



**Hank v Kinegeni (Miscellaneous Civil Application
E018 of 2024) [2025] KEHC 7703 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS CIVIL APPLICATION E018 OF 2024**

RL KORIR, J

JUNE 3, 2025

BETWEEN

JOHN NYAGA HANK APPLICANT

AND

HAWKINS KIMANDI KINEGENI RESPONDENT

RULING

1. The Application before me is stated to be brought under Order 37, Rule (6) the [Civil Procedure Rules 2010](#), Section 26, 27 and 28 of the [Limitation of Actions Act](#) & all other enabling provisions.)
2. It seeks orders that:-
 - a. That this application be certified urgent and be heard urgently and Ex-parte in regard to prayer (b).
 - b. That the Honourable court be pleased to grant the Applicant leave to file suit out of time against the respondent
 - c. That the costs of this application be provided for.
3. The Application is brought on grounds that the Respondent caused the Applicant grievous bodily harm and was charged in Chuka Chief Magistrate's Court Criminal Case No.1009 of 2019 where he was convicted and sentenced to a fine of Ksh.10,000/= and in default to serve 3 years imprisonment. That the Applicant was prevented by facts beyond his control from filing suit within time; that he had been in and out of hospital; that the Respondent had failed to amicably settled his claim for damages; and that it was in the interest of justice to grant leave to the Applicant to sue the Respondent.
4. In the Supporting Affidavit dated 9th October 2024, the Applicant reiterated the grounds and added that his treatment incapacitated him financially from filing suit within time. He stated that he needs



to file suit for general damages as the Respondent viciously caused him grievous bodily harm where he sustained permanent injuries and was now unable to work.

5. The Application is opposed by the Replying Affidavit of Hawkins Kimandi Kinegeni dated 3rd March 2025. The Respondent states that the Application was an afterthought, that the Applicant had filed Civil Suit No.E133 of 2023 which was dismissed for being time barred.
6. The Respondent stated that the delay was inordinate and the delay of 7 months since dismissal of suit No. E133 of 2023 on 18th July 2024 was unexplained

Applicant's Submissions

7. The Applicant filed submissions dated 24th March, 2025 in which he identified two issues being whether leave should be granted and who should bear the costs of the application.
8. The Applicant submitted that the cause of action arose some six years ago and Judgement in the Criminal Case was delivered 4 years ago. That Section 27 of the *Limitation of Actions Act* allows extension of the limitation period in actions for negligence, nuisance or breach of duty where the Plaintiff was unaware of the facts and the damages, related to personal injury. He relied on the case of *Hellen Kiramana vs. PCEA Kikuyu Hospital* [2015] eKLR.
9. The Applicant submitted that the court had discretion to extend time. He relied on the case of *Kanampiu (suing as legal representative of the estate of the late Kiberenge Njuri the deceased on behalf of Beatrice Kiberenge) v. Rucha & Another* (Miscellaneous Case No. E021 of 2022 [2022] KEELC 14652 (KLR) (9 November 2022) (Ruling.)
10. On costs, the Applicant submitted that costs follow the event and urged the court to rely on Section 27 of the *Civil Procedure Act*.

Respondent's Submissions

10. The Respondent identified two issues for determination being whether the Applicant's prayer for extension of time was available; and who should pay the costs of the Application.
11. The Respondent submitted that the Applicant did not have to wait for criminal case No.1009/2019 to be determined before filing a civil suit. That even after his Civil suit No.E113 of 2023, which was dismissed for being time barred, the Applicant took another 7 months to file the present Application and that the delay had not been explained.
12. Urging the dismissal of the Application, the Respondent submitted that limitation of action imposed by statute cannot be extended courtesy of Order 50 Rule 6 which deals with applications brought under the *Civil Procedure Act* and Rules.
13. The Respondent placed reliance on several authorities whose citations were not correctly captured.

Analysis and Determination

14. The Applicant seeks extension of time to file suit for damages. The background to the Application has been stated by both parties. The Applicant was attacked by the Respondent on 31st July, 2019 at 13.00 hours. Upon his complaint, the Respondent was charged in Chuka Chief Magistrate's Court Criminal Case No.1009 of 2019. In a Judgement delivered on 31st May, 2021 Hon. Njoki Kahara, Senior Resident Magistrate convicted the Respondent and sentenced him to a fine of Ksh.10,000/- and in default to serve 3 years' imprisonment.



15. From the Applicant's grounds, supporting affidavit and submissions, it appears that the outcome of the criminal case motivated him to file a civil suit for damages.

16. Section 4 (2) of *Limitation of Actions Act* Cap 22 of the Laws of Kenya provides:-

Any action founded on tort may not be brought after the end of three years from the date on which the cause of action arose.

17. The Applicant urged the position that his case came within the proviso in Section 27 of the *Act* which allows extension of limitation period for actions relating to negligence, nuisance or breach of duty where the plaintiff was prevented by circumstances from filing suit or was ignorant of material facts.

18. The Respondent on the other hand urged the position that limitation of time was statutorily set by the *Limitation of Actions Act* and not rules of procedure where the court had discretion to extend time.

19. Section 27 of the *Limitation of Actions Act* provides:-

- “(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) (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.”

20. The above section gives the court discretion to allow extension of time in cases where the claimant or plaintiff in a personal injury claim was prevented by extreme circumstances from filing suit on time. Such circumstances would include where the claimant was incapacitated by the injury and where there were material facts relating to the cause of action which were not within which the claimant’s knowledge before the prescribed limitation period elapsed.
21. The Applicant has stated that he was incapacitated by the injuries that the Respondent occasioned him to the extent that he was in and out of hospital and spent money on his treatment which in turn put litigation out of his reach financially.
22. In her Judgement convicting the Respondent dated 31st May, 2021, and attached to the Applicant’s affidavit the trial court stated:-
- “In this case, the complainant sustained a fracture of the left hand humerus fracture which caused him to be admitted in hospital for 10 days. For treatment he underwent an operation that fixed the fracture by inserting a metal plate to unite it. Therefore I am satisfied that the injury PW2 sustained was serious in nature which left him with a permanent injury on the left hand that now requires him to live with a metal plate probably for the rest of his life in order to support the said hand. I concur with the doctor’s assessment that the injury PW2 sustained is grievous harm in nature.”
23. I have looked at the Applicant’s Complaint dated 1st August, 2023 annexed to the Respondent’s Replying Affidavit. Paragraph 3 of the Complaint sets out particulars of the injuries suffered by the plaintiff as follows:-
- a. Fracture of the left humerus
 - b. Injuries on the head
 - c. Pain in left side of the arm
 - d. Soft tissue injuries over elbow.
24. From the Judgement of the trial court in the criminal case and the Applicant’s own Complaint above, it was clear to this court that the Applicant did indeed suffer grievous harm and was hospitalized for 10 days. He underwent surgery to insert a metal plate in the hand. While I appreciate that the injuries were serious, it is my view that they did not fit into a category that could have incapacitated the Applicant for 6 years so as to prevent him from instituting suit within the limitation period or until now. There was no medical report attached to his Application to persuade the court that his circumstances would fall within the limited exception to the limitation period granted under Section 27 of the Limitation of Actions Act.
25. I am persuaded by the case of Royal Media Services Ltd v. Valentine Mugure Maina & Another (2019) eKLR (cited to me by the Applicant) and where Ngaj J stated:-

“Before I conclude, I must mention that Section 4 (2) is couched in such terms that the trial court is left with discretion to extend the time within which a claimant can file suit for damages in defamation claims. It may be that the claimant was under disability of some sort



and therefore he could not, for that reason, file the claim within the statutory period. Where the court is inclined to extend time, it must have regard to all the circumstances of the case and in particular to such circumstances as the length and the reasons for, the delay on the plaintiff.....the court, in making its discretion will consider the date on which any such facts did become known to him and the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action.” (Underline mine)

26. Where a court has discretion to extend time, it must do so judiciously. In the case of *Susan Ogutu Oloo & 2 Others vs. Doris Odindo Omolo* (2019) eKLR the Court of Appeal set out the following principles:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V. Iebc* (2014) Eklr Sup. Ct. Application No. 16 OF 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

27. In this case, the Applicant’s cause of action arose from injuries sustained on 31st July, 2019 when the Respondent attacked him. He has implied in his pleadings that he awaited the outcome of the criminal case to bring the civil suit. That is not a good reason as nothing in law prevented him from filing a suit for damages. Further, and as already stated, the injuries were not of such magnitude as to incapacitate him from filing a civil suit within time.
28. In submitting that the Applicant had no money to file suit earlier, the Applicant either overlooked or was not aware of the provision of law in the Civil Procedure allowing him to file suit as a pauper.
29. It is my finding from my evaluation of the circumstances relied on by the Applicant that the delay of six years was not only inordinate but has also not been satisfactorily explained to the satisfaction of the court. The order sought for extension simply cannot be granted. The prayer is thus dismissed.

Costs

30. Both parties have prayed for costs in their favour.

Section 27 of the *Civil Procedure Act* provides:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.” (Underline mine)

30. It is trite law that costs follow the event and that the winning party ought to be compensated for their trouble. In this case however, Applicant was trying to sue the Respondent for a wrong committed against him by the Respondent. As already shown, the Respondent was convicted of the offence in a criminal trial court. That being that case, and notwithstanding the dismissal of the Application, I do not find it just for the wrong doer to benefit from an award of costs.

31. In the result, the Application is dismissed. I order that each party shall bear their costs in this Application.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 3RD DAY OF JUNE, 2025.

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. I.C Mugo for the Respondent and also holding brief for the Applicant’s Counsel; Muriuki (Court Assistant.)

