



**Chepkwony v Attorney General & 2 others (Environment & Land
Case 9 of 2016) [2023] KEELC 17174 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 9 OF 2016**

**MC OUNDO, J
APRIL 27, 2023**

BETWEEN

EZEKIEL CHEPKWONY PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

DMK CONSRUCTION LIMITED 3RD DEFENDANT

RULING

1. Pursuant to an Application dated the March 3, 2022, brought under the provisions of Order 2 Rule 15(1) (b),(c) & (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant herein sought for the Plaintiff's suit against the 2nd Defendant be struck out with costs on the grounds that it was time barred, the cause of action (trespass) having taken place sometime on or about the year 2005 after which the suit had been instituted on or about February 21, 2017. That the suit was therefore an abuse of court process because it had been instituted beyond the mandatory statutory timelines and without leave. That the continued existence of the suit was prejudicial to the 2nd Defendant/Applicant.
2. The Application was supported by the supporting affidavit of one Wasike Cedric, counsel for the 2nd Defendant/Applicant sworn on the March 3, 2022.
3. The Application was opposed by the Plaintiff's Replying Affidavit sworn on July 15, 2022 to which the Respondent had deponed that the suit was founded on forceful excision and/or compulsorily acquisition of his parcel of land namely Kericho/Koiwa/468 by the Ministry of Land, Housing and Urban Development, for purposes of building a road and road reserve and that the same had been done without compensation. That the suit had been instituted on February 16, 2016 within the stipulated time of twelve years and within the tenets of the provisions of Article 40 of the Constitution.



4. That the suit was not founded and/or based on tort of trespass but excision of his land by the said Government officials who had authorized the 2nd Defendant to illegally build a road and road reserve on a portion of his land. That the Application lacked merit and ought to be dismissed with costs.
5. There was no response from the 1st and 3rd Defendants herein although the 1st Defendant filed their submission in support of the Application. On the October 12, 2022, directions were taken that the said Application be conversed by way of written submissions.

The 2nd Defendant/Applicant's submissions

6. In support of their Application, the 2nd Defendant/Applicant framed their issue for determination as to whether the Plaintiff's suit should be struck out and proceeded to rely on the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules as the principles guiding the striking out of pleadings. Further submissions were that the suit herein was filed by the Plaintiff /Respondent sometime in February 2017 wherein he had alleged that the cause of action against the 2nd Defendant/Applicant arose sometime in 2005 when the 2nd Defendant/Applicant trespassed on his parcel of land known as Kericho/Koiwa/468 and constructed a road and road reserve on part of the said parcel of land.
7. That the provisions of Section 4(2) of the Limitation of Actions Act were clear and therefore the Plaintiff /Respondent's suit was time barred as the same had been filed without leave from court. Reliance was placed on the decision in the case of Jones M Musau & another v Kenya Hospital Association & another [2017] eKLR, where the Court of Appeal had noted 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.
8. The 2nd Defendant/Applicant further relied on the decision in Simon Ndwiga Murage v Embu Water And Sanitation Co Ltd [2020] eKLR to submit that an alleged long term consequential damage could not extend the period of limitation ad infinitum. That it was trite law that a statute-barred Plaint could not disclose a reasonable cause of action and therefore since the Plaintiff/Respondent's suit was time barred and had been filed without leave of the Court, the same was an abuse of the court process and should be struck out.

The 1st Defendant submissions.

9. In support of the 2nd Defendant/Applicant's Application that the suit ought to be struck out for being time barred, the 1st Defendant submitted that a reading through the Further Amended Plaint dated the April 14, 2022, the same was clear that Plaintiff's claim was for damages for trespass in which he had alleged that in the year 2005, the District Surveyor, Konoin District, the Ministry of Roads and the 2nd Defendant's workers had allegedly trespassed on his parcel of land wherein they had constructed a road on it. That the Plaintiff had thus sought for orders of eviction, damages and in the alternative, prompt compensation as provided for by the law.
10. That the suit was first filed on February 16, 2016, which was 11 years after the cause of action had accrued. A Notice to sue the Government, previously issued under Section 13A of the Government Proceedings Act, Cap. 40 Laws of Kenya, was sent to the 2nd Defendant in October 2014, which was 9 years after the fact.
11. That they were in support of the 2nd Defendant's Application dated March 3, 2022 which had sought to strike out the Plaintiff's case because it had been a suit founded on the act of trespass. That the cause of action having arisen in 2005, then by dint of Section 4(2) of Limitation of Actions Act, the suit was time barred.



12. That upon reading the 2nd Defendant's Application, and its written submissions dated December 18, 2022 together with the two (2) Authorities filed in support of the same, they fully agreed and adopted the same in reply to the Plaintiffs claim, to which they submitted on account of the said Application, that the Plaintiffs case was time barred and the same ought to be dismissed as the same was filed outside the mandatory statutory timelines and without the leave of the Court.
13. That in addition to the 2nd Defendant's submissions, that the suit and claims as against the 1st Defendant, the District Surveyor, Konoin District and the Ministry of Roads were equally time barred by dint of Section 3(1) of the *Public Authorities Limitation Act*. The 1st Defendant relied on the decisions in *Bosire Ogero v Royal Media Services* [2015] eKLR and in *Haron Onyancha v National Police Service Commission & Another* [2017] eKLR to buttress their submissions and to seek for the dismissal of the Plaintiff's suit.

The Plaintiff's Submissions.

14. In response and in opposition to the 2nd Defendants' Application, the Plaintiff submitted that the suit's action was based on compensation of road access which the Government of Kenya through the Ministry of Lands, Housing and Urban Development had compulsorily acquired after excision of his land known as Kericho/Koiwa/468 in the year 2005. Further, the Plaintiff contended that his claim was not founded on trespass and that he had instituted his suit by way of Plaint on February 16, 2016 within the stipulated period as was provided for under *Limitation of Actions Act*. That further, Article 40 of the *Constitution* did not limit compensation of land compulsorily acquired by the Government.
15. The Plaintiff framed his issues for determination as follows;
 - i. Whether the Plaintiff's cause of action in the suit is based on compensation or trespass?
 - ii. Whether this suit is time barred?
 - iii. Who will bear the costs of this Application?
16. On the first issue for determination as to whether the Plaintiff's cause of action in the suit was based on compensation or trespass, it was the Plaintiff's submission that as discerned from the Plaint filed on February 16, 2016 and later amended on February 3, 2017 and further amended on April 14, 2022, all with the leave of the court, that the same was founded on relief of compensation of part his land Reference No Kericho/Koiwa/486, which had been unlawfully excised by Government of Kenya through the Ministry of Land, Housing and Urban Development.
17. That the Ministry, through the 1st Defendant had contracted the 2nd Defendant to construct the said road access through his land without compensating him. That it has been after a series of meetings to do so without any success that the Plaintiff had decided to sue the Defendants. That the 3rd Defendant had been joined to the suit as a Government mandated agency deemed to compensate the injured party when the state acquires land compulsorily for its needs.
18. That the suit was not based on trespass and therefore the provisions of Section 4 of *Limitation of Action Act* could not be invoked. That the Government unlawfully acquired a portion of his land without compensation and therefore the failure to pay damages arising therein was what the suit was all about.
19. The Plaintiff relied on the decision in the case of *Patrick Musimbe v National Land Commission & 4 Others* [2016] eKLR which had expounded on the procedure for compulsory acquisition of private property by the state. His submission was that even if the matter was within the parameters of trespass, which is denied, the suit had been instituted on February 16, 2016 which was within the twelve (12)



years bracket as provided for under *Limitation of Actions Act*. That the Application was not merited and the same should be dismissed with costs.

Determination.

20. I have given due consideration to the rival arguments and the authorities cited, the 2nd Defendant's Application which is backed by the 1st Defendant is to the effect that the Plaintiff cannot bring a suit against them because the same is time barred, the cause of action (trespass) having taken place sometime on or about the year 2005 wherein the suit had been instituted on or about February 21, 2017, some 12 years later.
21. The Plaintiff on the other hand has argued against the Application stating that the suit was not founded on the act of Trespass, but rather that the same was founded on a relief for compensation of his land reference No Kericho/Koiwa/486, which had been unlawfully excised by Government of Kenya through the Ministry of Land, Housing and Urban Development, for the construction of a road access and therefore the provisions of Section 4 of the *Limitation of Actions Act* were inapplicable.
22. The issue that stands out for determination therefore is whether the Plaintiff's suit is time barred.
23. I have considered the fact that the original suit dated the February 16, 2016 was filed on an equal date, there had been an amendment to the Plaint on the February 3, 2017 which had further been amended on the April 14, 2022. In the further amended Suit at para 5, the Plaintiff asserted as follows:
"Sometimes during the year 2005 the district surveyor, Konoin district, then ministry of roads officials and representatives of the second Defendant company illegally and without any reasonable cause and or justification and without the Plaintiff's consent, trespassed onto the Plaintiff's said land and while therein inspected the same and thereafter surveyed and excised a portion thereof."
24. At paragraph 8 of the Plaint, the Plaintiff contended as follow;
"It is the Plaintiff's contention that the actions of the said officials and the second Defendant amounted to trespass and illegal acquisition of the Plaintiff's said land without following due process and without payment of compensation."
25. The Plaintiff then particularized the damage and loss he had suffered, as a result of the Defendants' trespass, and thereafter sought for orders of eviction, restoration of his land to its origin state, and in the alternative prompt compensation.
26. It is therefore quite clear that the Plaintiff herein is seeking compensation for the alleged deprivation of his suit land after the 2nd Defendant trespassed thereon and constructed a road and a road reserve.
27. The provisions of Section 4(2) of the *Limitation of Actions Act* stipulates as follows:
"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:"
28. The 1st Defendant, the office of the Hon Attorney General Respondent, is the representative of the Republic of Kenya in all legal proceedings for the enforcement of law and the assertion or protection of public rights and which office is established under Article 156 of the *Constitution*. To this effect thereof when the Hon Attorney General is made a party to the suit, then the Public Authority's Limitation Act comes into play.
29. It is thus clear from the Plaintiff's pleadings in his suit filed on the February 16, 2016 that in the year 2005, the District Surveyor, Konoin district, then Ministry of Roads officials and representatives of the 2nd Defendant Company illegally and without any reasonable cause and/or justification trespassed onto



his land parcel No Kericho/Koiwa/486, and unlawfully excised part of it and proceeded to construct a road and a reserve road without compensating him.

30. The provisions of Section 3(1) of the [Public Authorities Limitation Act](#) is clear on the limitation of proceedings against the Government or a local authority and provides that;

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

31. From the above captioned provisions of the law and the Plaintiff’s pleadings, that in or around the year 2005, upon acquisition by the Government of a piece of his land in parcel No Kericho/Koiwa/486 to construct a road and a road reserve, time started running in the same year being 2005 and time within which to file suit then lapsed in the year 2006. The Plaintiff filed his initial suit on the February 16, 2016 and was thus late by a period of about 10 years. Section 3 of the [Public Authorities Limitation Act](#) provides for a period of 12 months after the cause of action accrued, to file suit against the Government or a local authority. The filing of the current suit 10 years later was clearly in contravention of the provisions of the law and the Plaintiff’s suit was therefore time barred.

32. A reading of the Plaintiff’s Plaint shows that he had premised its claim on the tort of trespass and conversion. The Plaintiff pleaded particulars of alleged loss and damage to support the alleged trespass wherein he had claimed general damages. Simply put, the Plaintiff’s claim, which was anchored on a tort of trespass committed by the 1st Defendant’s agents, is time barred by dint of section 3(1) of the [Public Authorities Limitation Act](#).

33. It is also important to establish the link between the [Public Authorities Limitation Act](#) and the [Limitation of Actions Act](#). In this regard, Section 6 of the [Public Authorities Limitation Act](#) provides for Application of the [Limitation of Actions Act](#) in matters governed by the Act and provides as follows: -

“Notwithstanding the provisions of Section 31 of the [Limitation of Actions Act](#), section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the [Limitation of Actions Act](#) the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the [Limitation of Actions Act](#), Part III of that Act shall apply to this Act.”

34. 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. In accordance with Section 6 of the [Public Authorities Limitation Act](#) cited herein above, reference to Section 4(2) of the [Limitation of Actions Act](#) meant reference to Section 3(1) of the [Public Authorities Limitation Act](#) which provides that actions founded on tort must be brought within 12 months. The import of this provision is that the Plaintiff’s claim was statute barred by slightly over 10 years.

35. In [Gathoni v Kenya Co-operative Creameries Ltd](#) [1982] 104 at p 107 the court had held as follows:

“... The law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the Applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”



36. The Court of Appeal in *Mukuru Munge v Florence Shingi Mwawana & 2 others* [2016] eKLR held that:
- “The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.”
37. The Plaintiff needed to commence his claim within the time prescribed under Section 4(2) of the *Limitation of Actions Act* (which meant reference to Section 3(1) of the *Public Authorities Limitation Act*.) It follows therefore that by the time the Plaintiff filed this suit, his claim was already statute barred.
38. In the case of *Bosire Ongero v Royal Media Services* [2015] eKLR the court had held that the issue of limitation went to the jurisdiction of the court to entertain claims and therefore if a matter was statute barred the court had no jurisdiction to entertain the same.
39. The Plaintiff’s case has come to the end of the road in the present instance, the Application dated the March 3, 2022 is herein allowed with the result that the Plaintiff’s suit is hereby struck out with costs for being time barred.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27TH DAY OF APRIL 2023

M C OUNDO

ENVIRONMENT & LAND – JUDGE

