

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Misc Civ Appli 30 of 2005

**LUCY WANJIKU MWENDA.....PLAINTIFF/
APPLICANT**

VERSUS

**CHARITY NYOKABI WAINAINA.....1ST
DEFENDANT/RESPONDENT**

**SAMUEL NJUGUNA WAINAINA.....2ND
DEFENDANT/RESPONDENT**

RULING

The applicant filed an ex parte originating summons under Section 22 of the Limitation of Actions Act and Order XXXVI rule 36 of the Civil Procedure Rules. She prayed for extension of time to enable her file a suit against the proposed respondents as hereinabove stated. In her affidavit in support of the application, she deposed that by an agreement dated 19th September 1986, her late husband, Edward Waboro Mwenda, purchased Plot No. 20, Kiratina Farmers Company Ltd from Charity Nyokabi, the first respondent herein, and she annexed a copy of the sale agreement as annexure "LWM1" to her said affidavit. She further stated that her husband died on 23rd September 1987 and she applied for letters of administration which were issued to her on 30th March 1988. Since the death of her husband she had developed the aforesaid plot and put up several rental housing units. The applicant learnt that the second respondent had filed Succession No. 124 of 1982 at Thika Chief Magistrate's Court and her aforesaid property had apparently been inherited by the second respondent. She became aware of that when the second respondent started sending prospective purchasers to view the property in question. The applicant therefore sought extension of time to enable her file a suit against the respondent herein.

I have considered the applicant's averments and prima facie, it appears that the respondents have unlawfully and fraudulently acquired the applicant's property, that is Plot No. 20 Kiratina Farmers Company Ltd. If indeed the applicant was not aware of the Succession Cause in Thika, she could not have taken any action to protect her interest. The applicant has shown that she is the administratrix of the estate of her late husband and therefore she was the only one entitled to inherit her late husband's property. Although this application was brought under the provisions of Section 22 of the Limitation of Actions Act, I am of the view that it ought to have been brought under Section 26 of the Act which enables the court to grant extension of time in cases of fraud, mistake and ignorance of material facts. In the interest of justice I grant leave to the applicant to file the appropriate suit out of time as against the respondent. The costs of this application shall abide the outcome of the suit to be filed.

DATED, SIGNED and DELIVERED at Nakuru 12th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Miss Njoroge for the applicant.

D. MUSINGA

JUDGE