



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 635 OF 2015(O.S)

NJOROGE MWAURA.....1ST APPLICANT

JOSEPH KIMOLOLI KATOO.....2ND APPLICANT

MUASA MUTISO.....3RD APPLICANT

VERSUS

DAVID JOHN MUNYAE.....1ST RESPONDENT

DAVIS NYAMU NJOKA.....2ND RESPONDENT

GERALD MWAI WANJIRA.....3RD RESPONDENT

RUTH WANJIRU MUIRURI.....4TH RESPONDENT

DAVID KINYANJUI WAINAINA5TH RESPONDENT

SIMON KAMAU GATUHI.....6TH RESPONDENT

ANNA NDUNGE (sued as the administrator

of the estate of Wambua Musoiya).....7TH RESPONDENT

LUKA MUSEMBI NTHENGE.....8TH RESPONDENT

CAROLINE NDUKU.....9TH RESPONDENT

STELLAMARIS NGINA.....10TH RESPONDENT

NYORO KIILU.....11TH RESPONDENT

MAVUNO HALISI LIMITED.....12TH RESPONDENT

KAKUZI LIMITED.....13TH RESPONDENT

MURANG'S DISTRICT LAND REGISTRAR.....14TH RESPONDENT

RULING

Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya provides as follows:-

“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.”

Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya on the other hand provides that:

“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.”

Section 27(1) of the said Act provides as follows;

“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 a written law or independently of a contract or written law (emphasis mine) 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.**

Section 28(1) of the Limitation of Action Act provides that;

“An application for leave of the court for the purposes of section 27 shall be made ex parte, except in so far as the rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.”

What I have before me is the applicants' ex parte Originating Summons that was brought under section 27 and 28 of the Limitation of Actions Act aforesaid and Order 37 rule 6 of the Civil Procedure Rules, 2010 for leave to file a suit against the respondents after the expiry of the limitation period. The application was brought on the grounds set out on the face thereof and on the affidavit of the 2nd applicant sworn on 6th July 2015. The application was brought by the three (3) applicants on their own behalf and on behalf of the thirty four (34) others. The applicants have contended that together with the others on whose behalf the application has been brought, they were employees of the 13th respondent at all material times. They have contended that in the year 1976, the 13th respondent allotted them land measuring 87.20 hectares (215 acres) as a retirement gift. The applicants have contended that following this allotment, they appointed the 1st respondent who was the 13th respondent's farm manager and who was not supposed to benefit from the said parcel of land to manage the process of sub-division of the said parcel of land and the sharing of the portions thereof among the beneficiaries who were thirty six (36) in number.

The applicants have contended that the said parcel of land measuring 87.20 hectares (hereinafter referred to as **“the suit property”**) was to be sub-divided into residential, agricultural and commercial plots and all were to be allocated to the applicants. The other portions of the said parcel of land were reserved for public utilities such as schools, churches, markets, access roads and other public amenities. The applicants have contended that the sub-division of the suit property was to be undertaken in three (3) phases. The first phase involved the sub-division and issuance of titles to the applicants for the residential plots. The second phase involved the sub-division and allocation of the agricultural plots and the last phase involve the sub-division, allocation and processing of titles for the commercial plots. The applicants have averred that the sub-division and issuance of titles for the residential plots went on

smoothly and each of the applicants obtained their respective shares of the said plots. The applicants have averred that the subsequent sub-division of what remained of the suit property did not go as had been planned. The 1st respondent who was to oversee the sub-division of the whole of the suit property as earlier planned is said to have fraudulently, secretly and unlawfully allocated to himself huge chunks of land of what remained of the suit property although he was not entitled to any.

The 1st respondent is also said to have allocated and transferred other portions of what remained of the suit property to other persons like the 2nd respondent who was not an employee of the 13th respondent. The 2nd respondent in turn transferred some of the parcels of land that he acquired through the 1st respondent to the 3rd, 4th, 5th, 6th and 12th respondents. The 1st respondent is said also to have unlawfully allocated portions of the suit property to the 9th and 10th respondents. The 9th and 10th respondents who were employees of the 13th respondent also illegally benefited from extra land from the 1st respondent. The 1st respondent is said to have retained about 23 plots in his name.

The leave which the applicants are seeking is to enable them file a suit against the respondents for the recovery of the said parcels of land which the respondents are said to have acquired illegally. The applicants have contended that they did not file a suit against the respondents earlier because they had gone to other forums to seek redress which they did not get. Ultimately they filed a suit in the High Court at Nyeri against the respondents on 22nd April 2013 in Nyeri ELC No. 71 of 2013 (O.S) which they withdrew on 21st February 2015 after their advocates on record advised them that the same was time barred.

What I need to determine is whether this court has jurisdiction to extend the time limited by section 7 of the Limitation of Actions Act within which a suit for the recovery of land should be brought assuming that the applicants' intended suit is time barred. To start with, from the facts of the applicants claim against the respondents, I doubt if the claim is time barred. Without deciding the issue with any finality as it is not before me, I am of the view that the claim may be saved under the provisions of section 26 of the Limitation of Action Act. I am of the view that If the claim is time barred and cannot be saved under section 26 of the limitation of Actions aforesaid, the period of limitation provided under section 7 of the Limitation of Actions Act cannot be extended.

As I have indicated above, section 27 of the Limitation of Actions Act applies only to actions for negligence, nuisance or breach of duty and where the damages claimed is in respect of personal injuries to a person. The court has no jurisdiction under section 27 of the Limitation of Actions Act to grant leave to an applicant wishing to bring an action for the recovery of land after the limitation period provided for under section 7 of the Limitation of Actions Act has expired.

Due to the foregoing, I am of the view that the applicants' application before me is misconceived and has no merit. That being my view of the matter, the application dated 9th June 2015 is accordingly dismissed. Each party shall bear its own costs.

Delivered, Dated and Signed at Nairobi this 29th day of January, 2016

S. OKONG'O

JUDGE

In presence of

Mr. Kimathi holding

brief for Thongori for the Applicants

N/A for the 1st, 7th, 8th and 11th Respondents

N/A for the 5th Respondent

Mr. Jelle for the 13th Respondent