



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Miscellaneous Application 381 of 2009  
IN THE MATTER OF AN APPLICATION BY JOSEPH NJANE MAINA (thro' his  
legal representative Damaris Wamuyu Njane)**

**AND  
DAMARIS WAMUYU NJANE..... APPLICANT  
RULING**

**DAMARIS WAMUYU NJANE**, in her capacity as the legal representative of the estate of JOSEPH NJANE MAINA, deceased, took out the originating summons dated 18<sup>th</sup> November 2009, in which she applied for leave to file a suit out of time against Mary Wairimu to recover the refund of the amount of the purchase price or part thereof paid by the deceased to Mary Wairimu to purchase 3 acres to be excised from L.R. No. Nyeri/Naromoru/734. The originating summons is said to be taken out pursuant to sections 27 and 28 of the Limitation of Actions Act and Order XXXVI rule 3C(1) of the Civil Procedure Rules.

It is the submission of the applicant that the deceased entered into an agreement with Mary Wairimu, hereinafter referred to as the Respondent, to purchase three acres to be excised from L.R. No. Nyeri/Naromoru/734 at a consideration of Kshs.120,000/- on 29<sup>th</sup> April 1993. It is said the deceased paid a deposit of Kshs.46,000/- upon signing the agreement. It is said that by the time the deceased passed on in 1999, the respondent had not facilitated the subdivision and subsequent transfer of the aforesaid parcel. The applicant further averred that the respondent kept on promising her that she would honour the agreement until the time to file suit lapsed. The applicant is now before this court seeking for leave to file suit out of time to recover the purchase sum paid to the respondent.

I have carefully considered the material placed before me. What the applicant intends to do is to file a suit against the respondent to recover money which was paid to the respondent to purchase land. Annexed to the affidavit of the applicant is a copy of the sale agreement dated 29<sup>th</sup> April 1993. The applicant's husband (deceased) paid the initial deposit of Kshs.46,100/- out of the purchase sum of Kshs.120,000/-. The agreement indicates the completion date to be 31<sup>st</sup> August 1993. Under section 19 (1) of the Limitation of Actions Act, no action may be brought to recover proceeds of sale of land after the end of 12 years from the date when the right to receive the money accrued. The completion date of the agreement was stated to be 31<sup>st</sup> August 1993. Twelve years therefore lapsed by 1<sup>st</sup> September 2005. The applicant has premised her application on the provisions of sections 27 and 28 of the Limitation of Actions Act. The aforesaid sections gives this court the discretion to extend time to file an action based on tort. The applicant's intended suit relates to an action to recover proceeds of the sale of land. It is therefore clear that this court's jurisdiction has not been properly invoked. Even if the application was properly before this court, I do not think it will succeed because the same does not meet the requirements needed in such applications. There is no evidence that the applicant suffered any disability that impeded her from filing an action in time. Secondly, it is not alleged that some facts were not within her knowledge until the time allowed to sue had lapsed. It was incumbent upon the applicant to show that she was ignorant of material facts relevant to her case.

In the end I find the originating summons to be incompetent and unmeritorious. The same is ordered struck out and dismissed with no order as to costs.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of May 2010.*

**J.K. SERGON  
JUDGE**