



**Nyerere & another (Suing as Legal Representative of Bismark Nyerere Mutie - Deceased) v
Njoka & another (Civil Case E343 of 2024) [2025] KEMC 111 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEMC 111 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E343 OF 2024
YA SHIKANDA, SPM
MAY 15, 2025**

BETWEEN

MBINYA NYERERE 1ST PLAINTIFF

DAVID MUTUA MUTIE 2ND PLAINTIFF

**SUING AS LEGAL REPRESENTATIVE OF BISMARK NYERERE MUTIE -
DECEASED**

AND

MUREITHI NJOKA 1ST DEFENDANT

BENARD NGUMBI 2ND DEFENDANT

RULING

1. The action was commenced by way of Originating summons dated 23/12/2024. The Originating summons was later amended on 3/3/2025. Thus was filed pursuant to the provisions of sections 27 and 28 of the Limitations of Actions Act, section 3A of the [Civil Procedure Act](#) and Oder 37 rule 6 of the Civil Procedure Rules. The summons seeks the following orders:

1. That the Honourable court be pleased to grant leave to the plaintiff/applicant to file suit out of time against the defendants;
2. That costs be provided for.

The Summons is supported by an affidavit sworn by the 1st Applicant and is premised on the following general grounds:

- i. The action is founded on the tort of negligence;
- ii. There is an active criminal inquest ongoing being Makindu Inquest No. E002 of 2022;



- iii. The applicants were waiting to rely on the outcome of the inquest to enable them use the same as evidence in the suit for compensation;
 - iv. The applicants were misguided in thinking that they had to wait for the conclusion of the inquest in order to file a suit for compensation;
 - v. The inquest is yet to be concluded;
 - vi. The applicants are in talks with the respondents with a view to an out of court settlement;
 - vii. The plaintiff's stand to suffer irreparable loss unless leave is granted;
 - viii. The respondents shall not suffer any loss should leave be granted.
2. Upon amending the Originating Summons, the applicants purported to amend the supporting affidavit. An affidavit cannot be amended like a pleading. The applicants ought to have filed a fresh affidavit to support the Originating Summons. In the affidavit in support of the application, the 1st applicant deposed that she was one of the legal representatives of the estate of the deceased herein. She reiterated the grounds on the face of the application. Copies of the deceased's burial permit and certificate of death were filed on record.
 3. The manual or physical record indicates that the respondents filed a joint Replying affidavit. The same is not on the Case Tracking System which is the primary record. It is not clear how the replying affidavit found its way to the court file since there is no stamp impression to show that it was received at the registry and no evidence to show that the same was paid for. For those reasons, the replying affidavit is expunged from the record. In any event, an application of this nature is to be heard ex parte.

Main Issues For Determination

4. In my view, the main issues for determination are as follows:
 - i. Whether the Applicants have shown sufficient cause to warrant extension of time;
 - ii. Whether the Applicants are entitled to the relief sought;
 - iii. What other orders should the court make?

Analysis And Determination

5. The applicants did not make any submissions but relied on the pleadings on record. I have carefully considered the application and given due regard to the applicable law.

6. The Legal Provisions

Order 37 rule 6 of the Civil Procedure Rules provides thus:

- “(1) An application under section 27 of the *Limitation of Actions Act* made before filing a suit shall be made ex parte by originating summons supported by affidavit.
- (2) Any such application made after the filing of a suit shall be made ex parte in that suit”.



7. Section 4(2) of the *Limitation of Actions Act* provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”.

8. Section 27 of the *Limitation of Actions Act* provides that:

“(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”.

9. Section 3A of the *Civil Procedure Act* provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

Analysis

10. In the case of *Rawal v Rawal* [1990] KLR 275 the court stated that the object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time. In dismissing an application to file and serve a record of appeal out of time, G.B.M Kariuki



JA (now retired) in the case of Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR, held as follows:

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time”.

11. Similarly, in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court of Kenya held as follows:

“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigant's legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined..... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”.

12. The Supreme Court, in the above case, then laid down the following underlying principles that a court should consider when exercising its discretion to extend time:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondent if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.

13. To begin with, the applicants claim to be the legal representatives or administrators of the estate of the deceased Bismark Nyerere Mutie. No grant of representation was annexed to the affidavit in support of the application or filed at all. The applicants did not even disclose their relationship with the deceased herein. I do not think that the applicants could institute any proceedings in respect of the estate of the



deceased without a grant of representation. The applicants did not annex a draft plaint so as to inform the court of what they intend to pursue. Section 28(2) of the Limitation of Actions Act provides that:

- “Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
- (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - (b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action.” (Underlining mine)

14. In order to fulfil the requirements of section 28(2) above, my view is that it is not enough to file an application seeking extension of time. The applicant ought to file a draft plaint as well as documents in support of the claim so that the court may be in a position to make an assessment and ascertain whether the evidence, in the absence of any other evidence, would be sufficient to establish the cause of action, apart from any defence under section 4(2) of the Limitation of Actions Act. Secondly, the applicant must attach evidence to show or 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 knowledge (actual or constructive) of the applicant until a date which:

- i. 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
- ii. in either case, was a date not earlier than one year before the date on which the action was brought. This is in compliance with section 27(2) of the Limitation of Actions Act.

15. Section 30 of the Limitation of Actions Act provides in part:

- “(3) Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act 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—
- a. he did not know that fact; and
 - b. 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 before that time for the purpose ascertaining it; and
 - c. 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.
- (4) In the application of subsection (3) of this section to a person at a time when he was under a disability and was in the custody of a parent, a reference to that person in paragraph (a), paragraph (b) or paragraph (c) of that subsection shall be construed as a reference to that parent.



- (5) In this section, "appropriate advice" in relation to any fact or circumstances, means the advice of a competent person qualified, in their respective spheres, to advise on the medical, legal or other aspects of that fact or those circumstances, as the case may be."

16. The reasons given by the applicants are that:

1. They were waiting to rely on the outcome of the inquest upon being misguided;
2. The intended tortfeasors were in talks with the applicants and promised to settle the matter but did not do so.

1.7 Clearly, the applicants do not meet the threshold set by the law. The Applicants knew or ought to have known that the limitation period for filing such a suit was three years. The reasons given for the delay are not plausible. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judiciously in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. However, such power ought to be exercised in the manner illustrated herein above.

18. The scope of section 27 of the *Limitation of Actions Act* was discussed in *Gathoni v Kenya Co-Operative Creameries Ltd* [1982] KLR 104 where the Court of Appeal expressed the following view;

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 advise 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".



19. It has not been demonstrated that the applicants were prevented by a plausible reason falling within sections 27 and 28 of the Limitations of Actions Act from taking legal action within the prescribed period. I am aware of the provisions of Article 159(2) (d) of *the Constitution*. There are various judicial pronouncements concerning Article 159(2) (d) and in particular whether the provision is a cure for all irregularities. For instance, in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR, the Court of Appeal had this to say:

"We do not consider Article 159 (2) (d) to be a panacea, nor a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation. A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

20. Similarly, Kiage JA in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR stated as follows:

... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

21. The above holding was quoted with approval by the Supreme Court in the case of *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR, whereas in the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR the Supreme Court had this to say regarding Article 159(2)(d) of *the Constitution*:

Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (*Raila Odinga and 5 Others v. IEBC and 3 others*; Petition No. 5 of 2013, [2013] e KLR)".

22. In view of the foregoing, I would confidently and comfortably state that Article 159(2)(d) of *the Constitution* cannot be invoked by a party who blatantly and without reasonable excuse circumvents



the rules of procedure nor a party who has been indolent and failed to exercise due diligence. *The Constitution* is not a panacea for every legal ailment. Similarly, this court, ordained as a judicial body should not be thought of as a safe haven for lethargic litigants. The key phrase is “without undue regard”. In my opinion, it simply means that courts should not pay unwarranted attention to procedural technicalities. Parties must, at all times, strive to comply with the rules of procedure and where there is default, the same must be explained to the court.

23. The nature, extent and effect of the default must also be taken into consideration. A party in default cannot claim as of right, but must earn the court's succor under Article 159(2)(d) of *the Constitution*. The same applies to the overriding objective captured under sections 1A and 1B and the inherent powers of the court under section 3A of the *Civil Procedure Act*. The mere fact that the application is made ex parte does not mean that the application should be allowed as a matter of course. The applicant must satisfy the court that he is entitled to an extension of time. That is why even after the order of extension has been granted at the ex parte stage, the defendant still has a right to challenge the order of leave during the trial.
24. Therefore, it behoves the applicant to give a satisfactory explanation for the delay at the ex parte stage. I am afraid that the applicants herein have not succeeded in this endeavour. In view of the foregoing, I find that the applicants have failed to show sufficient cause to warrant the granting of the orders sought. The applicants have not satisfied the requirements of the relevant legal provisions. There is no material that would enable me to exercise my discretion in favour of the applicants. Justice should not be delayed. It is my finding that the application is devoid of merit and must fail. Consequently, the application dated 3/3/2025 is hereby dismissed with no orders as to costs since the same was to be heard ex parte.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 15TH DAY OF MAY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

