



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**MISC APPLICATION NO. 386 OF 2017**

**FRANCIS MUGO MWANGI.....APPLICANT**

**VERSUS**

**DAVID KAMAU GACHAGO.....DEFENDANT**

**RULING**

***(Application for extension of time to file suit said to be based on contract; no power given to the courts to extend the limitation period for cases under contract; application dismissed)***

1. This is an Originating Summons said to be brought inter alia pursuant to the provisions of Section 4 of the Limitation of Actions Act, Cap 22, Laws of Kenya, and Order 37 Rule 6 of the Civil Procedure Rules, 2010. The application seeks orders that the applicant be granted leave to file suit against the respondent out of time. The application is supported by the affidavit of the applicant. He has deposed inter alia that he is the duly appointed attorney of one Catherine Waithera Karanja. The said Ms. Karanja entered into an agreement for the purchase of land on 17 February 2010 whereby she purchased from David Kamau Gachago, the named respondent, the land parcel Nakuru Municipality Block 1/1205 (Langalanga). It is said that the purchaser paid the vendor certain sums of money, leaving a balance of Kshs. 800,000/=, which sum the vendor has refused to collect, nor surrender the title documents. He has deposed that he had filed the suit Nakuru ELC No. 320 of 2015 which was struck out as it was filed before he registered his power of attorney. He has averred that at the moment he is outside the limitation period hence this application.

2. I have considered the application together with the written submissions of counsel for the applicant. It is the belief of the applicant that he is out of time based on the provisions of Section 4 of the Limitation of Actions Act, which is inter alia drawn as follows :-

*4. Actions of contract and tort and certain other actions*

*(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -*

*(a) actions founded on contract;*

*(b) actions to enforce a recognizance;*

*(c) actions to enforce an award;*

*(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of of penalty or forfeiture;*

*(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

3. It seems to me as if the applicant believes that her action is based on contract, thus Section 4 is applicable. I am not too sure whether the applicant's cause is an action under contract, which would make it fall under Section 4 of the Limitation of Actions Act, or whether it is an action for recovery of land which would make it fall under Section 7 of the Limitation of Actions Act, the latter of which provides that the limitation period for such action is 12 years, for it does appear to me that what the applicant wants is to file an action for recovery of land.

4. Be as it may, in so far as the application seeks for extension of time under Section 4 of the Limitation of Actions Act, this court has no jurisdiction to extend the limitation period for actions under contract. Section 27 of the Limitation of Actions Act, only allows extension of time for actions based on tort and not contract. The said provision of the law is drawn as follows :-

S. 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 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.

5. It will be seen that Section 27 only permits for an extension of time where the action is based on tort, that is, under Section 4 (2) of the Limitation of Actions Act. It follows that in so far as this application is based on a prayer to extend time for filing suit, based on Section 4 (1) of the Limitation of Actions Act, this court has no powers to do so. That indeed was held to be the position in the case of ***Divecon Contractors Limited vs Samani (1995-1998) 1 EA 48***, cited in the case of ***Denis Ksang Ripko vs Kenya Commercial Bank Limited, Kisumu ELRC Case Misc. Application No. 12 of 2015 (2016) eKLR***.

6. I leave it to the applicant to see whether there are other provisions of law under which he may seek relief, or consider whether his suit is still within time under Section 7 of the Limitation of Actions Act. That however is a decision that I leave to the applicant to make, and I will not comment on the same within the context of this application, for it is the applicant who best knows the nature of his claim and the cause of action thereof.

7. For the above reasons, the application is dismissed but I make no orders as to costs as strictly speaking, despite there being a named respondent, the application is an ex parte application, as provided for under Order 37 Rule 6.

**Dated, signed and delivered in open court at Nakuru this 22<sup>ND</sup> day of November 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

**Mr. Ngotho holding brief for M/S Henia Anzala & Co. Advocates for the applicant.**

**Court Assistant: Carlton Toroitich**