



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
MISC ELC CASE NO. 39 OF 2014

ESTHERINA NJOKI.....APPLICANT

VERSUS

WILLIAM D. NYAMU JOSPHAT.....RESPONDENT

RULING

The applicant herein has by this ex-parte Notice of Motion sought leave to file suit out of time seeking orders that one acre of land be carved out of the parcel of land known as BARAGWE/KARIRU/2583. The application is brought pursuant to the provisions of **Section 3A of the Civil Procedure Act, Order 50 Rule 1** of the Civil Procedure Rules and **Section 26 and 28** of the **Limitation of Actions Act**. The same is supported by the ex-parte applicant's nine (9) paragraphs affidavit in which he has deponed, inter alia, that the respondent is his brother out of a polygamous family and was registered as owner of the parcel of land BARAGWE/KARIRU/87 to hold in trust for the other family members but that in 1985, the respondent caused the said land to be sub-divided into two portions being BARAGWE/KARIRU/937 and 938 which he has been further sub-dividing and selling to third parties. That the respondent is now currently the registered owner of BARAGWE/KARIRU/2583.

I have considered the application. It is clear that the applicant seeks to file a suit as a beneficiary to recover trust property and as provided under **Section 20 (2) of the Limitation of Actions Act**, such action may not be brought after six years from the date the cause of action occurred. The cause of action appears to have accrued in 1985 hence this application.

The **Limitation of Actions Act (CAP 22 Laws of Kenya)** gives the Court power to enlarge time within which a suit may be brought. By virtue of **Section 28 of the Limitation of Actions Act**, a party who seeks the Court's leave to bring an action out of time must fulfill the requirements set out in **Section 27 (2) of the Limitation of Actions Act**. That means the applicant must prove that material facts relative to the cause of action that he proposes to file were or included facts of a decisive character which were at all times outside his knowledge (actual or constructive). If the extension is sought in cases of fraud or mistake, the applicant must show when he discovered the fraud or mistake. In cases where the applicant was under a disability, the applicant must lead evidence to show that he was under a disability when the limitation period caught up with him. There are therefore stringent requirements that an applicant has to meet in an application such as this one.

Looking at the application before me and more particularly the supporting affidavit, it is clear that no reasons have been placed before this Court to explain why the leave sought ought to be granted. There is no mention of any ignorance of any facts on the part of the applicant or any disability that prevented him from filing the intended suit in time. The Court therefore has no material upon which to consider the

application. All that the applicant has done is give a narrative of how the land in dispute has changed hands. He has not met the requirements set out in the **Limitation of Actions Act** that would allow the Court to grant him the leave sought notwithstanding the sympathy that this Court may have for him.

In the circumstances, the Notice of Motion dated 2nd July 2014 is dismissed with no order as to costs.

B.N. OLAO

JUDGE

3RD OCTOBER, 2014

3/10/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Chomba for Mr. Mwai for Applicant – present

Respondent – absent

COURT: Ruling delivered this 3rd day of October, 2014 in open Court.

Mr. Chomba for Mr. Mwai for Ex-parte Applicant – present

B.N. OLAO

JUDGE

3RD OCTOBER, 2014