



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL MISCELLANEOUS APPLICATION NO. 62 OF 1999**

**JACINTA NGINA MWANZIA ::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**MARY MUTHINI KAMAU ::::::::::::::::::::::::::::::: RESPONDENT**

**Coram: J. W. Mwera J.**

**Mrs. Nzei Advocate for Applicant**

**Advocate for Respondent Absent**

**C.C. Muli**

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**RULING**

The applicant herein by her application dated 29.6.2000 desires this court under O. 44 r. 1, O 6 A r. 5 Civil Procedure Rules and S. 3A Civil Procedure Act that this court review its ruling of 21.7.99 declining to grant leave to the applicant to sue out of time and to allow her to amend the application which was dismissed, dated 24.3.99. It prayed for leave to sue out of time. As said earlier, the ruling of 21.7.99 did not accede to that prayer. Now the applicant desires that if her review is allowed, she files and argues a notice of motion dated (draft) 30.11.2000 again asking for leave to sue out of time.

Mrs. Nzei argued that in its ruling of 21.7.99, this court was in error in the light of S.30 (2) Limitation of Actions Act wherein it should have found and held that obtaining a grant of representation was some material of a decisive nature. It was added that it was also in error for this court to remark that the applicant's lawyer was not right to swear an affidavit in support of the application dated 24.3.99. Therefore the applicant swore the affidavit in support of the present application and also did the same to accompany the amended motion in draft dated 30.11.2000. The court heard that obtaining a grant of representation by the applicant was some material of a decisive nature, to the claim because filing a suit without it meant the suit was incompetent yet it was her desire to sue both under the Law Reform as well as the Fatal Accidents Acts. It may be remarked here that a grant of representation goes to the root of the claim under the Law Reform Act and not the other. The cause intended is based on tort – a motor vehicle having knocked down and killed one Joseph Mwanzia Mungaithi – the late husband of the applicant, along Nairobi Mombasa road on 19.1.96.

Beginning with the claim that this court was in error to comment that the applicant's lawyer had sworn the affidavit in support of the application dated 24.3.99, it may be clarified that that was not the basis to refuse leave in the ruling of 21.4.99. The court remarked.

“Mrs. Nzei swore an affidavit to the effect that initially the applicant instructed M/s Gathenji and Company Advocates to sue on her behalf and that firm did nothing of the sort. Now if this is a matter which if contested by that firm Mrs. Nzei would be hard-put to step in the witness box and answer in cross-examination as well as represent the applicant hence the existing authoritative case law that matters of evidence better known by a client should better be deposed to by that client or litigant and never by the lawyer.”

On 21.7.99, the court did not disregard or expunge Mrs. Nzei's affidavit sworn on 24.3.99 to support the

application of the same date for leave to sue out of time. So no error was committed by the court and the same could not be said to be on the face of the record. The remark was made in passing, after all M/s Gathenji and Company Advocates were not anywhere trying to cross examine Mrs. Nzei on her deposition that that firm of advocates failed to file a suit as the applicant had instructed it.

It was also argued that procuring a grant of administration fell within the ambit of S.27 Cap. 22. The contents of this section as well as their relation to S.30 (2) were set out in the ruling of 21.7.99. The court was of the mind then as it is now that material facts of a decisive nature do not include procuring a grant of administration. If this court was in error of the law, it would be greatly honoured to learn it with a decision from the highest court in the land.

The prayers are refused.

Orders accordingly.

Delivered on 24th May 2001.

**J. W. MWERA**

**JUDGE**