



Atako v Kenya Power & Lighting Company Limited (Miscellaneous Civil Suit E585 of 2024) [2024] KEHC 11835 (KLR) (Civ) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL SUIT E585 OF 2024
JN MULWA, J
OCTOBER 3, 2024**

BETWEEN

ISAAC MATATI ATAKO APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. By way of Originating Summons dated 13th June, 2024 filed under Certificate of Urgency the Applicant moved Court seeking orders:
 1. That leave be granted to the Applicant Isaac Matati Atako to file suit against Kenya Power & Lighting Company Limited after the limitation period.
 2. That cost of this Application abide the results of the intended suit.
2. The Exparte Application is based on the grounds on its face and is supported by the affidavit sworn by Isaac Matati Atako, annexing thereto:-
 1. Copy of Complaint marked – IMA-1.
 2. Copy of Preliminary Objection marked – IMA-2.
 3. Copy of Ruling marked- IMA 3.
3. The application stems from Chief Magistrate’s Court in Nairobi (Milimani Commercial Division) which in conceding lack on Jurisdiction allowed the Preliminary Objection as raised by the Respondent’s.



The Applicant in its grounds in support states that the delay in filing the suit was caused by the fact that the matter was first filed in Chief Magistrate’s Court in Nairobi (Milimani Commercial Division) vide CMCC No.E9803/2021.

4. This instant Application is founded on the provisions of Sections 27, 28 and 29 of the Limitation of Actions Act Cap 22 Laws of Kenya, Order 37 Rule 6 of the Civil Procedure Rules (2010) and sections 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions.

Section 4(2) of the Limitation of Actions ,Cap 22 laws of Kenya provides;

“an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

5. Section 27 provides that ;

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 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.

6. It is deducible from the annexed Plaintiff marked- IMA 1 at paragraph 7 that the Plaintiff suffered 85% disability as a result of the accident and is thus incapable of conducting any income generating activity to support himself and his family. It goes without that this averment satisfactorily meets the set provisions of section 27 of the Limitation of Action Act, Cap 22 Laws of Kenya.



7. Section 28(1) of the *Limitation of Actions Act* Cap 22 provides; ‘an application for leave of Court for purposes of section 27 of this Act shall be made ex parte, except in so far as rules of the Court may otherwise provide in relation to applications made after the commencement of the relevant action.’
8. In this instant case, the application is made ex parte-seeking leave to file suit against the Respondent out of time.

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Section 28 (2) of the *Limitation of Actions Act* Cap 22 provides as follows - 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 be 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); and
- b. To fulfill the requirements of section 27(2) in relation to that cause of action.’

9. The Applicant at paragraph 8 of the supporting affidavit sought to rely on the provision of Article 159(2) (d) of *the Constitution* of Kenya.

In its grounds in support of the Application at paragraph (f) the applicant states he shall suffer irreparable damage if orders sought are not granted as he will be condemned for mistakes conducted by his Advocates.

10. From these provisions, it is apparent that the court’s discretion in extending time for filing actions based on contract is strictly governed by the statute. The Act sets out perimeters within which the court may exercise the discretion. In the case of *Mweu v. Kabai & Another* [1972] E.A. it was held that once one satisfies the statutory conditions under Section 27(1) of Cap. 22 the court will retain no further discretion in the matter but must grant the leave sought. Where the said statutory conditions are not fulfilled, the discretion is absent and any application for extension must then be refused.

The question before this court is therefore, whether the Applicant has fulfilled the statutory conditions set out in Section 27(1) of Cap. 22 to entitle him to the discretion sought.

It is clear that before the court grants the ex parte leave to the Applicant to file the suit out of time it has to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired.

11. In the instant case, the Applicant argued that the reason for the delay was due to a mistake by his former Advocate and went on to rely on the provisions of Article 159(2) of *the Constitution* of Kenya. In *Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.”
12. The Supreme Court of Kenya has laid down some general guidelines to help determine the handling of an application to enlarge time to file an appeal in the decision *Fahim Yasin Twaha vs Timamy Issa Abdalla & 2 Others* [2015] eKLR the court stated:

“As regards extension of time, this Court has already laid down certain guiding principles.



In the Nick Salat Case, it was thus held:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favor of the applicant.”

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
 2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
 3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
 4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.
13. Based on the foregoing, it is apparent that the Applicant has fulfilled the statutory conditions to entitle grant of the orders sought.

Conclusion.

14. The Applicant’s Originating Summons dated 13th June, 2024 is allowed with costs to abide the outcome of the intended suit.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 3RD DAY OF OCTOBER, 2024.

JANET MULWA

JUDGE

