



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISCELLANOUS ELC NO. 20 OF 2014

RAPHAEL GACHOKI NJANGURUPLAINTIFF/APPLICANT

VERSUS

ALESIO NDANJU KARAGU Alias AREISIO NDANJU KIRAGU.....DEFENDANT/RESPONDENT

RULING

By his Notice of Motion filed herein on 25th March 2014, the plaintiff/applicant seeks two substantive orders:-

- 1. That this Court do grant him leave to amend his Originating Summons as per the draft amended Originating Summons and enjoin two other defendants in this suit namely BENEDICT KIRAGU NDANJU and SUSAN MUTHONI NDANJU***
- 2. Upon grant of prayer No. 1 above, this Court be pleased to extend time within which to institute suit against the defendants herein.***

The application which is brought under the provisions of **Order 1 Rule 10 (2), Order 8 Rule 3, Order 37 Rule 6 (2) of the Civil Procedure Rules and Section 27 and 28 of the Law of Limitation Act** is supported by the affidavit of the plaintiff/applicant and premised on the grounds, inter alia, that the plaintiff/applicant's then advocate did not seek leave to file the suit out of time yet it is clear that the transaction giving rise to this suit took place way back in 1965 and by the time this suit was filed in 2000, the land subject matter of this suit had already been sub-divided and transferred to the proposed two defendants hence the need to amend the Originating Summons.

The application is opposed and in his replying affidavit, the defendant raises the issue that the cause of action occurred in 1966 yet the Originating Summons sought to be amended was filed in 2006 which is some 40 years ago and in any event, he is no longer the registered proprietor of the land subject matter of this suit.

BENEDICT KIRAGU NDANJU and SUSAN MUTHONI NDANJU the proposed 2nd and 3rd defendants herein have also filed replying affidavits in which they aver, inter alia, that they have been in occupation of the suit land for over 15 years and the plaintiff/applicant has not explained why it took him so long to file this suit.

Submissions have been filed both by Ms Wangechi for the plaintiff/applicant and Ms Thungu for

the defendant/respondent which I have considered together with the application and rival affidavits.

As stated above, the application seeks two orders namely leave to amend the Originating Summons filed herein on 4th December 2006 and also an extension of time within which to file suit against the defendant and also BENEDICT KIRAGU NDANJU and SUSAN MUTHONI NDANJU. I will first deal with the application to extend time because it will have a bearing on the application to amend the Originating Summons.

Normally, an application for leave to commence a suit out of time is made ex-parte and the defendant only becomes aware of the order granting leave when the same is served upon him together with the plaint and summons. The defendant can then challenge the order granting leave at the time of the trial – see **ORUTA & ANOTHER VRS SAMUEL MOSE NYAMATO C.A. CIVIL APPEAL NO. 96 of 1984.** Nonetheless, in the matter now before me, the application was served upon the defendant perhaps because it also seeks another remedy apart from the extension of time.

In order to grant an order for the extension of time the Court must be satisfied that the applicant has met the provisions of **Section 27 (2) and 28(2) of the Limitation of Actions Act.** **Section 27 (2) of the Limitation of Actions Act** provides that:-

“The requirements of this sub-section 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 the period and***
- b. ***In either case, was a date not earlier than one year before the date in which the action was brought”***

From the foregoing, it is clear that extension of time only applies to claims made in tort and even then, **Section 27 (1) of the Limitation of Actions Act** makes it clear that the claim must be in respect of claims for personal injuries arising from negligence nuisance or a breach of duty. In **MARY OSUNDWA VS NZOIA SUGAR COMPANY LIMITED C.A. CIVIL APPEAL NO. 244 of 2000 (KISUMU)**, the Court of Appeal while considering the application of **Section 27 of the Limitation of Actions Act** stated as follows:-

“This section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. The 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. This 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”

Looking at the pleadings herein, the question I need to answer is whether the cause of action for which an extension of time is sought is infact a tort within the meaning of **Section 27 (1) of the Limitation of Actions Act.** From the Originating Summons (amended and original), it is clear to me that the claim for which extension is sought is not one in tort but rather in contract. The first three orders sought therein are as follows:-

1. ***“Whether an agreement entered into the year 1965 between the parties for sale of Agriculture land could be granted a valid consent under the Land Control Act in 1967***

- 2. Whether the plaintiff is entitled to 3 acres or ½ acres of land parcel No. INOI/KIAGA/326 having agreed to sell only 3 acres thereof**
- 3. Whether during the Land Control Board's meetings any irregularities were committed which deprived the plaintiff the land in issue"**

It is plain from a reading of those pleadings and the remedies sought in the Originating Summons that the suit for which extension is sought is premised on some agreement relating to the purchase of land known as INOI/KIAGA/326. The claim has nothing to do with tort and therefore, it is not one of those claims for which extension may be granted and this application cannot therefore be granted.

Even assuming that I am wrong on that and that this claim is indeed one in tort, the plaintiff/applicant would still have to prove, as required by **Section 27 (2) of the Limitation of Actions Act**, **"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 ----"**

In his affidavit in support of this application, the plaintiff/applicant makes the following averments:-

2: "That on or about the year 2006, I instructed the firm of A.P. Kariithi to act for me and recover my ½ acre of land parcel No. INOI/KIAGA/326 from the defendant herein"

3: "That the said advocate instituted a case against the defendant herein over land parcel No. INOI/KIAGA/326"

4: "That the said advocate did not conduct a correct search on the land to reveal the status of the land then"

5: "That I only gave them the names of the defendant who had been utilizing the said land and whom we had transaction with in 1965"

Nowhere in his affidavit does the plaintiff/applicant explain why this suit was originally filed in 2006 (without leave), to enforce an agreement entered into in 1965. There is also no explanation by him as to what material facts of a decisive character relating to this cause of action were at all times outside his knowledge, to warrant the grant of the leave sought to file this suit out of time. In his own affidavit in support of the Originating Summons, he depones that sometime in 1965 he agreed to sell to the defendant 3 acres out of his land parcel No. INOI/KIAGA/326 at Ksh. 3,000 but did not apply for the consent of the Land Control Board to transfer the said land. Later, he got sick (confused in mind) and has now recovered. He then discovered that defendant transferred the land to himself sometime in 1967. There is no attempt to explain when he become sick and confused and when he recovered and discovered that the defendant had transferred the land to himself. **Section 30 (3) of the Limitation of Actions Act** states that for purposes of **Section 27** of the Act, a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person if, but only if;

- a. He did not know the fact and**
- b. In so far as the fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it and ;**
- c. In so far as there existed, and were known to him circumstances from which, with appropriate advice, the fact might have been ascertained or inferred, he had taken all steps (if any) as it was reasonable for him to have taken before the time for the purpose of obtaining appropriate advice with respect to those circumstances.**

Considering all the above, it is clear to me that the plaintiff/applicant's cause of action is founded on contract for which an extension of time is not available. Secondly, even if his claim was one in tort (which it is not), he would not have satisfied the criteria for extension of time. The 2nd limb of the plaintiff/applicant's Notice of Motion therefore fails.

In the circumstances, it follows that the 1st limb of the plaintiff/applicant's Notice of Motion does not need to be addressed since it cannot be granted in isolation of the 2nd limb.

Ultimately therefore, the plaintiff/applicant's Notice of Motion dated 24th March, 2014 and filed herein on 25th March, 2014 is dismissed with costs.

B.N. OLAO

JUDGE

19TH DECEMBER, 2014

19/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Mwangi for Wangechi for Applicant – present

Ms Thungu for Respondent – absent

COURT: Ruling delivered this 19th day of December, 2014 in open Court.

Mr. Mwangi for Wangechi for Plaintiff/Applicant present

Ms Thungu for Defendant/Respondent absent.

B.N. OLAO

JUDGE

19TH DECEMBER, 2014



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