



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 1043 OF 2016(O.S)

ESTHER WANJIKU NGANGA.....1ST APPLICANT

HARRISON KARIUKI NGANGA.....2ND APPLICANT

VERSUS

THABITA WANJIKU KABERA.....1ST RESPONDENT

WAMBUI NJUGUNA.....2ND RESPONDENT

RULING

The applicants are the administrators of the estate of Nganga Kioi, deceased (hereinafter referred to as “Nganga”) while the respondents are the administrators and beneficiaries of the estate of Kagure Wa Kioi also deceased (hereinafter referred to as “Kagure”). What is before me is the applicants’ application brought by way of Originating Summons dated 29th August, 2016 seeking leave to file a suit against the respondents in relation to all that parcel of land known as Karai/Karai/4883(earlier referred to as “Karai/Karai/6”)(hereinafter referred to as “the suit property”). The applicants have averred that on 4th July, 1971, Kagure sold the suit property to Nganga at a consideration of Kshs.450/-. The applicants have averred that the suit property was subsequently transferred and registered in the name of Nganga. The applicants have averred that the suit property was a subdivision of the then larger parcel of land known as Karai/Karai/70(earlier referred to as “Karai/Karai/2”) that was registered in the name of Kioi Nagi deceased. The applicants have averred that Kagure had acquired the suit property as a beneficiary of the estate of the said Kioi Nagi following succession proceedings that were conducted at the District Magistrate’s Court at Kikuyu in Succession Cause No. 1 of 1959.

The applicants have averred that the distribution of the estate of the said Kioi Nagi that was carried out following the succession proceedings at Kikuyu District Magistrate’s Court aforesaid was nullified by the High Court on 28th June, 2000 in Nairobi High Court Succession Cause No. 1434 of 1992. The applicants have averred that the High Court directed that the titles that had been issued to the beneficiaries of the estate of Kioi Nagi following the earlier distribution of his estate be cancelled the parcel of land, Karai/Karai/70(earlier referred to as “Karai/Karai/2”) be distributed a fresh. The applicants have averred that as a result of the said decision of the High Court, the title that was held by Nganga in respect of the suit property that had been conveyed to him by Kagure was cancelled and he was given the liberty to file a suit against Kagure for the recovery of the property once the same was allocated to Kagure during fresh distribution of the estate of Kioi Nagi in the event that Kagure failed to transfer the property to him willingly.

The applicants have averred that following the said High Court decision, Karai/Karai/70(earlier referred to as “Karai/Karai/2”) was distributed afresh amongst the beneficiaries of the estate of Kioi Nagi and the suit property was allocated to Kagure and registered in the names of the respondents as the beneficiaries of her estate on 7th September, 2015. The applicants have averred that the respondents have refused to honour the agreement that was entered into between Nganga and Kagure and have instead demanded that the applicants do vacate the suit property. The applicants have averred that it has become necessary in the circumstances to file a suit against the respondents for the recovery of the suit property. The applicants have averred that the time within which they ought to have instituted a suit against the respondents has expired and it is for that reason that they have brought the present application for extension of time within which to file the intended suit. The applicants have contended that they have been in occupation of the suit property since 1971 and that they could not have brought the suit earlier due to the delay by the administrators of Kioi Nagi to carry out fresh distribution of Karai/Karai/70(earlier referred to as “Karai/Karai/2”).

When the applicants’ application came up for hearing before me on 20th September, 2017, the applicants advocate relied entirely on the affidavit in support of the application and urged me to allow the same. I have considered the application together with the affidavit filed in support thereof. The following is my view on the matter.

Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya (hereinafter referred to as “the Act”) provides as follows:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of

action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 4(2) of the Act on the other hand provides that:

“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.”

Section 27(1) of the said Act provides as follows;

“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 a written law or independently of a contract or written law (emphasis mine) 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.*

Section 28(1) of the Act provides that;

“An application for leave of the court for the purposes of section 27 shall be made ex parte, except in so far as the rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.”

The applicants’ ex parte Originating Summons has been brought under section 28(1) and (4) of the Act and section 3A of the Civil Procedure Act. As I have mentioned earlier in this ruling, the applicants have sought leave of the court to file a suit against the respondents after the expiry of the limitation period. The application has been brought on the ground that there was a delay on the part of the administrators of Kioi Nagi to carry out fresh distribution of his estate and by the time the distribution was done in the year 2015, the time within which the applicants should have filed a suit against the respondents had lapsed. I have noted from the application that the suit property was registered in the name of Njuguna until the year 2000 when the title in favour of Njuguna was cancelled by the High Court. The High Court granted leave to Njuguna to file a suit against Kagure or the administrators of the estate of Kioi Nagi in respect of the suit property. It is not clear why the applicants did not file a suit within the limitation period from the time of cancellation of Njuguna’s title to the suit property. I am of the view that it was not necessary for the applicants to wait until after the respondents had been issued with a title in respect of the suit property to file a suit.

What I need to determine is whether this court has jurisdiction to extend the time limited by section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya (“the Act”) within which a suit for the recovery of land should be brought. I am of the view that the period of limitation provided under section 7 of the Act cannot be extended save by operation of law under section 26 of the Limitation of Actions Act in cases of mistake or fraud. The court can only extend time within which to file a suit under section 28 of the Act cited by the applicants where the conditions set out in section 27 of the Act have been satisfied. Under section 27 of the Act, time can be extended only in respect of actions for negligence, nuisance or breach of duty and where the damages claimed is in respect of personal injuries. The court has no jurisdiction under section 27 of the Act to grant leave to an applicant wishing to bring an action for the recovery of land after the limitation period provided for under section 7 of the Act has expired. The Act having set out expressly the circumstances under which the prescribed period of limitation can be extended, the provisions of section 3A of the Civil Procedure Act is inapplicable.

Due to the foregoing, the application before me is misconceived and has no merit. That being my view on the matter, the application dated 29th August, 2016 is dismissed accordingly with no order as to costs.

Delivered and Signed at Nairobi this 5th day of April 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

No appearance for the Applicants

No appearance for the Respondents

Court Assistant Catherine