



Case Number:	Environment & Land Miscellaneous Application 17 of 2018
Date Delivered:	26 Sep 2019
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Loice Chepkemai Komingoi
Citation:	David Waruiru Ngotho v Isaac Dan & 3 others [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC APP NO. 17 OF 2018**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME**

**BETWEEN**

**DAVID WARUIRU NGOTHO.....APPLICANT**

**VERSUS**

**ISAAC DAN.....1<sup>ST</sup> RESPONDENT**

**MARY KINYUA.....2<sup>ND</sup> RESPONDENT**

**KWAME INVESTMENTS LTD.....3<sup>RD</sup> RESPONDENT**

**KIARIE.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. This is a Chamber Summons dated 12<sup>th</sup> February 2018 brought under Section 26 of the Limitation of Actions Act, and all other enabling provisions of the law.

2. It seeks orders

*1. That this honourable court be pleased to grant leave to the applicant to file suit out of time.*

*2. That if prayer (i) above is allowed, the honourable court be pleased to grant the applicant fourteen (14) days to file its plaint.*

*3. That if prayer (i) above is allowed, honourable court be pleased to grant an order of injunction to restrain the 4<sup>th</sup> respondents by itself, its agents, servants or otherwise howsoever from encroaching into or trespassing onto the applicant's property being Mukuru Embakasi Plot No. A6 and 7 situate in the City of Nairobi in Nairobi and/or from continuing in occupation of the portion of the suit property that it has encroached into pending the interpartes hearing of this application.*

*4. That if prayer (i) above is allowed, this honourable court be pleased to grant an order of injunction to restrain the 4<sup>th</sup> respondents by itself, its agents, servants or otherwise howsoever from encroaching into or trespassing onto the applicant's property being Mukuru Embakasi Plot No. A6 and 7 situate in the City of Nairobi in Nairobi and/or from continuing in occupation of the portion of the suit property that it has encroached into pending the interpartes hearing and final determination of this suit.*

*5. Costs of this application be provided for.*

3. The grounds are on the face of the application and are set out in paragraphs (1) to (12).

4. The application is supported by the affidavit of Thomas Njenga Ngotho, donee of power of attorney donated or granted by Dr. David Wairuri Ngotho, the applicant herein sworn on the 12<sup>th</sup> February 2018.
5. The respondents were duly served by an advertisement in the Daily Nation of 29<sup>th</sup> June 2018.
6. The application is opposed. There are grounds of opposition filed by the 3<sup>rd</sup> respondent dated 22<sup>nd</sup> January 2019. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents did not file any response.
7. The court ordered that the application be canvassed by written submissions.
8. I have considered the chamber summons, the affidavit in support and the annexures. I have also considered the grounds of opposition, the written submissions on behalf of the parties, the oral highlights and the authorities cited. The issue for determination is whether this application is merited.
9. In paragraph 4 of the supporting affidavit, the applicant claims to have visited the plots in 2007, and found they had been sold to somebody else. He has not explained the delay in bringing this application, from 2007 to 2018. In essence the applicant has not shown that there is sufficient cause for the delay.
10. The applicant seeks to enforce two contracts, one entered between himself and the 1<sup>st</sup> respondents. As per section 4(1) of the Limitation of Actions Act, an action for a contract cannot be brought after the end of six years.
11. The applicant claims to have discovered the fraud in 2007. The delay in bringing this application has not been explained.
12. Section 26 of the Limitation Act states:-  
  
“Where, in the case of an action for which a period of limitation is prescribed, either-  
  
(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or  
  
(b) the right of action is concealed by the fraud of any such person as aforesaid; or  
  
(c) the action is for relief from the consequences of a mistake,  
  
the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:  
  
***Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-***  
  
(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or  
  
(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”
13. The applicant claims he discovered in 2007 that the suit property had been sold to someone else, one Mr. Kiarie who is named as the 4<sup>th</sup> respondent herein. The said 4<sup>th</sup> respondent has not been said to be a part to the alleged fraud nor was he aware of any fraud. The applicant has not brought out any particulars of fraud nor has he laid any evidence to establish the same.
14. I find that the applicant has failed to satisfy the court that he ought to be given leave to file suit out of time. I find no merit in this application and the same is dismissed with costs to the 3<sup>rd</sup> respondent.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 26<sup>th</sup> day of September 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

Miss Muthoni for Mr. Gichigi for the Defendants

Kajuju - Court Assistant



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