



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 351 OF 2015 (O.S)
IN THE MATTER OF THE LIMITATION OF ACTIONS
ACT (CHAPTER 22) OF THE LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION BY SARAH NJERI GICHERU &
ESTHER WAMBUI MWAURA FOR LEAVE TO FILE SUIT OUT OF TIME**

BETWEEN

SARAH NJERI GICHERU & ESTHER WAMBUI MWAURA (SUING

AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF

HENRY GICHERU MWAURA).....PLAINTIFFS/APPLICANTS

&

PATRICK KIMPIATU.....1ST DEFENDANT/RESPONDENT

P.C.E.A KIKUYU HOSPITAL.....2ND DEFENDANT/RESPONDENT

RULING

The Plaintiffs/Applicants (the “**Applicants**”), being the legal representatives of the estate of HENRY GICHERU MWAURA (the **Deceased**) filed an Originating Summons dated 19th June, 2017 under the provisions of section 27 of the Limitation of Actions Act seeking extension of time to file suit outside the limitation period and the proceedings and plaint filed on 25th November, 2015 to be deemed to have been filed out of time and that the same be admitted out of time. According to the Supporting Affidavit of **SARAH NJERI GICHERU**, the cause of action arose on 29th November, 2010 when the deceased died. The deceased had been admitted at the 2nd Respondent hospital on 19th November, 2010 after he was shot by robbers and after the next of kin was dissatisfied with the way he was being handled they requested for referral to another medical institution. It is averred that the referral was done 10 days later and it is upon arrival at the Kenyatta National Hospital (KNH) that the deceased succumbed to the injuries.

It is further deponed that the Applicants wrote a demand letter and the response from the Defendants’ insurer was that they hold the matter pending investigations. The Applicants also lodged a complaint with the Medical Practitioners and Dentists Board on 17th March, 2011 whose decision was rendered on 6th May, 2014 finding the Respondents guilty and recommending compensation. The Applicants aver that thereafter they entered into negotiations with the Respondents which did not materialise leading to filing of the instant suit on 25th November, 2015 by which time the statutory period within which to file the suit had lapsed.

I have considered the application and the affidavit in support. The effect of section 27 of the Limitation of Actions Act was elaborated in **Mary Osundwa v Sugar Company Limited [2002] Eklr** where the Court of Appeal held that: **“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort..”**

In this Application, the cause of action is founded on the tort of negligence and the applicant has explained the reasons for the delay in filing the Suit being that the Respondents' insurer had requested for the matter to be held in abeyance pending further enquiries. There was also a complaint with the Medical Practitioners and Dentists Board which took some time before it was finally determined.

The principles that a court should consider in exercising its jurisdiction to grant extension to file suit out of time were laid down by the Supreme Court in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR**, which are;

- (i) ***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;***
- (ii) ***a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***
- (iii) ***whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;***
- (iv) ***where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
- (v) ***whether there will be any prejudice suffered by the respondents, if extension is granted;***
- (vi) ***whether the application has been brought without undue delay; and***
- (vii) ***whether in certain cases, like election petitions, public interest should be a consideration for extending time” .***

I find that the Applicants have laid a basis to the satisfaction of this Court for the extension of time. The Respondents did not file a response to the application and I find that they will not be prejudiced in any way by an extension of time to file the suit out of time.

The application dated 19th June, 2017 is therefore granted as prayed. The Suit to be filed within 14 days from the date of this ruling. Costs shall be in the cause.

Dated, Signed and Delivered at Nairobi this 12th Day of April, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Applicant

..... For the Respondent