



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL APPEAL NO. 6 OF 2021**

**RUTH SYOKAU KILUNDA &**

**TERESIA MUNYALO KISINGU**

**(both suing as the legal administrators and legal representatives of the estate of**

**MWENDWA MUNYALO.....APPELLANTS**

**VERSUS**

**EPHANTUS MWANGI MACHARIA..... 1<sup>ST</sup> RESPONDENT**

**DAVID MAINA KANJA..... 2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Ruling of Hon. N. C. Adalo (RM) dated 12<sup>th</sup> January 2021 at Mariakani in Civil Suit No. 110 of 2020)***

**Coram: Hon. Justice R. Nyakundi**

**Janet Jackson & Susan LLP Advocates for the Appellant**

**Respondents in person**

**RULING**

This appeal stems from the decision of the trial Court dated 12.1.2021 dismissing the application filed by the appellant for leave to extend time to file a claim for damages under the Fatal Accidents Act.

**Background**

The facts of the case at the trial can fairly be described as straight forward as deduced from the Plaintiff dated 17.8.2020. In connection with the trial of the claim, the appellant lodged a Plaintiff for Judgement against the respondents in special damages, general damages under the Fatal Accident Act and Law Reform Acts, costs of the same and interest. That action was on account which occurred on or about 16.8.2017 along – Kaloleni – Mwakirunge Road where the deceased collided with Motor vehicle Registration No. KAC 598M, was so negligently driven, it lost control and ran over the deceased.

In respect of this cause of action, the appellant was required to proceed with the following of the claim within the statutory period of (3) three years. On behalf of the estate of the deceased, it is clear that the appellant did file the claim but outside the statutory period of three (3) years.

Regrettably however, the Court on considering the matter took the view that the evidence on material factors which arises by operations of Law under Section 27 and 28 of Limitation Act had not been satisfied by the appellant. On appeal the question then is whether, the discretion so exercised was wrong in principle or misdirection of the facts and the Law for the appellate Court to interfere with it.

**Determination**

The Limitation Act was intended to give effect substantially to the limitations period for the various cause of action and for the defendants

not to be confronted with state claims. The most important to note is that actions in negligence for personal injury must be brought within three (3) years, after the cause of action as strictly provided for under Section 4 of the Limitations of Actions Act. It is obvious the cause of action arises the moment the wrong is committed.

As to the expiration of the time for bringing action, the rule is that the last day is the anniversary of the day on which the cause of action arose. If the appellant failed to bring the Law suit within the required period of time of three (3) years, the statute of limitations will generally bar her claim and dismiss it the way it did in the impugned Ruling.

In our jurisdiction a claim before a Court of Law extends the time available for the institution of proceedings out of time, the Court must be satisfied that in all the circumstances of the case, Sections 27 and 28 of the Limitations Act have been satisfied.

That the facts material to the plaintiffs' case were not ascertained by him until sometime after three (3) months before the expiration of the limitation period or occurring after the expiration of that period. That the plaintiffs' failure to institute the action within the limitation period resulted from material facts relating to the cause of action were or included facts of a decisive character ascertained by him or her not earlier than one year before the end of that period of limitation.

The judicial discretion is therefore based on these discoverability principles. There is no alternative statutory discoverability provision in which the Court can exercise discretion to grant leave for a suit to be filed out of time.

In the instant case, the appellant reason for the delay to file the suit for damages in time arose from the fact of not having an identity card and the circumstances surrounding Covid – 19- pandemic. The reasons why the appellant failed to commence the action within the statutory limitation period is neither covered by the provisions of Section 27 and 28 of the Act nor does it qualify as material of a decisive character. The extent to which the appellant acted promptly and reasonably once she knew that the alleged act or omission of the respondent might be capable of giving rise to an action of damages largely remains unexplained in the affidavit evidence.

The date of knowledge was either the appellant had within her means of knowledge all material facts of a decisive character relating to the cause of action. Under Section 27, 28 and 30 of the Limitations Act construed purposively the material facts of which the appellant was required to have knowledge, in my view can be stated to consist the following characterization:

***(a). The fact that personal injuries resulting from the negligence of the respondent due to the accident which occurred on 16.8.2017 constituted that cause of action for damages.***

***(b). The nature and the extent of personal injuries or disability suffered by the deceased resulting from that accident were of a decisive character to influence the discretion of the Court to extend time.***

***(c). The fact that the personal injuries so resulting were attributable to the negligence or breach of duty to the extent which any one of those personal injuries were so attributable.***

In the present case, it seems to me that the appellant had both the actual and constructive knowledge that the fatal injury was significant capable of instituting proceedings for damages on behalf of the estate. It is irrelevant that she did not have an identity card and the Covid-19 pandemic became a barrier in instituting the suit within the statutory period of three (3) years. These difficulties do not accord a remedy to the appellant within the scope of Section 27 and 28 of the Limitations of Actions Act. It is stressed that justice to the appellants required some sacrifice in order to bring herself within the statutory time limit of three (3) years.

Bearing in mind the guiding principles of the limitation period of three (3) years under Section 4 (1) of the Limitations of Actions Act, the suit for damages was statutorily barred irrespective of the reasons given at the trial Court. The Law has no difficulty in permitting extension of time save on the existence of discoverability of material of a decisive character as stipulated under Section 27 and 28 of the Act.

With legal sympathy, I am certain of one thing, namely the appellants appeal lacks merit. I would dismiss this appeal with costs.

**DATED, SIGNED AND DELIVERED via email AT MALINDI THIS 30<sup>TH</sup> DAY OF JULY, 2021**

.....

**R. NYAKUNDI**

**JUDGE**

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