



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 492 OF 2013 (O.S.)**

**IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME TO FILE SUIT OUT OF TIME**

**AND**

**IN THE MATTER OF THE ESTATE OF THE LATE NEMWEL NYASAGARE NYANARO**

**AND**

**IN THE MATTER OF AN APPLICATION BY JANET MAGOMA ONKUNDI (APPLICANT)**

**RULING**

By an originating summons filed on 22<sup>nd</sup> November 2013 and dated 21<sup>st</sup> November 2013, the applicant through the firm of E.N. Omoiti & Co Advocates seeks from this Court extension of time to institute civil proceedings for recovery of damages arising from a road accident involving the deceased Nemwel Nyasagare Nyanaro on 7<sup>th</sup> August 2007 out of the statutory period. The same is brought under the provisions of Sections 4(2) and 27 of the Limitation of Actions Act Cap 22 Laws of Kenya.

It is premised on the grounds that the applicant is a widow of the deceased and that she did not file suit in time owing to the protracted succession battle involving her and her late husband's mother and sister which begun in 2007 but only ended in 2013 after the intervention of the public trustee as administrator of the estate of the deceased, and who did not have the capacity to sue for damages arising out of the said fatal accident. She annexed a copy of grant issued to the public trustee on 3<sup>rd</sup> April 2014 vide **NRB HCC Succession Cause No 2830 of 2007** to her supporting affidavit sworn on 21<sup>st</sup> November 2013 as well as a death certificate, police abstract of the fatal accident among other documents.

I have considered the applicant's application, the grounds on the face thereof and the supporting affidavit, coupled with the submissions by her counsel in Court and the annexures in support thereof. The death certificate attached shows that the deceased died on 7<sup>th</sup> August 2007. Therefore, going by the provisions of Section 29 of the Limitation of Actions Act, an application for extension of time could only be entertained if the suit had been filed by 6<sup>th</sup> August 2008. However, to date, over seven years after the deceased's death, no suit has been filed.

In other words, under Section 29(4) of the Limitation of Actions Act, application for extension of time is only applicable where the suit is an action for damages in respect of a deceased person's death, if the action is brought before the end of 12 months from the date on which the deceased died. Thus, the claim would be statute barred after one year from the deceased's death. However, Section 4(2) of the

Limitation of Actions Act provides for causes of action founded on tort to be statute barred after 3 years. Consequently, limitation set in on 6<sup>th</sup> August 2010.

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 advise in respect of the facts. In addition, the application for leave under Section 27 must be brought within one year of the cessation of the period during which the decisive material facts were outside his or her knowledge.

Similarly, in the much cited case of **Lucia Wambui Ngugi – Vs – Kenya Railways and Another – NRB HCMA No. 213/89 Mbito J** (as he then was), was observed as follows:-

***“When an application is made for leave under the Limitation of Actions Act, a Judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one for leave.”***

Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important at when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized and, if that evidence does not make quite clear that the plaintiff carries within the terms of the Limitation of Actions Act, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course, be assumed for the purposes of the ex-parte application that the evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex-parte on inadequate evidence that the defendant will be able to mitigate the injustice which may have to be done to him by obtaining an order for the trial of a preliminary issue – Section 27 of the Limitation of Actions Act provides that Limitation period under Section 4(2) of the said Act can be extended in certain circumstances and by the provisions of Section 31 of the Act all limitation periods prescribed by any other written law is extendable by the provisions of Section 27 of the said Act.

Consequently, the applicant can only avail herself of the provisions of Section 27 of the Act as read with Section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the Court gives leave on account of the applicant’s ignorance of material facts relating to the cause of action which were of a decisive character.

Although what amounts to “ignorance of material facts of a decisive character” is not always easy to distinguish, by Section 30(1) of the Act, when read with Subsection thereof, material facts of a decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action.”

The issue therefore is whether the applicant has met the above criteria which I can summarize into two:

- a) Whether the applicant has a good cause of action.
- b) Whether she has met the conditions of Section 27(2) of the Act.

On the first issue, Order 36 Rule 3 (c) (1) of the Civil Procedure Rules provides that:

3 (c) (1) – an application under Section 27 of the Limitation of Actions Act made before filing suit shall be made by originating summons supported by an affidavit. There is no suit filed yet so the application is

properly before the Court. However, the applicant deposes that she delayed filing the suit because of the protracted succession war which was only resolved in 2013 after which she filed this application.

I have carefully perused the documents availed to the Court and I do not find any grant of letters of administration issued to the applicant giving her the capacity to sue on behalf of the estate of the deceased. It is true that a succession cause was pending and there were objections and battles in court. However, nothing prevented the applicant from obtaining a limited grant for purposes of filing suit for damages only which is normally issued *exparte*, as she was well represented in that cause by her advocate on record. Furthermore, it seems that the said battles are far from over as it is the public trustee who was eventually appointed to administer the estate of the deceased.

The question therefore is, when did she become aware that she had to file suit for damages and does she now have the necessary *locus standi*? The answer is in the negative. The course of action arose in 2007. She should have filed suit in 2010. It has taken her 3 years after the lapse of the statutory period to bring this application. She does not demonstrate in her application that she lacked certain material facts and that she had taken all reasonable steps and sought appropriate advise in respect of the facts. In **Gathoni – Vs – Kenya Co-operative Creameries Ltd [1982] 2 KLR 104, BOC (K) Ltd – Vs – Joseph Kinuthia Karanja & Another HCA 700/2007 eKLR and Direcon Ltd – Vs – Saman [1995-1998] IEA 48**. The applications were dismissed on the grounds that

- 1) The applicants had not fulfilled the conditions set out in Section 27 (2) of the Limitation of Actions Act
- 2) That ignorance of statutory provisions on limitation was not a material fact of a decisive character under the Act nor was ignorance of jurisdiction of the Court or the negligence of an advocate.

In this case the applicant had already sought advise which enabled her to petition Succession Cause No. 2830/2007. As was observed in the Gathoni's case (*supra*)

***“The law of limitation of Actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”***

In this case, the applicant has not been diligent. She took over 6 years to bring this application from the date when the cause of action arose. The Act, regrettably, is not intended to assist litigants who sleep on their rights.

In **Rawal – Vs – Rawal 1990 KLR 275 Bosire J** (as he then was) stated that:

***“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 of his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”***

The above decision cited *Dhanesar Melita – Vs – Manilal Shah 1965 EA 321* where it stated in addition,

***“The object of limitation enactment is to prevent a plaintiff from prosecuting stale claims ... and the effect of limitations enactment is to remove remedies irrespective of the merits of the particular case.”***

The same position was taken by the Court in **Iga – Vs – Makerere University [1997] EA 65** that:

***“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations of Actions Act (cap 70) together with Order 7 rule 5 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 a remedy sought for and when a suit is time barred, the court cannot grant the remedy or relief.”***

There is no evidence that the applicant has even issued notice of intention to sue the intended defendant. 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. In this case, I find that the applicant did not act reasonably. She appears to have been interested in the deceased's estate only for purposes of recovering ready cash. She was aware of the cause of his death but did nothing to seek compensation in damages within reasonable time. Delay defeats equity.

The delay in this matter is inordinate and the application, in my view is an afterthought as not even a demand letter to the intended defendant is exhibited. In addition, the police abstract annexed shows there were two people who lost their lives in the ill fated accident, with one of the deceased Susan Amayo, being the registered owner of the accident motor vehicle. It is not clear what class of person the applicant's deceased husband was in the said motor vehicle. He could have been the driver or a passenger but that is neither disclosed in the abstract nor in the affidavit. The applicant in my view, is trying to chase a wild goose.

There is nothing in the petition for the limited grant that culminated into a full grant in favour of the public trustee to show that the applicant herein intended the limited grant to enable her to file suit for recovery of damages. Paragraph 5 of the form 19 discloses the fact that she was seeking a grant of representation to the deceased on the grounds that:

***“The deceased was an employee of Kenya Revenue Authority and I need to collect and preserve the benefits of the deceased held by KRA Staff Pension Scheme and shares held by Ushuru Sacco.”***

She also named the assets in paragraph 6, with nil liabilities at the said paragraph. No doubt, she had no intention of lodging the claim for recovery of damages two months after her husband's death when she filed a petition under Section 67 of the Law of Succession Act. She has woken up a little too late. The Law of Limitation was not intended to assist persons like the applicant in this case. She lied at her paragraph 5 of her supporting affidavit when she deposes that the purpose of her filing of the letters of administration ad colligenda bona of the deceased's estate to inter alia enable her to file suit for damages arising from the demise of the deceased. I have read the entire proceedings of the said petition and I find no mention of that intention. If that were the case, no Judge could have denied her that right as it was clear that time was running out with the battles over the hard cash that was available and due to the deceased's estate by virtue of his employment.

In the result, I decline to grant the applicant's application dated 21<sup>st</sup> November 2013 and dismiss the same with no orders as to costs.

**Dated, signed and delivered at Nairobi this 12<sup>th</sup> Day of November, 2014.**

**R.E. ABURILI**

**JUDGE**