



Onyancha (Suing on behalf of the Estate of Rhoda Kemunto Onyancha (Deceased) v Wanjiru (Civil Appeal E201 of 2021) [2023] KEHC 17292 (KLR) (Civ) (3 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

CIVIL APPEAL E201 OF 2021

DO CHEPKWONY, J

MAY 3, 2023

BETWEEN

**JOSEPH ONYANCHA (SUING ON BEHALF OF THE ESTATE OF RHODA
KEMUNTO ONYANCHA (DECEASED) APPELLANT**

AND

SIMON WANJIRU RESPONDENT

*(Being an Appeal from the Ruling and Order of Hon. D. A. Ocharo
(PM) delivered on 3rd December, 2019 in Milimani CMC Civil
Application No.1106 of 2019, Joseph Onyancha –vs- Simon Wanjiru)*

JUDGMENT

Background

1. By way of Originating Summons dated 27th September, 2019 and filed in court on even date, the Applicant/Appellant (hereinafter referred to as the “Appellant”) filed the summons seeking leave to file a suit against the Respondent out of time before the Trial Court. To be precise, the summons sought for the following reliefs:-
 - a. Spent;
 - b. That the Honourable Court be pleased to grant leave to the Applicant to file this suit out of time;
 - c. That the cost of this application be in the cause.
2. The summons was premised on the grounds That the delay in filing this suit was occasioned by the inadvertence of the earlier instructed counsel and That the mistakes of an advocate should not be visited



on a client who gave instructions to the advocate in good time. It is also been averred That none of the parties will be prejudiced in any way if the same is allowed and That the allowance sought is necessary in the interest of justice to enable the real questions in controversy as between the parties to be placed before the court for determination. It is further averred That as a result of the accident, the Applicant lost her daughter which made it impossible to follow up with the advocate she had instructed. It is hence averred That it would only be fair and just That the prayers sought are granted.

3. The Originating Summons was disposed by way of written submissions and upon consideration of the said submissions, the Trial court delivered its ruling on 3rd December, 2019 in which the court dismissed the application with no orders as to costs.

The Appeal

4. Being dissatisfied with the decision of Hon. D. A. Ocharo (PM) delivered on 3rd December, 2019 in Milimani Misc. Civil Application No.1106 of 2019, the Appellant has preferred this appeal vide a Memorandum of Appeal dated 29th January, 2020 raising the following grounds of Appeal (Verbatim):

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- a. That the learned Magistrate failed to consider submissions by counsel for the Applicant and critically analyze the same and accord it, its due weight.
- b. That learned Magistrate erred in law and fact in failing to consider the merits of the Appellant's application.
- c. That the learned Magistrate erred in law and fact in failing to consider the reasons for the delay in filing the suit.
- d. That the learned Magistrate erred in law and wrongly exercised his discretion in the circumstances.
- e. That the learned Magistrate erred in law in failing to acknowledge and find That the Applicant had met the requirements for the orders sought.

The Appellant proposes to ask the Honourable Court for the following orders: -

- a. That this appeal be allowed.
 - b. That the Orders issued on 3rd December, 2019 with regard to filing suit out of time be set aside and That the Appellant be allowed to file a suit out of time.
 - c. That costs of this appeal be in the cause.
5. This appeal was admitted for hearing on 18th February, 2022, whereby this Court issued directions That the appeal be canvassed by way of written submissions and only the Appellant filed his submissions. The Appellant's submissions are dated 5th May, 2022.

Analysis and Determination

6. This being a first appeal, it is the duty of this Court to analyze and re-evaluate the evidence That was adduced before the trial court and reach its own inference, save That the court should be minded to warn itself That it did not hear or see the witnesses testify so as to appreciate their demeanor. This



position was outlined in the case of *Abok James Odera T/A A. J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013]eKLR, where the Court held as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

7. I have considered the grounds set out in the Memorandum of Appeal by reading through the original records of proceedings of the trial court alongside the Appellants’ submissions, cited authorities and the law. The Court of Appeal in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR, held That:-

“An Appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown That the Judge proceeded on wrong principles, or That he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

8. Upon considering the pleadings before court, I find That this appeal revolves around a single issue which this court is called upon to determine, which is whether the Appellant’s appeal is merited to warrant the grant of the orders being sought.

9. The law on limitations period is provided for under Sections 4(2) and 27(1) of the *Limitations of Actions Act*, which provides That:-

Section 4 (2) provides That: -

“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.”

Section 27 of the *Limitations of Actions Act* goes on to provide 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 court has, whether before or after the commencement of the action, granted leave for the purposes of this Section; and
 - c. 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

b. 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.”

10. Section 27 of the Limitations of Actions Act provides That Section 4(2) does not afford a defence to an action founded on tort. It provides That 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. In the instant case before court, the cause of action arose on 20th August, 2011 therefore the claim ought to have been filed before 20th August, 2014. The Originating Summons seeking to extend time was filed on 27th September, 2019 before the trial court which is period equivalent to more than 5 years after the lapse of the statutory period of filing the claim.

11. The Appellant has attributed the delay to have been occasioned by the inadvertence of the earlier instructed counsel. In this Court’s view, the reason advanced by the Appellant is not convincing enough to enable this court exercise its discretion in his favour. Although the Respondent did not file any response in this appeal, this Court has an obligation to look at the pleadings before it and come up with a just and fair determination.

12. It should be noted That in an application for leave to file a suit out of time, the Applicant should be able to explain the reasons for the delay to the satisfaction of the Court. In this instant appeal, the Appellant has not explained to the satisfaction of this Court the reason there has been a delay for more than 5 years. Therefore, in the absence of a proper explanation for the delay this court is left with no option but confirm the decision of the Trial court.

13. The Appellant has submitted That Section 27(1) of the Limitations of Actions Act sets out the conditions to be satisfied before leave can be granted. The conditions are That the action is founded on a tort, the action is for damages for negligence, nuisance or breach of duty and the damages claimed by the Plaintiff are in respect of personal injuries of any person.

14. In the case of *Willis Onditi Odhiambo -v- Gateway Insurance Co. Ltd* [2014]eKLR, the Court of Appeal observed That:-

“Under Section 27 (1) of the Limitations Act, time to file a suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages accorded should be in respect of personal injury to the plaintiff as a result of the tort.”

15. Based on the foregoing reasons, the appeal dated 29th January, 2020 is without merit and is hereby accordingly dismissed with no orders as to costs.



16 Orders accordingly

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...3RD ... DAY OF ...MAY... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either parties

Court Assistant – Simon/Martin

