



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 2207 of 1998**

**CHRISTOPHER KAGEMA GICHUHL.....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**BENSON IRUNGI MBARIA.....1<sup>ST</sup> DEFENDANT**

**ROSEMARY WANJIKU MBARIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is a very old case. The record is evidence of protracted litigation and I must wonder why it has not been determined from the time it was filed. There is now before me an application by way of Chamber Summons under Order VI A rules 3,5,7 and 8 of the Civil Procedure Rules and Sections 3A and 100 of the Civil Procedure Act for orders that the 1<sup>st</sup> and 2<sup>nd</sup> defendants be granted leave to amend and file their further amended defence in terms of the annexed draft and that the said draft be deemed as duly served.

The grounds set out are that the plaintiff's suit is statute barred under the Governments Lands Act Cap 280 Laws of Kenya and that the omission to include the defence of the statutory limitation under the Government Lands Act was inadvertent.

It is also the defendants' case that the suit is statute barred under the Limitation of Actions Act Cap 22 Laws of Kenya and no leave to extend the time of Limitation was sought by the plaintiff. The defendants have pleaded prescription as a defence which is the legal consequence of Limitation of Action but have not pleaded specifically limitation of action as a defence.

It is also their case that the amendment will facilitate the determination of the real issues in dispute and that the plaintiff will not suffer any prejudice if the application is allowed. The application is opposed and a replying affidavit as been sworn by the plaintiff to that effect.

There is now a Notice of Preliminary Objection filed by the plaintiff's advocate to the effect that the application is *res judicata* and that it is an abuse of the process of the court and is brought in bad faith.

Both counsel have filed submissions which I have on record. This is not the first time the issue of limitation has come up because there is on record a ruling by Kubo J. which mentioned the said issue.

I have noted that this case is very old. There is no doubt that its continued presence in our shelves is overbearing not only on the plaintiff but I believe also on the defendants. In the ruling made by Kubo J. the learned judge said **"it appears the case for the defence is being prepared in staggered installments. This won't do."** It has not been shown on the part of the defendants why this amendment is being sought this late in the proceedings. Observe that the issue of Limitation has been alluded to. This can properly be canvassed when evidence is called by the parties hereto. I consider it an abuse of the process of court for the application to be brought this late in view of

what is being advanced.

Kubo J. in his ruling aforesaid mentioned also that the issue of limitation is an issue for evidence at the trial of the suit. I have no doubt that the learned judge had the issues alive in his mind and did not want to go beyond such observations. I hold the same view and proceed to uphold the Preliminary Objection and dismiss the application with costs to the plaintiff. Orders accordingly.

*Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of October, 2010.*

**A. MBOGHOLI MSAGHA**  
**JUDGE**