



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 160 OF 2015(O.S)**

**DANIEL KIRUMBI NJOROGE.....PLAINTIFF**

**VERSUS**

**CHRISTOPHER KANGETHE KIGWE.....DEFENDANT**

**RULING**

Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya (hereinafter referred to as “the Act”) provides as follows:

**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.**

Section 4 (1) and (2) of the Act on the other hand provides that:

**(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**

- (a) actions founded on contract;**
- (b) actions to enforce a recognizance;**
- (c) actions to enforce an award;**
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

**(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:**

**Provided that an action for libel or slander may not be brought after the end of twelve months from such date.**

Section 27(1) of the Act provides as follows:

**Section 4(2) does not afford a defence to an action founded on tort where:**

- a) The action is for damages for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or a written law or independently of a contract or written law (emphasis mine) and**
- b) The damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person, and**
- c) The court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and**
- d) The requirements of subsection (2) are fulfilled in relation to the cause of action.**

Section 28(1) of the Act provides that:

**An application for leave of the court for the purposes of section 27 shall be made ex parte, except in so far as the rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.**

Order 37 Rule 6 of the Civil Procedure Rules provides as follows:

**6. (1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.**

**(2) Any such application made after the filing of a suit shall be made ex parte in that suit.**

The Plaintiff brought this suit by way of Originating Summons on 25<sup>th</sup> February, 2015. Together with the Originating Summons, the Plaintiff brought an application by way of Notice of Motion dated 24<sup>th</sup> February, 2015 in which he sought the following orders;

1. That the court be pleased to extend time for filing the accompanying Originating Summons.
2. That costs be in the cause.

The application was supported by an affidavit sworn by the Plaintiff on 24<sup>th</sup> February, 2015. In the affidavit, the Plaintiff (hereinafter referred to only as “the Applicant”) stated that on 19<sup>th</sup> November, 1998, he entered an agreement with the Defendant (hereinafter referred to only as “the Respondent”) under which the Respondent agreed to sell to him and he agreed to purchase from the Respondent a portion measuring 1 acre of all that parcel of land known as L.R No. 10823/5 (hereinafter referred to as “the suit property”) at a consideration of Kshs. 95,000/-. The Applicant averred that he paid the purchase price to the Respondent in full and what remained was for the Respondent to subdivide the suit property and transfer to him the portion thereof that had been sold to him. The Applicant averred that he waited patiently for this process to be completed for several years. The Applicant stated that the Respondent claimed that the delay was being occasioned by the Lands Office. The Applicant averred that in 2013, he got suspicious that all was not well and together with his wife, they tried to contact the advocates who were acting for the Respondent in the transaction seeking their intervention in the matter. The Applicant averred that he did not get any assistance from the said advocates.

The Applicant averred that he subsequently faced financial challenges and bereavements in the family that made it difficult for him to file a suit against the Respondent. The Applicant averred that he is now in a position to pursue a claim against the Respondent for breach of the said agreement for sale and urged the court to extend time for him for that purpose.

The application was opposed by the Respondent through undated grounds of opposition filed on 30<sup>th</sup> March, 2016 and a replying affidavit sworn on 29<sup>th</sup> March, 2016 and filed on the same date. In the affidavit, the Respondent averred that the suit property had never been registered in his name. The Respondent averred that the property had all along been registered in the name of a company known as Kigwe Limited. The Respondent averred further that the suit property is agricultural land and as such the purported agreement for sale that he entered into with the Applicant was void since Land Control Board consent was not obtained within six months of the date of the agreement. The Respondent contended further that the Applicant’s application was fatally defective in that time can only be extended in respect of tortious claims and not otherwise. The Respondent averred that even if it is assumed that the Applicant’s claim was in tort which it is not, the Applicants had not satisfied the threshold set out under section 27 of the Limitation of Actions Act, Cap. 22 Laws for extension of time. In the grounds of opposition, the Respondent added that the Applicant’s application should have been brought by way of Originating Summons and not by way of Notice of Motion. The Respondent contended further that the application was defective for failure to cite the provisions of the law under which it was brought.

The Applicant died on 4<sup>th</sup> March, 2019 while the application was pending. The application was argued on 17<sup>th</sup> June, 2021. The Applicant’s widow and legal representative, Ms. Njoroge argued the application in person while Ms. Mutinda advocate appeared for the Respondent. In her brief submission, Ms. Njoroge relied entirely on the Applicant’s affidavit in support of the application. Ms. Njoroge reiterated that the Applicant did not file a suit against the Respondent earlier because he was in communication with the Respondent who kept saying that he was waiting for the title for the land that was sold to the Applicant from the Ministry of Lands. Ms. Njoroge submitted that the Applicant did not suspect any foul play. She submitted further that in addition to the personal challenges that faced the Applicant, the Applicant was also frustrated by his advocate. In conclusion he urged the court to extend the time to allow the suit to be heard as it was not the Applicant’s fault that the suit was not filed on time.

In her submissions in reply, Ms. Mutinda submitted that the Applicant’s Originating Summons was seeking the enforcement of the agreement for sale that the Applicant had entered into with the Respondent. Ms. Mutinda submitted that under Order 37 Rule 6 of the Civil Procedure Rules and Section 27 of Limitations of Actions Act, an application for extension of time could only be made in respect of claims in tort. Ms. Mutinda submitted that time cannot be extended for claims arising from contracts. In support of this submissions, she cited Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. The Respondent also argued that the application was defective as it did not disclose the sections of the law under which it was founded. The Respondent urged the court to strike out the application.

As rightly pointed out by the Respondent, the Applicant’s application was not brought under any provisions of the law. There is no doubt from the Applicant’s Originating Summons that the applicant’s claim against the Respondent is based on breach of contract for sale of land. The limitation period for actions based on contract is 6 years from the date of the cause of action while that for recovery of land is 12 years. What I need to determine is whether this court has jurisdiction to extend the time limited by section 4 of the Limitation of Actions Act within which a suit for enforcement of a contract for sale of land should be brought.

The Applicant has not cited any provisions of the law or authority giving this court power to extend time limited under section 4 of the Limitation of Actions Act in respect of causes of action based on contract or under section 7 of the Limitation Actions Act for the recovery of land. The limitation period provided for in the Limitation of Actions Act can only be extended in respect of actions for negligence, nuisance or breach of duty and where the damages claimed is in respect of personal injuries to a person. I am in agreement with the Respondent that the court has no jurisdiction under section 27 of the Limitation of Actions Act to grant leave to an applicant wishing to bring an action for the enforcement of an agreement for sale of land or for the recovery of land after the limitation periods provided for under sections 4 and 7 of the Limitation of Actions Act have expired.

In Willis Onditi Odhiambo v Gateway Insurance Co Ltd [2014] eKLR, the Court of Appeal stated as follows:

**“The appellant moved the High Court by his Originating Summons filed on 19th September, 2011 for leave to file suit out of time under the provisions of Sections 27 and 29 of the Limitation of Actions Act. Section 29 is of no relevance in this appeal. Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort...”**

In the absence of any provision of the law giving this court power to grant the order of extension of time sought by the Applicant, I find the applicant’s application dated 24<sup>th</sup> February, 2015 without merit. That being my view on the matter, the application dated 24<sup>th</sup> February, 2015 is accordingly dismissed. The Originating Summons in respect of which extension of time was sought is consequently struck out. Each party shall bear its own costs.

**DELIVERED AND DATED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021**

**S. OKONG’O**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:**

**MS. MUKAMI, PLAINTIFF’S LEGAL REPRESENTATIVE PRESENT IN PERSON**

**MS. MUTINDA FOR THE DEFENDANT**

**MS. BETSY CHELENGAT-COURT ASSISTANT**