



**Nuthu v Karanja (Civil Appeal 263 of 2023)
[2024] KEHC 10181 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 263 OF 2023
TW OUYA, J
JULY 24, 2024
(FORMERLY KIAMBU CIVIL APPEAL NO. E066 OF 2021)**

BETWEEN

FELISTUS NYAMBURA NUTHU APPELLANT

AND

JAMES NJOROGE KARANJA RESPONDENT

(Being an appeal from the Ruling of Honourable J.A. Agonda in Ruiru Chief Magistrate's Court Civil Miscellaneous Application Number E002 OF 2021 delivered on 1st April 2021)

JUDGMENT

1. This Appeal was filed by Felistus Nyambura Nuthu (hereinafter referred to as the Appellant) against the Ruling and order of Honorable J.A Agonda, Chief Magistrate rendered on 1st April 2021 in favor of James Njoroge Karanja (hereinafter referred to as the Respondent).

Background

2. The orders appealed against is for expansion of time and leave granted to the Respondent to file Appeal out of time. The Respondent was granted 14 days leave to file and serve its summons and pleadings from the date of the Ruling. That upon service, the Appellant was granted 14 days leave to file and serve its defense and relevant documents. A mention date for pre-trial direction was granted with a view to take hearing date for the main suit.
3. The grounds presented by the Appellant in the memorandum of appeal dated 14th April, 2021 were that the trial magistrate erred in law by failing to consider the circumstances under which the law allows extension of the time to file civil claim, the provisions of the *Limitation of Actions Act* and that the reasons given had no basis in law and also failed to consider the provisions of the *Limitation of Actions Act*.



4. The Respondents case is that the explanation and offered to the Lower court at the time of considering the Application were satisfactory. The first reason is that the Respondent's insurer desired to prosecute the Respondent's suit under the doctrine of subrogation within the statutory timelines by instructing the Respondent's Advocates vide an email dated 6th May 2020 amidst of the COVID 19 pandemic. That the Advocates drafted pleadings for the Respondent's suit and securing the witness statements for filing by 27th May 2020. The process was interrupted by the COVID 19 pandemic and government directives to scale down activities affected court processes causing massive delays in terms of filing and prosecuting suits by litigants.
5. The Respondent's Advocates emailed the Pleadings for the Respondent's case to Ruiru Magistrate's Court's registry for filing on 27th May 2020. The Respondent's Advocates did not get any response from Ruiru Magistrate's court registry in terms of assessment and subsequent filing of their pleadings and were further estopped from pursuing the same physically. Upon resumption of office, the Respondent's Advocates filed the Originating Summons Application seeking leave to file the Respondent's suit out of time.
6. He was therefore precluded from filing his suit in time by unforeseeable circumstances beyond his control bearing in mind the effects of the COVID 19 pandemic on timely administration of justice; hence an inference can be made that the Respondent explained to the Trial Court's satisfaction that the reasons for his delay were justified yearning for an order of extension of time to file his suit out of time.
7. Interpretation of Section 27 of the Limitation of Actions Act by the Appellant offends the oxygen principles enshrined under Article 159(2)(a) and (d) of the Constitution of Kenya 2010 which provides that justice shall be administered to all without undue regard to procedural technicalities. Further reference is made to the overriding objective enshrined under Section 1(1) of the Civil Procedure Act which provides that the objective of the said statute is: "to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act".

Submissions

8. Parties in the appeal canvassed their respective arguments through written submissions. I have considered the grounds of appeal in the rival submissions. I have also perused the authorities relied upon by the parties. What is discernable from the record is that subsequent to obtaining an order to extend the limitation period within which to file the intended suit out of time, the court must take into account the law, circumstances and reasons availed to the court by the applicant. The Appellant identified only one issue for determination that is, whether the Respondent had satisfactorily discharged the conditions warranting the grant of order for leave to file the suit out of time.

The Appellant argues that the Respondent's brought his application to file suit out of time after the expiry of the limitation period of 3 years contrary to the provisions of section 4 (2) of the Limitation of Actions Act. That the application was made after three and a half years from 30th May, 2017 when the cause of action arose. 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. The cause of action herein arose on the 30th May 2017. The respondent waited for over three and half years to file an application to file the suit out of time.

The burden is upon the Respondent to satisfy the conditions for expansion of time by offering reasons that led to the delay.



Issues For Determination

9. I have read and considered the submissions by the parties herein and deduced three issues for determination:
 - I. Whether the circumstances considered for granting leave to file suit out of time were justified.
 - II. Whether the trial magistrate erred in law by finding that the applicant's application was merited in law.
 - III. Whether the trial magistrate erred in law and fact in granting the respondent leave to file suit out of time.

Relevant Law

10. I have also taken into account the relevant law and authorities that govern matters on leave to file suit out of time. Article 159 of the Constitution stipulates that justice will be done without undue regard to technicalities. Section 4(2) and 27 of the Limitation of Actions Act Cap 22 Laws of Kenya stipulate that Sections 1A, 1B,3A and 100 of the Civil Procedure Act Cap 21 Order 37 Rules 6 &14 of the Civil Procedure Rules 2010
11. The principles governing an ex-parte application in respect of leave to file a suit out of time were enunciated in the Supreme Court case of County Executive of Kisumu v County Government of Kisumu and 8 Others (2017) eKLR [Civil Application No. 3 of 2016] as follows: -
 - a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c) Whether the court should exercise the discretion to extend time is a consideration to be made on a case-by-case basis;
 - d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e) Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f) Whether the application has been brought without undue delay; and
 - g) Whether in certain cases, like the election petitions, public interest should be a consideration for extending time
12. The Respondent in his supporting Affidavit in the Lower Court stated that the delay to file the suit was twofold: It was occasioned by the Covid-19 Pandemic. That the Advocates drafted pleadings for the Respondent's suit and witness statements for filing by 27th May 2020. The process was interrupted by the COVID 19 pandemic and government directives to scale down activities affected court processes causing massive delays in terms of filing and prosecuting suits by litigants. Secondly, the Respondent's Advocates emailed the Pleadings for the Respondent's case to Ruiru Magistrate's Court's registry for filing on 27th May 2020 but did not get any response from the court registry in terms of assessment and subsequent filing of their pleadings and were further estopped from pursuing the same physically. It was upon resumption of office, that the Respondent's Advocates filed the Originating Summons Application seeking leave to file the Respondent's suit out of time.



13. In the spirit of Article 159 of the *Constitution*, it would be in the interest of justice for the court to allow the Applicant have her day in court and a chance to be heard in order to prove his claim. In this case the Respondent was precluded from filing his suit in time by unforeseeable circumstances beyond his control bearing in mind the effects of the COVID 19 pandemic on timely administration of justice. An inference can be made that the Respondent explained to the Trial Court's satisfaction that the reasons for his delay were justified and yearning for an order of extension of time to file his suit out of time.
14. In considering whether the court can grant this Application, the requirements of Section 27 of the *Limitations Act* must be fulfilled. See *Mwangi Kanyingi v Francis Kariuki Kanyingi & Another* (2008) eKLR. It is also clear that the grant of extension of time is at the discretion of the court. Section 3A of the *Civil Procedure Act* provides that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice to be met.”

However, this discretion can only be exercised within the premises of the provisions of the Law.

15. I have therefore taken into consideration the fact that there needs to be an appreciation of the statute of *Limitation of Actions Act* and the purpose for which it was crafted. The question that the court will have to consider is whether the Lower Court had jurisdiction to grant leave to file the suit out of time. 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 the cause of Action occurred. Under Section 27 of the same *Act*, time can only be extended for an action for personal injuries but not for material damage to a vehicle. It is noteworthy that in the instant suit, the Respondent sought to file a claim for material damages occasioned to his motor vehicle as is expressed in the pleadings in the Lower Court and submissions herein.
16. In the case of *Bisai & Another v Post Bank Credit* (OS) 237 of 2003 the Judge held that extension of time only relates to an action in respect of personal injuries. In the case of *Mary Ojundwa v Nzoia Sugar Company Limited* Civil Appeal No. 244 of 2000 the Court of Appeal when dealing with a similar Application held: -

“Section 27 of the *Limitation of Actions Act* clearly lays down that in order to extend time for filing a suit, the action must be founded on tort and must relate to the tort of negligence nuisance or breach of duty and the damage claimed must be in respect of personal injuries to the Plaintiff as a result of the Tort”.

Section 27 is a statutory provision which the court has to apply and adhere to whether the Plaintiff has a good claim or not and whether the delay in filing the same was sufficiently explained. It is unfortunate but the court is bound by those legal provisions.

The *Civil procedure* Section 3A enjoins courts to do all that is necessary to prevent abuse of the process of the courts and to ensure that the ends of justice are met. The purpose of the *Limitation of Actions Act* was not to extinguish causes of action but only bars the bringing of the same outside the stipulated time but where the barrier is lifted, the claim is sustained. However, discretion must be exercised judiciously and only within the precincts of the law.

Findings

- 17.



- a. The circumstances considered for granting leave to file suit out of time were justified in that the Respondent was precluded from filing his suit in time by unforeseeable circumstances beyond his control bearing in mind the effects of the COVID 19 pandemic on timely administration of justice.
- b. The trial magistrate erred in law by failing to establish its jurisdiction and the legal basis for granting the application. The respondent's claim is for material damages to a motor vehicle and does not fall within the provisions of Section 4(2) as read together with section 27 of the *Limitation of Actions Act*.
- c. The trial magistrate erred in law and fact in granting the respondent leave to file suit out of time by failing put into context the nature of the Respondent's claim and the fact that it did not fall within the provisions of the law on exemptions for extension of time to file civil claims.

Disposition

18.

- i. The Appeal is allowed.
- ii. The Ruling of the Lower Court dated 1st day of April 2021 is hereby is set aside.
- iii. No order as to costs.

DELIVERED (VIRTUALLY), DATED THIS 24TH THE DAY OF JULY 2024

T.W. OUYA

JUDGE

Miss Maina For Appellant:

Mr. Ojong'a For Respondent:

Martin Court Assistant:

