REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 527 OF 2013

JONES M. MUSAU ……..…...…… 1ST PLAINTIFF

MAGDALENE WAYUA MAVYUVA ….. 2ND PLAINTIFF

VERSUS

THE NAIROBI HOSPITAL …….. 1ST DEFENDANT

PETER MUNGAI NGUGI ……...….2ND DEFENDANT

R U L I N G

The notice of motion filed by the defendants herein, one dated 20th March 2014 by the 1st 2014 by the 1st defendant and the one dated 13th October 2014 by the 2nd defendant were both consolidated and heard as one on account that they both sought to have the plaintiffs suit struck out with costs and brought under the provisions of Order 2 Rule 15 (1) a and (d) of the Civil Procedure Rules.

The main and common ground in both notices of motion as filed and argued is that the plaint discloses no reasonable cause of action against the defendants; that the claim as filed is statute barred by virtue of the provisions of Section 4(2) of the Limitation of Actions Act (Cap 22) of the Laws of Kenya and finally that the plaintiff lacks the locus standi to institute suit on behalf of the estate of the deceased Benjamin Mavyura Mwangagi as she has no grant of letters of administration intestate.

The consolidated applications are not supported by any affidavits as Order 2 Rule 15 (1) a, b and d does not require any affidavit or evidence to be adduced to prove the grounds relied on.

The plaintiff filed a replying affidavit sworn on 2nd April 2014 by Jones M. Musau and a further affidavit sworn on 26th September 2014 annexing a grant of letters of administration intestate issued to both plaintiffs on 15th June 2009 vide HCC Machakos P & A 225 of 2009 by **Hon. Justice Isaac Lenaola** which grant now settles the issue of the plaintiff's locus standi in the matter, leaving this court to determine the rest of the issues to be framed at a later stage.

The plaintiffs contend that the suit herein is proper and competent and that it would have been an abuse of court process if they had filed suit when a complaint filed vide PIC 9/2010 on 3rd February 2010 against the defendants was pending hearing and determination and as the Preliminary Inquiry Committee is a statutory body mandated to deal with claims of similar nature. It is further deposed that it was not

until 6th August 2013 that the Medical Practioners and Dentists Board found that 1st defendant liable for the death of the late Benjamin Mavyuva Mwangangi and ordered the 1st defendant to initiate mediation process with a view to compensating the plaintiffs within 90 days from the date of the decision. In their view, the suit herein was therefore initiated after mediation failed and was therefore filed within time which begun to run after the decision of the Medical Practioners and Dentists Board was made that is, within 90 days from 6th August 2013 and therefore does not fall within the armpit of Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya. They further depose that the applications herein are calculated to frustrate the plaintiff's viable cause of action, mala fides and intended to delay and deny access to justice.

The parties' advocates appeared before me and argued the applications orally.

Miss Maathai for the 1st defendant submitted that the suit herein as filed on 19th December 2013 and amended on 2nd April 2014 and filed on 3rd April 2014 is statute barred as it is based on medical negligence. She relied on the provisions of Section 4 (2) of the Limitation of Actions Act which provide for the filing of such actions within 3 years from the date the cause of action accrues. According to her, paragraph 7 of the amended plaint discloses that the deceased died on 29th August 2008 and she maintained therefore, that, that is the date when 3 years begun to run. In her view, it follows that the suit having been filed after 5 years from the date when the cause of action arose on 29th August 2008 the same is bad in Law. In addition, she dismissed the plaintiff's averment that filing of the suit was dependent on the outcome of the complaint proceedings and decision of the Medical Practitioners and Dentists Board which only came on 6th August 2013. She relied on the decision of **JOO & 2 Others - Vs – Praxedes P. Mandu & 2 Others (2011) eKLR** at page 13 that the Preliminary Inquiry Committee has no statutory mandate to hear claims and award damages. Further, she argued that lodging of the complaint before the Preliminary Inquiry Committee did not preclude the plaintiff from filing suit in court within the statutory period as provided for in law. She further submitted that consequently, this court has no jurisdiction to hear and determine a suit barred by limitation, relying on the decision of **KPLC – Vs – Mutava Nzanu Nguu (2008) eKLR** emphasizing that the plaintiff has not produced any order of the court granting leave extending the limitation period. She further submitted that where the suit is filed out of the statutory limitation period, then the cause does not disclose a reasonable cause of action and ought to be struck out. She relied on the authority of **Dr. Murray Watson – Vs – Rent-A-Plane Ltd & 3 Others HCC 2180/94 (UR).**

Mr. Ogado for the 2nd defendant associated himself with the submissions by Miss Maathai and added that the plaintiffs having been fully aware of the injury suffered by the deceased from 29th August 2008 and that is the reason why they sought redress from the Preliminary Inquiry Committee and the Medical Practioners and Dentists Board, they cannot allege any ignorance of the date of injury. He further emphasized that as no leave was sought to extend the limitation period for filing suit herein, the suit was incompetent and unredeemable.

In response, opposing the defendant's applications and submissions by their advocates on record, Miss Mbulu advocate for the plaintiffs maintained that the suit herein was filed within time and referred the court to Section 26 (c) of the Limitation of Actions Act which states that time begins to run in a suit founded on mistake when a party discovers that mistake.

According to her, the deceased died at Nairobi Hospital on 29th August 2008 and the plaintiffs filed a complaint and that they waited for a determination on what caused the deceased's demise. She stated that the Medical Practioners and Dentists Board report states that the deceased died of sepsis perforation of his rectum, adopting the Preliminary Inquiry Committee's report. She cited Section 27 of the Limitation of Actions Act to the effect that the plaintiff was ignorant of material facts of what the cause of the deceased's death was so she could not have filed suit before discovery of that cause of death as per the Medical Practioners and Dentists Board report. She maintained further that the suit was based on negligence and therefore it was filed within time. She dismissed Section 4 (2) of the limitation of Actions Act as not being a basis for the orders sought herein.

She urged the court not to strike out the suit but that should it find that the plaintiff should have sought leave, the court should resort to substantive justice and not procedural technicalities and allow the suit to proceed to full trial to be determined on merit. She dismissed as irrelevant all the authorities cited by the defendants and urged the court to examine them carefully as it was clear that in some of the authorities the court ruled that in the interest of justice, the court should breathe life in a suit and in another authority a plaintiff was allowed to file suit out of time after 16 years from the date when the cause of action arose. She agreed with one of the authorities of **Dr. Murray Watson (Supra)** that striking out of a plaint is a draconian act and can be devastating to the parties hence the court should instead invite the plaintiff to seek leave out of time and take judicial notice of Sections 1A, 1B, 63 of the Civil Procedure Act and not strike out the suit herein without considering the nature of the claim and Sections 26 (c) and 27 of the Limitation of Actions Act.

The defendants' advocates maintained that the suit was incurably incompetent and no amount of amendment can inject life in it. Further, that the Preliminary Inquiry Committee report relied on was not produced to show that they were unaware of the mistake and further that there is no pleading disclosed in the plaint to show that the suit is founded on mistake. In addition, counsels submitted that Sections 1A, 1B, 63 of the Civil Procedure Act and Article 159 of the Constitution could not cure the limitation complained of as it is not a procedural technicality but a jurisdictional issue and since jurisdiction is everything in a suit, the cause can still be struck out even if it is devastating to the parties.

They concluded that as no leave was obtained and as time begins to run from date of injury as negligence as a tort is the basis of the claim, in its absence, the suit herein cannot be cured even by an amendment.

I have carefully considered the application for striking out the plaint on account that it discloses no reasonable cause of action for having been filed out of time as stipulated in law. I have also considered the authorities cited in support thereof and the rival submissions by counsels for both parties to the suit.

The principles applicable for striking out a suit under Order 2 Rule 15 (1) of the Civil Procedure Rules were set out in the Court of Appeal decision in **D.T. Dobie & Co (K) Ltd – Vs – Muchina (1982) KLR 1** that:

> ***"(a) The court should not strike out if there is a cause of action with some chances of success***
>
> ***(b) The power should only be used in plain and obvious cases and with extreme caution***
>
> ***(c) The court should not engage in a minute and protracted examination of documents and facts***
>
> ***(d) If a suit shows semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward."***

The same principles were adopted in the subsequent case of **Dr. Murray Watson – Vs – Rent-A-Plane Ltd (Supra), Lynette Oyier – Vs – Savings & Loan (K) HCC 891/96 (UR**) and **Bank Credit and Commerce Int'l (Overseas) Ltd – Vs – Giogio Fabuse & Another HCC 711/85** among others.

On jurisdiction, the case of **Owners of Motor Vessel 'Lilian S' – Vs – Caltex Oil (K) Ltd (1989) KLR 1** and **Samwel Kamau Macharia & Another – Vs – KCB Ltd & 2 Others (2012) eKLR** are relevant. In the **Lilian S's** case, the Court of Appeal held per **Nyarangi JA** that

> ***"… 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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the maker before it the moment it holds the opinions that it is without jurisdiction."***

This holding was derived from the writings of John Beecroft Saunders in a treatise headed words and

phrases legally defined – **Vol 3 I – N** at page 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 formal way for its decision. The limits of this authority are imposed 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 to the kind and nature of 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."***

I have no reason to depart from the above words which have been adopted by our very own Court of Appeal in several cases and clearly, should I find that this court lacks jurisdiction to entertain this suit for reasons that it was filed outside the stipulated statutory period, I will have to down my tools and take no further step. I will go further and add that should I find that the suit herein was statute barred when it was filed, from the onset, I declare that Article 159 of the Constitution of Kenya 2010 was not intended to override clear provisions of the Statute of Limitation and neither was Sections 1A and 1B of the Civil Procedure Act.

The main issue for determination therefore in this application is whether or not the suit herein was filed within the statutory period as challenged by the defendants.

To determine this issue, I must examine the pleadings and documents in support thereof. The plaint filed on 19th December 2013 by the plaintiffs is clear that the deceased Benjamin Mavyuva Mwangangi died on 29th August 2008 at Nairobi Hospital while being attended to by the second defendant physician, Dr. Peter Mungai Ngugi having been admitted therein on 26th August 2008 complaining of a problem relating to urination. He was operated on 27th August 2008 which went awry and a correction/repeat surgery done on 28th August 2008 when he succumbed to what the mortician determined as acute peritonitis due to perforated bowels and to which the Medical Practioners and Dentists Board is alleged to have determined upon hearing the parties that it was caused by medical malpractice and or negligence of the defendants herein.

The plaintiffs allege that the death of the deceased was due to the negligence of the defendants herein as pleaded and particularized in paragraphs 6, 9 and 10 of the plaint.

It is further pleaded at paragraph 10 that on 3rd February 2010 the plaintiffs lodged a complaint with the Preliminary Inquiry Committee case No. 9/2010 with the Medical Practioners and Dentists Board which determined the matter on 6th August 2013 and ordered for a mediation process with a view to compensating the plaintiffs but the defendants reneged on mediation hence the filing of the suit herein.

On 3rd April 2014 the plaintiffs filed an amended plaint to correct the name of the 1st defendant to read the Kenya Hospital Association, a company limited by guarantee.

It is worth noting that at no place in the pleadings did the plaintiffs base their suit on mistake or misrepresentation. It is based on medical negligence of a duty to care with full particulars thereof enumerated. It is therefore not true for the counsel for the plaintiffs to submit that the suit was based on mistake and that the cause of action only arose upon discovery of that mistake. Further, it is clear from

the plaintiffs' pleadings that the deceased died on 28th August 2008 two days after he was admitted to hospital and it took nearly two years for the plaintiff to lodge a complaint with Preliminary Inquiry Committee as alleged and subsequently with Medical Practioners and Dentists Board which allegedly made a determination that the deceased died as a result of medical malpractice and negligence on 6th August 2013 subsequent to which the plaintiffs herein filed this suit.

The question that arises from the above undisputed facts is whether the cause of action arose on 28th August 2008 when the deceased died two days after his admission at Nairobi Hospital, or on 6th August 2013 when the Medical Practioners and Dentists Board is alleged to have made a determination that the defendants were responsible for his death on account of medical negligence.

Counsel for the plaintiffs has argued that it would have been an abuse of the court process if suit had been filed in court while the Preliminary Inquiry Committee and the Medical Practioners and Dentists Board were also investigating the complaint relating to the cause of death of the deceased. At the same time, the plaint at paragraph 8 states that an autopsy carried out by Dr. Peter M. Ndegwa revealed that the deceased died due to acute peritonitis due to perforated bowels, which is attributed to the medical negligence particularized in paragraph 9 of the amended plaint thus:-

1. As against the 1st defendant:-

   a) Failure to put in place measures to ensure proper record management, documentation and archiving of patient's treatment. The admission notes, operation notes and post operative progress notes were extremely scanty and at times inconsistent;

   b) 1st defendant's doctors who saw the patient did not indicate the patient details i.e. the name, the age, ward, bed number and the consultant's is missing;

   c) The 1st defendant failed to institute proper communication systems between the nurses managing the patient post operatively and the doctors which ultimately led to mismanagement and death of Benjamin Mavyuva Mwangangi.

2. As against the 2nd defendant

   a) The defendant delayed and or failed to make critical decisions after the 1st surgery causing acute peritonitis due to perforated bowels and subsequent death of Benjamin Mavyuva Mwangangi;

   b) The defendant failed to review the patient, Benjamin Mavyuva Mwangangi post operatively;

   c) The defendant failed to note peritoneal soiling during the second operation which led to acute peritonitis;

   d) The defendant failed to seek help of his colleagues while managing the patient;

   e) The defendant failed to follow the correct procedures required in dealing with the patient;

   f) The defendant failed to make proper and accurate entries about the patient;

   g) The defendant failed to provide proper post-operate care of the patient.

One important undisputed fact that I must reiterate here is that the plaintiff's advocate did not seek or obtain any leave to file suit herein out of time because she believed and was persuaded even at the hearing of this application that such leave for extension of the limitation period was not necessary

because the cause of action arose in 2013 after the decision of the Medical Practioners and Dentists Board revealed that the defendant's medical negligent acts were responsible for the post-operative complications that occurred leading to the death of the deceased Benjamin Mavyuva Mwangangi. She also stated in her submissions that had she filed the suit before such determination was known, it would have been an abuse of the court process as the matter was still being handled by a statutory body which had the power to do so.

With utmost respect to the learned counsel for the plaintiffs, she no doubt misapprehended the law relating to Limitation of Actions and the jurisdiction of courts to try suits.

Beginning with the issue of jurisdiction of courts to try suits, Section 5 of the Civil Procedure Act provides that:-

> ***"Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred."***

She did not city any provision of the law that expressly barred the court herein from hearing or trying the suit herein while the complaint filed with Preliminary Inquiry Committee or the Medical Practioners and Dentists Board was pending and how such filing of such suit would have been tantamount to an abuse of the court process.

Further, she misapprehended the law by assuming that the Preliminary Inquiry Committee and Medical Practioners and Dentists Board had concurrent jurisdiction with the court. In as much as there may have been a complaint lodged with Preliminary Inquiry Committee or Medical Practioners and Dentists Board, it is clear that, that could not have been a suit as defined under Section 2 of the Civil Procedure Act as

"suit means all civil proceedings commenced in any manner prescribed."

I have examined the Medical Practioners and Dentists Act and I am unable to find any provision barring parties to a dispute or complaint before it or the court from entertaining a dispute pending before the Board established under Section 4 of the Act.

Neither do I find that the filing of a suit in court before the determination of the inquiries by the Board could in any way have offended the provisions of Section 6 and 7 of the Civil Procedure Act for reasons that Section 7 in particular relates to a competent court which has heard and finally decided the issue as stipulated therein. Further, Section 2 of the Civil Procedure Act defines a court to mean High Court and Subordinate Courts acting in the exercise of its civil jurisdiction.

A Preliminary Inquiry Committee or Board under the Medical Practioners and Dentists Board Act Cap 253 Laws of Kenya is not and has never been a court and proceedings before it are normally regarded as an inquiry and not a trial. The process is considered as a quasi-criminal process and its findings could not, in any way exonerate the defendants from liability in tort. If negligence was not established against them, they could still be liable in tort notwithstanding that their actions were found by the inquiry to be inculpable as was held in **Charles Munyela Kimit – Vs – Cpl Joel Mwenola & 3 Others (CA 129/2004)** by the Court of Appeal that

> ***"The burden of proof is lesser in civil proceedings than in criminal proceedings or proceedings of a criminal nature."***

Regrettably in this application, the plaintiff has not attached any proceedings of the Preliminary Inquiry Committee or even the decision allegedly arrived at by the Medical Practioners and Dentists Board, the basis upon which counsel claims the suit herein was filed. The plaintiffs have therefore not discharged any burden of proving that there was a decision and that they relied on that decision to file suit herein. But again, even if there was such decision made on 6th August 2013 which the Court has not been given any opportunity to look at, as I have stated, my perusal of the suit herein does not reveal any reliance on

mistake.

Under the provisions of Order 2 Rule 1 of the Civil Procedure Rules which provides:

> ***"(1) every pleading in civil proceedings including against the government shall contain information as to the circumstances in which it is alleged that the liability has arisen. And …"***

In addition, Order 2 Rule 4 (1) provides that:

> ***"4 (a) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality***
>
> ***a) …***
>
> ***b) Which, if not specifically pleaded, might take the opposite party by surprise or***
>
> ***c) Which raises issues of fact not arising out of the proceeding pleading."***

The submission by the plaintiff's advocates that the suit is founded on mistake, as I have stated, is not supported by the pleadings she filed before court, not even in her subsequent amendments, and neither has she sought leave of court to amend the pleadings to base her clients' claim on mistake. Order 2 Rule 6 bars a party in any pleading to make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

Although the above subrule does not under rule 6 (2) prejudice the right of a party to amend or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative, the plaintiffs never intimated to court that they have such an intention of seeking to plead mistake in the alternative. As matters stand, therefore, the defendants are caught by surprise that a claim that specifically particularizes their liability to be based on negligence is being referred to as "based on mistake" which fact was never pleaded in the first instance, and neither is it being pleaded in an application for leave to amend the plaintiff's plaint. It therefore has to be taken face value that the plaintiff's pleadings contain all the necessary particulars of their claim which includes particulars of medical negligence relied on for being responsible for the death of the deceased Benjamin Mavyuva Mwangangi, which pleadings cannot be mistaken for something else which is not disclosed therein.

From the above exposition, I now turn to the provisions of Section 4 of the Limitation of Actions Act relied on by the applicants/defendants in seeking to have this suit struck out for being statute barred. The relevant provision is Section 4 (2) that

> ***"An action founded on tort may not be brought after end of three years from the date on which the cause of action accrued".***
>
> The words used herein is may. My interpretation is that the Section does not prohibit the bringing of such suit after the expiry of such period, and I so find, being cognizant of the provisions of Section 26, 27, 28, 29 and 30 of the said Limitation of Actions Act, part C Section 26 provides for extension of limitation period in case of fraud or mistake.

Under Section 26,

> ***"Where, in the case of an action for which a period of limitation is prescribed either,***
>
> ***a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or***
>
> ***b) The right of action is concealed by the fraud of any such person as aforesaid; or***

c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.

In my view, this is the Section that learned counsel for the plaintiff was relying on when she submitted that Section 4 (2) of the Act was not available to the defendants as Section 26 (c) of the Limitation of Actions Act states that time begins to run in a suit founded on mistake when a party discovers that mistake and that in this case, time started running on 6th August 2013 when Medical Practitioners & Dentists Board pronounced itself on the cause of the deceased's death.

Learned counsel for the plaintiffs further submitted that under Section 27 of the Limitation of Actions Act, where the plaintiff was ignorant of material facts or actions of negligence, and as their suit was based on negligence, they had filed it in time and that they did not require leave to file the suit herein.

Section 27 (1) provides that:

"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.

The subsection (2) that must be fulfilled for the plaintiff to benefit from the provisions of Section 27(1) are that

"It must be proved that material facts relating to that cause of action were or 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."

From the above provisions of Sections 27 (1) (c) it is clear that there is no automatic extension of the limitation period once it has passed, a party must seek, whether before or after commencing the action, to be granted leave extending time within which to bring the action or to validate the action already filed, and Section 28 thereof provides for the procedure for bringing such applications to enable a plaintiff obtain relevant leave to bring the intended action or to validate the already instituted suit.

The said Section 28 further defines what a court for purposes of Section 27 and 28 means

"The court in which the action has been or is intended to be brought."

Having said so much of the claim based on mistake or negligence, for personal injuries as stipulated in the above section, the question that begs an answer is whether he claim herein is for recovery of damages for personal injuries sustained as a result of alleged negligent acts of the defendants herein.

The answer to this question, is found in Section 29 of the Limitation of Actions Act which makes provision where injured person has died and it states:

> ***"29 (1) In relation to an action to which Section 27 of the Act and Section 28 of the Act applies, being an action in respect of one or more causes of action as surviving for the benefit of the estate of a deceased person by virtue of Section 2 of the Law Reform Act (Cap 26), Section 27 of this Act and Section 28 of Act shall have effect subject to Subsection (4) and (5) of this Section.***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(4) Section 27 (1) of this Act shall not have effect in relation to an action falling within Subsection (1) or Subsection (2) of this Act, unless the action is brought before the end of twelve months from the date on which the deceased died."***

What then is the implication of this Section? It is clear that the deceased having suffered death as a result of the alleged medical negligence, the cause of action for or against his estate for the alleged acts of negligence must be brought before the end of 12 months from the date on which the deceased died. In our present application, therefore, the suit against the defendants herein on account of medical negligence was only maintainable within 12 months from 29th August 2008 when he died.

What I gather from all the provisions under Part III of Cap 22 which deals with extension of periods of limitation provided for under Section 4 of the Act is that as long as the period for filing or bringing of a claim as particularized under the Act is statute barred, whether or not one is justified in bringing the same out of time, leave of court to extend such time is mandatory before instituting suit, and even where the law allows a party to institute before obtaining such leave, then leave must be sought and obtained before the matter or suit is deemed to be validly filed or instituted.

The other question then is whether the court can *suo moto* grant extension of the limitation period. Looking at Section 31 of the Limitation of Actions Act which is part of Part III of the said Limitation of Actions Act which also covers Sections 22 to 31 both sections inclusive, it is clear that under Sections 27 (c), the plaintiff must show that the court has granted leave, whether before or after commencement of the suit for purposes of this section. The sections as reproduced above must be complied with.

The plaintiffs have failed to prove to this court that Section 26 (c) and 27 of the Limitation of Actions Act are available to them. They did not apply for any leave to file this suit out of time, or to validate the same, whether the suit is based on mistake or negligence.

As I have stated and I reiterate here, that the law does not require the plaintiffs to have obtained the leave before commencement of the suit. They could still have done so after commencement of the suit and particularly after they were put on notice by the defendants defence filed on 21st March 2014 and the application herein filed on the same date as the defence. Nothing prevented them from filing an application even if the application herein was pending in court to cure the defect. They chose not to and took solace in the provisions of Section 26(c) and 27 without combing through the Act to identify the qualifications therein on whether the suit was sustainable or not.

I do not therefore agree with the plaintiff's counsel that the court can invoke its inherent jurisdiction under the provisions of Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution to revive a claim which is expressly extinguished by statute. The suit herein can only be revived under the provisions of the Law of Limitations Act as espoused herein, not under the provisions of the Civil Procedure Act. In other words, it is my view that the limitation statute is not a procedural rule, in as much as it provides a procedure for filing an application to extend the period of limitation. It is a substantive law and therefore the provisions of Sections 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregarding the provisions of the Law of Limitations Act. And even if I was

wrong on my interpretation that the Law of Limitations Act is not a procedural law, Section 3 of the Civil Procedure Act provides that:

> ***"In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any law for the time being in force."***

It therefore follows from the above provision of the Civil Procedure Act that where there is a procedure provided by another Act of Parliament other than the Civil Procedure Act, then that other procedure takes precedence over the Civil Procedure Act.

It is therefore my view that the advent of the provisions of Section 1A and 1B of the Civil Procedure Act are not intended to destroy the law but to fulfill them, and *"to ensure that the path of justice is not clogged or littered with technicalities."* See **Republic – Vs – Principal Magistrate P. Ngare Gesora & 2 Others Exparte Nation Media Group Ltd (2013) eKLR**. In the above case, **Hon. Justice G.V. Odunga** added that:-

> ***"However, where a certain cause of action is disallowed by law, the issues of the path of justice being clogged does not arise since in that case justice demands that a claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law."***

Further that,

> ***"It must however be remembered that what the Law of Limitations Act provides is that certain causes of action may not be brought after the expiry of a particular period of time. In other words, the Act bars the bringing of particular actions after the specified periods of limitation. It does not extinguish causes of action."***

In **Rawal – Vs – Rawal (1990) KLR 275 Bosire J** (as he then was), stated thus:-

> ***"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."***

The above decision cited **Dhanesvar V. Mehta – Vs – Manilal M. Shah (1965) EA 321** with approval 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 to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment to remove remedies irrespective of the merits of the particular case."***

From the above cases and others referred to therein, it is clear that where a claim is barred by statute, a plaintiff must demonstrate to the court that he/she has sought exemption by obtaining leave to sustain the suit, which leave lifts the barrier thereof and thereby revives the otherwise 'dead' claim.

Consequently, the plaintiff's suit can only be revived if they can avail themselves the provisions of Section 27 as read with Section 29 (4) and Section 31 of the Law of Limitations Act which enact that the limiting provision shall not afford a defence in an action founded on tort where the court gives leave on account of the applicant's ignorance of material facts relating to the cause of action which were of a decisive character and which were at all times outside the applicant's knowledge and that he became aware of those facts after the limitation period or within one year before the expiry of the limitation period and in which event, in either case, the action must be brought within one year of such discovery.

Such leave granted is normally sought in exparte proceedings and the defendant is only allowed to

challenge the facts in due course of the hearing of the main suit.

Article 159 (2) (d) on the other hand captures the spirit that courts should endeavour to deliver substantive justice without undue regard to procedural technicalities. But as I have stated earlier, I doubt that the said Article is available to the plaintiffs herein. It does not mean that suits can be filed outside the limits of time without sanctions of the court, as public policy would not fly in the face of the statute of limitations as was succinctly put by the Court of Appeals in the decision by **Ouko, Kiage & Mohammed JJA** in **CA NRB No. 228 of 2013** between **Nicholas Kiptoo Arap Korir Salat – Vs - IEBC & Winfred Rottich Lesan & 2 Others** that:

> ***"I am not in the least persuaded that Article 159 of the Constitution and the Oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed, courts cannot aid in the bending and circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned***."

The Supreme Court in the case of **Shabbir Ali Josab – Vs – Annar Osman Gamray (Civil App No. 1 of 2013)** is another example where the learned Judges of the Supreme court made it clear that, and in citing its own decision in **Raila Odinga – Vs – IEBC & 4 Others – Petition No. 5/2013** pronounced thus:-

> ***"The court is guided by rules and regulations and urges all parties to follow the same since they guide the courts and the parties in obtaining justice. However the essence of Article 159 (2) (d) is that a court of law should not allow the prescriptions of procedure and form to triumph the primary object of dispensing substantive justice to the parties.***
>
> ***This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the process of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course."***

The advocate for the plaintiffs urged the court that, should it find that leave to file this suit out of time ought to have been obtained, to tamper justice with mercy and exercise its discretion not to strike out or dismiss the suit but direct that the plaintiffs do apply for such leave since the act of striking out a suit as draconian and causes injustice to the parties. I hear Miss Mbulu to be urging this court to invoke the provisions of Section 1A and 1B of the Civil Procedure Act and to be saying that the suit herein means everything for her clients who lost their beloveth one in the negligent hands of the defendants and that they should not get away with just like that!

Regrettably, the omission to seek leave before this application goes to the root of the very statutory enactments and constitutional provisions that I have referred to above and as espoused in the cited cases above and to invoke inherent jurisdiction in this matter would result in serious precedent setting that breeds confusion in the court corridors and there will no longer be any reason for respecting the laws of limitation even when they have been violated with impunity.

The Court of Appeal in **Hunter Trading Co. Ltd – Vs – Elf Oil (K) Ltd CAppl 6/2010** reiterated the need to guard against arbitrariness and uncertainty when applying the Oxygen principle and insisted that rules and precedents that are Oxygen compliant must be fully complied with to maintain consistency and

certainty. It warned that "if improperly invoked, the Oxygen principle could easily become an unruly horse",

And that it was the duty of the courts to tame it by application of sound judicial principles.

The sound judicial principles in this application are that despite the significance of this suit to the plaintiffs, their failure to seek extension of time to institute or valide the instituted suit is fatal. Further, that it has never been a practice that courts sympathise with a party on account of importance of the subject matter of a suit as that would, of itself, not save an incompetent suit. I agree with the words of the Court of Appeal in **Nicholas Kiptor Arap Korir Salat (Supra)** that:-

> ***"The greater the importance of a particular appeal (matter) the more the case and scrupulous attention an appellant (party) should take to ensure compliance with the Rules (law). And the court must be seen to maintain that consistency."***

The duty of this court, as with all other courts, is to let the law take its course. The circumstances of this case provide an opportunity for application of clear and unambiguous principles and precedents which should assist litigants and legal Practioners as well in determining with some measure of certainty the validity of claims long before they are instituted in court.

Thus, the court would have no jurisdiction to entertain a suit that is statute barred. In other words, the statute bars institution of a suit whose life has come to an end. And as jurisdiction is everything, only conferred by statutes and the Constitution and not clothed by parties to a dispute, and as there is no valid suit against the defendants herein, the suit herein as filed cannot stand. See the case of **Owners of Motor Vessel "Lilian S" – Vs – Caltex Oil (K) Ltd (1980) KLR 1**.

Counsel further urged the court to direct that the suit not being so hopeless, some life could be injected therein with an order for amendments. In my view, no amount of amendment can revive this suit that was instituted outside the limitation period and as no application for leave to extend the same has been sought as provided for under Section 28 of the Limitations of Actions Act. Amendments would only cure a defect or irregularity that was contained in the pleadings not clothe an incompetent suit with some competence. It is not that the quality of pleadings before the court are wanting. What the plaintiffs allege to be mistake or ignorance of material facts is what they should be relying on in urging the court to extend the limitation period not otherwise.

The position is that the suit before this court plainly and obviously from the onset, does not disclose any reasonable cause of action and is incurably irredeemable by an amendment as regards the Law of Limitations. It has no foundation and no chance of succeeding if it is allowed to proceed to trial. It is pointless therefore to let such a suit proceed only to gain fanciful advantage and leading to no possible good.

I allow the defendant's application as filed and argued and accordingly, I proceed and strike out the plaintiff's suit herein as filed on 19th December 2013 by a plaint dated 18th December 2013 and as amended on 2nd April 2014 and filed on 3rd April 2014.

Costs are in the discretion of this court. In this case, it is clear that the plaintiffs who are represented by an advocate relied on the professional advise of their counsel who filed this suit believing that it was within the statutory period. She should have consulted the law and relevant authorities before doing so. The plaintiffs are therefore not to blame for the misadventure. I shall spare them costs and order that each party shall bear their own costs of the incompetent suit and of this application.

Dated, signed and delivered at Nairobi this 10th day of December, 2014.

R.E. ABURILI

JUDGE