



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CIVIL SUIT NO. 50 OF 2007

P M N.....PLAINTIFF

VERSUS

KENYATTA NATIONAL HOSPITAL.....1<sup>ST</sup> DEFENDANT  
DR.A.J.WERE.....2<sup>ND</sup> DEFENDANT  
DR.P.MBUGUA.....3<sup>RD</sup> DEFENDANT  
DR. MBOLOI.....4<sup>TH</sup> DEFENDANT  
DR. W. WAFULA.....5<sup>TH</sup> DEFENDANT  
DR.J O ATINA.....6<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT

**R U L I N G**

The plaintiff in this case P M N alleges by his plaint dated 7<sup>th</sup> March, 2014 filed in court instant against the defendants jointly and severally that on or about the 4<sup>th</sup> day of April, 2006 he visited the 1<sup>st</sup> defendant Kenyatta National Hospital for medical treatment and was diagnosed to be suffering from tuberculosis (TB) and HIV and thus was put on TB and Anti-Retroviral drugs. The plaintiff claims that he was treated by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> defendants who were doctors employed by the 1<sup>st</sup> Defendant hence the latter is vicariously liable for the acts of negligence attributed to the said doctors.

It is alleged that as a result of the defendants’ negligent acts, and wrongful diagnosis, the plaintiff, the TB and Anti-Retroviral drugs he used occasioned him physical and psychological torture, emotional distress, loss of erection, paralysis on one side of the body and loss of marriage.

The plaintiff claims from the defendants special and general damages cost of the suit and interest and any other relief that the court may deem fit to grant.

The 1<sup>st</sup> defendant herein, Kenyatta National Hospital filed defence dated 19<sup>th</sup> May, 2014 denying the

claim against it by the plaintiff and contending at paragraph 10 of its defence filed through the law firm of Mulondo, Oundo, Muriuki & Company Advocates that the plaintiff's claim was statute barred in accordance with the express provisions of the Limitation of Actions Act Cap 22 Laws of Kenya as it is premised on the tort of negligence which is alleged to have arisen way back in 2006.

Earlier on 6<sup>th</sup> May, 2014 the 7<sup>th</sup> defendant Attorney General had filed a chamber Summons seeking to have the Attorney General struck out of the suit on account that the 1<sup>st</sup> defendant Kenyatta National Hospital was a statutory Corporation which represents itself in civil matters and that the AG could therefore not be made a party to such proceedings. Further, that no Notice of Institution of suit was served upon the Attorney General pursuant to the Government Proceedings Act. That application was however not prosecuted. The same is pending.

Other than the 5<sup>th</sup> and 6<sup>th</sup> defendants who entered appearance and filed a joint defence through the firm of Miller & Company Advocates, the rest of the defendants entered appearance separately.

The 1<sup>st</sup> defendant then formally lodged a Notice of preliminary Objection dated 31<sup>st</sup> October, 2014 seeking to have the suit herein struck out for being time barred.

The Preliminary objection was canvassed on 23<sup>rd</sup> March, 2015 by way of oral submissions with all the parties being ably represented by their respective advocates on record.

At the hearing of the preliminary objection, Mr Angaya, counsel for the 1<sup>st</sup> defendant submitted that the objection is founded on section 4(2) of the Limitation of Actions Act. Counsel submitted that the cause of action was brought to court on 7/3/2014 based on the tort of negligence against the defendants.

The 1<sup>st</sup> defendant's case is that the plaintiff is guilty of laches; and that the suit has been filed after 7 years from the date when the alleged cause of action arose. Mr Angaya submitted that the plaintiff did not seek extension of time as required under section 27 of the Limitation of Actions Act.

Mr Angaya further submitted that the plaintiff filed the complaint in the wrong forum that is the Medical Practitioners & Dentists Board which can only make recommendations but cannot grant damages for negligence. He argued that the plaintiff's complaint was dismissed in 2012 by the Board and that the plaintiff did not lodge an appeal. The 1<sup>st</sup> defendant's counsel relied on the case of **MUGO NDEGWA VS AMBOSELI LTD.**

Mr Soita, counsel for the 7<sup>th</sup> defendant Attorney General supported the 1<sup>st</sup> defendant's preliminary objection. He submitted that the suit is statute barred under section 3(1) of the Public Authorities Limitation Act and that the suit against the Attorney General is unsustainable since it ought to have been filed within 12 months from the date when the cause of action accrued. He urged the court to strike out the suit with costs.

Mr Mare, counsel for the 5<sup>th</sup> & 6<sup>th</sup> defendants also supported the 1<sup>st</sup> defendant's preliminary objection. He submitted that the cause of action arose on 18<sup>th</sup> July 2007 after the 2<sup>nd</sup> test was done at the Liverpool VCT. It was also submitted that no leave of court to extend the period for filing suit was sought and or obtained under section 28 of the Limitation of actions Act.

Mrs Njogu counsel for the 3<sup>rd</sup> defendant also supported the preliminary objection raised by the First Defendant and submitted that the suit is time barred and should be struck out with costs to the 3<sup>rd</sup> defendant.

The preliminary objection was opposed. Mr Oduor counsel for the plaintiff submitted that the plaintiff did not sit on his rights. He followed up the issue with a view to having it resolved amicably and that it ended up at the Medical Practitioners & Dentists Board and at that time he was acting in person. The plaintiff's counsel submitted that this court has jurisdiction to grant leave to have the suit resuscitated if it finds that

the suit was filed out of time.

He explained that the plaintiff is a lay man; he went before the Medical Practitioners & Dentists Board to seek compensation where his claim was dismissed. He stated that the plaintiff deserves to be heard in the interest of justice.

Counsel for the plaintiff relied on **Article 159 of the Constitution**, and sections **1A, 1B and 3A of the Civil Procedure Act**. He urged the court to sustain this suit.

In reply Mr Mare submitted that **sections 1A, 1B, and 3A** of the Civil Procedure Act were not meant for the indolent parties but to assist expedite justice to all parties. He argued that if the plaintiff wants leave then he should make a formal application for leave.

Mrs Njogu also urged the court to disregard the attempt by the plaintiff to apply for leave in the cause of the preliminary objection. She submitted that the 1<sup>st</sup> defendant filed a preliminary objection early enough by his defence since October 2014 hence the application for leave should not be considered.

I have carefully considered the preliminary objection and the counsels' brief submissions and in my view the only issue for determination is ***whether in the circumstances of this matter the preliminary objection should be allowed.***

The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in **MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS (1969) EA 696**. At page 700, Law, JA stated that:

***“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newbold P. added as follows at page 701:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

In this case, the preliminary objection relate to the provisions of section 4(2) of the limitation of Action which provides –

***4 (2) 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:***

**It is not disputed that the suit has been brought after the period of three years from the date when the cause of action arose. The plaintiff filed his suit through a plaint dated 7<sup>th</sup> march 2014. Under paragraph 5 of the plaint he pleaded that on 4<sup>th</sup> April 2006 he visited the 1<sup>st</sup> defendant for treatment and was diagnosed to be suffering from tuberculosis and HIV and was thus put on TB and anti retroviral drugs. The plaintiff sought further tests which revealed that he was not suffering from TB and he also did not have HIV. The plaintiff claims that the medication administered to him has caused psychological torture, loss of erection, paralyzed one side of the body and loss of his marriage.**

**The plaintiff is urges the court to enter judgment against the defendants for general damages for pain, suffering and loss of amenities and special damages.**

In my view, the plaintiff's claim falls under the law of torts and more specifically, the tort of medical negligence which may have led to misdiagnosis of the plaintiff's illness. That being the case, the claim falls within those that cannot be brought after 3 years and governed by section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

Having found that the plaintiff's claim is time barred *the question is whether it should be dismissed.* Mr Oduor in his objection to the preliminary objection submitted that the court has jurisdiction to resuscitate the suit if the court finds that the suit herein was filed out of the statutory period.

Although Mr Oduor did not make any formal application for leave to extend the period within which the suit could be filed, I hold the view that his oral application can be considered by this court. Extension of time for filing of suit is provided for under Section 27 of the limitation of Actions Act which states:

*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.*

In Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000 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.”*

The above provisions of the law shows that 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).

The Court of Appeal in **Willis Onditi Odhiambo v Gateway Insurance Co Ltd** Civil Appeal NO. 37 OF 2013 [2014] eKLR stated:

*“Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort.*

*The section clearly does not give jurisdiction to the court to extend time for filing suit in cases involving execution of decrees. In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence. Here, the extension was sought to enforce a judgment and/or decree. Time within which to lodge such action cannot be extended under the provisions of Section 27 of the Limitation of Actions Act.”*

The power to extend time is discretionary and not fettered at all, save that the said power should be exercised judiciously and upon defined principles of the law. In the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited**, Civil Application 98 of 2013, [2014] eKLR, the Court of Appeal in determining an application to file and serve a record of appeal out of time stated:

*“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.*

*In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.” (emphasis added).*

Although the decisions cited refer to extension of time or leave to file and serve record of appeal out of time the principle of law emanating also applies in this case.

Mr Oduor submitted to the court that the plaintiff first filed his claim at the Medical Practitioners & Dentists Board where the complaint was dismissed on the ground that the Board had no power to make monetary award.

In my view, the plaintiff did not sit on his rights as alleged by the defendants. He took steps to ensure that his claim is resolved by seeking assistance from the Board although unsuccessful. It is also clear that the plaintiff is desirous to prosecute his case against the defendants. In my view the plaintiff has given a reasonable explanation, therefore in the interest of justice, he should be allowed to have his day in court. The plaintiff should not be ousted from the judgment seat to ventilate his grievances as that would be denying him access to justice which is a constitutionally guaranteed right under Article 48 of the Constitution and a right to a fair hearing under Article 50(1) of the Constitution, which latter right cannot be limited under Article 25 of the Constitution.

It must also be remembered that what The Limitation of Actions Act provides is that certain causes of action may not be brought after the expiry of a particular period of time. In other words the Act bars the bringing of particular actions after the specified periods of limitation. *The Act does not extinguish causes of action.* See **Judicial Review Misc. Civil Application 321 of 2011 Kenya Law Reports 2014 in Republic v Principal Magistrate P. Ngare Gesora Principal Magistrate's Court & 2 others Ex-parte Nation Media Group Ltd [2013] eKLR.** Odunga J, citing Bosire J in **Rawal vs. Rawal [1990] KLR 275, Bosire, J** (as he then was) stated:

***“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims”.***

The above decision cited **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321** where it was stated:

***“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”***

The same position was affirmed in **Iga vs. Makerere University [1972] EA 65** in which it was held:

***“A plaintiff which is barred by limitation is a plaintiff “barred by law.” A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim... The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time-barred, the court cannot grant the remedy or relief”.***

In other words, since the Act does not extinguish a claim but only bars the bringing of the same, where the barrier is lifted by extension of time the claim may still be sustained.

The defendants maintained that this court should not grant the plaintiff as he should be ordered to serve them with an application for leave to defend. My view on that plea is that the defendants have a remedy under the law, which is trite that the application for leave in the suit has to be made Exparte, and the challenge to leave granted can only be made at the trial of the suit. The rationale for such procedure was aptly given in the case of **Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995 where Shah, JA** expressed himself as follows, on the remedy available to the party aggrieved by a decision extending time to file suit where circumstances do not warrant such extension:

***“By virtue of section 28(1) of the Limitation of Actions Act, Cap 22, Laws of Kenya (the Act) an application for leave of the superior court (for that matter of the subordinate court) has to be made ex parte. The proposed defendant is not a party to that application. Indeed he cannot be for the simple reason that section 28(1) mandated that such application “shall be made ex parte. This situation is reinforced by the provision of Order 36 rule 3C of the Civil Procedure Rules... In a situation such as outlined above the defendant only becomes aware of the order extending time when he is served with the summons, plaint and the order extending time.***

***There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In the Court's view, the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is a dispute as to facts. It will be***

up to the judge presiding at the trial to decide the issue but not as a preliminary point.

*The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted ex parte... Although it was a general principle in regard to ex parte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intentions of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an ex parte order obtained giving leave for the purpose of the section... The respondent having obtained leave to file action as required by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order ex parte will be rendered nugatory.*

*It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made, can apply to the court which made the order to set aside... The judge who heard the application for extension of time must first hear it (in case of an application filed before filing suit) ex parte. He has no discretion in the matter. He is bound by the requirements of the Act. If the evidence shows prima facie that the requirements of the Act are satisfied, leave should be given.*

*It is in the action only that the defendant can challenge the facts in due course. This is, because the requirements of section 27 are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law etc. If evidence showing prima facie that the requirements of the Act are satisfied, leave should be given leaving the defendant to challenge the facts in the action in due course. The statute does not seem by its language to confer discretion but merely a jurisdiction to decide whether the requirements of the statute are or are not fulfilled. That decision of course involves points on which judicial mind may differ... The trial judge will not be sitting in appeal on findings of the judge who granted leave in the first instance. His job would primarily be to decide if the leave was actually and legally properly obtained. There may be cases where medical evidence may be misleading enough to enable one judge to grant such leave but when correct medical data may be brought forward by the defendant, the picture may drastically change.*

*here may be clear cases where the applicant may swear to facts which are not true, which can only be challenged at the trial. There may even be cases where a Judge, because of work-load in the superior court, may not have time to apply his mind to the requirements of the Act which Act of course limits the granting of such leave in respect of personal injury, Fatal Accidents Act, and the Law Reform Act claims only. Often the interpretation of section 27, 28 and 29 of the Act, as explained in section 30 of the Act may not have been brought to the attention of the judge. It follows that the order granting an extension stands and is binding on the parties. But that means that the order stands until it has been effectively set aside. And such an order, where the objection to it is of the character here set up by the appellants, can only be so directed to that special end... The trial judge is entitled to hear the challenges hurled at the ex parte order and decide whether or not the ex parte order was correctly obtained by the applicant. The issue as to whether or not leave to file suit out of time was granted properly or not is a matter to be challenged at the trial stage and not by a review application.”*

In the same matter, **Akiwumi, JA** on his part held:

*“When the judge of the superior court grants leave ex parte, under the Limitation Act to*

*institute proceedings which can be challenged at the trial, he in a way, does no more than a judge does when he for instance, grants an ex parte injunction, which can also be successfully challenged before another judge at its inter partes hearing. Furthermore the question of a judge of the superior court sitting on appeal on the granting of an ex parte order under the Limitation Act by another judge of the superior court, does not in the particular circumstances, arise.*

*In general a party affected by an ex parte order can apply to discharge it but the procedure under the Limitation Act is altogether exceptional. It says in terms that an application shall be made ex parte. This is a strong indication that the Judge is to decide the application on hearing one side only. No provision is made for the defendant being heard. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.*

*Statute can take away or limit fundamental rights or those given by the general rule of law which can also be described as the common law. It therefore cannot be said that the common law has an unassailable status. If this is so, even where statute law and the common law are held to be of equal standing, then a fortiori, on the assumption that in Kenya, the common law is of a lower standing than the statute law, statute law can make greater inroads into the common law.”*

The same position was re-affirmed in **Yunes K Oruta & Another vs. Samwel Mose Nyamato Civil Appeal No. 96 of 1984.**

As was correctly observed by Odunga J in **Republic v Principal Magistrate P. Ngare Gesora Principal Magistrate’s Court & 2 others Ex-parte Nation Media Group Ltd** (supra), what the foregoing decisions establish is that where an order has been made extending time, such order is not final but is merely provisional and that the defendants will have every opportunity of challenging the facts and the law afterwards at the trial. It is the trial judge who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar and he is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.

However, this court hesitates to grant leave to the plaintiff extending the limitation period as section 27 (2) of the Limitation of Acts Act is clear as to what an applicant should satisfy the court before being granted such leave.

The plaintiff, in my understanding, was not arguing an application for leave to file suit out of time. He was responding to a preliminary objection raised by the defendants that the suit herein is statute barred and therefore it should be dismissed or struck out with costs. That being the case, the plaintiff must be given an opportunity to file an appropriate application seeking leave of court to extend the period within which this suit out to have been filed. Section 28 of the Limitation of Actions Act is clear that an application for leave can be made before the filing of suit vide an *exparte* Originating Summons, or in the suit *exparte* in the suit

Courts of justice should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay like in this case.

In the end I decline to dismiss or strike out this suit and I dismiss the preliminary objections raised as lacking in merit. I grant the plaintiff 21 days from the date hereof to file an application for extension of time within which this suit should have been filed. Such application shall be made in this suit. In default thereof, the suit as filed shall stand struck out for being statute barred with no orders as to costs.

Each party to bear their own costs of the preliminary objection.

**Dated, signed and delivered in open court at Nairobi this 5<sup>th</sup> day of June, 2015.**

**R.E.ABURILI**

**JUDGE**