



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 69 OF 2014(O.S)

1. RANJIT SINGH LOCHAB.

2. HARVINDER KAUR LOCHAB (Suing as the

legal Representative of the Estate of

RANDEEP SINGH LOCHAB.....PLAINTIFFS/APPLICANTS

VERSUS

1. MUMBU HOLDINGS LTD.....1ST DEFENDANT/RESPONDENT

2. JOHN MBUU.....2ND DEFENDANT/RESPONDENT

RULING

1. The applicants are the joint administrators of the Estate of **Randeep Singh Lochab** who died following a road accident along the Nakuru-Naivasha Road on the 29th May 2011.

The grant of Letters of Administration was issued to the plaintiffs being the father and mother of the deceased on the 8th September 2011-in **Succession Cause No 17 of 2014** at the **High Court of Kenya at Nairobi**.

In the Exparte Originating Summons and brought under **Section 27 and 28 of the Limitations of Actions Act and Order 37 Rule 6(1)** of the **Civil Procedure Rules and Section 3A of the act, Chapter 21** they seek the following orders:

1. That Plaintiff/Applicant be granted leave to file suit out of time against the Defendants/Respondents in respect of damages as per the draft plaint attached to the application.

2. That the draft amended plaint attached herein be deemed filed upon payment of requisite court fees.

2. The grounds upon which the application is based are, and as appears on the face of the application, that the delay in bringing the suit was caused by factors beyond the powers of the application in that they being the parents of the deceased, who was their only child and son, were gravely affected by the loss and due to their old age were hit by depression and were unable to operate normally for a couple of years, that soon after recovery they petitioned for a **Grant of Letters of Administration** that were issued on **the 8th September 2014**. It is their statement that

the application was brought without delay and that they have a valid and sustainable claim against the intended defendants and pray to be afforded an opportunity to file and prosecute the case.

3. The supporting affidavit sworn by the 1st Administrator repeats the above grounds. They have shown by annexures that they have already obtained all the necessary documents to enable them file the suit as soon as leave is granted. They further aver that the driver of one of the accident vehicles motor vehicle registration number **KAP 847K** was charged with the offence of causing death by dangerous driving and was fined upon his own plea of guilty.

4. The application by Originating Summons as provided under **Section 27 of the Limitations of Action Act**, though Ex parte, the Court (J. Emukule,) directed that the Respondents be served. The Respondents opposed the application by their grounds of opposition dated the 10th November 2014 and filed on the 11th November 2014 as hereinunder.

1. That the plaintiffs application is not based on any ground under **Section 27 and 28 of the Limitations of Actions Act Chapter 22 Laws of Kenya.**

2. That the plaintiffs do not hold any grant for purposes of filing a suit (being a Grant of Letters of Administration *ad Litem*)

3. That the certificate of death in respect of the deceased was issued on the 23rd November 2011. It is clear that the plaintiffs have been indolent and have not proved any material facts that were outside their knowledge.

4. That the application has no merit and should be dismissed with costs.

Both parties filed written submissions on the application.

5. For the applicants, it is urged that they have satisfied the conditions necessary to warrant extension of time to file the suit. They relied on several authorities and the **Limitation of Actions and Act** and the **Common Law of Equity**.

It is their submission that though the claim is time barred, **Section 27 of Chapter 22** allows extension of time upon satisfaction of certain conditions. In particular, and relying on **Lucia Wambui Ngugi -vs- Kenya Railways and Another HCCA No. 213 of 1989**, stated that the court should scrutinise the case to see if it is a proper one for leave and particularly the affidavit evidence to see whether the applicant comes within the terms of Limitation Act.

It is submitted that under **Section 27 of the Act** as read with **Section 31** thereof, the court should consider whether the applicants ignorance of material facts 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.

The only grounds given for the delay by the applicants as I can deduce from the very long submissions are mental disability caused to the plaintiffs by the death of their only son and child, that caused them depression, and old age.

6. In their revival submissions the respondents state that under **Section 27 and 28 of the Act**, extension of time can only be allowed in case of ignorance of material facts. The said material facts, they state were not stated or revealed. It is their submission that the only reason was failure to obtain Letters of Administration in good time before lapse of the 3 year period and that, to any reasonable person, cannot constitute ignorance of material facts. It is the respondents submission that what the applicants have obtained is a full grant of administration for purposes of administration of the deceased estate and not for filing of the suit as alleged and that a petition for limited grant *ad litem* would have been issued sooner, as the death certificate was obtained in

November 2011. They relied on the case **Lucia Wambui Ngugi -vs- Kenya Railways & Another (Supra)** to buttress their contention that the evidence in support of the application ought to be carefully scrutinised, and if that evidence does not certify that the applicant comes within the terms of the Limitation Act, the court ought to disallow the application. It is further submitted that, and being guided by the decision, **Gathoni -vs- Kenya Co-operative Creameries Ltd** that the Act does not help persons like the applicants who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

7. The court has considered the affidavit evidence tendered by both parties, and the rival submissions.

I must state here that it is not clear as to the real reasons why the applicants never filed the suit within time. I want to believe that they are well informed senior citizens of this country they did not obtain Limited Grant *Ad Litem* to facilitate the filing of the accident suit but had to wait for the full grant to be issued.

See case of **Gathoni -vs- Kenya Railways (Supra)**.

It might well be true, and perfectly expected for parents to go into depression and even other sicknesses more so in situations like in this case due to the loss of their only child. The petition for grant of Letters of Administration were applied for in January 2014 after time for filing suit had lapsed. The affidavit evidence does not show clearly what really happened so as to constitute material facts outside their knowledge or ignorance to bring themselves under **Section 27 and 28 of the Limitations of Action Act**.

8. The applicants main reason for the delay was disability through depression. As stated, no evidence of doctors report was annexed to the supporting affidavit. Could this then be a material factor of decisive character to persuade the court to grant the order sought? The **Gathoni case (Supra)** explained what material factor of decisive character is. It is true from the evidence that the applicants, just like in the **Gathoni case**, failed to do what an informed citizen would reasonably do.

So did the depression and mental condition of the plaintiffs lead to ignorance of the material facts of decisive character? It is not a clear cut matter.

“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 a mount as would justify the bringing of the action.”

See the case **Mary Osundwa -vs- Nzoia Sugar Co. Ltd Civil Appeal No. 244 of 2000**.

9. I have considered the chances of success in the intended suit by the plaintiffs. There is no doubt, looking at the draft plaint, and the averments in the originating summons that there exists a case with reasonable chances of success. Justice G.V. Odunga in **Mwania Kisavi Musau Mary Ndunda -vs Landmark Holdings Ltd Hc Misc Application No. 477 of 2012 (NAI)** faced with a similar situation like in this matter admitted that it was not a clear cut matter when he stated that where a party, due to state of mind is unable or is disabled from making an informed opinion, whether or not he has a cause of action that may justify extension of time within which to file the suit. He proceeded to allow the application. The circumstances of this application are such that the orders sought ought to be granted after taking into account all the averments and submissions. While allowing the application as prayed, I am alive to the fact that my decision is subject to challenge during the hearing of the intended suit.

This court in its discretion, will adopt the reasoning in the **Mwania Kisavi Case(Supra)**, and find that the applicants have fulfilled, albeit in part, the conditions set out under **Section 27 and 28**

of the Limitations of Actions Act. The result is that the Applicants are granted leave to file the suit out of time and the Draft Plaintiff attached to the application be filed within 15 days of the date of this ruling. As this ought to be an Ex parte application, costs of the application shall be costs in the cause.

Dated, signed and delivered in open court this 30th day of November 2015.

JANET MULWA

JUDGE