



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO.46 OF 2018

BETWEEN

**HEZBON PANDE NYAIDHO (suing as a legal administrator of the
estate Florence Pande Nyaidho).....APPELLANT**

AND

JAMES A. ABURA.....RESPONDENT

***(Being an Appeal from the Ruling in Kisumu CMCC No. 623 of 2016 by Hon. A.Odawo (RM) on 29th
March, 2017)***

JUDGMENT

1. **HEZBON PANDE NYAIDHO (hereinafter referred to as appellant)** filed a Notice of Motion dated 17th November, 2017 seeking extension of time to file suit against **JAMES A. ABURA (hereinafter referred to as respondent)** in the lower to claim damages arising out of a road traffic accident in which his wife (**Florence Pande Nyaidho**) was fatally injured.
2. In a ruling dated 29th March, 2017, the Notice of Motion was dismissed.
3. This appeal raises the question whether the lower court correctly refused to grant the appellant leave to appeal out of time under Section 27 of the Limitation of Actions Act.
4. The record shows that on or about 24th October, 2006, the Appellant's wife **Florence Pande Nyaidho (hereinafter referred to as the deceased)** died in a road accident.
5. On 17th November, 2017, which is 11 years after the road traffic accident, the appellant applied to the Magistrate's court in Kisumu for leave to file suit out of time. That was in **CMCC 623 OF 2016** where he invoked the jurisdiction of the court under Section 3A of the Civil Procedure Act. Explaining the reasons why it had taken him that long to initiate action, he deposed the delay was occasioned by his failing health. In support thereof, he referred to treatment chits, medical report and receipts which were not annexed to the supporting affidavit.

The appeal and submissions by counsel

6. In his memorandum of appeal the appellant complains that the trial magistrate was wrong in finding that there were no material facts relating to the cause of action; that the trial magistrate failed to correctly

interpret Section 27(1) of the Limitation of Actions Act and denied the Appellant his right to be heard under Article 159 of the Constitution.

Analysis and Determination

7. I have considered the appeal and the submissions by learned counsel for the Appellant. The sole question for determination is whether the learned trial magistrate erred in rejecting the appellant's application, made under Section 27 and 28 of the Limitation of Actions Act, for leave to file suit out of time. The reasons why the trial magistrate declined to grant the appellant leave to file suit out of time are stated in the ruling thus:

“The deceased passed away on 24th October, 2006, there is no evidence shown to satisfy the court that there were material facts relating to the cause of action that were at all material times outside the knowledge of the applicant. The explanation given by the applicant is not evidenced.”

8. In support of his application for extension of time, the appellant stated that the delay was occasioned by his failing health. In support thereof, he referred to treatment chits, medical report and receipts which were not annexed to the supporting affidavit.

9. In the case of **Dominic Njuguna Wairimu v Joseph Wambugu Kibe [2018] eKLR**, held as follows:

“In order to surmount the defence of limitation on grounds of ignorance of material facts under Section 27 of the Limitation of Actions Act, in addition to fulfilling the requirements under Section 27(1)(a), (b) and (c), namely that the action is for damages for negligence, nuisance or breach of duty; that the damages claimed consist of or include damages in respect of personal injuries, the applicant must demonstrate that the requirements of Section 27(2) are fulfilled in relation to the cause of action. Section 27(2) of the Limitation of Actions Act provides that:

“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.”

10. Expounding on those provisions, Kwach, JA (as he then was) in **Bernard M. Mbithi vs Mombasa Municipal Council & another [1993] eKLR**, stated that:

“The Court will grant an application for leave to bring an action after the expiry of the normal three-year limitation period if the plaintiff proves that material facts relating to his cause of action were or included facts of a decisive character which were at all times outside the knowledge of the plaintiff until a date which was either after the end of the three-year period or not earlier than twelve months before its end and was, in either case, not more than twelve months before the date on which the action was brought. Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action; (b) the nature or extent of the personal injury so resulting; and (c) the fact that the personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable.

It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character, that is to say, they must be such that a

reasonable person, knowing them and having obtained appropriate advice with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action.

Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive).”

11. In Ngari & another Vs Odero (1999) 2EA 24, the Court of Appeal stated that the requirements of Section 27(2) are stringent and that if the same are not met, the application for leave to file suit out of time must be rejected.

12. As already indicated, the appellant did not annex any document to prove that his health was failing and that he was so incapacitated as to be able to take any action to pursue his claim until 2016. The record shows that the Police Abstract was issued on 9th November, 2006 and the death certificate on 20th December, 2006. There is no suggestion that the Appellant failed to pursue his claim earlier due to ignorance of material facts. The learned trial magistrate was therefore correct in holding that the appellant did not fulfill the requirements of Section 27(2) of *the Act*.

13. Despite the unfortunate circumstances and the compassion I might have for the appellant, I am unable to find fault in the ruling of the lower court. Consequently, the appeal fails and the same is hereby dismissed with no order for costs.

Orders accordingly.

DELIVERED AND SIGNED IN KISUMU THIS 7th DAY OF March 2019.

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Appellant - Ms. Othong hb for Mr. Mwamu

Respondent - NA