



**Gikuhi v Nderitu (Civil Case E162 of 2020)  
[2024] KEHC 266 (KLR) (Civ) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 266 (KLR)

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

**CIVIL**

**CIVIL CASE E162 OF 2020**

**JN MULWA, J**

**JANUARY 25, 2024**

**BETWEEN**

**LUCY WANJIKU GIKUHI ..... PLAINTIFF**

**AND**

**SIMON GATHERU NDERITU ..... DEFENDANT**

**JUDGMENT**

1. This suit was instituted by the Plaintiff against the Defendant by a Plaint dated October 22, 2020 but amended by leave of court on December 22, 2021, herein after referred to as the Amended Plaint dated December 22, 2021.
2. A brief background to the suit shows that the motor vehicle subject of the accident that gave rise to the suit occurred on the 6/09/2014 along Jogoo Road within Nairobi County while the Plaintiff was a fare paying passenger in motor vehicle registration no KAJ 474B that at about 9.00pm collided with another motor vehicle registration no KBX 066M from which she sustained serious injuries, and was treated in Several hospitals including Kenyatta National Hospital, Spinal Injury Hospital at Nairobi and Apollo Hospital in India.
3. The Plaintiff blamed the driver of motor vehicle Registration No. KBX 066M which at the material time was owned and registered in the Defendant's name. The plaintiff pleaded particulars of the Defendant's negligence, injuries she sustained and nature of special damages she incurred as a result of the accident.  
  
The Plaintiff therefore sought compensation in general and special damages, future medical and related medical expenses and appliances as well as costs of the suit.
4. Upon being served with the court process the defendant in his statement of defence dated March 15, 2021 the defendant denied occurrence of the accident as well as the Plaintiff having been a passenger



in the said vehicle registration no. KAJ 574B on the material date. The defendant further raised a legal defence under the *Limitation of Actions Act*, Cap 22 Laws of Kenya that the suit was time barred, having been filed six years from the date of the alleged accident.

5. In the Plaintiff's reply to the defence and dated April 23, 2021, the plaintiff pleaded that leave to file the suit out of time was granted by the Court and in the list of documents annexed an order of the court issued on 4/05/2018. However, the Defendant has raised this issue as a matter for courts consideration; whether the said leave issued on 4/05/2018 is binding to this court. I shall determine this issue as a preliminary legal issue and or objection as its outcome may well determine whether the court should proceed to render itself on the other issues of both liability and quantum of damages.

### **Whether leave of court to file suit out of time issued on 4/05/2018 is binding on this court.**

#### **Defendants submissions.**

6. The defendant's submissions on this issue are dated 25/08/2023, and largely dwell on the applicability of the subordinate court's order granting leave to the plaintiff to file suit out of time.
7. I have considered the very detailed submissions and the authorities cited being: -
  - a. [\*Jane Dzidza Kutandaza V. Kenya Power & Lighting Co. Ltd & Another\*](#) [2015] eKLR.
  - b. [\*John Gachanja Mundia v. Francis Muriira & Another\*](#) [2017] eKLR
  - c. [\*Peter Kimani Ndai & Another v. Peter Gitau Njoroge\*](#) [2008] eKLR.
  - d. [\*Moi Teaching and Referral Hospital V. Cypul Awuor Aura\*](#) [2012] eKLR *Oruta & Another V. Nyamoto* [1988] eKLR.

It is the defendant's submission that the subordinate court being supervised by the High court cannot be bound by an order issued by the said subordinate court; that Section 28(5) of the Limitations of Actions Act defines court, as the court the Applicant intends to file the suit at, if the suit has not been filed and the court where the suit is filed if leave is sought after the filing of the suit; and that, a challenge to grant of leave to file a suit out of time may be challenged only during the trial during which time the burden of proof as to whether the Applicant was deserving of the leave shifts to the Applicant in terms of Section 27(1)(d) of Cap 22.

8. The defendant thus urged the court to find that the leave to file suit out of time dated 4/05/2018 is not applicable to this court.

#### **Plaintiff's submissions.**

9. In opposition to the objection/challenge mounted by the defendant on the validity of whether the leave obtained in the subordinate court binds this court, the plaintiff filed supplementary submissions dated 18/09/2023. I have read and gave due consideration thereto.
10. To state the least, I find the plaintiff's submission at its paragraph 5 to be mischievous and misplaced. The reason why the plaintiff moved the subordinate court for leave to file suit out of time was because at the time, in 2018, the suit was already statutory time barred by about one year. The starting point is therefore whether as at May 2018, the plaintiff could not have filed her suit arising from an accident that occurred on 6/09/2014, without leave of court for extension of time being a tort as it was squarely caught up by limitation on 6/09/2017 by dint of Section 27 4(2) and 28 of the *Limitation of Actions Act*.



11. Relying on the *Pronouncement in Iga v. Makerere University* [1972] EA62 that: -

“The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief.... The effect then it that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are drawn in the pleadings, the suit must be rejected.

12. It is submitted that once leave has been granted by the court, and the rival party feels that it was not properly granted, the burden of proof shifts to the rival party as captured in the case *Cozens v. North Deron Hospital Management Committee & Another* [196] 2 ALL ER 799.

Other than pleading its objection at its statement of defence, the defendant failed to mount its objection by allowing the case to proceed to full trial, without any objection at any stage of the proceedings.

### **Analysis and determination**

#### **On whether leave to file suit out of time dated 4/05/2018 issued by the subordinate court is binding to this court**

13. I have considered the submissions on the issue for determination from each side.

An objection or preliminary objection of law may be raised by a party at any time before, during but not after the trial of a case.

The motion dated 20/02/2018 upon which the above order was granted and issued by Hon. A. N. Makau (MS) in CMCC Misc. Appln. No. 230 of 2018 is not attached to these proceedings. It was granted upon hearing interpartes, in presence of counsel for both parties.

It is noted that despite the order having been given on 4/05/2018, the plaintiff delayed by a period of 2 ½ years to file the suit. In the absence of the motion and the supporting affidavit, this court is unable to interrogate the reasons put forth for the delay of six years before the suit was filed.

14. Section 27(2)(b) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provides the parameters under which leave to file suit out of time may be granted. The suit may be filed before or after leave has been granted, to the court the Plaintiff intends to file the suit.

The leave herein was obtained in the subordinate court, and the suit filed in the High Court.

15. Section 28(1) provides that the application for leave under Section 27 shall be made *ex parte*.

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2 provides that: - where such an application is made before the commencement of a relevant addition, 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); and
- b. To fulfill the requirements of section 27(2) in relation to that cause of action,



16. Further to the above,

Section 28 (5) “court” in relation to an action means the court in which the action has been or is intended to be brought (emphasis mine)

In respect to the above, section 28 (2) where the cause of action is brought after leave has been granted is relevant herein as the instant suit was brought or instituted after leave had been obtained in the subordinate court.

17. It is the defendants’ submissions that pursuant to Section 28(5) “court” in relation to an action means the court in which the action has been or is intended to be brought, and therefore, the application for leave having been made at the subordinate court, the suit ought to have been instituted in the subordinate court, and not in the High Court, citing the case *Jane Dziddza Kutandaza v. Kenya Power Lighting Co Ltd & Another* [2015] eKLR, Aburiri J opined that: -

“The issue is whether the plaintiff would use the leave granted by the subordinate court to file suit in the high court....”

18. The learned judge in the *Jane Dzidza Kutambaza* above upon analysis the material facts rendered that: -

“... accordingly, I order that the leave obtained from the subordinate court is inapplicable to this suit and accordingly strike it out and direct the plaintiff to file a fresh application for leave in this suit pursuant to the provisions of Section 27 and 28 (3) of the Law of *Limitations Act* and Order 37 Rule 6(2) of the *Civil Procedure Rules* before this suit can be set down for hearing”.

19. The basis of the above pronouncement is pursuant to Article 165(6) of the *constitution* that the High Court has supervisory jurisdiction over the subordinate court, hence leave obtained from the subordinate court cannot bind the High Court.

20. It is trite that any challenge to leave having been granted to file suit out of time to a plaintiff may be challenged by the defendant or other party during the trial of the suit and not after the trial/hearing. This is well founded on numerous decisions among them, *Peter Kimani Ndai & Another v. Peter Gitau Njoroge* [2008] eKLR, *Moi Teaching and Referral Hospital V. Cyril Awuor Aura* [2012] eKLR and *AAA V. Registered Trustees (Agakhan University Hospital Nairobi)*, [2015] eKLR, wherein the criterial for obtaining leave to file suit out of time under section 27 and 28 of cap 22 were discussed found to have been lacking in the decisions.

I am persuaded by the defendant’s submissions that the purpose of Section 27 and 28 of the *Limitations of Actions Act* as provided under section 4(2) thereof is that otherwise statute barred suit may be extended in case of ignorance of material facts in actions for negligence, nuisance or breach of duty.

21. Likewise, Order 37 (6)(1) of the *Civil Procedure Rules* provides for extension of time to file suit under Cap 22 Section 27 before filing of the suit exparte by an originating summons supported by an affidavit. Rule 6(2) provides that if a suit is already filed, leave shall to be applied for in the suit.

22. This suit was filed in 2020 after the impugned leave was granted by the subordinate court.



At all material times the Plaintiff knew, or ought to have known which court it intended to file the suit- more so in view of the very serious injuries the Plaintiff sustained and the monetary jurisdiction of the subordinate court vis-a-vis the damages it intended to seek from the court.

23. By seeking leave from the Subordinate Court, it must have been clear, in terms of Section 28(5) of *Limitations of Actions Act* the court it intended to file the suit in was the subordinate court. Thus, the definition of “court” therein being the court in which the action has been or is intended to be brought, and to add, if already filed, in the court it is filed.
24. In the circumstances, the holding in *Jane Dzidza Kutandaza* (Supra) is persuasive, more so in that the High court has supervisory jurisdiction over the subordinate court.

More importantly, the Plaintiff even in the face of the challenge to the “leave” from the subordinate court found it not fit to bring to this court’s attention, by annexing the motion through which it sought leave, to aid the court to consider the reasons for the delay in filing the suit within the statutory period as provided under the *Limitation of Action Act* Section 27, and whether such reasons if any, were sufficient for the grant of such orders of 4/05/2018.

25. The burden of proof as earlier held lies with the Plaintiff to show that the leave was indeed deserved – *Moi Teaching and Referral Hospital* (Supra).

Further it is trite that if the Defendant was not satisfied with the manner and or grounds upon which leave was granted, such objection and or challenge is taken during the trial of the suit, as held in the case *Oruta & Another vs Nyamoto* [1988] eKLR.

26. The question arises then how the court in which the leave was not obtained would be able to consider the objection/challenge unless it is on Appeal.
27. Without further interrogation, I am satisfied that the challenge mounted by the Defendant is well deserved for the reasons stated above.

Consequently, this court finds and holds that the leave granted to the Plaintiff to file suit out of time by the subordinate court by an order dated 4/05/2018 is not binding to this court (the High Court), nor is it applicable to this suit as filed. It would however have been applicable had the suit been filed before the Subordinate Court which granted the leave.

28. In the circumstances, I proceed to strike out the leave dated 4/05/2018, and direct that the Plaintiff move the court under Section 27 and 28 of the *Limitations of Actions Act*, and Order 37 Rule 6 of the *Civil Procedure Rules* 2010 for appropriate leave, or as the court may determine.
29. In the meantime, this suit having been heard fully, and pending for determination, all further proceedings shall be stayed, for a period of 90 days to allow the Plaintiff to take whatever action it deems fit in view of the orders above.
30. The case will be listed for mention for further directions on 22/04/2024.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024**

**J. N. MULWA**

**JUDGE**

