



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 410 OF 2014**

**ROBERT MELEYA OLE LETOLUO ..... 1<sup>ST</sup> APPLICANT**  
**JOEL KEIWA ..... 2<sup>ND</sup> APPLICANT**  
**NKOSIAN KIOK ..... 3<sup>RD</sup> APPLICANT**  
**JANET LETOLUO ..... 4<sup>TH</sup> APPLICANT**  
**STANCY LETOLUO ..... 5<sup>TH</sup> APPLICANT**  
**PERSONAL REPRESENTATIVE OF THE ESTATE**  
**OF PEMBA KIEWA (DECEASED) ..... 6<sup>TH</sup> APPLICANT**

**VERSUS**

**SYNERGY INDUSTRIAL CREDIT LTD ....1<sup>ST</sup> RESPONDENT**  
**KERAI GHANSHYAM ..... 2<sup>ND</sup> RESPONDENT**  
**JAMES MUTINDA MULAI ..... 3<sup>RD</sup> RESPONDENT**

**R U L I N G**

By an originating summons dated 2<sup>nd</sup> May, 2014, the ex-parte applicants Robert Meleya Ole Letoluo and 5 others seek the following orders from this court:

1. ...
2. That the applicants herein be granted leave to institute a suit out of time against the respondents Synergy Industrial Credit Limited, Kerai Ghanshyam and James Mutinda Mulai.

The application is brought under the provisions of Section 27 (1) and Section 28 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya, Order 37 Rule (b) of the Civil Procedure Rules 2010 and all other enabling provisions of law.

The application is grounded on 10 grounds. Ground No. 4 and 5 are that the delay in filing suit within the three year period from 7<sup>th</sup> August 2010 was that the applicants were seriously injured in the accident which occurred on 7<sup>th</sup> August 2010 involving motor vehicle registration No. KBD 9002/ZC7683 owned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents while being driven by the 3<sup>rd</sup> respondent, which motor vehicle collided with motor vehicle registration No. KBD 712Y as a result of which Pemba Keiwa died and the rest of the applicants sustained very serious injuries. It is contended that the 3<sup>rd</sup> respondent was charged with a criminal traffic case at Kibera Chief Magistrate's Court Tr. 3104/2010 and as the applicants have been and are still waiting for its conclusion, time has run out and continues to run out.

It is further averred that the applicants sustained serious injuries and have been recuperating thus could not institute suit within the limitation period.

The application is supported by an affidavit sworn by Robert Meleya Ole Letoluo the 1<sup>st</sup> applicant with authority "signed" by "all" other applicants.

The alleged accident occurred along Waiyaki Way in Nairobi County.

Curiously, one of the applicants, Stancy Letuluo, according to the attached medical notes from Kenyatta National Hospital, is a minor aged 7 years old. Regrettably, there is no next friend or authority to represent the minor to the advocate. Order 32 (1) of the Civil Procedure Rules expressly provides that:

***"Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor."***

Sub rule (2) thereof provides that:

***"(2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose, and the authority shall be filed."***

Furthermore, under Order 32 92), where a suit is instituted by or on behalf of a minor without a next friend the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented.

In addition, Order 32 Rule 5(1) provides that every application to the court on behalf of a minor, other than an application under rule 10 (2), shall be made by his next friend or by his guardian *ad litem* (where minor is defendant or respondent.)

Subrule 2 of Rule 5 provides that every order made in a suit or on any application before the court in which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian *ad litem*, as the case may be, may be discharged, and, where the advocate of the party at whose instance such order was obtained, knew, or might reasonably have known, the fact of such minority with costs to be paid by such advocate.

With the above clear provisions of the law regarding suits for/by and or on behalf of or against minors, in the absence of a named next friend and authority to advocate, the application herein cannot stand.

Besides the above anomaly, the documents filed also show that one of the persons who was involved in the fatal accident was Pemba Keiwa (deceased). Like in the case of Stancy letuluo above, the person who is supposed to be suing or seeking leave to sue out of time on behalf of the estate of the deceased Pemba Kiewa is not named. It is simply indicated "*personal representative of the estate of Pemba Keiwa (deceased) ... 6<sup>th</sup> respondent*".

With utmost respect to the advocates who drew those documents and filed in court on behalf of the concerned parties, it is an unacceptable practice to flagrantly ignore provisions of the law on the capacity

to sue and be sued. There can be no personal representative of a deceased person's estate without a name of a living person, which person must have the necessary legal capacity to sue and or be sued in his/her own name.

Order 31 of the Civil Procedure Rules makes provision for suits by or against trustees, executors and administrators. Furthermore, Section 2(1) of the Law Reform Act provides that:-

***“2(1) subject to the provisions of this Section, on the death of any person after the commencement of this Act, all causes of action subsisting or vested in him shall survive against, or as the case may be, for the benefit of his estate.”***

In other words, there must be, as a condition precedent to the applications a person named or to be named for appointment, as a representative of the estate of the deceased Pemba Keiwa to take proceedings in enforcing his rights under the law. This provision is no doubt consistent with Section 82 (1) of the Law of Succession Act Cap 160 Laws of Kenya which stipulates powers of personal representatives. It provides that:

***“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-***

***a) To enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death of his estate.”***

Under Section 3 of the law of Succession Act, a personal representative is someone who has been granted letters of administration to the estate of the deceased intestate pursuant to an application under Section 51 of the said Act. The Court of Appeal in the decision of **Troustik Union International & Ingrid Ursula Heinza – Vs – Jane Mbeyu & Alice Mbeyu CA 269/97** reiterated that only an administrator can sue on behalf of a deceased person under the law of Succession Act. They held that:

***“The Act came into force on 1<sup>st</sup> July 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on 10<sup>th</sup> April 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to Section 82 (a) of the law of Succession Act. That Section confers that power on personal representatives within the contemplation of the Act. That Section confers that power on personal representatives and on them alone. As to who the personal representatives within the Act is, Section 3, the interpretive section, provides on all inclusive answer: It says, “personal representative means executor or administrator of a deceased person.” It is common ground that the deceased in this case died intestate. Therefore the only person who can answer the description of a personal representative is the administrator of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act.”***

The long and short of it all is that there is no “*personal representative*” named in the pleadings filed in this matter to have lodged these proceedings on behalf of the estate of Pemba Keiwa (deceased). Simply put, there is no person or individual as far as I can visualize, standing and laying claim on the deceased's Pemba Keiwa's estate.

The question would therefore be, to whom would this court grant leave extending the limitation period sought, to institute suit on behalf of the deceased's estate? The person who purportedly signed an authority to the 1<sup>st</sup> applicant is not listed in the pleadings.

In a nutshell, the application touching on the interests of the minor Stancy Letuluo and the deceased Pemba Keiwa cannot stand in law. They are simply incompetent and I proceed to strike them out.

Nonetheless, the proceedings herein are critical for the determination of the parties rights under the law to

ventilate their grievances. It is not in the interest of justice to oust the parties from the seat of justice. The court herein is the temple of justice, and as I sit in that temple as a minister to administer justice, I have inherent unfettered powers to make any such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. My duty is also to ensure just determination of proceedings and to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Civil Procedure Act as espoused in Sections 3A, 1B and 1A of the Civil Procedure Act. As the application is jointly filed with only one deponent Robert Meleya Ole Letoluo purporting to swear the affidavit on behalf of all the rest including those who have no capacity to sue or to customize such suing or applying as per my exposition above – the minor and deceased, having held that the application touching on the two is incompetent, and having proceeded to strike it out, accordingly, I proceed to strike out the entire originating summons as being incompetent. I exercise my discretion and grant the parties hereto an opportunity and leave to file fresh applications which application shall be filed separately seeking leave for extension of the limitation period to file suits arising out of the material accident pleaded.

Such applications shall be filed within 60 days from the date of this ruling failure to which the order herein striking out the originating summons dated 2<sup>nd</sup> May 2014 stands undisturbed. This is intended to avoid hardship and prejudice to the parties in any intended future proceedings.

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of December, 2014.**

**R.E. ABURILI**

**JUDGE**