REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL CASE NO. 175 OF 2019

RE *(suing as legal representative of the estate of*

SEO - DECEASED)..APPLICANT

-VERSUS-

DR. AGGREY OTIENO AKULA................................1ST RESPONDENT

JALARAM NURSING & MATERNITY HOME......2ND RESPONDENT

RULING

The Applicant, **RE**, has moved the court in her capacity as the Legal Representative of the Estate of **SEO** (Deceased).

1. The application is for leave to file and to litigate the Applicant's *"Intended Plaint"* out of time.

2. When the application first came up before me, on 9th September 2019, I directed that the Applicant should serve it upon the Respondents.

3. After the Respondents had been served, they filed their respective replying affidavits. Thereafter, the application was canvassed by way of written submissions.

4. It was the Applicant's case that the Respondents acted negligently in the manner they had accorded medical treatment to SEO, resulting in her death.

5. The acts complained about are said to have taken place on 30th July 2015 and on 1st August 2015.

6. Following the demise of S, a complaint was lodged at the **MEDICAL PRACTITIONERS AND DENTISTS BOARD**, on 11th November 2015.

7. On 18th March 2016 the Preliminary Inquiry Committee of the Medical Practitioners and Dentists Board delivered its Ruling on the Complaint.

8. The Committee's conclusion was that the 1st Respondent be admonished for;

> ***"…… failing to prepare well and adequately prior to undertaking a caesarean section to patient with a low-lying uterine myomas notwith- standing the anticipated and well documented postpartum haemorrhage for caesarean section in such patients."***

9. The Committee noted that due to the condition of the patient, the 1st Respondent was expected to document the need for high alert and to be well prepared to mitigate the known risk for such patients.

10. The considered opinion of the Committee was that the caesarean section should have been undertaken in another facility, which was well equipped to handle the patient.

11. The said opinion was informed by the fact that the hospital herein, had at the material time, a poor emergency response.

12. The Applicant has pointed out that;

> ***"The current suit is necessary because since March 2016 todate, the family of the deceased, through the said complainant before the Tribunal has been trying to get both Respondents make an offer towards compensation of the deceased's family,and the two have remained adamant."***

13. The Applicant made it clear that because of the difficulties encountered by the family, in trying to get compensation, an Application was filed in court on 16th June 2016, seeking Letters of Administration.

14. Apart from that Application, which the Applicant identified as being **Probate & Administration Cause No. 53 of 2016**; the Applicant said;

> ***"Further, on the P & A Cause No. 43 of 2019, the Applicant approached the court for Locus to file this matter, and on the 23rd May; 2019, was issued with Limited Grant for purposes of filing this suit ……. "***

15. As the Applicant has indicated in her submissions, the one and only reason why she sought the Limited Grant was for purposes of filing the intended suit.

16. It is common ground that the matter before me is not the intended suit, in which the Estate of **SEO** would be seeking compensation from the Respondents.

17. The application before me is for leave to file the intended Plaint out of time.

18. Notwithstanding the said prayer in the application, the Applicant's submissions now suggest that there was no delay in lodging the intended suit.

19. If, as the Applicant now suggests, there was no delay in bringing the Plaint to court, that implies that this whole process was not necessary at all.

20. The **Limitation of Actions Act** stipulates as follows, at **Section 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."***

21. In this case, the intended suit was based on negligence, which is a tort. Therefore, the intended suit ought to have been instituted within 3 years from the date when the cause of action accrued.

22. From the Applicant's submissions, the matters about which the Respondents are alleged to have been negligent, occurred between 30th July 2015 and 1st August 2015. Therefore, the suit, if any, ought to have been instituted by 30th July 2018.

23. As no suit had been instituted by 11th September 2019, when the Applicant lodged the present application, there is no doubt that there was already a delay in instituting proceedings.

<u>Locus Standi</u>

24. The Respondents have submitted that the Applicant lacked the requisite locus standi to sustain the application.

25. It is common ground that on 13th May 2019 the Applicant filed **<u>SUCCESSION CAUSE NO. 43 OF 2019</u>**, through which she petitioned the Court for the;

> ***"Grant of Letters of Administration Ad Litem (is) to institute a medical negligence suit on behalf of the Estate of the deceased, which suit if not filed immediately might be barred by the statute of limitation Chapter 22 of the Laws of Kenya."***

26. From those words, which I have recited from the Certificate of Urgency dated 10th May 2019, it is clear that the Applicant was well aware that in order for her to acquire the requisite locus standi, she needed the Grant of Letters of Administration.

27. The Court promptly granted the Limited Grant of Letters of Administration Ad Litem, on 23rd May 2019. A copy of the same was exhibited before me, by the Applicant.

28. It is noteworthy that Hon. R. K. Ondieki SPM, who issued the Limited Grant, expressly stipulated that it was **LIMITED FOR A PERIOD OF 90 DAYS**. That means that before the end of August 2019, the Applicant should have filed the suit.

29. I find that because the Applicant had told the court that she was well aware that the suit should have been filed immediately, in order to avoid it being barred by the statute of limitation, she had every reason to act expeditiously in instituting the suit.

30. Upon the lapse of the 90 days from the date when the court issued the limited grant, the Applicant ceased to have any legal capacity to institute action on behalf of the Estate of SEO (Deceased).

31. Therefore, I find that the Applicant lacked locus standi to sustain these proceedings.

Exparte Proceedings

32. The Applicant submitted that the application for leave to file suit out of time, should be made exparte.

33. In the case of **MARY WAMBUI KABUGU Vs KENYA BUS SERVICES LIMITED, CIVIL APPEAL NO. 195 OF 1995**, the Court of Appeal said;

> ***"By virtue of Section 28 (1) of the Limitation of Actions Act, Cap. 22 Laws of Kenya (the Act), an application for leave of the superior court (for that matter the subordinate court) has to be made ex parte. The proposed defendant is not a party to that application. Indeed, he cannot be for the simple reason that Section 28 (1) mandated that such application* 'shall be made ex parte' …………."**

34. The Respondents have not challenged the provisions of **Section 28 (1)**, and I believe that that is because the wording is clear: that the application for leave is to be made exparte.

35. The person who makes an application is the Applicant. It was thus the responsibility of the Applicant to make the application ex parte.

36. In this case, she made a conscious decision to exclude from the heading of her Chamber Summons, the words;

> ***"Ex Parte"***

37. Secondly, the Applicant expressly indicated on her application that the said application was;

> ***"TO BE SERVED UPON;***
>
> ***1. DR. AGGREY OTIENO AKULA KISUMU***
>
> ***2. JALARAM NURSING AND MATERNITY HOME KISUMU***
>
> ***NOTE: "If any party served does not appear at the time and place above-mentioned, such order will be made and proceedings taken as the Court may think just and expedient."***

38. When the application was first placed before me on 9th September 2019, I directed that it be served upon the Respondents.

39. In making the Orders that the Respondents be served, I took into consideration the fact that the Applicant had indicated that the application was to be served upon the Respondents. In effect, it is the Applicant who did not make the application

ex parte. She made a choice to have it served.

40. I therefore find it strange that the Applicant now submits that the application ought to have proceeded ex parte.

41. Secondly, if the Applicant was intent on proceeding ex parte, she could have raised the issue at the earliest possible opportunity, to enable the court determine whether or not to allow the Respondents to participate in the hearing of the application.

42. Instead, the Applicant indicated on her application that she wished to serve the said application upon the Respondents, and thereafter she did not raise a preliminary objection to the participation of the Respondents.

43. In the circumstances, the Respondents filed their respective Replying Affidavits and also their submissions. I find no reason in law, or in fact, to either ignore or to expunge the materials which the Respondents have placed before the court.

44. I appreciate that ordinarily a Defendant would only challenge the leave which was granted to a Plaintiff to file suit out of time, when the case came up for hearing.

45. The Applicant herein has acknowledged, and rightly so, that when the court grants leave ex parte;

> ***"……. there is nothing final about it. It is merely provisional. The Defendants will have every opportunity of challenging the facts and the law afterwards, at the trial."***

46. In the circumstances, I hold the considered view that the Applicant who chooses to serve her application on the potential Defendants,

cannot be prejudiced when the Respondents are allowed the opportunity to respond to the application before the court determines whether or not to grant leave.

47. In the case of **REPUBLIC Vs JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & ANOTHER, EX PARTE WILFRED KARUGA KOINANGE & 3 OTHERS, MISC. APPLICATION NO. 359 OF 2003**, the Court expressed itself thus;

> ***"Clearly the interested party will have the right to challenge any leave granted ex parte herein to the applicants. So, if they have a right to challenge the leave after it has been granted, what is wrong in having them challenge the same before it is granted? Is it not logical that what can be done after, can also be done before in certain circumstances where the court considers it appropriate to do so?"***

48. In this case where the Applicant had previously made it known that she appreciated the need to be clothed with the requisite locus standi, and also that unless proceedings were instituted expeditiously, the whole claim could become barred by the statute of limitation, I find that interest of justice would be best served in hearing the Respondents at this stage, rather than wait until the case got to the stage of trial.

49. In the case of **OTIENO Vs OUGO & ANOTHER [1986 – 1989] EA 468** the court said;

> ***"…… an Administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as at the date of inception."***

50. In similar vein, I find that where the letters ad litem were issued, but the validity thereof had lapsed, the Applicant had no locus standi to bring this application, on the grounds that she was the Legal Representative of the Estate of SEO.

51. The application was incompetent at the date of its inception, as the Applicant lacked the requisite locus standi.

52. By way of further emphasis about that legal position, I cite the following words which were stated by a five-Judge bench of the Court of Appeal in **TROVISTIK UNION INTERNATIONAL & ANOTHER Vs JANE MBEYU & ANOTHER, CIVIL APPEAL NO. 145 OF 1990**;

> ***"To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone.***
>
> ***As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all inclusive answer. It says 'personal representative means executor or administrator of a deceased person.'***
>
> ***It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased.***
>
> ***The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act. Section 3 says 'administrator means a person to whom a grant of letters of administration has been made under this Act.'***

53. The Applicant did not hold any letters of administration at the time she lodged the present application. Therefore, she was not a personal representative of the Estate of the deceased.

54. In any event, the Applicant had all the necessary information required to institute proceedings, from as early as 18th March 2016, when the Medical Practitioners and Dentists Board found that the Respondents were accountable for what befell S.

55. By so saying, I am not suggesting that the cause of action accrued on that date. The said date is relevant because a professional tribunal made a finding which appears to put blame on the Respondents. It therefore provided an independent evaluation of what had transpired whilst S was being accorded medical attention by the Respondents.

56. As far as the cause of action was concerned, the same accrued from the date when the Respondents conducted their work in such manner as formed the basis for holding them accountable for the demise of S.

57. The cause of action accrued on 1st August 2015. Therefore, as at 11th September 2019 when the Applicant was moving the court, the delay was not for 13 days, as alluded to by the Applicant.

58. The 3 years' period, during which suit could have been filed, lapsed at the end of July 2018. Therefore the delay was already in excess of 13 months.

59. The Applicant has not provided the court with any explanation for the said delay. Therefore, even if the Applicant had had the requisite locus standi, I would still have rejected the application because it lacks merit.

60. In the result, the application dated 9th September 2019 is dismissed, with costs to the Respondents.

DATED, SIGNED and **DELIVERED** at **KISUMU** This **15th** day of **December** 2020

FRED A. OCHIENG

JUDGE