



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPL. NO. 282'A' OF 2015**

**FRANCIS MBURU NJUGUNA .....APPLICANT**

**VERSUS**

**KHAN SHAKIL.....1ST RESPONDENT**

**OLIVEJOY SUPPLIERS LIMITED.....2RD RESPONDENT**

**RULING**

1. This ruling determines the exparte applicant's application dated 2<sup>nd</sup> May 2015 which seeks for leave of court to file suit out of the statutory Limitation period. The application is brought under the provisions of Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya. The application is supported by an affidavit sworn by Mbiyu Kamau advocate sworn on 2<sup>nd</sup> May 2015 to the effect that she was instructed to apply for letters of administration *ad litem* on behalf of the applicant and the same were applied for on 26<sup>th</sup> October 2009 and the grant was only issued on 30<sup>th</sup> July 2012 and that despite efforts to ascertain the status of the matter through the Deputy Registrar of the High Court, nothing much was forthcoming and they only learnt of the issuance on 8<sup>th</sup> October 2014 when it was collected from the registry over 5 years since issuance of the grant as shown by the date stamp.
2. That the deponent then tried to contact the applicant on phone but they had changed telephone contacts and their whereabouts unknown and that it was only upon invitation that he went to her office. That no prejudice will be occasioned to the respondents and that the court should exercise its discretion and grant extension of time, since the deceased was only 40 years and left behind a widow and 4 dependants who relied on him and that he died in a road traffic accident at his prime age. That the applicant has not been indolent.
3. The applicant also annexed copy of draft plaint, limited grant and application for grant and police abstract of the accident which occurred on 23<sup>rd</sup> April 2006 along Mombasa Road near Polythene Industries involving motor vehicle KAS 607C ZC 1096 Renault Trailer and pedestrians who all died.
4. The application was argued orally in court by Ms Njuguna holding brief for Ms Mbiyu Kamau for the exparte applicant. In her submissions, Miss Njuguna reiterated the contents of the application and the supporting and supplementary affidavit filed on 28<sup>th</sup> January 2016.
5. I have carefully considered the application by the exparte applicant as argued by his counsel Miss Njuguna. I have also considered the supporting and supplementary affidavit and the annexures thereto.
6. The law applicable for granting of extension of time within which to file suit is Sections 4, 22,27,28,29,30 and 31 of the Limitation of Actions Act and the procedural provisions are Order 37 Rule 6 of the Civil Procedure Rules.
7. Section 4(2) of the Limitation of Actions Act provides that:

***“(2) An action founded on tort may not be brought after the end of three years from the date of which the cause of action arose.***

8. The above provision is nonetheless qualified by Section 22 of the said Act which provides that if on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of 6 years from the date when the person ceases to be under a disability or dies, whichever event occurs first, notwithstanding that the prescribed period of limitation has expired.
9. The Section also sets out some exceptions. Section 4(2) above is also qualified by Section 27(1) and (2) of the Limitation of Actions Act which provides that Section 4(2) does not afford a defence to an action founded on tort where:-
  - a. ....
  - b. ***The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and***
  - c. ***The court has, whether before or after the commencement of the action, granted leave for the purposes of this Section; and***
  - d. ***The requirements of Subsection (2) are fulfilled in relation to the cause of action.***

10. Under Section 27(2); it is provided that:-

***“(2) The requirements of this Subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or concluded facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff until a date to which –***

- a. ***Either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period and;***
- b. ***In either cases, was a date not earlier than one year before the date on which the action was brought***

11. The above legal enactments were succinctly brought out in the case of **Gathoni V Kenya Co-operative Creameries Ltd [1982] e KLR** where the Court of Appeal pronounced that:

1. ....
2. ***For an application to be allowed under Section 27 of Cap 22 Laws of Kenya, 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. The applicant must show to the satisfaction of the court that she had taken all reasonable steps and sought appropriate advice in respect of the facts.***
3. ***Must bring such action within one year of the cessation of the period during which the decisive material facts were outside his/ her knowledge.”***

12. In **Lucia Wambui Ngugi V Kenya Railways & Another HC Miscellaneous Application 213 of 1989**, Mbitio J (as he then was) observed that:

***“ it must of course be assumed that for purposes of the ex parte application, the evidence is time, but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done to him by obtaining an order for the trial. Consequently, this application can only succeed if the applicant can avail herself of the provisions of Section 27 as read with Section 31 of the Act which enact that the limiting provision shall not afford a defence to an action***

*founded on tort where the court gives leave on account of applicant's ignorance of material facts relating to the cause of action which were of the decisive character. Although what amounts to "ignorance of material facts of decisive character" is not always easy to distinguish, by Section 30(1) of the Act, when read with Subsection (2) thereof, material facts of a decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of action."*

13. In **Rawal V Rawal** [1990] KLR 275, Bosire J (as he then was) stated that:

*"the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand, and protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."*

14. In **Dhanesvar V Mehta Manilal M. Shah** [1965] EA 321 the court stated that:

*".....the effect of limitation enactment is to remove remedies irrespective of the merits of the particular case."*

15. Similarly in **Iga V Makerere University** [1972] EA 65 the court stated that :

*".....unless the appellant in this case had put himself within the limitation period showing the grounds upon which he could claim exemption the court shall reject his claim."*

16. Arising from the many judicial pronouncement that I have carefully selected and which are relevant to the instant case, it is trite that the limitation of Actions Act Cap 22 Laws of Kenya does not extinguish claims but operates as a bar to claims which are time barred. The extension of time to revive a statute barred suit can, however, be brought under Section 27 of the Act in tort with regard to claims for personal injuries arising from negligence, breach of duty or nuisance.

17. In the instant case, the cause of action arises from a traffic road accident which occurred on 23<sup>rd</sup> April 2006 involving the deceased Wanyoike Njuguna who sustained fatal injuries following the accident.

18. The applicant herein presented a petition for grant of letters of administration ad litem on 26<sup>th</sup> October 2009 before **Nairobi High Court Succession Cause No. 2279 of 2009**, which was three years after the deceased's demise. In that petition, a copy which is annexed to the supporting affidavit of Mr Francis Mburu Njuguna, as "MKJ," the petitioner presented the petition in his capacity as the son to the deceased Wanyoike Njuguna. In the affidavit in support of the said petition, he listed himself, John Kamau and James Kengethe Njuguna as his dependants. However, in the draft plaint annexed to the supplementary affidavit annexed to the affidavit of Ms Mbiyu advocate, the petitioner/applicant is listed as a brother to the deceased.

19. The limited grant of letters of administration ad litem was granted on 30<sup>th</sup> July 2012. According to Ms Mbiyu Kamau, by her affidavit, the delay in filing suit was due to the delay in collection of the grant and that her firm only learnt of its issuance on 8<sup>th</sup> October 2014 two years later and even then, from 8<sup>th</sup> October 2014, it was until 1<sup>st</sup> July 2015, nine months later that this application was filed. In total, from the date of accident to the time of filing of this application is a period of 9 years and 5 months.

20. The applicant's counsel claims in her affidavit that upon receipt of the grant, her efforts to trace the applicant were futile as he had changed his mobile number and she only managed to get him upon visitation at his home and informing him of the issuance of the grant and that it was at that visitation that the applicant expressed interest in pursuing the suit on behalf of his late brother's estate.

21. In my most humble view, the explanation by the applicant's lawyer is laughable and unacceptable

before this court. The long delay of over 9 years in filing this application does not disclose any ignorance of any material fact of a decisive character or at all on the part of the applicant as stipulated in Section 27(2) of the Limitation of Actions Act. The explanation given by the applicant's advocate for the long delay only goes to support the inference that the applicant lacked interest in pursuing the claim and had to be visited by his advocate many years later to cause him to develop interest in the matter. That kind of lethargical attitude is not permitted in the law. The applicant has not attempted by way of affidavit, to demonstrate that any of the grounds upon which he could claim for exemption from the delay are available to him. It is for that reason that I find that irrespective of the merits of the intended suit, the remedy is effectively removed due to the long delay. In this case, the case of **Rawal V Rawal (supra)** is applicable. The applicant's claim is stale. It is now almost ten years since the accident occurred. There is no evidence that the respondent was ever notified of any intention to sue for damages. The defendant must be protected from an injustice of having to defend a suit after he has probably lost evidence for his defence and from being disturbed after a long lapse of time. In this case, the applicant has not availed any evidence that he is absolutely entitled to leave to file suit out of time. If this court were to grant such leave, in the circumstances of this case, it would have the effect of depriving the defendant (assuming he is still alive) of a very valuable statutory and Constitutional right of access to justice. Justice delayed is justice denied. In this case, the application has been brought after an inordinately and excessively and unsatisfactorily unexplained long period of time and without sound logical and rational grounds for such delay. Delay defeats equity.

22. The applicant by simply sitting at home and changing his telephone contacts such that his advocate could not reach him is not any form of disability. It was the applicant's duty to get in touch with his lawyer on the progress of his case and not to keep away and be sought after by his advocate. This is not the kind of case where the court can exercise discretion in favour of the indolent applicant and extend the limitation period. I am not persuaded to hold that despite the long delay, justice can still be done. It is trite that a case belongs to a litigant and not to his advocate. A litigant has a duty to pursue the prosecution of his or her case. There is absolutely no material that the advocate had her client's express instructions to file suit but that the advocate failed to do so in time. An advocate would not sign verifying affidavit on behalf of her client in as much as she could sign pleadings on his behalf. It is the duty of the litigant to constantly check with his advocate the progress of his case. (see Odunga J in **Alphonse Kondi Diaga V Commissioner of Cooperative Development (2016)eKLR**). In the instant case, the party went to sleep and had to be awakened by a less vigilant advocate, as the facts narrative show. It would in my view, be a travesty of justice if I was to grant such a party leave to file suit out of time after nearly ten years of slumber on his part.
23. Accordingly, I reject the application by the exparte applicant for leave to extend the period within which suit ought to have been filed from 24<sup>th</sup> March 2006 and dismiss the application for want of merit. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 15th day of March 2016.

R.E. ABURILI

JUDGE

**In the presence of:**

Miss Njuguna h/b for Miss Mbiyu for the applicant

N/A for Respondent

Adline: Court Assistant