

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC MISC. APPL. NO. 5 OF 2023**

**KENNETH                      SISMWO                      SAIKWO-----**  
**APPLICANT**

**VERSUS**

**RICHARD                      SOMEK                      SANDUI-----1<sup>ST</sup>**  
**RESPONDENT**  
**SIMON                      B.                      NDIEMA-----2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

**1.** Before me is an *Ex Parte* Originating Summons dated **04/09/2023**. It was brought by the Applicant under **Sections 27** and **28** of the Limitation of Actions Act, **Order 37 Rule 6** of the Civil Procedure Rules, 2010 and what he termed as “all enabling provisions of the Law.” It sought the following prayers:-

- 1. That leave be granted to the Applicant Kenneth Sismwo Saikwo to file suit against Richard Somek Sandu and Simon B. Ndiema after the limitation period.**
- 2. That the costs of this Application abide the results of the intended.**

2. The Application was based on a number of grounds which were that all that parcel of land known as Land Reference Number **6991** (Original Number **6440/2**) being the portion comprised in a Grant dated Twentieth day of December One Thousand Nine Hundred and Twenty-Four and registered as Title Number **I.R. 1122** and Land Reference Number **6991/2** being the portion of land comprised in the Certificate of Title registered as No. **I.R. 3013** were on **23<sup>rd</sup>** day of **December 1999** registered in the names of Ndiema Cherugut, Wilson Kutere, Stephen Baron Sisimwo, Zakayo Chemining'wa, Samson Kachiwai, Charles Naibei, Keptei, Jackoson Tengwer, Lawrence Langat and Simon Kitoo as tenants in common in equal shares of **68.7 acres**; the portion of Stephen Baron Sisimwo was reduced to **42.5 acres** and which portion he occupied and utilized until his demise on **12/06/1998** and which his Estate has been utilising to date; the said portion was never sold to any third party during the lifetime of the late Stephen Baron

Sisimwo nor by his beneficiaries after his demise; in **2002 High Court Succession Cause No. 89 of 2002** was filed to distribute his Estate; a Grant of Letter of Administration was subsequently issued to David Sisimwo Stephen and Sisimwo Silas in the succession cause and confirmed on **09/05/2013**; by it the whole portion belonging to the late Stephen Baron Sisimwo was distributed to Kenneth Saikwa Sisimwo; then a surrender of the leasehold was made to the government and conversion into freehold interests under the national titling program resulted into the issuance of a title deed now referred to as **Saboti/Kiboroo Block 7 (Kipsagam Farm)/40**; the title deed erroneously indicated that the Applicant was entitled to own **34.97 hectares (85.7 acres)** instead of **42.5 acres**; on **17/02/2023** the Applicant received a letter from the County Surveyor -Trans Nzoia indicating that there was to be a boundary confirmation of the land **Saboti/Kiboroo Block 7 (Kipsagam Farm)/40**

on **24/02/2023**; on **27/02/2022** (*sic*) the Applicant wrote back objecting to the intended boundary confirmation exercise until his title deed for parcel No. **40** (above) was rectified to read **42.5 acres**; it was during the time that the Applicant obtained a copy of the map of the said Block which indicated that his parcel of land No. **40** (above) was in fact less than **42.5 acres** and three land parcels known as **Saboti/Kiboroa Block 7 (Kipsagam Farm)/37, 38** and **39** had been introduced into the portion meant for the late Stephen Baron Sisimwo and subsequently the Applicant herein; the said parcels have now been registered in the names of Richard Somek Sandui and Simon B. Ndiema; the aforesaid registration has aggrieved the Applicant who has confirmed that it took place on **24/05/2017** and he wishes to make a claim of fraud, negligence and/or mistake; and the delay in filing the suit was because the Applicant was totally unaware

of the impugned registration until he was notified by the surveyor of the boundary confirmation exercise.

3. The Application was supported by the Affidavit of Kenneth Sisimwo Saikwo sworn on **04/09/2023**. It reiterated most of the contents of the grounds in support of the application save that the deponent added that he had the true copy of the title to the suit land, which copy he annexed and marked as **KSS-1**. That he had the copy of the Certificate of Confirmation of Grant, dated **09/05/2013** and a copy of the title deed to **Saboti/Kiboroa Block 7 (Kipsagam Farm)/40** both of which he annexed as **KSS-2** and **KSS-3**. He annexed as **KSS-4** the copy of the letter dated **17/02/2023** and as **KSS-5** a copy of his letter dated **27/02/2023** containing his objection to the intended confirmation of boundaries. He annexed as **KSS-6** a copy of the Registry Index Map showing the addition parcel numbers **Saboti/Kiboroa Block 7 (Kipsagam Farm)/37, 38 and 39** and as **KSS-7(a)**

and **(b)** copies of the title deeds for on Richard Somek Sandui and Simon B. Ndiema.

4. As at the time of preparing the ruling, the Applicant had not filed any submissions although this Court directed him on **13/12/2023** to file them by **15/12/2023**. Nevertheless, the Court now proceeds to determine the Application on merits since submissions only serve the purpose of passing over the view of the Court on the merits of a party's or the demerits of the adverse party's case.

#### **Analysis and Determination**

5. I have considered the Application, the law and facts herein. I am of the view that the issue herein is a simple one: whether the applicant has given satisfactory reasons for leave to file suit in respect of **Saboti/Kiboroo Block 7 (Kipsagam Farm)/37, 38, 39 and 40** and the original Land Reference Number **6991** (Original Number **6440/2**) comprised in a Grant dated **1994** and registered as Title Number **I.R. 1122**

and Land Reference Number **6991/2** being the portion of land comprised in the Certificate of Title registered as No. **I.R. 3013**. This Court now proceeds to use the simplest format of determining legal issues, which is by identifying the Issue(s), the law (Rule), Applying the law to the facts and drawing a Conclusion thereon (IRAC).

- 6.** The Issue is that the Applicant was, for reasons he has given in the facts he deponed to, unable to file suit in respect of the conversion and subdivision of the original parcel of land and the resultant parcels in time. He prays for leave to be granted to file the suit out of time.
- 7.** The Rule or law regarding extension of time to file suits in respect of various civil matters is **Section 26** of Limitation of Actions Act. The application of these provisions in relation to the instant Originating Summons becomes relevant when looked at vis-à-vis **Section 26** of the Act. **Section 26** provides that:

***“Where, in the case of an action for which a period of limitation is prescribed, either-***

***(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or  
(b) the right of action is concealed by the fraud of any such person as aforesaid; or  
(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”***

8. The Applicant cited **Sections 27 and 28** of the Limitation of Actions Act which, in the humble opinion of this Court, do not apply in the instant circumstances. First, **Section 28** which is titled, “**Application for leave of court under section 27**”, cannot be read in isolation of **Section 27** because it provides that it is in relation to the preceding Section. It stipulates that:

***“An application for the leave of the court for the purposes of section 27 of this Act 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 a relevant action.”***

- 9.** This calls for an interpretation of the import and Application of **Section 27** of the Act. I am of the view that the Section does not apply to extension of time to file matters relating to land. It relates to only those actions which are tortious and none other. The operative and guiding phrase is the opening line which is that "*Section 4(2) does not afford a defence to an action founded on tort where-*". I have underlined the root phrase of the entire phrase in order to lay emphasis on the aspect the provision addresses.
- 10.** Thus, in relation to fraud the provision above is inapplicable. As I move from this point it is worth advising that it is the duty of learned counsel in all cases to assist the Court in arriving at the proper interpretation of the law and not to mislead it or deliberately misinterpret the law. Therefore, counsel should endeavor to apply the proper rules of statutory interpretation before citing and purporting to rely on a specific provision of law.

**11. In Mary Osundwa V Nzoia Sugar Company Ltd**

**[2002] eKLR**, the Court of Appeal stated:

***“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”.***

**12.** I agree with this learned view which I am bound with. It means that the proper provision applicable is **Section 26** of the Limitation of Actions Act in case of a disability fraud. In regard to the provision the issue that arises immediately is whether it provides for the filing of an application for extension of time before institution of suit. The defining part of the provision is the one which reads that *“...the period of limitation does not begin to run until the plaintiff has discovered the fraud or the*

*mistake or could with reasonable diligence have discovered it:"*

**13.** The meaning of the phrase is that when fraud is committed or the action upon which the fraud is based is concealed or on a mistake time is frozen up to when the Plaintiff discovers the fraud or the mistake or diligence on his part could have made it easier for him/her to discover it. Essentially, the correct step for the Plaintiff to do when the three situations manifest is to move to Court as soon as possible but not later than the expiry of the period of limitation which then is unfrozen from the discovery or exercise of due diligence. There is no part for an application for leave of the Court to be sought or granted. Further, it means that when a party files the suit and the defendant challenges the competency of the suit on account of limitation of time, that is when the Court is supposed to determine whether indeed the suit was filed outside of the prescribed period. It is at that point that or any time

afterward that the Court is obligated to determine compliance of that requirement. And the burden lies on the Plaintiff to prove that the limitation of time did not catch up with the institution of the suit. Had the legislature intended that the provision be the basis of seeking leave of the court through an application of sorts, it would have expressly stated as much, just as it did in respect of **Section 27** of the Act. Thus, in my considered view, an application for leave to file a suit outside of the limitation of time based on the three instances explained above, that is to say, under **Section 26** of the Act, would be incompetent and a misconception for that matter.

- 14.** I am alive to the fact that the Applicant cited **Order 37 Rule 6** of the Civil Procedure Rules, when he brought the instant Application. The Rule reads as follows:-

***“(1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit.***

***(2) Any such application made after the filing of a suit shall be made ex parte in that suit.”***

**15.** Without a doubt the Rule applies to only the applications which are brought under **Section 27** of the Act. It cannot by any stretch of imagination be extended to extension of time in respect of other provisions in the Act other than **Section 27**. And since this Court has rendered itself on the application of the Section, it goes without saying that the Rule is irrelevant in so far as the Applicant sought to use it to seek extension of time on respect to an action based on fraud.

**16.** The evidence as to when the fraud was discovered or would have been discovered vis-à-vis the institution of the suit to challenge is a matter of evidence at the time of determination of a suit challenging it. It cannot be one for leave to file, or extension of time before institution of, the suit. The upshot is that the Application

is misconceived and not competent. I dismiss it with no order as to costs since it was an ex-parte one.

**17.** Orders accordingly.

**Ruling dated, signed and delivered at Kitale via Electronic Mail on this 27<sup>th</sup> day of February, 2024.**

A handwritten signature in black ink, appearing to read 'Fred Nyagaka', is written over a horizontal line. The signature is somewhat stylized and cursive.

**HON. DR. *IUR* FRED NYAGAKA  
JUDGE, ELC, KITALE.**