



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 28 OF 2012

JOHN MUCHIRI MAGONDU PLAINTIFF

VERSUS

THE CHAIRMAN BOARD OF GOVERNORS

ST PAULS PRIMARY SCHOOL 1ST DEFENDANT

MWEA LAND DISPUTES TRIBUNAL 2ND DEFENDANT

SENIOR RESIDENT MAGISTRATE COURT

AT WANG'URU 3RD DEFENDANT

KIRINYAGA COUNTY GOVERNMENT 4TH DEFENDANT

RULING

1. The Honourable Attorney General raised a Notice of Preliminary Objection dated 7th June, 2021 and filed on 10th June, 2021 on behalf of the 1st, 2nd and 3rd Defendants.
2. The said Notice of Preliminary Objection raises the following grounds; -
 - a. The claim is barred and contravenes Article 160 (5) of the Constitution of Kenya, 2010.
 - b. The claim is time barred and contravenes Section of the Limitation of Actions Act Cap 22 laws of Kenya.
3. On 19th October, 2021, the parties through their advocates on record took directions to have the said Preliminary Objection canvassed by way of written submissions.
4. The Plaintiff filed their submissions dated 13th September, 2021 on 7th October, 2021. However, the defendants didn't file any.

PLAINTIFF'S SUBMISSIONS: -

5. The Plaintiff submitted that Article 232(1) a, b, c, e, & f of the Constitution of Kenya provides the values and principles of public service which include accountability for administrative acts and principles of public service in all state organs in both levels of government.
6. He submitted that sections 8 of the Attorney General Act, 2012 and 52 of the Societies Act do not contradict Article 232 (1) of the Constitution of Kenya as they clearly spell out under what circumstances the public Officer cannot be called upon to account.
7. He submitted that the purpose of those sections as read together with Article 160 (5) insulates officers where they have done something in good faith and without negligence and thus it does not mean that one cannot be called upon to account where he/she has done something in bad faith and negligence.
8. On the issue of the suit being statute barred, he submitted that he brought the claim to recover the land in the year 2012 and since then, there have been proceedings in relation to the land.

9. He submitted that the action was brought in 2012 and not in 2021 as alleged by the 1st, 2nd and 3rd defendants and the amended plaint shows that 12 years had not lapsed since the dispossession was instructed in 2009.

ANALYSIS: -

10. I have considered the Preliminary objection, the submissions as well as the relevant law.

11. *What constitutes a Preliminary Objection was set out in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, where it was held that:*

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

12. The first ground that has been raised by the 1st – 3rd Defendants is that the plaintiff’s claim is barred and contravenes Article 160 (5) of the Constitution of Kenya, 2010. Article 160(5) of the constitution provides as follows: -

“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

13. The said ground is based on the principle of Judicial Immunity which in my view is a pure point of law which has been enunciated by the Supreme Court of Kenya in the landmark case of **Bellevue Development Company Ltd v Francis Gikonyo & 3 others [2020] eKLR** whereby it was held as follows: -

“..... As such, if a Judge acting in his capacity as a Judge, acts in good faith in the lawful performance of his duties, he has absolute immunity even when he acts in excess of his jurisdiction. We therefore endorse Mativo J’s statement in Maina Gitonga v Catherine Nyawira Maina & Another (supra) that:

“It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction.

.... [73] We agree and would only conclude by stating that the immunity accorded to a Judge is absolute in the meaning attributed to the expression by Article 160(5) of the Constitution and as analysed in this Judgment. But that is not the end of the matter. We must still address the remedy available to a party alleging misconduct on the part of a judicial officer in decision making.

[74] Suppose there are allegations that a Judge has acted in bad faith or unlawfully and thus imputations of judicial impunity are made? Is such a Judge to be left scot free? Is a party injured by the “fraudulent, dishonest or perverse” conduct of a Judge without remedy?

..... [77] A Judge, in our view, thus remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent litigants from enjoying their Constitutional and statutory rights. The duty imposed on a Judge, then, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important Constitutional rights can be reviewed or appealed in another Court. But the conduct of a Judge who acts mala fides or unlawfully may thus trigger proceedings before the Judicial Service Commission and may ultimately lead to his removal thus the need for extreme care in the enjoyment of immunity.”

14. From the above case which is binding to this Honourable Court, it is clear that a judge or Judicial Officer enjoys absolute immunity from all criminal and civil proceedings on account of their performance of a judicial function. Where a litigant is aggrieved to the point she thinks that such an officer failed to act in good faith as premeditated under Article 160 (5) of the Constitution of Kenya, her remedy in my view lies in filing a complaint before the Judicial Service Commission

15. I have looked at the Amended Plaint filed on 13th October, 2010. The 3rd Defendant is claiming to have adopted the award of the 2nd defendant which is claimed to have lacked jurisdiction.

16. Without going to the merits of the case and in view of the foregoing, it is my view that the 3rd Defendant enjoys absolute immunity as the said adoption of the award was made on account of the performance of a judicial function under section 7 of the Land Disputes Tribunals Act, 1990 which provides that: -

“(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree

shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

17. The claim against the 3rd Defendant is therefore wrongly before this Honourable Court and the same is out for dismissal.

18. The second ground is on the issue of limitation which is a point of law which can be raised as a pure point of law. This is because the issue of Limitation goes to the jurisdiction of this Honourable Court. This position was held in the case of **Bosire Ogero v Royal Media Services [2015] e KLR** whereby Honourable Justice R.E. Aburili held that:

“The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998. It is for that reason that the issue of jurisdiction must be raised at the earliest opportunity. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (see Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1 Per Nyarangi JA.....”

19. Turning to this case, the argument by the respondents is that the plaintiff’s claim is time barred and contravenes Section 7 of the Limitation of Actions Act Cap 22 laws of Kenya which provides that: -

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

20. I have looked at the Amended Plaintiff. The Plaintiff seeks the following: -

a. A declaration that the Mwea Land Disputes Tribunal Acted Ultra Vires in adjudicating on matters relating ownership of land parcel No. Kabare/Nyagati/128 in Mwea Land Disputes Tribunal Arbitration Case No. 403/Kabare/Nyagati/128 and that its award dated 30th June, 2009 is null and Void.

b.

21. From those averments, the cause of action arose on 30th June, 2009. The Plaintiff filed his claim on 7th June, 2010. This was approximately one year later. It is evident that the period of 12 years had not lapsed and thus, the claim is not stale.

CONCLUSION: -

22. From the foregoing, I find the first ground in the Notice of Preliminary Objection dated 7th June, 2021 merited and the same is hereby upheld. Consequently, I hereby give the following orders/directions;-

- a. The case against the 3rd Defendant be and is hereby struck out with costs.
- b. The objection that the suit is time barred is without merit and is overruled.
- c. Due to the age of this suit, the matter be fixed for hearing on priority basis.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 18TH FEBRUARY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Mr. Chomba for the Plaintiff
- 2. 1st, 2nd and 3rd Defendants/Advocate – absent
- 3. Mr. Maina Kagio for the 4th Defendant
- 4. Kabuta – Court clerk.