



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 638 OF 2010**

**JANE DZIDZA KUTANDAZA.....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**ANTHONY WANDERI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The suit herein as filed on 31<sup>st</sup> December, 2010 by the plaintiff Jane Dzidza Kutandaza against the Defendants Kenya Power & Co Ltd and Anthony Wanderi emanates from the plaintiff's deceased husband Anesmus Titus Kefa Ahango having been an employee of the 1<sup>st</sup> Defendants and having lost his life while in the employment of the 1<sup>st</sup> Defendant, driving motor vehicle registration no. KAA 856P Isuzu Lorry which collided with motor vehicle registration KYY 887 Isuzu Lorry Truck along Ngong- Kiserian Road on 31<sup>st</sup> January 2006.
2. The plaintiff is the administrator of the estate of the late Anesmus Titus Kefa Aliango and has sued on her own behalf and on behalf of the estate of the deceased.
3. From the plaint as filed and the defence raises the issue of jurisdiction of this court to hear and determine the suit, which was supposedly filed out of the statutory limitation period. The accident occurred on 31<sup>st</sup> January, 2006 whereas the suit was filed on 31<sup>st</sup> December 2010, 4 years after the date of accident. Paragraph 9 of the defence dated 17<sup>th</sup> September 2012 seeks to have the plaint as filed dismissed as the same is statute barred.
4. When the matter came up for hearing before me on 25/11/2014, I directed the parties to address the court on that preliminary issue but none of them appeared ready to submit hence
5. I hence granted them leave to file written submissions. As at 25/11/2014 the plaintiff had not obtained an extract order extending the limitation period under section 27 of the limitation of Actions Act and the file was placed aside for a while pending extraction.
6. When the order was availed to the court, I discovered thatn the said leave to file suit out of time as given on 8<sup>th</sup> December 2010 was issued by the Senior Resident Magistrate Hon.Mrs. L. Arika vide Milimani Chief Magistrate Civil Miscellaneous application No 6980 of 2010 (O.S).

7. I therefore directed the parties' advocates to address the court on the issue of the jurisdiction of a Resident Magistrate's court entertaining an originating summons that granted leave to the plaintiff, extending time within which suit could be filed outside the statutory limitation period, in the High court.
8. The plaintiff filed her submissions on 5<sup>th</sup> December 2014 in support of the suit and the leave as granted. Her advocates on record M/s Kithi & Co Advocates asserted that the originating summons dated 4<sup>th</sup> October, 2014 filed before the Chief Magistrate's court seeking leave to file suit out of time and heard on 8<sup>th</sup> December 2010 by the Senior Resident Magistrate Hon. L. Arika was in order.
9. In his view, this court has the jurisdiction to hear and determine this suit pursuant to Article 165(3) of the Constitution of Kenya which provides that the High Court has original jurisdiction in Criminal and Civil matters and the Senior Resident Magistrate had competent jurisdiction to issue the order extending the limitation period.
10. Further that the order as issued by the lower court only granted the plaintiff extension of time to sue and is in no way a directive to the High Court.
11. Counsel further gave an analogy of the provision of law on transfer of suits and stated that it was not a transfer of suit from the lower court to the High court as was held by **Jairus Ngaah J in Isaac Ngiri Mwangi Vs Veronicah Wangari Isaac & Others (2013) Eklr** where his Lordship held that the Chief Magistrate's Order to transfer a file to the High court at Nyeri was obviously made in error as a Magistrate's court has no powers to transfer any suit to the High Court and there is no provision in law that provides for such power.
12. It was further submitted that in the event that this court finds that the suit herein should have been filed in the lower court, then this court can invoke the provision of section 18 (1) (a) of the Civil Procedure Act to transfer this suit on its own motion to the lower Court for hearing and determination.
13. He urged that should this court find this suit wrongly placed, it should apply the overriding objectives of Section 1A and 1B of the Civil Procedure Act and the Principles of Judicial Authority enshrined in Article 159 (2) of the Constitution and forward it to the appropriate court with jurisdiction as no party will suffer any prejudice in that event relying on the case of **Wycliffe Mwangaza Vs Grainbulk Handlers Ltd (2014) Eklr**.
14. He also implored the court to find that sections 11 and 18 of the Civil Procedure Act guide parties on places of suing and that the court can return a plaint filed in the wrong court to the correct court where suit should have been instituted without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the process of court, citing Practice Directions Relating to the filing of suits, Applications and Reference in proper court, 2009 Gazette Notice No 1756, as buttressed by Hon. Justice Kamau J in **Nairobi Imaging Centre Ltd Vs Kenya Medical Association & 2 Others (2013) eKLR**.
15. The authorities relied on by the plaintiff all relate to the power of the High court to transfer suits from one subordinate court to another, from the subordinate court to the High Court and from the High court to a Subordinate Court. Pursuant to the provisions of section 18 of the Civil Procedure Act.

The Defendant's Advocates offered no submissions on the subject.

16. I have carefully considered the submission by counsel for the plaintiff on the subject, the applicable law and the cited authorities in support of the position that the suit herein is properly before this court and that the Senior Resident Magistrate had the power/jurisdiction to grant leave extending the limitation period for filing suit out of time.

17. I however, regret to note that counsel for the plaintiff has ventured into a different territory and path. The issue for determination was as simple as **“whether the SRM had the jurisdiction to grant leave extending the limitation period for filing suit which suit was filed in the High court; and not whether this court has jurisdiction to hear this suit or whether it has the power to transfer suits and more specifically, this suit to the subordinate court or return plaint to the lower court in the event that it finds that the suit herein was wrongly filed in the High Court”**.

18. In my view, therefore, the lengthy submissions on transfer of suits were unnecessary and irrelevant, only intended to divert the attention of this court from the very basic legal principle of Jurisdiction, which should never be confused with procedural issues of transfer of suits.

19. In addition, this court is not interested in engaging parties to suits in procedural technicalities but in achieving substantive justice as contemplated in section 159 2(d) of the Constitution.

20. Parties to suits and their advocates on the other hand are enjoined by sections 1A and 1B of the Civil Procedure Act to assist the court to achieve the overriding objectives of the Act and the rules made therein to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act; and handle all matters presented before it for the purposes of attaining the following aims:-

- a. The just determination of the proceedings
- b. The efficient disposal of the business of the court;
- c. The efficient use of available judicial and administrative resources;
- d. The timely disposal of proceedings, and all other proceedings in the court at a cost affordable by the respective parties and
- e. The use of suitable technology.

21. In my view, the issue of jurisdiction should not be confused with jurisdiction to transfer suits which latter is a procedural issue. I am concerned about the jurisdiction of the Magistrates courts to entertain an originating summons extending time for filing suit that is statute barred, and using such leave obtained to file suit in the High Court

22. In **owners of the motor vessel “Lillian S” Vs Caltex Oil (K) Ltd (1989) KLR1** Hon Justice Nyarangi of the court of Appeal held that:

***“ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a confirmation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without it”***.

23. I concur with the above court of Appeal holding and add that Jurisdiction to entertain disputes or matters cannot be conferred by parties. It is conferred by the constitution and other written laws of the land.

24. The authority for the above position and holding by the Hon. Justice Nyarangi is to be found in the writings of **John Beecroft Saunders** in the treatise headed **“words and phrases legally defined- vol 3: 1-N p. 113 that:-**

***“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a found way for its decision.***

***The limits of this authority are improved by the statute, charter or commission under***

*which the court is constituted, and may be extended or restricted by the like means, if no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.*

25. The issue of Limitation goes to the jurisdiction of any court and any dispute that is proven to have been filed out of time without leave is amenable to striking out.

26. But the issue here is not that there was no leave or that leave was not deserved. The issue is whether the plaintiff would use the leave granted by the subordinate court to file suit in the High Court.

27. The established law now is that any challenge to leave granted as to whether the plaintiff deserved such leave extending the limitation period can only be raised during the trial of the suit, and not as a preliminary point. The rationale for such law is that the limitation Act does not extinguish claims or actions themselves but operates to bar the claims or remedy sought for and when suit is time barred, the court cannot grant the remedy or relief per **Iga Vs Makerere University (1972) E.A 65** In **Rawal Vs Rawal (1990) KLR 275** Bosire J

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 had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”.**

In **Mary Wambui Kabugu Vs Kenya Bus Services Ltd C.A 195 of 1995** Shah J.A expressed himself thus:-

**“By virtue of Section 28 (1) of the Limitation of Actions Act, Cap 22, Laws of Kenya (the Act) an application for leave of the superior court (for that matter of the subordinate court) has to be made ex parte.**

**The proposed defendant is not a party to that application. Indeed, he cannot be for the simple reason that section 28 (1) of the Act mandated that such application “shall be made ex parte.**

**The situation is reinforced by the provision of order 26 rule 3C (now order 37 rule 68 (7) of the Civil Procedure Rules. In a situation such as outlined above, the defendant only becomes aware of the order extending time when he is served with summons, plaint and the order extending time.**

**There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In the court’s view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say, if there is a dispute as to facts. It will be upto the judge presiding at the trial to decide the issue but not as a preliminary point.**

**The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the limitation of Actions Act particularly where leave to file an action**

against the defendant has been granted ex parte.....

**The respondent having obtained leave to file action as required by the law, that order can only be queried at the trial but not by an application to discharge it otherwise the provisions of the Act in providing for obtaining an ex parte order will be rendered nugatory....."**

28. What the foregoing decision establish is that an order extending time for filing suit out of time is a provisional one and can be challenged at the trial as to whether it was merited in terms of compliance with the provisions of section 27 (2) of the limitation of Action Act or not.

29. In the instant case, I reiterate that the issue is whether a party can obtain leave from one court-Subordinate court and use it to file suit in the High Court. An exposition of the Law of Limitation of Actions Act is critical in unraveling the position.

30. It is worth noting that the limitation of Actions Act is a substantive law regarding and or prescribing for the limitation for actions. For purpose of this suit, sections 27 and 28 of the Act are relevant. Under section 27 (1), an action which would otherwise be statute barred under section 4 (2) can be extended in case of ignorance of material facts in actions for negligence, nuisance and breach of duty.

31. Such extension, under subsection (1) (c) must have been obtained whether before or after the commencement of the action.

32. The procedure for leave of court for purposes of section 27 is provided for under section 28 of the limitation of Actions Act and Order 37 rules 6 (1) & (2) of the Civil Procedure Rules.

33. Of significance is that under order 37 of the Civil Procedure Rules, there is no distinction between the High Court and subordinate court in seeking for leave to extend the limitation period.

34. However, the limitation of Actions Act Section 28 (5) defines "court", in relation to an action means the court in which the action has been or is intended to be brought".

35. It follows therefore that an application for leave of court under section 27 of the Act must be instituted and obtained from the court in which the suit is intended, where no suit has been filed yet or in the case where suit is already instituted, in that particular suit.

36. In this case, the plaintiff having obtained leave before filing suit, in the subordinate court, she was expected to have filed the main suit in that court, assuming it had the jurisdiction to hear and determine the suit.

37. She could not, pursuant to section 28 (5) of the Limitation of Actions Act, obtain leave from the Lower court and use it to file suit in the High Court, more particularly, the High Court being a superior court with supervisory jurisdiction over the subordinate courts pursuant to the provisions of Article 165 (6) of the Constitution. It is that aspect in this suit that attracted the court's attention to delve into this issue.

38. The plaintiff's counsel in his submissions urged the court to transfer this suit to the subordinate court if it finds that the suit is filed in the wrong court, but he did not address the issue as stated above and backed by section 28 (5) of the Limitation of Actions Act.

39. In my view, to transfer the suit to the subordinate court might prejudice the plaintiff's pecuniary claim as general damages sought are only quantifiable after determination of the claim on merits.

40. Nonetheless, as I have analysed, the purpose of the law of limitation was meant to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect the defendant after he had lost the evidence of his defence from being disturbed after a long lapse of time. "***The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case***". "But

it is not meant to extinguish claims.” (additional mine) per **Rawal Vs Rawal (Supra)** and **Dhanesvar V Mehta Vs Manilal M. Shah (1965) E.A. 321.**

41. In other words in the present case, without leave, the suit as filed cannot stand. However, as the Defendant has been made aware of the existence of this suit and therefore cannot claim loosing evidence or being disturbed after a long lapse of time, the suit as filed can still stand with leave for extension being sought ex parte in this suit pursuant to the provisions of section 28 (3) of the Limitation of Actions Act and subject to the plaintiff satisfying the requirements as set out in section 27 (2) of the said Act as read with section 30 of the said Act.

42. Section 28 (3) allows the bringing of an application after the commencement of a relevant action whereas section 30 of the Act is interpretative of sections 27, 28 and 29 of the Act with regard to material facts relating to a cause of action.

43. Accordingly, I order that the leave obtained from the subordinate court is inapplicable to this suit and accordingly strike it out and direct the plaintiff to file a fresh application for leave in this suit pursuant to the provisions of Section 27 & 28 (3) of the Law of Limitations Act and order 37 Rule 6 (2) of the Civil Procedure Rules before this suit can be set down for hearing.

As it is the court that invited the parties to make submissions on the issue which is now determined, to facilitate substantive justice to be achieved, I make no orders as to costs.

Further, that such application for leave shall be made within 14 days from the date hereof failure to which this suit stands struck out.

**Dated, Signed, and Delivered at Nairobi this 28<sup>th</sup> January 2015.**

**R.E. ABURILI**

**JUDGE**

**28/1/2015**

Coram Hon. Aburili J

CC- Kavata

Mr. Musiega for the plaintiff.

Mr. Gelo holding brief for Walukwe for Defendant.

Mr. Musiega- I request for copy of the typed proceedings and ruling.

**R.E. ABURILI J**

**JUDGE**

**Court-** A certified /typed copy of ruling to be supplied to the plaintiff as prayed upon payment of the requisite fees.

**R.E. ABURILI J**

**JUDGE**

**28/1/2015**