



**Milgoi (Suing as the administrator of the Estate of Edna Chepkirui Milgo
- Deceased) v Nyandiva & another (Miscellaneous Civil Application
E001 of 2024) [2024] KEHC 8430 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
MISCELLANEOUS CIVIL APPLICATION E001 OF 2024**

**F GIKONYO, J
JULY 10, 2024**

BETWEEN

**CATHERINE CHEPKEMOI MILGOI (SUING AS THE ADMINISTRATOR OF
THE ESTATE OF EDNA CHEPKIRUI MILGO - DECEASED) APPLICANT**

AND

OSBORNE NYANDIVA 1ST RESPONDENT

JOYCE NJERI GITAU 2ND RESPONDENT

RULING

Extension Of Time To The File Suit

1. The Amended Originating Summons dated is seeking the following orders: -
 1. That this honourable court be pleased to grant the ex parte applicant leave to file suit out of time against Osborne Nyandiva And Joyce Njeri Gitau, the owner and/ or driver of motor-vehicle registration No. KBK 456Y over road accident that occurred on the 25th February, 2017 along Narok-Maimahiu.
 - 2 That cost of this application be in the cause.
2. The application is based on the grounds set out in the application and the supporting affidavit sworn by Catherine Chepkemoi Milgo on 09/04/2024. The application is premised on sections 4(2), 27(2), 28 and 30 of the Limitation of Actions Act, Order 37 rule 6(1) of the Civil Procedure Rules.
3. The applicant's is a biological mother to the late Edna Chepkirui Milgo(Deceased). The deceased died in a fatal road traffic accident involving motor vehicle registration No. KBK 456Y, and KBW 184S a Toyota Rav4 in which the deceased was travelling in.



4. On or about 10/04/2017, the applicant instructed the firm of Brandy Koskey & Co. Advocates to file a civil claim against the respondents herein. It was not until December 2017, when the said firm of advocates, vide petition for letters of administration ad litem dated 06/12/2017 moved the court in Nakuru Succession Cause No. 157 of 2017. The grant ad litem was issued on 15/12/2017.
5. In or around January 2018, the said firm of advocates deliberately misadvised the applicant that they were negotiating with the respondents herein with a view of settling this matter out of court.
6. Upon realizing that Brndy Koskey & Co Advocates was not keen on pursuing her case and/ or were probably compromised to abandon this matter, the applicant instructed the firm of C.J. Kipruto & Co Advocates to pursue the prosecution of this matter. The said firm informed the applicant that they had commenced this matter vide statutory notice and a demand letter dated 01/02/2018 and 03/04/2018 respectively.
7. Consequently, the said firm of C.J. Kipruto& Co Advocates went quiet without updating the applicant on the proceedings on the progress of her matter, her tangible steps to expedite the prosecution of this matter notwithstanding. The said firm of advocates further advised the applicant that they had commenced negotiations with the respondents' insurer and as such they needed more time to finalize the same.
8. Meanwhile, the Covid-19 pandemic broke out; it brought all businesses to a standstill; also halted the applicant's determination to get justice for her deceased daughter. In or around 2021 when the court operations resumed, the applicant's erstwhile advocate assured that they had a settlement and she would be called to receive her compensation, which settlement never materialized. The respondent was charged in Narok CMCC Traffic Case No. 835 of 2017 and convicted of the traffic offence of causing the death of the said Edna Chepkirui Milgo(deceased) by dangerous driving.
9. On or about 15/01/2024, the applicant's efforts to know the progress of the settlement were futile and on 23/01/2024 the applicant instructed advocates now on record who discovered that the claim was statute barred hence this application.
10. The applicant contends that the delay in filing the claim within the time required by law was not deliberate but due to acts of the applicant's previous advocates who were hell-bent on derailing the course of justice.
11. The applicant averred that she is keen on prosecuting this matter and has done everything within her means to see that the same is timeously done without success.
12. The applicant averred that the application has been filed in good faith and in the interest of substantive justice. The applicant has a prima facie case with very high chances of success. Unless this court intervenes by granting the leave sought to file this suit out of time, the applicant stands to suffer irreparable loss unless the orders sought herein are granted. On the contrary, the defendant will not be prejudiced in any manner as he shall have his time in court.
13. The applicant averred that the balance of convenience tilts in favour of the applicant herein.
14. The applicant averred that it is in the interest of justice that this originating summons be allowed and the orders sought granted.



Analysis And Determination

Issue

15. The issue for determination in the ex parte application before the court is: -

1 Whether there are circumstances which warrant extension of time to file suit out of time?

Analysis

16. Order 37, Rule 6 of the *Civil Procedure Act* (Cap 210) enables a party to apply, 'ex-parte by originating summons supported by affidavit' for extension of time to file suit under section 27 of the *Limitation of Actions Act*.

17. The *Limitation of Actions Act*, (Cap 22) provides for circumstances in which the court may extend time to file suit.

18. Of specific relevance to the application herein is: 'ignorance of material facts in actions for negligence'.

19. The court would grant extension of time: -

'...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.

20. Extension of time is not a right but discretionary equitable remedy available to a deserving party and grantable upon certain defined principles enunciated in the Supreme Court case of *County Executive of Kisumu v County Government of Kisumu and 8 Others* (2017) eKLR [Civil Application No. 3 of 2016] to wit:-

a. ...;

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted;

f. Whether the application has been brought without undue delay; and

g. Whether in certain cases, like the election petitions, public interest should be a consideration for extending time.



21. The cause of in respect of which extension of time is being sought, arose 7 years ago; there is a period of 4 years after the limitation period.
22. What explanations have been given by the applicant for this delay?
23. The Applicant in her supporting Affidavit states that the delay in filing the suit was caused by two factors.
24. First, the advocates assured her that they were in out-of-court negotiations to would settle the matter amicably; but negotiations failed.
25. Second, the two different advocates she engaged to pursue her claim failed her on two occasions and did not promptly provide her with full details of what was going on.
26. According to her, these events led to the long delay in lodging the civil suit and are the basis for the present application.
27. From the material and information provided, the Applicant took various steps to pursue her claim. The lack of prompt updates from her legal counsel, and subsequent failure of settlement after prolonged negotiations, marks the beginning of her long wait for justice. She also accused her previous advocates for dilatory in pursuing her case. She only got help from the advocates now on record who informed her that her claim was time barred, and advised her to seek for extension of time from the court, hence, this application.
28. This court is content to cite a persuasive case of *Royal Media Services Ltd v Valentine Mugure Maina & Another* (2019) eKLR, Ngaa J. explained the application of Section 4(2) of the *Limitation of Actions Act* as follows:-

“ 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.”
29. It is evident from the supporting affidavit that the Applicant endeavoured to pursue her legal rights. It appears that the counsel she approached did not keep her updated of the progress of her case. On the basis of disclosed facts, this is not a case in which the court could let mistake of counsel to fall upon the client. This court is persuaded that she would suffer prejudice if locked out of judicial system due to omissions of her legal counsel.
30. In arriving at the said conclusion this court appreciates the challenges that such a person may face after undergoing trauma and losing a relative in a road accident.
31. Lastly, it would be in the interest of justice for the court to allow the Applicant to have her day in court and a chance to be heard to prove her claim. She has a legitimate claim. And, from her averments, part of the delay was caused by prolonged negotiations between the parties in the hope that a settlement would be fastened.



32. Before I close, this court appreciates and does not diminish, the purpose for which the Statute of Limitation of Actions Act was enacted; it was stated in sheer simplicity in the case of *Rawa v Rawa* (1990) KLR, 275, that:-

“The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time.”

33. In conclusion, the applicant is not the indolent suitor; she has demonstrated gallant effort to pursue her claim. Accordingly, on the basis of the averments in the affidavit sworn by the applicant, this court is satisfied, that the Applicant has satisfactorily explained her failure to institute the proceedings within the time stipulated in law; a perfect basis for the court to exercise discretion in her favour.

34. In the upshot, this court allows the application. The Applicant shall file the suit within 21 days of this ruling.

35. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 10TH DAY OF JULY, 2024.

HON. F. GIKONYO M

JUDGE

In the Presence of :

C/A: Otolu

Ouma for Applicant – Absent

