



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. SUIT NO. 144 OF 2017

KAMAU NJUGUNAAPPLICANT

VERSUS

KIAMBU COUNTY GOVERNMENT..... RESPONDENT

RULING

What I have before me is the applicant's application brought by way of Originating Motion dated 27th July, 2017 in which the applicant is seeking leave to file a suit against the respondent out of time. The application is supported by the applicant's affidavit sworn on 27th July, 2017. The applicant's case as set out in the application and the affidavit in support thereof is as follows. The applicant is the administrator of the estate of one, Njuguna Muhuhu, deceased (hereinafter referred to only as "the deceased"). The deceased was at all material times registered as the proprietor of all that parcel of land known as Gatamaiyu/Kagwe/T.144 measuring 0.25 acres (hereinafter referred to as "the suit property"). On unknown date, the respondent unlawfully and without any justification excised a portion of the suit property measuring 0.1 acres which was subsequently assigned land reference Gatamaiyu/Kagwe/T.248 (hereinafter referred to as "Plot No.T.248"). The respondent thereafter allocated Plot No. T.248 to a third party. The deceased did not learn of the unlawful excision of the suit property and creation of Plot No. T.248 until 1980 when he conducted a search on the suit property. Following this discovery, the deceased unsuccessfully engaged the respondent in a bid to recover the excised land. After the death of the deceased, the applicant sought the assistance of the Kenya Anti-Corruption Commission in the matter which found that the excision was illegal and recommended that he be compensated. The respondent failed to implement the said recommendation. After exhausting all other means in trying to recover Plot No. T. 248 that was excised from the suit property, the applicant filed ELC Suit No. 294 of 2008 on 18th June 2008 which he withdrew on 15th May, 2017 since he had not taken out letters of administration as at the time of filing the suit. The applicant has contended that the delay in the filing of a suit against the respondent was occasioned by factors beyond his control. He has urged the court to allow the application in the interest of justice.

The application was served upon the respondent which opposed the same through grounds of position dated 6th February, 2018. The respondent contended that the application had been brought after inordinate delay and that a court of equity cannot assist the indolent. The application was argued on 26th February, 2018 when Mr. Muchai appeared for the applicant while Ms. Mbugua appeared for the respondent. In his submission in support of the application, the applicant's advocate relied entirely on the applicant's affidavit in support of the application. He submitted that the court has power under sections 3,3A and 63(e) of the Civil Procedure Rules to extend time for filing a suit. In her submissions in reply, Ms. Mbugua for the respondent reiterated that the application had been brought after inordinate delay taking into account the fact that the cause of action arose in 1980 when the deceased learnt of the excision of the suit property.

Determination:

I have considered the application together with the affidavit filed in support thereof. I have also considered the submissions of counsel. The issue for determination is whether the court should extend time for the applicant to file the intended suit against the respondent. The applicant's application was brought under sections 3, 3A and 63(e) of the Civil Procedure Act. I am of the view that these provisions of the law are irrelevant to the issue before the court. The conditions which must be satisfied before a court can grant extension of time to file suit out of time are spelt out in section 27 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya 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 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 Limitation of Action 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.”

In interpreting section 27 of the Limitation of Actions Act, the Court of Appeal in Mary Osundwa v Nzoia Sugar Company Limited KSM CA No. 244 of 2000 stated as follows:

“This section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. The action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. This section does not give jurisdiction to the Court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort”

This decision was cited with approval in Willis Onditi Odhiambo v Gateway Insurance Co. Ltd KSM CA No. 37 of 2013. From the material before me, the applicant’s cause of action against the respondent is for recovery of land. This cause of action in respect of which an extension of time has been sought does not fall within the ambit of section 27 (1) of the Limitation of Actions Act. The court therefore lacks jurisdiction to grant the orders sought.

For the forgoing reasons, I find no merit in the Originating Summons dated 27th July, 2017. The same is dismissed accordingly with each party bearing its own costs.

Delivered and Dated at Nairobi this 22nd day of November, 2018

S. OKONGÓ

JUDGE

Ruling read in open court in the presence of:

No appearance for the Applicant

No appearance for the Respondent

John - Court Assistant