



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 8 OF 2016**

**AMOS NYAGA KANGANGI.....APPLICANT**

**VERSUS**

**MURANGI GAKINYA.....1<sup>ST</sup> RESPONDENT**

**HARISON GICHIMU MWANGI.....2<sup>ND</sup> RESPONDENT**

**ROBERT J. THUO A. NYAGA.....3<sup>RD</sup> RESPONDENT**

**DIOCESE OF MERU REGISTERED TRUSTEES.....4<sup>TH</sup> RESPONDENT**

**MWENENDEGA ENTERPRISES LIMITED.....5<sup>TH</sup> RESPONDENT**

**AGNES WAWIRA IRERI.....6<sup>TH</sup> RESPONDENT**

**MONICA GATAKAA KIRUSA.....7<sup>TH</sup> RESPONDENT**

**GILBERT GATAKAA KIRUSA.....8<sup>TH</sup> RESPONDENT**

**KOMOTHO C/O KAMWIRE.....9<sup>TH</sup> RESPONDENT**

**WILSON WACHIRA MUGO.....10<sup>TH</sup> RESPONDENT**

**JULIUS MAINA KAMOTHO.....11<sup>TH</sup> RESPONDENT**

**JULIUS MURIUKI WAITHAKA.....12<sup>TH</sup> RESPONDENT**

**TERESIA RUGURU MURIUKI.....13<sup>TH</sup> RESPONDENT**

**JOHN M.N. NDERI.....14<sup>TH</sup> RESPONDENT**

**JOSHUA NDUNGU KINGORI.....15<sup>TH</sup> RESPONDENT**

**HARRISON WAIHENYA MUTHONI.....16<sup>TH</sup> RESPONDENT**

**JANE KABURA THUO.....17<sup>TH</sup> RESPONDENT**

ABEL MURIITHI WAMUTI.....18<sup>TH</sup> RESPONDENT

JOSEPHINE NJERI WAMUTI.....19<sup>TH</sup> RESPONDENT

PHILIP WAMUTI MUCHANE.....20<sup>TH</sup> RESPONDENT

ANTHONY MBIRI NDWIGA.....21<sup>ST</sup> RESPONDENT

PATRICK MURIITHI NJOGU.....22<sup>ND</sup> RESPONDENT

### RULING

By his Notice of Motion dated 19th December 2016 and brought under **Section 22 of the Limitation of Actions Act, Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 51 of the Civil Procedure Rules**, the Ex-parte applicant seeks the main order that he be allowed to file suit against the respondents out of time.

The application is based on the grounds set out therein and supported by the Ex-parte applicant's affidavit. The gravamen of the application is that the applicant has since 1961 been the registered proprietor of the land parcel known as GATURI/GITHIMU/633 (the suit land) and still holds the original title thereto although it is not part of his annexures notwithstanding that he has referred to it as annexure **ANK 5**. That until 2003, he was living in Mombasa and had not left anyone to look after his land. Upon his return from Mombasa in 2003, he discovered that in 1973, the 1st respondent had fraudulently transferred the suit land to the 2nd and 3rd respondents who further sub-divided it into GATURI/GITHIMU/2349 and 2350. The 2nd respondent transferred land parcel No. GATURI/GITHIMU/2350 to the 4th respondent who further sub-divided it into fifteen (15) portions being GATURI/GITHIMU/8579 to 8593 and which he transferred to the 5th, 6th, 7th and 8th respondents. The 3rd respondent on the other hand sub-divided land parcel No. GATURI/GITHIMU/2349 into thirteen (13) portions being GATURI/GITHIMU/2843 to 2855 which he transferred to the 9th to 22nd respondents. He started following up the fraudulent transfers of the suit land to the respondents with the Government offices in the hope that it would revert back to him. However, due to financial constrains, he could not move to Court immediately as he was financially disabled and was depending on well wishers. He therefore seeks leave to file the suit out of time since it is now 13 years from the time he learnt about the illegal transfers of the suit land. Annexed to his supporting affidavit are the Green Cards and Certificates of search in respect to the fraudulent subdivisions transferred to the respondents and although in his affidavit he depones that he still holds the original title deed which is annexure **ANK 5**, no such title deed was annexed thereto.

The application was canvassed by **MR. MACHARIA** advocate who relied on the supporting affidavit and the grounds on the face of the same.

I have considered the application which is premised under **Section 22 of the Limitation of Actions Act**. That provision provides as follows:-

***“If, on the date when a right of action occurs 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 die, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:***

***provided that –***

----- . “

It is clear from the applicant's supporting affidavit that although the suit land was first fraudulently

transferred by the 1st respondent to the 2nd respondent and 3rd respondent in 1973, he only discovered this fraud in 2003 upon his return from Mombasa. Therefore, under **Section 26 of the Limitation of Action Act**, the period of limitation would not begin to run until the fraud was discovered which was in 2003. Under **Section 7 of the Limitation of Actions Act**, a suit to recover land may not be brought after the end of twelve years. The combined effects of **Sections 7 and 26 of the Limitation of Actions Act** is that the applicant had upto 2015 to file this suit. Unfortunately for him, by the time he filed this application in December 2016, he was already one year out of time hence this application for leave.

**Section 22 of the Limitation of Actions Act** would still give him another window of six (6) years if he can demonstrate that he was under a disability. He has deponed that he was under a disability in that he had no finances to move to Court soon after discovering that the suit land had been fraudulently transferred to the respondents. The disability he refers to is financial disability. In paragraph eight (8) (iv) of his supporting affidavit, he has deponed as follows:-

***“That due to financial constraints, I was not able to move to Court immediately and institute the suit. I was financially disabled”***

There is no doubt that lack of finances can be a serious disability in this country especially in the rural areas. However, the disability envisaged under **Section 22 of the Limitation of Action Act** is defined in **Section 2 (2) (b)** of the same Act as follows:-

**“a person is under a 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 detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics”.** Emphasis added.

The disability relied upon by the applicant is financial disability and while I sympathize with his predicament, the law does not allow extension of time on the ground of financial disability. Indeed not even physical disability. It has to be where the applicant is either a minor or of unsound mind as provided for under **Section 2 (2) (b) of the Limitation of Actions Act**. This Notice of Motion must therefore collapse.

Having said so, it is also my view that where a party is under a disability as provided for under **Section 2 (2) (b) of the Limitation of Actions Act**, then he would not need leave of the Court to file any action and the other party can only raise it as a Preliminary issue at the trial. The same situation would obtain where the cause of action is founded on fraud or mistake under **Section 26 of the Limitation of Actions Act**. It would appear to me that in cases where a party was under a disability or where there is fraud or mistake under **Sections 22 or 26 of the Limitation of Actions Act**, an application for leave would not be necessary. Instead, those provisions allow a party to file a suit notwithstanding the expiry of the limitation period so long as the action falls within those provisions. The other party can then take up the issues of limitation in the trial. That is why **Section 28 of the Limitation of Actions Act** only talks of leave with respect to cases falling under **Section 27** of the same Act which deal with cases of ignorance of material facts in actions for negligence, nuisance or breach of duty.

Ultimately therefore, and with profound sympathy for the applicant, the Notice of Motion dated 19th December 2016 stands dismissed.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**

Ruling dated, delivered and signed in open Court this 3<sup>rd</sup> day of March 2017

Mr. Macharia holding brief for Ms Muthike for the Applicant present.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> MARCH, 2017**