

REPUBLIC OF KENYA
IN THE HIGH COURT

AT BUNGOMA

MISC. APPL. NO.96 OF 2006

IN THE MATTER OF APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME

BETWEEN

MOSES WESANGULA WANYAMA.....APPLICANT

AND

BEN KHAEMBA.....RESPONDENT

RULING

This is a ruling on an application to institute a suit out of time dated 23.03.2006. The Applicant is the administrator of the estate of his grandfather Joel Wanakacha Sitati. He states that his grandfather bought five (5) acres of land in 1967 from one Ben Khaemba the Respondent and paid the full purchase price. The grandfather took over the land and the vendor gave vacant possession. In 1974, the vendor Ben Khaemba came back to the land with the consent of the Applicant's grandfather. The grandfather to the applicant died in the same year. The Applicant's father had died in 1963. When the Respondent returned to the land, it was agreed that he could refund the purchase price paid by the Applicant's grandfather. To date no refund has been done and no action has been taken by the Applicant or his relatives. It is this refund which the Applicant wishes to pursue in a civil suit if he is granted leave to file the suit out of time.

The reasons for delay are that if the refund of the purchase price is not pursued, the family of the Applicant will be rendered destitute. Secondly, that the other relatives were reluctant to follow up the matter with the Respondent because he is their blood relative. The cause of action arose in 1974 when the Respondent returned to the land and promised to refund the purchase price. The grandfather of the Applicant died the same year giving a legal right to his beneficiaries to pursue the refund on being appointed personal representatives of the deceased. This application was filed on 23/03/2006 which is 32 years after the cause of action arose.

Although the law allows extension of time to file a suit, the issue of reasonableness of a cause of action and the period of time taken before applying for extension of time must be taken into consideration. The Applicant does not plead ignorance of any material facts which prevented him from bringing the suit on time. It is clear in his affidavit that all material facts were within his knowledge only that he expected other people to take action but they failed to do so. This is not a good enough reason to extend time of a three decade old cause of action. It is the grandfather of the Applicant who had bought the land from the Respondents. The Applicant may be a beneficiary of the deceased but it is absurd to follow causes of action which are this remote.

The Respondent filed a replying affidavit although he did not attend the hearing of the application. He denies knowledge of the annexed handwritten land sale agreement. He also annexes a copy of search to show that he is the registered owner of the land. The Respondent raises the issue that no grant has been obtained by the Applicant to give him authority to pursue the claim.

The Applicant in his affidavit says it is the Respondent who stays on the portion which he has sold. He does not himself say that he stays or cultivates the said portion. In his application, the Applicant is pursuing refund of the purchase price paid to the respondent by his grandfather. He lays no claim of adverse possession. The decision of SALIM VS BOYD & ANO. MOMBASA HCCC NO.12 OF 1968 relied on by the Respondent is irrelevant since it deals with adverse possession.

I reject the argument that the family of deceased will be rendered destitute if leave is not granted. This family has survived for over 30 years since their grandfather died.

In the supporting affidavit paragraph 10, the Applicant depones that he has been appointed administrator of the estate of his deceased grandfather. However there is no annexure of any grant. It is the grant which gives any person the authority to follow up interests in the estate of a deceased person. In absence of a grant, this court finds that the Applicant has no legal authority to file such a claim. The application is hereby struck out with costs.

I wish to point out that even if the Applicant had been appointed the personal representative of the deceased, his application lacks merit as pointed out earlier.

F. N. MUCHEMI
JUDGE

Ruling dated and delivered at Bungoma this 1st day of December, 2010 in the presence of Mr. Onyando for the Applicant.

F. N. MUCHEMI
JUDGE