



Maina v Kenya Power & Lighting Co. Ltd & another (Civil Suit 6 of 2013) [2024] KEHC 4434 (KLR) (Civ) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4434 (KLR)

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

**CIVIL
CIVIL SUIT 6 OF 2013**

CW MEOLI, J

APRIL 26, 2024

BETWEEN

EDWIN KIRITU MAINA PLAINTIFF

AND

KENYA POWER & LIGHTING CO. LTD 1ST DEFENDANT

JOSEPH K. WANGETHE 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 11.01.2013, Francis Maina Kiritu in his capacity as next friend and father to Edwin Kiritu Maina (hereafter the Plaintiff) sued the Kenya Power & Lighting Co. Ltd and Joseph K. Wangethe (hereafter 1st and 2nd Defendant(s)) seeking inter alia general damages for pain and suffering and loss of amenities; general damages for diminished earning capacity; special damages, including future medical expenses, and costs of the suit. The Plaintiff averred that at all material times, the 1st Defendant supplied electricity vide account No. 2403822 to multiple dwelling houses (flats) that were owned by the 2nd Defendant and situated within Kayole Mihango Estate.
2. It was averred that the Plaintiff was at the material time a minor residing with his family as tenants of the 2nd Defendant's in Plot No. A3-225 (hereafter the premises); that on or about 01.02.2008, the Plaintiff was lawfully removing his socks from the clothes line at the balcony of the subject premises, negligently erected by the 2nd Defendant, his servants, employees and or agents close to the live electric power cables, when he came into contact with a high voltage but uninsulated power line which the 1st Defendant, their servants, employees and or their agents so negligently and without due regard to the safety of the residents, had strung close to the balcony of the house; and that as a result, the Plaintiff sustained severe injuries, loss and damage.



3. On 25.02.2013 the 1st Defendant filed a statement of defence denying the key averments in the plaint and averred that the suit was statute barred for having been filed outside the period prescribed by the Limitation of Actions Act. Moreover, that the grounds advanced in support of the application for leave to file suit out of time did not satisfy the requirements of Section 27 of the Limitation of Actions Act.
4. The 2nd Defendant filed a statement of defence dated 18.04.2013 and amended on 29.06.2026 to include a counterclaim of even date. In which he denied the key averments in the plaint and averred, without prejudice to the denials in his statement of defence, that the subject premises were erected far from the high voltage electric lines and therefore the Plaintiff was the author of his misfortune. His counterclaim against the Plaintiff and 1st Defendant, was premised on the averment that the accident was occasioned by breach of statutory duty and negligence on the part of the 1st Defendant. He pleaded contributory negligence against the Plaintiff, invoking in addition, the doctrine of volenti non fit injuria and seeking that liability be apportioned in the ratio of 90:10% against the 1st Defendant and the Plaintiff, respectively.
5. In reply to the respective statements of defence, the Plaintiff reiterated the contents of the plaint and joined issues with the averments contained in the 1st and 2nd Defendants statement of defence. In his defense to the counterclaim, the Plaintiff reiterated the contents of the entire plaint and denied that the Plaintiff contributed to the accident as claimed and put the 2nd Defendant to strict proof. The Plaintiff thereafter moved the court through a motion dated 25.02.2020 seeking the discharge of the next friend, Francis Maina Kiritu, and leave to proceed with the suit in his own name, having attained the age of majority. On 05.03.2020 the motion was allowed by consent.
6. During the trial, the Dr. Moses Kinuthia testified as PW1. He identified himself as a Medical Practitioner holding a MBChB from the University of Nairobi. He testified that he examined the Plaintiff on 26.07.2012 who had a history of electrocution on 01.02.2008. It was his evidence that the Plaintiff sustained extensive burn wounds to the right upper limb leading to amputation, to the left chest wall and forearm. That, consequently, the Plaintiff suffered amputation below the right upper limb, but was however in fair condition on examination. He further stated that the Plaintiff's right limb was amputated 5 cm below the elbow and that the remaining stump was wasted, though the wound had healed.
7. Further having reviewed the notes from Kenyatta National Hospital (KNH) and P3 form, he classified the injuries as grievous harm causing pain and blood loss, consistent with electrocution. He maintained that the loss of the right upper limb to a right-handed young person adversely affected his prospects, and that a bionic arm was recommended at a cost of Kshs. 5,000,000/-. He produced the medical report dated 08.08.2012 as PExh.1 and related fees receipt as PExh.2, asserting that he was paid Kshs. 15,000/- for Court attendance. In conclusion, he stated that the Plaintiff would require 4 replacements of the bionic arm in his lifetime, at a cost of Kshs. 20,000,000/-
8. Under cross-examination, PW1 stated that he prepared the report when the Plaintiff was aged 14 years old and had not re-examined him since. Confirming that the opinion regarding replacement of the bionic arm did not indicate the number of replacements needed or the source of the bionic arm nor seen any other report recommending a prosthesis. He maintained that the history given in his report related to amputation done 4 years prior to his examination of the Plaintiff, following electrocution. In re-examination, he asserted that the report indicated that the Plaintiff was admitted for over two (2) months in hospital.
9. The Plaintiff testified as PW2. He said he was aged 25 years old, having recently graduated from Pwani University, and that the accident occurred when he was 9 years old. Adopting his witness statement



dated 25.02.2020 as his evidence -in-, he stated that the electricity power lines were close to the balcony of the subject premises, approximately an arm's length from the lines used to hang clothes. That while the 1st Defendant had installed the power lines, the cloth lines had been installed by the 2nd Defendant, without warning concerning proximity of the power lines.

10. He confirmed that he was right-handed, and the amputation of his right arm compelled him to learn to use his left arm, to pursue a degree in Economics instead of Engineering and to rely on people to help him with ordinary tasks such as washing clothes, at a fee. He especially blamed the 1st Defendant for the power cables strung in close proximity to the balcony and the 2nd Defendant for failing to take any protective measures regarding the cloth lines at the balcony of the subject premises. In confirming admission at KNH for two (2) months, he produced the P3 Form as PExh.3, KNH Discharge Summary (PExh.4), receipt from KNH (PExh.5), receipt from True Light Medical Services (PExh.6), report from Imara Primary School (PExh.7) , demand Letter to the 1st and 2nd Defendants (PExh.8(a) & 8(b)) and application to file suit out of time and affidavit as PExh.9(a) & 9(b).
11. During cross-examination, he stated that at the time of the accident he was 9 years old, hence could not tell what was in place first – the building or the power line – or when his parents moved into the subject premises. That in high school he used a hand prosthesis which was uncomfortable, and he therefore did not obtain another one since. Asserting that an artificial arm would be appropriate. He confirmed being unemployed since graduation and asserted that leave had been sought to file the suit out of time because the erstwhile counsel failed to file the suit in time. He further reiterated that he was admitted at KNH for two (2) months and upon discharge only attended regular outpatient checkups.
12. Asserting that at the time of his electrocution he was trying to remove his socks from the clothesline, which was close to the electrical line, he said that nobody else was injured at the time. He however disputed tampering with the power line when electrocuted. In re-examination he echoed the fact that he didn't use a prosthesis because they fitted poorly and were therefore uncomfortable.
13. Francis Maina Kiritu testified as PW3. He identified himself as a farmer and father to the Plaintiff. He too adopted his witness statement dated 13.12.2022 as his evidence- in -chief. It was his evidence that the distance between the balcony of the subject premises and the power line installed by the 1st Defendant was an arm's length. That the cloth lines were installed by the 2nd Defendant without a barrier to protect the tenants from contact with the electric line. He asserted that since the accident the Plaintiff was dependent on the family for basic chores and that he wholly blamed the Defendants for the accident.
14. In cross-examination, he said he had moved into the subject premises sometime in the year 2000, and was unaware whether the premises were erected on a road reserve. He however could not tell what came first, between the premises and power lines, only that upon moving into the subject premises he found the cloth line in place. Regarding leave to file suit out of time, PW3 stated that delay was occasioned by erstwhile counsel who failed to file suit in good time. He stated that the Plaintiff's socks had earlier been hung up on the cloth line by the Plaintiff's mother and that the 1st Defendant ought to have put up a warning or barrier to safeguard the residents. He concluded by stating that his family lived in the building for about 4 years without incident but moved out after the accident.
15. Esther Wamutira Miano testified as PW4. She identified herself as a businesswoman and tenant residing on the 3rd floor of the subject premises. Adopting her witness statement as her evidence -in -chief, she stated that the balcony and hanging line on her floor were an arm's length of the electrical cables, and that 2nd Defendant installed the clothing lines without any barrier to protect the tenants from contact with the power cables. She narrated further that her son had suffered amputation following electrocution, and that she filed suit and obtained judgment, a copy of which she adduced as PExh.10.



16. Under cross-examination, she maintained that the electrocution incident involving her son happened after the Plaintiff's and that she filed suit in good time and had also referred PW3 to her advocate in 2013. Maintaining that the 2nd Defendant had installed the cloth lines next to the power cables, she asserted to have sustained minor shocks while hanging long items such as bed sheets. And that despite complaints to the 2nd Defendant he took no corrective measures during her occupation of the subject premises between 2007-2013. She stated that the Plaintiff's family moved into the subject premises sometime in 2008.
17. On behalf of the 1st Defendant, Dr. George K. Museve testified as DW1. He identified himself as an orthopedic surgeon and senior lecturer at the University of Nairobi. Confirming to have examined the Plaintiff he produced the Medical Report dated 19.08.2013 as DExh.1. He asserted that the cost of a prosthetic arm is estimated at Kshs. 250,000/- and at the time of preparing the report the Plaintiff was young and he estimated that he would require two (2) functional prosthetic arms. He observed that the right elbow was very stiff and needed attention for the prosthesis to work. Further that, the Plaintiff had contractures limiting movement of the right shoulder both of which required surgery at an estimate cost of Kshs. 750,000/-.
18. He stated during cross-examination that the Plaintiff's injuries arose from electrical burns resulting in total disability assessed at 45% thus limiting his career prospects and quality of life. His recommendation was that the Plaintiff ought to acquire a functional prosthesis which is the same as a bionic arm explaining that a prosthesis can either be functional or aesthetic. He further maintained that his estimates were obtained from prosthetics dealers in 2013, and could not tell the source of PW1's estimates. He said some prosthetics are costly due to their functionality and estimated the cost of surgery to resolve the Plaintiff's shoulder deformity at Kshs. 750,000/-
19. Ruth Mbalelo testified as DW2. She identified herself as Legal Officer at APA Insurance Ltd and thereafter proceeded to adopt her witness statement dated 04.03.2020 as her evidence -in -chief. She produced a copy of the Originating Summons (O.S) dated 13.09.2012 being Nairobi HC Misc. Application No. 500 of 2012 (DExh.2) and a copy of the certified proceedings and ruling in Nairobi HC Misc. Application No. 500 of 2012 as DExh.3.
20. She admitted during cross-examination that she had neither worked with the 1st Defendant, witnessed the accident in question, nor was aware whether the power lines were insulated and the distance between them and the Plaintiff's house. Further she admitted to a similar incident in the subject premises in 2011. She took issue with the grounds advanced in DExh.2, and upon which leave was granted to file suit out of time. She said she did not have with her a report in respect of the accident herein.
21. The 2nd Defendant, testified as DW3. He identified himself as a farmer residing in Gatundu. Adopting his witness statement dated 03.07.2018 as his evidence- in -chief he tendered as exhibits an Agreement for sale of Plot No. E3-225, Kayole (DExh.4), Assignment of Plot No. A3-225, Kayole (DExh.5), Approved official construction plan issued on 07.01.1994 (DExh.6), Correspondence between the 2nd Defendant and Nairobi City County (DExh.7) and Correspondence between the 2nd Defendant and 1st Defendant as DExh.8. It was his evidence further that the 1st Defendant installed the power cables upon his application and that the same were insulated as a safety measure. He maintained that the 1st Defendant was wholly liable for the accident while asserting that even an adult could not reach the electric cables from the subject premises and he could not tell how the accident involving the Plaintiff occurred.



22. Under cross-examination, he confirmed being the owner of the subject premises where the Plaintiff resided at the material time. He said he was not present when the accident occurred. Reiterating that the electrical cables transmitting power to the subject premises were insulated but admitting a similar incident of electrocution involving a child in 2011, he said he could not estimate the distance between the cables and the balcony of the subject premises. That an adult could not reach the electrical cables from the balcony of the subject premises. Regarding the decision in PExh.10, where damages were awarded in the sum of Kshs. 4,000,000/-, he said the 1st Defendant shouldered 70% of the liability.
23. On being referred to DExh.6 and DExh.8, he reiterated that the subject premises had necessary approvals and that he applied for power which was eventually connected by the 1st Defendant to a meter box in the subject premises. However, that the main electric cables ran down the road to other buildings. He asserted that it was the duty of the 1st Defendant to place warning signs on their main cables and that the Nairobi City County inspected the subject premises during construction. He concluded by stating that the 1st Defendant's officers approved and connected power to the building.
24. At the close of the trial, directions were taken for the filing of submissions.
25. On the part of the Plaintiff, counsel submitted on four (4) issues for the Court's consideration. Addressing the question whether the suit was barred by virtue of Section 4(2) of the [Limitation of Actions Act](#), he contended that the suit was filed in full compliance with Section 27(1) of the [Limitation of Actions Act](#); that the right of action had been concealed by fraud; and that the Plaintiff has a constitutional right to access to justice. As concerns Section 27(1) of the Act, he argued that the suit was for damages in respect of an action founded on negligence, and the damages sought in respect of personal injuries. Hence the leave granted in HC Misc. Application No. 500 of 2012.
26. He asserted that the circumstances leading to delay fell within the ambit of Section 27(1) of the Act. In respect of the latter, he cited the definition of "material fact" as captured in Section 30 of the Act, restated the contents of PExh.9(a) & 9(b) and the Plaintiff's evidence, to assert that the material facts in question were outside the knowledge of PW2 and PW3 until after the expiry of the limitation period. It was submitted that extent to which the personal injuries were attributable to the negligence of the Defendants herein was outside the knowledge of PW2 and PW3 whereas the latter had taken steps to ascertain the same by seeking appropriate legal advice from an advocate. That it was upon counsel to ascertain the extent to which the personal injuries were attributable to the negligence of the Defendants and file the suit, which he did not do. He thus contended that the requirements of Section 27(2) as read alongside 28(2) of the [Limitation of Actions Act](#) were complied with, leading to the issuance of leave in HC Misc. Application No. 500 of 2012.
27. On the right of action being concealed by fraud, counsel relied on Section 26(b) of the [Limitation of Actions Act](#), to argue that despite issuance of instructions to erstwhile counsel in 2008, it was not until June 2012 that PW3 discovered that the said counsel had never filed suit as instructed. That by the said conduct of erstwhile counsel, the Plaintiff's right of action was concealed by fraud, and therefore the period of three years began to run on or about the month of June 2012 when the fraud was discovered.
28. Regarding the Plaintiff's right to access to justice, counsel invoked the provisions of Article 20 & 48 of [the Constitution](#), Section 7(1) of the Sixth Schedule to [the Constitution](#), Section 27(3) of the [Limitation of Actions Act](#), and cited the decisions in *Kenya Bus Services Limited v Minister for Transport & Others*, Civil Case No. 504 of 2008, *Bob Thompson Dickens Ngobi v Kenya Ports Authority & Others, Mombasa Civil Suit No. 87 of 2013* and *Telkom Kenya Limited v Kenya Railways Corporation*, Nairobi HC Commercial & Tax Case No. 621 of 2016. In support of the submission that it would



be unfair and in contravention of the Plaintiff's rights to access to justice for the Court to ignore the evidence presented based on Limitation of Actions Act.

29. Besides, he stated, the Defendants have not indicated that the delay in filing the suit had made it impossible to procure evidence required in raising a defence to the claim. Counsel therefore urged the Court to consider the graveness of the Plaintiff's injuries alongside the Defendant's objection and to find that allowing the objection would be prejudicial and unfair to the Plaintiff, and amount to denying him the right to access to justice.
30. On the merits of the suit, it was contended that the Plaintiff's injuries were confirmed by medical evidence adduced. It was argued that based on the evidence before Court, the 1st Defendant was liable for reasons that;- they installed the power line at an arm's length away from the subject premises where the Plaintiff was residing exposing him to risk; they installed uninsulated power lines; they failed to inspect and properly maintain the power lines; the Plaintiff was a minor living in the subject premises, hence it was up to the 1st Defendant to exercise a high degree of vigilance to prevent any accidents; and that as the installer of power lines, it owed a duty of care which duty it breached by not properly inspecting and maintaining the power lines. The decisions in *EW (suing as the next friend and mother to BM) v Kenya Power & Lighting Company Limited and Anor, Nairobi HC. Civil Case No. 451 of 2012* and *AMK (suing as mother and next friend to JMK) v Kenya Power & Lighting Company Limited, Meru HC Civil Suit No. 28 of 2019* were relied on in the latter regard.
31. With respect to the 2nd Defendant's liability, it was argued that based on the evidence before Court, he was liable because;- he confirmed that he was the owner of the building; he constructed the building close to the power lines and installed cloth hanging lines next to the said power lines; he failed to put up any barriers or warning signs despite the proximity of the said hanging lines to electric cables; and that as the landlord he owed a duty of care to take steps to mitigate against all possible risks, which he failed to do. Therefore, the Defendants ought to be jointly and severally held wholly liable, while the 2nd Defendant's counterclaim against the Plaintiff being unfounded ought to be dismissed with costs.
32. Regarding damages for pain, suffering and loss of amenities, counsel restated the evidence before the trial Court in respect of the Plaintiff's injuries and attendant sequela in urging the Court to award Kshs. 5,000,000/-. In so doing, he relied on the decisions in *Mwaura Muiruri v Suera Flowers Limited & Another, HC Civil Case No. 189 of 2009, DA v Kenya Power & Lighting Company Limited, Meru HC Civil Suit No. 29 of 2018* and *AMK (suing as mother and next friend to JMK) v Kenya Power & Lighting Company Limited (supra)*.
33. On diminished earning capacity, while citing *Mwaura Muiruri (supra)* and Schedule 17 of Legal Notice No. 20 of 2022 (Scale of fees for professional engineering services), Rules 2022, counsel submitted that the Plaintiff had proved his academic aptitude to pursue an engineering degree. That the lowest level of an engineer earned Kshs. 450,000/- pm and retired at 60 years since qualification at the age 25 years. Hence, the Plaintiff would have been able to work as an engineer for 35 years. Thus, earning a cumulative income of Kshs. 75,600,000/- calculated as follows: - Kshs. 450,000x35x12x40% (60% being expenses and taxes). That because the Plaintiff had despite his injuries earned a degree in Economics, counsel proposed an award under of Kshs. 37,800,000/- (75,600,000x0.5) under the header.
34. On special damages and future medical expenses an award of Kshs. 167,750/- and Kshs. 20,000,000/-, respectively, was urged based on the evidence before the Court. In conclusion, the Court was urged to award a total of Kshs. 62,967,570/- in general damages, costs and interest, while dismissing the 2nd Defendant's counter-claim with costs.



35. Counsel for the 1st Defendant equally opened his submissions by addressing the preliminary issue of the Plaintiff's leave to file suit out of time. In so doing he anchored his submissions on the decisions in *Yunes Oruta & Another v Samwel Nyamato* – CA No. 96 of 1984 as cited with approval in *Divicon Limited v Shirinkhanu Sadurudin Samani* – CA No. 142 of 1997, *Mary Wambui Kahugu v Kenya Bus Services Ltd* – CA No 195 of 1995 and *Republic v Principal Magistrate P. Ngare Gesora, Principal Magistrate's Court & 2 Others Ex-parte Nation Media Group Limited* [2013] eKLR. For the proposition that leave granted to file suit out of time is not final and can be challenged at the hearing of the suit as done herein by the 1st Defendant. That the cause of action herein arose on 01.02.2008 whereas the suit was filed on 14.01.2013, hence the suit was time barred. Moreover, that the reasons advanced in respect of the application for leave do not satisfy the prescriptions of Section 27(2) of the *Limitation of Actions Act*.
36. In demonstrating the above, counsel submitted that failure to file suit on account of mistake of counsel does not qualify as one of the requirements of Section 27(2) as read with Section 30(3) of the *Limitation of Actions Act*. That the Plaintiff in his application for leave to file suit out of time did not advance and or prove that the material facts relating to the cause of action were at all times outside his actual or constructive knowledge. On the contrary, based on the reasons advanced, the Plaintiff was alive to the limitation of time in respect of his cause of action. Citing the decision in *Peter Kimani Ndai & Another v Peter Gitau Njoroge* [2008] eKLR, counsel asserted that the burden lay upon the Plaintiff to prove that indeed his application for leave satisfied the mandatory conditions spelt out in Section 27 and 28 of the *Limitation of Actions Act*. And the Plaintiff having failed to do so, the Court ought to set aside the ex- parte leave granted and strike out the suit for being statute-barred.
37. Concerning liability, it was submitted that from cross-examination, it was unclear how the Plaintiff came into contact with the live cable whilst purportedly removing his socks from a cloth line. Counsel went on to argue that from the evidence, it was established that the power lines were located a considerable distance from the balcony in question such that an adult on the balcony could not reach out and touch the power lines. Therefore, the manner in which the Plaintiff came into contact with the power cable remains unestablished, save by the Plaintiff's own negligence of touching the electrical cable.
38. With respect to the 2nd Defendant's liability and or negligence, counsel maintained that from the evidence, the subject building was too close to the power lines ordinarily erected on road reserves. Therefore, the 2nd Defendant must have breached the way leaves and encroached onto the road reserve, as a consequence of which the subject premises were erected too close to the power line. Thereby exposing tenants to obvious risk. Concerning PExh.10, counsel argued that the facts therein are distinguishable to the instant matter on grounds that the subject suit had been filed in time; and that the claimant therein was aged 5 years, thus of tender age and not liable for negligent actions.
39. As to the appropriate award of general damages, counsel urged the court to award Kshs. 900,000/- for pain, suffering and loss of amenities. The decisions in *Kenya Power & Lighting Co. Ltd v Mathew Nambeta Wanjohi* [2019] eKLR and *CA Civil Appeal No. 24 of 2015 – Douglas Kafala Obeva v David Ngama* were called to aid in this regard. Concerning damages for diminished earning capacity, it was argued that the injuries did not affect the Plaintiff's mental faculties as he continued with his education, eventually earning a degree from the university. As such there would be no justification in awarding damages under this head which was too remote in the circumstances.
40. On special damages counsel conceded to the award of Kshs. 152,570/- as pleaded and proved by the Plaintiff. Finally, on future medical expenses, it was contended that the medical reports in respect of the Plaintiff were at variance. That Dr. Museve's prognosis and opinion regarding future medical expenses



were more authoritative as he is an Orthopedic Surgeon. Thus, the Court was urged to award Kshs. 1,200,000/- as proposed by Dr. Museve. The 1st Defendant sought dismissal of the suit on account of limitation, and if not so persuaded, to assess liability and damages as urged.

41. On the part of the 2nd Defendant, counsel upon restating the evidence at the trial, submitted that the Plaintiff ought to shoulder 10% liability against the 1st Defendant's liability of 90%, the latter having installed un-insulated electrical cables which they knew or ought to have known were dangerous. It was further pointed out that the 1st Defendant did not file a defence to the 2nd Defendant's counterclaim, hence the averments therein stood admitted. Counsel maintained that the 2nd Defendant could not be held liable for the 1st Defendant's negligent installation of electricity. That present suit was filed as an afterthought of the decision in PExh.10 as facts of the said decision differ from those herein.
42. On quantum of damages, counsel summarily called to aid the decisions in Kenya Power & Lighting Limited v Stella Mgeni [2018] eKLR and Kenya Power & Lighting Limited v Fredrick Muhavi Amusinda (suing as a personal representative of the estate of) Anzavula Amusinda. In conclusion, it was submitted that the Court ought to dismiss the Plaintiff's suit with costs and allow the 2nd Defendant's counterclaim.
43. The court has considered the evidence on record and the respective parties' detailed submissions. Upon a review of the material before it, the court is of the considered view that this case turns on the question of limitation. The plea of statutory limitation as raised by the 1st Defendant is based on the undisputed fact that the cause of action herein arose on 01.02.2008 while the suit was filed on 14.01.2013. Admittedly, the suit was filed pursuant to leave, similarly challenged on grounds that the reasons advanced in respect of the application for leave, namely mistake of counsel, do not satisfy the prescriptions of Section 27(2) as read with Section 30(3) of the *Limitation of Actions Act*.
44. The cause of action is premised on the tort of negligence Section 4(2) of the *Limitation of Actions Act* provides that 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. Therefore, the Plaintiff's suit ought to have been filed on or before the 01.02.2011. Leave to file suit out of time was granted by Onyancha, J. on 07.12.2012. At the trial, both PW2 and PW3 confirmed that leave was sought to file the suit out of time on grounds that that erstwhile counsel did not file the suit as instructed, and in time. See PExh.9(a) & 9(b).
45. Under Section 27 as read with Section 28 of the *Limitation of Actions Act* the Court has power to extend the limitation period for filing a suit in cases founded on negligence. The former provides that; -
 - “(1) 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.



- (2) 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.
- (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued”.

46. It is settled that the grant of leave to file suit out of time is not final, as the leave so granted can be challenged at the hearing of the suit. See Court of Appeal decision in *Bernard M. Mbithi v Mombasa Municipal Council & another* [1993] eKLR and *Mary Wambui Kabugu v Kenya Bus Service Limited* [1997] eKLR. Section 27 above has been the subject of numerous decisions by the superior courts. The Court of Appeal in *Dominic Njuguna Wairimu v Joseph Wambugu Kibe* [2018] eKLR stated that; -

“ 19. In order to surmount the defence of limitation on grounds of ignorance of material facts under Section 27 of the *Limitation of Actions Act*, in addition to fulfilling the requirements under Section 27(1)(a), (b) and (c), namely that the action is for damages for negligence, nuisance or breach of duty; that the damages claimed consist of or include damages in respect of personal injuries, the applicant must demonstrate that the requirements of Section 27(2) are fulfilled in relation to the cause of action. [Emphasis added]

47. At the heart of the 1st Defendant’s contestation is PExh.9(a) & 9(b) produced by the Plaintiff and DExh.2 & DExh.3 tendered by DW2. PExh.9(a) & DExh.2 are copies of the exparte Originating Summons (O.S) in Nairobi HC Misc. Application No. 500 of 2012 seeking leave, while PExh.9(b) is the further affidavit in support of application for leave. DExh.3 being the certified copy of proceedings and ruling in Nairobi HC Misc. Application No. 500 of 2012. Of particular relevance is PW3’s deposition in PExh.9(a) & 9(b), in support of the prayer for leave to file suit out of time. At paragraphs 5, 6, 7 and 8 of the supporting affidavit (in PExh.9(a)) it was deposed as follows; -

“ 5. That sometimes in the year 2008, I instructed the firm of T.O. N Kemunto & Co. Advocates, Coffee Plaza, 7th Floor Room 4, Haile Selassie Avenue, Nairobi to pursue my compensation claim with Kenya Power & Lighting Company Limited and Joseph K. Wangethe. [I annex herein and mark “FMK4” a receipt from the said firm of advocates showing payment of instruction fees]



6. That during my several follow ups with the said advocate, he at all material times intimated that he had filed the suit, served the Respondents herein but that he had a problem in securing a hearing date for the suit.
7. That on or about June 2012, when I confronted my former advocate and demanded from him proof of having filed suit by giving me at least the case number, I realized that he never filed the suit since he could not either produce proof of having filed the suit and or give me the case number.
8. That I consequently withdrew instructions from the said firm of advocates and instructed my current advocates of record to take up this case” (sic)

48. In paragraph 5 & 6 of the further affidavit PExh.9(b), PW3 further deposed; -

- “ 5. That I visited the offices of the said advocates on several occasions between the year 2008-2012 and on occasion I was informed that he was engaged in out of court negotiations with Kenya Power & Lighting Company Limited.
6. That I shall aver that my former advocates did not avail to me any documents evidencing the negotiations except a letter dated 8th March 2012 which I now annex herein and mark as “FMK1” (sic).

49. Onyancha, J. in a brief ruling delivered on 07.12.2012, stated that;-

“In the above circumstances, I grant leave to the Applicant to file his/her suit out of time with the usual liberty of Kenya Power & Lighting Company Limited to challenge if is necessary during the hearing of the intended suit.”

50. The test of a successful application seeking leave to file suit out of time was set out by Kwach JA in Bernard M. Mbithi (supra), when he observed that;-

“The Court will grant an application for leave to bring an action after the expiry of the normal three-year limitation period if the plaintiff proves that material facts relating to his cause of action were or included facts of a decisive character which were at all times outside the knowledge of the plaintiff until a date which was either after the end of the three-year period or not earlier than twelve months before its end and was, in either case, not more than twelve months before the date on which the action was brought. 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.

It is not sufficient that the 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.



Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive)”.

51. In this case leave was granted on the premise that Applicant (PW3) was at all material times under the impression that upon instructing erstwhile counsel, allegedly in 2008, he had proceeded to file suit. That it was only in June 2012 when he confronted counsel that he realized that the suit had yet to be filed. From the foregoing, it is evident that, as of 2008, PW3 was alive to the cause of action and thus allegedly approached counsel to take up the matter and file suit. Allegedly, it took four (4) years for PW3 to discover the true position and instruct another counsel. The use of the word allegedly is deliberate because annexure “FMK4”, the purported receipt in respect of payment of instruction fees to erstwhile counsel was not attached to the affidavit in support of the originating summons to corroborate assertions that instructions were issued to erstwhile counsel in 2008.
52. Equally, the annexure “FMK1” (to the further affidavit in support of the originating summons) supposedly proving ongoing negotiations appears to have been a demand letter addressed to the 1st Defendant and is dated 08.03. 2012.. The said letter does not make any reference to any earlier correspondence regarding negotiations.
53. However, even if proof of instruction to counsel in 2008 had been provided by the Plaintiff, the error, mistake, or failure on the part of erstwhile counsel to carry out instructions does not satisfy the test set out by the Court Bernard M. Mbithi (supra). The Plaintiff’s alleged late realization of erstwhile counsel’s failure to act did not constitute a material fact relating to his cause of action or fact of a decisive character which at all times was outside the knowledge of the Plaintiff. The envisaged material fact of a decisive character relates to the cause of action itself and not actions in pursuit of the cause of action, such as the alleged failure by erstwhile counsel to act. Concerning the actual cause of action it is evident that as of 2008, the Plaintiff was fully aware of the fact that he had a cause of action against the 1st Defendant, based on the material facts in his possession or knowledge.
54. In his judgment, in Bernard M. Mbithi (supra), Kwach, JA. cited with approval the English case of *Re Pickles v National Coal Board (Intended Action)* [1968] 1 WLR 997 as follows:-

“[T]he proposed plaintiff had been employed as a miner by the proposed defendants from 1947 to 1960, when he changed his employment to that of a lathe operator. In February, 1966 he became ill and in July, 1966 he was informed by his doctor that he was suffering from silicosis contracted during his employment as a miner. He then consulted his trade union, having in mind the only possibility of obtaining a National Insurance Pension, but his papers were mislaid by the union and therefore not considered by the union’s legal advisers until June, 1967. In July, 1967 the proposed plaintiff learned for the first time that he might have a claim for damages against the proposed defendants and he thereupon applied for leave under the Limitation Act 1963. It was held by the Court of Appeal, reversing the judge, that although the proposed plaintiff knew that he was suffering from silicosis in July, 1966, the fact that his silicosis was attributable to the negligence of or breach of statutory duty of the proposed defendants was a material fact of a decisive character unknown to him until July 1967. It was also held that, in putting the matter before his trade union, he had taken all such action as it was reasonable for him to take in order to satisfy the requirements of the Act. The case was, therefore, a proper one for leave to be granted and the proposed plaintiff had until July 1968 in which to bring his action”.



55. The above facts exemplify what constitutes a material fact of a decisive nature as contemplated in section 27(2) of the Limitation of Actions Act. Kwach, JA. in Bernard M. Mbithi (supra) applying the English decision to the facts of the case before him concluded to that: -

“In the present case, there can be no doubt that the appellant knew right from the start that the death of his son had been caused by negligence and / or breach of duty attributable to the respondents. He did not have to wait for the conclusion of the inquest to make that determination. The fact that he thought this was necessary did not and could not make it a material fact. The application was therefore rightly rejected by the judge.”.

56. Similarly, in this case, the Plaintiff's belief that erstwhile counsel had acted upon his instructions to file suit and subsequent discovery to the contrary, did not constitute a material fact of a decisive character within the meaning of Section 27(2) as read with 28 & 30 of the Limitation of Actions Act. The Plaintiff's counsel's submissions on the question and the reliance placed on 26(b) of the Limitation of Actions Act are to no avail. Equally, the Plaintiff's invocation of Article 20 & 48 of the Constitution, Section 7(1) of the Sixth Schedule to the Constitution and Section 27(3) of the Limitation of Actions with emphasis on the right to access to justice cannot give succor to the Plaintiff's cause.

57. Reviewing all the foregoing, the Court must conclude that the leave granted on 07.12.2012 to file the present suit out of time cannot stand and ought to be set aside. It is so ordered. The Plaintiff's asserted injuries were severe and adversely impacted his entire life, and the court is not without sympathy for him. However, the limitation of time goes to the jurisdiction of the Court to entertain proceedings before it. In *Thuranira Karauri Vs. Agnes Ncheche* [1997] eKLR the Court of Appeal held that:-

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

58. The only option open to the court having set aside the leave granted to file this suit out of time is to strike out the suit. It is so ordered. However, in view of the circumstances of the matter, the court will order that each party shall bear its own costs in the suit.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Karei

For the 1st Defendant: Ms. Wahome h/b for Mr. Mege

For the 2nd Defendant: Ms. Magara

C/A: Erick

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