



**Mbaka v Ntabari (Environment & Land Miscellaneous Case
003 of 2023) [2023] KEELC 16587 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND MISCELLANEOUS CASE 003 OF 2023**

CK YANO, J

MARCH 29, 2023

BETWEEN

CATHERINE CIAKUTHII MBAKA APPLICANT

AND

JANE ROSA KARIMI NTABARI RESPONDENT

RULING

1. Before me for determination is an application dated February 28, 2023 brought under the provisions of Order 37 Rule 2 of the *Civil Procedure Rules*, section 4 and 27 of the *Limitation of Actions Act* and section 1A, 1B and 3A of the *Civil Procedure Act*. The applicant seeks leave to file suit out of time as well as orders of temporary injunction restraining the Respondent from interfering or alienating the property originally known as LR No Magumoni/Itugururu/2821. The application is supported by an affidavit of Catherine Ciakuthi Mbaka, the applicant sworn on February 28, 2023.
2. The grounds in support of the application are stated on the face of the face of the application as follows:
 1. That the Applicant's son Anthony Mwenda Mabaka (now deceased) purchased a ¼ acre from the Respondent herein back in the year 2016.
 2. That the deceased paid the purchase price and had completed the same but the Respondent failed to transfer the parcel of land LR Magumoni/Itugururu/2821.
 3. That before the demise of the deceased, he had issued a demand letter to the Respondent.
 4. That the enforcement of a contract sale agreement lapsed before the deceased could enforce his rights.
 5. That the Respondent has taken advantage of the death of the deceased by refusing to transfer the parcel of land LR Magumoni/Itugururu/2821 to the Applicant since the demise of the deceased back in the year 2018.



6. That the Applicant was granted letters of administration ad litem for purposes of pursuing the interest of the deceased in this matter.
 7. That it is in the interest of justice that the Applicant be allowed leave to enforce the sale contract agreement out of time.
 8. That the Respondent will not be prejudiced if this application is allowed.
 9. That there has been no inordinate delay in bringing this application.
3. The same grounds are reiterated in the affidavit in support of the application. The applicant has also annexed copies of the death certificate, limited grant ad litem and an application for registration of a caution.
 4. The application herein is *ex-parte*. I note however, that besides leave to file suit out of time, the applicant seeks an order of temporary injunction. The principles upon which an application for temporary injunction were laid down in *Giella vs Cassman Brown Case*. An applicant must establish that he or she has a prima facie case with a probability of success, that the applicant is likely to suffer irreparable harm if an injunction is not granted, and finally, where the balance of convenience tilts if the court is in doubt. In this case, the suit is yet to be filed by the applicant. The application before court is for leave to file suit out of time. Therefore, the application is not grounded on any suit and I decline to consider the same. Having dealt with that preliminary issue, I now turn to the substantive application which is for leave to file suit out of time.
 5. Sections 4 and 27 of the [Limitation of Actions Act](#) under which the instant application has been filed provides as follows:
 4. Actions of contract and tort and certain other actions.
 - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
 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 purpose 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.
6. Section 28 of the [Limitations of Actions Act](#) provides for an application for leave of court under section 27 and states 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 application 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 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 accrued 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 connection 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.
7. A reading of sections 27 and 28 above shows that the same expressly refer to claims in tort where the action is for damages from negligence, nuisance or breach of duty. They do not provide for claims arising from contractual relationships. In my view, the two sections are limited to extension of limitation period for claims under section 4(2) of the *Limitation of Actions Act* which provides for actions founded on torts and are not applicable to claims under section 4(1) of the Limitations of Actions Act under which limitation period for contracts is provided for.
8. In the case of *Devacon v Samani* the Court of Appeal stated that there is no provision for extension of limitation period with respect to contracts and stated as follows:
- “To us, the meaning of the wording of section 4 (1) ... is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action ...A perusal of part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the superior court did, that “the wording of section 4(1) of the *Limitation of Actions Act* (chapter 22) suggests a discretion that can be invoked.”
9. In the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, the Supreme Court stated that jurisdiction of courts is derived from either the *constitution* or the law. The sections relied upon by the applicant do not confer jurisdiction on this court to make the orders sought. This court has no jurisdiction to grant the orders sought by the applicant.
10. In the result the application dated February 28, 2023 is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF MARCH, 2023 IN THE PRESENCE OF:

CA: Martha

Ms. Musyimi for Applicant

N/A for Respondent

C. K. YANO,

JUDGE.

