



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 23 OF 2010

1. MOHAMED BARISA DHIDHA
2. WILBERFORCE
BONAZA
3. ATHMAN BAHOLA
BUYA
4. AMON BUYA
HIRIBAE
5. BWANAISAH BARISA BUYA
MOROWA
6. JOSEPH
OKEI
7. ABDALLAH KOMORA
8. JANE MKALA
9. BAKARI BAHOLA BAJILAPLAINTIFFS
*[suing for and on behalf of 248 affected members
of Ndera & Ngwano Communities of Tana Delta District]*

-VERSUS-

1. THE ATTORNEY-GENERAL
*[on behalf of (a) THE MINISTRY OF LANDS
AND SETTLEMENT; (b)THE MINISTRY
OF ENVIRONMENT; (c) OFFICE OF THE
PRESIDENT; (d) THE MINISTRY OF
WILDLIFE AND TOURSIM]*

2. THE DIRECTOR OF KENYA WILDLIFE SERVICE
3. THE WORLD BANK COUNTRY DIRECTOR
4. THE GLOBAL ENVIRONMENT
FACILITY.....DEFENDANTS

RULING ON A PRELIMINARY OBJECTION

The main cause is a suit by plaint dated **25th January, 2010**, whereby nine persons on behalf of 248 others, are suing for alleged *breach of contract*. Under the umbrella of the suit, there are two applications which were coming up for hearing: the 2nd defendant's Chamber Summons of **14th July, 2010**; and the 1st defendant's Notice of Motion of **13th August, 2010**. The two applications have a common design: the first seeks a *striking-out* and *dismissal* of the suit for being "*an abuse of the process of the Court*"; and the second seeks that *same object*, though on the ground that the suit "*is statutorily time-barred*."

Although by an earlier direction, it is the preliminary objection that was due for hearing, the initial canvassing of the same led learned counsel **Mr. Njoroge** to ask that his client's Notice of Motion of **13th August, 2010** be regarded as a further preliminary objection, and disposed of at the same time. This request was granted, as objections were not upheld.

The objectors, 3rd and 4th defendants, in the preliminary objection of **16th November, 2010**, contend that the suit "*is incompetent, does not lie and should be dismissed ab initio with costs to the 3rd and 4th defendants*." The objectors have set out the following grounds:

(i) pursuant to s.5(1) of the Bretton Woods Agreements Act (Cap.464, Laws of Kenya) and Article VII, s.8(i) in the Schedule thereto, the 3rd defendant is immune from legal process, with respect to acts performed in his official capacity;

(ii) pursuant to s.5(1) of the Bretton Woods Agreements Act (Cap.464) and Article VII, s.3 in the Schedule thereto, the 4th defendant, as the alter ego of the World Bank, is immunized from any action except where it has issued or guaranteed securities;

(iii) there is no privity of contract between the plaintiffs and 3rd and 4th defendant to render the 3rd and 4th defendants liable for any, or any breaches of, contract;

(iv) the suit herein is time-barred, pursuant to s.4 of the Limitation of Actions Act (Cap.22, Laws of Kenya).

At the hearing of the preliminary objection, the 3rd and 4th defendants were represented by learned counsel, **Mr. Ojiambo** and **Ms. Ndiko**, the 1st defendant by learned counsel, **Mr. Njoroge**, and the plaintiffs by learned counsel, **Mr. Kenzi**.

Mr. Ojiambo contested the plaint, in terms of propriety of form: it was drawn vaguely, and did not lend itself to responding pleadings, in certain respects; it does not state whether there was a *written contractual agreement*; it does not state *when* the alleged breach took place. But counsel submitted that there are more fundamental issues to raise at this stage, going to the very foundation of the suit as filed. In particular, the joinder of the 3rd defendant would give the impression that this defendant occupied an office in the establishment of the World Bank; and the 4th defendant was not described in the pleadings; it remained unclear whether the Global Environmental Facility was a legal entity. Counsel urged that the plaint, on account of its vagueness in the pleadings, ought to be struck out, unless amended.

Mr. Ojiambo submitted that in the pleadings, the plaintiffs state (para.9 of plaint) that an *agreement* existed between 3rd and 4th defendant on the one hand, and the plaintiffs on the other – but they do not indicate this was a *written agreement*. Yet by the Law of Contract Act (Cap.23, Laws of Kenya), s.3, an agreement for the disposal of an *interest in land* was required to be in writing, as a basis for enforcement. It was, therefore, learned counsel urged, incumbent upon the plaintiffs to plead specifically that a written agreement existed: and failing this, the suit cannot be maintained.

The next point is in relation to immunity to legal process. By s.5(1) of the Bretton Woods Agreement Act (Cap.464), the 3rd defendant enjoys immunity. The aspects of immunity provided for are specified in the Schedule, Article VII s.3 of which provides for "*immunity from judicial process*," as follows:

“The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.”

And s.8 provides for “immunities and privileges of officers and employees”:

“All Governors, Executive Directors, Alternates, officers and employees of the Fund –

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Fund waives this immunity;.....”

Counsel submitted that the 3rd defendant herein, as an Executive Director of the World Bank, “falls in the same category as officers accorded immunity”, save where the Bank itself waives immunity.

Counsel urged it was a fatal defect in the plaint herein, that it made no mention of 3rd defendant’s immunity, and was silent on the question whether immunity had been waived. The plaint had made no reference to the *capacity* in which 3rd defendant was acting; but it must have been in *official* capacity – and this will mean that immunity applies as specified under s.8 of the Schedule to the Bretton Woods Agreements Act.

Counsel urged that the Court of Appeal decision, ***Tononoka Steels Limited v. The Eastern and Southern Africa Trade and Development Bank***, Civil Appeal No. 255 of 1998 upon which the plaintiffs were relying was not applicable in this case; in that case the Court held that the Bank therein had no immunity from legal process. Counsel submitted that in the ***Tononoka Case*** the Court had held that the Minister had not acted within his powers, when he purported to confer immunities upon officers of the Bank in question – for the acts in question were purely commercial transactions, and so the PTA Bank could not avoid liability by claiming immunity.

Such, counsel submitted, was different from the position in the instant matter: the immunity in this instance is granted *directly by statute*, and no Ministerial intervention is required. And by virtue of the statutory provision, 3rd defendant could only be sued if he acted personally, in a *personal capacity*, and not for the World Bank. Counsel submitted that whereas the suit targeted 3rd defendant in his *official capacity*, in this status, 3rd defendant enjoyed *statutory immunity*: and consequently no action can be sustained against him.

With regard to 4th defendant, counsel submitted that this was a face of the World Bank, and Article VII, s.3 of the Bretton Woods Agreements provides that:

“Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution...”

Counsel submitted that the Bank enjoyed immunity as it had not issued or guaranteed any *securities*; there was no *customer-bank relations* between the plaintiffs and the World Bank; the only parties to any transactions, in this case, would be the *World Bank* and the *Republic of Kenya*.

Counsel submitted there was no tenable suit against the 3rd or 4th defendant; the 4th defendant being, in effect, the World Bank, which was protected in law by a set of immunities.

Learned counsel, **Mr. Njoroge** for 1st defendant, focused attention on para.9 of the plaint which pleads:

“The plaintiffs [aver] that [sometime] in the year 2000 the 1st defendant being the Government of Kenya, in conjunction with 2nd, 3rd and 4th defendants, entered into an agreement for [the] compulsory acquisition of the plaintiffs’ ancestral land in the Tana Delta District.....comprising 248 farming families.”

He submitted that, “*assuming there was a contract in 2000, a period of 10 years had passed by the time the suit was filed*”; and that the suit fails to comply with the terms of s3(2) of the Public Authorities Limitation Act (Cap.39, Laws of Kenya), and that no action founded on contract may be filed against the Government after the expiry of *three years* from the occurrence of the cause of action. Counsel cited the Court of Appeal decision, ***Iga v. Makerere University*** [1972] E.A. 65 for the proposition that “*if action is brought out of [the limitation] period....[then]....the*

Court [has] no jurisdiction to entertain the suit.”

Learned counsel, **Mr. Kenzi** for the plaintiffs, submitted that there was no ambiguity in the suit as filed, and that there had been an *agreement* between 3rd and 4th defendants and the Government for acquisition of the plaintiffs’ ancestral land – and that this was *not a contract governed by the Law of Contract Act* (Cap.23, Laws of Kenya). The acquisition, counsel submitted, was governed by other statutes – the Land Acquisition Act (Cap.295) and the Trust Land Act (Cap.288); and the Government was then *compulsorily acquiring land* for public use.

Counsel submitted that the applicable limitation period was different in respect of different defendants: six years for the 2nd, 3rd and 4th defendants – and that the baseline for counting should be from **2005** when the Government issued documents in relation to the lands in question. Counsel contested the argument regarding limitation period: on the basis that the defendants had not raised it in the pleadings.

On the subject of immunity, **Mr. Kenzi** submitted that the 3rd and 4th defendants did not enjoy *absolute* immunity from civil suits; and that no foreign organization could enjoy immunity from legal process without a Government Gazette Notice conferring immunity. Counsel urged that the Schedule to the Bretton Woods Agreements Act had to be gazetted by the Minister, for it to confer immunity upon 3rd and 4th defendants.

Learned counsel **Mr. Ojiambo**, in reply, submitted that no relationship of contract was created by the Land Acquisition Act – and hence there was no cause in *contract*, as a basis of the suit. Moreover, counsel urged, the suit makes no reference to the Land Acquisition Act (Cap.295), and that if the plaintiffs perceived their grievance as being related to *trust land*, then their suit should have been against the *local authority*. Counsel submitted that the suit, while founded on the existence of an agreement between the Government of Kenya, on the one hand, and 3rd and 4th defendants on the other, bears no pleading that any agreement existed between the *plaintiffs* on the one hand, and 3rd and 4th defendants on the other hand; and that if any contract at all existed, there is no pleading as to whether it was a *continuing contract*, nor on the moment when a breach thereof took place.

With regard to immunities for particular positions of responsibility, counsel submitted that the plaintiffs’ position confounds two separate statutes, with differing provisions: the **Privileges and Immunities Act (Cap.179)**, which empowers the **Minister** to extend immunities in certain cases, and the **Bretton Woods Agreements Act (Cap. 464)**, which *directly grants immunities* – though without extending the same to *commercial* transactions. Counsel submitted that the Bretton Woods Agreements Act itself donates immunity, and the Minister does not intercede by publishing a Gazette Notice.

The basic principle guiding preliminary-objection proceedings remains as laid down by the Court of Appeal in ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** [1969] E.A. 696: “[A preliminary objection] raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct” (at p.701, *per Sir Charles Newbold, P*).

Learned counsel have questioned the foundation of a suit which, though purporting to rest on *contract*,

fails to identify that contract, or state the *date* when it was entered into, or specify its status whether written or unwritten; a suit which enjoins a plurality of parties including entities of international character, but without any averment on the *immunity status* in law, of such parties; a suit in contract which is related to the terms of the Law of Contract Act (Cap.23, Laws of Kenya), with regard to transactions involving landed property, but which refers not to the written form; a suit purportedly in contract, but which bears no relation to the relevant law of limitation of actions.

In the pleadings, the plaintiffs perceive as crucial to their case certain situations, even though the jural profiles of these phenomena remain undefined: communal and ethnic occupation of a certain swathe of land; the said land being “*an important ecosystem [lying] at the mouth of Tana River*”; this land being “*very fertile land due to fertile soil [deposited] as the river gets to the Indian Ocean*”; the plaintiffs having been subsistence farmers; the said delta being “*home of the rare and endangered species of apes and monkeys [referred to as] the Tana River Red Colobus and the Tana River Crested Mangabey.*”

The plaintiffs plead (para.9 of plaint) that:

“*sometime in the year 2000 the 1st defendant being the Government of Kenya, in conjunction with the 2nd, 3rd and 4th defendants entered into an agreement for compulsory acquisition of the plaintiffs’ ancestral land in the Tana Delta District...*”

Just as learned counsel for the objectors have urged, if such a transaction was a *contract* it would be a contract between the *plaintiffs* and the *Government of Kenya* – and firstly, this would not be a case of *compulsory acquisition*; and secondly it would be a contract between the plaintiffs *and* the several other parties.

The outlines of a **contract**, what **Black’s Law Dictionary**, 8th ed (2004) defines as “[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”, have *not* been identified, even though the plaint attributes failed *contractual* obligations to *all* the parties herein. While the “contract” rubric, and references to “contract” appear in the plaint, learned counsel **Mr. Kenzi** submitted that the transaction in question was governed by “*the [Land Acquisition Act (Cap.295, Laws of Kenya)] and the Trust Land Act [Cap.288, Laws of Kenya].*”

There is *no certainty*, then, as to the *contractual basis* of the claim; and I am in agreement with counsel for the objectors that an essential element in the pleadings is missing. This is a matter of both *merits* and *procedural compliance*; as regards the merits, it will not be possible for the defendants to put in the requisite *defence*, with such a state of pleadings – and this will limit the scope for the Court to arrive at a just settlement.

Secondly, just as counsel for the objectors has indicated, the lack of clarity as to the *cause of action* has a relevance to the issue as to compliance with the limitation period as prescribed by law.

Mr. Kenzi did not squarely address the issue as to *immunity* from ordinary suit, granted directly by the terms of the Bretton Woods Agreements Act (Cap.464, Laws of Kenya); for unclear cause he contended that immunity, for the 3rd and 4th defendants, must be conferred by *the Minister*, under the Privileges and Immunities Act (Cap.179, Laws of Kenya). Consequently, the plaint carries no pleadings foreshadowing the propriety of lodging suit against the 3rd and 4th defendants.

On the grounds above set-out, it is plain that the suit as lodged by the plaint of 25th January, 2010 does not rest on a valid foundation, and is not tenable. I will make Orders as follows:

(i) The 1st, 3rd and 4th defendants’ preliminary objections are upheld; and the suit as against the three parties, is struck out in limine.

(ii) The plaintiffs are granted locus poenitentiae to reconstruct their plaint and file a suit in compliance with the law, within 21 days of the date hereof.

(iii) Parties shall, in the meantime, have the liberty to apply.

(iv) Costs shall be in the cause.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 5th day of March, 2012.

**MAUREEN ODERO
JUDGE**