



Ethics & Anti-Corruption Commission v Kipkemoi & 3 others (Environment & Land Case E089 of 2023) [2023] KEELC 19189 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19189 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E089 OF 2023**

MD MWANGI, J

JULY 28, 2023

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

DANIEL KIPKEMOI 1ST DEFENDANT

MW MBOGO 2ND DEFENDANT

WHITEHART INVESTMENT LIMITED 3RD DEFENDANT

WILSON GACANJA 4TH DEFENDANT

RULING

Background

1. The Plaintiff herein vide its Notice of Motion application dated March 3, 2023 brought under the provisions of Section 1A, 1B, & 3A of the [Civil Procedure Act](#) and Order 40 rule 1 of the [Civil Procedure Rules](#) seeks an order restraining the 3rd Defendant by itself, servants, agents and employees and any other person claiming through it from selling, charging, further charging, transferring, alienating, disposing of, dissipating or in any other manner howsoever dealing with the suit property LR 209/12303 IR No 63566 pending the hearing and determination of this suit. The grounds upon which the application is based are on the face of the application (a-v) and in the supporting affidavit of Justus Wangia sworn on March 3, 2023.
2. The application is opposed by the 3rd Defendant who in addition to the Preliminary Objection dated April 13, 2023, also filed a Replying Affidavit sworn on 13th April 2023 and a Further Affidavit sworn



on April 27, 2023. In the Preliminary objection, the 3rd Defendant/Respondent in this matter avers that: -

- a. The suit instituted by the Plaintiff has passed the statutory limitation period as prescribed under section 7 of the *Limitation of Actions Act*, Cap 22, which highlights that no action can be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him.
 - b. The cause of action accrued in 1994 as reflected under the Plaintiff's pleadings thereby being 29 years since the cause of accrued which makes the plaint contra-statute and unreasonably delayed.
 - c. The Plaintiff has not sought leave from the court for extension of time and further has no basis or ground for extension of time.
 - d. The suit instituted is therefore unjust and prejudicial to the Defendant and should be struck out and dismissed as it amounts to an abuse of the court process.
3. In the affidavits in response to the Plaintiff's application, the 3rd Defendant avers that the Plaintiff's application is lacking in merit and should not therefore be granted.

Court's Directions

4. The court directed that the Preliminary objection and the application by the Plaintiff be canvassed concurrently and by way of written submissions. Both parties complied. The 3rd Defendant though filed two sets of submissions, one in respect of the Preliminary objection while the second in respect of the application. I have had the opportunity to read the said submissions which now form part of the record of this court.

Issues for Determination.

5. There are only 2 issues for determination in this matter:
- a. Whether the Plaintiff's suit is time barred, and
 - b. Whether the application by the Plaintiff meets the threshold for the grant of an order of interlocutory application.

Analysis and Determination.

A. Whether the plaintiffs suit is time barred.

6. The 3rd Defendant argues that the Plaintiff's suit is time barred by virtue of section 7 of the *Limitation of Actions Act*. The 3rd Defendant further avers that section 43 of the said Act provides that the Act (*Limitation of Actions Act*) applies to proceedings by and against the government as it applies to proceedings between private persons.
7. The 3rd defendant relied on a number of cases to support its Preliminary Objection including *Masulal Maganlal Rawal –Vs- manenkhal Maganlal Rawal* (1989) eKLR, *Gathoni –Vs- KCC Ltd* (1982) KLR 104, & *Daniel Sebastian Angwenyi –Vs- Everex Travellers Ltd & Another* (2015) eKLR. The three cases explain the object of the statutes of limitation.



8. On its part, the Plaintiff response was that section 74 of the *Anti-Corruption and Economic Crimes Act*, 2003 amends Section 42 of the *Limitations of Actions Act* with the implication being that the Act excludes an action to recover possession of government land as well as proceedings under sections 51, 52, 55 & 56 of the *Anti-corruption & Economic Crimes Act*. Further that the said section at sub-section (1) (k) excludes action in which recovery or compensation in respect of loss or damage to any public property is sought. The Plaintiff pointed out various decisions upholding the above position, namely, (*EACC –Vs- Ebsons Construction Company Ltd & 3 others* KEELC 107 (KLR), *EACC –Vs- Gitbaiga & 4 others* (2022) KEELC 2516(KLR) & *EACC –Vs- Njuguna Macharia* (2015) eKLR.
9. In the case of *EACC –Vs- Habib Omar Kongo & 2 others*, this court while handling a similar objection as the one raised by the 3rd Defendant made a finding to the effect that sections 41 and 42 of the *Limitation of Actions Act* expressly excluded from its operations claims on and proceedings for recovery of trust and public land.
10. Section 42(1) (d) of the *Limitation of Actions Act* is categorical that the Act does not apply to,

“proceedings by the government to recover possession of government land.”
11. The case by the Plaintiff herein falls within the scope of the exemption. As the Plaintiff has pleaded in paragraph 5 of the plaint, the suit property, known as LR No 209/2811 I.R 18615, was at all material times ‘government land, planned, reserved and allocated to Kalro’.
12. I therefore agree with the Plaintiff’s submissions and dismiss the 3rd defendant’s Preliminary Objection.
13. The Plaintiff was not therefore obligated to seek leave of the court for extension of time as alleged by the 3rd Defendant by virtue of the provisions of section 42 of the *Limitation of Actions Act*.

B. Whether the plaintiff’s application meets the threshold for the grant of an order of interlocutory objection.

14. From my reading of the submissions of the parties, both are in agreement in regard to the applicable principles for the grant of an order of interlocutory application as spelt out in the case of *Giella –Vs- Cassman Brown & Co Ltd* (1973) EA 358 which were further upheld in the *Nguruman Ltd –Vs- Jan Bonde Nielsen & 2 others* (2014) eKLR. The Court of Appeal while upholding the principles stated that,

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to, (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant has to surmount sequentially.”
15. The 1st issue that the court must consider is whether the Plaintiff has established a prima facie. In considering whether or not a prima facie case has been established, the court should not, as stated in the *Nguruman* Case, hold a mini trial and must not examine the merits of the case closely. What is expected of the court is to,

“see that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”



16. Having considered the affidavit evidence presented by the parties in this case, I am persuaded that the Plaintiffs have demonstrated a prima facie case.
17. The second consideration is irreparable injury. Under this heading, and in a case of this nature, public interest is also a consideration that this court must not lose sight of. The Plaintiff has not brought this suit for its own interest as an entity. This suit is in essence brought on behalf of the people of Kenya. The consideration then should not be whether the Plaintiff stands to suffer irreparable injury as an entity, no. The irreparable injury that would be occasioned, if at all, would be against the people of Kenya.
18. With the institution of these proceedings, I understand the Plaintiff's apprehension that the 3rd defendant may seek to dispose off, transfer or charge the suit property in an attempt to defeat any decree that may result from these proceedings.
19. Further, and considering the nature of this case, the balance of convenience is in favour of preserving the substratum of this suit pending hearing and determination of this suit.
20. Accordingly, the court allows the Plaintiff's application in the following terms: -

“That pending hearing and determination of this suit, the 3rd Defendant by itself, servants, agents and employees and any other person claiming through it be and is hereby restrained from selling, charging, further charging, transferring, alienating, disposing of, dissipating or in any other manner howsoever dealing with the suit property LR 209/12303 IR No 63566.”

21. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Ochala for the Plaintiff/Applicant.

Mr. Shariff for the 3rd Defendant/Applicant.

Mr. Kiprotich for the 4th Defendant.

Court Assistant: Yvette.

