



REPUBLIC OF KENYA



KENYA LAW
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**Mwende v Elmi & 2 others (Civil Suit 156 of 2014)
[2024] KEHC 14271 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14271 (KLR)

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

CIVIL

CIVIL SUIT 156 OF 2014

JN MULWA, J

NOVEMBER 14, 2024

BETWEEN

JANET MWENDE PLAINTIFF

AND

MOHAMMED ABDI ELMI 1ST DEFENDANT

MEGA WHOLESALERS LTD 2ND DEFENDANT

AND

MEGA TRANSPORTERS COMPANY LIMITED RESPONDENT

RULING

1. The Plaintiff/Applicant herein Janet Mwende, by a plaint dated 28th May 2014 and filed in court on an even date sued the Defendants to recover damages and costs following a fatal road accident that occurred on 21/4/2011 along Nairobi-Mombasa Highway at Voi. The Plaint was later amended on 26/10/2018. Other cases were filed by victims in the accident, which have since been consolidated with this case. These are HCCC NO.155/2014 and 154/2014. These cases proceeded to inter partes hearing and judgment on liability determined by the court on 10/11/2022 wherein the Defendants were held wholly to blame for the accident.
2. Additionally, other cases being HCCC NO. 38,39,40,41, 42, and 43 of 2013 were heard and concluded in this court on liability at 100% upon the Defendants, and damages assessed in each of the cases to the plaintiffs therein.
3. While the assessment of damages in HCCC NO. 156, 155, and 154, was pending before this court, the Defendants filed a Notice of Preliminary Objection (P.O) dated 23/11/ 2023 raising a point of law under *Limitation of Actions Act*, claiming that the suits were filed outside the three (3) years period.



4. In response to the Defendant's Preliminary Objection, the Plaintiff filed a Notice of Motion dated 14th December, 2023 seeking the following orders:-
 - i. Spent.
 - ii. That this Honourable Court be pleased to extend the time for filing this suit and consequently have this suit filed on the 28th May, 2014 be deemed as duly filed.
 - iii. That this Honourable court be pleased to grant leave to the Applicant to continue with this suit for its full hearing and determination by this Honourable Court.
 - iv. That the costs of this Application be in the cause.
5. The application is brought under the provisions of Order 37 Rule 6(2) of the Civil Procedure rules and Sections 26, 27 and 28(3 a and c) of the Limitation of Actions Act, Section 1A, 1B & 3A of the Civil Procedure Act, and supported by the affidavit of Janet Mwendu sworn on 14th December, 2023.
6. The Defendants' filed their Grounds of Opposition to the Application dated 14th December, 2023.
7. On 4th July 2024, directions were taken before the court that the P.O and the Plaintiff's Application be heard together by way of written submissions which both parties filed.

Plaintiff's Submissions.

8. The plaintiff submitted that she deserves the leave sought because failure to seek this Honourable Court's leave prior to filing of the suit or commencement of the suit was a mistake by the previous Advocates who misdirected themselves by filing the suit 38 days after the limitation period without seeking leave of the Court. She maintained that the mistake and or ignorance of material facts and the law was a mistake that should not be visited upon her as the client.
9. She further submitted that the Defendants have been inordinate in raising their said Preliminary Objection despite having participated in this matter for the past 10 years and their said Preliminary Objection is only aimed at time wasting more of the Court's precious time and that the Defendants have been actively in this matter as this matter has already proceeded for hearing on liability under the lead file and a judgment on liability rendered which should not be rendered useless.
10. Additionally, The Plaintiff submitted that the Limitations of Actions Act provides for extension of time within which to bring a claim on tort of negligence seeking compensation by way of damages for personal injury by filing an ex-parte application for leave of court to either commence the said suit or to have the time barring the claim extended, citing the case of Embakasi Sweet Waters Welfare Group v Matumaini Ventures Ltd & Another [2016] eKLR wherein the learned Judge examined the above relevant sections of the Limitation of Actions Act and stated as follows:-

Section 4(2) of the Limitation of Actions Act 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: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

Section 27(1) of the said Act provides as follows;

Section 4(2) does not afford a defense 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 a written law or independently of a contract or written law (emphasis mine) 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.

11. Section 28(1) of the Limitation of Action Act provides that;

An application for leave of the court for the purposes of section 27 shall be made ex parte, except in so far as the rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.”

Defendant’s submissions.

12. In their submissions dated 23/11/20234, the defendants cited sections 4 (2) of Limitations of Actions Act for the proposition that an action founded on tort may not be filed after three years , and that no leave was obtain for filing the suit out of time as provided at Section 27 of the Act and therefore the suit can not be entertained, stating that this court lacks jurisdiction as held in the case of Owners of the Motor Vessel Lillian v Caltex Oil Kenya Ltd (1989) KLR.
13. Having set out the respective parties’ positions as above, the issue that emerge for determination is;
 - a. Whether the plaintiff’s suit as filed is barred by limitation of time. If so, whether it should be dismissed with costs.

Analysis and determination.

14. An issue of limitation of action in a suit ought to be raised at the earliest as by its nature touches on the court’s jurisdiction. As has been severally held, jurisdiction is everything, without which, a court of law must down its tools in respect of a matter before it the moment it holds the opinion that it is without it as well articulated in the Court of Appeal in the case of Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1.
15. The Limitation of Actions Act Chapter 22 Laws of Kenya is the primary substantive legislative enactment which statute expects the intending plaintiffs to exercise reasonable diligence and to take reasonable steps in their own interest, as not all causes of action once barred by statutory limitations are capable of being revived. See Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR where K. D. Porter JA held that:-

“The Act does not help persons who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

16. In the instant case, the Defendants contention is that the suit is time barred and no leave was sought or obtained to bring it out of time. A reading of Section 27(1) of the Limitation of Actions Act shows that extension of time only applies to claims made in tort and even in tort the claim must be in respect



of claims for personal injuries arising from 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).

17. In the case of Dr. Lucas Ndungu Munyua vs Royal Media Services Limited & another [2014] eKLR, Odunga J stated that:-

From the foregoing extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from 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). Therefore section 27 aforesaid does not provide for extension of time in defamatory matter.

18. This was confirmed in [*Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000*](#) where the Court of Appeal held:

“Section 27(1) of the [*Limitation of Actions Act*](#) clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.

19. That is the claim before the court and therefore falls squarely under the purview of section 27 of the Act. There is no dispute that the plaintiff's claim was time barred by 38 days, and that no leave was sought or granted prior to filing of the suit. Whether through ignorance or negligence, once again by both parties, the issue was never raised, the suit proceeded, was heard and judgment delivered on liability with participation of all parties, and the fact never brought to the various courts attention that have handled the suit for ten (10) years, with participation of both the plaintiff and the Defendants, only for the defendants to raise a Preliminary Objection at this point, after entry of judgment.

20. In the courts view, there would be no justice to the plaintiff if the court would proceed to terminate the suit at this stage.

The right to be accorded a fair hearing is embedded in [*the Constitution*](#), Article 50(1) which right cannot be limited, by virtue of Article 25. In the end, the plaintiff will have been guaranteed the right to access justice as enshrined and guaranteed in Article 48 of [*the Constitution*](#).

21. Madan J. A. (as he then was) in the DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR held, as to the matter with striking out of suits:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.”

22. The plaintiff upon the matter of Limitation being brought up proceeded to quickly filed the application dated 14/12/2023 the suit to conclusion seeking leave from the court to be allowed to continue with the suit to finality.

Upon consideration of all material facts stated above, and without unnecessary repetition, Section 27 and 28, and Section 4 (4) of Cap 22 empowers the court to extend time and or allow continuation of a suit filed out of time without leave of court out of ignorance and or negligence to bring an action founded on tort out of time provided that the court is satisfied of the reasons for the delay.



23. This court will not punish the plaintiff by striking out the suit for mistakes made by its advocates, taking into account that the Defendants, for over ten years acquiesced to the undisputed material facts, as to do so would not only be unfair and unjust in the circumstances of the suit.

1. The Defendants Preliminary Objection dated 29/5/2023 is dismissed.
2. The plaintiff's application dated 14/12/2023 is allowed.
3. The suit shall continue to finality.
4. Directions on further hearing of the suit shall be taken on 29/01/2025.
5. These orders shall apply to HCCCNO. 155/2014 and HCCC NO. 154/2014.
6. No costs are awarded to either party on the PO or on the Application.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

JANET MULWA

JUDGE

