



**REPUBLIC OF KENYA**

**IN THE E.L.C COURT OF KENYA AT EMBU**

**E.L.C. MISC CIVIL APPLICATION NO. 6 OF 2016**

**EFUREITH IRIMA MUGO** (*Suing in her capacity as a*

*Beneficiary and legal representative of the Estate of JEREMIAH NGIRI*

**KIBATI alias JEREMIAH NGIRI (Deceased).....APPLICANT**

**RULING**

1. The applicant herein is the administrator of the estate of the late Jeremiah Ngiri Kibati alias Jeremiah Ngiri who reportedly passed away on 8<sup>th</sup> September, 1992.
2. The deceased is said to have been the owner of L.R No. MBETI/KIAMURINGA/173 located in Mbeere within Embu County.
3. The applicant states that upon being appointed the administrator of his late father's estate in 2013, he discovered that the said property had been fraudulently subdivided into L.R No. MBEERE/KIRIMA/2231 and 2232 and in the names of various third parties.
4. Upon failing to resolve the issue of the alleged fraudulent alienation of his late father's property, he decided to pursue legal means against the current registered owners.
5. Consequently, by an ex-parte Originating Summons dated and filed in court on 11<sup>th</sup> October, 2016 sections 27 and 28 of the Limitation of Actions Act and Order 37 Rule 6 of the Civil Procedure Rules, he sought the following to orders:
  - a) That the applicant be granted leave to file suit out of time against Josiah Wambua Silas, Peterson Wambugu, Kahariri Rubi, Douglas Kirinyu Kathenge, Mwangi Muthini and Ibara Mwaniki.
  - b) That the costs of the application be provided for.
6. The said Originating Summons is supported by the affidavit of the applicant sworn on 11<sup>th</sup> October 2016 to which he has attached several exhibits giving a lengthy history of the land in question.
7. The said Originating Summons was listed for hearing ex-parte before me on 15<sup>th</sup> February 2017 when it was argued by the applicant's advocate and the ruling set for 2<sup>nd</sup> March 2017.
8. It is clear from the face of the originating summons that it is brought under **sections 27 and 28 of the Limitation of Actions Act (Cap 22)** as the substantive law. The material provisions of section 27 provide as follows:

## Section 27

**“(1) 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 of written law 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 to 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.**

**(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –**

- a) either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and**
- b) in either case, was a date not earlier than one year before the date on which the action was brought”**

9. The relevant parts of **section 28** of the Act provide as follows:

**28 (1) An application for the leave of court for the purposes of section 27 shall be made ex-parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of relevant action.**

**(2) where such an application is made before the commencement of the relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or no behalf of the plaintiff, it appears to the court that, if such action were brought forthwith and the like evidence were adduced in the action, that evidence would in the absence of any evidence to the contrary, be sufficient –**

- a) To establish that cause of action, apart from any defence under section 4(2) and**
- b) Fulfil the requirements of section 27 (2) in relation to that cause of action”**

10. The relevant parts of section 4(2) of the Limitation of Actions Act referred to hereinbefore sets the limitation period for claims in tort as follows:

**(2) 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”**

11. The main issue to be considered in this application is whether the applicant’s case meets the requirements of **sections 27 and 28** of the **Limitation of Actions Act**. **Section 28** is very clear that the court shall grant leave if, **and only if**, the applicant meets the requirements of section 27 of the Act.

12. So does the applicant meet the requirements of section 27 of the Act? It is clear from the provisions

of section 27 of the Act, that the section only confers upon the court the power to consider applications for leave to extend time for filing suit only in limited cases of tortious liability where the action is for **damages** for negligence, nuisance or breach of duty in respect of **personal injuries** to any person. That is why that section makes reference to the three year limitation period for instituting actions founded on tort and the provisions of section 4 (2) which prescribe the limitation period for tort.

13. It is evident from the Originating Summons dated 11<sup>th</sup> October 2017 that the applicant's claim is based upon land for which a separate limitation period of twelve years is prescribed under section seven (7) of the Limitation of Actions Act. There is no provision under the Act for the extension of the limitation period prescribed under section 7 of the Act or any other section of the Act other than section 4(2) on tort. It would appear that the legislature did not intend to provide for such extension in respect of other causes of action other than tortious liability of negligence, nuisance and breach of statutory duty which result into personal injuries.

14. The Court of Appeal of Kenya has had occasion to consider the interpretation of section 27 of the Act in a number of decided cases. In the case of *Mary Osundwa v. Nzoia Sugar Company Ltd 2002 eKLR*, the trial judge had granted an order for extension of time by consent of the parties in a case falling outside the provision of section 27 (1) of the Act. The Court of Appeal, in allowing the appeal, held that:

***“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 tort 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. The section does not give jurisdiction to extend time for filing suit in cases involving contract or any other cause of action than those in tort. Accordingly, Osemo J had no jurisdiction to extend time as he purported to do on 28<sup>th</sup> May, 1991. That the order was by consent can neither be here nor there; the parties could not confer jurisdiction on the judge by their consent.”***

15. The Court of Appeal in the more recent case of *Willis Onditi Odhiambo v. Gateway Insurance Co. Ltd (2014) eKLR* cited with approval the case of *Margaret Osundwa (supra)*. In the latter case, the court had no hesitation in overturning the leave which had been granted by the High Court to the decree holder to commence execution proceedings out of the limitation period provided for under section 4(4) of the Limitation of Actions Act.

16. Similarly, in the case of *Divecon Limited vs. Samani [1995 – 1998] EA 48*, the Court of Appeal overturned the leave to file suit out of time in a matter involving contract. The Court of Appeal stated thus:

***“...to us, the meaning of the wording of section 4(1)...is clear beyond my doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for bringing or the action.”***

***...a perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear provisions, it would be unacceptable to imply as the learned Judge of the superior court did, that “the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked.”***

17. In view of the foregoing, therefore, I am of the view, and I so hold, that this court has no jurisdiction to grant any extension of time to the applicant to file suit out of the period prescribed by parliament under section 7 of the Limitation of Actions Act.

18. The consequence of the above holding on that the Originating Summons dated 11<sup>th</sup> October 2016 is hereby dismissed with no order as to costs.

19. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU**

this **2nd** day of **MARCH 2017**

In the presence of Ms Fatuma holding brief for Ms Njeru for the Applicant.

Court clerk Njue.

**Y.M. ANGIMA**

**JUDGE**

**02.03.17**