

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 38 OF 2006

JACOB TOLOI LUSENO PLAINTIFF

V E R S U S

**ATTORNEY GENERAL
DEFENDANT**

R U L I N G

On 24-4-2007, Mr. Njuguna, the learned State Counsel, appearing for the Defendant in this suit, raised a Preliminary Objection that the suit was time barred when it was filed and should be struck out. He contended that paragraph 3 of the Plaintiff shows that the cause of action arose on 21.08.1995 and that the suit was not filed until after a period of ten years on 05.04.2006. Paragraph 3 of the plaintiff states:-

“3. On or about the 21st August 1995, the Defendant, through his agent or principal the Kakamega District Land Registrar caused to be altered and/or subdivided L.R. NO. KAKAMEGA/LUKUME/650 which then was registered in the names of the Plaintiff.”

Paragraphs 6, 7 and 8 of the Plaintiff state:-

“6. The Plaintiff’s claim is for an order for rectification of the register to read parcel No. KAKAMEGA/LUKUME/650.”

“7. The Plaintiff applied for leave to file suit out of time vide KAKAMEGA HCCC NO. 55 of 2001 (O.S.) and the same was granted vide the Honourable court’s ruling delivered on the 10th March, 2006.”

“8. Notice of intention to sue the Defendant was issued on the 21st November 200.”

The Plaintiff does not show the acreages of each of the two parcels excised from land title No. Kakamega/Lukume/650 and the claim that the total acreage of those two subdivided plots is less than 4.4 ha which was the acreage of the original title No. Kakamega/Lukume/650 is not ostensible nor does the Plaintiff on its face show this.

The cause of action in the Plaintiff is founded on tort not least because it alleges a civil wrong on the part of the Registrar of Lands. Section 3 (1) of the Public Authorities Limitation Act, Cap 39 stipulates:-

“s.3 (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

Paragraph 3 of the Plaintiff shows that the cause of action arose on 21-8-1995. The suit was filed on 5-4-2006, eleven years later. It is alleged in paragraph 7 of the plaintiff that this court granted leave on 10-3-2006 to the Plaintiff to file the suit herein. That leave is open to challenge during the hearing of the suit. The Plaintiff shall, by evidence, be expected to prove the allegation about the grant of leave and shall also

be expected to prove that the leave granted was in respect of the cause of action in the suit.

In view of the averment in paragraph 7 of the plaint and as evidence would be required to rebut it if it is not true or if it is not applicable to the cause of action in this suit, the preliminary objection cannot hold good. I accordingly dismiss it. Costs shall be in the cause.

Dated at Kakamega this 8th day of November, 2007.

G. B. M. KARIUKI

J U D G E