



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 103 OF 2016

TOM ONYANGO OKETCH (suing on behalf of the estate of

GEORGE ADONIJA OKETCH (DECEASED)PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITALDEFENDANT

RULING

1. This ruling determines the Originating Summons dated 4th April 2016 taken out by Professor Kiama Wangai & Company Advocates on behalf of the applicant/plaintiff Tom Onyango Oketch (suing on behalf of the estate of the later Adonijah Oketch).
2. The Originating Summons is brought under the provisions of Order 37 Rule 6 (2), Order 7 Rule 3(3) of the Civil Procedure Rules, 2010, Section 1A,1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Section 3 of the Public Authorities Limitation Act, Chapter 39 Laws of Kenya, and the inherent powers of the court and all enabling provisions of the law.
3. The applicant/plaintiff in the exparte Originating Summons seeks for orders:
 1. Spent
 2. That this Honourable court be pleased to grant extension of limitation period.
 3. That costs of this application be provided for.
4. The application is predicated on the grounds that :
 1. Preliminary inquiry Committee matter PIC case No. 68 of 2013 before the Medical Practitioners and Dentists Board is taking long to conclude.
 2. That the deceased died on 28th December 2008.
 3. That the plaintiffs obtained letters of administration *ad litem* on 11th December 2008.
 4. That the plaintiff filed HCC 278 of 2013, that he withdrew to allow the process at the Medical Practitioners and Dentists Board to proceed in good faith, the said suit had been filed without obtaining leave.
 5. That delay in filing this matter is not attributable to the plaintiff.
 6. That in light of the Post Mortem Report by Doctor Oduor Johansen the case having overwhelming chance of success, it is in the interest of justice that the orders sought for extension of time should be granted.
5. In the supporting affidavit sworn by the intending plaintiff, he reiterates the grounds in support of

the application.

6. The ex parte application was argued orally before me this morning by professor Wangai counsel for the plaintiff/applicant reiterating the grounds and contents of the supporting affidavit.
7. I have carefully considered the application for extension of time within which to file suit against the proposed defendant Kenyatta National Hospital, which is a public/Government institution. Under Section 3 of the Public Authorities Limitation Act, Cap 39 Laws of Kenya,

3(1) “No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

8. Under subsection (3) of section 3 above, **where the defence to any proceedings is that the defendant was at the material time acting in the cause of his employment by the Government or Local Authority and the proceedings were brought after the end of**

- a. **Twelve months, in the case of proceedings founded on tort.....**
- b.

From the date on which the cause of action accrued, the court, at any stage if the proceedings if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.”

9. From the above provisions, it is clear that no suit can be brought against the Government or a local authority, where such cause of action accrued over a period of twelve months.
10. Section 5 of the said Act provides for extension of Limitation in case of disability. In such a case, the action may be brought at any time before the end of twelve months from the date when the person ceases to be under a disability (with some exceptions not material to this suit since the applicant has not raised any defence of disability).
11. In this case, in the annexed draft plaint, the plaintiff at paragraph 11 and 12 claims that the deceased died due to the negligent acts of the defendant and a breach of the contractual obligation. However, only particulars of negligence are set out. Negligence is a tort. Nonetheless, Section 3 (1) (b) is also clear that no suit founded on contract can be brought against the Government or Local authority after 3 years from the date when the cause of action arose, except as provided for under Section 5 of the Public Authorities Limitation Act.
12. The cause of action in this case arose on 28th December 2008. It is over 7 years since the cause of action arose. The reasons for the delay are that the matter giving rise to the cause of action is still being handled by the PIC of the Medical Practitioners and Dentists Board vide PIC case No. 68/2013.
13. However, the applicant has not explained to this court why no suit was filed between 28th December 2008 and 2013 when the matter was taken up by PIC, which was nearly 5 years from the date when the cause of action accrued. That notwithstanding, this court notes that the application herein was not brought under the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya and even if it was, then Section 6 of the Public Authorities Limitation Act Cap 39 Laws of Kenya clearly stipulates that:

“Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Section 22 of that Act shall not apply in respect of the provisions of this Act, and, in Section 27 of the Limitation of Actions Act the Reference to Section 4(2) of that Act shall be read and construed as a reference to Section 3(1) of this Act, but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act Part III of that Act shall apply to this Act.”

14. Section 31 of the Limitation of Actions Act provided that

“Where a period of Limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if part III were incorporated in it.

15. Part III of the Limitation of Actions Act deals with extensions of limitation. A reading of Section 6 of the Public Authorities Limitation Act together with Section 27(1) of the Limitation of Actions Act leads to the conclusion that where limitation period has run out Under Section 3(1) of the Public Authorities Limitation Act, like in the instant case where the cause of action ought to have been instituted within 12 months from 28/12/2008, the same may be extended under the same conditions as stipulated under Section 27 of the Limitation of Actions Act.

16. Section 27 of the Limitation of Actions provides that:

27(1) Section 4(2) does not afford a defence to an action founded on tort where

- a. *The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and*
- 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*

1. *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 included facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff until a date which-*

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

3. *This Section does not exclude or otherwise affect –*

- a. *Any defence which, in an action to which this Section applies, may be available by virtue of any written law other than Section 4(2) (whether it is a written law imposing a period of limitation of not) or by virtue of any rule of law or equity; or*
- b. *The operation of any law which, apart from this Section, would enable such action to be brought after the end of three year from the date on which the cause of action accrued.*

17. The above Section 27 of the Limitation of Actions Act was interpreted by Mbiti J in **Lucia Wambui Ngugi V Kenya Railways & Another Nairobi HCC Miscellaneous Application 213 of 1989** thus:

“When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the ex parte application that the affidavit evidence is true; 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 him by obtaining an order for the trial

of a preliminary issue...Section 27 of the Limitation of Actions Act...provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provisions of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, 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 the appellant's ignorance of material facts relating to the cause of action which were of 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 Limitation of Actions Act when read with subsection (2) thereof, material facts of 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 the action."

18. In *Gathoni Vs Kenya Co-operative Creameries Ltd* [1982] KLR 104 Potter, J in dealing with the same issue stated that:

"The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned Judge dismissed this ground because disability in the statutory context of Section 2(2) (b) of the Limitation of Actions Act does not include physical disability.....Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under Section 22 would no doubt be raised as a preliminary issue at the trial. The applicant's application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive).....Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances... In Section 30(5) "appropriate advice" is defined as meaning in relation to any facts or circumstances "advice of the competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be.....The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suit against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not hold persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

19. In *Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000* the Court of Appeal held:

"Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort."

20. From the above decisions, it is clear that extension of time for filing suit out of the stipulated statutory period applies only in claims made in tort and even in such claims, they must be for personal injuries arising from negligence, nuisance or breach of duty (whether such duty exists

- by virtue of a contract or of a written law or independently of a contract or written law).
21. And even in cases which fall under the aforesaid provisions, Section 27 of the Limitation of Actions Act must be fulfilled. The applicant must satisfy the court that material facts relating to that cause of action were or included facts of a decisive character which were at all material times outside the knowledge (actual or constructive) of the plaintiff/applicant). And for the party to prove, he must show that he did not know that fact, that in so far as that fact was capable of being ascertained by him, he had taken all steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as these existed, and were known to him, circumstances from which, with appropriate advise, that fact might have been ascertained for inferred he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purposes of obtaining **“appropriate advise”** with respect to those circumstances.
 22. **“Appropriate advise”** is defined under Section 30(5) as meaning, in relation to any facts or circumstances **“advise of a competent person qualified in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances as the case may be.”**
 23. In this case, the tort claimed is that of negligence (medical negligence). It is claimed that the deceased died because of the negligence of the defendant in that its employees did not attend to him in time after he was taken to the Kenyatta National Hospital, a public Hospital following a road traffic accident.
 24. The deceased died on 28th December 2008. The question is whether the plaintiff in this case has taken appropriate advice and whether he was ignorant of material facts of a decisive character, thus, delaying in the filing of the suit.
 25. The only explanation given by the plaintiff in filing of suit within the stipulated statutory period is from 2013 when PIC case was opened. No explanation has been provided for the delay prior to 2013, by which time, nearly 4 years from the date of death of the deceased, the time for filing suit had already expired as stipulated in Section 3 (1) of the Public Authorities Limitation Act Cap 39 Laws of Kenya. In addition, there is no evidence that a complaint was lodged to Medical Practitioners and Dentists Board in 2008 or 2009 but that the case was only opened in 2013.
 26. Furthermore, it cannot be true that the applicant has been waiting and is still waiting for the determination of the PIC case in order for him to file this suit since it is not known when the PIC case will be determined, which PIC case was opened nearly four years after the expiry of the limitation period.
 27. In addition, this court refuses to be persuaded that only the PIC results would inform the filing of a suit against the defendant since the annexed autopsy report by Doctor Oduor Johansen done on 31st December 2008, three days after the deceased’s demise was clear on the cause of the deceased’s death. The Autopsy report Signed on 2nd January 2009 states that the cause of death was :
 - a. **Immediate cause of death: left subdural Haematoma.**
 - b. **Underlying cause of death: Blunt force trauma .**
 - c. **Manner of death: Motor vehicle accident.**
 28. In paragraphs 4,5,6,7,8 and 9 of the draft plaint, the plaintiff avers clearly that **“...the defendant neglected or ignored to properly diagnose the injuries that were suffered by the deceased and accord him the necessary requisite medical care,.....he negligently refused, failed and or neglected to admit and put the deceased under ICU in effort to contain the bleeding that eventually caused his demise.”**
 6. **The defendant.....refused to provide any proper diagnostic equipment and or facility to accord the deceased the requisite emergency treatment,.....**
 7. **The deceased was put on treatment but his condition did not improve. After three days of ineffective treatment the deceased developed a high fever and difficult in breathing. He was put on ventilator antibiotics.**

8. During the said treatment period of 1st defendant negligently and/or without due care and /or diligence delayed the admission and /or caused to be delayed the admission of the deceased to ICU so that the bleeding by the deceased led to los of blood and blockage of the respiratory system subjecting him to difficult in breathing, raw pain for the entire five days and death.

9. Further and without prejudice to the foregoing the deceased infact died of a left subdural haematoma (intracranial bleed) that was missed by the defendant.”

29. With the above conclusions by the plaintiff, following the autopsy report signed in January 2009 by the Mortician, it has not been demonstrated that the plaintiff was ignorant of any material facts of a decisive character as to the cause of the deceased's demise, or that he was waiting for any other appropriate advise.

30. In my humble view, the plaintiff knew or ought to have known from the autopsy report annexed to this application that he had a cause of action against the defendant that gave rise to the deceased's death which was due to the negligent acts of the defendant.

31. Accordingly, I find that the requirements of Section 27(2) of the Limitation of Actions Act have not been fulfilled by the plaintiff/applicant.

32. In **Rawal Vs 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, 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.”

33. 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.”

34. And in **Iga V Makerere University [1972] EA 65** the court held 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.....”

35. In the instant case, it is an undisputed fact that the cause of action arose on 28th December 2008 as per the death certificate and autopsy report annexed to this application, and expired on 28th December 2009. By the time the PIC case was opened in 2013, it was over 4 years and it is now over 7 ½ years since the deceased died. The applicant obtained letters of administration ad litem on 11th December, 2009 before the expiry of the limitation period and filed suit No. HCC 278/2013 and withdrew it in July, 2015. In my view, that was his own undoing, since a suit could still be filed out of time and leave sought to validate the suit. See Sections 28, 29-31 of the Limitation of Actions Act). In this case, the prolonged delay in filing suit within 1 year from the date when the cause of action arose has not been explained. In addition, the requirements under section 27 of the Limitation of Actions Act have not been fulfilled.

36. For the aforesaid reasons, I find that this application is not merited. I proceed to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 30th day of May, 2016.

R.E. ABURILI

JUDGE

In the absence of **Prof Kiama Wangai** advocate for the plaintiff exparte applicant who was in court this morning and argued this application and a ruling set for 2.30 pm.

CA: Adline