



**RUKIYA SOUD ALI BIN BASHIR.....PLAINTIFF/
RESPONDENT**

-VERSUS-

1. SWALEH MOHAMMED SWALEH

**2.ABDULRAHIM MOHAMED SWALEH.....DEFENDANTS/
APPLICANTS**

RULING

M/s. Khatib & Company, Advocates on behalf of the defendants, moved the Court by Notice of Motion dated **1st September, 2010** and brought under s.4(2) of the Limitation of Actions Act (Cap. 22, Laws of Kenya), ss.1A and 1B of the Civil Procedure Act (Cap.21, Laws of Kenya), and Order L, Rule 1 of the earlier edition of the Civil Procedure Rules. The application carries one significant prayer: “*[that] the plaint be struck [out] and the suit be dismissed as it is time barred.*”

The application rests on the following grounds:

- (i) *that plaintiff’s cause of action as pleaded occurred on 15th August, 1997;*
- (ii) *the claim being for trespass the suit should have been commenced within three years as from 15th August, 1997;*
- (iii) *as at today, it is in excess of 12 years since the cause of action arose;*
- (iv) *the suit is time-barred and ought to be dismissed with costs.*

To the application and the specified grounds, the firm of *M/s. Ojode Onjoro & Co, Advocates* on behalf of the plaintiff, filed grounds of opposition dated **21st September, 2010**; and the objection takes the form of the following contentions:

- (i) *the application is frivolous, vexatious and an abuse of Court process;*
- (ii) *the application is meant to delay fair trial and is evasive and obscures the real cause of action;*
- (iii) *the Orders sought cannot be granted, as they will not defeat the provisions of s.27A of the Registered Land Act (Cap.300, Laws of Kenya).*

The plaintiff had also filed a Notice of Preliminary Objection, dated **10th September, 2010**; and this has two points:

- (i) *that, the application is mischievous and an abuse of the Court process; and*

(ii) that, the suit is unchallengeable under s.27(a) of the Registered Land Act (Cap.300), by virtue of registered and absolute ownership being vested in the plaintiff.

Learned counsel, **Mr. Khatib** for the defendants/applicants made reference to para.6 of the plaint: “the plaintiff pleads that on or about **15th August, 1997** the defendants wrongfully entered and took possession of the suit property and have thereafter wrongfully remained in possession and illegally leased the same for monetary reward and have thereby trespassed, and continue to trespass thereon.” This cause of action, counsel urged, arose on **15th August, 1997**, and so can no longer be pursued, on grounds of limitation period for *tort cases*.

From counsel’s perception, the facts attending causation fall squarely within the provision of the Limitation of Actions Act, s.4(2) which thus provides:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

Counsel submitted that the claim is time-barred, and that no leave of Court had been sought before filing the claim out of time. He submitted that his client’s case had support in authority: **Janendra R. Shah & Others v. Mistry Valji Naran Mulji**, Mombasa HCCC No. 84 of 2005; **Abubakar Zain Ahmed v. Premier Savings & Finance Limited & Others**, Mombasa H.C.C No. 109 of 2004.

Counsel submitted that the application is frivolous, vexatious and an abuse of Court process; in particular, he urged that the application lacks substance because the defendants in their statement of defence and counterclaim, made no claim for revocation of title to the suit property, and only sought *injunction, general damages and costs*.

On the question whether the trespass case was tenable, counsel urged that the plaintiff was the registered owner of the suit land, and that his rights were protected by ss.27 and 28 of the Registered Land Act “which in effect state [that] the rights of a registered title [-holder] under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests....”

Counsel submitted that the application is incompetent “as it cannot challenge the proprietary rights of the plaintiff.” He went on to urge that: “The plaintiff has a reasonable cause of action to entitle her [to] obtain a remedy against the defendants,” as her claim has high chances of success “considering that the title to the suit property has not been challenged.”

Counsel contested the defendants’ recourse to the law of limitation, on the ground that they had not specifically pleaded it.

The defendants have brief submissions, in which the specific question emerging is that the plaintiff’s suit was lodged well after the limitation period had expired. The plaintiff has *not denied* that contention, but has attempted to shift the focal point in the matter to *failure to plead* limitation in the defence and counterclaim. I take it that the defendants’ statement, that the period of delay in filing suit is in excess of ten years, is well based, as it has not been denied.

The plaintiff has also argued that since the suit property is registered in her name, and this fact is uncontested, her right to sue for trespass cannot be contested, and so the defendant’s case lacks a basis in law.

I have closely examined the written submissions of counsel; and I find them short on their explication of the critical issues of law. In particular, the Court should have been addressed on the relationship between the tort of *trespass*, and the fact of *possession* or *occupation*; and on the relationship between the tort of trespass, and *registered title to land*.

In the short term, and in interlocutory applications, the Court would uphold *possessory rights*, leaving the

question of full proprietary rights to be resolved within the framework of the main suit. In this case, what the plaintiff claims is the proprietary rights; but he says nothing about the defendants' possessory rights. The Court must take the position, in the circumstances, that the defendants' possessory rights have a legitimate basis. Thus, those rights cannot be contested merely by pleading the existence of registered proprietary rights.

It follows that a plaintiff who contests such legitimate possessory rights must comply with the governing law. A case based on the tort of trespass is, essentially, a challenge to such possessory rights; and so the plaintiff must take such rights as he finds them, and act in compliance with the law of limitation in relation to them.

In this case, the suit is extremely belated, in a manner that infringes the law of limitation.

I hereby allow the defendants' application by Notice of Motion of **1st September, 2010**; and I strike out and dismiss the suit filed on **5th August, 2010**.

The plaintiff shall bear the defendants' costs for this application and for the suit itself.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 24th day of February, 2012.

**MAUREEN ODERO
JUDGE**