



**Kiraga (As Administrator of the Estate of Nzai Kiranga) v Ganiwalla & 3 others (Environment and Land Civil Miscellaneous Application E010 of 2022) [2023] KEELC 20387 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20387 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E010 OF 2022**  
**EK MAKORI, J**  
**OCTOBER 6, 2023**

**BETWEEN**

**CHENGO NZAI KIRAGA (AS ADMINISTRATOR OF THE ESTATE OF NZAI KIRANGA) ..... APPLICANT**

**AND**

**HUSSELN KASSAMALI GANIWALLA ..... 1<sup>ST</sup> RESPONDENT**  
**SETTLEMENT FUNDS TRUSTEE – KILIFI ..... 2<sup>ND</sup> RESPONDENT**  
**LANDS REGISTRY – KILIFI ..... 3<sup>RD</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. On 14<sup>th</sup> of June this court - Odeny J. allowed the application for an extension of time within which to file suit. The application as I can see was uncontested as can be seen from the proceedings of that day. The Court granted 7 days within which to file a plaint. Malindi ELC No. E036 OF 2022 was subsequently filed.
2. respondents/applicants being aggrieved with that decision seek that the orders issued on June 14, 2022 be set aside on grounds that extension of time within which to file suit is provided for under section 27(2) of the *Limitation of Actions Act*. and in any event, under that section, time can only be extended where the claim is for damages for negligence, nuisance or breach of duty and where the damages consists of or include damages in respect to personal injuries. The claim by the respondent/applicant does not fall within those heads.
3. On that strength, the applicant/respondent herein seeks that the filed suit - Malindi ELC No E036 of 2022 be struck out.



4. In a rejoinder the respondents/applicants aver that the only way to in the already filed suit - Malindi ELC No E036 OF 2022 as in the case of *Jane Dzidza Kutandaza v Kenya Power and Lighting Co Ltd and another* [2015]eKLR.
5. The issue at hand is whether to set aside orders issued by this court on June 14, 2022 and strike off Malindi ELC No E036 of 2022.
6. I have perused the annexed plaint on the subject of the extension of time and noticed there are allegations of fraud on how plot No Mtwapa Settlement Scheme plot 582(old title), plot No Kilifi/ Mtwapa/878 (new title) changed hands. The respondents/ applicants will be pleading fraud and subsequent cancellation of that title in the filed suit.
7. On the issue of extension of the limitation period in case of ignorance of material facts in actions for negligence, etc.(as in this case) is governed by section 27 of the *Limitation of Actions Act*:

“(1) 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.

(2) 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.

(3) This section does not exclude or otherwise affect—

- (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
- (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.



8. How does one approach the court for an extension of time under section 26 above? It is provided under section 28 of the Act as follows:

“28. Application for leave of court under section 27

- (1) An application for the leave of the court for the purposes of section 27 of this Act shall be made *ex parte*, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
- (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
  - (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
  - (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.
- (3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—
  - (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
  - (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.
- (4) In this section, “relevant action” in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.
- (5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought.



9. In this action, the respondent /applicant seems to have moved the court under 27 and 28 of the *Limitation of Actions Act* pleading ignorance on the limitation within which to sue et al. As correctly stated by the applicant/respondent the grievances as captured in the plaint do not fall within the parameters under that section, time can only be extended where the claim is for damages for negligence, nuisance, or breach of duty and where the damages consist of or include damages in respect to personal injuries. The claim by the respondent/applicant does not fall within those heads. In any event, the orders ought to have been issued ex parte, but I can see there was service in any event with no show from the Respondents/applicants, and the orders were issued as a matter of course.
10. On that ground, alone I would have set aside the orders of this court dated June 14, 2022, but then again it will serve no purpose. The submissions here should have been exported to the suit filed after the orders issued - Malindi ELC No E036 of 2022 as held in *Jane Dzidza Kutandaza v Kenya Power and Lighting Co Ltd and another* [2015]eKLR:  

“What the foregoing decision establish is that an order extending time for filing suit out of time is a provisional one and can be challenged at the trial as to whether it was merited in terms of compliance with the provisions of section 27 (2) of the limitation of Action Act or not.”
11. We could be splitting our hair here for nothing – after this court issued the orders being challenged, it became functus officio. The issues being raised here be migrated to Malindi ELC No E036 of 2022.
12. The upshot is that the application dated 15<sup>th</sup> August 2022 is hereby dismissed with no orders as to costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 6<sup>TH</sup> OCTOBER, 2023.**

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**E. K. MAKORI**

