



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 576 OF 2013

HANNAH NYAMARU NDUNGU..... PLAINTIFF

VERSUS

FREDIRICK MIRANGI1ST DEFENDANT

RUTH NJOKI MIRANGI2ND DEFENDANT

RULING

The plaintiff by an originating summons dated 15th May 2013 and brought under section 26 of the Limitation of Actions Act, Order 37 Rules 3 and 6 (1) of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeks the following orders:-

1. That this Honourable court be pleased to grant the Applicant leave to file suit out of time against the Respondent.
2. That the caution placed on the land **640/Karati** be lifted pending determination of the suit.
3. That upon granting such leave the draft plaint annexed hereto be deemed to be duly filed upon payment of the requisite court fee.

The application is premised on the grounds set out on the face of the application and the supporting affidavit sworn by the plaintiff on the 15th May 2013. The plaintiff has set out the following grounds to support her application:-

- a. That the applicant is old and sickly and has not been able to conjure the strength nor time to file the suit due to her ill health.
- b. That the applicant has up until now been unable to raise the legal fees necessary to file the suit as she has no stable source of income and even struggled to raise the same.
- c. That the Applicant did not know of the limitation in bringing action against the Respondent as she was only informed of the same when she instructed counsel to file the suit against the Defendant/Respondent. In any event there was no communication going on between the lawyers and the final negative response was received only recently in February 2013.

The applicant vide the supporting affidavit depones that on 23rd June 1991 she entered into an agreement for sale to purchase a portion of 2 acres out of plot **NO. 640/Karati** from the 1st Respondent as per the copy of agreement annexed and marked "**HNN1**" and that the 2nd Respondent who was the wife of 1st

Respondent was a signatory to the agreement as a witness. The Applicant further depones that despite completing the payment for the 2 acres, the 1st Respondent has not caused title to the portion of 2 acres to be transferred to the Applicant and that the 2nd Respondent who has since separated from her husband has placed a caution over the parcel of land to frustrate any transfer of the parcel of land to the Applicant. The Applicant depones that she wishes to file a suit against the Respondents to enforce the agreement but since the suit would be statute barred by reason of the period of limitation having expired, she prays to the court to be granted leave to file the suit out of time.

The 1st Respondent did not file any response to the Applicant's application but the 2nd Respondent filed a replying affidavit dated 24th September 2013 in opposition to the Applicant's application. The 2nd Defendant states that she was not a party to the alleged agreement between her estranged husband and thus the Applicant has wrongfully enjoined her as a party to these proceedings. The 2nd Respondent contends that the applicant's delay of 22 years before bringing this action is inordinate and not excusable and the same ought not to be entertained by the court. The 2nd Respondent further states that she placed a caution over the parcel of land to protect her interest as a beneficiary.

The parties filed written submissions where they reiterate the facts as set out in their respective affidavits. Having considered the pleadings, the facts and the parties submissions the issue for determination is whether the Applicant is entitled to have leave to file suit out of time.

The applicant's application is brought under section 26 of the Limitation of Actions Act which provides in part as follows:

26. Where in the case of an action for which a period of limitation is prescribed, either

(a) the action is based upon fraud of the defendant or his agent, or of any person through whom he claims or his agent, or

(b) the right of action is concealed by the fraud of any such person as aforesaid, or

(c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered It.

Quite evidently the cause of action on the part of the Applicant arises out of the agreement for sale dated 23rd June 1991 which the applicant states the 1st Defendant failed, refused and/or neglected to complete. In the annexed draft plaint the Applicant alleges breach of the contract/agreement and prays for damages and specific performance of the contract.

Under section 4 of the Limitation of Actions Act, cap 22 laws of Kenya an action founded on contract may not be brought after the end of six years from the date on which the cause of action occurred. Section 4(1) provides:-

The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

- a. **Actions founded on contract,**
- b. **Actions to enforce an recognizance,**
- c. **Actions to enforce an award,**
- d. **Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture.**
- e. **Actions including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

In the instant case the contract that the Applicant founds her action on was made in 1991. As per the draft plaint under paragraph 6 the Applicant avers that she duly paid the last payment of the purchase price on or about the year 1993 thereby discharging her obligation to the Defendants as per the agreement of sale. This implied that the 1st Defendant became obliged to complete his part of the bargain under the agreement in 1993 and thus the cause of action against the 1st Defendant arose then. Hence assuming the cause of action arose in 1993 the plaintiff/Applicant ought to have instituted her suit in 1999.

Leave to extend the limitation period is not granted as a matter of course. An applicant for leave to file suit out of time must satisfy the court that he/she was prevented by sufficient/reasonable cause from bringing the action within the prescribed period. In the present case the Applicant appears to say that the defendants had a scheme to defraud her since they did not transfer the portion of 2 acres to her after she completed paying the purchase price and with that she seeks to take refuge in the proviso under **Section 26 (a)** of the Act that states:-

“the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it-“.

I do not think the applicant can have any refuge in this provision for the simple reason that there was no fraud that she had not discovered. After she completed paying the purchase price she no doubt knew the 1st Defendant had not completed his part of the agreement and the cause of action arose then and there was nothing to prevent her from bringing the action.

The Applicant has also stated she is old and sickly and short on finances and these prevented her from initiating the suit and additionally that she did not know of the provisions relating to limitation of actions. I do not think anything would turn on this as it appears the Applicant is crutching on anything to justify her application. The applicant had the financial ability to enter into the contract and it is not clear at what point her fortunes dipped for the worse so that she became financially incapacitated. The Applicant took nearly 22 years from the date of the agreement to bring the instant application and naturally these years would have taken a toll on her frame owing to advancing age but who is to blame? The applicant alleges she is sickly yet no evidence has been availed to show that she had been incapacitated over the years by reason of sickness to an extent that she was not in a position to give instructions on the institution of the suit.

The applicant has not shown what action if any, she took after she paid the purchase price to the 1st Defendant to enforce the agreement for sale. It cannot be permissible that she can wait for 22 years after she entered the agreement without taking any action and out of the blues come forth to seek leave to bring an action out of time. The delay is simply inordinate and inexcusable. There is absolutely no basis upon which the court can exercise its discretion to grant extension of limitation under section 26 of the Limitation of Actions Act Cap 22 Laws of Kenya. There was no fraud on the part of the Defendants that the applicant did not know about.

Financial inability and sickness and/or old age as pleaded by the Applicant cannot constitute disability within the meaning of section 2(2) (b) of the Act as the Applicant is neither a minor or of unsound mind.

Hon. Justice Potter, JA in the case of **Co-operative Creameries Ltd (1982) KLR** while considering an appeal arising from a refusal by **Mead, J.** to grant leave to file suit out of time observed thus:-

“The law of Limitation of action is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provisions is made for infants and for the mentally unsound. But, rightly or wrongfully, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.

I fully agree with the observation and hold that applicant failed to act diligently and/or reasonably and would not be deserving of the court's discretion. I find the Applicant's originating summons to be

devoid of merit and I order the same dismissed with costs to the 2nd Respondent.

Ruling dated, signed and delivered this...**12th**.....day of...**March**.....2015.

J. M. MUTUNGI

JUDGE

In the Presence of:

..... For the Plaintiff

..... For the Defendants