



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC MISC CIVIL APPLICATION NO. 11 OF 2015

CHARLES MACHARIA GITIA 1ST APPLICANT

MICHAEL MUGO GITIA2ND APPLICANT

VERSUS

REBEKAH WANJIRU NDUNG’U 1ST RESPONDENT

TABITHA NDUTA NDUNG’U2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

This application is brought vide the provisions of **Section 27(1) (b) and 28(1) and (2) of the Limitation of Actions Act** and **Order 37 Rule 6(1) of the Civil Procedure Rules**. It is an ex parte application in which the applicants seek the following orders:-

- 1. That this Court be pleased to grant leave to the plaintiff/applicant to file suit out of time***
- 2. That costs be in the cause.***

The same is supported by the 2nd plaintiff/applicant’s affidavits as well as the grounds on the face of the application and it was argued orally by Mr. Otieno advocate for the applicant.

I have considered the application, the supporting affidavit and submissions by counsel. I have also considered the pleadings as per the proposed plaint and the annexures thereto.

It is clear from the 2nd applicant’s affidavit and proposed plaint that he and the 1st applicant are the administrators of the Estate of RAPHAEL GITIA GITHINJI (deceased) while the 1st and 2nd defendants are widows and administrators of the Estate of JOSEPH NDUNGU CHEGE (also deceased). At all material times, the deceased RAPHAEL GITIA GITHINJI was the registered proprietor of property known as

LOC 1/KIRWARA/343 (now LOC KIRWARA/578, 579 and 580) and in 1967, he applied for Ksh. 3,000/= loan using that title from Muranga Tea Development Authority which he serviced but the security was never released to him. It was only after investigation that the applicants discovered that infact their father’s land LOC 1/KIRWARA/343 had been transferred and registered in the names of JOSEPH NDUNGU CHEGE (deceased) who had subsequently sub-divided it into three parcels being LOC/KIRWARA/578, 579 and 580 which were then distributed among the 1st and 2nd defendants.

It is clear from the proposed plaint for which leave is sought that the claim relates to a fraudulent disposition of land. Section 4(2) of the Limitation of Actions Act provides as follows:-

“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”

And Section 27(1) is in the following terms:-

“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 where the duty exists by virtue of a contract or of written law independently of contract or written law; and***
- b. ***The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries of any persons; 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 Sub-section (2) are fulfilled in relation to the cause of action”***

As can be gleaned from the above provision, time to file suit can only be extended where the action is founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff in respect of the tort. This provision was considered in MARY OSUNDWA VS NZOIA SUGAR COMPANY LIMITED C.A CIVIL APPEAL NO. 244 of 2000 (KISUMU) – 2002 e K.L.R where the Court of Appeal stated as follows:-

“This section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort”.

Therefore, while it is correct that the claim sought to be filed is based on tort, it is also true that it is based on tort of fraudulent disposition of land and not of negligence or breach of duty and neither is it in respect of a claim for damages for personal injuries. It is therefore not a claim for which extension to file suit can be granted.

In the circumstances, whereas I sympathize with the applicants, I am un-able to grant the request as the law does not allow me to do so.

Ultimately therefore, the applicants’ Notice of Motion dated 3rd September 2014 and filed herein on 2nd March 2015 seeking leave to file suit out of time is dismissed with no order as to costs.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Otieno for Applicant – absent

Ms Chilaka for 3rd Respondent – present

COURT: Ruling delivered this 18th day of September 2015 in open Court.

Mr. Otieno for Plaintiff/Applicant – absent

Ms Chilaka for 3rd Respondent – present

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

Court: Explanatory note on delay

This ruling was due on 23rd June 2015 but I was bereaved and out of the country until 7th July 2015 when I resumed duties and the High Court vacation commenced soon thereafter. That explains the reason for the delay which is however highly regretted.

Parties were advised by our letter dated 27th July 2015 to attend today for ruling but only the Attorney General has been represented.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015