



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 990 of 1999**

**KUTIMA INVESTMENTS LTD.....PLAINTIFF**

**-VERSUS-**

**MUTHONI**

**KIHARA.....1ST DEFENDANT**

**COMMISSIONER OF MINES & GEOLOGY.....2ND DEFENDANT**

**RULING**

On the 17th May 1999, Kutima Investments Ltd. (hereinafter referred to as “**the Plaintiff**”) filed a suit against Muthoni Kihara (“**the First Defendant**”) and the Commissioner of Mines and Geology, the Second Defendant herein to whom I shall hereinafter refer to as “**the Commissioner**”.

The Plaintiff is the registered proprietor as lessee of the piece or parcel of land known as L. R. No. 12199/4 situate in the Taita Taveta District which it purchased from Peter Mwamburi Saul and Patrick Joel Mwangola. In the Agreement for Sale dated the 25th May 1994, only Peter Mwamburi Saul is named as Vendor. The purchase price is stated to have been the sum of K. Shs. 10.5 million and the completion date was the 30th September 1994. The property (hereinafter referred to as “**the suit premises**”) was sold with vacant possession. Before the sale to the Plaintiff, the previous owners, namely Peter Mwamburi Saul and Patrick Joel Mwangola had under an agreement allowed one Kihara Kibugi, the late husband of the First Defendant, to move onto the suit premises and prospect for minerals. The said Kihara Kibugi died in 1986 but his two widows, the First Defendant and Wanjiku Kihara, carried on the business of prospecting for minerals on the suit premises. At some stage around 1993, they found minerals of commercial quantity and started mining. The plaintiff considered this development a breach of their terms of occupation and requested them to vacate the suit premises claiming that the First Defendant was a trespasser. During the period between 1993 and 1998, the First Defendant submitted applications for mining or prospecting licences to the Commissioner which, although not granted by the Commissioner, caused the Plaintiff to be apprehensive that the Commissioner would issue such licences unless earlier restrained by the court. The Plaintiff maintained that the grant of such licences would be illegal under the provisions of Mining Act [Cap. 306].

Against the First Defendant, the Plaintiff sought an injunction restraining her together with her servants and agents from entering or remaining on the suit premises; accounts of the proceeds earned from the mining activities since 1993; and general damages. The Plaintiff sought a declaration against the Commissioner that the Commissioner has no right or power to grant the First Defendant prospecting or mining licences over the suit premises without the Plaintiff’s consent.

The First Defendant filed her Statement of Defence on the 23rd July 1999 in which she denied the Plaintiff's claim. She denied being a trespasser and stated in her defence that after the death of their husband (Kihara Kibugi), she and her co-wife took over and carried on with the business of prospecting.

A Defence was filed by the Hon. The Attorney – General on behalf of the Commissioner on the 5th December 2003 in which he maintained that the licences issued to the First Defendant by the Commissioner were properly and lawfully issued and that the suit is incompetent because it was time – barred and did not in any event comply with the mandatory provisions of sections 13 A and 16 of the Government Proceedings Act [Cap. 40].

The foregoing is a brief summary of the pleadings in this case. For now, I have to deal with two applications filed by both Defendants under Order 6 rules 13 and 16 of the Civil Procedure Rules to strike out the suit. The Chamber Summons application filed by the First Defendant is dated the 12th January 2005 and seeks to strike out the suit on, among other grounds, that it is time–barred. The application by the Commissioner, also brought by way of Chamber Summons, was filed on the 27th January 2005. It seeks to strike out the Plaintiff on grounds including the following set out hereunder: -

- (1) That the suit is time-barred as against the Commissioner under the provisions of the Public Authorities Limitation Act [Cap.39].
- (2) That under the provisions of sections 3 and 12 of the Government Proceedings Act, the Commissioner is non – suited.
- (3) That the suit does not lie under the provisions of section 13 A of the Government Proceedings Act.
- (4) That under section 16 of the Government Proceedings Act, orders of injunction cannot issue against the Commissioner.

In the Grounds of Opposition filed by the Plaintiff's Advocates on record on the 27th January 2005 and the 14th February 2005 respectively, it is contended, inter alia, that the suit is competent and that the sections of the law relied upon by the respective learned counsel of the Defendants do not apply.

I will first consider the application by the First Defendant. In paragraph 5 of the Plaintiff, the Plaintiff admits that the late Kihara Kibugi entered the suit premises between the years 1982 and 1986 and further that following his death in 1986, his two wives continued in occupation and to prospect for minerals. There is no doubt that the First Defendant and her co-wife were definitely in occupation in May 1994 when the Plaintiff purchased the suit premises from Peter Mwamburi Saul and Patrick Joel Mwangola. Trespass, on which the Plaintiff's claim is founded, is a tort. If Kihara Kibugi was a trespasser, Peter Mwamburi Saul and Patrick Joel Mwangola had three years from 1982 to get him off the suit premises. That is my reading and understanding of section 4(2) of the Limitation of Actions Act [Cap. 22]. After Kihara Kibugi's death, his widows took over his business and continued in occupation. By 1994 when the Plaintiff purchased the suit premises, they together with their late husband Kibugi had been in occupation for a period in the order of twelve years. Although the Plaintiff claims these two women were trespassers, no attempt whatsoever would appear to have been made to evict them from the suit premises either before the purchase or immediately thereafter though the property was expressed to have been sold with vacant possession. It was not until May 1999 that the Plaintiff finally filed this suit seeking to evict the First Defendant from the suit premises.

Even assuming that the First Defendant's occupation did not derive from her late husband Kihara Kibugi, the Plaintiff should have moved against her within three years from the date on which the Plaintiff acquired title to the suit premises - that is to say by the end of 1997 at the very latest. Since occupation by Kihara Kibugi and the First Defendant goes back to 1982 - some twenty three years - even if one thought that they were trespassers, they most probably have acquired certain legal rights recognized by law which cannot be ignored. On this point alone, the application by the First Defendant must succeed and is allowed and granted in terms of prayers Nos. 2 and 3 thereof. Accordingly, it is ordered that the Plaintiff's suit against the First Defendant be and is hereby struck out with costs; the First Defendant will also have

the costs of this application.

I now deal with the Commissioner's application. Though Mr. C. O. Rachuonyo, learned counsel for the Plaintiff, submitted that the claim against the Commissioner is not really an injunction but merely a declaratory relief, my careful examination and consideration thereof reveals that what the Plaintiff seeks to do is to stop - that is to say restrain - the Commissioner from performing his statutory duty to issue licences. That is clearly an injunction relief which cannot and does not lie by virtue of the provisions in section 16(1) (i) of the Government Proceedings Act. Since the claim is founded on tort (improper issuance of licences), the suit should have been brought within twelve months from the date of Kihara Kibugi's death or in the alternative, twelve months from the date the Plaintiff acquired title to the suit premises in 1997. That is my reading and understanding of the provision in section 3(1) of the Public Authorities Limitation Act on which the Commissioner relies. For that reason, the application by the Commissioner must succeed and is allowed and granted in terms of prayers Nos. I and II thereof. Accordingly and having found and held that the suit against the Commissioner is incompetent, it is ordered that the same be and is hereby struck out with costs to the Commissioner who will also have the costs of this application.

To sum up, the suit is incompetent and is struck out with costs to both Defendants who will also have the costs of their respective applications.

With regard to the host of judicial authorities which were cited to me by respective learned counsel for the parties, and while I remain indebted to them respectively for their industry, I did not, and with profound respect to counsel, find most of such authorities relevant in deciding these applications and reaching my conclusions.

Dated and delivered at Nairobi this 26th day of April 2005.

**P. Kihara Kariuki**

**JUDGE**