

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. E004 OF 2023**

**MARGARET WAMBUI NDEGWA (*suing on her behalf and the estate of the late Joseph Ndegwa Maringa, deceased*)  
.....APPELLANT**

**VERSUS**

**JOHN IRUNGU GICHUHI.....1<sup>ST</sup>**

**RESPONDENT**

**KENNEDY WAMBUGU KARIERI.....2<sup>ND</sup>**

**RESPONDENT**

*(Being an appeal against the ruling by Hon. J. Irura (PM) in the Principal Magistrate's Court at Kigumo, delivered on 22<sup>nd</sup> December 2022)*

**JUDGEMENT**

1. This appeal emanates from the ruling delivered by *J. Irura* (Principal Magistrate) in Kigumo MISC. APP. No. E003 of 2022 in which the learned trial magistrate dismissed the appellant's Exparte Originating Summons dated 25<sup>th</sup> May

2021. In the summons, the appellant had sought leave to file a suit out of time.

- 2.** In support of her Originating Summons, the appellant (then the applicant) contended that she had obtained a grant of letters of Administration ad Litem in respect of the Estate of the late *Joseph Ndegwa Maringa* who sustained fatal injuries in a road traffic accident which occurred on or about the 17<sup>th</sup> December 2016.
- 3.** The accident involved motor vehicle Registration No. KBX 295 N in which the deceased was travelling as a fare paying passenger. The appellant claimed that the accident was caused by the negligence of the 1<sup>st</sup> defendant who was the 2<sup>nd</sup> defendant's authorised driver and that as a result of the accident, the deceased's estate suffered loss and damage.
- 4.** Further, the appellant averred that she had sought to sue the proposed defendants in the year 2017 but was unable to do so since she lacked financial ability to instruct a firm of advocates to file suit on her behalf as funeral expenses had left her financially drained; that she also fell ill and was only

able to instruct her current advocates to file suit in April 2022 but by this time, the statutory limitation period for filing the suit had already expired.

- 5.** It was the appellant's case that failure to file her intended suit on time was not intentional but was caused by lack of financial ability and the onset of the Covid-19 Pandemic and consequent hard economic times.
- 6.** After considering the summons and the brief oral submissions made by the appellant's counsel, the learned trial magistrate delivered her ruling on 22<sup>nd</sup> December 2022 and dismissed it for lack of merit with no orders as to costs.
- 7.** The appellant was aggrieved by the trial court's ruling hence this appeal. In her memorandum of appeal dated 6<sup>th</sup> September 2023, she relied on five grounds of appeal in which she faulted the learned trial magistrate for: failing to appreciate the law regarding extension of time to file suit out of time; disregarding her evidence to the effect that she was unable to file her intended suit on time because she fell ill and was adversely affected by the aftermath of the Covid-19

pandemic ; and, that the learned trial court erred in law and fact by finding that the application lacked merit and dismissed it instead of exercising her discretion and allowing the summons to enable her intended suit to be determined on merit.

- 8.** The appeal was prosecuted by way of written submissions dated 20<sup>th</sup> January 2025. The submissions were filed on behalf of the appellant by her advocates on record, *Ms. Maina Muiruri & Company Advocates*.
- 9.** This being a first appeal to this court's, I am conscious of my duty to re-evaluate, re-assess and re-consider the evidence or material placed before the trial court to arrive at my own independent conclusion regarding the legal validity or otherwise of the trial court's impugned decision.
- 10.** I have considered the grounds of appeal, the appellant's written submissions as well as the record of the trial court.

Having done so, I find that the only key issue arising for my determination is whether the instant appeal was merited.

**11.** *Section 4 (2) of the Limitation of Actions Act (the Act) provides the statutory timelines within which actions based on tort, like the appellants intended suit, ought to be filed. The provision states as follows;*

***“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.....”***

**12.** The limitation period prescribed by *Section 4 (2)* above can however not be used as a defence if the circumstances set out in *Section 27* of the Act are shown to exist. *Section 27 (1)* is in the following terms;

***“ 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.***

**13.** Section 27 (2) referred to in (d) above provides as follows;

***“ 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.***

**14.** My reading of the foregoing provisions of the law reveals that  
the

court can only extend the limitation period prescribed in *Section 4 (2)* above if the action is based on the tort of negligence, nuisance or breach of duty and the damages sought are in respect of personal injuries to the plaintiff as a result of the tort subject matter of the suit.

- 15.** It is also clear from *Section 27 (2)* of the Act that extension of time can only be granted if the applicant proved that material facts relating to the cause of action were not within his or her knowledge until after the time limited for filing suit had expired or was not earlier than one year before the end of that period. This position was elaborately articulated by the Court of Appeal in ***Tana and Athi Rivers Development Authority V Joseph Mbindyo & 3 others [2013] KECA 242 (KLR)*** when it stated as follows;

***“ From the foregoing provisions, it is clear that before the court granted the ex parte leave to the respondents to file the suit out of time it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired.***

16. As correctly submitted by the applicant and as emphasized by the Supreme Court in the case of **Nick Salat V IEBC & 7 others [2014] eKLR**, extension of time is not granted to a party as a matter of right. It is an equitable relief which is granted at the discretion of the court only to a deserving party.
17. I agree with the reasoning of *Ngaah J* in the persuasive authority of **Royal Media Services Ltd V Valentine Mugure Maina & Another [2019] eKLR** also cited by the appellant when he enumerated some of the factors the court ought to consider when exercising its discretion in deciding whether or not to grant an applicant extension of time to file a suit out of time. This is what the Hon. Judge said:

***“... section 4 (2) is couched in such terms that the trial court is left with discretion to extend the time within which a plaintiff can file suit. It may be that the plaintiff was under disability of some sort and therefore he could not, for that reason, file the claim within the statutory period. Where the court is inclined to extend time, it must have regard to all the circumstances of the case and in***

***particular to such circumstances as the length and the reasons for, the delay on the plaintiff.....the court, in making its discretion will consider the date on which any such facts became known to him and the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action.”***

- 18.** In this case, it is clear from the appellant’s originating summons and the affidavits sworn in support thereof that the appellant was very much aware of the material facts relating to her cause of action as far back as June 2017 and this must be why she obtained a grant of letters of administration ad Litem obviously because she was aware she needed the grant in order to institute a suit for recovery of damages against the proposed defendants on behalf of the deceased’s Estate. It is noteworthy that the grant was obtained about 2½ years before the time limited for filing the intended suit expired on 17<sup>th</sup> December 2019.
- 19.** The appellant claimed that she wanted to sue the proposed defendants in the year 2017 but was unable to do so due to

financial constraints and the fact that she fell ill and was unable to instruct her advocates. She did not however disclose when she allegedly fell ill and for what period of time. She did not also substantiate these claims with any evidence.

**20.** In her ruling, the learned trial magistrate thoroughly interrogated the material placed before her and made a finding, correctly so I must add, that the appellant had failed to give a satisfactory explanation for her failure to file her suit between June 2017 when she obtained the grant ad litem and December 2019 when the statutory three year limitation period expired. The explanation given for this delay of about two years was not credible or plausible. The appellant did not also give convincing reasons to explain her further delay of over four years before instructing her advocates to institute suit for recovery of damages for the benefit of the deceased's Estate and his dependants.

**21.** After my independent appraisal of the material presented to the trial court, I am in full agreement with the learned trial

magistrate that the appellant failed to demonstrate that there were material facts or facts of a decisive character relating to the cause of action that were not within her knowledge either an year to the lapse of the statutory period or until after the three year period expired.

**22.** Contrary to the appellant's complaint that the trial court did not appreciate the law applicable to extension of time to file suits out of time, a reading of the trial court's ruling leaves no doubt that the learned trial magistrate fully understood and addressed her mind to the applicable law in the *Limitation of Actions Act* and even went ahead to give the rationale for limiting time for filing suits. In my considered view, the learned trial magistrate properly applied the applicable law to the facts before her and correctly exercised her discretion in arriving at the impugned decision. I find no reason to fault her decision.

**23.** The appellant's contention that the learned trial magistrate should have exercised her discretion to allow the application to enable her intended suit to be heard on merit cannot be

sustained because the discretion to extend time to file a suit out of time, just like all other discretions, must be exercised judiciously in accordance with the law and established legal principles.

**24.** The trial court could not have allowed the application as a matter of course irrespective of whether or not the appellant had laid down a good basis sufficient to justify grant of the orders sought. As stated earlier, extension of time is not granted as a matter of right. It is an equitable remedy granted only to a deserving party. Am satisfied that the appellant did not demonstrate that she deserved exercise of the court's discretion in her favour. I say so because as correctly pointed out by the learned trial magistrate, equity follows the law and it aids the vigilant not the indolent.

**25.** Having found as I have above, it is my conclusion that the learned trial magistrate properly exercised her discretion when arriving at her decision to dismiss the application for lack of merit. I find no reason to fault her decision.

**26.** In the result, I have come to the conclusion that this appeal is not merited and it is hereby dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **MURANGA** this 26<sup>th</sup> day of November 2025.

**HON. C. W. GITHUA**

**JUDGE**

**In the presence of:**

*Mr. Chege* for the appellant

*Ms. Susan Waiganjo*, Court Assistant