suit against the Respondent to recover both General and Special Damages which are due to the estate of the deceased, following her premature death.
5. The intended claim is founded upon the alleged negligence on the part of the person who was driving a vehicle belonging to the intended Defendant.
6. The Applicants have said that the reason for the delay in instituting proceedings is that the deceased was an orphan, and secondly that her siblings were so destitute that they were compelled to hold several fundraisers, in order to get the funds required to meet the professional fees and court fees.
7. The Applicants also said that by 25th March 2020, when they had an appointment at their advocates office;

“... courts had been closed owing to the Covid-19 pandemic, and have lately become fully functional.”

8. It is in those circumstances, that the Applicants found themselves unable to file suit within the time allowed by law.
9. The Applicants hold the view that their failure to act in time is excusable, inadvertent and a misadventure which was worsened by natural calamity, which they believe ought not to impede their constitutional right to access justice.
10. In the case of **WAMBUI NGUGI Vs KENYA RAILWAYS & ANOTHER, HIGH COURT MISC. APPLICATION NO. 213 OF 1989**, the learned Judge held as follows;

“When an application is made under the Limitation Act, a Judge in chambers should not grant leave as a matter of course. He should carefully scrutinize the case to see whether it is a proper one for leave.”

11. I have given due consideration to the material which the Applicants placed before the court. It shows that the substantive reason for the delay is the financial inability of the Applicants to pay professional fees and court fees.

12. Pursuant to the provisions of **Section 27 (2)** of the **Limitation of Actions Act**, the court may grant an extension of time within which a suit may be filed;

“..... 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”

13. I find that the Applicants failed to meet that specific requirement of the law.

14. In the case of **PETER GICHUKI MWANGI Vs KENYA COPYRIGHT BOARD & 3 OTHERS, HIGH COURT MISC. SUIT NO. 259 OF 2018**, the court held as follows;

“The two annexures do not show that the Applicant was sick since 2013 and that he was not financially capable of instituting the suit claiming damages for malicious prosecution the entire period.

He further failed to show that, if he was financially crippled, what attempts were made to enforce his alleged claim as a pauper under Order 33 of the Civil Procedure Rules, 2010.

Further, it should be noted that the Section relied upon by the Applicant, thus Sections 27 and 28 of the Limitation of Actions Act, do not recognize sickness or financial inability as grounds for extension of time to institute a statutory barred claim. The said Sections are so specific as to the requirements, and cannot be construed in any other manner than as drawn.”

15. In this instance, the Applicants did not specifically invoke the provisions of **Section 27** or **28** of the **Limitation of Actions Act**. However, I find that when the court is called upon to grant an extension of time to file suit, the Court must derive guidance from the **Limitation of Acts Act**, as it is that statute that expressly grants the requisite power and authority to the court, to grant extension of time.

16. Secondly, I find that it is not an accurate statement of fact, that as at 25th March 2020, the Courts in Kenya had closed down due to the Covid-19 pandemic. I am aware that the Judiciary scaled-down its operations, by complying with the protocols issued by the Ministry of Health and the National Council for the Administration of Justice. The reality was to limit operations in open courts, whereupon virtual court sessions became the “*new normal*”.

17. Even as at March 2021, when the Applicants say that the courts have become “*fully functional*”, we are still primarily having virtual courts.

18. But in any event, I find that there is no explanation tendered by the Applicants, for the delay between March 2020, (when they instructed their lawyers), and 24th November 2020, when the current application was filed.

19. Between 25th March 2020 and 4th June 2020 (when the suit became time-barred), there was sufficient time to file suit.

20. But if there was a good reason for not filing suit during that period, it has not been brought to the attention of the court.

21. Furthermore, there is no explanation for the delay in bringing this application, between June 2020 and November 2020.

22. In the circumstances, I find no merit in the application dated 24th November 2020: The same is therefore dismissed.

DATED, SIGNED and DELIVERED at KISUMU This 24th day of March 2021

FRED A. OCHIENG

JUDGE