



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 13 OF 2013

HENRY MAINA GATETE.....APPLICANT

VERSUS

JANE NJOKI NGUGI.....1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

RULING

The Applicant filed an Originating Summons dated 25/4/2013 seeking an order for leave under Section 27, 28 and 30 of the Limitations Act to bring an action out of time for the recovery of the property known as Commercial Plot No. G-11 situate in Kayole. The Applicant also prays that special and general damages for trespass together with interest and costs be quantified during the hearing of the suit.

The application is supported by an affidavit sworn by the Applicant on 25/4/2013. The Applicant deposes that he is the registered owner of Commercial Plot No. G-11 Kayole (*the suit property*) having purchased it from the original allottee, Grace Konchella, on 27/4/1994. It was the Applicant's deposition that he paid stamp duty at the Lands office on 21/10/1994 and subsequently, the 2nd Respondent held a meeting and approved the sale and thereafter issued an assignment showing the transfer in his favour from Grace Konchella. The Applicant deposed that he was involved in a road traffic accident in the year 2002 which rendered him hospitalized for two years hence limiting his movements. He deposed that upon his recovery, he came to learn that the 1st Defendant had encroached and constructed on his property. It was his disposition that he made a report to the 2nd Respondent which through a letter dated 5/2/2001 advised him that investigations were ongoing but however no action was taken as the 1st Defendant continued to carry out construction on the property. The Applicant states that the 1st Respondent continues to trespass on the suit property to his detriment and he therefore prays that the orders sought be granted.

In support of the application, the Applicant annexed a copy of an allotment letter in favour of the Grace Konchella for Plot No. G-11 dated 15/7/1993; an agreement for sale dated 27/4/1994 between the original allottee and the Applicant in respect of the Plot No. G-11; Minutes of Proceedings of the 2nd Respondent for the month of July 1994; Assignment Document evidencing transfer in favour of the Applicant from the original allottee; and correspondence between the Applicant and the 2nd Respondent over the suit property.

Response

The application was opposed by both the Respondents. The 1st Respondent swore a Replying Affidavit on 20/8/2013 wherein she deposed that the Applicant had failed to avail any justifiable reason that he is entitled to leave to bring the action out of time. The 1st Respondent deposed that she is the owner of Plot H-11 Kayole Shops adjacent to the main road. It was her disposition that she acquired the plot in 1992 as an initial allocation from the Chief Kayole Location which were un-surveyed plots under informal settlements. Thereafter she put up a temporary residence and partly started carrying out a business thereon. The deponent stated that subsequently, the 2nd Respondent came in to regularize the plots by carrying out a formal survey and sub-division on the basis of existing occupation on the ground, when after she went to Dandora City Council Housing Department to make payments and regularize their occupation. The deponent stated that she received an Official Allotment Letter and immediately commenced paying the requisite fees to the 2nd Respondent including the survey fees. The 1st Respondent deposed that upon the 2nd Respondent conducting a survey she and her neighbours, whose plots are situate on the same line with hers, were issued with beacon certificates with their plots marked as "H".

The 1st Respondent maintained that she is the owner of the plot and has developed it over time to the 2nd Floor. She referred the Court to a letter from the 2nd Respondent dated 29/7/2013 confirming that she is the lawful owner. It was her deposition that she has been in occupation and has not received notice either verbally or in writing that she has trespassed on another's property. She deposed that any interference on her development would be unconscionable and lead to grave and irreparable damage on her part. In support of her response, the 1st Respondent annexed an allotment letter in her favour from the 2nd Respondent in respect of Plot No. Shop 11 Block H dated 5/8/19.....; bundle of receipts evidencing payment of the 2nd Respondent's fees including stand premium, ground rent, survey fees, and rates; an allotment letter in favour of Mary Wanjiru Kimani in respect of Plot No. H-9 and Affidavit sworn by Mary Wanjiru Kimani deposing that her plot No. H-9 is situate a plot away from the 1st Respondent's Plot H-11; copies of development plans drawn by the Housing Development Department of the 2nd Respondent; and a photograph showing the development on her property.

The 2nd Respondent filed Grounds of Opposition dated 10/6/2013 and stated that the application is time barred in view of the mandatory provisions of the Limitations of Actions Act. The application is without merit as the allegations in support of the same are baseless and unsubstantiated. Further that it was an afterthought, scandalous and abuse of the Court Process. The 2nd Respondent averred that the Court lacked jurisdiction to preside over and grant the orders sought.

Submissions

This application was canvassed by way of written submissions. L. Kwamboka Advocate for the Applicant filed submissions dated 11/9/2013 wherein counsel reiterated the contents of the application and affidavit in support. Counsel submitted that leave to bring an action out of time is discretionary and that the Applicant's delay has been exhaustively explained and supported by documentary evidence, to wit, the Applicant's ownership documents and correspondence between the Applicant and the 2nd Respondent. It was counsel's submission that the Applicant relied on the letter form the Director of City Planning to the effect that the issue was under investigation but unknown to him, the 2nd Respondent continued to develop the property. Counsel submitted that the Applicant has an arguable case in that there is a substantive question of ownership between the Applicant and the 1st Respondent. Further that no prejudice shall be caused to the Respondents if the application to extend time is granted and the substantive is heard on merit. Counsel submitted that the 1st Respondent's act of trespass has and continues to deny the Applicant his right to earn revenue from the commercial property.

Namada Simoni, Advocate for the 1st Respondent filed submissions dated 18/9/2013. Counsel submitted that the Applicant had invoked the wrong provisions of the law in filing the application, and consequently, the application has no legal basis. In respect of the Limitation of Actions Act, counsel

submitted that Sections 27, 28 and 30 thereof were irrelevant to the application, in that Section 27 deals with extension of limitation period in causes of action that fall under Section 4 of the Act and that Section 4 deals with limitation of actions founded on contract and tort. Counsels submitted that the correct provision for action of recovery of land is section 7 of the Act. As regards Section 28 counsel submitted that it sets out the procedure of bringing an action under Section 27 which as submitted is inapplicable to the application. Section 30 deals with the interpretation of sections 27 & 28 which the counsel submitted are inapplicable application. In respect of the provisions of the Civil Procedure Rules invoked by the Applicant, counsel submitted that **Rules 3, 4, 5 and 6(1)** are not relevant to the application herein.

It is counsel's submission that the 1st Respondent has been in occupation and without interruption on the property since 1992 and that at no time has the any action been taken against her to vacate the property. Counsel submitted that the provisions in Section 7 of the Limitation of Actions Act clearly placed a limit of 12 years within which a person can bring an action for the recovery of land. Counsel also submitted that pursuant to Section 17 thereof, the title of that person to the land in question is extinguished after the expiration of the prescribed period under Section 7. Counsel cited the cases of **Gatimu Kinguru v Muya Gathangi (1976 – 80) KLR 317** in support of his submission.

Milimo Muthomi & Company Advocates for the 2nd Respondent filed submissions 7/10/2013 wherein counsel submitted that it is established law that extension of time can only be considered if it relates to claims made in tort over personal injuries. Counsel cited the case of **Francis Mugo Ndegwa v Amboseli Court Limited (2012) eKLR**, where the Court stated:

“...the extension of time only applied to claims in tort and even in tort, claims must be in respect of claims for personal injuries from 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.”

Determination

Whether the Applicant invoked the wrong provisions of the law

A statutory provision cited invokes the jurisdiction of the court. If the jurisdiction of the court is not properly invoked an application becomes incompetent. Nyamu J. Joel K Yegon & 4 Others vs John Rotich & 4 Others [2004] eKLR

The Applicant brought this application under **Section 27, 28 and 30 of the Limitations of Actions Act**. **Section 27** deals with the extension of limitation period in causes of action that falls under **Section 4** thereof. The latter, provides for actions of contract and tort. The 1st Respondent is of the view that this being a matter in respect to land, the proper provision is **Section 7** and **not Section 4 of the Limitations of Actions Act**. So as to determine whether the Applicant has cited the wrong provisions of the law, it is proper to reproduce the relevant provisions.

Section 4 (2) reads:

“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:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

Section 7 reads:

“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”

The Applicant's claim is that of trespass. He alleges that the 1st Respondent has trespassed on to his property and developed the same. Trespass to land has been defined as consisting of "*any unjustifiable intrusion by one person upon land in the possession of another*", (see, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**).

"Tort is defined as a civil wrong, other than breach of contract, for which a remedy maybe obtained, usually in form of damages. Intentional Tort is committed by someone acting in general or specific intent. Examples include, battery, false imprisonment, and trespass to land"

Black's Law Dictionary 9th (ed.) Pg. 1626. Having seen that trespass is an action of tort, it therefore falls under the provisions of Section 4(2) of the Limitations of Actions Act. It is distinct from an action for recovery of land envisaged in Section 7 thereof which primarily forms the basis of claims of adverse possession. I therefore find that the Applicant has properly invoked the jurisdiction of this court by seeking leave to bring an action of tort of trespass out of time. Suffice to say, in the event the Applicant has brought the suit for the recovery of land, then Section 7 of the Limitations of Actions Act shall apply which limits time within which such an action can be brought to 12 years.

Whether the Applicant has established sufficient grounds to obtain leave to file suit out of time

Even before I determine this limb, it is noteworthy that there is a dispute as to the plot in issue. The Applicant avers that he is the owner of Plot G-11 in Kayole and has documentation in support thereof. The 1st Respondent on her part alleges that she is the owner of Plot H-11 Kayole which she avers is distinct from the Applicant's plot. The 1st Respondent has outlined in her affidavit how she acquired the said plot and has annexures in support. The question that arises is whether the plot in dispute is located on the same physical location but has different descriptions or whether the Applicant has filed the suit against the wrong party. This issue cannot be adjudicated upon without the matter going to trial and evidence adduced. At this point of the application, the court will limit itself to the prayer for leave to file suit out of time. The Applicant avers that he suffered serious injuries after a road accident in 2002 which rendered him immobile for two years. On being discharged, he learnt that the 1st Respondent has encroached onto his property. The Applicant states that he wrote severally to the 2nd Respondent to deal with the issue. The 1st Respondent submitted that the Applicant has not given sufficient reasons to explain the delay in filing this suit

I have perused the Applicant's documents and taken note that there are letters addressed to the 2nd Respondent, dated 20/4/2000, 22/1/2001, 4/12/2003 and a response from the 2nd Respondent dated 5/2/2001 in respect of the Applicant's letter dated 22/1/2001. The correspondence between the Applicant and 1st Respondent save for one letter dated 4/12/2003 are dated 2001 prior to the alleged accident of 2002. Therefore, one can only conclude that the cause of action did arise which the Applicant had knowledge of prior to the accident. There is also a letter from the Applicant's counsel to the 2nd Respondent dated 6/10/2009 in respect to the same subject matter. Between the time counsel wrote the letter of demand and the date of filing this suit is over 4 years and over 10 years after the accident. In my view this is extreme delay in a manner that infringes the law of limitation. Ojwang' J. and Odero J. in **Rukiya Soud Ali Bin Bashir v Swaleh Mohammed Swaleh & another [2012] eKLR** said:

"It follows that a plaintiff who contests such legitimate possessory rights must comply with the governing law. A case based on the tort of trespass is, essentially, a challenge to such possessory rights; and so the plaintiff must take such rights as he finds them, and act in compliance with the law of limitation in relation to them. In this case, the suit is extremely belated, in a manner that infringes the law of limitation."

The provisions of Sections 27, 28 & 30 of the Limitations of Action Act guides the court on circumstances where the court can extend time within which to file an action. **Section 27** reads:

27. (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) (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.

From the foregoing provision, extension of time only applies to claims made in tort and even in tort the claims must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty. The suit herein is a claim of tort, but it is in respect of an action of trespass which is not among those specified under **Section 27**. Further, the Applicant relies on physical disability as the cause of the delay in filing the suit. This allegation was made without the support of any documentary evidence. Nevertheless, disability within the context of the Limitations of Actions Act does not include physical disability. See **Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104** where the Court held:

“The disability relied on by the applicant being a physical disability, the nature and the extent of which was not revealed, the learned judge dismissed this ground because disability in the statutory context of section 2(2)(b) of the Limitation of Actions Act does not include physical disability...”

Notably, even if the claim were to fall under the headings outlined under Section 27, the Applicant must still prove that material facts relating to that cause of action were or included facts of a decisive character were at all times outside his knowledge (actual or constructive). *Section 30(3) of the Act provides that for the purposes of Section 27 a fact shall be taken at any particular time to have been outside the knowledge (actual or constructive) of a person, if but only if (1) he did not know that fact; and (2) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken that time for the purpose of ascertaining it; and (3) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect to those circumstances....In section 30(5)*

*“appropriate advice” is defined as meaning in relation to any facts or circumstances “advice of a competent person qualified in their respective spheres, to advice on the medical, legal or other aspects of that fact or those circumstances, as the case may be..” **Gathoni vs. Kenya Co-Operative Creameries Ltd [1982] KLR 104***

Other than the physical disability that this Applicant roots his application for leave on, there are no other grounds to substantiate his application. Consequently, the application must fail for want of meeting the criteria provided under Section 27 aforesaid. As a result, there shall be no need to deal with the other prayers in the application. In the circumstances, the application is dismissed with costs to the Defendants.

Dated, Signed and delivered this 31st day of March 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the 1st Respondent

.....For the 2nd Respondent

..... Court Clerk

L.N. GACHERU

JUDGE