



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC CIVIL APPLICATION No. 250 OF 2017

IN THE MATTER OF LIMITATION OF ACTIONS

ACT CAP 22 LAWS OF KENYA

JOSEPH MUTURI NGUGI Suing as the legal representative of the Estate of
MOSES NGUGI KAMAU (Deceased).....**APPLICANT/PLAINTIFF**

EX PARTE ORIGINATING SUMMONS

(Under section 27 and 28 of the limitation of Actions Act Cap 22, Section 3A of the Civil Procedure Act Cap 21, Order XXXVII Rules 6(1) of the Civil Procedure Rules)

R U L I N G

Vide the applicant's application by way of an Ex-parte Originating summons dated the 24th March 2016, he seeks leave to file his intended suit against one Francis Njoroge Muigai, the legal representative of the Estate of Ayub Rimui Muchina, The Director of surveys, Director of Land Adjudication and Settlement and the Hon. Attorney General in regard to LR No. NYANDARUA/ORAIMUTI/95 and 98, out of time.

The said application is premised on the grounds that:

- i. That both **MOSES NGUGI KAMAU** and **AYUB RIMUI MUCHINA** were deceased.
- ii. That **MOSES NGUGI KAMAU** was in the year 1965 allocated LR No. NYANDARUA/ORAIMUTI/98 which land parcel measured 52 acres.
- iii. That **AYUB RIMUI MUCHINA** subsequently acquired LR No. NYANDARUA/ORAIMUTI/95 measuring 51 acres which boarded parcel No. 98 and in the process of obtaining a title deed for the same, a portion of approximately 18 acres was hived from parcel No. 98 and attached to parcel No. 95
- iv. That **MOSES NGUGI KAMAU** died on the 2/7/2011 while pursuing the claim with the ministry of lands whereas **AYUB RIMUI MUCHINA** died in the year 2006 before the dispute could be resolved.
- v. That the cause of action arose on the 20/2/1987 when **AYUB RIMUI MUCHINA** acquired a title deed for parcel No. 95 for 70 acres instead of 51 acres.
- vi. That the identity of the legal representative of the Estate of **AYUB RIMUI MUCHINA** was only known in October 2015 when he stated executing a certificate of confirmation of Grant in respect of the estate.
- vii. That **MOSES NGUGI KAMAU** had been ailing for a long time prior to his demise.
- viii. That the leave granted is mandatory to enable the applicant to commence the intended suit.

When the plaintiff's Counsel appeared before me on the 16th March 2017, he relied on the grounds herein enumerated which were supported by the sworn affidavit of Joseph Muturi Ngugi Suing as the legal representative of the Estate of Moses Ngugi Kamau (Deceased) and dated the 24th March 2016.

I have looked at the application with a lot of anxiety having noted that the cause of action arose in 1987. In essence thereof, the applicant is applying for **leave to extend the period within which the suit could be filed** 30 years after the cause of action arose.

I also noted that the issue here is not about a land boundary dispute, but rather a dispute where one party alleges that the other party through fraud colluded with the employees of the Ministry of Lands and was allocated more land than they ought to have been allocated.

Having regard to the provisions of the Limitations of Actions Act under which this application is premised, suffice to say that this case does not fall within the ambit of the matters listed therein that ought to be considered for the sought for, extension of time.

Sections 27 of the Limitation of Actions Act provides as follows:

“27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

(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 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.

(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.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”

In **Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000**, the Court of Appeal held:

“Section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.”

The above provisions of the law shows that extension of time only applies to claims made in tort, and even in tort, the claims must be in respect of claims for personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law).

In the case of **Willis Onditi Odhiambo v Gateway Insurance Co Ltd Civil Appeal NO. 37 OF 2013 [2014] eKLR**, The Court of Appeal stated:

“Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort.

The section clearly does not give jurisdiction to the court to extend time for filing suit in cases involving execution of decrees. In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence. Here, the extension was sought to enforce a judgment and/or decree. Time within which to lodge such action cannot be extended under the provisions of Section 27 of the Limitation of Actions Act.”

Similarly, in the case of **Director Ltd vs. Samani [1995 – 1998] 1 EA 48** at page 54, the court ruled:

“No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, in 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 based in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.

Sections 27 and 28 of the Limitations of Actions Act are therefore not applicable in the present case because the cause of action is not based on negligence, nuisance or breach of duty. These sections are only applicable on actions based negligence.

From the above decisions, it is clear that extension of time for filing of suits out of the stipulated statutory period applies only in claims made in tort and even in such claims, they must be for personal injuries arising from negligence, nuisance or breach of duty (whether such duty exists by virtue of a contract or of a written law or independently of a contract or written law).

The above matter, whose delay is so inordinate does not fall within the spectrum of the above conditions.

This court lacks jurisdiction to entertain the application as the case is statutory barred. This application is hereby dismissed.

Dated and delivered at Nyahururu this 30th day of May 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE