



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**Miscellaneous Civil Application 359 of 2012**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE SUIT AFTER EXPIRATION  
OF TIME ALLOWED UNDER THE LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF  
KENYA**

**MBURU NGANGA suing as the Legal Representative of the estate of JOSEPH KARIUKI MBURU  
(deceased) and on his own behalf..... PLAINTIFF**

**VERSUS**

**SHAMJI KARSAN ARJAN.....1<sup>ST</sup>  
DEFENDANT**

**DELITE CONSTRUCTION COMPANY LTD.....2<sup>ND</sup>  
DEFENDANT**

**R U L I N G**

By an Originating Summons dated 11<sup>th</sup> June 2012 expressed to be brought under the provisions of Order 37 Rule 6(i) of the Civil Procedure Rules 2010 and sections 27 and 28 of the Limitation of Actions Act, Cap 21 Laws of Kenya and All other provisions of the Law, the plaintiff herein, **Mburu Nganga** seeks the following Orders:

- 1. That the Honourable court be pleased to extend time within which the plaintiff/applicant may file and serve a copy of a draft plaint annexed hereto upon the Defendants out of time.**
- 2. That the Honourable court prescribe the time whining which the Plaintiff should file the plaint and effect service upon the Defendants herein.**
- 3. That the costs of this application be provided for.**

The Summons are based on the following grounds:

- (i) The plaintiff/applicant filed its original suit CMCC No. 390 of 1996 within time, that is to say on the 18<sup>th</sup> January 1996.**
- (ii) The said CMCC No. 390 of 1996 was dismissed on a technicality namely; plaintiff lacked Locus Standi when he filed that suit.**

**(iii) Plaintiff/Applicant's first advocates filed and said CMCC No. 390 of 1996, under a mistaken belief that the plaintiff/applicant had already obtained letters of Administration which turned out to be untrue.**

**(iv) The inordinate delay caused by circumstances beyond Plaintiff/Applicant's control.**

**(v) Other reasons and grounds to be adduced at the hearing hereof.**

The Summons are supported by the plaintiff's affidavit sworn on 11<sup>th</sup> June 2012. According to the said affidavit, the plaintiff's son, the deceased herein passed away when a building collapsed on him and the plaintiff instructed a firm of advocates, **M/s Nabutete & Company Advocates** to institute recovery proceedings in respect thereof on behalf of the estate of the deceased. The firm asked the plaintiff to secure grant of letters of administration which the plaintiff mistook to be Death Certificate and which he had, and assured the said advocates that he had already obtained the grant of representation. Since the limitation period was running out, he instructed the advocates to proceed and file the suit under the impression that he had secured the required document. Subsequently he obtained grant of letters of administration limited to prosecuting CMCC No. 390 of 1996. However due to ensuing negotiations the advocates failed to withdraw the said suit. When the matter was eventually fixed for hearing an objection was raised with respect to the plaintiff's *locus standi* in the matter which application was upheld and the suit was dismissed. His attempts to have the decision dismissing the suit reviewed was thwarted by the disappearance of the court file and eventually on the advise of his counsel it was decided that instead of continuing with the search for the file it would be better to institute fresh proceedings in which case there would be a need to seek extension of time hence the present Summons.

The effect of the statute of limitation has been the subject of numerous judicial pronouncements. The Limitation of Actions Act provides 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. 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”.**

This 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 taken in *Iga vs. Makerere University* [1972] EA 65 in which it was held:

**“A plaint which is barred by limitation is a plaint “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”.**

It therefore follows that a cause of action that is barred may in certain cases be revived if the conditions set out in section 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya are fulfilled. That section provides as follows:

**(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.*

The foregoing clearly stipulates the circumstances under which the court may extend time for bringing an action barred by statute. The issue of limitation was extensively dealt with by **Mbito, J** in **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 of 1989** in which the learned Judge expressed himself as follows:

**“When an application is made for leave under the Limitation Act, a judge in chambers should not grant leave as of course. He should carefully scrutinise 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 that 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 scrutinised, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations 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 affidavit 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 done 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 said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can 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 appellant’s ignorance of material facts relating to the cause of action which were of decisive character...Although what amounts to “ignorance of material facts of decisive character” is not**

always easy to distinguish, by section 30(1) of the Limitation of Actions Act when read with subsection (2) thereof, material facts of 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”.

Potter, J in Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104 dealing with the same issue had this to say:

“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability...Of course, if the applicant were under a relevant disability, she would not need the leave of the court to commence her action. The issue as to whether the period of limitation was extended in her case under section 22 would no doubt be raised as a preliminary issue at the trial. The applicant’s application for leave was made under Section 27, where the applicant has to show that her failure to proceed in time was due to material facts of a very decisive character being outside her knowledge (actual or constructive)...Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances....In section 30(5) “appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be...The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.

What comes out clearly from the foregoing is 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).

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”.

Even in cases where the claim falls under the aforesaid provisions time will not be extended unless the applicant proves 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. In order to prove this, the applicant is expected to show that he did not know that fact; that in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and that in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances. In section 30(5)

“appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be”.

It follows from the foregoing that first and foremost the action must be one for damages for negligence, nuisance or breach of duty. In this case there is no doubt at all that the action is for negligence and/or breach of duty. Secondly, the damages claimed by the plaintiff must consist of or include damages in respect of personal injuries of any person. It is again clear that the damages arise from personal injuries to the deceased from which the deceased succumbed. The third condition is that leave must then have been sought and obtained. This is the stage at which we are presently. The last requirement is the fulfilment of the provisions of subsection (2) of section 27 of the said Act. Under this subsection the applicant is expected to prove that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the applicant’s knowledge and that he became aware of these facts after the limitation period or within one year before the expiry of the limitation period. In either case, the action must be brought within one year of such discovery.

In this case the grounds upon which the extension of time is sought are that the applicant was not aware of the nature of the document he was required to secure. The question then is whether the failure to secure the said documents amounts to ignorance of a material fact of a decisive character. As held above **“material facts of 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”**. In this case, the plaintiff knew he had a cause of action. He knew the extent of the injuries (in this case fatal) and he knew that the injuries were sustained as a result of negligence. He did in fact file the case. It is therefore only the nature of evidence that he needed to enable him get compensation that he had not secured. I have looked at the grant that was issued and it is indicated to have been issued on 16<sup>th</sup> April 1997. The cause of action arose on 27<sup>th</sup> March 1995. So that by the time the grant was made, the plaintiff was still within the limitation period. Assuming that the case fell within the provisions of section 27(2)(b) the applicant ought to have brought the application within one year of such grant. It follows therefore that even if the failure to obtain grant was to be considered to have been ignorance of a material of decisive character, which it was not, this application would still not succeed.

The other issue that has been alluded to is the fact of negotiations. It is true that where the applicant is lulled into a sense of false security that a settlement is in the offing as a result of which limitation period is allowed to run, the other party may not succeed in the plea of limitation and the Court may well be entitled to extend time. See **David Stephen Gatune vs. The Headmaster Nairobi Technical High School & The Attorney General Civil Appeal No. 79 of 1982 [1988] KLR 561.**

In this case, I am, however not satisfied that the applicant was led to believe that a settlement was in the offing. From the documents exhibited I have not seen any emanating from the opposite party indicating the existence of any negotiations.

To make matters worse the applicant spent a considerable period of time pursuing the elusive path of review of the decision dismissing his case. The period lost during the said period, a period which cannot by any means be described as not inordinate, cannot amount to ignorance of material facts of decisive character as discussed in the authorities above. In any case the mere fact that a Court file goes missing is not a reason to commence fresh proceedings. If that were the position parties would simply evade the consequences of the previous court proceedings by facilitating the disappearance of Court files. There are, in my view, alternative remedies to parties to resort to where for any reason a court file cannot be found other than institution of fresh proceedings.

In the result I find no merit in the Summons herein which I hereby dismiss but with no order as to costs.

**Dated at Nairobi this 10<sup>th</sup> day of October 2012**

**G V ODUNGA**

**JUDGE**

Delivered in the presence of Mr. Nabutete for the Applicant