



Kalama & another (Administrators of the Estate of George Katana Fondo (Deceased) v County Government of Kilifi (Civil Appeal E075 of 2021) [2024] KECA 748 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 748 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E075 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

**EDWARD FONDO KALAMA AND MARY BAYA KARISA
(ADMINISTRATORS OF THE ESTATE OF GEORGE KATANA FONDO
(DECEASED) APPELLANT**

AND

COUNTY GOVERNMENT OF KILIFI RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 8th July 2021 in HCCA No. 88 of 2019)

JUDGMENT

1. This is a second appeal from the judgment and decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 8th July 2021 in HCCA No. 88 of 2019 arising from the judgment and decree of the Hon. L. N. Juma, SRM, dated 29th August 2019 and delivered on 2nd October 2019 in Kilifi SPMCC No. 270 of 2018.
2. The precis of the judgment and decree leading to the impugned judgment of the learned Judge and the subsequent appeal before us is that, by a Plaint dated 31st July 2018, the appellants, Edward Fondo Kalama and Mary Baya Karisa (suing as administrators of the estate of the late George Katana Fondo) sued the respondent, the County Government of Kilifi, in Kilifi SPMCC No. 270 of 2018 pursuant to the Law Reform Act and the Fatal Accidents Act praying for: general damages under the Law Reform Act and the Fatal Accident Act; special damages of Kshs. 73,050; costs of the suit; and interest at Court rates.
3. Their case was that on or about 20th September 2014, the deceased was riding his motorcycle registration number KMDB 940G in the Matsangoni area along Kilifi – Malindi road when it collided



with the respondent's motor vehicle registration number KBY 967C, which was alleged to have been negligently driven by the respondent's servant or agent thereby causing fatal injuries to the deceased in consequence whereof his estate suffered loss and damage; that the respondent's driver acted negligently in the course of his employment and within the scope of his authority as a servant or agent of the respondent's; and that the respondent was vicariously liable for his negligence. The particulars of negligence and of the loss and damage aforesaid were specifically pleaded in their plaint.

4. The appellants averred further that they first filed a petition dated 26th January 2015 in the High Court of Kenya at Mombasa on 9th February 2015 in Succession Cause No 18 of 2015 seeking grant of letters of administration ad colligenda bona for the purposes of filing suit and preservation of the deceased's estate; that, on 10th October 2017, the High Court advised the appellants to file a petition for grant of letters of administration ad litem to enable them file their intended suit; that they filed a fresh petition sometime in November 2017 and obtained a grant of letters of administration ad litem on 15th December 2017; that, on obtaining the grant of letters of administration ad litem, they applied for leave to file the suit out of time on 6th July 2018 pursuant to sections 4(2), 27, 28 and 29 of the [Limitation of Actions Act](#), Cap. 22; that the Hon. L. N. Juma SRM granted the appellants leave as sought on 17th July 2018 with orders that the respondent bears the costs of the application and incidentals thereto; and that they proceeded to file suit against the respondent as aforesaid.
5. In its statement of defence dated 22nd August 2018. The respondent denied the appellants' claim and contended that it was the deceased who carelessly, negligently and/or recklessly rode, managed and/or controlled his motorcycle causing it to collide with the respondent's motor vehicle. It set out the particulars of negligence attributable to the deceased and averred that the appellants' suit was time barred by virtue of the provisions of the [Limitation of Actions Act](#), Cap 22; and that it was intent on raising a preliminary objection to the suit and challenge the court's decision to grant leave extending time to file suit out of time.
6. The appellants' suit proceeded to hearing whereupon the parties called their witnesses and closed their respective cases. In their submissions dated 8th July 2019, learned counsel for the respondent, M/s. Okello Kinyanjui & Company, contended, inter alia: that, the grant of letters of administration ad litem issued by the court after the time for filing the suit had lapsed, was not sufficient reason for extension of time to file the suit out of time; that the court could only grant leave under section 28 of the [Limitation of Actions Act](#) if a cause of action is established and the requirements of section 27(2) as read with section 29(5) of the *Act* are fulfilled (that is, if it is proved that material facts relating to that cause of the appellants were dated between 2014 and 2015, showing that, for 4 years, the appellants had all documents required to bring a road traffic accident claim before lapse of the limitation period. They urged the court to declare the appellants' suit as time barred.
7. On their part, the appellants contended that failure by the court to issue the relevant documents on time led to the delay in filing the suit. In their submissions dated 1st July 2019, learned counsel for the appellants, M/s.A. Osino & Company, submitted that the appellants had petitioned the High Court for a grant in HC Succession Cause No. 18 of 2015 on 9th February 2015, but that it was not until 10th October 2017 when the court issued directions for a fresh petition to be filed; and that a fresh petition was filed and the grant issued on 15th December 2017 by which date the limitation period for filing the suit had lapsed; that it was critical to obtain the grant before filing the suit as required under section 82(a) of the [Law of Succession Act](#), and that the delay in issuing the same was attributable suit was beyond their control; and that she was satisfied that leave for extension of time to file suit was properly granted. She proceeded to apportion liability at 80% against the respondent and 20% against the appellants. Further, she awarded the appellants Kshs. 100,000/= as general damages for pain and



suffering; Kshs. 200,000/= for loss of expectation of life; Kshs. 5,000,000/= for loss of dependency; Kshs. 53,000 as special damages; costs of the suit; and interest.

8. Dissatisfied with the learned Magistrate's decision, the respondent lodged an appeal in the High Court of Kenya at Malindi in HCCA No. 88 of 2019. In its judgment, the High Court (R. Nyakundi, J.) upheld the learned Magistrate's judgment on liability and award on damages. With regard to the issue as to whether the learned Magistrate was correct in granting the appellants leave to file suit out of time, the learned Judge held that the learned Magistrate granted leave without considering the stringent requirements of section 27(2) of the *Limitation of Actions Act*, which the appellants had not satisfied, having failed to show that failure to file suit within time was due to material facts of a decisive character. According to the learned Judge:

“The learned trial magistrate was wrong in granting leave to extend the statutory time line without first considering that the provisions of sections 27 and 30 (3) of the Limitations Act were not complied with to persuade her to invoke jurisdiction in section 28 to grant leave for them to file the suit out of time. The language used in those sections does not import an open guarantee of discretion to be exercised at whim or caprice by the trial court. By dint of these provisions, I am in agreement with the appellant that the claim for damages was statute barred. The approval of the court was nothing but erroneous exercise of discretion in the matter Reverting to the gist of the appeal on extension of time I am of the view that Courts ought not to be sympathetic to parties who infringe the statutory set limitation period for stale claims likely to infringe on the rights of the defendant. When faced with such an application to extend time the Court is entitled to conduct an inquiry as provided for under section 27, 28 and 30 of the *Limitation of Actions Act* Cap 22 of Laws of Kenya. The duty is to assess the extent of the substantial and compelling circumstances for such a leave to be granted to an intended litigant to file his claim in statute barred cause of action. The maxim ignorance of the law is no defence or excuse applies *Mutatis Mutandis* to the applicant under the provisions of the Act. The diligence rationale here shows the Respondents slept on their rights and no material factors of a decisive nature was presented before the trial Court to guarantee extension of time to file their suit against the appellant.

This fundamental principle on the suit having been barred by statute sums up the core of this appeal and is the key that brings into existence the cause of action. In the circumstances the judgement obtained by the Respondents on liability and award of damages remains non-suited. This appeal therefore succeeds and is allowed with no orders as to costs.”

9. Dissatisfied with the learned Judge's decision, the appellants moved to this Court on appeal on a regiment of 20 grounds set out in their Memorandum of Appeal dated 5th September 2021 against the grain of rule 88(1) of the *Court of Appeal Rules*, which mandates litigants to ensure that a memorandum of appeal concisely sets forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided and the nature of the order which it is propose to ask the Court to make.
10. That said, we take note of the fact that the appellant reduced and reframed the 20 grounds into four as posited in their written submissions dated 2nd June 2022, namely: that the trial court failed to consider, appreciate, and apply all the evidence tendered on record in arriving at his decision; that the trial court failed to appreciate and apply the law on extension of time under the *Limitation of Actions Act*, the *Law of Succession Act*, the *Law reform Act* and the *Fatal Accidents Act* in refusing to confirm the extension of time; that the decision by the Judge offended Constitutional provisions; and that the appellant was



lawfully entitled to the dismissal of the appeal before the High Court and confirmation of the award by the Magistrate.

11. In support of the appeal, learned counsel for the appellants M/s. P. A. Osino & Company, filed written submissions, a list of authorities and case digest dated 2nd June 2022. Counsel cited, *inter alia*, the cases of *Charles Kipkoech Leting vs. Express (K) Ltd & another* [2018] eKLR where this Court set out its mandate on second appeal; *Mary Osundwa vs. Nzoia Sugar Company Limited* [2002] eKLR for the proposition that section 27 of the *Limitation of Actions Act* clearly lays down the circumstances in which the court would have jurisdiction to extend time; *Kenya Civil Aviation vs. WK & 2 others* [2019] eKLR for the proposition that Section 31 of the *Limitation of Actions Act* provides that where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of the *Limitation of Actions Act* was incorporated; and that Part III of the *Limitation of Actions Act* provides for extension of the limitation period in three instances viz:
 - “(i) as provided in section 22, in case of disability.
 - ii. as provided in section 26 in case of fraud or mistake and
 - iii. as provided in section 27 in case of ignorance of material facts in actions for negligence.”
12. Opposing the appeal, learned counsel for the respondent, M/s. Okello Kinyanjui & Company, also filed written submissions and a list of authorities dated 14th June 2022 citing this Court’s decision in *Divecon Limited vs. Shrinkhanu Sadrudin Samani* (unreported) Civil Appeal No.142 of 1997 for the proposition that, if the action was brought under the *Law Reform Act* and the *Fatal Accidents Act*, then the evidence that should have been considered before granting or sustaining the ex parte extension of time is that relating to the lack of knowledge of material facts by the deceased, but not the respondent or anyone else, and which did not exist.
13. The 4 main issues in contention as settled with the agreement of counsel are: whether the trial court failed to consider, appreciate, or apply the evidence tendered on record in arriving at his decision; whether the learned Judge failed to appreciate and apply the law on extension of time under the *Limitation of Actions Act*, the *Law of Succession Act*, the *Law Reform Act* and the *Fatal Accidents Act* in declining to affirm the extension of time allowed by the trial court; whether the learned Judge’s decision offended any Constitutional provisions; and whether the learned Judge erred in allowing the respondent’s appeal and, in declining to confirm the learned Magistrate’s decision to extend time.
14. In our considered view, the four issues may be more accurately reframed into one (1) decisive issue falling to be determined on points of law, namely: whether the learned Judge was at fault in allowing the respondent’s appeal against the learned Magistrate’s decision to extend time and allow the appellants to file suit out of time.
15. Turning to the singular issue as to whether the appellants were entitled to extension of time to file suit in the trial court, the sequence of events that followed the fatal accident involving the deceased and the respondent’s motor vehicle are instructive. We take to mind that the deceased died on 20th September 2014 as a result of fatal injuries suffered in consequence of a road traffic accident involving his motorcycle and the respondent’s motor vehicle driven by its servant or agent in the course of his employment and within the scope of his authority as such. The accident was attributed to negligence on the part of the respondent’s servant or agent for whom the respondent was vicariously liable.



16. Section 3(1) of the *Public Authorities Limitation Act*, Cap. 39 requires that any claim founded on negligence against a public authority (such as the respondent) be brought before the end of twelve months from the date on which the cause of action accrued. Accordingly, the appellants ought to have brought their suit by 19th September 2015. It is noteworthy that the appellants obtained a police abstract report dated 6th November 2014 which identified the driver, the owner and the insurer of the motor vehicle in issue; that The appellants also obtain written confirmation dated 3rd March 2015 from the Kenya Revenue Authority identifying the respondent as the true owner of the motor vehicle; that the appellants' advocates wrote a demand letter dated 26th March 2015 to the respondent, demanding admission of liability failing which they would institute civil proceedings for compensation; that it was not until 6th July 2018 when the appellants took out an Originating Summons in Kilifi SRMC Miscellaneous Civil Suit No. 5 of 2018 seeking leave to file suit out of time; that leave to file suit out of time was granted ex parte vide an order dated 17th July 2018, approximately 2 years 9 months after the limitation period for filing the suit had lapsed; and that the appellants filed suit in Kilifi SRMCC No.270 of 2018 vide a plaint dated 31st July 2018.
17. In an attempt to explain their prolonged inaction, the appellants stated that the delay was attributable to the time taken to obtain the requisite letters of administration ad litem; and that the delay was beyond their control. It is clear from the record before us that it was not until 10th October 2017 when the High Court prompted the appellants to obtain letters of administration ad litem that they petitioned the court therefor sometime in November 2017 and obtained the grant barely a month later on 15th December 2017. We find nothing on record to suggest that the appellants were not seized of any material facts of a decisive nature required to file the suit within the period of limitation, and which only came to their knowledge so late in the day. With all due respect, the appellants were indolent so to speak, and undeserving of the trial court's discretion to extend time. Moreover, equity does not aid the indolent.
18. As the High Court of Kenya at Nairobi correctly observed in HCCC No.300 of 2002 - Simon Wayiti Kimani vs. James Kimari Kimani & 2 Others (Unreported) where extension of time was sought in the face of inordinate and unexplained delay in filing suit, "if the Court were to exercise its discretion in favour of the plaintiff, it would be offending the principle of equity which does not aid the indolent but aids the vigilant." (see also *Moses Mbugua Mwangi vs. British American Tobacco Ltd* [2014] eKLR)
19. In our considered view, the learned Judge cannot be faulted for allowing the respondent's appeal in light of the fact that the appellants did not demonstrate any diligence in attempting to obtain the limited grant of letters of administration ad litem in good time to enable them file suit before expiry of the period of 12 months limited for filing suit against the respondent. We find that he correctly held that no material facts of a decisive nature were presented before the trial Court to justify extension of time to file their suit against the respondent.
20. It is also not lost to us that, after the appellants filed the original petition for limited grant of letters of administration ad colligenda bona on 9th February 2015 for the purpose of collecting and preserving the deceased's estate, they simply sat back and took no further action until prompted by the High Court on 10th October 2017 almost three years after the cause of action had arisen. To our mind, it is inconsequential what misperceptions the appellants or their counsel were labouring under with regard to the mandatory provisions of statute law on limitation of actions and, in particular, section 3(1) of the *Public Authorities Limitation Act*, Cap. 39.



21. Also worth noting is that the *Public Authorities Limitation Act* incorporates Part III (Extension of Periods of Limitation) of the *Limitation of Actions Act* under section 6 in the following terms:
6. Application of Cap. 22 Notwithstanding the provisions of section 31 of the *Limitation of Actions Act*, section 22 of that *Act* shall not apply in respect of the provisions of this *Act*; and in section 27 of the *Limitation of Actions Act* the reference to section 4(2) of that *Act* shall be read and construed as a reference to section 3(1) of this *Act*, but subject thereto and notwithstanding section 42 of the *Limitation of Actions Act*, Part III of that *Act* shall apply to this *Act*.
22. Section 6 of the *Public Authorities Limitation Act* limits the application of Part III of the *Limitation of Actions Act* (which makes provision for extension of periods of limitation) by excluding the application of section 22 of the *Limitation of Actions Act* (extension of time in cases of disability). Likewise, section 6 of the *Public Authorities Limitations Act* limits the application of section 27 of the *Limitation of Actions Act* (which provides for extension of limitation periods in case of ignorance of material facts in actions for negligence, etc.). Finally, any reference to section 4(2) of the *Limitation of Actions Act* (which prescribes the period of limitation in actions founded on torts to three years) shall be read and construed as a reference to section 3(1) of the *Public Authorities Limitations Act* (which prescribes the limitation period in similar actions against the government or local authority to 12 months). In effect, extension of time to file suit is only permissible on the grounds specified in Part III of the *Limitation of Actions Act*.
23. Relevant to the case before us is section 27(2) of the *Limitation of Actions Act*, which allows extension of time to file suit only where:
- “... 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 years 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.”
24. On the authority of the afore-cited provisions, the learned Judge correctly found that the learned Magistrate failed to conduct an inquiry as required under sections 27, 28 and 30 of the *Limitation of Actions Act*. The provisions of sections 27 and 30(3) of the *Act* were not complied with so as to persuade the trial court to invoke the discretion to grant leave to the appellants to file suit out of time. Indeed, the indolence demonstrated by their inordinate delay in approaching the court for a period of almost three years deprived the appellants of such discretionary orders which the learned Magistrate granted in error against the precepts of equity. Hence the learned Judge’s decision to overturn that judgment.
25. The appellants’ compounded excuse that they needed to “acquire capacity” to sue under section 82(a) of the *Law of Succession Act*, section 4(1) of the *Fatal Accidents Act* and section 2(1) of the *Law Reform Act* (which they claimed was a legal requirement of a decisive nature) does not hold. As the learned Judge correctly found, capacity to sue in the circumstances of this case was easily attainable on application for a grant of letters of administration ad litem. Their claim that the administrator of the deceased’s estate was unknown until after the limitation period had lapsed couldn’t be further from the truth. Truth is, no steps were taken to secure the requisite grant to facilitate civil action on behalf of the deceased’s estate. Even though Part III of the *Limitation of Actions Act* provides for extension of



the limitation period in cases of disability (pursuant to section 22), fraud or mistake (as contemplated in section 26) and ignorance of material facts in cases of negligence (as provided in section 27), their case did not fall within any of the categories aforesaid. Accordingly, the learned Judge was not at fault in considering the provisions of section 30(1) of the Act. The appellants' contention that he failed to consider the other sub-sections of that section which they claim to be applicable to their case does not hold.

26. The appellants' contention that the delay in obtaining letters of administration (during which period the administrator was unknown) is a material fact of a decisive character falling within section 27 as defined under section 30 of the Act is equally unconvincing. In any event, all the appellants needed to do was to petition for a grant of letters of administration without delay. Moreover, the time taken in ordinary cases to apply for and obtain letters of administration ad litem to lend capacity to file suit is as short as it took them after the High Court prompted them to do so since they had knowledge of all material facts required to found a cause of action. Their apparent ignorance of the timelines within which they ought to have done so is inexcusable.
27. In *Mbithi vs. Municipal Council of Mombasa and another* [1990– 1994] 1 EA 359, the appellant therein unsuccessfully sought leave to bring an action out of time against the respondents to recover damages for the death of his son who drowned in a pit dug by the 2nd respondent in a school owned by the 1st respondent. The appellant pleaded ignorance of the law, having thought that he could not bring the suit until an inquest ordered into the death of his son was concluded and findings made. This Court held that only restricted material facts relating to the nature, degree and liability for the injury which were decisive in character and which were outside the applicant's actual or constructive knowledge could constitute grounds for extension of time under section 27 of the Limitation of Actions Act. Kwach JA held that:

“Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action; (b) the nature or extent of the personal injury so resulting; and (c) the fact that the personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable.”

29. The Court went on to observe that it is not sufficient that facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character, that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action. We are not persuaded that any material facts of a decisive nature occurred after expiry of the limitation period.
30. In *Divecon Limited vs. Shrinkhanu Sadrudin Samani* Civil Appeal No. 142 of 1997, which we take the liberty to quote in extenso, the Court held that:

“In the circumstances of this case, the ingredient which deserves consideration is whether taking into account the fact that the Respondent's action was brought under the Law Reform Act and the Fatal Accidents Act which both apply where a person has died as a result of injuries, the requirements of section 27(2) and 29 of the Act has been fulfilled at the time when the Respondent made her application for extension of timeSection 30 of the Act defines the crucial phrases used in section 27, 28 and 29 of the Act The Respondent's only reason for not instituting proceedings against the appellant in time was that she was an illiterate old woman and as she put it:‘not conversant with my rights under the Law Reform Act Cap 26 or any other provisions that safeguard my interest and rights’,and that,



since the death of her son on 11th June 1983, she had been expecting her son's widow who had after her son's death, moved from Kenya to live in India, to institute proceedings against the AppellantThe matters deponed in the Respondent's affidavit certainly do not constitute 'material facts relating' to the action brought by the respondent or 'facts of a decisive character' as defined in section 30 of the Act But what is more, it cannot be said that the Respondent's excuse for not bringing her action in time was a matter that was, at all times before his death, outside the knowledge of Captain Sanami."

31. In the appellants' case, all the material facts relating to the cause of action, namely: the nature or extent of the personal injuries suffered by the deceased; that the fatal injuries were attributable to the negligence, nuisance or breach of duty on the part of the servant/agent/employee of the respondent; and who had been identified as the tortfeasor, were already within the appellants' knowledge even before their advocates wrote the demand letter on 26th March 2015, which was some 6 months or so after the cause of action accrued.
32. In conclusion, we find nothing to suggest that the learned Judge was at fault in overturning the trial Magistrate's decision to extend time in favour of the appellants to enable them file suit notwithstanding their unexplained inordinate delay, and in the absence of proof of lack of knowledge of any material facts of a decisive character that would have justified the trial court's decision.
33. Finally, having found that the appellants' suit was statute barred, the learned Judge ought to have dismissed the appellants' appeal in its entirety. In the circumstances, he was at fault in upholding the learned Magistrate's decision on liability and award on damages.
34. Having carefully considered the record, the impugned judgment, the grounds of appeal, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed with costs. Consequently, the Judgment and Decree of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 8th July 2021 is hereby upheld, save for the learned Judge's decision to uphold the trial Magistrate's award on liability and quantum, which is hereby dismissed. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

