

**REPUBLIC OF KENYA**

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

**ELCL MISC NO. E087 OF 2025**

**NAWEL & JEMUWA INVESTMENT ..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH KUNGU NGENGI ..... 1<sup>ST</sup>**

**DEFENDANT/RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup>**

**DEFENDANT/RESPONDENT**

**DIRECTOR OF LAND ADMINISTRATION**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DIRECTOR OF SURVEY ..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....6<sup>TH</sup>**

**DEFENDANT/RESPONDENT**

**RULING**

**Introduction**

1. This court is tasked with determining an Originating Summons dated 16<sup>th</sup> September 2025 in which the applicant seeks the following Orders:

*1. THAT this Honourable Court be pleased to grant leave to the Plaintiff/Applicant herein to file suit as against the Defendants out of time*

*2. THAT the costs of this suit be in the cause.*

2. The application is premised on the grounds on the face of it and the supporting affidavit of Japhet Nyaga sworn on even date.

3. The Applicant alleges that the 1<sup>st</sup> Defendant was fraudulently allocated Land Parcel No. 13199 which is a road reserve along Thika Super Highway formerly known as Murang'a Thika-Nairobi Road.
4. The Applicant contends that the allocation of the land parcel 13199 to the 1<sup>st</sup> Defendant was done without following due process which has occasioned the Applicant who is the legal owner of Land Parcel No. 4148/15 Juja/Kiaura together with occupants of the adjacent land parcels access to their properties.
5. The Applicant contends that he has been following up the matter with the proposed Defendants since 1997 to no avail.
6. The Applicant asserts that he was informed by officials from the offices of the 2<sup>nd</sup> to the 6<sup>th</sup> Defendants that, before any action could be taken in relation to the matter, he was required to obtain a court order. The Applicant submits that this requirement was communicated after the statutory period for instituting a suit against the 1<sup>st</sup> Defendant had already expired, effectively precluding the Applicant from taking timely legal action.
7. Accordingly, the Applicant seeks leave of the Court to file the suit out of time, contending that doing so will not occasion any prejudice to the 1<sup>st</sup> Defendant/Respondent.

### **Issues for Determination**

8. Having considered the Originating Summons application, the affidavit in support, the submissions and the relevant authorities, the sole issue for determination is: *whether the Applicant has demonstrated sufficient cause to justify the grant of leave to file the suit out of time.*

### **Analysis and Determination**

9. The Court is called upon to determine whether the Applicant, owing to circumstances beyond his control, should be permitted to invoke the jurisdiction of this Court notwithstanding the lapse of the statutory limitation period. This inquiry is neither mechanical nor indulgent. It requires a careful balancing of the policy objectives underpinning limitation statutes against the imperative of substantive justice.
10. The application is brought pursuant to Section 27 of the Limitation of Actions Act and Order 37 rule 6 of the Civil Procedure Rules, which expressly contemplate that an application for extension of time, made before the filing of a substantive suit, shall be instituted ex parte by way of an originating summons supported by affidavit.
11. Section 27 of the Limitation of Actions Act recognizes that justice is not always served by rigid adherence to chronological limits. It provides:

***“27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.***

*(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*

*(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.”*

12. The statutory language acknowledges that the wheels of justice must sometimes move beyond the strict confines of time, particularly where material facts of a decisive character have remained hidden from the Plaintiff through no fault of his own.
13. Section 27 does not dilute the doctrine of limitation, nor does it invite indiscipline in litigation. Rather, it affirms that limitation periods are not instruments of injustice but guides, and that where their rigid application would defeat the right to a fair hearing, the Court retains a carefully circumscribed discretion to extend its temporal boundaries.
14. That discretion, however, is neither open-ended nor to be exercised on the basis of sympathy. The courts have consistently warned that limitation statutes serve a substantive purpose and are not mere procedural technicalities to be brushed aside at will.
15. In ***Gathoni v Kenya Co-operative Creameries Ltd***[1982] eKLR the Court of Appeal stated that the law of limitation is intended to protect defendants against unreasonable delay and that a plaintiff who fails to bring an action within the prescribed period loses the right to enforce the claim. The Court emphasized that limitation provisions must be applied strictly, save where the law itself provides an exception.
16. Equally, the jurisprudence makes plain that an application for leave under Section 27 is a preliminary *ex parte* inquiry, not a final adjudication on limitation or the merits of the cause of action.
17. In ***Njoroge v. Kimani*** [2024] KEHC 7834 (KLR) (Civil Appeal E789 of 2022) the High Court considered the proper scope of Section 27

and related procedure in the context of a tortious claim filed well beyond the three-year limitation period. It was *not* in dispute that the subordinate court had granted leave to file suit out of time; the question was whether the reasons then advanced met the statutory test. The appellate court reaffirmed that an order extending time, granted *ex parte* before the filing of the substantive suit, is a matter for trial and may subsequently be challenged when the suit is brought. The Court pronounced that limitation issues of this nature are generally to be addressed at the trial of the main suit, where evidence and circumstances can be fully interrogated, rather than struck out summarily at the leave stage.

18. Moreover, ***Njoroge v. Kimani*** (*supra*) underscores that the burden rests upon the plaintiff to demonstrate that the delay is attributable to material facts that were outside his actual and constructive knowledge within the prescribed limitation period. The mere existence of delay does not, without more, satisfy the statutory threshold; the reasons proffered must comport with the statutory concept of material facts of a decisive character.
19. The Court must be satisfied of three matters: that the delay is explicable by reference to circumstances beyond the Applicant's control; that the Applicant acted with reasonable diligence once the decisive facts became apparent; and that the grant of leave will not occasion manifest prejudice to the Respondent beyond the ordinary burdens of litigation.

20. The Applicant avers that he did not remain passive in the face of the impugned allocation. He contends that upon discovering that the 1st Defendant had been issued with a title over land constituting an access road, he persistently engaged the 2nd to 6th Defendants, seeking administrative intervention through the cancellation of the title, a proper survey, and lawful planning to restore access to his adjacent parcel. These efforts, he asserts, were pursued in good faith and with the legitimate expectation that the dispute could be resolved without recourse to litigation.
21. According to the Applicant, it was only after these engagements that he was informed by the relevant public authorities that no action could be undertaken without a court order. Critically, this position was communicated after the statutory period for instituting proceedings against the 1<sup>st</sup> Defendant had expired.
22. On the material placed before the Court, the delay is thus explained not by indifference or neglect, but by reliance on administrative processes that ultimately proved ineffective.
23. The Court is further satisfied, at this preliminary stage that the Applicant acted with reasonable promptitude once it became apparent that judicial intervention was unavoidable. There is no indication that the delay was tactical or designed to steal a march on the Respondent. Rather, the chronology disclosed points to a litigant who sought redress through lawful channels before resorting to the courts.

24. As regards prejudice, the Applicant maintains that the grant of leave will not occasion any manifest prejudice to the 1<sup>st</sup> Defendant beyond the ordinary burden of having to defend a claim. At this stage, no evidence has been placed before the Court to suggest that the Respondent's ability to mount a defence has been irreparably compromised by the passage of time.
25. Notwithstanding these factors, the Court finds that the statutory threshold under Section 27 has not been met.
26. The correspondence and letters exchanged with the 2<sup>nd</sup> to 6<sup>th</sup> Defendants, while demonstrating sustained engagement and attempts at administrative resolution, do not reveal material facts of a decisive character that were outside the Applicant's actual or constructive knowledge during the limitation period.
27. In ***Bernard M. Mbithi v Mombasa Municipal Council & another*** [1993] eKLR the Court while considering the scope of section 27 of the Limitation of Actions Act noted:
- "The issue to be determined in this appeal therefore is whether ignorance of the law can constitute a material fact of a decisive nature within the meaning of section 27 of the Act. The judge, relying on the case of **Mweu v Kabai and another** [1972] EA 24, held that ignorance of the law did not constitute a material fact. (emphasis mine)"*
28. The principle established in *Mbithi (supra)* underscores that Section 27 is concerned with material facts of a decisive character that were genuinely unknown, not with diligence, persistence, or procedural

steps. Reliance on administrative follow-up, correspondence with other offices, or other governmental processes, while demonstrating good faith, cannot substitute for the discovery of such facts.

29. In the present case, the Applicant has not shown that any decisive material facts were unknown within the prescribed period, and the correspondence relied upon does not satisfy the statutory threshold to engage the Court's discretion.
30. The Applicant's efforts and good faith conduct are noted and respected, but they cannot substitute for the strict requirements of the statute.
31. Accordingly, the Court is constrained to refuse the Applicant's request for leave to file the suit beyond the prescribed limitation period.
32. The Originating Summons dated 16<sup>th</sup> September 2025 is hereby dismissed with no order as to costs.

**Dated, signed and delivered, at Thika this 11<sup>th</sup> day of February 2026.**

.....  
**J. M. ONYANGO**  
**JUDGE**

**In the presence of:**

1. Mr. Njuguna for the Applicant
2. Ms Magana for Mr. Motari for the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 7<sup>th</sup> Respondents
3. Ms Maina for the 6<sup>th</sup> Respondent

Court Assistant: Hinga

ORIGINAL