



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 9 OF 2014 (O.S.)**

**SERAH KANINI MUTUNE**

**& ANOTHER ..... APPLICANTS**

**VERSUS**

**MWIRIGI ELIAS MURANGIRI ..... RESPONDENT**

**R U L I N G**

1. Before Court is an originating summons dated 13<sup>th</sup> January 2014 filed by the applicants/plaintiffs Serah Kanini Mutune and Fransicah Ndinda Mathera under the provisions of Order 37 Rule 6 of the Civil Procedure rules and Section 27 of the Limitation of Actions Act.
2. The originating summons taken out by the firm of E.K. Mutua & Co Advocates for the applicants/plaintiffs seeks orders
  1. That the applicants be granted leave to file suit against the respondent/defendant after expiry of the limitation period since the cause of action arose.
  2. That costs be in the cause.
3. The application is based on the grounds that
  - a) The delay in filing suit was not intentional.
  - b) The applicants have a plausible explanation for the delay.
  - c) That the applicants were unable to file suit because for a considerable period, the documentation could not be secured owing to the fact that the accident herein occurred in Uganda.
4. The application is further supported by the affidavit of Fransicah Ndinda Matheka the 1<sup>st</sup> applicant.
5. Miss Kethi Kilonzo advocate holding brief for the firm of E.K. Mutua & Co Advocates argued the application on behalf of the applicants on 20<sup>th</sup> November 2014 relying on the grounds on the face of the application and the supporting affidavit thereof. She urged the court to exercise

its discretion, based on the explanation given in the affidavit of Fransicah Ndinda Matheka to grant the orders sought.

6. The said affidavit of Fransicah Ndunda Matheka sworn on 13<sup>th</sup> January 2014 avers that the applicants have a limited grant obtained from the High Court Nairobi vide P&A Cause No. 693/2013 to administer the estate of the deceased Edward Mutuku Matheka who died on 3<sup>rd</sup> December 2010 in Uganda while on duty in the employment of the respondent Mwirigi Elias Mulangiri following a fatal road accident which occurred along Jinja – Iganga Highway.

7. The applicants are mother and sister to the deceased. The death certificate and police abstract report from Uganda Police is attached to the affidavit in support.

8. She deposes that it took time to obtain the death certificate on 6<sup>th</sup> December 2012 and therefore the grant as the matter involved authorities of Uganda Government, outside the jurisdiction of this court.

9. That the deponent fell ill whereas the deceased's mother went into depression following the deceased's death.

10. That the failure to lodge suit in time was not deliberate.

11. From the police abstract report attached, the defendant/respondent was the driver and owner of the motor vehicle Mitsubishi Canter truck registration No. KBJ 122P during the time of accident.

12. The applicants intend to recover damages on behalf of the estate of the deceased Edward Mutuku Matheka which has suffered loss following his demise.

13. I have carefully considered the originating summons together with the grounds thereof, the supporting affidavit, the annexures thereof and the submissions by Miss Kethi Kilonzo appearing for the applicants on behalf of Mr. E.K. Mtua Advocate.

14. The law applicable to applications for extension of time to file suit out of time is Section 27 of the Limitation of Actions Act, which law has been espoused in various cases and decisions of this court.

15. Section 27 of the Limitation of Actions Act provides that

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

a) The action is for damage for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or 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 purpose of this section; and

d) The requirements of Subsection (2) are fulfilled in relation to the cause of action.

2) The requirements of Subsection (2) are fulfilled in relation to a cause of action if it is

proved that material facts relating to that cause of action were on included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date 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 case, was a date not earlier than one year before the date on which the action was brought

3) ...

16. Section 4(2) of the said Act limits the time for bringing an action founded on tort three years from the date on which the cause of action occurred.

17. It is therefore Section 27 (1) (c) which allows extension of time for bringing such expired claims, whereas Section 28 thereof provides the procedure for lodging such applications. It shall be made ex parte. This Section is complemented by Order 37 of the Civil Procedure Rules which provides that an application under Section 27 of the Limitations of Actions Act shall be commenced by way of an originating summons.

18. The applicants have complied with those sections as cited and have the necessary locus standi as administrators of the estate of the deceased.

19. Section 28 (2) however puts a rider to a granting of such an application – to the effect that the court must be satisfied on evidence adduced on behalf of the plaintiff that if such an action were brought forthwith and the like evidence were adduced, (since it is ex parte before filing suit) in that action, that evidence would in the absence of any evidence to the contrary, be sufficient to establish that cause of action and to fulfill the requirements of Section 27 (2) of the Act.

20. In relation to where the injured person has died like in the instant case, the action under Section 27 must comply with the requirements under Section 29 of the Limitation of Actions Act that such action must be brought before the end of twelve months from the date on which the deceased died.

21. In this case, the deceased died on 3<sup>rd</sup> December 2010. It is therefore expected that suit for recovery of damages on behalf of his estate should have been lodged by 2<sup>nd</sup> December 2011.

22. The evidence attached show that the deceased died in Uganda and the accident was being investigated by Ugandan authorities. The applicants only managed to get police abstract and therefore death certificate in December 2012 and had to apply for letters of administration which were granted on 29<sup>th</sup> May 2013. It however took them 7 months to apply for leave for extension of time.

23. They have explained that they were unwell and that the deceased's death shocked and traumatized the 1<sup>st</sup> applicant who is his mother.

24. Although no medical evidence is adduced, I believe the applicants on oath that indeed, death of a beloved one brings trauma and shock to the family who many at times recover too late to find time for lodging the claim expired.

25. There has been delay of 2½ years to bring the claim, which delay has been explained.

26. In **Gathoni – Vs – Kenya Co-operatives Creameries Ltd (1982) KLR**, the Court of Appeal held that:-

***“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.***

***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. Here, the applicant failed to satisfy the court.***

***3. An application for leave under Section 27 must bring the action within one year of the cessation of the period during which the decisive material facts were outside his knowledge.”***

27. **Mbito J** (as he then was) observed in the case of **Lucia Wambui Ngugi – Vs – Kenya Railways & Another NRB HC MISC APP No. 213/1989** that:-

***“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 ... 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 order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right ... 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 appellants’ ignorance of material facts relating to the cause of action which were of a decisive character ...***

***Although what amount to “ignorance of material facts of decisive character” is not always easy to distinguish, by Section 30 (1) of the Act when read with Sub section (2) thereof, material facts of a decisive nature 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.”***

28. The above criteria, in my view, has been complied with by the applicants in this case. I find that they have a good case for extension of time to file suit outside the limitation period.

29. In so finding this court employs the cardinal principle of the rule of law that the right to be heard is a fundamental constitutional right. A party with the necessary capacity who avails themselves to the jurisdiction of the court should not be denied an opportunity to ventilate their grievances, especially if in the exercise of that right, the adverse party is not prejudiced and the application is brought in good faith.

30. To deny them the opportunity will be ousting them from the judgment and therefore the justice seat.

40. Accordingly, I allow the applicant’s application seeking leave to file suit out of time to claim damages on behalf of the estate of the deceased Edward Mutuku Matheka who died on 3<sup>rd</sup> December 2010. Such suit shall be expeditiously filed and in any event not later than 30 days from the date hereof in default, the order for leave herein granted lapses.

41. Costs shall be in the cause.

**Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of December, 2014.**

**R.E. ABURILI**

**JUDGE**