



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 155 OF 2016 (OS)

PETER WAMBUA KAUA and KEMENDE KAUA (Suing on behalf
of the estate of **EDWARD MUONI** (deceased).....**PLAINTIFFS**

VERSUS

1. NYAMIERO WESLEY MORARA.....1ST DEFENDANT

2. JACKSON OMWENO OMUKE.....2ND DEFENDANT

RULING

1. Before this court is the plaintiff's originating summons dated 13th June, 2016 seeking extension of time within which to file the suit. The motion is supported by the affidavit of Peter Wambua Kua. He stated that the cause of action occurred on 7th April, 2012 and expired on 7th April, 2015. The reason advanced for the delay in filing the suit in time is that the plaintiffs' previous advocates failed to file the suit within the prescribed time. That the said failure was discovered when the current advocates on record called for the file only to discover that no suit had been filed. That the plaintiffs have a genuine claim against the defendants which should be vindicated by this court.

2. In submissions, it was argued that the plaintiffs' advocates' mistakes ought not be visited upon the plaintiffs. To support that argument, the plaintiff cited **Paul Asin t/a Asin Supermarket v. Peter Mukembi [2013] eKLR** and **Re Joyce Wamuhu Gitau [2015] eKLR**. The court in the latter case was of the view that unless there is fraud or intention to overreach justice, a party should not be left to suffer the penalty of not having his/her case heard on merit. On the court's discretion to extend time, the plaintiff cited **Rosemary Wanjiru Kungu v. Elijah Macharia Githinji & another [2014] eKLR** where the court held that other than showing that the matter being sought to be extended falls under section 27 (1) of the Limitation of Actions Act, the applicant must also establish that material facts relating to that cause of action or included facts of a decisive character which were at all times material were outside the knowledge of the plaintiff. It was submitted that the plaintiffs thought that their case had been filed in court. That they had no reason to distrust their advocates. That the plaintiffs only came to discover that the suit had not been filed when their current advocates asked for the file from the previous advocates.

3. On delay, it was submitted that there was no delay in bringing this application. That immediately the file was received from the plaintiffs previous advocates on 16th May, 2016, the plaintiffs were advised that the suit was statutory barred and the application herein was filed on 14th June, 2016. On the issue of delay, the plaintiff cited **Pravichandra Jamnadas Kakad v. Kenya Bus Services Limited & Another [2014] eKLR** where the court laid down factors to be considered when deciding whether or not delay is inordinate and inexcusable. It was submitted that while the plaintiff may have recourse against the previous advocates, he should be allowed his day in court. The plaintiff also sought refuge under Article

159 of the Constitution.

4. Section 27 of the limitation of Actions Act Cap 22 Laws of Kenya provides for extension time, it provides:

“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 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.

(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) (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.”

5. It follows therefore, that extension of time under this section is only available to claims made in tort. However, even then 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).

6. The said provision does not provide for extension of time in defamation cases. See **Dr Lucas Ndungu Munyua v. Royal Media Services Limited & another [2014] eKLR**, where 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). ... 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”

7. Considering that the plaintiff’s claim arises from alleged injuries said to have been sustained as a result of a road traffic accident, the claim is available for extension of time. There are however other factors that courts must consider in so doing. The Supreme Court while dealing with the issue of extension of time in the case of **Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** laid down some guiding principles as follows:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“...we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;***
- 2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***
- 3. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case- to- case basis;***
- 4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
- 5. Whether there will be any prejudice suffered by the respondents, if extension is granted;***
- 6. Whether the application has been brought without undue delay; and...”***

8. The said principles affirm those highlighted in **Pravichandra Jamnadas Kakad**(supra). Keeping the foregoing test in mind, I am cognizant of the precedent on mistakes by counsel. In **Phillip Chemowolo & Another v. Augustine Kubede (1892-88) KAR 103 at 104**, Apaloo, JA observed that it does not follow that ***“because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.”*** And in **Belinda Murai & Others v. Amos Wainaina(1978) LLR2782 (CALL)** Madan, JA stated that ***“the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.”***

9. The plaintiff indicated that instructions were given to the previous advocate to file the suit. In so doing, the plaintiff entrusted the advocate with the suit. The advocates who are legal professionals ought to understand the effects of failure to file suit within the prescribed time. The plaintiff is said to have known about the failure to file the suit within time when they engaged the services of another advocate. It is clear to me therefore that the failure to file the suit within the prescribed time was not deliberate or rather was not with a view of defeating justice. Upon such discovery the current advocates filed this application within one month of such discovery. In my view, this application has been filed within reasonable time. I am also of the view that allowing this application will not prejudice the defendants in any way that cannot be compensated by costs.

10. Accordingly I allow the application herein and order that the suit be filed within 14 days from the date of this ruling.

Dated, signed and delivered at Nairobi this 16th day of March, 2017.

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L NJUGUNA

JUDGE

In the presence

..... *For the Plaintiff*

..... *For the 1st Defendant*

..... *For the 2nd Defendant*