

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

Misc Civ Appli 56 of 2005

1. JOSEPH ESHISILA

**2. REBECCA ANDALA LIKAMI.....
APPLICANTS**

V E R S U S

1. ABRAHIM KEYA KIGAMU

**2. MASIKI MAKOA LAMOGWA.....
RESPONDENTS**

RULING

Section 7 of the Limitation of Actions Act, Cap 22, stipulates that an action to recover land must be brought before the expiry of twelve (12) years from the date on which the right of action accrued. It states:

S.7 “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.”

The exparte application dated 4th August 2005 shows that Rebecca Andala Likami and Joseph Eshisila, a mother and son respectively, are the applicants. Seliphas Likami s/o Masiali was the husband of Rebecca Andala Likami and the father of Joseph Andala Likami. He died in 1973. He left a piece of ancestral land known as Butsotso/Shibeye/684. In 1992, the parcel of land was subdivided into two parcels known as Butsotso/Shibeye/1655 and 1656 which were transferred to Abraham Keya Kigamu and Masiki Makoa Lomogwa.

The two applicants applied in Kakamega H.C. Succession Cause No.366 of 2000 for a Grant of Letters of Administration Intestate in the estate of the deceased, Selphas Likami s/o Masiali. A Grant was made to them on 09/02/2001. The estate was shown to comprise the parcel of land No. Butsotso/Shibeye/684. On 16/04/2002, this court in the said Succession Cause observed that the parcel of land No. Butsotso/Shibeye/684 had been subdivided as aforesaid and the subdivided parcels were not in the name of the deceased. It is as a result of this revelation that the applicants applied for leave to institute suit out of time against the transferees of the said subdivided parcels.

The provisions of Rule 3C(1) of Order XXXVI of the Civil Procedure Rules require that such application be made exparte by originating Summons supported by an affidavit where the suit is yet to be filed but where the suit has been instituted, such application must be by way of an exparte Chamber Summons made in that suit. Rule 3C(1) (supra) has been complied with.

Where, as here, the period of limitation is prescribed, the period of limitation does not begin to run until the plaintiff has discovered the fraud, or the mistake or could with reasonable diligence have discovered it. In the application herein, the applicants stepped into the shoes of the deceased and became the legal representatives of his estate on 9th February 2001 when the Grant of Letters of Administration Intestate was made to them. No action could accrue to them prior to that date as they had no capacity. But as soon as they obtained the Grant, nay, even from the date they petitioned for it, they could with due

diligence have discovered the change in the registration of proprietorship of the said parcel of land. Time started to run, not from the date of change of registration of the proprietorship, but from the date of discovery of this fact.

The applicants' cause of action does not appear to be time barred. Nevertheless I allow the application and grant the applicants leave to file suit against the named Respondents within 30 days.

Dated, signed and delivered at Kakamega this 29th day of June, 2006.

G. B. M. KARIUKI

J U D G E