



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT 280 OF 2009

1. CYRUS MWANDAO MCHARO
2. MARIA MBALA MWAMBI.....PLAINTIFFS

VERSUS

1. PRIVIA MALASI
2. COMMISSIONER OF LANDS.....DEFENDANTS

RULING

Several applications were made by the parties, following the filing of the plaint which was dated 18th August, 2009. The plaintiffs themselves filed a Chamber Summons on 15th September, 2009; the defendants filed a Notice of Preliminary Objection on 21st October, 2009 and also filed on the same date a Notice of Motion. In giving directions on these preliminaries, the Court directed on 29th October, 2009 that the Notice of Preliminary Objection would first be taken up.

The objection is dated 19th October, 2009 and relates in the first place to the suit itself. The objector thus objects:

- (i) ***the suit is statute-barred;***
- (ii) ***the suit does not lie, in view of the provisions of the Registered Land Act (Cap. 300, Laws of Kenya);***
- (iii) ***the plaintiffs “have not exhausted any legal rights conferred by various statutes, in particular the Land Adjudication Act (Cap. 284, laws of Kenya);***
- (iv) ***the suit is wholly defective and ought to be struck out in limine.***

Learned counsel **Mr. Lutta**, for the defendants, submitted that the plaint fails to disclose the date of the cause of action – and thus deprives the Court of an opportunity to determine if it has jurisdiction; the pleadings ought to have stated the said date.

Counsel urged that the pleadings had yet another shortfall: they did not comply with the terms of Order **VII**, rule 1(1)(e) of the Civil Procedure Rules; they do not state if there are any other proceedings in this or any other Court touching on the issue in litigation. The plaintiffs’ pleadings, furthermore, had not stated whether the Court had jurisdiction to entertain the matter; and they had not pleaded that the relevant question arose within the jurisdiction of the Court. Consequently, counsel urged, the plaintiffs had not, by their pleadings, submitted themselves to the jurisdiction of the Court.

Mr. Lutta submitted that the 1st plaintiff, though claiming to have authority to swear an affidavit on behalf of 2nd plaintiff, had not authenticated that claim, for instance, by way of a power of attorney.

Counsel urged that the suit, which was a claim for land, did not comply with the terms of s.7 of the Limitation of Actions Act (Cap.22, Laws of Kenya) and was statute-barred.

Counsel submitted that an official search conducted at the Lands Registry had shown that the suit land, L.R. No. Bura/Mwatate/1091 was registered in the name of 1st defendant and the relevant entry had been made on **19th August, 1997**; and the twelve-year Limitation period from that date lapsed on **18th August, 2009**. Since the suit was brought before the Court on **15th September, 2009**, counsel submitted

that the claim came some 25 days after the lapse of time under the Limitation of Actions Act. Similarly, the land known as L.R. No. Bura/Mwatate/1092 had been registered in the name of 1st defendant on 19th August, 1997, the day when another parcel of Land L.R. No. Bura/Mwatate/1104 had been registered in the name of 1st plaintiff.

Counsel urged that since it was claimed 2nd defendant had trespassed on Plot No. Bura/Mwatate/1091, and trespass was a tort, the claim should have been brought within three years, to comply with the Limitation of Actions Act; and the claim for *mesne profits* did not lie, as it should have been made within six years.

Counsel urged that title No. Bura/Mwatate/1091 when issued on 19th August, 1997 was a first registration in the name of 1st defendant – and so, this title was indefeasible, by virtue of s.143 (1) of the Registered Land Act (Cap. 300, Laws of Kenya). Therefore, counsel submitted, the only recourse open to the plaintiffs was to sue the State for compensation.

Counsel submitted that the plaintiffs had not complied with the terms of s.22 of the Land Adjudication Act (Cap. 284, Laws of Kenya) which requires that a party who is dissatisfied with the manner of land adjudication has 60 days from the date of notice to appeal; and the plaintiffs had not been granted any extension beyond the prescribed period.

Hearing of submissions was adjourned from *5th November, 2009 to 25th November, 2009* – and on that occasion **Mr. Lutta** stated before the Court that he had just been served with an amended plaint in Court, dated and filed on *5th November, 2009*. Counsel noted that this amended plaint had been filed out of time, and without the Court’s leave; and service had also been effected out of time.

Ms. Mucai for the plaintiffs contested the contention that the suit was fatally defective – and she grounded this argument on the statement that the plaintiffs had now made amendments to the plaint. Counsel submitted that the amended plaint had been filed on the last day when pleadings closed – and that the preliminary objection had been raised prematurely before the close of pleadings.

Ms. Mucai contested the claim that the suit was statute-barred; the date of the suit was 18th August, 2009 – and that date fell within the limitation period. It had been stated in the amended plaint that the trespass for which the plaintiffs were claiming had begun on 26th February, 2009 – so that the claim fell within the limitation period for torts.

Learned counsel contested the contention that the plaintiffs had not exhausted the relevant land law procedures: she urged that this was a question linked to matters of fact, which required evidence and so was not a proper preliminary-objection matter. Counsel stated that 1st plaintiff had been advised by the Land Registrar to file suit in the High Court, and so this matter was properly taken before the High Court; among other things, the plaintiffs were seeking injunctive orders – and these could only be sought before the High Court.

Mr. Lutta in his reply urged that “the amended plaint is an afterthought even if it had been [effected] within time. It was brought to defeat an objection”.

Counsel noted that the amended plaint had not been served on him within 14 days as required by law. The amended plaint, counsel urged, was inconsistent with the verifying affidavit earlier filed by the plaintiffs.

It is not doubted that the plaintiffs’ amended plaint was served upon the defendants belatedly, and without compliance with the requirement of the law. As to the time of filing the amended plaint, counsel for the objectors is not certain whether there was compliance with the law, though counsel for the plaintiffs is positive that there was due compliance. An objection to suit proceedings ought to be founded on a clear recognition of fact, on the issue of compliance or non-compliance with filing deadlines; and therefore this point is to be taken in favour of the plaintiffs.

Learned counsel **Mr. Lutta**, for the defendants, invited the Court to see the stealing of a march, in the entire set of actions attending the amendment of the plaint. This Court, however, must rely on clear fact, and must not proceed from attribution of bad faith, even where a party appears to act unusually for the purpose of complying with prescribed time limitations.

But more important, as a matter of principle, is the fact that the constitutional facility which is the Court, is continually sitting to determine all matters that bear the colour of justiciable disputes; and in this way an obligation rests on parties to await the judicious determination of the dispute, through the normal process of *hearing*. No case is, in my opinion, made in this instance for skipping the orderly hearing process of the Court.

Accordingly, the Notice of Preliminary Objection is dismissed, with costs to the plaintiffs.

Orders accordingly.

SIGNED

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J. B. OJWANG

JUDGE

DATED and **DELIVERED** at **MOMBASA** this 19th day of February, 2010.

Coram:

Court Clerk: ***Ibrahim***

For the Plaintiffs:

For the Defendants/Objectors: