



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 349 OF 2010

CHARLES MWEMBU KAMARI.....1ST PLAINTIFF

ANNE KAMARI 2ND PLAINTIFF

(Suing as the administrators and personal

representatives of the estate of Andrew Mwembu Kamari)`

-VERSUS-

DR. E. C. KUNGU 1ST DEFENDANT

THE NAIROBI HOSPITAL..... 2ND DEFENDANT

RULING

1) The plaintiffs herein took out the motion dated 25th April 2019 whereof they sought for an order to enlarge time of filing this suit. The motion is supported by the affidavit of Charles Mwembu Kamari. The defendants filed the replying affidavit of Maxwell Maina Mwangi and a preliminary objection to oppose the motion.

2) I have considered the ground set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion plus the rival oral submissions.

3) It is the submission of the plaintiffs that the cause of action arose on 1st March 2006 and that the plaintiffs obtained letters of administration ad litem on 18th May 2010 and that on 9th July 2010 the plaintiffs filed this suit in which they pleaded for inter alia that the defendants were in breach of contractual obligation. It is pointed out that the 2nd defendant did not plead in its defence that the action is time-barred but only raised the issue through the notice of preliminary objection dated 5th March 2019. It is on that basis that the plaintiffs deemed it fit to validate the suit.

4) The defendants on their part stated that the suit is time-barred by dint of Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya hence it should be struck out. The defendants further argued that the claim is purely based on a claim of damages for alleged negligence against the 2nd defendant which arose on 1st March 2006 and the same became time-bared on 1st March 2009. It was also pointed out that the plaintiffs ought to have applied for prior leave before the suit could be filed. It is also the argument of the defendants that this court cannot enlarge time nor find the plaint being properly on record.

5) Having considered the material placed before this court and having taken into account the rival oral submissions, it is apparent that the plaintiff averred in paragraph 6 of the plaint that a duty of care and implied contractual obligation arose between the 2nd defendant and the deceased, that the defendant would exercise all reasonable skills and care ascribed to them to ensure the safety and care of the deceased.

6) In my humble view the mention of the word 'implied contract' cannot by any interpretation make the action contractual. The same is purely based on the tort of medical negligence. Such an action can only be brought within three (3) year under Section 4(1) of the limitation of Actions Act. It is admitted that the cause of action arose on 1st March 2006 which the plaint was filed on 9th July 2010. By that time the suit was already time-barred.

7) The plaintiffs in their submissions seem to suggest that because the defendants did not plead in their defence that the suit was time-barred, they are not entitled to do so by a notice of preliminary as it was done here. That submission cannot stand because a preliminary objection can be raised any time of the proceedings before judgment. The main order being sought from this court is for the extension of time of filing suit.

8) This court was also asked to deem plaint dated 7th July 2010 and filed on 9/7/2010 as properly on record. It is clear in my mind that by the time of filing the plaint, the same was barred hence no orders can flow from. A party must first seek for leave to file an action out of time. One cannot file the suit and later come back to court to have it deemed as properly filed. The plaintiff's action was dead on arrival and there is nothing to resuscitate. This court has no jurisdiction to grant orders based on an action which is statutorily barred.

9) In the end, I find the preliminary objection to be with merit, it is upheld. Consequently, the motion is dismissed and the suit is ordered struck out. In the circumstances of this case, a fair order on costs is direct which I hereby do that each party bears its own costs.

Dated, signed and delivered at Nairobi this 18th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant