



Mungai (Suing as the Legal Representative of the Estate of Mary Wambui Njoroge - Deceased) v Wainaina (Civil Appeal E1046 of 2024) [2025] KEHC 14516 (KLR) (Civ) (15 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1046 OF 2024

WM MUSYOKA, J

OCTOBER 15, 2025

BETWEEN

AGNES WANJIRU MUNGAI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY WAMBUI NJOROGE - DECEASED) APPELLANT

AND

CAROLINE WANGUI WAINAINA RESPONDENT

(Appeal from the judgement and decree, of Hon. BM Cheloti, Principal Magistrate (PM), of 9th August 2024, in Nairobi CMCCC No. E974 of 2020)

JUDGMENT

1. The suit, at the primary court, had been initiated by the appellant, against the respondent. The suit was commenced by the personal representative of the deceased, who had died in a road accident on 12th July 2017, which had occurred along Limuru Road, Nairobi. It involved motor vehicle registration mark and number KCB 962E, owned and controlled by the respondent.
2. The respondent resisted the claim, wherein he denied all the allegations made against him in the plaint. In the alternative, he pleaded that, if any accident occurred, involving the deceased and his vehicle, then the same was solely caused or contributed to by the negligence of the deceased, or that the accident was inevitable, or beyond the control of the respondent.
3. The matter came up several times, before the trial court, until the appellant lodged a Motion, dated 15th December 2023, for enlargement of time for filing suit, and the deeming of the suit as properly filed, and for its consolidation with another, which had arisen from the same accident. The appellant attributed the 25-day delay in filing suit to lack of grounds and the challenges presented by the



Covid-19 Pandemic. She pointed out that the limitation period for filing the claim expired on or about 12th July 2020, and the suit was filed on 6th December 2020.

4. In a ruling, delivered on 9th August 2024, the trial court declined to grant the prayer for extension of time, on grounds that it was not prayed for, and, in any event, it would not be available where the applicant had already filed suit out of time. On consolidation, it was ruled that the 2 suits, sought to be consolidated, were both filed out of time, hence the consolidation order was not available.
5. That ruling aggrieved the appellant, hence she initiated the instant appeal. The grounds are that there was evidence of compliance by the appellant, with the conditions for grant of the order for enlargement of time, and to deem the suit properly filed; the trial court erred in holding that time could not be enlarged after the suit had been filed; the trial court failed to appreciate the principle for enlargement of time to file suit; the trial court failed to appreciate the facts of the case; and the trial court failed to appreciate the submissions by the appellant.
6. Directions were given, on 8th May 2025, for canvassing of the appeal by way of written submissions.
7. I have only come across written submissions by the appellant, in the record that is before me. The submissions turn on whether the appellant applied for enlargement or extension of time to file the suit; what the relevant statute provides on the subject of extension of time to file suit, where a suit has already been filed; and whether consolidation should have been ordered.
8. On whether the Motion, dated 15th December 2023, sought extension of time to file suit out of time, I have perused that application. The first prayer on it, invites the trial court to “be pleased to enlarge time for filing ... suit and the suit herein be allowed as properly filed in court.” To my mind, that prayer sought extension of time to file suit. I do not understand what the trial court meant by stating that there was no such prayer. The trial court had before it an application for extension or enlargement of time to file suit. There was jurisdiction, therefore, for the trial court to consider grant of that prayer.
9. On the second issue, on what the relevant statute says, on enlargement or extension of time to file suit, in particular, where a suit is filed first and extension is applied for thereafter. I have looked at the [*Limitation of Actions Act*](#), Cap 22, Laws of Kenya. The relevant provisions are in sections 27 and 28 of the said Act.
10. Section 27 provides for instances where defences to an action founded on tort do not exist. One of those situations is where leave, under section 27, had been granted for the filing of the suit out of time, whether the application for extension or enlargement of time is filed before or after the filing of the suit.
11. Section 27(1)(c) says that:
 - a. ...
 - b. ...
 - c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - d. ...”
12. That provision, in my understanding, clearly points to leave to enlarge or extend time, being sought and granted both before and after commencement of the action. It would follow that it is permissible to file for extension of time to file suit out of time, even after that suit has been filed. There would be



- nothing wrong with filing such an application, and a court has jurisdiction to entertain it, and to grant the extension or enlargement of time sought. The effect of grant of the order would be to deem that the suit, as filed, would have been filed within the limitation period.
13. Section 28 builds on section 27. It provides that the applications for leave for extension or enlargement of time, whether or not filed before or after commencement of action, should be made ex-parte, except that, for those filed after commencement of action, the court may require otherwise. Otherwise, may include the court directing that the application be served, and disposed of inter partes.
 14. In its own words, section 28(1) states:

“An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except insofar as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.”
 15. Of course, if the suit has been filed, and summons to appear served, appearance entered and defence filed, it would only be natural, that the application, to extend time to file suit out of time, and to deem the suit, already filed, duly filed, be served on the parties who have responded to the suit, and the application be disposed of inter partes.
 16. The combined effect, of sections 27(1)(c) and 28(1) of the *Limitation of Actions Act*, is that time, to file a suit after expiration of the limitation period, may be enlarged or extended, both before or after the suit has been filed. The holding by the trial court, therefore, that there was no jurisdiction to extend time, after the suit had been filed, was not on sound footing, and had no foundation under the *Limitation of Actions Act*.
 17. The other issue is on consolidation. The trial court declined to grant the order, on the ground that the 2 suits, sought to be consolidated, had both been filed out of time, and without leave to file the same out of time. Curiously, although the Motion, dated 15th December 2023, seeks consolidation of Milimani CMCCC No. E974 of 2020 and Milimani CMCCC No. E3907 of 2020, the affidavit, sworn in support of that Motion, says nothing about the suit in Milimani CMCCC No. 13907 of 2020. There is no exposition, in the affidavit, on why the 2 suits should be consolidated.
 18. Again, although that supporting affidavit says nothing about Milimani CMCCC No. E3907 of 2020, documents relating to that suit are annexed to the said affidavit. One would wonder about the basis for doing so, where no averments are made about that suit in the body of the affidavit. Annexures to an affidavit are meant to support the averments made in that affidavit. Without averments being made on a subject, there would be no foundation for attaching any documents, purporting to support that which has not been averred in the affidavit.
 19. Be that as it may. I have perused the complaints in both suits, that is to say Milimani CMCCC No. E974 of 2020 and Milimani CMCCC No. E3907 of 2020. The complaint in Milimani CMCCC No. E3907 of 2020 is a replica of the complaint in Milimani CMCCC No. E974 of 2020. One is the exact copy of the other, word for word, comma for comma, full stop for full stop. Consolidation is not meant for such. The filing of a replica, of a suit filed earlier, is evidence of abuse of court process. There was no point of filing Milimani CMCCC No. E3907 of 2020, during the pendency of Milimani CMCCC No. E974 of 2020. The remedy for that should be withdrawal of the latter suit, by the party who filed it, and, in the absence of such withdrawal, the striking out, by the court, of the suit filed in abuse of court. The trial court was right, in declining to consolidate the 2, although for different reasons, which were plausible, for both suits were filed out of time, and no order had been sought or obtained to extend the time for the filing, of Milimani CMCCC No. E3907 of 2020, out of time, and to deem it as duly filed.



20. The long and short of it is that the appeal succeeds, on the matter of the extension of time to file suit out of time, and to deem the suit in question, Milimani CMCCC No. E974 of 2020, duly filed, but not on the matter of the consolidation of the 2 suits. Plausible reasons had been given, to explain the delay to have the suit filed within the limitation period. The consequence shall be that the order of the trial court, of 9th August 2024, declining to grant extension of time to file suit and to deem the suit as duly filed, is hereby set aside, and substituted with an order allowing the application, dated 15th December 2023, in terms of prayer 1 thereof. The appeal is allowed in those terms.
21. The original trial court records shall be returned to the trial court, for prosecution of the suit in Milimani CMCCC No. E974 of 2020, or such other business as the parties hereto may be minded to move the court to conduct. This appeal file shall be closed. Each party shall bear its own costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 15TH DAY OF OCTOBER 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Owino, instructed by Owino & Company, Advocates for the appellant.

Mr. Amimo, instructed by Oloo & Oloo, Advocates for the respondent.

