

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL CASE 53 OF 2004

M'RINGERA M'MBWIRIA.....PLAINTIFF/APPLICANT

VERSUS

RINTAUGU M'INOTI..... DEFENDANT/RESPONDENT

RULING

The application is dated 13.10.04. It seeks that this court grants the applicant leave to file a claim against the defendant out of the time prescribed by the law. This means that if the court grants the leave sought, it will then proceed to deem this suit as properly filed. The court is informed that the land in dispute is L. R. No.Abothuguchi/Katheri/448 and that the applicant/plaintiff is nephew to the defendant. The land was originally registered on 3.4.1963 in the name of the defendant, who claims that the registration was done in trust for and to the benefit of the plaintiff. The plaintiff would therefore claim a breach of the said possible trust. The plaintiff is said to be 50 years old but states that he was a minor when the registration was done in 1963. The applicant argued this application ex-parte. This is a little strange because he had properly filed the suit through a plaint dated 4.6.2004 which must have been served upon the defendant who in response filed a defence dated 28.6.2004. In total disregard of the plaint and the defence which until now are on the face of record, properly in place, the plaintiff now by this application, is seeking for leave to file a fresh claim out of time.

I have considered this situation. In my view the applicant is taking this course to avoid an application for striking out the present suit upon the various grounds pleaded by the defendant in Para.8 of the defence on the record. The defence avers that the plaintiff's claim is bad in law, is time barred and lacks cause of action. Since however the defendant did not object to this course being taken by the plaintiff, the court will examine the application as presented, despite the fact that it is being brought not independently but under the present suit, which by implication, is being presumed to be non-existent or invalid by the plaintiff himself.

The applicant bases the application on the fact that the applicant is a close relative of the defendant. That the defendant was registered on the first registration as the owner of the piece of land known as Abothuguchi/Katheri/448. He does not reveal in the supporting affidavit when the registration took place. He does not reveal the closeness of the relationship between him and the defendant. He does not reveal on what basis the defendant was registered as a trustee of the plaintiff. But he argues that it was recently when he, the plaintiff, wanted to start developing the property that the defendant showed resistance and sought Government protection. He claims that clan elders met and ordered the defendant to transfer the land to the plaintiff but that the defendant refused. No evidence of such clan arbitration was exhibited in support of this application, except a letter written by the District Commissioner of the area directing the protection of the defendant's interest on the said land.

I have carefully considered this application. In my view the leave sought here to file the suit out of time is not a mere extension of time usually done at the wide discretion of the court under the Civil Procedure Rules. I understand the applicant to be seeking for an extension of time to beat his failure to file a suit within the prescribed periods provided under the Limitations of Actions Act, Cap 22 of the Laws of Kenya. If I am right in this assumption, then the plaintiff has carefully avoided saying so in his argument in support of this application. He may have taken this course so either because he is ignorant of what he wants or because he did not specifically want to identify himself with the provisions of the said Act.

Be the situation what it may, the plaintiff, to obtain the extension of time to file a suit already barred

in time, has to bring himself within the exceptions to the Limitations Actions Act. Those exceptions would persuade the court to grant the extension even if at the time of seeking the leave, mere averments or pleadings of the same would persuade the court to grant leave which may yet be challenged during the proper hearing of the suit.

I have carefully perused the supporting affidavit and the grounds on the face of the Chamber Summons upon which the application is based. They do not explain the reasons why the applicant did not file his claim, if any cause there was, for a period of about 32 years since he became an adult. Nor does the affidavit state why the plaintiff would seek to develop the land only recently when he could have done so from the period he became an adult. Where was he living and cultivating for the last 32 years?

The court also had a chance to peruse the plaint. The impression one picks from it is that the plaintiff was very economic with relevant crucial information. He cannot even properly state the real relationship between him and the defendant except to say that the two share one great grandfather. He is even afraid of stating in the plaint when the demarcation and registration of the land took place and why the defendant and not any other person would be selected to be registered as trustee. He claims that he put many developments on the land in question including planting tea, coffee and other plants and also putting up houses on the land, without any resistance from the defendant. And yet he admits in the supporting affidavit that when he recently tried to enter the land, the defendant prevented him from doing so which shocked him and made him decide to come to court.

The court accordingly finds no basis upon which it can extend the time limitation as provided under the Limitation of Actions Act, Cap 22. This application cannot therefore succeed. It is dismissed with costs to the defendant. It is upon the defendant to take the necessary steps to remove the suit out of the court records. Consequent upon this decision of court, the interim order which granted inhibition to be registered against L.R No.Abothuguchi/Githongo/448 or No.Abothuguchi/Githongo/448, as it is referred to in the supporting affidavit, is hereby ordered cancelled forthwith. Under these circumstances there is no need for the court to make a full ruling upon the application dated 13.7.2004 seeking for inhibition.

Orders accordingly.

Dated and delivered at Meru this 15th Day of September,2005

D. A. ONYANCHA,

JUDGE