



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISCELLANEOUS CIVIL APPLICATION 162 OF 2010

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP.22 LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION BY SOLOMON M'IRURA MATHIU

FOR LEAVE TO FILE SUIT OUT OF TIME

R U L I N G

This is an ex parte originating summons brought by the Applicant under Order XXXVI Rules 3C and 7 of the Civil Procedure Rules and Section 27 and 28 of the Limitation of Actions Act (Cap.22) seeking for orders that the applicant be granted leave to file suit out of time against the respondent seeking an order for re-transferring of Abothuguchi/Githongo/815 back to the applicant and a declaration that the intended respondent is entitled to only 1.5 acres out of the suit property. The grounds in support of the application are stated on the face of the application.

The application is supported by annexed affidavit of the applicant and annexures attached thereto. The respondent though the application is ex parte was served but did not attend hearing of this application.

This court heard oral submissions made by Mr. Ondari, learned Advocate for the applicant. The court has carefully considered the submissions and has also read the application, affidavit in support and annexures in support of the application.

The issue for determination by this court is whether the applicant laid sufficient basis for this court to grant leave to file suit out of time seeking re-transferring back of the suit property on ground of fraud.

In the instant application, the applicant averred that he was the original owner of L.R.Abothuguchi/Githongo/815 since 26th January, 1970. That on 12th September, 1979 the applicant sold 1.5 acres out of his aforesaid land to the respondent. That before subdivision the respondent transferred the whole land to himself on 7th April, 1979. That the applicant was not aware of the transfer but discovered the fraudulent transfer in 2000 when he filed a case before the Land Disputes Tribunal which delivered its decision on 28th March, 2000 as per annexed copy of the award marked "SM-O1". That the applicant preferred an appeal to Appeals Committee, which appeal was dismissed as per annexure "SM-02".

Subsequently the applicant preferred an appeal to the High Court vide HCCA No.52 of 2003 at Meru as per annexed court's judgment marked "SM-03". The court in its judgment set aside both the tribunal and

Appeal Committee decisions and allowed applicant's appeal. The applicant therefore filed HC.Misc.Application No.19 of 2009 seeking a declaration that the intended respondent herein is entitled to 1.5 acres out of the main land.

The said suit was struck out for want of leave under the Law of Limitation of Actions Act. The applicant averred that he learnt of the fraud in 2000 and that since 18th December, 2009 he has been paying costs for the struck out suit till 8th November, 2010 when he finished paying the costs. He averred that this is a sensitive and emotional land dispute that if it is not heard on merit it may cause constant brawls in the two families.

In the instant case the applicant has averred that he sold 1.5 acres to the intended respondent. That on 7th April,1979 the intended respondent fraudulently transferred the whole suit land to himself without the knowledge and authority of the applicant. The intended applicant's suit is based on fraud whereas under Section 7 of the Limitations of Actions Act any suit for recovery of land ought to be filed within 12years. Section 26 of the said Act provides that where fraud, mistake or ignorance of material facts is pleaded, time will run from the moment such a litigant discovered the fraud or mistake. In the present case, the applicant pleaded that he discovered the fraud in 2000 but did not disclose the month. The applicant is late just by few months.

In the case of **PHILIP KIMUTAI LANGAT P/A KIPLANGAT MAINA – VS – JOB KIBET MAINA(2007) eklr Civil Case No.100 of 2005**, Hon.Justice L. Kimaru, granted leave to plaintiff to file a suit to recover land fraudulently transferred to the defendant after a period of 21years and in so doing he stated:-

“However, I have taken into consideration that the subject matter of the suit is land. The Court of Appeal has directed courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits and not on technicalities.”

In case of **HON. M'MBIJIWE –V-MUNICIPAL COUNCIL OF MERU HC. MISC.APPLICATION NO.385 OF 2008** Hon.Justice J. L. A Osiemo, as he then was, granted leave to the applicant to file suit out of time after expiry of 21 years since the cause of action allegedly took place and in doing so he stated:-

“The applicant seeks leave to file appeal to the Water Board. It is now settled that the decision whether or not to grant leave for appealing is essentially discretionary. It is also well settled that the general matters which the court takes into account in deciding whether to grant leave sought are:-first the length of delay; secondly the reasons for delay and thirdly possibly the chance of appeal succeeding.”

I am not bound by the above-mentioned decisions being decisions of the High Court, but I find them to be persuasive and I agree with the same.

Under Article 50 (1),(2) of the Constitution of Kenya,2010 it is provided:-

“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Further to the above Article 48 of the Constitution of Kenya,2010 provides:

“48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

In addition to the above, Article 40(2) (a) of the Constitution of Kenya,2010 provides:-

“(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or.....”

I have taken into consideration that the subject matter of the suit is land which is very sensitive and in most cases the only source of livelihood for most of the people especially in rural areas. The rural lands is what most of the people call home and go to after all hope is lost and have nowhere else to go.

Our Constitution is very clear that, in so far as possible, that justice be administered without undue regard to procedural technicalities(See Article 159(2) (d) of the Constitution of Kenya,2010. The Constitution is against depriving any party his/her property or any interest in or right over any property arbitrarily. Everyone has a right to have any dispute resolved by application of law in a fair trial.

I have noted the applicant’s intended suit is predicated on allegation of fraud. The delay since discovery of fraud in 2000 is not inordinate and the reason for delay have been explained. I do not find that it would be in the interest of justice to shut the applicant out of the corridors of justice especially in a claim for recovery of land. It is imperative that the applicant be allowed to ventilate his case by establishing or otherwise the allegation of fraud against the intended respondent by allowing the matter to be heard and determined on merits.

The upshot of the matter is that the application is allowed under the following terms:-

a) The applicant be and is hereby granted leave to file suit out of time against the intended defendant seeking an order for retransferring of ABOTHUGUCHI/GITHONGO/85 back to the applicant and a declaration that the intended respondent is entitled to only 1.5 acres out of the main land.

b) The applicant is granted leave to file suit within the next 30days from today.

c) No orders as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF SEPTEMBER, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open court presence of:

1. Mr. Ondari for the applicant

**J. A. MAKAU
JUDGE**