



**KanTravellers v Musee (Suing as the Personal Representative of the Estate of Emmanuel Wafula Makokha - Deceased) & another (Civil Appeal E047 of 2022) [2023] KEHC 2100 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E047 OF 2022  
DK KEMEL, J  
MARCH 21, 2023**

**BETWEEN**

**KAN TRAVELLERS ..... APPELLANT**

**AND**

**COSMAS MAKOKHA MUSEE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF EMMANUEL WAFULA MAKOKHA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JANEPHER NASAMBU MAKOKHA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF EMMANUEL WAFULA MAKOKHA - DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement of the Senior Resident Magistrate Hon. D. Ogal delivered on 18th day of May 2022 in Kimilili PMCC No. 190 of 2019)*

**JUDGMENT**

1. This an appeal from the decision of the Senior Resident Magistrate's Court on a Notice of Preliminary Objection dated February 22, 2021, filed by the Appellant on the ground that the suit Kimilili PMCC No 190 of 2019 was filed out of time.
2. A brief background was that the Respondent herein filed an application dated April 6, 2021, seeking an order for extension or enlargement of time to file the suit out of time. Upon grant of the said order the suit was deemed duly filed and according to the said Plaintiff on record the cause of action arose on August 31, 2016 and the suit was filed in Court on December 19, 2019. The reason for delay was lack of funds. The application was supported by a supporting affidavit deponed by the 1<sup>st</sup> Respondent on April 6, 2021.



3. The Appellant filed a Notice of Preliminary Objection dated February 22, 2021 on grounds that the Respondents suit is time barred and failed to comply with the provisions of the Limitations of Actions Act.
4. In response the Respondents filed grounds of opposition to the Appellant's Preliminary Objection dated February 22, 2021, as follows: that the suit was duly filed within time in accordance with Order 50 Rule 4 and 6 of the CPR; that the application was pursuant to under Order 37 Rule 6 (2) of CPR for extension of time to file suit; that the Court has discretion for the extension of time and have the suit deemed as duly filled to protect the Respondent's right to be heard and that the Court has the tendency to hear the case on merits rather than dismissal on technicality.
5. Both counsels on record filed their written submissions and authorities for the trial Court's consideration.
6. The trial Court in its holding, noted that the delay of 35 days was not inordinate and found it in the interest of justice that parties be granted an opportunity to be heard on merits. He made further orders that the Respondents do compensate the Appellant Kshs 15,000/= as costs for the Preliminary Objection.
7. Aggrieved by that decision the Appellant filed this appeal which is predicated on the grounds that: -
  - i. The learned trial magistrate erred in law and in fact by failing to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suit for being time barred.
  - ii. The learned trial magistrate erred in law and in fact by failing to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suit for contravening the provisions of Section 4(2) of the Limitations of Actions Act, CAP 22 of the Laws of Kenya despite having been filed out of time.
  - iii. The learned trial magistrate erred in law and in fact by failing to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suit despite concealing that the suit was filed out of time and ought to be struck out.
  - iv. The learned trial magistrate erred in law and in fact by sustaining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' suit despite failing to dismiss the Notice of Preliminary Objection challenging the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suit for being time barred.
  - v. The learned trial magistrate erred in law and in fact by failing to strike out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suit for being time barred and proceeding to allow the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' application dated April 6, 2021 being an afterthought which was filed after the Notice of Preliminary Objection challenging the suit for being time barred was filed.
  - vi. The learned trial magistrate erred in law and in fact by ignoring the Appellant's written submissions in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents application dated April 6, 2021 whereas the reasons advanced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents seeking leave to file suit out of time did not meet the threshold set under section 27 and section 28 of the Limitation of Actions Act, CAP 22 of Laws of Kenya.
8. The appellant sought the following orders:
  - i. That the appeal be allowed



- ii. That the ruling and order of Hon D Ogal (SRM) delivered on May 18, 2022 be set aside and an order striking out the 1<sup>st</sup> and 2<sup>nd</sup> Respondents suit with costs in the subordinate court be made.
  - iii. That the Appellant be awarded the costs of the appeal.
9. The appeal was canvassed by way of written submissions. Both parties filed and exchanged submissions.
  10. Vide submissions dated August 16, 2023, the Appellant submitted that the Plaintiff vide a plaint dated November 6, 2019 and filed on December 19, 2019, sought general damages, special damages and costs of the suit out of a road accident that occurred on August 31, 2018. According to Counsel, the trial Magistrate pursuant to Section 4 of the Limitation of Actions Act ought to down his tools as the limitation of time is a jurisdictional question. Counsel relied on the case of Anaclet Kalia Musau vs Attorney General & 2 Others (2020) eKLR and Mini Bakers (NRB) Limited vs Levi Kariz Oriedo (2020) eKLR.
  11. It was submitted that the Appellant filed a Preliminary Objection in the lower Court on March 3, 2021 challenging the suitability of the suit and subsequently filed an amended statement of defence introducing an amendment to the effect that it will raise a preliminary objection as the suit was time barred. The Respondents proceeded to file an application dated April 6, 2021, seeking to cure the defect that had already been raised by the Appellant in the amended statement of defence and Notice of Preliminary Objection. The application was filed one month and four days after the Notice of Preliminary Objection had been filed and the trial Court allowing the filing of a response to the Notice of Preliminary Objection was not as per law. Counsel relied on the case of Salome Wangari Mwaura & Another vs John Kiage & 4 Others (2019) eKLR.
  12. It was submitted that the trial Court erred when it held that it found the application dated April 6, 2021 unopposed as the Appellant did oppose the same. The Appellant was never allowed to comment on the contents of the application that listed the reasons as to why the pleadings were filed out of time and whether the same met the threshold set under section 27 of the Limitation of Actions Act CAP 22. The Appellant further submitted that on the reason of lack of sufficient funds, the Respondents were not barred from filing pauper suits in support of this proposition. Counsel placed reliance on the case of Pascal Lole Makovo vs Oriflame East Africa Limited (2020) eKLR.
  13. It was submitted that on the second reason that the base commander advised them to await the outcome of the traffic case so as to file the civil suit, in this Country nothing bars civil cases from running concurrently with a criminal case as this was the holding in the case of Commissioner of Police & The Director of Criminal Investigation Department & Another vs Kenya Commercial Bank Limited & 4 others (2013) eKLR.
  14. Counsel urged this Court to dismiss the Respondents' suit in the lower Court on grounds that it was time barred under the Limitations of Action Act.
  15. In opposition to the Appeal, the Respondents vide submissions dated February 13, 2023, submitted that subject to the provisions of Order 50 of the Civil Procedure Rules the Honourable Court has the discretion to enlarge time where a suit had been filed out of time and have the suit deemed filed with enlargement of time.
  16. It was submitted that subject to Order 37 Rule 6(b) of the Civil Procedure Rules an application for extension of time to file a suit can be made before or after filing of the suit. Counsel urged this Court to uphold the decision of the trial Court.



17. It was submitted that the Notice of Preliminary Objection was not raised until the 1<sup>st</sup> respondent had testified and the matter was listed for further hearing thus it was not an afterthought. The application was made pursuant to Order 37 Rule 6(2) of the Civil Procedure Rules and that the same was made in an existing suit thus it was not correct that the trial Court had no jurisdiction. He urged this Court to dismiss this appeal with costs.
18. According to Section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted thereto. Thus, the duty of the first Appellate Court is to subject the evidence to a fresh evaluation and make own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor -Vs- Associate Motor Boat Co Ltd 1968 EA 123*.
19. Under section 4(2) of the Limitations of Actions Act, an action founded on tort shall not be brought after the expiration of three (3) years from the date in which the cause of action occurred. However, Section 28 of the Act vests in the Court the power to extend time and grant leave to the applicant to file suit out of time.
20. The Appellant contended that it raised the question of leave as a preliminary issue but the trial Court did not consider it. It bears repeating that limitation of actions is a matter for trial and should be so determined. It is noted that the application as well as the ruling does disclose the central reason upon which leave was granted to file outside the limitation period of 3 years. It is noted also that the trial Court did not consider the issue of limitation of actions in its ruling. I should think that, perhaps the trial Court took the view that, it was not necessary to determine the question of limitation or that leave granted was sufficient for all purposes. This notwithstanding, I should establish whether the Respondents' suit should be dismissed for being time barred.
21. Considerations outlined in Sections 27, 28, 29 and 30 of the Limitations of Actions Act should be seen within the principle of justice that; justice shall be done to all parties in judicial proceedings. Similarly, of significant note is that the law detests delay, for being insidious and an affront to justice. Therefore, whereas access to justice is a cardinal constitutional principle of justice, care should be observed, where delay in seeking remedy is manifest, not to deny or implode the right of the Defendant to the defence of limitation of actions except in accordance with the law.
22. On the effect of delay, I do no better than Hardiman J in his judgement in *J O'C V The Director of Public Prosecutions [2000]3 IR 478,499-500* which may be summarized as follows; -
  - a) A lengthy lapse of time between an event giving rise to litigation and a trial creates a risk of injustice.
  - b) The lapse of time may be so great as to deprive the defendant of his capacity to be effectively heard.
  - c) Such lapse of time may be so great as it would be contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial in which he or she would have to try to defeat an allegation of negligence on her part in an accident that took place after a long lapse of time.
  - d) A long lapse of time will necessarily create inequity or injustice, and amount to an absolute and obvious injustice or even a parody of justice.



- e) The foregoing principles apply with particular force where disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.
23. Therefore, there is a public interest element in the provisions on limitation of actions. See Peart J in *Byrne V Minister for Defence [2005]1 IR 577,585* where it was stated as follows; -
- ' a public interest, which is independent of the parties, in not permitting claims which have not been brought in a timely fashion, to take up valuable and important time of the Courts and thereby reduce the availability of that much used and need resource to plaintiffs and defendants who have acted promptly in their litigation, as well as increase the cost to the Courts Service and through that body to taxpayers, of providing a service of access to the Courts which serves best the public interest.'
24. Be that as it may, I am aware that it has been held that requirements in section 27(2) of the *Limitation of Actions Act* is stringent and constitute the test on whether to grant or not to grant leave to file suit out of time. I am also aware that it has been held that in the context of statutory limitation provisions, the amount of delay may not be relevant. Ssee the case of *Crispus Ned Ngari and another V Churchill Odera CA No 233 of 1998 (1999) 2 EA 241*, and *Barclays Bank of Kenya Ltd V the Commissioner General of Kenya Revenue Authority CA No 67 of 1998*.
25. Considerations of material factors, fairness and equity permeate the statutory limitations of time to file suit. Arbitrary locking out of a Plaintiff from seeking remedy due to limitation of time is awful. However, organized and democratic societies which are governed by the Rule of Law do recognize the need for causes of actions to be commenced within reasonable time and have prescribed statutory limitation of time. Thus, except as may be allowed in law, it is oppressive to a Defendant to be dragged into civil claims long after the circumstances that gave rise to the cause of action have changed or lapsed since the occurrence of the loss and damage.
26. This is a claim founded on alleged negligence of the appellant. The *Limitation of Actions Act* sets out material facts of a decisive character and circumstances in which a person may be permitted to file suit out of time. For purposes of this appeal, I draw from the excerpts of Section 30 which provides as follows; -
- (1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following—
- a) The fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action;
- b) The nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty; (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.



- (2) For the purposes of sections 27, 28 and 29 of this Act any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them, would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4(2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in the award of damages sufficient to justify the bringing of the action.
- (3) Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person, if, but only if—
- a) He did not know that fact; and
  - b) In so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose ascertaining it; and
  - c) In so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances.

27. The record shows that the Respondents knew of the fact of the accident and did ascertain that following the accident, they proceeded to take out letters of administration intestate with a view to filing suit. It was further noted in the 1<sup>st</sup> Respondent's supporting affidavit supporting affidavit to the application for leave dated April 6, 2021 that the reason for the delay was as a result of advice from the base commander who informed them to pursue the traffic case first then institute the civil one and lack of funds to institute the said suit.

28. The above reasons as fronted by the Respondents are not viable nor convincing to this Court to uphold the ruling of the trial Court. As duly noted by the Appellant, the law does not bar litigants from pursuing both civil and criminal litigation concurrently. Hence, the respondents were at liberty to institute the civil suit as well as the traffic case but they did not do so. On the issue of lack of funds, the Respondents had the option of approaching the Court vide suits by paupers pursuant to Order 33 Rule 1 (2) of the Civil Procedure Rules which defines 'pauper' as follows:

- ' (2) For the purposes of this Order a person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the institutions of such suit.'

It is instructive that despite the respondents claim of having lacked money with which to institute suit, they did not take advantage of the provision on filing as a pauper. The application to seek leave to lodge suit out of time was therefore in bad taste and meant to frustrate the appellant with a stale claim and that the respondents seem to have been woken up from slumber by the preliminary objections



29. Failure by the learned trial magistrate to consider limitation of time at the trial in light of sections 27 and 30 (3) of the Limitations of Actions Act was an error in principle. The language used in sections 27-30 of the *Limitation of Actions Act* does not intend exercise of discretion in granting leave to be at whim. It takes an inquiry in accordance with the said sections to make a determination of leave to file suit.
30. Ultimately, I am satisfied that the entire appeal has merit and is hereby allowed in the following terms: -
- i. The Notice of Preliminary Objection dated February 26, 2021, is merited.
  - ii. Kimilili PMCC No 361 of 2019 is struck out for being statute barred under the limitations of Actions Act with costs to the Appellant.
  - iii. The application dated April 6, 2022, is dismissed with costs to the appellant
  - iv. The costs of this appeal are awarded to the Appellant.

**DATED AND DELIVERED AT BUNGOMA THIS 21<sup>ST</sup> DAY OF MARCH 2023**

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Wekesa for Chesoni Appellant

Mbugua for Mwebi for Respondent

Kizito Court Assistant

