

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC APPLI. 385 OF 2008

HONOURABLE GILBERT KABEERE M'MBIJJEWE.....APPLICATION

VERSUS

MUNICIPAL COUNCIL OF MERU

(TANA WATER SERVICES BOARD).....
RESPONDENTS

R U L I N G

Before me is an application by way of an Originating Summons (Ex parte) brought by the Applicant under Order XXXVI Rule 3D of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 22 and 38 (4) of the Limitation of Actions Act seeking leave to commence an action for recovery of his land **LR No. NTIMA/IGOKI/2032** out of time.

The application is based on the grounds as stated in the body of the originating summons and affidavit sworn by the Applicant on 198th June 2008.

Briefly the facts which give rise to this claim as gathered from the affidavit evidence on record are that the Applicant is the registered owner of land parcel **LR NO NTIMA/IGOKI/2032**. In or about 1988 - 1992 the Respondent illegally moved on the suit land and purported that they had acquired the same for development of water works. At the time unknown to the Applicant Meru Municipal Council and the Ministry constructed water treatment works on the land without his consent. The Applicant was a Member of Parliament from about 1979 to 1992. He was taken ill in or about 1990 and has been unwell having lost his voice and could not speak and had to be taken to United States of America and United Kingdom for treatment and now he has recovered and that during his illness and at the time unknown to him the Respondents trespassed on his land and are causing acts of wastage thereon.

The Applicant now seeks leave to file appeal to the Water Appeals Board out of time to recover his land.

It is strite law that when such an application is made before the commencement of a relevant action, the court shall grant leave in respect of a relevant cause of action to which the application relates 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 was adduced in that action, that evidence would in the absence of any evidence to the contrary be sufficient to establish that cause of action.

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 the leave sought are:- first the length of delay; secondly the reasons for delay and thirdly possibly the chance of appeal succeeding.

It is now about 21 years since the cause of action allegedly took place. The applicant is a senior citizen

of this country and was an honourable member of Parliament for over 30 years up to 1990. This delay is obviously inordinate and the reason given for the delay is that he was taken ill and was taken abroad for treatment. The Applicant is the registered owner of the suit land and he has produced the title to the suit premises. That being the case, his interest over the suit land is protected under the constitution. See Section 75 of the Constitution which provides that if land is acquired for public benefit there should be prompt payment of full compensation.

Having considered the application in light of the affidavit evidence on record and the submissions by counsel for the applicant I am satisfied that the Applicant has placed before me sufficient materials and I am persuaded to grant and I do grant the Applicant leave to file appeal to the Water Appeals Board out of time.

Order accordingly.

Delivered and dated at Nairobi this 26th day of July 2008.

J. L. A. OSIEMO

JUDGE