



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

MISC. APPLICATION CASE NO. 3 OF 2020

VIGINIAH KAIRIGO RUNJI.....APPLICANT

VERSUS

CHRISTOPHER NTHIA GUCUTHA.....1ST RESPONDENT

ABDULRAHIM BIN AWATH BIN ABDALLA.....2ND RESPONDENT

ROBERT NJOKA MUTHARA.....3RD RESPONDENT

SHARON WAMBURA MARIGU.....4TH RESPONDENT

SICILY MIKUI BENSON.....5TH RESPONDENT

SILAS E. NJERU.....6TH RESPONDENT

LINCOLA NJERU BARNABAS IRERI.....7TH RESPONDENT

DANIEL NYAGA KIENGE.....8TH RESPONDENT

JOEL JULIUS GATIARI.....9TH RESPONDENT

CHARLES KAMAU.....10TH RESPONDENT

SAMUEL KITHE GICHONI.....11TH RESPONDENT

EUSTACE NJERU N. JOSIAH.....12TH RESPONDENT

PETERSON NYAGAH THIONGO.....13TH RESPONDENT

STEPHEN KARIUKI NGANGA.....14TH RESPONDENT

MICHAEL IRERI NGANGA.....15TH RESPONDENT

LILY CIAMBAKA KANAMPIU.....16TH RESPONDENT

DANIEL KIUNGA KIAMBATI.....17TH RESPONDENT

MICHAEL IRERI NJERU.....18TH RESPONDENT

RULING

1. By an *ex-parte* notice of motion dated 24th January 2020 expressed to be brought under Sections 27 (1) and 28 of the Limitation of Actions Act (Cap. 22) (“the LAA”), Order 50 Rule 6 of the Civil Procedure Rules 2010, section 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the Law, the Applicant sought the following orders:

a) That this honourable court be pleased to grant leave to the Applicant/intended Plaintiff to file a suit for fraudulent transfer and sale of land out of time against the Respondent/intended Defendant.

b) That costs of this application be provided for.

2. The said motion was based upon the grounds set out on the face of the motion and supported by the Applicant's supporting affidavit sworn on 24th January 2020 together with the 3 annexures thereto. The Applicant contended that she was the owner of the 26 properties set out in the application and the draft plaint which she claimed to have inherited from her late husband. It was contended that the 1st Respondent had fraudulently acquired the same, sub-divided them, and sold them to the 2nd – 18th Respondents. The suit properties were described as Evurore/Evurore/100, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 434, 435, 436, 437, 106 and 107.

3. The Applicant further stated that she was an elderly and illiterate lady who had no knowledge on the technical aspects of filing suit hence the delay in seeking recovery of the suit properties from the Respondents. It was her case that she only discovered the alleged fraud when she noticed some strangers occupying and developing the suit properties. She did not, however, disclose the year when such discovery was made in her supporting affidavit. In the draft plaint annexed to the supporting affidavit it was indicated that the alleged fraud was committed in the 1980s.

4. When the said application was listed for hearing on 18th February 2020 it was prosecuted orally by Ms. Mukami for the Applicant. She submitted on the basis of the grounds set out on the face of the application and relied upon the contents of the supporting affidavit and the annexures thereto. She emphasized that the suit properties were *fraudulently* acquired by the 1st Respondent and prayed that the application for leave be allowed. This being an *ex parte* application, the Respondents were not served hence they did not participate in the application.

5. The court has considered the Applicant's notice of motion dated 24th January 2020 together with the supporting affidavit and annexures thereto. The court has also considered the oral submissions by the Applicant's advocate. The main question for determination herein is whether or not the Applicant has made out a case for the grant of leave to file suit out of time under **Sections 27 and 28** of the LAA.

6. **Section 27** of the LAA stipulates as follows:

“(1) 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 of a written law or independently of a contract or written law); and [Rev. 2012] Limitation of Actions CAP. 22 L19 - 17 [Issue 1]

(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.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.” (emphasis added)

7. On the other hand, **Section 28** of the LAA provides for the procedure of moving the court for leave for purposes of **Section 27**. It stipulates that the Applicant shall move the court *ex parte*. There being no existing suit or pending proceedings on recovery of the suit properties, the Applicant could only move the court by originating notice of motion as opposed to the conventional notice of motion which is normally employed in existing proceedings.

8. The court is, however, of the opinion that the adoption of the wrong procedure in moving the court does not necessarily invalidate the

proceedings in view of the provisions of **Article 159 (2) (d) of the Constitution of Kenya 2010** and **Section 19 (1) of the Environment and Land Act, 2011** which obligates this court to dispense justice without undue regard to procedural technicalities. The court is also fortified in this view by the authority of **Boyes V Gathure [1969] EA. 385** where the former East Africa Court of Appeal upheld proceedings commenced by a wrong procedure.

9. So, has the Applicant demonstrated that she meets the requirements of **Section 27** of the **LAA**? It is clear from the provisions of **Section 27 (1)** that the section only confers jurisdiction upon the court to consider applications for extension of time in only limited cases relating to tortious liability where the action is for damages for negligence, nuisance or breach of duty in respect of personal injuries to a person. That is why the section makes reference to the 3 year limitation period for instituting actions founded on tort and the provisions of **Section 4(2)** of the **LAA** which prescribe the limitation period for tort.

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.”

12. Before concluding the ruling, the court shall also consider the provisions of **Section 26** of the **LAA**. Although the Applicant did not specifically cite the section in her application, the court is obliged to consider it since it has a bearing on the fraud alleged against the Respondents. The said section falls within **part III** of the **LAA** which provides for extension of the limitation period in cases of disability; acknowledgement and part payment; fraud; mistake; and ignorance of material facts.

13. **Section 26** of the **LAA** stipulates as follows:

“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.” (emphasis added)

14. As indicated in the earlier part of the ruling, the Applicant was not forthcoming on when she discovered the alleged fraud on the part of the Respondents. Although she indicated that the fraud was committed in the 1980s she completely failed to state when she discovered the alleged fraud. She was very economical with the material facts relating to discovery of the alleged fraud. She was only content to state that she discovered the fraud when she saw the Respondents occupying and developing the suit properties without specifying the year.

15. The court has perused the scanty material which was annexed to the supporting affidavit. The exhibit marked 'VKR2' consists of two letters dated January and February 1982 relating to a land dispute between Runji Itharaweru and Njagi Itharaweru. The exhibit marked 'VKR3' indicates that Runji Itharaweru was the Applicant's late husband who appears to have been pursuing recovery of the suit properties through the office of the Chief, Mavuria Location and the District Officer, Siakago Division as far back as 1982. The material on record further indicates that Runji Itharaweru died in 1998.

16. The material on record further indicates that there were proceedings before the Land Disputes Tribunal in Siakago being *LDT Case No. 3 of 2007* involving one of the suit properties (*Evurori/Evurori/1326*) by which the Applicant appears to have been allowed to continue occupying that parcel until an alternative parcel was availed to her. Moreover, the exhibit marked VKR3 indicates that the Applicant was sued on 25th March 2015 in relation to parcel 1326 but she did not file any counterclaim therein.

17. The court is of the opinion that the Applicant and her late husband were aware of the alleged fraud at least as early as 1982 when they sought recovery of the suit properties (or some of them). The matter appears to have landed before the Land Disputes Tribunal in 2007 with respect to one of the suit properties. The Applicant does not appear to have taken any concrete steps towards recovery of all the 26 properties which she believed to be hers all along. In the premises, even if time for purposes of the **LAA** were to be computed with effect from 1982 or 2007, the Applicant's claim would still be statute-barred within the reckoning of **Section 26** of the **LAA**.

18. The court is further of the opinion that the Applicant's claim is untenable for another reason. Under the proviso to **Section 26** of **LAA**, an action may not be brought for recovery of property against purchasers for value where such purchasers were not party to fraud and did not at the time of purchase know that any fraud had been committed. It was not contended by the Applicant that the 2nd – 18th Respondents who were purchasers were privy to the alleged fraud or that they had reason to believe that the 1st Respondent had committed any fraud. In fact, the Applicant's case was that it was the 1st Respondent only who had committed fraud and that the 2nd – 18th Respondents were merely purchasers.

19. The upshot of the foregoing is that the court finds and holds that the Applicant has failed to make out a case for the grant of leave to file suit for recovery of land out of time. Accordingly, the court has no jurisdiction to grant the leave sought. The consequence is that the court finds no merit in the notice of motion dated 24th January 2020 and the same is consequently dismissed with no order as to costs.

20. Orders accordingly.

RULING DATED and SIGNED in Chambers at EMBU this 30TH DAY of APRIL 2020 in the absence of the Respondents owing to the prevailing Covid-19 situation. The ruling was transmitted to M/s P.M. Kahiga & Co. Advocates for the Applicant using the email address which they provided.

Y.M. ANGIMA

JUDGE

30.04.2020