



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CIVIL CASE NO. E053 OF 2021

BETWEEN

JUDITH ATIENO OTIENO (suing as the legal representative of

KENNEDY OKELOO (DECEASED).....**APPLICANT**

VERSUS

EDWIN KIMANI KURIA.....**RESPONDENT**

RULING

1. **JUDITH ATIENO OTIENO (Judith)** filed an ex party Originating Summons seeking leave of this Court to file a suit out of time on behalf of the estate of her Late husband **KENNEDY OKELLO (deceased)**. Judith seeks to file a suit to recover damages suffered to her late husband's estate following his fatal road traffic accident. That accident occurred on 20th August, 2017.

2. Judith deponed in her affidavits sworn on 22nd February, and 9th August, 2021 that she petitioned for limited grant through Succession Cause No. 1535 of 2018. That grant was not presented to this Court and accordingly it is not clear from which court she sought the grant. Judith further stated her deceased's husband was the family's sole bread winner and following his death, she was left with the burden of catering for her 7 children. Judith further deponed:-

“THAT following the demise of my husband the outbreak of COVID-19 pandemic I was forced to relocate and go up country as I could not afford to pay rent in Nairobi.”

3. Judith deponed that while she was upcountry, she lost her phone and in the process lost contact with her advocate in Nairobi and it was not until February, 2021 she was able to travel to Nairobi to follow up her case.

4. The application is brought under the provisions of section 27 and 28 of the Limitation of Action Act, Cap 22.

ANALYSIS

5. An action founded on tort may not be filed after the end of three years from the date on which the cause of action accrued: See **Section 4(2) of Cap. 22**. It follows that Judith should have filed her action on 19th August, 2020. **Section 27 of Cap. 22** provides the court with power to extend the limitation period in case of ignorance of material facts in action for negligence. **Section 27(2)** spells out how the provisions of **Section 27** are satisfied that is it has to be proved the material facts relied upon to support the application for extension were material facts of a decisive character outside the applicant's knowledge. **Section 27(2)** is in the following terms:-

“(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.

6. Section 30 of Cap. 22 goes further to define the phrase material facts relating to a cause of action as follows:-

“30(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.

7. The provisions of Section 27(2) of Cap. 22 were discussed in the case *In re THE ESTATE OF THE LATE NEMWELL NYASAGARE NYANARO (2014) eKLR*:-

“For this Court to grant the prayers sought, the applicant must satisfy the Court that she has met the conditions set out in Section 27 (2) of the law of Limitations of Actions Act and as set out in the Court of Appeal case of GATHONI – VS – KENYA CO-OPERATIVE LIMITED that for an application for leave to be allowed under Section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the Court, that failure to apply within time was due to lack of knowledge of certain material facts. The applicant must show to the satisfaction of the Court that she had taken all reasonable steps and sought appropriate advice in respect of the facts.”

8. Judith, in the material presented to this court did not show that her failure to comply with the limitation period was due to lack of knowledge of certain material facts. The reason Judith gave, that she went upcountry, does not satisfy the requirements of section 27 of Cap. 22.

9. In the above vein, is the discussion in the case *KENYA POWER & LIGHTING COMPANY VS. COLLINS AGUMBA ABOGE (2016) eKLR* thus:-

“17. The scope of section 27 of the Act was discussed in GATHONI V KENYA CO-OPERATIVE CREAMERIES LTD (above) where the Court of Appeal expressed the following view:-

The applicant’s application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive) ... Section 30(3) of the Act provides that for the purposes of Section 27 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 (1) he did not know that fact; and (2) 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 that time for the purpose of ascertaining it; and (3) 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 In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be ... The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

10. It is for the above reasons that I disagree with the submissions filed by the learned counsel for Judith that this is a proper case for extension of time to be granted. The application fails and is dismissed.

RULING DATED AND DELIVERED AT KIAMBU THIS 18TH DAY OF NOVEMBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice

For the Applicant : Mr. Nyagah

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE