



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

**AT NYERI**

**CIVIL APPEAL NO. 71 OF 2008**

**MAGDALINE WANJIRU GITONGA.....1<sup>ST</sup> APPELLANT**  
**LAWRENCE NDUHIU GITONGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARLES MATHENGE NJOGO.....RESPONDENT**  
*(Being appeal against the judgment of L. Mbugua, Principal Magistrate in Karatina Resident Magistrate's Civil Case No. 7 of 2008 delivered on 27<sup>th</sup> August 2008)*

**JUDGMENT**

This judgment is the outcome of the appeal against the judgment of Hon. L. Mbugua, learned Principal Magistrate, delivered on 27<sup>th</sup> August 2008. The appeal arises from a suit which was filed on 28<sup>th</sup> January 2008 by Waithera Githinji in her capacity as the legal representative of the Estate of Samuel Kangangi Githinji, deceased, (Respondent), against Solio Ranch Ltd., the Appellant herein. The Respondent had prayed for damages under the Fatal Accidents Act and under the Law Reform Act in respect of the fatal injuries visited upon her deceased son as a result of a road traffic accident which occurred on 13<sup>th</sup> November 2003 along Sagana-Karatina road. It is said that motor vehicle registration No. KAL 902 p being the property of the Appellant herein was carelessly and recklessly driven thereby veering off the road and knocking down the deceased who was lawfully riding a bicycle along the pedestrian section of the road. As a result of the collision, Samuel Kangangi Githinji, deceased, suffered fatal injuries. The Respondent obtained an order extending time to file a suit out of time vide Embu H.C.C.C. No. 162 of 2007 on 16<sup>th</sup> January 2008. The Appellant contended in his defence that the Respondent's suit was incompetent having been filed out of time and that the leave given was irregularly obtained. The trial magistrate considered the pleadings, the evidence and the rival submissions and in her judgment delivered on 27<sup>th</sup> August 2008, she found the Appellant 100% liable. She gave judgment in favour of the Respondent and against the Appellant in the following terms:

- |                                 |   |                |
|---------------------------------|---|----------------|
| (a) Pain 7 Suffering            | - | Ksh.10,000/=.  |
| (b) Loss of expectation of life | - | Ksh.480,000/=. |
| (c) Special damage              | - | Ksh. 26,250/=  |

The Appellant was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds in its Memorandum of Appeal:

1. ***That the trial magistrate erred in law in failing to take into consideration the issues raised by***

- the defence and in eventually finding the Defendant 100% to blame.*
- 2. That the learned trial magistrate misdirected himself in holding that the High Court order issued in Embu H.C.C.C. No. 162 of 2007 (O.S.) was not challenged by the Defendant whereas the Defendant had pleaded the defence of limitation of action, raised the issue in cross-examination of the Plaintiff's witnesses and amply submitted on the issue in the written submissions filed on 6<sup>th</sup> August 2008 and this misdirection led to the trial magistrate coming to the wrong findings on liability.*

*That the learned trial magistrate erred in law in failing to consider the issue of whether the Plaintiff's suit was time barred as pleaded in the defence and other proceedings on the Court record and as such came to a wrong conclusion in the judgment.*

- 4. That the trial magistrate exercised her discretion wrongly in the assessment of the amount awardable to the Plaintiff thus arriving at an excessive award on*

When the appeal came up for hearing, learned counsels appearing in this dispute recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions. Let me begin by stating that the Appellant's main contention in this appeal is the competency of the suit. It is the submission of the Appellant that learned Principal magistrate failed to take account the Appellant's objection raised and argued against the suit. It is the Appellant's view that had its objection been considered, the suit could have been dismissed on the basis that the same was filed out of time and that the order extending time to file was irregularly obtained. I have on my part re-evaluated the case before the trial court. It is obvious from the pleadings that at the time of filing suit i.e. on 28<sup>th</sup> January 2008, three years had lapsed. The Respondent appreciated this fact that is why she applied for the extension of time to file a suit out of time before the Embu High Court. When this issue was raised and argued before the learned Principal Magistrate, she came to the conclusion that time to file suit out of time was extended by this court and since there is no appeal to challenge the order, then the subordinate court was constrained from interfering with the order. In the case of **Divecon Ltd. =Vs= Shrikhanu Sandrudin Samani C.A. No. 142 of 1997** (unreported) the Court of Appeal held *inter alia*:

***“These requirements (of S. 27 (2) and 29 of the Limitation of Actions Act) are that where the period of Limitation had lapsed, it must be proved before an extension of time is granted ex parte, that material facts relating to the cause of action were or included facts of a decisive character which were at all material times until his death, outside the knowledge (actual or constructive) of the deceased and not of the respondent.”***

It is apparent that the court should have looked at the reasons the Respondent used to obtain extension of time. I have perused the affidavit of Waithira Githinji sworn on 21<sup>st</sup> December 2007 and filed in support of the Originating Summons dated 21<sup>st</sup> December 2007 filed in Embu High court. In the aforesaid affidavit, the Respondent avers that the deceased's family instructed the firm of Maina Karingithi & Co. Advocates to pursue the issue relating to the compensation due to the deceased's family and his Estate from the Appellant. The Respondent stated that they left everything to the learned advocate until 20<sup>th</sup> July 2007 when they visited his office where their advocate kicked them out of his office. It would appear they withdrew instructions from the firm of Maina Karingithi & Co. Advocates on 20<sup>th</sup> November 2007 and instead appointed the firm of Kinyua Kiama & Co.

Advocates to pursue the matter. On 6<sup>th</sup> December 2007, the Respondent avers that she discovered that their erstwhile advocate had not obtained letters of administration and neither did they file the compensatory suit. The Respondent avers that Mr. Kinyua Kiama, their learned advocate, advised them to apply for extension of time to file this suit, which they did before this Court at Embu. Before critically re-examining the merits of the Originating Summons, let me dispose of the other issue raised by the learned Principal magistrate. It is stated that the learned Principal Magistrate felt that she had no power to

question this court's ex parte order extending time to file suit out of time. With respect, the learned Principal Magistrate fell into error. The Court of Appeal in the case of **Oruta & Another =Vs= Nyameto [1988] K.L.R. 590** held *inter alia*:

***“that the order granting leave can only be challenged during the trial of the main suit.”***

The learned Principal magistrate was the trial court. She was not prohibited from setting aside an ex parte order of leave which extended time to sue. Such an order remained provisional hence can be interfered by the trial court.

Having concluded the preliminary issue, let me now revisit the question as to whether the grounds or reasons advanced in support of the Originating Summons fell within those envisaged under *Section 27 (2)* and *Section 29* of the Limitation of Actions Act? I have already stated that the main reason advanced by the Respondent in support of the application to extend time to file an action out of time was not among those envisaged under *Sections 27* and *29* of the Limitation of Actions Act. The Court of Appeal stated at page 10 in **Divecon Ltd. =Vs= Shrikhanu Sadrudin Samana** as follows:

***“But also, since the Respondent’s action was brought under the Law Reform Act and the Fatal Accidents Act, such evidence (material facts) is completely irrelevant .....it is only that which was outside the knowledge of the deceased (were he to file suit as a plaintiff) that could be considered, and there being no such evidence the ex parte extension of time cannot stand.”***

In the end I will allow the appeal on this single ground. Consequently the appeal is allowed, the judgment and decree of the learned Principal magistrate delivered on 28<sup>th</sup> August 2008 is set aside and is substituted with an order dismissing the suit.

I will not condemn the Respondent to pay costs in view of the fact that the deceased was her son hence it will not be fair to burden her or the deceased's Estate with costs.

***Dated and delivered at Nyeri this 15<sup>th</sup> day of July 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence of Miss Muchoki holding brief Mugambi for the Appellant and no appearance Kinyua Kiama for Respondent.

**Mugambi:** I pray for an order to direct decretal sum deposited with H.F.C.K. A/C No. 3000010054 to be released to the Appellant's advocate.

**COURT:** Order granted as prayed.

**J. K. SERGON**  
**JUDGE**