



**Mwende & another ( Suing on their own behalf and as the administrators of the Estate of the Late Tonny Mwenda Kiraithe) v Kiraithe (Civil Suit E005 of 2024) [2025] KEMC 15 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEMC 15 (KLR)

**REPUBLIC OF KENYA  
IN THE MUTOMO LAW COURTS  
CIVIL SUIT E005 OF 2024  
LK MWENDWA, PM  
JANUARY 22, 2025**

**BETWEEN**

**MONICAH MWENDE & BETTY NDUMI NZEGH ( SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE TONNY MWENDA KIRAITHE) ..... PLAINTIFF**

**AND**

**IGNATIUS MWENDA KIRAITHE ..... DEFENDANT**

**RULING**

1. I have before me a Notice of Motion, dated 14/5/2024 and filed on 30/7/2024 by the Defendant. The motion is expressed as brought under Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules.
2. The aforesaid motion seeks the following orders.
  - a. That pending the hearing and determination of the application inter partes, this Honorable Court be pleased to issue a Conservatory Order staying proceeding for the hearing of the main suit.
  - b. That this Honourable Court be pleased to set aside the proceedings and subsequent Ex-parte orders granting leave to file suit out of time and other consequential Orders thereto.
  - c. That this Honorable Court deem it fit to strike out the Plaintiff's suit for being filed out of time.
  - d. That the costs of this application be provided for.



3. The Application is premised on the grounds set out on its face; which are supported by the affidavit of Mercy Wambui Gitau, the counsel on record for the Defendant/Applicant. The grounds of the Application have been set out as follows;-
  - a. That the Plaintiffs/Respondents were improperly issued with Ex-parte Orders to file suit out of time.
  - b. That the time to file the suit lapsed after the expiry of three years from the date of the accident.
  - c. That the plaintiff has to date never demonstrated sufficiently why it took them seven years to file the present suit.
  - d. That in the absence of compelling evidence why the plaintiff had to file the suit out of time the Court granting them leave to file their suit out of time ought to be set aside and the entire suit struck out for being filed out of time.
  - e. That it is in the interest of justice to set aside the orders issued on 4<sup>th</sup> January 2024.
4. The Respondents filed a Notice of Preliminary Objection in response to the Motion herein. The Preliminary Objection is dated 7/6/2024 and was filed on 30/6/2024, and it raised on the following grounds.
  - a. The Application is abuse of court process as it is in contravention of with the Limitations Actions Act, Civil Procedure Act and established Case Law.
  - b. The Application is fatally defective in view of the provisions of Order 9 Rule 9 of the Civil Procedure Rules.
  - c. Application is premature to this Act.
5. On 16/10/2024, the directions were issued that the Notice of Motion dated 14/5/2024 and the Preliminary Objection be heard simultaneously and by way of written submissions. Both parties have filed their respective submissions. The Applicants submissions are dated 8/11/2024 while those of the Respondents are dated 15/11/2024.

#### **Applicant's case**

6. The Applicant contends that the leave to file this suit out of time, granted on 4/12/2024, to the Respondents was issued improperly. The Applicant invites this court to consider that no credible reasons were offered by the Respondents for taking seven (7) years to file this suit. He thus urges the court to set aside the ex parte leave so issued and proceed to dismiss this suit on account of being statute barred. The Applicants referred the court to the holding in South Scoux Farms Limited Vs. Jane Nyambura(2021) eKLR as well as the Provisions of Section 30 of the Limitations of Actions Act.

#### **Respondent's case**

7. The Respondents take the view that, in light of Case law, the orders sought cannot issue. They have argued that leave to file suit out of time was properly issued as provided for under Section 28 of Limitations of Actions Act, Cap 22 Laws of Kenya. They contend such a leave can only be challenged during the trial of a matter as was held in Mary Wambui Kabugu Vs. Kenya Bus Service Limited (1997) eKLR.



8. The Respondents have also attacked the propriety of Applicants Motion. The Respondents take the view that application as drawn and filed is fatally defective. They argue that the application has been brought under the wrong provisions of the Law.
9. The Respondents further allege that the affidavit in support of application offends provisions of Order 19 Rule 3 Civil Procure Rules; in that the deponent thereof has deponed to matters not within his personal knowledge; further that the supporting affidavit is stated to have been sworn in Muranga but the address of commissioner of oaths address is for Chuka. It is the applicant's view that the affidavit should thus be struck off. Once struck out the motion cannot stand alone and the application ought to be struck out as was held in *Heywood Ochieng Aseso Vs Jackson Kimeu Mulinge & 2 others (2023)eKLR*.
10. Finally, on the issue of striking out this suit, the Respondents submit that the Applicant has not demonstrated and of the grounds set out under Order 2 Rule 15. They have urged the court to consider the guiding principles for striking out a pleading set out in *D.T Dobie 7 Company (Kenya) Limited Vs. Joseph Mbarie Muchima & Another (1980) eKLR*.

### **Analysis and Determination**

11. I have considered the Application as well as the Preliminary objection and the rival submissions of the parties. The Application has challenged the exparte leave to file this suit on grounds that no reason was advanced for delay of 7 years. The Respondents' principal argument is that leave so obtained can only be challenged during trial and not as presently undertaken by the applicants.
12. The above is the main contention between the parties. But before I determine it, I will first address myself to the issues of propriety of the application raised by the Respondents. To my take on all the issues raised on the propriety of the supporting affidavit being on a different page and the same having being sworn in Muranga but commissioned in Chuka are technicalities that are curable under the Provisions of Article 159(2)(d) Constitution of Kenya which decrees the court to focus on substantive justice rather than procedural technicalities. The same applies to allegations of the application being brought under the wrong provisions of the law.
13. Another issue that was raised on the supporting affidavit is that it offends the provisions of Order 19 Rule 3 Civil Procedure Rules. The Respondent submit that no deponent of supporting affidavit herein has deponed to matters that he does not have personal knowledge of. There was no effort made to demonstrate which of the matters deponed therein are not within the personal knowledge of deponent. I am thus not persuaded that the affidavit is in breach Order 19 Rule 3 is alleged.
14. I therefore find no merit in all the attacks directed to this supporting affidavit herein I decline the invitation to shrike it out.
15. The next issue, the principle one is whether this court can set aside the exparte order granting leave to file suit out of time on the grounds that the delay for 7 years was not explained. Tied to this is if this court has jurisdiction to set aside such an order, at what stage and in which manner should a party approach the court.
16. The suit herein premised on claim for compensation for damages resulting from an alleged road traffic accident on 21/6/2017. The action is thus founded on tort for which limitation is set at three (3) years as per Section 4(2) of the *Limitation of Actions Act*. Thus the claim herein became statute barred on 22/6/2020.



17. Section 27 & 28, Limitations of Actions Act vests in the court the power to extend time and grant leave to file suit out of time. The Application is made ex-parte. The manner of approaching the court is set out at Order 37 Rule 6, thus :-
  - i. An Application under Section 27 of the Limitations of Actions Act made before filing of a suit shall be made ex-parte by the originating summons supported by affidavit.
  - ii. Any such application made after the filing of a suit shall be made ex-parte in that suit.
18. There is no contention that leave herein was sought before the filing of this suit. Neither is there a disagreement that the Respondents sought the same through an ex-parte originating summons vide Mutomo Miscellaneous Civil Application No. E001 of 2024.
19. As earlier stated in this Ruling, the contention is whether leave so obtained can be challenged vide an interlocutory application as the Applicant has opted herein. In this regard I have read and been guided by the court of Appeal decision in Mary Wambui Kabugu(Supra). I have also read High Court decision of PMN Vs. Kenyatta National Hospital & 6 others (2015) eKLR; South Sioux Farms (Supra).
20. What follows from all the above decisions is that once an Applicant has been granted leave to file suit out of time, the same can be challenged at the same court but during the trial. This is the position advanced by the Respondent.
21. The applicant has urged this court find that an ex-parte leave can be set aside where it is demonstrated that it was obtained improperly, to this extent, I agree with his argument-the point of my departure is that should be challenged at the trial.
22. Indeed, in the authority of South Sioux Farms(Supra) relied upon by the applicant the High Court (Gikonyo) faulted the lower court for not considering the question of Limitations of Actions during trial.
23. The court went on to state as follows:-

“The appellant contended that they raised the question of leave as a preliminary issue but the trial court did not consider it. It bears repeating that limitation of actions is a matter for trial and should be so determined. I do note that the Ex parte application as well as the ruling does not disclose the central reason upon which leave was granted to file outside the issue of limitation period of 3 years. I do note also that the trial court did not consider the issue of limitation of actions during trial. I should think that, perhaps the trial court took the view that, it was not necessary to determine the question of limitation or leave granted was sufficient for all purposes. This notwithstanding, I should establish whether the respondent’s suit should be dismissed for being time barred”.
24. I thus find and hold the question as to whether leave to file this time was granted properly should be preserved and entertained during hearing herein. It has been raised prematurely.
25. Having found no merit in prayer to set aside the ex-parte leave herein. A consequent prayer to dismiss the suit for having been filed out of time suffers the same fate. It cannot issue at this stage.

## **Disposition**

26. The upshot is that I find and hold as follows;
  - a. The Notice of Motion dated 14/5/2024 and filed on 30/7/2024 be and is hereby dismissed with costs to the Plaintiffs/Respondents.



- b. The Notice of Preliminary Objection dated 7/6/2023 and filed on 22/6/2024 be and is hereby upheld.

**DATED, SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF JANUARY, 2025.**

**HON. L .K. MWENDWA**

**PRINCIPAL MAGISTRATE**

