



REPUBLIC OF KENYA



**Chondo & another v Jawa & 5 others (Miscellaneous Application
2 of 2022) [2022] KEELC 15369 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
MISCELLANEOUS APPLICATION 2 OF 2022**

AE DENA, J

JULY 14, 2022

BETWEEN

ALI SAFARI CHONDO 1ST APPLICANT

**SWALEHE ALI MWIJUMA (ADMINISTRATORS TO THE ESTATE OF SAFARI
CHONDO) 2ND APPLICANT**

AND

LUPHANDEE NGANYAWA MWIJO 1ST RESPONDENT

MKALA MWERO JAWA 2ND RESPONDENT

JAWA KOMBO JAWA 3RD RESPONDENT

DIRECTOR LAND, ADJUDICATION & SETTLEMENT 4TH RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER

KINANGO 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The originating summons dated February 28, 2022 seek the following orders;
 - a. That the plaintiff/applicants be granted leave to file suit against the defendants/respondents out of time.
 - b. That the annexed plaint herein be deemed as duly filed upon payment of requisite court fees.
 - c. That costs of this application be in the cause.
2. The application is supported by the two applicants Ali Safari Chondo and Swalehe Ali Mwijuma. The intended suit revolves around Plot No 358-Kinango which the applicants claim is their ancestral land



[hereinafter referred to as the suit property]. It is stated that the statutory period for instituting the suit has lapsed, that while they applied for grant of letters of administration ad litem after the death of Safari Chondo who died on August 20, 1991, it took a longer time than anticipated for the same to be granted. A copy of the same was exhibited. The applicants depose that they were not aware that there was a time limit within which to file suit. That the respondents have trespassed on the suit property and were threatening to unlawfully evict them. They state that they will suffer great prejudice in the event that the application is not allowed as the impending threatened eviction has occasioned fear and psychological damage to them and their families. Annexed to the application is a copy of draft notice of motion for temporary orders of injunction and the proposed plaint.

3. By an order of this court counsel for the plaintiff filed written submissions dated May 30, 2022. The submissions basically reiterate the facts deposed by the applicants. Counsel urged that the applicants had demonstrated the reasons for the delay in instituting the suit and will be greatly prejudiced in the event the orders sought are not granted. It was urged that the delay was regrettable but not inordinate and prayed that the application is allowed.

Analysis and Determination

4. The originating summons is brought pursuant to the provisions of Order 37 Rule 6[1] of the [Civil Procedure Rules](#) and section 27 and 28 of the [Limitation of Actions Act](#) cap 22 Laws of Kenya.

Section 27 of the [Limitation of Action Act](#) provides for extension of limitation period in case of ignorance of material facts in certain actions such as negligence. Further section 28 (1) (2) (a) and (b) of the [Limitation of Actions Act](#) provides: -

- i. "(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
- ii. (2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—
 - a. To establish that cause of action, apart from any defence under section 4(2) of this Act; and
 - b. To fulfil the requirements of section 27(2) of this Act in relation to that cause of action."

5. An applicant for leave to file a suit out of time must meet the requirements set out under section 27 and 28 above. The Court of Appeal in the case of [Mary Osundwa v Nzoia Sugar Company Limited](#) (Civil Appeal No 244 of 2002) and [Willis Onditi Odhiambo v Gateway Insurance Co Ltd](#) Civil Appeal No 37/2013 had this to say; -

"Section 27(1) of the [Limitation of Actions Act](#) clearly lays down that in order to extend time of filing a suit, the action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort." (emphasis mine).

6. The applicant's case is that since the deceased herein passed away in the year 1981 the respondents have trespassed on the suit property and are threatening to evict the applicants. Section 4 (2) of the



Limitation of Actions Act sets a limitation period of 3 years. Therefore, the applicants claim being a tort ought to have been filed within 3 years from the time the applicants learnt of the trespass.

7. I have also considered the proposed pleadings that were annexed to the application. Clearly the intended suit is not based on the claim for negligence, nuisance or breach of duty and hence does not qualify for extension of time as pleaded.
8. The applicants state that the grant of letters of administration took longer than expected. A look at the copy of the grant herein reveals that it was filed in the year 2021 and issued in June the same year. This only accounts for 1 year or thereabouts. Granted that the same took long it has not been stated as to why it took the applicants over 40 years to file the application for the grant. The court in Mwangi S Kimenyi v Attorney General & another considered what constitutes inordinate delay held that; -

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable..." (emphasis mine)

Even assuming there may have been other existing proceedings and efforts (see the proposed list of documents) applying the litmus test above, I have no doubt in my mind that this delay is inordinate.

9. It is also clear that the applicants seek recovery of the suit property that they allege is their ancestral land ostensibly encroached upon by the respondents. Section 7 of the Limitation of Actions Act is to the effect that 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.
10. The extension of limitation period is provided in case of ignorance of material facts. Based on the facts and material placed before this court, the applicants have not been able to prove that material relating to the cause of action herein were not within their knowledge. Instead they plead ignorance of legal procedures in filing suit after the death of the deceased. This clearly cannot be a defence based on the maxim ignorance of the law is no defence.
11. From the foregoing the applicants have failed to satisfy the requirements of the relevant provisions of the limitation of actions Act on extension of time to file suit for recovery of the suit property. The upshot is that the originating summons is without merit and the same is dismissed with no orders as to costs.

DELIVERED AND DATED AT KWALE THIS 14TH DAY OF JULY, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Plaintiff /Applicant

Mr. Denis Mwakina- Court Assistant.

