



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

Miscellaneous Case 188 of 2009

LYDIAH WANJIRU APPLICANT/PLAINTIFF

VERSUS

G.G. GITHUI 1ST DEFENDANT/RESPONDENT
ALLIANCE ELDORET

ROAD SERVICE 2ND DEFENDANT/RESPONDENT

RULING

Before court is an *ex parte* Notice of Motion dated 27th November 2009. It is brought under Order XLIX Rule 5 of the Civil Procedure Rules. It seeks for an order to be granted by the court for leave to file a suit out of time. The applicant is the legal representative of the estate of Gilbert Kimotho Matheri, deceased, who died on 30th November 2004 through a road accident. The applicant seeks leave to file for compensation for the said death. The Notice of Motion was filed before this court on 27th November 2009. That is 3 days shy of 5 years delay since the death of Matheri, deceased. Section 4 (2) of the Limitation of Actions Act limits the period for filing in court claims in tort such as this one to 3 years. The action claiming compensation for the estate of Matheri, deceased, should therefore have been filed in the year 2007. Firstly, I would state that the application before court is incompetent for having relied on Order XLIX Rule 5. That Rule provides as follows:-

“5. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

It is clear that this Rule can only extend time when time has been fixed for doing an act or taking proceedings under

the Civil Procedure Rules. There is no act or proceedings under the Civil Procedure Rules which the applicant seeks extension to do in this matter. Essentially, the applicant should have moved the court under Section 27 and 28 of the Limitation of Actions Act. Section 27 (2) was considered **In the matter of the estate of the late Ibrahim Ali Barre** Miscellaneous Civil Application No. 9 of 2008 (Meru) where it was stated thus:-

*“Under Section 27(2) the applicant is required to prove in order to obtain leave that the “the material facts relating to that cause of action were or included facts of decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff” In the case of **Ngari & Another Vs. Odero [1999] 2EA 241** the Court of Appeal stated that the requirements of those two sections, that is, section 27 and 28 should be stringently applied and that if they are not met the court should reject an application for extension of period of limitation. In that case, the court stated:-*

“The next of friend of the respondent and Mr. Kasamani were fully aware of the material facts of a decisive character to enable them to file the suit within the limitation period and they could not have relied upon Sections 27 and 28 of the Act to say otherwise.”

The applicant has not satisfied that requirements of Section 27 (2). The applicant's application would also fail because the applicant initiated this action by way of Notice of Motion. Notice of Motion is not a pleading as defined under Section 2 of the Civil Procedure Act. This was clearly stated in the case **Board of Governors, Nairobi School Vs. Jackson Ileri Geta** [1999] KLR where the Court of Appeal stated:-

“2. Pleading is defined in section 2 of the Civil Procedure Act to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

- 3. The use of the term “summons” in the definition of the term “pleading” must be read to mean “originating summons” as that is a manner prescribed for instituting suits.***
- 4. Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used the Civil Procedure Act and Rules and made thereunder.***
- 5. An application under O. VI Rule 13 (1), of the Civil Procedure Rules must only be confined to complaints or defences, or such modes which are prescribed for instituting suits and the statements in defence or reply thereto.”***

Order IV rule 1 prescribes the manner of commencing suits as follows:-

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

The Notice of Motion before court is not a manner prescribed for instituting suits and cannot be described as

pleading. Accordingly, for the reasons stated above, the Notice of Motion dated 27th November 2009 is found to be incompetent and is hereby dismissed with no orders as to costs.

Dated and delivered at Meru this 2nd day of July 2010.

MARY KASANGO
JUDGE