



**REPUBLIC OF KENYA**

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

**ELC MISC.APPLICATION NO.1 OF 2018**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22**

**AND**

**IN THE MATTER OF ORDER 37 RULE 6(1) CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME**

**BETWEEN**

**J W N..... PLAINTIFF/APPLICANT**

**-VERSUS-**

**JULIUS KAMANDE KABIRU.....DEFENDANT/RESPONDENT**

**RULING**

The Applicant/Intended Plaintiff filed this *Originating Summons* dated *22<sup>nd</sup> January 2018* brought under *Section 22* of the *Limitation of Actions Act Cap 22 Laws of Kenya* and *Order 37 Rule 6(1)* of the *Civil Procedure Rules Cap 21 Laws of Kenya* and all enabling provisions of law and sought for the following orders.

- 1. That the Applicant be granted leave to file suit against Defendant herein out of time.**
- 2. That the costs of this application be in the cause.**

The application is supported by the following grounds:-

- a. That the statutory period to file a claim against the Defendant has lapsed 12 years.**
- b. That the intended claim is genuine and has high probability of success.**
- c. That the claim involves recovery of and/or compensation to the Plaintiff by Defendant for breach of Sale Agreement dated 1<sup>st</sup> March 1999.**
- d. That the Applicant was precluded from filing the claim on time due to mental disability causing the Applicant to be treated at Mathari National and Referral Hospital.**
- e. That no prejudice will be occasioned to the Defendant if claim is instituted since the Defendant will be accorded an opportunity to defend himself.**

The application is also supported by the *Affidavit* of *J W N*, the Applicant who averred that she purchased land parcel *No.Ithanga Phase 11/431* measuring *1.63 Hectares* from the Defendant on *1<sup>st</sup> March 1999* as per the attached *Sale Agreement JWN*. The purchase price was *Kshs.158,000/= for the whole land and by 13<sup>th</sup> April 2004, she had paid Kshs.128,000/=* as per *annexture JWN-1*. However the Respondent refused to execute the transfer form nor attend the *Land Control Board* to commence the transfer process.

Further that in the year **2005**, the Applicant lost her son **F N** and she became ill and depressed and had to seek treatment at **Mathari Mental Hospital** where she had been treated earlier for mental illness in **1975**. She attached a treatment note from **Mathari Mental Hospital** marked **JWN-3**. However in **August 2017**, the Doctors at **Mathari Hospital** assessed her and found her stable and thus the filing of this application. That she has learnt that the Defendant has now transferred this land to his son **Patrick Kamau Kamande** on **2<sup>nd</sup> October 2017** in complete breach of the said **Sale Agreement**.

Further, that the time for filing the cause of action has since lapsed and thus the reason why she has filed this application to be allowed to file suit out of time. It was her contention that no party shall be prejudiced if the suit is filed out of time since the intended Defendant will be accorded a chance to raise their defence. Further that she strongly belief that she has a strong case with high chances of success.

The said **Originating Summons** was served on the Defendant herein **Julius Kamande Kabiru** on **6<sup>th</sup> April 2018** as per the **Affidavit of Service** of **Amos Chege Kanoga** filed on **16<sup>th</sup> May 2018** but he failed to file any response. The **Originating Summons** is therefore unopposed. Even if the **Originating Summons** is unopposed, is it merited?

The application herein was canvassed by way of written submissions which this Court has carefully considered. The Court has also considered the pleadings in general, the annexures thereto, the relevant provisions of law and the cited authorities and the Court makes the following findings:-

The **Originating Summons** herein is anchored under **Section 22** of the **Limitation of Actions Act Cap 22 Laws of Kenya**, which provides:-

**“If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired”.**

It is evident from the above provisions of law that an action may be brought after expiry of the prescribed period if the person to whom the right of action accrues is under a **disability**. Further **Section 2(b)** of the said Act provides that:-

**“For the purpose of this Act,**

**a. ....**

**b. A person is under disability while he is a minor or of unsound mind and without prejudice to the generality of the foregoing a person is conclusively presumed to be of unsound mind while he is determined in pursuant of some written law authorizing the detention of persons of unsound mind or even criminal lunatics”.**

The Applicant has averred that she was suffering from depression from the **year 2005**, when she lost her **son F N**. It was her contention that she remained on treatment until the **year 2017** when the **Doctors** at **Mathare Mental Hospital** found her stable. The **Doctors’ Assessment Report** was attached to the instant **Originating Summons** as **JNW-4**.

As was held in the case of **Ranjit Singh Lochab & Another...Vs...Mumbu Holdings Ltd & Another(2015)eKLR**:-

**“It might well be time and perfectly expected for parents to go into depression and even other sicknesses more so in situations like this case due to the loss of their only child”.**

The Applicant has alleged that her cause of delay was disability due to depression. The doctors have indeed confirmed that the Applicant was undergoing treatment at **Mathari Mental Hospital** but she is now stable.

The Applicant has alleged that the intended Defendant breached a **Sale Agreement** and she attached copies of acknowledgement receipts of receipt of part of the purchase price by the said Defendant. The Applicant has a reasonable cause of action.

Having now carefully considered the **Originating Summons** in totality, the Court finds that the circumstances herein tilt towards grant of the orders sought.

The Court is also alive to the fact that this decision is subject to challenge during the hearing of Intended suit and the Intended Defendant will have an opportunity to ventilate his case during the hearing of the intended suit. See the case of **Mary Wambui Kabuga...Vs...Kenya Bus Services Ltd, Civil Appeal No.195 of 1995**, where the Court held that:-

**“It must be remembered that even when the Judge grants leave, there is nothing final about it. It is merely provisional. The Defendant will have every opportunity of challenging facts and the law afterwards at the trial. The Judge who tries this case is the one who must rule finally whether the Plaintiff has satisfied the conditions of overcoming the time bar. He is not in the least bound by the provisional view expressed by the Judge in Chambers who gave leave”.**

Equally, the Court finds that the grant of this leave is not final and the Defendant will have an opportunity to challenge the facts at the trial.

For the above reasons, the Court finds that the Applicant's **Originating Summons** dated **22<sup>nd</sup> January 2018** is merited and it is allowed entirely in terms of prayer No.1. The intended suit to be filed within a period of 30 days from the date hereof. Further costs shall be in the cause.

It is so ordered.

**Dated, Signed and Delivered at Thika this 23<sup>rd</sup> day of November 2018.**

**L. GACHERU**

**JUDGE**

**23/11/2018**

In the presence of

No appearance for Applicant

No appearance for Defendant

Lucy - Court clerk

**Court** – Ruling read in open court in the absence of the parties.

**L. GACHERU**

**JUDGE**

**23/11/2018**