



Patel (Suing as personal representative of the Estate of Manu Kirtee Patel (Deceased)) v Samknakay & 2 others (Miscellaneous Civil Case E395 of 2022) [2024] KEHC 781 (KLR) (Civ) (1 February 2024) (Ruling)

Neutral citation: [2024] KEHC 781 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL CASE E395 OF 2022
JN MULWA, J
FEBRUARY 1, 2024
IN THE MATTER OF SECTIONS 27 AND 28 OF THE
LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF THE APPLICATION FOR LEAVE TO FILE
SUIT OUT OF TIME

BETWEEN

KIRTEE KUMAR BABUBHAI PATELBHAVIN KIRTEE PATEL PLAINTIFF
SUING AS PERSONAL REPRESENTATIVE OF THE ESATTE OF MANU
KIRTEE PATEL (DECEASED)

AND

DR SAEED MOHAMED SAMKNAKAY 1ST DEFENDANT
DR. KAGASI LUGANGA KISIA 2ND DEFENDANT
THE AGA KHAN UNIVERSITY HOSPITAL 3RD DEFENDANT

RULING

1. The Ex parte Applicant approached the court by an Application dated 22/6/2022 brought under provisions of Order 37 Rule 6 (1) of the *Civil Procedure Rules* 2010, Sections 1, 1A, 3 and 3A of the



Civil Procedure Act, Sections 27 and 28 of the *Limitations of Actions Act* Cap 22 Laws of Kenya, seeking the following orders: -

1. That the Honourable Court be pleased to grant the ex-parte Applicant leave to file suit against the Respondents after the expiry of the Limitations period.
2. That costs of the Application be in the cause.
2. The grounds for the Application are that on 2/11/ 2012 the deceased was admitted at the 3rd Respondent's hospital with GastroenteritisGastroenteretis. ; that oOn the following day the patient patient was wheeled to theatre fully conscious with assurance from the physician that the procedure would not take long. Further the Applicant states that when he went . The Applicant herein KB Patel went into Operation Room and he oObserved that the patient had distended abdomen and the anesthetist was struggling to ventilate the patient as there was no surgeon present in the operation room, and that .The family's plea for any surgeon or surgical resident present to perform an emergency paracentesis to assist remove the fluid in the abdomen bore no fruits and the patient was thereafter wheeled to the ICU where her health deteriorated and eventually succumbed on the 27/11/2012.
3. The Applicant averred that the Applicants herein lodged a complaint with the Medical Practitioners and Dentists Board, which took a while to rule on the proceedings conducted, after raising complaints with the Third Respondent, which formed three committees to investigate the matter and made their findings vide the proceedings dated 27/3/2013, 11/4/2013, and 15/5/2013, respectively. The Board's investigations never provided any logical conclusions to its findings to date. The Applicant's efforts to obtain the outcome came to their attention at some point in 2018. Unhappy with the situation, they filed an appeal, which was never answered. As a result, they wrote a letter dated 25/11/2019, to the Ministry of Health, citing their advocate's submission to the Medical Services Board, which received no response, and which also stated that the Ministry would assist them in obtaining damages for medical negligence, which was never done.
4. The Applicants further stated that they then obtained letters of Administration Ad Litem but could not file suit as statutory time to file such suit had lapsed, hence the application before the court.
5. An Ex parte Applicant in an application like this must meet the requirements of Sections 27, 28 and 30 of the Limitation of Actions Act Cap 22 Law of Kenya;

“27.

- (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 a 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 purpose 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-time outside the knowledge (actual or constructive) of the plaintiff until a date which –
6. The Applicants claim is based upon alleged medical negligence by the Respondents. The time lapse or delay for filing the claim is about eleven years as at the time of filing this application and about six years when they claim that the Medical and Dentists Board rendered their decision on the alleged complaint. I say alleged because nothing has been provided to the court to demonstrate that indeed some complaint was filed with the Board, and if so the proceedings and determination by the said board.
 7. Additionally, the Applicants claim to have had counsel assisting them all the time who, if indeed there were such counsel, ought to have given them wise advice on limitation of actions in matters of medical negligence.
 8. Requirements of Section 27 (4) (d) reproduced above must be fulfilled for leave to be granted by the court. An applicant must demonstrate that the material facts relating to the cause of action were of decisive character and more importantly that they were at all the material times not within their knowledge or reach, whether actual or constructive; and further the applicant must demonstrate that he had taken all steps as it was reasonable for him to take for the purpose of ascertaining the appropriate advice in respect to the circumstances as were expressed in the case of *Tom Onyango Oketch vs Kenyatta National Hospital (2016)*eKLR. The same observations were made in several other decisions among them *Kenyatta National Hospital vs Dorcas Odongo & another 2021*eKLR.
 9. By the above observations, I am constrained to come to a finding that the Applicants have not satisfied the requirements as by law required as to be granted leave to file suit out of the statutory limitation under the Limitations of Actions Act, Cap 22 Laws of Kenya.
 10. The Application is dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE.

