



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC MISC NO. E003 OF 2021 (O.S)

**EUNICE NDUTA and MARGARET NDUTA (suing as the legal administrators
of the estate of the late Kamau Manda).....APPLICANTS**

VERSUS

LILIAN CHEMUTAI.....1ST RESPONDENT

JAMES MUNGAI.....2ND RESPONDENT

SIMON MANDA.....3RD RESPONDENT

RULING

1. By a notice of motion dated 22nd March, 2021 brought under **Order 37 Rule 6 of the Civil Procedure Rules and Sections 26 and 28 of the Limitation of Action Act (Cap. 22)** the Applicants sought leave of court to file suit challenging the issuance of a title deed for **Title No. Nyandarua/Upper Gilgil 8**(*the suit property*) to the 1st Respondent. The application was supported by the affidavit sworn by the 1st Applicant on 22nd March, 2021 and the exhibits thereto.
2. The gist of the application was that the Applicants were amongst the administrators of the estate of the late Kamau Manda (the *deceased*) who was the original owner of the suit property. The Applicants contended that the 1st Respondent had fraudulently caused the suit property to be transferred into her name without following due process whereas the same was listed as part of the assets of the deceased in a pending succession cause being Nakuru High Court Succession No. 389 of 2009 (*the succession cause*).
3. The Applicants contended that they only came to discover the alleged fraudulent transfer on 8th December, 2020 when the Respondents served their list of documents in the succession cause. They stated that since the transfer of the suit property was effected on 13th December, 2007 the time for filing suit had expired under the **Limitation of Actions Act (the Act)** hence the application.
4. The Respondents filed a replying affidavit sworn by the 1st Respondent on 24th May, 2021 in opposition to the application. The 1st Respondent stated that the deceased was her husband and that before his demise he had transferred the suit property to her absolutely. The Respondents contended that it was not true that the Applicants discovered about the transfer of the suit property on 8th December, 2020 as alleged. The Respondents contended that the transfer and title documents were annexed to their replying affidavit dated 28th September, 2009 in the succession cause to which the Applicants were privy.
5. The Respondents, therefore, contended that all material facts relating to the alleged cause of action were within the Applicants' knowledge hence no good reason had been shown for the failure to file suit within the limitation period. The Respondents were of the view that the Applicants had failed to satisfy the legal requirements for extension of time to file suit out of time under the **Act**. They consequently prayed for dismissal of the application.
6. The Applicants filed a further affidavit sworn on 2nd June, 2021 in which they disputed the contents of the replying affidavit and maintained that the suit property was fraudulently transferred to the 1st Respondent. They reiterated that the suit property was listed as one of the assets of the deceased in the succession cause and that it was in the interest of justice for them to be granted leave to ventilate their claim. They further contended that they were under the impression that the High Court would adjudicate over their claim prior to the establishment of the Environment and Land Court hence their failure to file suit was not deliberate.
7. When the application came up for hearing, it was directed that it shall be canvassed through written submissions. The Applicants were given timelines within which to file their submissions. The record shows that the Applicants filed their written submissions on 20th September, 2021 whereas the Respondents filed theirs on 1st July, 2021.

8. The court has considered the notice of motion dated 22nd March, 2021, the Respondents' replying affidavit in opposition thereto as well as the Applicants' further affidavit. The court is of the opinion that the main question for determination is whether or not the Applicants have made out a case for the grant of leave to file suit out of time.

9. The court has considered the material on record and the submissions of the parties. Whereas the Applicants submitted that they had demonstrated good cause why the leave sought should be granted, the Respondents contended that the Applicants had failed to satisfy the requirements of the Act. It was the Applicants' contention that under **Section 26 of the Act** time does not begin to run in a claim based upon fraud until the claimant has discovered the fraud.

10. In Embu Misc. Civil Application No 3 of 2020 – **Virginia Kairigo Runji v Christopher Nthia Gacuthe & 17 others [2020] eKLR**, the Applicant filed an originating summons seeking leave of court to file suit out of time on account of alleged fraudulent transfer of various parcels of land. In dismissing the application, this court held as follows:

“ 10. It is evident from the application and the draft plaint that the Applicant’s claim is based upon recovery of land which has a separate limitation period of 12 years prescribed under Section 7 of the Act. There is no provision under the Act for the extension of the limitation period prescribed under Section 7 of the Act. It would thus appear that the legislature did not intend to provide for extension of time with respect to cases for recovery of land unless the case fell within the exceptions set out in Section 26 of the LAA. The court shall consider the provisions of the said section later in the ruling.

11. The Court of Appeal of Kenya had occasion to consider the interpretation of Section 27 of the LAA in the case of Mary Osundwa V Nzoia Sugar Company Ltd [2002] eKLR. In the said case, the High Court had granted leave, by consent of the parties, to the Appellant to file suit against the Respondent in a claim of alleged breach of contract, a matter which fell outside the provisions of Section 27 (1) of the LAA. In allowing the appeal, the Court of Appeal held, *inter alia*, that:

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to extend time for filing suit in cases involving contract or any other cause of action than those in tort. Accordingly, Osemo J had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can neither be here nor there; the parties could not confer jurisdiction on the judge by their consent.”

11. The court is, therefore, not inclined to grant the application for leave to file suit out of time under **Section 27 of the Act**. However, if the Applicants consider that their claim falls within the exceptions set out in **Section 26 of the Act** they shall be at liberty to file suit and prove at the trial that their claim is not statute barred under the **Act**.

12. **Section 26 of the Act** stipulates that:

“Where, in the case of an action for which a period of limitation is prescribed, either-

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, 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:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

13. The High Court had occasion to consider the effect of that Section in **Nzoia Sugar Co. Ltd v Kenya Ports Authority [1990] eKLR** whereby the court observed that:

“ Although Sections 22 and 26 of the Limitation of Actions Act refer to extension of the limitation period in case of disability or fraud or mistake respectively, it seems to me that these sections do not envisage an application for leave to extend the limitation period and an application based on those sections would be incompetent. Rather these provisions empower a party to file a suit despite the expiry of the limitation period prescribed for the action and give the court jurisdiction to disregard the limitation period prescribed for the action if the suit falls within the scope of Sections 22 and 26 of the Limitation of Actions Act. If it was intended that applications under Sections 22 and 26 of the Limitation of Actions be made in court, then enabling rules similar to order XXXVI Rule 3C providing for application for extension of limitation period under section 27 of Limitation of Actions Act could have been made”.

14. For the foregoing reasons, the court finds no merit in the instant application. Accordingly, the Applicants' notice of motion dated 22nd March, 2021 is hereby dismissed with no order as to costs. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 28TH DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

No appearance for the Applicants

No appearance for the Respondents

CA - Carol

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Y. M. ANGIMA

JUDGE