



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

**AT KITALE**

**MISC APPLI 109 OF 2006**

**BEATRICE NASIMIYU MUBWA.....1<sup>ST</sup> APPLICANT**

**SAMUEL NDIEMA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**TRUSTEES, CATHOLIC DIOCESE OF ELDORET.....1<sup>ST</sup> RESPONDENT**

**ROSE WANGOI KINGORI.....2<sup>ND</sup> RESPONDENT**

**RULING**

This is an application for leave to file a suit out of time.

The application is dated 29<sup>th</sup> September 2006 and is expressed as having been made pursuant to the provisions of sections 28, 29 and 30 of the Limitation of Actions Act.

The applicants are the legal representatives of the estate of ARAMISI JUMA BARASA (Deceased). He says that the Deceased was knocked down and fatally injured by a vehicle which was being driven by the 2<sup>nd</sup> respondent. As the applicants are convinced that the said accident was caused by the negligence of the said 2<sup>nd</sup> respondent, they believe that the said respondent was liable to compensate the estate of the deceased.

But, as the accident occurred on 6<sup>th</sup> July 2004, the applicants are fully aware that the period within which they could sue the respondents had expired. It was for that reason that this application had been brought, with a view to obtaining an extension of time.

According to the applicants, they were issued with letters of Administration on 13<sup>th</sup> December 2001. A copy of the grant was annexed to the affidavit in support of this application, to verify the fact that the grant was issued on that date.

The applicants have also made available to the court copies of correspondence exchanged between their lawyers and the 1<sup>st</sup> respondent, who were said to have been the registered owners of the vehicle which was being driven by the 2<sup>nd</sup> respondent, at the time of the accident in issue. A perusal of the said document shows that the parties were engaged in negotiations, with a view to amicably resolving the issues that arose from the accident in question.

However, the said negotiations failed to achieve the desired goal, leading to the need for the applicants to obtain a confirmation of the grant of letters of Administration, on 20<sup>th</sup> January 2005.

According to the applicants, the delay in filing suit was not intentional. The delay is said to have been caused by the need to obtain the Letters of Administration before the applicants could institute legal proceedings.

Section 28(1) of the Limitation of Actions Act provides that an application for leave of the court, for the purposes of section 27 is to be made *ex parte*.

By virtue of Section 28(2) of the Act, where an applicant seeks leave to bring an action, he is required, *inter alia*, to fulfill the requirements of section 27 (2) in relation to that cause of action.

Therefore, although the applicant herein did not specifically cite Section 27 of the Limitation of Actions Act, that section came into play by virtue of the provisions of sections 28, 29 and 30 of that Act, as each of those three sections make reference to section 27.

The marginal note cited alongside Section 27 as follows: -

***“Extension of limitation period in case of ignorance of material facts in actions for negligence etc.....”***

Section 27 (2) goes on to elaborate on the said marginal note, in the following words: -

***“The requirements of this subsection are fulfilled in relation to a cause of action if it is 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.”***

In this case, the applicants have demonstrated that from as early as 3<sup>rd</sup> April 2001, they were well aware that they had a right to institute legal action, through which to seek compensation for the demise of Aramisi Juma Barasa. As at that date, the advocates acting for the legal representative of the estate to Aramisi Juma Barasa (hereinafter cited as “the deceased”) wrote a letter of demand to the respondents.

As the applicants have stated in the affidavit of Samuel Ndiema, (the 2<sup>nd</sup> Applicant), their advocates had made out the demand notice to the respondents, whilst also pursuing the issuance of Letters of Administration. The said letters were eventually issued on 13<sup>th</sup> December 2001.

In effect, the applicants were well aware that in order to institute proceedings against the respondents, they needed to obtain Letters of Administration, for the estate of the deceased.

It is also evident, from their advocate’s letter dated 2<sup>nd</sup> October 2002, that the applicants knew that the deceased had been survived by his wife and four school going children. In any event, that was a fact that must have been known to the applicants from the outset, as there can be nobody else who would be better placed to know such facts than the applicants themselves.

In the circumstances, I hold that the applicants have failed to meet the requirements of Section 27 (2) of the Limitation of Actions Act. They did not prove that there were any material facts relating to the cause of action which were outside their actual or constructive knowledge before the expiry of the limitation

period.

In **NGARI & ANOTHER V ODERO [1999] 2 E.A.. 241** of page 244, the Court of Appeal said;

***“The next 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 Court of Appeal went on to emphasize that the requirements of those two sections were stringent, and that if they were not met, the court must reject the application for extension of the limitation period.

In the light of that authority, even though my sympathies go out to the estate of the deceased, I regret that I have no option but to dismiss the application dated 29<sup>th</sup> September 2006. It is therefore hereby dismissed. But, as there as, as yet, no other parties to this matter, I make no order as to costs.

**Dated and Delivered at KITALE** this 19<sup>th</sup> day of June, 2007.

**FRED A. OCHIENG**

JUDGE