



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 727 OF 2013

DICKSON KAMAU

MERCY WAIHIRA KAMAU

As administrators of the Estate of

Esther Wangui Kamau (Deceased) APPLICANTS

R U L I N G

Dickson Kamau and Mercy Waithira Kamau are the proposed plaintiffs in this application dated 27th June 2013 filed on 10th July 2013 by way of notice of motion brought under the provisions of sections 27 and 28 of the Limitation of Actions Act, Cap 22 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act

The applicants seek from this courts orders that:

1. The court do extend the period within which the applicants herein may file suit.
2. That the applicants be granted leave to file suit within such extended period of time.
3. That the court do give such further orders and or directions as it may deem fit to grant.
4. The costs in this application be in the cause.

The application sets out seven grounds upon which it is grounded.

That:

1. The late Esther Wangui Kamau was shot dead by a police officer on 3rd June 2009 under circumstances that give rise to a claim in tort and breach of statutory duty.
2. The applicants obtained a limited grant of letters of administration through the law firm of Ngugi Muhindi and Co. Advocates on 24th November 2010.
3. The said Mr. Ngungi Muhindi advocate passed on in the year 2012.
4. The applicants herein were in constant touch with the said deceased advocate who though

ailing assured them that all was well and that He had instituted suit on their behalf.

5. The applicant only learnt that no suit had been instituted upon the demise of Mr. Ngugi Muhindi advocate and on demanding for the file from the administrators of the said deceased advocate's law firm.

6. The applicants are keen to have the suit herein - which seeks to recover damages for the fatal shooting of their daughter.

7. No prejudice will be caused to any party if the orders sought are granted.

The said application is further supported by the sworn affidavit of Dickson Kamau the 1st joint applicant.

In the said affidavit sworn on 27th June 2013 the applicants depose that the deceased was shot dead while engaged in her place of work by a police officer who was legally mandated to carry a fire arm on 3rd June 2009 and a post mortem carried out by Dr. Andrew Kanyi Gachii a pathologist who prepared his autopsy report on 3rd July 2009 that revealed that cause of death was due to gunshot wounds and severe hemorrhage due to tracheal injury due to single gunshot wound to her neck.

It is alleged that the deceased was shot by police officers who were quelling a riot within the Nairobi Central Business District. She was at her place of work at the Bands Bar and Restaurant where she served as an attendant. She was survived by an 11 year old daughter and her parents - applicants herein. It is alleged that the delay in filing the suit for recovery of damages due to the estate was occasioned by factors beyond the applicants control as they had instructed the advocate Ngugi Muhindi who later demised without lodging the claim albeit he had obtained a limited grant on their behalf.

The application was argued by D. Gichuri advocate on behalf of the applicants, reiterating the content of the applicant and the sworn affidavit. He implored the court to find that the delay in instituting the suit was not deliberate as it was occasioned by reasons beyond the control of the applicants who relied on the professional advice of their advocate and who had assured them that everything was in order.

He urged the court not to shut the applicants from being heard for loosing their daughter by granting an extension of time within which the suit should be filed as the Attorney General the intended defendant has already received notice of institution of suit under the Government Proceedings Act. In addition, he submitted that regrettably, the police officer who fired the fatal shot was never charged in court and this has greatly aggrieved the applicants as their daughter was innocently working when she met the untimely death. He submitted that they have acted with alacrity upon receipt of the applicants' instructions and file from the administrator of their former advocate's firm and that the court should exercise its discretion judicially and grant the applicants an opportunity to be heard.

I have carefully considered the applicants' application and the submissions by their advocate in support of the application for extension of limitation period to enable them file suit for recovery of damages arising from the fatal shooting by the police of Esther Wangui on 3rd June 2009 while she was lawfully engaged upon her employment within the Central Business District of Nairobi, and that the applicants deserve a right to be heard.

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 of a decisive nature. The applicants must show to the satisfaction of the court that they had taken all reasonable steps and sought appropriate advise in respect of the facts.

Under section 28 of the Limitation of Actions Act, an application for leave for leave of the court for purposes of Section 27 of the Act shall be made ex parte but must establish that there is a cause of action and must fulfill the conditions under Section 27(2) of the Act i.e. that the applicants were ignorant of material facts of a decisive character which were at all material times outside the knowledge (actual or

constructive) of the applicant until a date after the limitation period.

Under Order 37 Rule(6) of the Civil Procedure Rules, an application under Section 27 of the Limitation of Actions Act Made before filling of a suit shall be made ex-parte by originating summons supported by an affidavit. In this case, the application is brought by way of notice of motion, under order 51(1) of the Civil Procedure Rules, and before filling of suits as shown by the attached proposed plaint.

It was observed in the case of **Rawal –Vs - Rawal [1990] KLR 275 Bosire J** (as he then was), 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 defense from being disturbed after a long lapse of time. It is not to extinguish claims.”

And earlier in **Dhanesvar V. Mehta – Vs - Manilal M. Shah [1965] EA 321** it was stated ,in addition to what was cited in **Rawal – Vs - Rawal** that:

“... The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

And in **Lucia Wambui Ngugi – Vs - Kenya Railways & Another-NRB HCC Misc Appl 213/89 Mbito J** (as he then was), expressed as follows:

“When an application is made for leave under the Limitation of Actions 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 the 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 exparte 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 exparte 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 of a preliminary issue...”

The main ground why the applicants herein, filed by way of notice of motion as opposed to originating summons was brought belatedly late is that the advocate who was instructed and who happened to have been ailing had assured the applicants herein that he had filed suit only for them to discover after his demise in 2012 that no suit had been filed. I must retaliate that the law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intended plaintiff(s) to exercise reasonable diligence and to take reasonable steps in his (their) own interest.

In this case, the applicants insist that they were diligent only that they were let down by their advocate who regrettably passed on before filling suit. I am aware that negligence of an advocate is no ground upon this court can exercise its discretion extending the limitation period for filling suit, even if such advocate were alive and was to testify to confess being negligent. Nonetheless, the applicants have implored the court to grant them an opportunity to be heard on the claim as they are greatly aggrieved by the actions of losing their daughter in the hands of a police officer whose duty was to protect innocent civilians and not to kill innocent persons.

The cardinal principal that this court and any other court should employ is that persons are entitled to the right to be heard to ventilate their grievances or disputes before a court of law, and not to be ousted from the judgment seat. Article 50(1) of the Constitution it is clear. It appears from the documents filed that

the deceased advocate's failure to institute suit as instructed has caused the applicant more grief.

In as much as the ignorance of material facts of decisive nature as contemplated in Section 27 of the Limitation of Actions Act has not been proved, it is clear that the applicants have demonstrated that prima facie they have an arguable claim and that delay in instituting suit or this application was not intentional. This is not to say that this is a general rule, to be applied to all cases, but that the circumstances of this case as submitted warrant a grant of the orders sought, in the interest of Justice.

Before I conclude, I mention that although the applicants' applications is not filed in accordance with Order 45 of the Civil Procedure Act, thereby attracting the wrath of this court to strike it out, I will in the circumstances of this case exercise my discretion and allow it though brought by way of notice of motion instead of an ex-parte-originating summons. This is not to say that applications or pleadings that ought to be initiated using a given procedure and which do not comply with the established procedure should be allowed to pass. As I have stated, this is a pure discretion which this court is excising to avoid hardship and denying the applicants an opportunity to initiate suit as stipulated in Article 159 (2) (d) or the Constitution.

Accordingly, I allow the applicants' application and grant them leave to file suit for recovery of damages on behalf of the estate of the deceased Esther Wangui out of time.

I further direct that such suit shall be filed and served within 15 days from the date hereof failing which leave herein granted lapses without more.

Costs shall be in the cause to be filed.

Dated, signed and delivered at Nairobi this 27th November 2014

R.E ABURILI

JUDGE