



**Mutua & another v Thuri & another (Miscellaneous Application
E412 of 2024) [2025] KEHC 9033 (KLR) (Civ) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9033 (KLR)

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

MISCELLANEOUS APPLICATION E412 OF 2024

JN MULWA, J

JUNE 26, 2025

BETWEEN

LYDIA WANJIRU MUTUA 1ST PLAINTIFF

TABBY MBEKY WANJIRU 2ND PLAINTIFF

AND

DR JOSEPH THURI 1ST DEFENDANT

AIC CURE INTERNATIONAL KIJABE 2ND DEFENDANT

RULING

1. By an Originating Summons (OS) taken out on 23/04/2024 the 1st and 2nd Applicants, pursuant to provisions of Order 37 Rule 6 (1) of the Civil Procedure Rules (CPR); Section 27 and 28 of the Limitations Act (Cap 22 Laws of Kenya) and Article 159(2) (d) of *the Constitution* sought leave of the court to file suit out of time against the Respondents for alleged medical negligence committed by the Respondents on or about 17/05/2017.
2. The OS is premised upon grounds stated at its face and at the Supporting Affidavit sworn on an even date by the Lydia Wanjiru Mutua, the first Applicant and documents annexed thereto, and a supplementary affidavit she swore on 3/07/2024.
3. The summons are vehemently opposed by the Respondents vide a Replying Affidavit sworn by Dr. Joseph Theuri, the first respondent.
4. The 1st Applicants' case is that in 2007, she was employed by the 2nd Defendant, was in good health but around 2013 she developed a spinal injury due to the nature of her work as a nurse therein for which injury she was treated and on 17/05/2017 underwent an operation on the Lumber Spine, Spine Fixation LS-51 conducted by Dr. Joseph Theuri, the 1st Defendant.



5. The 1st Applicant further states that despite the injury, she did not recover and continued was excruciating back pains and eventually sought further treatment in India where on 12/12/2022, she successfully underwent an endoscopic spine fixation surgery at CK Birla Hospital, India.
6. The 1st Applicant additionally states that the Indian doctors advised her that the surgery performed by Dr. Theuri – 1st Defendant was incomplete as no cage was inserted during the operation and therefore deduced that the 1st Respondent was negligent, which negligence she did not know until 12/12/2022 when the 2nd surgery was performed in India as stated above.
7. The 1st Applicant has provided a list of Dr. Aswani Marchant CK Birla Hospital documents as exhibit to buttress her case of alleged negligence against the 1st defendant and as well as documents and medical summary from the 2nd Defendants hospital.
8. The 1st Applicant's case is therefore that the said medical negligence by the Respondents was outside her actual or constructive knowledge and was only discovered when the second surgery was performed by the Indian Doctors and which was outside the statutory period of filing suits based on negligence hence the application before the court including the draft plaint.
9. The Respondent's case in opposition is found in the replying affidavit of Dr. Joseph Theuri as aforestated.
10. It is their case that in the first instance, the intended suit as seen from the draft plaint raises a myriad claims, including medical negligence allegations of burglaries to their house and alleged business losses allegedly occurred in the USA outside this courts jurisdiction in respect of the 2nd applicants losses I an Air BnB allegedly as she had to travel to India to accompany the 1st Applicant payment of medical insurance for the 1st applicant; all that have nothing to do with or in relation to the applicants and the respondent.
11. In respect thereof, the Respondents posit that at all material times the 1st Applicant being personal in the medical field as she alleged was aware and knew how she felt and at no time did she have or raised any complaints with Respondents that she was not under any disability or unaware of material facts of a decisive character and therefore there is no reason why she never filed the case within the statutory period and so the not deserving of the orders she seeks from the court.
12. Additionally, it is the Respondent's case that a denial of the leave sought will not prejudice the 1st Applicant as she has already lodged negligence proceedings at the Medical Practitioners and Dentists Board.
13. In summation, the Respondents state that no evidence at all has been placed before the court of her being under any disability between the time of the alleged tort to date or any material facts relating to the cause of action of a decisive character that were outside her knowledge, actual or constructive nor any to support her claim of employment by the 2nd Respondent as a nurse or at all, and terms her claims as malicious and unfounded.

Applicants Submissions

14. It is submitted that from the date of the first on 17/05/2017 to 12/12/2022 a period of around 5 years, the Applicants experienced severe pains which subsided after the 2nd operation when it came to her knowledge that the Respondents were negligent; hence the application for leave.
15. The Applicants sought reliance on Section 4(2) of the *Limitation of Actions Act* and decisions of the Superior Courts to argue that they have met the threshold for leave to be granted to file the intended



suit out of time, among them, in the matter of an application to file suit out of time in Hannah Njeri Gachau[2003] eKLR; Jennifer Mwonjaru Ngaruthi v. Shadrack Thiariie & 4 Others [2009]eKLR.

16. Also cited is the Court of Appeal decision in Jones M. Musau & Another v. Kenya Hospital Association & Another [2017] eKLR, for the proposition that lodging a complaint with the Kenya Medical Practitioners and Dentists Council does not bar or preclude a party from filing a suit against the Respondents.

Respondent's Submissions

17. It is the Respondents submissions that at all material times the 1st Applicant was aware of the full extent of her sickness and treatment and had no complaints at all against them and had no disability between the period that precluded her from filing intended suit within time.
18. It is also submitted that the intended suit by the draft plaintiff contain spurious and far fetched claims, showing a clear intention by the applicants to raise a mixture of claims that have nothing to do with a medical negligence claim but intended to oppress and scandalize the Respondents for claims in which the law does not accord extension of time to file.

Analysis and Determination

19. The issues that the court the court has flagged for determination are:
 - a. Whether the applicants have met the threshold for grant of leave to file a claim for medical negligence out of time
 - b. Who bear costs of this originating summons.
20. The Applicants intended claim for damages is based on the tort of alleged medical negligence, which is underpinned on Section 27 and 28 of the Limitation s of Actions Act, Cap 22 Laws of Kenya and other claims for alleged losses not directly connected with the tort of negligence in the courts considered view.
21.
 - (1.) Section 4(2) does not afford a defence to an actionVfounded 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 of independently of a contract or written law) and
 - b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists 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 purpose of this action; and
 - d. The requirements of sub-section(2) are fulfilled in relation to the cause of action.
 - (2) The requirements of this subsections 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 material 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.
- c. Section 28 of the limitation of Action Act lays down the procedure for making application for leave under section 27 and says
 - 28(1) an application for the leave of the court for the purposes of section 27 shall be made *ex parte* except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action;
 - (2) where an application is made before the commencement of a related action, the court shall grant leave in respect of the action to which the application relates if, and only if, on evidence adduced by or on behalf of the plaintiff if it appears to the court, if such an action was 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) and
 - b. To fulfil the requirements of Section 27 (2) in relation to that cause of action.
 - (2) Applies where the application is made after the commencement of the action.
 - (3) Defines “relevant action” to mean any action in connection with which leave sought by the application is sought.
 - (4) Defines “court” to mean the court in which the action has been brought or intended to be brought.

22. It is noteworthy that the requirement under Section 27(2) of the Limitation of Action Act is not about notice but about knowledge (Actual or constructive). “knowledge” is an awareness or understanding of a fact or circumstances, a state of mind in which a person has no substantial doubt about the existence of a fact as held in the case of Jennifer Mwonjaru Ngaruthi vs. Shadrack Thianie & 4 others[2009] eKLR

23. Actual knowledge is knowledge that a person is using reasonable care or diligence should have, and that knowledge is therefore attributed by law to a give person.

So a fact of a decisive character merely means a fact which was conclusive of the existence or otherwise of a cause of action.

24. The court of Appeal in the case of Jones M. Musau & Another (supra) held in respect of Section 27 of the Act, Section 4(2) that “to qualify for leave, it should be 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 either was after the 3 year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period, and in any case, was a date not earlier than one year before the date on which the action was brought”

25. Two things for consideration:

- a. Constructive or actual knowledge of the material facts.



- b. Whether the material facts were of a decisive character and outside of the applicants knowledge until the limitation period kicked offed

In the instant case, what are the decisive material facts in terms of sub-section 2 that were outside the knowledge of the Plaintiff until the limitation period lapsed.

The Applicant claims to have known the alleged negligence after the second surgery on 12/12/2020. Section 4 (2) (a) speaks of knowledge of material facts of a decisive character; in this case the alleged Respondent's negligence after the second surgery after three years of the 1st surgery. That in my view is within the envisaged period.

26. On the facts of a decisive character, these came up during the second surgery being an allegation (subject to prove) that the Respondent, particularly the 1st Respondent was negligent in his failure to insert a cage on the L4/5 during the first surgery of the Lumber Spine (and therefore incomplete)

I am persuaded that the 1st Applicant would not have had knowledge of those decisive material facts before the second surgery at the Indian hospital.

27. To that extent therefore this court is persuaded that the 1st Applicant has put up a spirited case for grant of leave to bring the intended suit out of time against the Respondents for the tort of medical negligence.

28. Further it is the courts finding that existence of a medical negligence to the Kenya Medical Practitioners and Dentist Board or council does not preclude an Applicant from filing a suit against the Respondents for alleged medical negligence claim as the determination of the same may be of assistance to the court in the eventual determination of the suit as held in the case of Jones M. Musau & Another (supra) that it was not necessary to await the outcome of determination by the medical board in order to institute the claim in court.

29. The court has interrogated the Applicants draft plaint. The role of the 2nd Applicant in the stated medical negligence claim is not clear or at all. She was not the patient. She had no contractual or any relevant relationship with the Respondents.

30. There is no demonstrated privity of contract between the 2nd Applicant and the Respondents or at all. She is not a suited to party to bring any suit against the Respondents.

For that reason, the court finds no plausible reason at all to allow the 2nd Applicant to file any suit in respect of the 1st applicants claim jointly with the 1st Applicant for being non-suited. The summons is dismissed against the 2nd Applicant.

31. For the foregoing, the following orders are issued:-

- a. The 1st Applicant Lydia Wanjiru Mutua is granted leave of court to file suit against the Respondents out of time (with a fresh plaint being drawn). The said suit shall be filed and served upon the Respondents within 21 days of this order.
- b. The 2nd Applicant Tabby Mbeky Wanjiru is precluded and barred from filing suit against the Respondent jointly and or severally in respect of the 1st Applicant's medical negligence claim against the Respondents.

32. Costs of this motion shall abide outcome of the suit.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JUNE, 2025



.....
JANET MULWA.
JUDGE

