



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO.418 OF 2014 (Formerly Nyeri HCC NO. 3 OF 2014)

JIM KAMUNGU MBURU.....PLAINTIFF

VERSUS

WILSON NGATIA KARUNGARU.....1ST DEFENDANT

(Sued as the legal representative of the estate

Of GEOFFREY KARUNGARU KABUA)

THE HON. ATTORNEY GENERAL.....DEFENDANT

RULING

Introduction

1. By a plaint dated **28th January, 2014** and amended on or about **8th August, 2014** to, *inter alia*, include the 2nd defendant (the Attorney General) as a party to the suit, the plaintiff seeks judgment against the defendants jointly and severally for Kshs.1,065, 650/= and costs of the suit.
2. It is the plaintiff's case that he suffered loss amounting to Kshs.1,065,650/= owing to fraudulent misrepresentation by the defendants. The plaintiff blames the 2nd defendant or the Government department in respect of which he is sued for having failed to Transfer or cause to be registered a caution in favour of the Government in respect of the parcel of land known as **LR. No. Iriaini/Kairia1537** (hereinafter called the suit property).
3. As a result of the omission by the 2nd defendant and/or the government department in respect of which the 2nd defendant is sued, the plaintiff claims that he entered into a sale agreement with **Geoffrey Karungaru Kabue** (deceased) and that after purchasing the suit property, he got the property registered in his name. When he decided to develop the suit property in 2011, he got information that the suit property was compulsorily acquired in 1970s for expansion of Karatina District Hospital.
4. The plaintiff faults the 2nd defendant or state department in respect of which the 2nd defendant is sued, for having failed to register the Government's interest in the suit property. She claims that owing to negligence on the part of the defendant or the government department in respect of which the 2nd defendant is sued, as an innocent purchaser for value without notice, he was exposed to deceit by an unscrupulous land owner.
5. The plaintiff also blames the 2nd defendant or the Government department in respect of which he is sued for approving a transfer in his favour when there was no good title capable of being transferred to him.

6. Upon being served with summons to enter appearance, the 2nd defendant filed a statement of defence denying all the allegations leveled against it and vide paragraph 11 and 12 of the statement of defence, intimated its intention to have the suit against it preliminary disposed of on among other grounds, that the suit against it is statute barred.

7. In fulfillment of its intention to challenge the suit against it, the 2nd defendant filed the notice of preliminary objection dated **4th February, 2015** where it contends that the plaintiff's suit offends the mandatory provisions of **Section 3(1)** of the Public Authorities Limitation Act, Cap 39 Laws of Kenya and as such a non-starter, incurably bad in law and an abuse of the court process. The 2nd defendant further contends that it will be highly prejudiced if the Plaintiff's suit is heard and determined as filed.

8. In reply and opposition to the notice of preliminary objection, the plaintiff filed the replying affidavit he swore on **13th February, 2015**. In that affidavit, the plaintiff has, *inter alia*, deposed that by the time he filed the suit herein, he only claimed for refund of purchase price and the expenses incurred from the 1st defendant because he believed the Government of Kenya acquired the land before he bought it; that through the statement of defence filed on behalf of the 2nd respondent, it appears that the suit property was acquired after he purchased the same and that the 1st defendant in his defence, contends that he made full disclosure concerning the suit property and even dares him to enjoin to the suit any person who might have interfered with his ownership of the suit property.

9. The plaintiff explains that the need to enjoin the 2nd defendant arose from the issues raised by the 1st defendant which may not be fairly adjudicated upon unless the 2nd defendant is a party to the suit.

10. Terming the act of restricting him from the use of the suit property when he is the registered owner thereof continuous, the plaintiff contends that the plea of time limitation cannot be used against him. The plaintiff also argues that the plea of limitation cannot attach in favour of the 2nd respondent because it was enjoined into the suit following an order of the court.

SUBMISSIONS

11. The application was disposed of by way of written submissions.

The applicant's submissions

12. In this regard on behalf of the 2nd defendant/applicant reference is made to **Section 3(1)** of the Public Authorities Limitations Act and submitted that the cause of action against the 2nd defendant being tortious, the claim against the 2nd defendant is by dint of the said section unmaintainable. The section provides as follows:-

“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.”

13. Concerning the plaintiff's contention that the orders sought cannot issue in favour of the 2nd defendant because it was enjoined to the suit pursuant to an order of a court, it is submitted that the said order was issued *ex parte* and for that reason the issues raised in the current application were not subject of determination in the application seeking to enjoin the 2nd defendant to the suit.

14. Reiterating that the plaintiff's suit against the 2nd defendant is time barred, counsel for 2nd defendant urges the court to dismiss the suit against it. In support of the 2nd defendant's case reference is made to the case of **Charles Wanduto Kihoro vs. National Bank of Kenya Ltd & another (2004) e KLR** where it was stated:-

“In light of the provisions of section 3(1) of the Public Authorities Limitation Act (Cap 39), the plaintiff ought to have instituted these proceedings on or before 5th June 1998. When the court asked the plaintiff's advocate, Mr. Mureithi, if he had any explanation that would exonerate the plaintiff from failure to comply with the time limit set by statute, his explanation was that the 2nd

defendant was a necessary party.

The court does acknowledge the fact that almost all criminal cases are prosecuted by state. It therefore follows that in such cases, if accused is convinced that he has been maliciously prosecuted, the Attorney General would be necessary party in the civil proceedings. However, the need to have the Attorney General enjoined as a defendant in civil suits for malicious prosecution does not in any way whatsoever imply that the Plaintiff can disregard the limitation period set out in Section 3(1) of Cap 39.”

The Respondent's submissions

15. In the submissions filed on behalf of the plaintiff, it is admitted that the plaintiff's claim is founded on tort but reiterated that the tortious act of the 2nd defendant is continuous. In this regard it is pointed out that the 2nd defendant and/or the Government department in respect of which the 2nd defendant is sued, registered restrictions against dealings in the suit property on 17th February, 2011 .

16. In support of the plaintiff's contention, reference is made to the case of **Lereya & 800 Others vs. Attorney General & 2 others KLR (E & L)761** where it was held:-

“The 1st and 2nd defendant, who had pleaded limitation, had conceded that the Propopis juliflora weed was invasive and that its effect on the environment was long-term or continuing. In the premise, their objection to the suit on the ground of limitation lacked merit.”

17. It is also pointed out that the 2nd defendant was added into the suit, pursuant to an order of the court and submitted that the 2nd defendant having being brought to the suit through a court order, cannot be heard to claim that the claim against it, is time barred. In support of that argument reference is made to the case of **Charles Mwangi Karingithi vs. Benson G. Macharia & Kimotho Mugambi Nyeri HCCC NO.315 OF 1996** where it was stated:-

“An exercise of discretion can never be subject to the Limitation of Actions Act, that is to say, time never runs against exercise of discretion by court.”

18. It is further submitted that because from the pleadings filed on behalf of the defendants it is not easy to discern when the suit property was acquired by the Government, the 2nd defendant is a necessary party for the purpose of shedding light on the issues raised in the suit.

Analysis and determination

19. It is not in dispute that the plaintiff's claim is tortious in nature. The alleged tortious conduct of the 2nd defendant and/or the Government department in respect of which the 2nd defendant is sued, is said to have occurred on or about 17th February, 2011. The current suit was filed on or about 28th January, 2014 and amended on or about 8th August, 2014 to, *inter alia*, enjoin the 2nd defendant.

20. By dint of the provisions of **Section 3(1)** of the Public Authorities Limitation Act aforementioned, *prima facie* the case against the 2nd defendant is time barred. However, in the circumstances of this case, the plaintiff contends that the tortious act on which his claim is based is continuous so that as long as the alleged wrongful action of the 2nd defendant persisted, he was entitled to bring the suit.

21. Whereas the contention by the plaintiff that the tortious act of the 2nd defendant which forms the subject matter of this suit is continuous is persuasive, I find that contention not to be supported by the pleadings filed in this case. In my view that argument would only hold water if the plaintiff was seeking removal of the restriction put on his title and not otherwise.

22. With regard to the contention by the plaintiff that the 2nd defendant's notice of preliminary objection is unmaintainable because the 2nd defendant was enjoined into the suit pursuant to an order of the court, I agree with the submissions by the 2nd defendant's counsel that the issues raised in the current application

were not brought to the attention of the court in the application for leave to enjoin the 2nd defendant to the suit.

23. Since the issue of time bar was not subject of consideration in the application for joinder, the plaintiff cannot be heard to say that the said issue cannot be raised in this suit. Be that as it may, having read and considered the statement of defence filed by the defendants' in this suit and being of the view that the 2nd defendant is a necessary party for the purpose of assisting the court make a just and fair determination of the issues raised in the suit, I decline to strike the 2nd defendant from the suit.

24. Costs of the application to be in the cause.

Dated, signed and delivered at Nyeri this 14th day of May,2015

L N WAITHAKA

JUDGE

In the presence of:

Mr. Makori for the 2nd Defendant

No appearance for 1st Defendant

Mr. Kingori h/b for the Plaintiff.

Lydia - Court Assistant