



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MACHAKOS
MISC. APPL. NO.103 OF 2015

EMBAKASI SWEET WATERS WELFARE GROUP

Suing through their official members

JESSIE RUBUA KIRONGOITHI HON. (SECRETARY)..... APPLICANT

VERSUS

MATUMAINI VENTURES LTD.....1ST RESPONDENT

KENYA COMMERCIAL BANK.....2ND RESPONDENT

RULING

On 20th February 2004, the Applicants entered into an agreement for sale with the 1st Respondent under which the 1st Respondent agreed to sell to the Applicants a portion of all that parcel of land known as LR No. 12867/13 measuring 10 acres (“the suit property”) at a consideration of Kshs.4,000,000/= on terms and conditions that were set out in the said agreement. At the time when the Applicant entered into the said agreement for sale with the 1st Respondent, the suit property was registered in the name of the 2nd Respondent and the Applicant paid the purchase price in full to the 1st Respondent through the 2nd Respondent. The Respondents on their part failed to complete their part of the agreement by transferring the suit property to the Applicants.

Sometimes in the month of June, 2006, the Applicants discovered that during the existence of its agreement aforesaid with the 1st Respondent with respect to the suit property, the 1st Respondent had entered into another agreement for sale in respect of the same property with a third party who had proceeded to register a caveat against the title of the said property forbidding registration of any dealing with the same.

The Applicants have now brought the present application seeking leave to file a suit out of time against the Respondents for the recovery of the purchase price which it paid for the suit property to the Respondents. The application which has been brought under among others section 26, 27 and 28 of the Limitation of Actions Act, Chapter 22 Laws of Kenya is based on the grounds set out on the face thereof and on the affidavit of the Applicants’ Secretary, Jessie Rubia Kirongoithi. The Applicant have contended that after the 1st Respondent failed to fulfill its part of the agreement for sale, they instructed the law firm of G. Achengo & Gitau Company Advocates to act for them against the Respondents and that they were made to believe that a suit had been filed by the said firm of advocates for the recovery of the purchase

price that they had paid to the Respondents. The Applicants have contended that in the year 2015, they became concerned over the matter and decided to instruct their advocates on record to pursue the same on their behalf. The Applicants have contended that upon carrying out investigations and making inquiries, their advocates on record found out that their previous advocates did not file any suit in court against the Respondents as they had claimed to have done. As at the time this discovery was made, the limitation period within which a suit for breach of contract could be maintained had expired. It is on account of that that the Applicants have now moved the court for extension of time to file a suit against the Respondents.

The application was brought ex parte. When the application came up for hearing on 7th April, 2016, Mr. Onyinkwa who held brief for Mr. Nyangito for the Applicants informed the court that the Applicants wished to rely entirely on the grounds set out on the face of the application and on the supporting affidavit of Jessie Rubua Kirongothi the contents of which I have highlighted above. Mr. Onyinkwa urged the court to grant the prayers sought in the application.

I have considered the Applicants' application together with the affidavit filed in support thereof. What I need to determine is whether the Applicant has met the threshold set out under sections 27 and 28 of the Limitation of Actions Act, Chapter 22 Laws of Kenya for extension of time. From the material before me, it is clear that the suit which the Applicants intend to file against the Respondents is for breach of the agreement for sale of the suit property. Under section 4 of the Limitation of Actions Act, actions founded on contract must be brought to court within 6 years from the date of the accrual of the cause of action. Section 4(2) of the Limitation of Actions Act 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.”

From the provisions of the Limitation of Actions Act which I have set out above, I am of the view that the Application herein is misconceived. It is clear from the provisions of sections 27 and 28 of the Limitation of Actions Act that only the limitation period for tort set out in section 4(2) of that Act can be extended with leave of the court. This court has no jurisdiction under sections 27 and 28 of the Limitation of Actions Act to extend the period of limitation provided under section 4(1) of the Limitation of Actions Act.

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

provided for under section 4(1) of the Limitation of Actions Act has expired.

As I have stated at the beginning of this ruling, the Applicants' application was also brought under Section 26 of the Limitation of Actions Act. I am of the view that this section is not relevant as it does not provide for extension of time by the court. Under Section 26 of the Limitation of Actions Act, time is extended by operation of law provided the conditions set out therein are met. I have looked at the case of, **In Re Solomon M'irura Mathiu[2012] eKLR** that was cited by the Applicants in support of the present application. I am not in agreement with that decision. In that case, the attention of the court was not drawn to the fact that the court had no power under sections 26 and 28 of the Limitation of Actions Act to extend time for the recovery of land.

Due to the foregoing, I am of the view that the Applicants' application dated 24th March 2015 has no merit. The same is accordingly dismissed with no order as to costs.

Delivered and Dated at Nairobi this 2nd day of August, 2016

S. OKONG'O

JUDGE

In presence of

Ms. Kosgey for the Applicant

N/A for the Respondents

John Court Assistant