



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC MISC CASE NO. 10 OF 2018

ESTHER BOSIBORI MINYONGA.....APPLICANT

VERSUS

SOSYTENUS MBOYA SIMON.....1ST RESPONDENT

FLORENCE MUMBI NJINE sued as the legal

Administrator of the Estate of

JAMES NJINE NDINGIRIGI, DECEASED.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. By an originating summons ex-parte dated 30th July, 2018 and filed on even date, (the application) the applicant through G.M. Nyambati and Company Advocates is seeking the following orders:-

i. Spent.

ii. THAT this Honourable Court be pleased to grant leave to the applicant to file a suit against the respondents out of time.

iii. THAT the costs of this application be in the cause.

iv. THAT this court be pleased to issue any such orders as it may deem just and expedient.

2. The application is premised on a 14 paragraphed supporting affidavit sworn on even date wherein the applicant averred, inter alia, that in the year 2000, she relocated to Uasin Gishu County. That she left the suit property then registered in her name as LR NO. BUKIRA BUHIRIMONONO/293 (the original land) which has since been fraudulently and illegally sub-divided to bring on board LR NO. BUKIRA BUHIRIMONONO/2021, 2022 and 2023 (the subsequent submissions) in the hands of his relative. That he was unable to file the suit in time due to unavoidable circumstances.

3. The applicant attached three (3) documents to her affidavit. The first document is a copy of green card marked as EBM-01 which shows that the applicant was the registered owner of the original land. The second documents are copies of official search marked as EBM-02 for the subdivisions of the land. The third documents is a copy of the charge sheet and the statements marked as EBM -03 that show that one Simon Robi (deceased) who fraudulently subdivided the original land was arrested and charged with the offence of forgery in Migori Principal Magistrate's Court Criminal case number 524 of 2005 and the witnesses thereof recorded their statements.

4. The grounds of the application include; that the applicant was not aware of the aforesaid fraudulent and illegal transactions that were meant to defraud her of land and that due to the limitation period under the law, she was unable to file her suit. That the orders sought therein are in the interest of justice.

5. In her supplementary affidavit sworn on 13th August 2018 and filed on even date, the applicant averred, inter alia, that the claim to be filed herein raises pertinent issues of law and fraud and therefore requires to be heard and determined on merit and that the delay to file the instant matter was not therefore intentional or deliberate. That the applicant has a suit with triable issues that require to be determined by this court as demonstrated by a draft copy of a plaint marked as EBM -01.

6. The 1st and 2nd respondents through M/s. Oguttu, Ochwal, Ochwangi, and Company Advocates opposed the application by way of the 2nd defendant's affidavit sworn on 8th August 2018 as well as a statement of grounds of opposition of even date. The grounds are that ;-

a) The instant originating summons, is pre-mature, misconceived, incompetent and otherwise legally untenable.

b) The applicant herein has not laid out and/or established the requisite conditions and/or ingredients envisaged under the provisions of Section 27 of the Limitation of Actions Act, Chapter 22, Laws of Kenya. Consequently, the applicant is undeserving of the orders.

c) The applicant herein has concealed and /or failed to disclose material and pertinent information from the Honourable Court. In this regard, the applicant is guilty of material non-disclosure.

d) On the other hand, the applicant herein has been dishonest with the Honourable court and same has therefore committed perjury. In this regard, the applicant herein, other than being disentitled from partaking of Equity,ought to be suitably punished.

e) At any rate, the applicant's originating summons, filed and/or mounted by the applicant, does not disclose and/or capture any reasonable cause of action.

f) In any event, the instant originating summons constitutes and/or amounts to an abuse of the due process of court.

g) The applicant herein in non-suited.

h) In the premises, the originating summons dated 30th July 2018 herein is devoid of merits, whatsoever and /or howsoever.

7. The 1st and 2nd defendants also relied on their list of authorities dated 11th August 2018 which include; **Mweu-v- Kabai and another (1972) EA 242.**

8. The 3rd defendant was duly served as per affidavit of service sworn on 10th August 2018 by a duly authorized process server Elijah Gekonge Nyangau. The 3rd respondent did not reply to the application thus did not oppose the same.

9. On 16th October 2018. I directed that the application be canvassed by way of written submissions. Learned counsel for the applicant and learned counsel for the respondent filed submissions accordingly.

10. By submissions dated 6th December 2018, learned counsel for the applicant urged the court to grant the orders sought in the application to enable her recover her stolen land. That the recovery can only be realized if a suit is filed and heard on merit.

11. Counsel relied **on Section 15 (1) (c) of the National Land Commission Act as amended, Article 159 (2) (d) of the Constitution of Kenya,2010 and Sections 13 and 19 of the Environment and Land Court Act,2015 (2012),**in favour of the applicant's case. He also framed and analysed three (3) issues for determination namely;-

a) Whether the property LR NO. BUKIRA BUHIRIMONONO/273 was registered in the applicant's name and fraudulently transferred.

b) Whether there was inordinate delay in filling of the instant applicant.

c) Whether the respondents can be appeased by way of costs.

12. In their submissions dated 6th December 2018 counsel for the respondent gave background of the case and framed the following issue for determination:-

a) Whether the applicant has met the threshold set in **Section 27 (2) of the Limitation of Actions Act Chapter 22 Laws of Kenya.**

13. In support of their submissions, Counsel relied on various authorities including **Dominic Njuguna Wairimu –v- Joseph Wambugu Kibue (2018) and Patrick S.R. Kimiti –v- John Ngugi Gachau and another (2015) eKLR .** Counsel also relied on **Section 3 (1) of the Public Authorities Limitations Act and that Article 159 of the Constitution of Kenya, 2010** can not be relied upon by the applicant as she has not met the stringent requirements of **Section 27 (2) of the Limitation of Actions Act (Cap 22).**

14. I have duly examined the application and the 1st and 2nd respondents' opposition to the same. I also note written submissions including issues for determination and authorities cited therein. I find that the issues for determination boil down to whether the applicant has met the requisite threshold for the grant of orders sought in the application.

15. The applicant's grounds (b) and (c) on the face of her application that the transfer and subdivision of the suit property was irregular, fraudulent and illegal are reinforced by paragraphs 4 and 6 of her supporting affidavit and the attached search certificates marked as EBM-02. The same allegations appear at paragraphs 5, 6 and 8 (a) to (g) of the draft plaint marked as EBM-01 attached to her supplementary affidavit.

16. The instant application is brought under **Article 159 (2) (d) of the Constitution of Kenya, 2010 and other provisions of the law including Section 27 of the Limitation of Actions Act (Cap 22)** which provide for extension of Limitation period in case of ignorance of material facts in actions for negligence, nuisance or breach of duty at law. The applicant or plaintiff has to prove that material facts relating to the cause of action were at all times outside the knowledge of (actual or constructive) of the plaintiff until a date as specified under **Section 27 (2) of the Limitation of Actions Act (Cap 22)**.

17. The applicant claimed that she was not aware of the fraudulent and illegal transactions hence she was not able to file her suit within the limitation period under the law. She has proposed to seek orders as per the document marked as EBM-01.

18. Black's Law Dictionary 10th Edition at page 775 defines "fraud" thus:-

"A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usually a tort....."

19. Quite clearly, the proposed action by the applicant is founded on fraud which is a tort. **Section 4 (2) of the Limitation of Actions Act (Cap 22)** reads:-

"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. (Emphasis laid)

20. The applicant averred at paragraphs 8 and 9 of his supporting affidavit that she was unable to file the suit in time due to certain unavoidable circumstances. That the delay to file the instant suit was not intentional or deliberate.

21. The 1st and 2nd respondents contended that the applicant has been aware of the transfer and the subsequent subdivisions in respect of the suit property. That she has suppressed crucial and material information from this honourable court. They relied on documents marked as FMN 1 to 6 attached to 2nd respondent's replying affidavit.

22. I bear in mind **Section 26 of the Limitations of Actions Act (Cap 22)** on extension of limitation period in case of fraud or mistake. Therefore, was the applicant aware of the alleged fraudulent and illegal transfer and subsequent subdivision of the suit property?

23. It is discernable from paragraphs 5 and 6 of applicant's supporting affidavit together with documents annexed thereto marked as EBM-03 as well as the 2nd respondent's replying affidavit together with documents marked as FMN 4,5 and 6 annexed to the affidavit that the applicant was aware of alleged fraudulent and illegal transactions in respect of the suit property. She then took over 13 years to originate this application. She was indolent in the circumstances.

24. Under **Article 10 (2) (b) of the Constitution of Kenya, 2010** the national values and the principle of governance include equity. However, equity does not aid the indolent, and delay defeats equity.

25. In the instant application, the delay by the applicant was extremely inordinate and deliberate. The same is not curable either under **Article 159 (2) (d) of the Constitution of Kenya 2010** or through the equity principle as provided under the same constitution.

26. In the premises, I find the application unmeritorious. The same fails as the respondents' ground of opposition are cogent and steadfast.

27. Thus, the application by way of originating summons ex-parte is hereby dismissed with costs to respondents.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of JUNE 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Ojala holding brief for G. Nyambati learned counsel for the applicant

Mr. Oguttu Mboya learned counsel for the respondents.

Tom Maurice – Court Assistant.