



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 226 OF 2014

ELIZABETH KAMENE NDOLO.....PLAINTIFF

VERSUS

MUEMA KITULU & 84 OTHERS.....DEFENDANT

RULING

The Applicant's application by way of originating summons made under Order 37 Rule 6 of the Civil Procedure Rules and sections 7 and 22 (iii) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya seeks an order that:-

The Applicant be granted leave to file suit for permanent injunction to secure property **L.R.NO.1757/6** from further encroachment waste, subdivision, grazing upon and acts of waste being committed by the Respondents on the parcel of land out of the prescribed period of limitation.

The application is supported on the grounds contained in the supporting affidavit sworn by **Elizabeth Kamene Ndolo** the applicant herein. The Respondents have through the law firms of **M/S Muema Kitulu & Company Advocates** and **Kyalo & Associates Advocates** oppose the applicant's application dated 27th February 2014. The firm of **Ogoya & Wambola Advocates** filed a Notice of appointment for all the respondents (but has since been replaced by **M/S Muema Kitulu & Co. Advocates**) save for respondent number 10 **Daniel K. Musinga** who is represented by **Kyalo & Associates** and filed grounds of opposition to the application on 12th March 2014. **MS Kyalo & Associates Advocates** filed ground of opposition to the Applicant's application on 11th March 2014 and subsequently on 2nd April 2014 filed a replying affidavit sworn by **Daniel K. Musinga** the 10th Respondent on 2nd April 2014 in opposition to the Applicant's application.

The Applicant as per the affidavit filed in support of the application is the registered proprietor of **L.R.NO. 1757/6** as per the certificate of title annexed and marked "**EKN1**". The subject parcel of land was vested to the Applicant following succession proceedings in **HC Succession Cause NO. 106 of 1985** and Court of Appeal Civil Appeal **NO. 128 OF 1995**. The court of Appeal judgment and vesting order are annexed and marked "**EKN2**" and **EKN3**" respectively. The Applicant states that during the period that the Succession dispute was pending before the court, the Respondents took advantage of the differences between and amongst the Applicants family members and entered onto the Applicants parcel

of land and have been committing acts of wastage thereon. The Applicant further states that the Respondents have always acknowledged her legal rights over the property **L.R. NO. 1757/6** and have as a consequence thereof engaged in meetings and consultations with the applicants children to negotiate an amicable settlement in regard to the portion that the Respondents occupy of the Applicants parcel of land. The Applicant however states the negotiations did not materialize and that the Respondents have hatched a plot to stake claim to the portion that they occupy claiming to have acquired title to the same by virtue of being in adverse possession.

The Applicant states that the overtures for a negotiated settlement led her to believe the Respondents were well meaning and intended to have the matter resolved. The Applicant further states that the protracted legal battles took a heavy toll on the family and her health was adversely affected and that during the preceding 10 years she has suffered meningitis and TB of the brain which she avers gravely impaired her ability to deal with stressful matters. The Applicants annexes copies of medical records marked **"EKNT"** to illustrate the fact that she has been ailing over a long period of time.

The 10th Respondent filed a replying affidavit on 2nd April 2014 where he depones that in 1991 he purchased a parcel of land measuring 30 acres from one **Jerome Mwathi Kaumbulu** who represented to him that he was the beneficial owner of 3000 acres or thereabouts situated at Sultan **Hamud** area (**now in Makueni County**) which formed part of **L.R. 1756** and **L.R.1757** and was at the time registered in the name of the Late **Joseph Musyimi Lele Ndolo** and who according to Jerome had prior to his death sold the said land to Jerome's late father **Josiah Salvin Kaumbulu** (then deceased). The 10th Respondent has annexed the agreement for sale dated 22nd May 1992 marked **"DKM1"** for the portion of 30 acres. The 10th Respondent further states he vide the agreement for sale dated 5th October 2005 marked **"DMK2"** purchased a further portion of 20 acres from his uncle one **Samuel Mutisya** who had been sold the land by the same **Jerome Mwathi Kaumbulu** who had earlier on sold the 10th Respondent the portion of 30 acres. The 10th Respondent depones that the Applicant was granted 3,200 acres of land out of her late husband's land and the rest of the land was granted to her other two co-widows pursuant to the judgment of the Court of Appeal in Civil Appeal NO. 128 of 1995 delivered on 16th May 1996. The 10th Respondent avers that since 1991 the family of the late **General Ndolo** and in particular the Applicant herein were aware that the Respondent was occupying the portion of about 52 acres of the suit property adversely to their interest and have not since made any attempt to evict the Respondent or to interfere with the use of the land that he has occupied and developed without any interruption for over 20 years.

The 10th Respondent has openly effected the developments outlined in paragraph 14 of his affidavit which includes the construction of a five bedroom double-storey palatial stone house and other ancillary buildings, fencing and cultivating the land, planting over 2000 indigenous and exotic trees, fruit trees and vegetables, connecting electricity and piped water to the premises and effecting other permanent developments all valued at approximately Kshs.30,000,000/-. A valuation report by **M/S Chapter Property Consultants** dated 30th October 2010 annexed and marked **"DKM3"** shows the value of the developments to Kshs.22,300,000/-.

The Respondent states a survey of the land by **M/S Geosite Surveyors** indicates that he has been in occupation of 52.07 acres. The Respondent affirms that he was not a tenant of the Applicant and nor has he ever entered into any purchase agreement with the Applicant. The Respondent admits the meetings held sometimes in the year 2006 with the Applicants sons, **Steve** and **Andrew Ndolo** but states the meetings were set up to discuss how all the persons who had purchased land from the late **Kaumbu** could be issued with title deeds to the respective parcels of land they occupy. The Respondent denies any question of paying a fair market price for the respective parcels of land was ever discussed and/or raised at the said meetings and refers to the Applicant's annexures **"EKN4"** and **"EKN5"** being the record of the meetings which confirm no such issue was raised at all and that the issues discussed related to payment of surveyor's fees and other necessary outgoings for purposes of preparation and issue of title documents. The 10th Respondent however states that the sons of the Applicant subsequently brought up the issue of payment of market prices for the parcels of land which all the Respondents refused to accede to for being unjustified.

The 16th Respondent **Muema Kitulu** on behalf of all the other Respondents swore a replying affidavit in opposition to the Applicant's application on 2nd April 2014 where he depones that all the Respondents have been in occupation of a portion of the suit land for periods of between 15 and 26 years and that the respondents who comprise over 100 families occupy an estimated total of about 800 acres of the suit land as per the sketch plan annexed and marked "**MK 9(b)**". The Deponent averred that the respondents entered the suit land through purchase from persons to whom the Applicant's deceased husband who was the registered owner had sold the land to but passed on before the transaction had been concluded. The Deponent further avers that the respondents have since entering into occupation of the suit land effected massive developments on the portions they occupy including building permanent homes to which utilities such as piped water and electricity have been connected. The Respondents have fenced and have all along been cultivating their respective parcels, have constructed dams, have grown indigenous and fruit trees and several of the respondents have buried their loved ones in the parcel of land as per annexure "**MK10**".

The Applicant filed a supplementary affidavit sworn on 29th May 2014 to respond to the replying affidavits sworn both by the 10th and 16th Respondent. The response affidavit by the applicant is in the main argumentative and is not factual and its tenor is captured in the Applicant's submissions dated on 30th June 2014 and filed in court on 1st July 2014. The 10th respondent filed his written submissions dated 4th August 2014 on the same date while the other Respondent filed their submissions dated 29th October 2014 on the same date.

I have reviewed the application by the applicant and the responses thereto by the Respondents and I have considered the submissions filed by the parties and indeed the primary issue to determine is whether the applicant has satisfied and/or met the criteria on which the court may exercise its discretion to grant leave to the Applicant to file suit out of time under the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya.

The Applicant submits that she has been under a disability which prevented her to bring the suit within the prescribed period and places reliance on the medical reports annexed to the supporting affidavit marked as "**ENK7**" and argues that the Applicant has brought herself within the provisions of section 22 (iii) of the Limitation of Actions Act to entitle the court to grant her leave to bring her action out of time. The Applicant further submits her right to recover her land can only be extinguished after 30 years as per the provisions of section 22 (iii) of the Limitation of Actions Act.

To contextualize the Applicant's application it is necessary to set out the relevant provisions of the Limitation of Actions Act which the Applicant relies on and I set the same out hereunder:-

Section 7 of the Act provides:-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Section 22 of the Act provides:-

If, on the date when a right of action accrues for which a period of Limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired.

Provided that-

i. This section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims,

ii. **When a right of action has accrued to a person under the disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time is allowed by a reason of the disability of the second person,**

iii. **An action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims,**

iv. -----

v. -----

In the present matter it is not in dispute that the respondents have been in possession and occupation of a portion of the Applicant's parcel of land for periods in excess of 20 years. The letter exhibited as "MK6" from the firm of **Mulwa and Mulwa Advocates to M/S Khaminwa & Khaminwa Advocates** way back in 1988 points to the respondents entry into the suit land at around that time. At any rate the Applicant acknowledges the respondents have occupied suit land for a period in excess of 12 years and thus the reason for the instant application seeking leave to be permitted to bring an action for the recovery of her land out of time against the respondents.

The Applicant's originating summons for leave to file the suit out of time is stated to be brought under Order 37 Rule 6 which merely provides the procedure to be followed by an applicant who seeks extension of the limitation period under section 27 of the Limitation of Actions Act.

Order 37 rule 6(1) provides:-

6.(1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.

Section 27 of the Limitation of Actions Act as per the head note deals with "**extension of limitation period in cases of ignorance of material facts in actions for negligence etc**". In the present application the Applicant does not allege and/or claim that there were any material facts of any decisive character which were at all times outside her knowledge (actual or constructive) which she only came to learn about after the period of limitation had lapsed and hence section 27 of the Act would be inapplicable to the present application.

Besides section 27 of the Limitation of Actions Act applies to actions and/or claims founded on tort and in my view cannot apply to a claim to recover land which is not a tortious claim. The applicant does not in any event claim there were any facts that were not within her knowledge which came to light after the limitation period had lapsed and thus section 27 of the Limitation Act has no application in the instant application.

The Applicant's application therefore remains rooted under section 22 of the Limitation of Actions Act and the issue is whether the Applicant had any disability that would entitle the court to extend the period of limitation in her favour. The Applicant has tendered two medical reports from **Dr. James O. Jowi** dated 7th February 2014 and **Dr. Charles M. Kivindu** dated 17th February 2014 to support her claim of disability. **Dr. Jowi** states that he has been managing the Applicant for "**essential hypertension**" since 2002 and in the report notes that the vital organs of the applicant were normal and observes that the applicant's blood pressure has been well controlled as long as she takes her medication. **Dr. Charles Kivindu** states in his report that the Applicant was treated for meningitis at the Forces Memorial Hospital in 1981 from which she recovered and after physiotherapy was able to walk in 1983. Meaning she virtually assumed her normal posture.

The Respondents submit the Applicant was not under any disability that would fall under section 22 of the Act such as to entitle her to extension of the limitation period. The Respondents point to the suits and appeal that the applicant took active part in during the period 1985 to 1996 including the succession suit

and the appeal arising there from. The Applicant did not during these cases both in the High Court and Court of Appeal plead incapacity and/or disability. **Why now in this application? If she had no capacity or was laboring under a disability could she have been appointed an administratrix under the law of succession Act, Cap 160 Laws of Kenya as she was? I suppose not since under the Law of Succession Act an administrator has to be a person capable of exercising the functions, duties and obligations of an administrator as stipulated under the Law of Succession Act, Cap 160 Laws of Kenya.**

The two medical reports tendered by the Applicant do not indicate that the applicant lacked the capacity to sue and/or be sued. The actions of the applicant during the period she states the family had a lengthy legal feud spanning from 1985 to 1996 and the subsequent actions where she sought to have an amicable resolution of the matter with the respondents does not depict the picture of a person who had any incapacity or who had any disability that would have prevented her from instituting action against the Respondents within the period of limitation.

The limitation of Actions section 2 (2) (b) stipulates what constitutes disability under the Act and provides as follows:-

2.(2) (b) a person is under a disability while he is a minor or of unsound mind, and without prejudice to the generality of the foregoing a person is conclusively presumed to be of unsound mind while he is detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics.

My understanding of section 2(2) (b) as it relates to extension of the limitation period under section 22 of the Act is that the disability has either to relate to the person being a minor and/or being of unsound mind during the period when the cause of action arises. Where that is the case, such a person would be entitled to an extension of six years where the disability continues up to the end of the limitation period from the time the disability ceases. The court of Appeal in the case of Peter **Gachue –vs- Humprey Gatonga (1982-88) IKLR 1125** inter alia held:-

1. If the period prescribed by the Act and the disability of the person (to whom the right of action accrued) ceases after the period has elapsed, that person has six years to bring his suit from the time that person became able to look after his affairs.

2. The limitation period starts from the time right of action accrued and runs the course, after or during which the six years expired starts.

3. Section 22 does not provide for the case where the right of action has accrued to a person not under a disability but which overwhelms. He has the normal period, or, the disability gives him no greater period of grace. Section 22 only applies to cases where the person is under a disability at the time the right of action accrued.

In the present case it is apparent the respondent entered into possession of the suit land during the lifetime of the Applicant's husband, the said **General Joseph Ndolo** (deceased) and thus the right of action arose and accrued to a person who had no disability. The applicant from 1984 when her husband died upto 2014 (30 years later) did not take any action to repossess the subject land from the Respondents who from the material placed before the court engaged in and undertook various developments on the land they occupied consistent with their being in adverse possession. The Applicant without any doubt was aware of the Respondents possession as from 1984 when her late husband died yet took no proactive action to recover and/or repossess the land occupied by the Respondents. From the material placed before the court by the parties the Respondents claim is for ownership of the properties they individually possess on the basis that they have been in adverse possession for a period of over 12 years and thus the applicant's title to the land has been extinguished. On the part of the Applicant the claim she would have against the Respondents is for the recovery of land that they have been in occupation and possession of and in my view cannot be a claim in trespass which would be tortious. Whether or not the Respondents claim for adverse possession are merited cannot in my opinion be determined in these proceedings. The Limitation of Actions Act under section 38 provides the procedure that a party who claims to be entitled by reason of

being in adverse possession needs to follow in order to be registered as owner of the land.

Section 38(1) of the Act provides:-

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

It is apparent that the Respondents through the demand letters issued to the Applicant dated 31st January 2014 were intended to serve as the demands before the filing of the action and I agree with the Respondents submission that this application by the Applicant was but a reaction to the demands by the respondents and was calculated to pull the carpet under the feet of the respondents.

I have upon evaluation of all the material placed before me by the parties come to the conclusion that the Applicant has failed to satisfy me that she had any disability as would entitle her to an extension of the limitation period under the provisions of section 22 of the Limitation of Actions Act. The Applicant cannot also find in solace under section 27 of the Act since the same is inapplicable to the circumstances of this case. My finding and holding is fortified by the holding of the Court of Appeal in the case of **Gathoni –vs- Kenya Co-operative Creameries Ltd (1982) KLR 104** where the court held thus:-

- 1. “Disability” within the meaning of section 22(V) of the Limitation of Actions Act (Cap 22) does not include physical disability. The definition of disability is clearly provided in section 2 (2) of the Act which refers to persons who are minors or are of unsound mind.**
- 2. For an application to be allowed under section 27 of the Limitation of Actions Act, it must be shown, to the satisfaction of the court, that failure to apply within time was due to lack of knowledge of certain material facts. The Applicants must show to the satisfaction of the court she had taken all reasonable steps and sought appropriate advice in respect of the facts. Here the applicant failed to satisfy the court.**
- 3. An applicant for leave under section 27 must bring the action within one year of the cessation of the period during which the decisive material facts were outside his knowledge.**

In the application before me the Applicant only experienced failing health and was advancing in age and in my view these cannot constitute grounds upon which extension of the Limitation period for actions for recovery of land under section 7 of the Limitation of Actions Act can be granted. Section 22(iii) which the applicant urges as providing for suits for recovery of land to be brought within 30 years from the date when the action accrued has no application in the circumstances of the present application. The provision in my view would only apply to instances where an applicant had a continuing disability recognizable under the law like in the case of unsoundness of mind which could last for a long period. In such instances the law puts a cap for actions to be brought not later than 30 years from the date when the cause of action accrued. Disability has to be proved and established in order for an applicant who relies on section 22 of the law of Limitations Act to succeed in an application for extension of the limitation period. The applicant herein has not shown she was under any disability and I hold she was not.

In the result and for all the reasons canvassed above I find the application by the applicant dated 27th February 2014 to be devoid of merit and I order the same dismissed with costs to the Respondents.

Ruling dated, signed, and delivered this...12thday of **February**2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Wanyanga.....For the Plaintiff

MS Kanini..... For the Defendants