



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL SUIT 20 OF 2003

BEATRICE NAFULA MOSES)

**JOSEPH KIPSANG KIMUTAI)
PLAINTIFFS**

VERSUS

JOSEPH CHEPSIROR)

PRISCILLA CHERUTO)

SAMSON KUKUTI)

**TABARNO CHEPCHOGE)
DEFENDANTS**

RULING

The matter before me arises from a preliminary objection which has been raised by **JOSEPH CHEPSIROR, PRISCILLA CHERUTO, SAMSON KUKUTI and TABARNO CHEPCHOGE**, who are the defendants herein, and though they had raised nine grounds, counsel abandoned all except four. It is their contention that the cause of action herein is based on the tort of trespass, which whose period of limitation is three years, as stipulated in section 4 of The Limitation of action Act Cap 22 of the Laws of Kenya.

It was the submission of Mr. Chepkonga, learned counsel for the defendants that the alleged trespass started in 1995, and that by the time when the suit was filed on 28/2/2003, the plaintiff was already time barred. It was also his submission, that the plaint is defective as it doesn't contain the mandatory provision as required under Order VII rule 1(e) of the Civil Procedure Rules ('CPR'), which stipulates that:

"1. (1) the plaint shall contain the following particulars-

(e) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.

" Finally, he pointed out that the plaint, which was signed by only one of the plaintiffs, was not accompanied by Summons, which, were in any event neither prepared nor were they served upon the

defendants, and that the suit was wrongly initiated by way of a plaint contrary to Order VI rule 14 of the CPR, which stipulates that:

“14. Every pleading shall be signed by an advocate, or recognized agent (as defined by Order III, rule 2), or by the party if he sues or defends in person.”

Mr. Manani, learned counsel for the plaintiffs, conceded that only one of the plaintiffs had signed the plaint but he was however of the view that, and I am inclined to agree with him, that such an omission should not render the entire suit a nullity. It will remain a valid cause of action in respect of BEATRICE NAFULA MOSES, the plaintiff who signed it. Order IV rule 3 of the CPR stipulates that:

“3. (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time of appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than 10 days.

(5) Every summons shall be prepared by the plaintiff or his advocate and file with the plaint to be signed in accordance with subrule (2) of this rule.”

In my humble opinion, if the plaint as served does not accompany the summons, it would be a defective service, as it would contravene the above requirement, but seeing that the plaintiffs were not represented at the time when they instituted the suit, the omission would be excusable, and I am inclined to agree with Mr. Manani, that the defendants who have already appeared in the matter have not been prejudiced in any way.

Be that as it may, I find that the plaintiffs also contravened and failed to comply with the mandatory provisions of Order VII rule 1 (1) (e), which stipulates that *“the plaint shall contain the following particulars-*

(e) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter.”

Had it been the verifying affidavit which was lacking in the material information, subrule (3) thereof would have come to the plaintiff's aid, but lack of compliance with (e) above, renders the suit invalid and the court would not, in my humble opinion, have any discretion in the matter.

Finally, a perusal of the pleadings reveals that the plaintiff avers that the defendants invaded their land namely, UASIN GISHU/NGENYILEL/312 (subject land) and constructed structures thereon in 1995, and their prayer therefore is for inter alia, an order of eviction. That to my mind is a claim which is based on the tort of trespass, and any action based on it must be brought within three years. This suit was therefore instituted out of time and it cannot be sustained.

The upshot of all this is that the preliminary objection is sustained and the application and the suit are hereby dismissed with costs.

Dated and delivered this 30th day of June 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Omwenga holding brief for Mr. Manani for plaintiffs

No appearance for the defendant