



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

**AT NAKURU**

**MISC APPLICATION 148 OF 2014**

**FRANCIS MURIGU MURAGE.....1<sup>ST</sup> APPLICANT**

**PETER NJUGUNA GITAU.....2<sup>ND</sup> APPLICANT**

**AND**

**CHINA ROAD AND BRIDGE CORPORATION LTD.....RESPONDENT**

**RULING**

1. This is an originating summons filed on 15<sup>th</sup> July 2014 and said to be brought under the provisions of Sections 27 and 28 of the Limitation of Actions Act, CAP 22, Laws of Kenya, and Order 37 Rule 6 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, CAP 21, Laws of Kenya. The applicants are seeking the following orders :-

1. That the limitation period for filing suit be extended in favour of the applicants and they be allowed to file suit out of time against China Road and Bridge Corporation Limited.
2. That the costs of this application be in the cause.

The application is based upon the following grounds :-

1. In the years between 2008-2009 when the cause of action on which the intended suit is grounded the 1st applicant was the registered owner while the 2nd applicant was the beneficial owner through purchase of al that parcel of land known as L.R 15970/20 Rongai, measuring approximately 90 acres.
2. In the year 2008 and 2009 the respondent while undertaking road construction between Njoro junction turn off and Timboroas without consent of the applicants trespassed into parcel L.R No. 15970/20 Rongai and carried therein extensive excavation of murrum and rock mining for purposes of road construction.
3. To the extent that there was no consent of the applicants the said excavations of murrum and mining rocks covering a surface area in excess of 1.5 acres violated the property rights of the applicants.
4. The respondent after conducting the said unlawful activities abandoned the quarry without making the slightest attempt to rehabilitate it and therefore a constant danger to any commercial

activities that the 2nd applicant may want to undertake on the said parcel of land.

5. The applicants have tried to compel the respondent to rehabilitate the degraded portion of land and compensate the applicants reasonably for the illegal undertakings and degradation of their parcel of land but the respondent is now uncooperative leaving the applicant without an option but to initiate compensation proceedings against the respondent.

2. The application is supported by the affidavit of Peter Njuguna Gitau who is the 2nd applicant. He has deposed that in the years 2008, 2009, and 2010, the 1st applicant was the registered owner of the land parcel L.R No. 15970/20 (Rongai) (the suit property), measuring about 90 acres. Sometimes in the years 2008 and 2009, China Road & Bridge Corporation Ltd (CRBC), while undertaking road construction, without the consent of the applicants, invaded the land and extensively excavated murram and rock. After finishing the road project, they moved out of the site without rehabilitating it. The applicants have been unable to rehabilitate the same because of the cost. On 4th June 2008, the applicants wrote to CRBC asking them to rehabilitate the site but the letter was ignored. The applicants then instructed a Quantity Surveyor who assessed the site and prepared a Bill of Quantities for rehabilitation date 24th September 2010. On 11th October 2010, the applicants through their advocates, wrote to CRBC seeking compensation based on the Bill of Quantities but CRBC has not acted. The applicants aver that they have tried patiently to seek compensation but CRBC has failed to do so. This is the reason they want leave to commence proceedings out of time.

3. In his submissions, counsel for the applicants inter alia submitted that the intended claim of the applicants can be broadly categorized into two. The first is for damages for the disused quarry and the costs of rehabilitating it. It is submitted that this is a continuing injury which the applicants can move the court for redress and is not statute barred. The second claim is for damages for bills of quantities for murram and rock mining. It is averred that it is this limb which is statute barred. It is this limb that they wish to seek extension of time. It is submitted that it is only recently that the citizenry have had the benefit of an environmental and land court to address their grievances.

4. I have considered the application. The cause of action intended by the applicants herein seem to me to be based on tort. It has indeed been stated that the claim is one of trespass and damage to property. The limitation period for torts is 3 years (save for libel and slander for which limitation is 1 year) as provided in Section 4 (2) of the Limitation of Actions Act.

5. The applicants herein intend to sue CRBC so that they may rehabilitate the site and also recover the value of excavated materials. Counsel for the applicant believes that there is a continuing breach on the aspect of rehabilitation but I am not too sure on this. Be as it may, the applicants herein are not seeking leave for extension of time on what they believe is a continuing breach, but what they intend to claim as the value of excavated materials. This is a sum of Kshs. 28, 753, 440/= from the Bill of Quantities prepared by their professional. The applicants are of the view that this claim is time barred hence the need to seek an extension of time. It will be noted that this application is inter alia brought under the provisions of Sections 27 and 28 of the Limitation of Actions Act, and it may be prudent for me to set them out. They provide 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.*

## *28. Application for leave of court under section 27*

*(1) 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.*

*(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—*

*(a) to establish that cause of action, apart from any defence under [section 4\(2\)](#) of this Act; and*

*(b) to fulfil the requirements of [section 27\(2\)](#) of this Act in relation to that cause of action.*

*(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but 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—*

*(a) to establish that cause of action, apart from any defence under [section 4\(2\)](#) of this Act; and*

*(b) to fulfil the requirements of [section 27\(2\)](#) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from [section 27](#) of this Act) to afford a defence under [section 4\(2\)](#) of this Act.*

(4) In this section, **“relevant action”** in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.

(5) In this section and in section 27 of this Act **“court”**, in relation to an action, means the court in which the action has been or is intended to be brought.

6. My interpretation of the above sections, particularly Section 27 is that extension of time for tort claims may be granted on certain considerations but such claim as noted in Section 27 (1) (b) must "consist of or include damages in respect of personal injuries of any person". No aspect of the intended claim of the applicants consists of or includes a claim for damages for personal injuries. It is not therefore one of the claims that can benefit from an extension of time.

7. Given the above, I am afraid that I find no merit in this application and it is hereby dismissed with costs.

8. The applicants are of course free to file any claim which they wish to do so. But they should be alive that limitation may be contested for I have not granted any extension of time.

9. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> Day of January 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of -:**