



Highbury Properties Limited v Nairobi City County Government & another (Environment & Land Case 51 of 2019) [2023] KEELC 17146 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 51 OF 2019**

**LN MBUGUA, J
APRIL 27, 2023**

BETWEEN

HIGHBURY PROPERTIES LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST DEFENDANT

DIRECTOR URBAN PLANNING NAIROBI CITY COUNTY 2ND DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 7.9.2022, filed by the Defendants who seek orders that the Plaintiff's suit be struck out and dismissed with costs. They contend that the suit is incompetent for having been filed out of time in offending Section 3(1) of the Public Authorities Limitation of Actions Act as read with Section 31 and 4(2) of the Limitation of Actions Act.
2. The application is based on grounds on its face and on the supporting affidavit of Wilfred Wanyonyi Masinde, Assistant director of building, Inspection and Planning of the 1st Defendant sworn on 7.9.2022. She deposes that from a perusal of the Court documents, she noted that the original plaint was filed on 15.2.2019 and the cause of action as pleaded in paragraph 11,12 and 14 of the plaint is said to have arisen on 9.2.2016 which is outside the 3 year limitation period mandated under Section 4 (2) of the Limitation of Actions Act within which to file such a suit.
3. She deposes that the suit is also outside the 12 month Limitation period set under Section 3 (1) of the Public Authorities Public Authorities Limitation of Actions Act.
4. She deposes that the plaint was amended on 8.5.2019 and even then, the Plaintiff still pleaded the same date of the cause of action as being 8.2.2016. She therefore claims that the suit remains fatally and incurably defective.



5. The application is opposed by the Plaintiff by way of the supporting affidavit of Anne Wathatu Ngururi sworn on 31.10.2022. She avers that the alleged breach herein started on or about 18.2.2016 when the employees of the Defendants made the 1st entry into the Plaintiff's property LR Number 209/138/59 (I.R No.98059) without her permission.
6. She further deposes that the case was filed on 18.2.2019 to challenge the Defendants' actions contrary to the provisions of Section 152 B,152C, 152E and 152G of the Land Act, 2012 as the dispute is about ownership and enjoyment of the property known as LR No. 209/138/59 (I.R No. 98059). She avers that this Honorable Court has jurisdiction pursuant to Sections 50 and 152F of The Land Act, 2012 to determine this suit.
7. The application was canvassed by way of written submissions.
8. The Defendants' submissions are dated 3.11.2022, where they contend that the statutory bar operates lawfully to oust the jurisdiction of the Court. They rely on the case of Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR and the case of Bosire Ogero v Royal Media Services [2015] eKLR to submit that limitation is a grave issue which goes to the jurisdiction of the Court. Other cases cited by the defendants are; Leisure Lodges Limited v Amirali Sbariff [2019] eKLR, David Nyandu v Francis Aburi Oyaro [2021] eKLR, Nelson machoka Keraro v Land Registrar Kisii & 3 other [2019] eKLR as well as the case of Iga v Makerere Univerity [1972] E.A.
9. The Plaintiff's submissions are dated 13.12.2022, where they address the following issues;
 - a. Whether this Honourable Court has the requisite jurisdiction to hear and determine this matter.
 - b. Whether the Honourable Court should strike out the suit as sought by the Defendants.
10. It is the Plaintiff's submission that the dispute herein is perfectly under the purview of the provisions of Section 13 of the Environment and Land Court Act, that the Court has jurisdiction to determine all issues touching on land particularly the denial, violation or infringement of, or threat to rights or fundamental freedom relating to right to property *vide* Article 40 of the Constitution.
11. It was submitted that striking out a suit is discretionary, and should be exercised sparingly and only where the pleadings are frivolous, scandalous and do not disclose any plausible cause of action which is not the case in this suit. The plaintiff urges the court to be guided by the decisions in Gladys Jepkosgei Boss v Star Publication Limited [2021] eKLR, Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others [2005] eKLR as well as the case of Abubakar Zain Ahmed v Premier Savings & Finance Limited & 4 others [2007] eKLR in exercising its discretionary power in this matter.
12. I have duly considered all the arguments raised herein. The question for determination is whether this suit is time barred under Section 4(2) of the Limitation of Actions Act as read with Section 3 (1) of the Public Authorities Limitation of Actions Act.
13. As rightly submitted by the plaintiff the court retains the discretion to strike out a suit.
14. I have taken into consideration that the issue of limitation was raised in the prosecution of the defendant's preliminary objections dated 12.6.2019. The said issue was not determined by the court in its ruling of 19.5.2021. The defendant chose to revive the issue of limitation via this application one year and four months later!
15. In view of the conduct of the defendant/applicant of raising Preliminary Objections and application's as and when they deem fit without due regard to the constitutional principle of having "expeditious



trials,” I decline to allow the application. Instead, I direct that the issue be argued during the trial. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Paul Muchiri holding brief for Dorcas Mwai for Plaintiff

H. Kinyanjui for Respondent

Court assistant: Vanilla

