



Ngugi & 2 others (all suing as the officials of Karagita Mixed Self Help Group) v Thika River Estate Limited (Miscellaneous Civil Application E006 of 2020) [2023] KEELC 226 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E006 OF 2020
A OMBWAYO, J
JANUARY 26, 2023**

BETWEEN

**PETER MBURU NGUGI (CHAIRMAN) 1ST APPLICANT
HOSEA MUTHAMA MWIKA (TREASURER) 2ND APPLICANT
GEOFFREY NGANGA NYOIKE (SECRETARY) 3RD APPLICANT
ALL SUING AS THE OFFICIALS OF KARAGITA MIXED SELF HELP GROUP**

AND

THIKA RIVER ESTATE LIMITED RESPONDENT

RULING

Brief Facts

1. The applicant filed the instant application dated November 13, 2020 seeking the following orders:
 1. That leave be granted to the applicant to file suit against the respondents after the Limitation period.
 2. That cost of this application abides the result of the intended suit.
2. The application was based on grounds set out and supported by the affidavit of Peter Mburu Ngugi the chairman of the applicant self help group sworn on November 20, 2020.
3. He gave a long history of the matter and stated that the group had bought the suit property from the respondent. That the applicant paid the purchase price in installments and also made efforts to get Arthur Kabui Ngwiri the director of the respondent company to sign the transfer documents in vain.



4. It was further stated that the applicant sued the respondent in 1994 in HCCC 2561 of 1994. That it took four years to serve the respondent's director and subsequently an *ex parte* judgment was entered in favour of the applicant on June 7, 2000. He stated that the applicant immediately took possession, subdivided the suit land and sold it to the members of the self help group.
5. He stated that a ruling to set aside the *ex parte* judgment was issued on where the Hon Lady Justice Nambuye in a separate ruling dated June 12, 2009 advised that the proper plaintiff in the suit are the officials of the self help group. He added that their advocate failed to advise them and/or rectify the anomaly and the Hon. Judge in her ruling of September 24, 2010 set aside the judgment of June 7, 2000 on several grounds among them that Karagita Mixed self help group could not sue or be sued and that the suit still stands to date.
6. That they wrongfully appealed the said decision in CA Civil App 222 of 2011 where the court of appeal upheld the decision by Hon Nambuye. He further stated that HCCC 2561 of 1994 was eventually transferred to ELC Nakuru where it became Nakuru HC ELC 23 of 2019. That their advocate wrongly filed the application for leave to amend the plaint which application was disallowed on the ground that the amendment would be prejudicial to the respondent.
7. He stated that to date the dispute over land parcel No LR 396/29 and 396/30 between the applicant and respondent has never been heard or determined on merit. He further stated that the intended suit does not introduce any new cause of action.
8. In conclusion, the applicant stated that they should not be punished for mistakes committed by their advocates. He urges the court in the interest of justice to allow them file the suit out of time.

Respondent

9. The respondent herein filed his replying affidavit dated November 18, 2022 in opposition to the applicant's notice of motion application dated November 13, 2020.
10. He deposed that the said application is an abuse of the court process intended to defeat the respondent's accrued defence of limitation and ought to be dismissed. He gave a considerable summary of the history of the case where deposed that *vide* the ruling delivered on November 21, 2019, the court found no merit in the Applicant's application to amend their plaint so as to include the present applicants.
11. He stated that the Honorable court issued a notice to show cause why Nakuru ELC 23 of 2019 should not be dismissed for want of prosecution where the Applicant in turn invoked the pendency of this application as a justification for not dismissing the suit.
12. The respondent stated that the matter came up for notice to show cause on July 5, 2022 where the court dismissed the suit for want of prosecution.
13. In conclusion, the respondent stated that the application lacks merit and should be dismissed with costs.

Submissions

14. The applicants filed their submissions dated December 14, 2022 on December 15, 2022.
15. They gave a background to their dispute with the respondent on the previous litigation and submitted that this suit has never been heard and determined on merit and that it would be in the interest of justice to give both parties an opportunity to be heard.



16. The applicants relied on Article 159(i)(d) of the Constitution and submitted that the courts are required to administer justice without undue regard to procedural technicalities and prayed that the court be guided by the said principles.
17. That they have spent a considerable amount of time and resources following Nairobi HCC 2561 of 1994 under the mistaken belief that the suit was properly filed only for the honourable court and the court of appeal to find that the suit was filed by a party which did not have locus standi.
18. The applicants submitted that they are aware that extension of time is not a right of a party as it is an equitable remedy that is only available to a deserving party at the discretion of the court. It submitted that it has laid a basis for the grant of the said orders and that the respondent will not be prejudiced in any way if the application is allowed.
19. In support of their arguments the applicants cited the decisions in the cases of Elizabeth Akinyi Ounda v Abubakar Wilberforce [2021] eKLR, HC Miscellaneous Application No 283A of 2015 John Mwangi Nganga alias John De Mathew and concluded their submissions by seeking that their application be allowed as prayed.
20. The respondent on the other hand filed its submissions dated December 14, 2022 on December 15, 2022. It gave the history of the litigation between it and the applicants herein and submitted that the applicants originating summons is an abuse of the court process as there is no provision for extension of time under the Limitation of Actions Act for a claim founded on a breach of contract.
21. The respondent submitted that as per the intended plaint, the applicant's claim is rooted on an alleged breach of contract purportedly entered into on July 4, 1993. The respondent relied on among other cases the cases of David Waruiru Ngotho v Isaac Dan & 3 Others [2019] eKLR and Kenya Orient Insurance Ltd vs Senenerro Ole Kurraro & 7 Others [2016]eKLR in support of its arguments.
22. The respondent further submitted that the present application is an afterthought and sought that the applicant's originating summons dated November 13, 2020 be dismissed with costs.

Analysis and Determination

23. This court has looked into the application and the replying affidavit and is of the view that the main issue for determination is whether the this court has jurisdiction to extend time for filing of a suit arising out of matters relating to contract.
24. Application for leave of court under section 27 of the Limitation of Actions Act provides as follows:
 - (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 fulfill 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.
25. In the case of *Willis Onditi Odhiambo v Gateway Insurance Company Limited* (2014) the Court of Appeal stated as follows:-
- Under section 27 as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is founded on tort and must relate to torts of negligence, nuisance or breach of duty and the damages claimed should be in respect of personal injuries to the Plaintiff as a result of the tort”.
26. In the case of *Mary Osundwa vs Nzoia Sugar Company Limited* [2002] eKLR the Court of Appeal stated as follows:
- This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts 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 the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly, Osiemo, J had no jurisdiction to extend time as he purported to do on May 28, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent”.
27. In the instant case, the applicant seeks to file a suit against the respondent out of time on the grounds that it had filed HCCC 2561 of 1994 in the name of Karagita Self Help Group instead of suing through its officials. It claimed that the delay was occasioned by the fact that the case was in court but inadvertently filed through the wrong parties by their advocates. This court has perused the draft intended plaint and is of the view that the cause of action clearly arises from an alleged sale agreement of the suit land by the respondents to the applicants. The applicant also prays for damages for breach of contract. This court therefore lacks the requisite jurisdiction to extend time for filing of a suit relating to a contract. In the circumstances, the application dated November 13, 2020 is without merit and is hereby dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF JANUARY 2023.

A O OMBWAYO

JUDGE

