



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MILIMANI
ELC MISC APPLIC NO 41 OF 2019

IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE SUIT

AND

IN THE MATTER OF AN APPLICATION BY RICHARD MUTHEE NJERU AND LUCY WAGATWE THIONG'O (EX-PARTE APPLICANTS)

RULING

1. On 12/3/2019, Richard Muthee Njeru and Lucy Wagatwe Thiongo brought an ex-parte application by way of originating summons dated 12/3/2019, seeking to be granted an extension of time within which to file suit relating to Land Reference Number 36/1/14. The application was supported by an affidavit sworn on 12/3/2019 by Richard Muthee Njeru. The application was canvassed in open court through brief oral submissions by Mr Wainaina, the ex-parte applicants' counsel. He made an oral application and he was allowed to orally amend the originating summons to cite Section 26 of the Limitation of Actions Act.
2. The case of the applicants is that they intend to file suit in this court to contest two conveyances effected in respect of the suit property on 15/12/1978 and /4/1986 respectively. They contend that the said conveyances were fraudulent and they learnt about the fraud on 4/12/1989. They add that they were either jobless or in school when they learnt about the fraud and it was not possible to take any legal action because they were constrained financially. They further state that in 1995, they agreed that Mr Richard Njeru would petition the court for letters of administration but due to numerous family feuds, it took 23 years for the grant of letters of administration to be confirmed.
3. During the hearing of the originating summons, Mr Wainaina submitted that the fraud was discovered in 1989 and the succession cause took 23 years to be determined. He stated from the bar that the applicant's claim is also premised on the tort of nuisance and the applicants will be bringing a claim for damages for nuisance.
4. I have considered the grounds set out in the application together with the supporting affidavit. I have also considered the oral submissions by counsel. Firstly, counsel's submissions relating to the tort of nuisance were made from the bar and were not anchored on any substantive motion or evidential material placed before court. Consequently, those submissions cannot be considered and cannot inform the decision of this court on the application under consideration. I reject those submissions on that account.
5. Section 7 of the Limitation of Actions Act (**the Act**) prescribes a period of twelve years for actions to recover land. Section 26 of the Act gives this court jurisdiction to extend the limitation period in cases of fraud, mistake or ignorance of material facts. It provides as follows:-

“26. Extension of limitation period in case of fraud or mistake:

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.”

6. I have looked at the materials presented to the court in support of the application for extension of time. Firstly, the present originating summons was jointly taken out by two applicants; Richarch Muthee Njeru and Lucy Wagatwe Thiongo. They contend in ground (b) as follows:

“(b) The applicants now have legal capacity to institute a suit by virtue of being appointed as administrators of the estate of Njeru Munge on 6th March 2018”

7. The grant of letters of administration obtained by the applicants is not attached to the application. What is attached is a certificate of confirmation of grant which states that the grant was issued to Richard Muthee Njeru alone but does not specify when it was issued. For this court to properly exercise its jurisdiction under Section 26 of the Act, the application for extension ought to be brought by the administrator(s) of the estate, not by persons whose locus is unknown. The locus of Lucy Wagatwe Thiongo in the present application is unknown. There is no evidence that she is a co-administrator of the estate of Njeru Munge.

8. Secondly, a copy of the grant ought to have been annexed to the application so that the court can examine it to confirm when it was issued to the applicant(s) and whether the delay is excusable. The certificate of confirmation of grant which the applicants have exhibited is principally an instrument denoting distribution of the estate. It does not indicate when the grant was issued. It is therefore not the appropriate piece of evidence for this purpose. What ought to have been exhibited is the grant itself.

9. Consequently, the court cannot exercise its jurisdiction under Section 26 of the Act in the absence of evidence demonstrating that the joint applicants are joint administrators. Similarly the court cannot grant an extension without knowing the date when the grant was given to the applicants by the court. The net result is that the originating summons dated 12/3/2019 is dismissed for lack of merit.

DATED, SIGNED and DELIVERED at NAIROBI on this 16th day of October 2019.

B M EBOSO

JUDGE