



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Kimani (Civil Appeal E789 of 2022)
[2025] KEHC 6389 (KLR) (Civ) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 6389 (KLR)

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

CIVIL

CIVIL APPEAL E789 OF 2022

JM OMIDO, J

MARCH 27, 2025

BETWEEN

PATRICK KIMANI NJOROGE APPELLANT

AND

JANE NDUITA KIMANI RESPONDENT

RULING

1. The Respondent's Notice of Motion, expressed to be brought under Sections 1A, 3A and 80 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, Order 45 Rule 1 and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeks the following orders:
 - a. [Spent].
 - b. [Spent].
 - c. [Spent].
 - d. That this Honourable Court be pleased to review/vary and/or set aside the judgement terms by the Honourable Justice D.S. Majanja (made) on the 2nd July, 2024 so as to meet the ends of justice.
 - e. That the costs of this application be provided for.
2. The grounds upon which the application is premised are set out on its face and are in precis that there is an error apparent on the face of the record in the judgement that was delivered on 2nd July, 2024 in that the court determined that the suit before the Small Claims Court pursuant to which the present appeal was filed was statute barred, yet the Respondent had successfully sought for leave to file the same out of time.



3. The Respondent thus complains that this court while determining the appeal erred in determining that the Respondent's application for leave to file the suit before the lower court out of time was not merited.
4. The application is supported by the Respondent's affidavit sworn on 6th August, 2024, which expounds on the above grounds.
5. The application is resisted by the Appellant who to that end filed grounds of opposition dated 25th October, 2024. The grounds that are presented are that the application is unmerited and misconceived and that it is an abuse of the process of this court.
6. On 28th October, 2024, directions were taken that the application be canvassed by way of written submissions. The parties filed their respective submissions.
7. I have perused and considered the application, the affidavit in support thereof, the grounds of opposition and the submissions of the parties. The issue for determination as discernible from the record is whether there is an error apparent on the face of the record in the judgement that was delivered herein on 2nd July, 2024 that would warrant this court to review the same.
8. A brief history of the matter is that this appeal emanated from the judgement and decree of the Small Claims Court in Milimani SCCC No. E1320 of 2022, a tortious liability claim. The Respondent filed the claim on the strength of an order to file the said suit out of time that was granted on an application dated 23rd March, 2022.
9. In the Response to the Claim, the Appellant herein challenged the leave granted to file the suit out of time as follows:

“Without prejudice to the foregoing, the Defendant avers that this suit is time barred and orders that may have been issued (for) its revival were unmerited; based on which the Defendant prays for the suit to be dismissed.”
10. In his submissions before the trial court, the Appellant addressed the court as follows on the order of extension obtained by the Respondent to file the suit out of time:

“The reason advanced in the ex parte Notice of Motion dated 23rd March, 2022 based on which the court granted the Claimant leave has not fulfilled the provision of Section 27(2) of Cap 22 Laws of Kenya. The said application is filed herein by the Respondent and produced by the consent of the parties.

In ground 3 and 4 of the application, she seems to say [that] P. Kiiru Kamau & Company Advocates though instructed in time failed to present the claim until Lestins & Smith Advocates were instructed to take over the matter.

In as much as the Claimant has nothing to show for those initial instructions and that the law firm of Lestins & Smith made a demand well within time before the cause of action got extinguished, this reason is not part of the reasons provided in statute based on which the court ought to grant leave to file suit out of time.

In brief, your Honour, we contend that the court had no basis to grant leave to file this suit. Both because the reasons advanced were not truthful and even if they were, they are not reasons that are envisaged under statute and therefore this suit should fail.”



11. The trial court in a judgement rendered on 9th September, 2022 found the Appellant 100% liable. The trial court went on to assess general and special damages at Ksh.150,000/- and Ksh.3,550/- respectively. The trial court did not address itself to the issue of leave to file the suit out of time and the order for extension of time, though raised by the Appellant both in his response to the claim and submissions.
12. Dissatisfied with the judgement of the trial court, the Appellant proffered the present appeal, which was canvassed by way of written submissions. Among the grounds that the Appellant presented in his appeal was that the Respondent did not provide valid reasons in his application for extension of time dated 23rd March, 2022. On her part, the Respondent took the position that the trial court extended the time for filing the suit on the basis of valid reasons.
13. In the judgement delivered on appeal, Majanja J faulted the trial court for failing to revisit the application for leave to file the suit out of time and determine whether the grounds and/or reasons thereof were tenable, noting that the apt opportunity for challenging such extension was during the trial of the main suit. The judge then went ahead to determine the issue on appeal.
14. The contention by the Respondent is that in its judgement on appeal, this court made an error apparent on the face of the record in finding that the suit before the trial court was statutorily time barred yet leave had been granted enlarging time for filing the suit out of time which order was never set aside or appealed from.
15. In her view, the finding of this court that the trial court should have reconsidered whether the leave or extension was granted on merit was inviting the trial court to sit on appeal on an issue that it had already determined. Thus then, that having held that the trial court should have revisited the issue of the order issued for extension of time, the court made an apparent error as this meant that the trial court was being invited to sit on its own appeal on a matter that was already determined.
16. Having considered the record of the lower court and the present record, the issue for me to determine is whether the finding of Majanja J that the trial court should have considered the grounds in the application for extension of time to file the suit; and his subsequent action of proceeding to consider the said grounds on appeal to reach the holding that that the extension was not merited amounted to an error apparent on the face of the record.
17. The question that abounds at this stage is, what amounts to an error apparent on the face of the record?
18. The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243: observed as follows:

“In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out”.(Underlined emphasis mine).
19. In the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal distinguished between an error apparent on the face of the record that can be subject of review and errors of law which can only be corrected on appeal. The court stated as follows:

“A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-



evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.” (Underlined emphasis mine).

20. An order for leave to file a suit out of time is ordinarily granted ex parte. Such an order is not final in nature as the law provides that the same can be challenged in the proceedings that are subsequently filed out of time on the strength of that order.
21. In the case of *Raja Material Supplies Limited v Mutegi & another* (Civil Appeal E009 of 2021) [2024] KEHC 7228 (KLR) (20 June 2024) (Judgment) I made the following observations:

“I take guidance from the decision of *P.M.N v Kenyatta National Hospital & 6 others* [2015] eKLR that when a court extends the limitation period within which to file a suit, the order for such extension can only be challenged at the trial of the suit that is subsequently filed.

.....

From the foregoing, it is clear to me that the application for extension of the limitation period within which to file a suit is one that is required by law to be heard and determined ex parte. The order of extension granted in such an application is not subject to appeal by a Respondent who in the first place was not a party to the Originating Summons. The proper manner in which to challenge the ruling or order that emanates from such an application is by confronting it at the trial of the suit that is filed pursuant to the order for extension.”

22. What Majanja J stated, albeit in different words, is what I stated in the above decision. The validity of the extension was challenged by the Appellant before the proper forum, i.e. within the same proceedings that were filed pursuant to the extension, and the trial court was under a duty to address the same, which was not done, which issue then went to appeal and was determined by the court in the judgement of 2nd July, 2024.
23. Thus then, the finding of Majanja J that the trial court should have considered the grounds in the application for extension of time to file the suit; and his subsequent action of proceeding to consider the said grounds on appeal to reach the holding that that the extension was not merited did not amount to an error on the face of the record as that was the correct procedure. The Judge simply outlined the proper procedure of challenging an extension to file a suit out of time and proceeded to determine the issue on appeal.
24. For the reasons stated above, I find that the application dated 6th August, 2024 is without merit. I proceed to dismiss it with costs to the Appellant, which I assess at Ksh.7,000/-.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 27TH DAY OF MARCH, 2025.

J.M. OMIDO.

JUDGE

For Appellant: Mr. Amimo For Ms. Kiarie.

For Respondent: Mr. Mwangi For Mr. Banda.

Court Assistants: Mr. Ngoge & Mr. Juma.

