



**Ngigi v Momai Investments Limited (Civil Appeal E100 of 2022)
[2023] KEHC 17344 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E100 OF 2022**

DAS MAJANJA, J

MAY 12, 2023

BETWEEN

CHRISPUS MUGI NGIGI APPELLANT

AND

MOMAI INVESTMENTS LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon.V. M. Mochache, RM/Adjudicator dated 1st February 2023 at the Small Claims Court Nairobi, Milimani in SCCC No. E920 of 2021)

JUDGMENT

1. The Appellant appeals against the ruling of the Small Claims Court striking out its claim on the ground that it was time barred under the section 4(2) of the *Limitation of Action Act* (Chapter 22 of the Laws of Kenya) (“the LAA”) and that there was no basis to extend time for filing the suit under section 27 of thereof.
2. The facts upon which this appeal is grounded are not disputed. By the Statement of Claim dated December 2, 2021, the Appellant, as owner of the motor vehicle registration number KBP 374X filed suit against the Respondent claiming Kshs. 159,300.00 for material damage to the vehicle following a road traffic accident that took place on December 10, 2018.
3. It appears that the suit was filed on December 15, 2021 which is outside the three-year limitation period for tortious claims provided under section 4(2) of the *LAA* whereupon the Appellant filed the Notice of Motion dated January 3, 2022 seeking an order that, “The Statement of Claim dated December 2, 2021 together with all the documents filed out of time on December 15, 2023 be and are hereby deemed properly filed on record.”



4. The application was supported the affidavit of the Appellant's counsel on record, Manyara Reginald Mworira, sworn on January 3, 2022. The thrust of the deposition was that after receiving instruction to file suit, he attempted to file suit via the e-filing platform but had difficulties doing so whereupon he was instructed to file the documents in person and physically but could not do so as the court had transitioned fully to online filing. Thereafter, he attempted to file the documents via email by sending them on December 2, 2021 to the court email; scnairobi2021@gmail.com requesting the court to assess the statement of claim and provide details for payment. That it was only until December 6, 2021 that the Court assessed the suit papers and responded by attaching the invoice for payment of filing fees and advising him that once the amount has been paid, the case number would be generated and the case given a mention date. On December 15, 2021 the Court informed him that the suit had been registered, given a case number and mention date. The Appellant urged that by time the suit was registered, the time frame for instituting the suit under the LAA had lapsed on December 9, 2021. He urged that the failure to file suit within the limitation period was as a result of circumstances beyond his control.
5. The Adjudicator considered the application and held that the suit was statute barred as it ought to have been filed on December 9, 2021 latest. That the suit, though based on negligence, was not a personal injury claim but of material damage to a motor vehicle hence the court could not extend time under section 27 of the LAA. In any event, the Adjudicator held that even if the court had jurisdiction to extend time, the facts of the case did not establish the threshold for granting leave to file the suit out of time.
6. In his Memorandum of Appeal dated February 25, 2021, the Appellant complains that the Adjudicator failed to consider and appreciate the fact that he presented the suit papers for filing on December 1, 2021 while the cause of action was still alive and in accordance with the existing procedure. That any delay in filing was occasioned by the court registry which took time to assess the fees and inform him to make payment and in the circumstances, the Adjudicator failed to exercise discretion judicially.
7. The Appellant accepts that the suit became statute barred on December 9, 2021. The issue for resolution is whether the Appellant filed his suit on December 2, 2021 or on December 15, 2021 when he was notified that the suit had been registered and which date the Adjudicator took as the date of filing. The Adjudicator did not consider the issue whether the suit was filed on December 2, 2021 or December 15, 2021.
8. Following the launch of the online filing system, parties have been required to file court document online. In some instances, and I take judicial notice, where the online platform is experiencing downtime, parties forward the documents via email for assessment and then filing. In this case, the Appellant forwarded the documents to the court on December 2, 2021. Ordinarily, the court ought to have acted on the same day and assessed the fees and proceeding to activate the suit upon payment of court fees. It is worth noting even though the documents were forwarded to the court by email, it only acted on them on December 15, 2021. It did not reject them meaning that the Appellant followed the proper and correct procedure. It is because of the court process that the documents were not filed on December 2, 2021.
9. As a general rule, a document is duly filed when the document is lodged at the appropriate court registry and the prescribed fee is paid. This is what was stated in *Motel Schweitzer v Thomas Edward Cunningham & Another* [1955] 22 EACA 252 where the Court of Appeal for Eastern Africa held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged and fees are paid.



10. Although the matter in issue is governed by the *Small Claims Court Act*, 2016, I think guidance on the issue of filing and payment of court filing fees can be gleaned from section 96 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which states:

96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

11. The aforesaid provision has been held to be permissive and the court has discretion to excuse the failure to pay fees where there are reasons given for such failure and in that case condone the consequences of the default by deeming the document to have been filed when it is lodged (see *Mombasa Cement Ltd v Speaker, National Assembly & Another* NRB Pet. No. 177 of 2015 [2018] eKLR and *Agnes Kwamboka v Philemon Matoke Mosioma & 2 Others* KSI Civil Appeal No. 135 of 2018 [2019] eKLR).

12. I find that the Statement of Claim and accompanying documents were lodged on December 2, 2021 but payment could not be made until the fee due was ascertained by the court and the Appellant duly informed. I therefore hold that the documents were lodged within the time limited for filing suit under the *LAA*. The issue then is whether failure to pay court filing fees is fatal to the claim. Guided by section 96 of the *Civil Procedure Act*, I hold that failure to pay the court filing fee on the date of filing is excusable and since it has been paid, the Statement of Claim shall be deemed to have been filed on December 2, 2021.

13. This decision shall apply to the following appeals where the respective suits were struck out by the court because they were filed out of time: HCCA No. E101 of 2022, Samuel Wairuri Kimani v Asunga Ogweno George, HCCA No. E102 of 2022, Bamburi Special Products Limited v Winny Chepkoech, HCCC No. E103 of 2022, Patrick Muchiri v Naftal Nchoroko Nyamwange and HCCA No. E105 of 2022, Caroline Njeri Waithira v Wasantha Sanjeeva Wanasinghe.

14. I therefore allow the appeal on the following terms:

a. The ruling and order dated February 1, 2022 be and is hereby set aside and substituted with an order allowing the Notice of Motion dated January 3, 2022 on terms that the, “The Statement of Claim dated December 2, 2021 together with all the documents filed out of time on December 15, 2023 be and are hereby deemed properly filed on record.”

b. The order in this appeal shall apply to the following appeals mutatis mutandis: HCCA No. E101 of 2022, Samuel Wairuri Kimani v Asunga Ogweno George, HCCA No. E102 of 2022, Bamburi Special Products Limited v Winny Chepkoech, HCCC No. E103 of 2022, Patrick Muchiri v Naftal Nchoroko Nyamwange and HCCA No. E105 of 2022, Caroline Njeri Waithira v Wasantha Sanjeeva Wanasinghe.

c. The Subordinate Court is directed to hear and determine the respective suits.

d. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023.

D.S. MAJANJA

JUDGE



Court Assistant: Mr M. Onyango.

Mr Keiro instructed by Kamotho Njomo and Company Advocates for the Appellant

