

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC.CIVIL APPLICATION NO. 63A OF 2017

DAVID KIBOR CHUMBA AND MILKA JEPCHUMBA (suing as the

Administrator and Administratrix, respectively, of the

Estate of the late PHILIPH KIPNGENO BOR).....APPLICANTS

-VERSUS-

MILCAH ROTICH RUTTO.....RESPONDENT

RULING

[1] The Applicants moved the Court *ex parte* vide the Notice of Motion dated **12 June 2017** for orders that leave be granted to them to file a suit out of time in connection with the Estate of the Deceased, the late **Philiph Kipngeno Bor**. The application was filed pursuant to **Sections 3 and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Section 4(2) of the Limitation of Actions Act** and all other enabling provisions of the law. It was premised on the grounds that the cause of action herein arose on **12 May 2014** when the Applicants' son and husband respectively passed away as a result of a fatal road accident; and that they applied for Limited Grant *ad Litem* on time, and the same was issued but the signing of the same delayed until **23 May 2017**, as the Honourable Judge who granted the Limited Grant *ad Litem* was away.

[2] It was further averred by the Applicants that they then filed an application dated **29 May 2017** at the Senior Principal Magistrate's Court at **Kapsabet** but the Court (**Hon. D. Alego, SPM**) directed that the application be filed before the High Court instead, as the High Court would be in a better position to understand the reasons for the delay. They added that no prejudice would be suffered on the part of the Respondent should the orders sought herein be granted. These grounds were expounded on in the joint affidavit of the Applicants sworn on **12 June 2017**, to which they annexed copies of the Limited Grant *ad Litem*, dated **23 May 2017**, the pleadings, witness statements and documents in respect of the proposed suit, as well as the *ex parte* application dated **29 May 2017** which was filed before the Senior Principal Magistrate, Kapsabet.

[3] Having perused and considered the proposed Complaint and the documents in support thereof, it is clear that the cause of action is predicated on allegations of negligence, in respect of which **Section 4(2) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya** is explicit that:

"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..."

[4] Accordingly, the Applicants had up to **11 May 2017** to file the proposed suit; but which they did not. Their explanation is that their application for Limited Grant *ad Litem* was not issued in time by the Court. A copy thereof, annexed to the application as **Annexure "DKCMJ1"** confirms that the said Grant was issued on **23 May 2017**, outside the limitation period. The Applicants have averred that whereas the orders in that regard were issued within time, the Grant could not be signed because the Judge concerned was away; which in itself is a plausible explanation. Moreover, the delay was not inordinate as the application before the court at Kapsabet was filed on **29 May 2017**.

[5] In the premises, I am persuaded that, granted the provisions of **Sections 27 and 28 of the Limitation of Actions Act**, sufficient cause has been shown to warrant the issuance of the orders sought; and that no prejudice would be suffered by the Respondent. In this regard, I find instructive the expressions of **Akiwumi, JA** in ***Mary Wambui Kabuga v Kenya Bus Services Ltd [1997]eKLR*** that:

It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.

[6] In the result, the Notice of Motion dated **12 June 2017** is hereby allowed and orders granted in the following terms:

[a] That leave be and is hereby granted to the Applicants herein to file suit out of time; and that any such suit be filed within a period of 14 days from the date hereof.

[b] The costs of the application to abide the outcome of the intended suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE, 2018

OLGA SEWE

JUDGE