



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL CASE NO.75 OF 2011**

**JUMA ABDALLA MATATA .....PLAINTIFF**

**VERSUS**

**1. ALI CHANGOMA**

**2. KHALID MUSA**

**3. MOHAMED MUSA**

**4. MASUDI MUSA**

**5. NAHID MOOSA AHMED ALWY**

**6. EUROTRUCKS & TRAVELLERS LTD .....DEFENDANTS**

**R U L I N G**

1. This Court is asked to consider and determine prayer 4 of the Notice of Motion dated 25<sup>th</sup> October 2012 for the following orders:-

**“4. The suit is struck out for being frivolous, vexatious & otherwise an abuse of court process as the cause of action is stale & caught up by section 7 of the Limitations of Actions Act.”**

2. In support thereof an affidavit was sworn by one Catherine Naemu Lanyasunya on 25<sup>th</sup> October 2012. She describes herself as a Director of Eurotrucks & Trailers (K) Limited (**hereinafter E & T Ltd**). At the hearing of the Application Counsel for E & T Ltd argued that the cause of action is stale and caught up by Section 7 of The Limitations of Actions Act. Counsel asked the Court to look at the plaint to discover when the cause of action accrued. That plaint is dated 25<sup>th</sup> March 2011. It was proposed that the cause of action accrued when the land was first registered under the system of registration in The Registered Land Act (**Cap 300 now repealed**). The date is said to be on 10<sup>th</sup> April 1995.

3. In opposing the Application, the Plaintiff swore a replying affidavit on 30<sup>th</sup> October 2012 setting out the background to this dispute in his perspective. More shall be said of this in the later part of this decision. The argument made on behalf of the Plaintiff is that right of action accrued in 2005 when the initial Plaintiff (now Deceased) was evicted from the suitland.

4. The reasons why E & T Ltd seeks the striking out of the Plaint are very pointed and specific. It is that the Plaintiffs cause of action is stale and caught up by the provisions of Section 7 of The Limitation of Actions Act. It is to this pointed attack that this Court will determine the merit of

the Application.

5. Section 7 of The Limitations of Actions Act provides:-

**“7. 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.”**

What needs to be underscored for purposes of this Application is the date of accrual of the right of action. And there is no agreement on this. The Plaintiff contends that it is on the date of eviction being the year 2005, while E & T Ltd submits that it is on the date of the first registration of the land on 10<sup>th</sup> April 1995.

6. I must emphasize that this is an interlocutory Application and may not be occasion to make any hard and fast findings on the facts. That said E & T Ltd has to date not filed a defence and so the averments made in the Plaint are in that respect uncontroverted. Two of the averments catch my attention and these are in paragraphs 15 and 16 of the Plaint:-

**“15. The Plaintiff avers that he was kicked out of the parcel of land by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who later sold the land to the 6<sup>th</sup> Defendant herein.**

**16. That upon realizing that his ancestral land had been fraudulently and unlawfully acquired by the 1<sup>st</sup> to 6<sup>th</sup> Defendant, the Plaintiff filed the Msambweni Land Dispute Case No.25 of 2010 and the Defendants herein which dispute was determined in favor of the Plaintiff.”**

7) One of the things the Court hears the Plaintiff to be saying is that the Deceased, being entitled to the suitland, was unlawfully dispossessed of it and this is an action to recover it. Necessarily the provisions of that Section 9(1) of The Limitation of Actions Act comes into play:-

**“9.(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.” (my emphasis)**

But, the Plaint is not specific as to the date of dispossession. There was however a statement in the Plaintiffs affidavit that eviction took place in 2005. If true, then by virtue of the provisions of Section 9(1) the suit may not be time barred.

8) It is trite that striking out is a draconian order and should only be made in the clearest of cases. Where an amendment to a pleading can inject some life into it, then an order for striking out should not be made. Some life can be injected into the plaint by a specific averment that dispossession happened in the year 2005. Thereafter the challenge will be on the Plaintiff to prove that the Deceased and therefore his Estate was lawfully entitled to the land at the point of eviction. That may prove to be the greater hurdle.

9) As would be clear, I am for disallowing the Application which I hereby do with costs to the Plaintiff. E & T Ltd may have anticipated this result and therefore requested that they be granted leave to file a Defence in the event that I disallowed the Application. That is a fair request. Leave is granted to E & T Ltd to file and serve their statement of Defence within 14 days of this ruling.

**F. TUIYOTT**

**J U D G E**

**COUNTERSIGNED, DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2014**

**IN THE PRESENCE OF:**

**J U D G E**