



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 242 OF 2013**

**DAVID MWANGI KIBOGO (Suing as the  
Administrator of the estate of the late  
SCHOLASTICA WAMUHU MWANGI).....PLAINTIFF**

**- V E R S U S -**

**DR. BENSON NDEGWA WAWERU.....1<sup>ST</sup> DEFENDANT**

**MARURA NURSING HOME LIMITED.....2<sup>ND</sup> DEFENDANT**

**MERIDIAN EQUATOR HOSPITAL LIMITED...3<sup>RD</sup> DEFENDANT**

**RULING**

1) David Mwangi Kibogo (suing as the administrator of the estate of the late Scholastica Wamuhu Mwangi) the plaintiff herein, by way of the plaint dated on 26<sup>th</sup> June 2013 and filed on 28<sup>th</sup> June 2013 instituted a suit against Dr. B. N. Waweru and Marura Nursing Home Limited as the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein respectively. The claim is for general and special damages for the death of Scholastica Wamuhu Mwangi, which he alleged to have been occasioned by the negligence of the defendants both personally and vicariously.

2) It is from this background that the 1<sup>st</sup> defendant raised a preliminary objection dated 25<sup>th</sup> April 2017 on a point of law to be determined in **limine**, that this honourable court lacks jurisdiction to hear and determine this suit because the plaint herein was filed out of the statutory mandatory period provided under Section 29(4) of the Limitation of Action Act, Cap 22 Laws of Kenya.

3) The death certificate attached shows that the deceased died on 26<sup>th</sup> September 2011. Under Section 29(4) of the Limitation of Actions Act, the application for extension of time is only applicable where the suit is an action for damages in respect of a deceased person's death, if the action is brought before the end of 12 months from date on which deceased died. Thus the claim would be statute barred after one year from the deceased's death i.e on 27<sup>th</sup> September 2012.

4) Going as by the provisions of Section 29 of the Limitation of Actions Act, an application for extension of time could only be entertained if the suit had been filed after 27<sup>th</sup> September 2012. The suit herein was filed on 26<sup>th</sup> June 2013 after the deceased's death. However Section 4(2) of the Limitation of Actions Act, provides for causes of action founded on tort to be statute barred after 3 years. Consequently, limitation set in on 27<sup>th</sup> September 2014.

5) The court however, can enlarge time with which to file a suit out of time where the applicant has to satisfy court that she/he has met the conditions set out in Section 27 (2) of the Limitations of Actions Act as set out in the Court of Appeal case of **Gathoni –vs- Kenya Co-operative Limited (1982) 2KLR 104** that for an application for leave to be allowed under Section 27 of the Limitation of Actions Act it must be shown to the satisfaction of the court that failure to apply within time was due to lack of knowledge of certain material facts.

6) The applicant must show to the satisfaction of the court that she had taken all reasonable steps and sought appropriate advise in respect of the facts. In addition the application for leave under Section 27 must be brought within one year of the cessation of the period during which the decisive material facts were outside his or her knowledge.

7) Order 26 Rule 3(c ) (i) of the Civil Procedure Rules provides that: 3(c ) (i) – an application under Section 27 of the Limitation of Actions Act made before filing suit shall be made by originating summons supported by an affidavit.

8) The nature of the plaintiff claim herein is founded on tort, consequently it will be statute barred after 3 years. Cause of action arose on 26<sup>th</sup> September 2011 when the deceased person died.

9) Under Section 29(4) of the Limitations of Actions Act gives 12 Months for a claim to be statute barred i.e 27<sup>th</sup> September 2012. By virtue of the nature of tort under which the plaintiff claim is brought limitation runs for three years i.e from 26<sup>th</sup> September 2011 to 27<sup>th</sup> September 2014.

10) The suit herein was filed on 28<sup>th</sup> June 2013 and consequently it is properly before this court. The 1<sup>st</sup> defendant preliminary objection is hereby dismissed with no orders as to costs.

**Dated, Signed and Delivered in open court this 24<sup>th</sup> day of November, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant