



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC MISC APPLICATION NO. 15 OF 2017

JOSPHAT MUCHIRI RUGANO.....1ST PLAINTIFF

BENSON NYAGA RUGANO.....2ND PLAINTIFF

(Both suing as the Legal Representatives of the Estate of Rugano Kuburia (Deceased))

VERSUS

**COUNTY GOVERNMENT OF KIRINYAGA.....1ST
DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....2ND
DEFENDANT**

RULING

By their Chamber Summons dated 29th June 2017, the Applicants seek the following orders:

- 1. That the Applicants be granted leave to file suit against the defendants out of time and the annexed draft plaint herein be deemed as filed.***
- 2. That the costs of this application be provided for.***

The application is based on the grounds set out therein and supported by the affidavit signed by both Applicants.

The Applicants case is that they are the children of the late **RUGANO KUBURIA** (the deceased) who died in 2000. They have now obtained a grant of letters of administration in respect of his Estate. Prior to his death, the deceased was the registered proprietor of land parcel No. KABARE/NYANGATI/780 (the suit land) which the County Government of Kirinyaga the (1st defendant herein) have tried to invade on the basis that the deceased had transferred it to them in 1999. The Applicants have been advised that the suit ought to have been filed within twelve (12) months from 1999 hence this application which is premised under **Section 28 of the Limitation of Actions Act** and **Sections 3 and 3A of the Civil Procedure Act**. For some reasons, the application has been served upon both defendants and the 2nd defendant has already filed a defence. Ordinarily, such an application is canvassed ex-parte and the defendant only learns about it when leave to file suit out of time is granted. But that is neither here nor there. Annexed to the application is a copy of the proposed plaint and verifying affidavit, a copy of the limited grant ad litem dated 1st July 2015 and a copy of the Green Card to the suit land.

When the application came up on 24th October 2017, **MR. MURIGU** advocate holding brief for **MR. KAHUTHU** advocate for the Applicants informed the Court that he would be relying on the documents filed.

I have considered the application together with the annexed documents.

Section 27 (1) and (2) of the Limitation of Actions Act upon which the application is founded states that:

“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 construction) 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” Emphasis added

Section 4 (2) of the Limitation of Actions Act provides as follows:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action occurred:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

It is clear from the provisions of **Section 27 of the Limitation of Actions Act** that the Court only has power to extend time for filing suits in cases of tort and where the action is for negligence, nuisance or a breach of duty **“in respect of personal injuries of any person”**. From the annexed copy of the plaint, it is clear that the Applicants seek to recover the suit land which, as per the copy of Green Card, was transferred to the 1st defendant on 20th July 1972. This is therefore a claim to recover land for which the limitation period is in fact twelve (12) years because **Section 7 of the Limitation of Actions Act** provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

It is therefore clear that extension of time can only be granted in cases falling under **Section 27 of the Law of Limitation Act**. This was considered by the Court of Appeal in the case of **MARY OSUNDWA**

VS NZOIA SUGAR COMPANY LTD 2002 e K.L.R where the Court 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”

That is the route that Courts in this country have consistently followed in many cases including WILLIS ONDITI ODHIAMBO VS GATEWAY INSURANCE CO. LTD C.A CIVIL APPEAL No. 37 of 2013 KISUMU (2014 e K.L.R).

The suit for which this application for leave is being sought does not fall within the ambit of the provisions of ***Section 27 of the Law of Limitation Act***. The application must therefore be rejected. Ideally, this should mark the end of my engagement with this matter.

However, though I am fully cognizant of the fact that I am not at this stage considering the merits or otherwise of the intended suit, I am struck by the fact that judging by the copy of the annexed plaint, the Applicants proposed suit appears to me to be over-ambitious if not rather far-fetched. I am emboldened to comment on it because even ***Section 28 (3) of the Limitation of Actions Act*** provides that the Court shall grant leave if, and only if, on evidence adduced by or on behalf of the plaintiff, it appears to the Court that if the like evidence would, in the absence of any evidence to the contrary, be sufficient to establish that cause of action. From the annexed plaint, the plaintiffs seek the cancellation of the title to the suit land so that the same reverts to the Estate of the deceased or in the alternative, the defendants pay for its current market value. The claim is based on a pleading that the 1st defendant registered the suit land in its names without paying compensation to the deceased. The copy of the Green Card however shows that the suit land was transferred to the 1st defendant’s predecessor the Kirinyaga County Council on 20th July 1972 as a gift. A gift is defined in ***BLACK’S LAW DICTIONARY 9TH EDITION*** as:

“The voluntary transfer of property to another without compensation”.

In those circumstances therefore, the Applicants claim for compensation for the value of the suit land sounds rather hollow and is not supported by their own evidence.

Having however considered the application on its merits, I find that it does not meet the requirements of ***Section 27 of the Limitation of Actions Act***. It is accordingly dismissed with no order as to costs.

B.N. OLAO

JUDGE

8TH DECEMBER, 2017

Ruling delivered, dated and signed in open Court this 8th day of December 2017 at Kerugoya

1st Plaintiff present

2nd Plaintiff present

Mr. Kahuthu for Plaintiffs absent

Mr. Gichia Court clerk present

B.N. OLAO

JUDGE

8TH DECEMBER, 2017