

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Miscellaneous Civil Application 170 of 2009

KAROKI KIMARU GATHUAAPPLICANT

VERSUS

ELENA WAIRIMU GICHUKI.....RESPONDENT

RULING

Karoki Kimaru Gathua, the applicant herein, took out the notice of motion dated 16th May 2009 in which he applied for an order to enlarge time to file an action out of time. The applicant filed an affidavit he swore on 19th May 2009 to support the motion. Elena Wairimu Gichuki, the Respondent herein, filed grounds of opposition to resist the motion. The motion is said to be taken out pursuant to the provisions of section 95 of the Civil Procedure Act and Section 28 of the Limitation of Actions Act.

The applicant has urged this court to grant the orders sought because the delay to file suit was beyond his control. The background of the facts leading to the filing of this motion appear to be short and straightforward. In 1990 or thereabout, it is alleged that one James Gichuki Muhoro agreed to sell to the applicant part of the parcel of land known as Nyandarua/Kanyagia/76. It would appear the aforesaid vendor received by installments a cumulative sum of KShs.529,550/= between the years 1990 and 1995 from the applicant as purchase price for 20 acres. It is claimed that the vendor initially agreed to sell 15 acres to the applicant at a consideration of Kshs. 240,000/- The vendor was sued vide Nyeri H.C.C.C. No. 257 of 1992 when he refused to transfer to the applicant the 15 acres. It is said that when the aforesaid suit was pending in court, the vendor approached the applicant with an offer to sell to him another parcel of 5 acres making it 20 acres. It is alleged that the vendor requested the applicant not to prosecute the pending suit as he was by then willing to transfer 20 acres to him. The vendor developed cold feet again and refused to transfer the 20 acres to the applicant despite receiving the consideration for the extra 5 acres. This prompted the applicant to amend his plaint to include the 5 acres and to further proceed with the hearing of the case. Unfortunately the vendor died on 6th October 1998 leaving the suit pending. The vendor's widow, Elena Wairimu Gichuki, the Respondent herein, was substituted in place of the deceased. It would appear the vendor nor Respondent filed a defence. Judgment in default of defence was entered. The land was finally attached and sold by public auction where the applicant was declared the highest bidder. The sale did not succeed, consequently the applicant was refunded the initial deposit of the bid. The Respondent successfully had the exparte judgment set aside on 11th April 2002. The Respondent, on 23rd April 2009 managed to have Nyeri H.C.C.C. No. 257 of 1992 ordered struck out on the basis that she was substituted in place of the vendor, yet she had not by then obtained letters of administration. The order striking out the suit prompted the applicant to now seek for leave to file suit out of time. The above stated chronology of events are deponed in the supporting affidavit of Karoki Kimaru Gathua sworn on 19th May 2009. I must hasten to state that the Respondent did not file any replying affidavit to controvert the aforesaid facts. I therefore take the facts to be true.

In her grounds of opposition, the Respondent has argued that the application should be dismissed because the reasons given are not plausible. It is said that the applicant should have filed an originating summons under Order XXXVI rule 3(2) of the Civil Procedure Rules. It is also argued that the pendency of the suit cannot be treated as a disability under S. 27 of the Limitation of Actions Act.

I have considered the material placed before me and the submissions made by learned counsels. I feel obliged to first deal with preliminary point raised by Mr. Wahome learned advocate for the Respondent. It is argued that the application should have been by way of an originating summons instead of a notice of

motion. The aforesaid defect was conceded by Mr. Wachira, learned advocate for the applicant, who in turn urged this court to spare the motion on the ground that the defect was not fatal.

I have carefully considered the arguments for and against the preliminary objection. Basically the objection is that of want of form. The rules anticipated the occasional inadvertent slip by litigants and their advocates in filing their applications by the prescribed form. It is true under order XXXVI rule 3(2) of the Civil Procedure Rules, an application for enlargement of time to file an action out of time shall be by an originating summons. The rules under order VI rule 12 of the Civil Procedure Rules gave the court the discretion to excuse the defects of want of form. In the broad interest of justice I will excuse the defect pointed out herein and treat it as an accidental mistake made by learned counsel which should not be visited upon the Applicant.

Having disposed of the preliminary issue, let me now consider the merits of the motion. Under sections 22, 27 and 28 of the Limitation of Actions Act, leave to file an action out of time can only be given if following *inter alia* exist:

- i That there is sufficient evidence to sustain the intended action.
- ii That the applicant was under a disability which prevented him from filing the action on time.
- iii The person who was entitled the action dies.
- iv Any sufficient reason.

I have carefully considered the detained explanation of the chronology of events and facts which preceded the filing of the application now before court. The facts deponed in the supporting affidavit of the applicant clearly establish sufficient evidence to sustain an action. Secondly, I find the reasons given for the delay to file suit to be plausible. I am convinced I should allow the application. Consequently I grant the applicant leave of 15 days to file an action out of time against the legal representative of the estate of James Gichuki Muhoro, deceased. Costs of the motion to abide the outcome of the intended suit.

Dated and delivered this 13TH day of October 2009.

J.K. SERGON

JUDGE