



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 341 of 2004

MOSES LESIAMON OLE MPOE 1ST PLAINTIFF

DENNIS SANARE OLE NKURUNAH 2ND PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

DAVID NJUNO KOINANGE } Being sued as Administrators...3RD DEFENDANT

WANJIRU MBIYU} of the Estate of MBIYU 4TH DEFENDANT

NJERI MBIYU} KOINANGE (DECEASED).....5TH DEFENDANT

RULING

The 3rd, 4th and 5th defendants (*herein after referred to as “the applicants”*) have filed an application order the provisions of **Order VI Rule 13(1) (a) of the Civil Procedure Rules** seeking the orders of this court to strike out the plaintiff’s suit on the ground that it did not disclose a reasonable cause of action. The application is based on the grounds that the applicants contend that the suit filed by the plaintiffs (hereinafter referred to as the respondents) was time barred under the Limitation of Actions Act as it relates to matters that took place in the colonial era over 50 years ago. The applicants further contended that the respondent’s suit was based on alleged customary or native title to land which did not exist in law, and if it ever existed, the same were extinguished by subsequent acts of the Government of Kenya. The applicants stated that they cannot be held responsible for the action of the colonial invaders, and particularly one Powys Cobb, who the applicants claim is unknown to them and who was not a party to this suit.

The applicant therefore stated that this suit was unreasonably instituted against them. The applicants further state that the plaint as drafted by the respondents was vague, evasive and ambiguous as it does not give dates or names of the number of the people alleged to be interested in the applicants land other than reference to them as “*Maasai habitants of Kenya,*” “*Indigenous residents,*” “*descendants, families and relatives*” which terms the applicants argue is an amorphous description of the persons alleged to be represented by the respondents. The applicants further state that the plaint as filed by the respondents did not set out the alleged constitutional rights of the respondents that had been infringed. The applicants contend that the respondents should have filed a constitutional reference under **Section 84 of the**

Constitution if they were of the view that the facts pleaded in this case raised a constitutional question.

The application is opposed. The respondents have filed grounds in opposition to the application. Their advocate on record, Mr Thomas Letangule filed a replying affidavit in further opposition to the application. In their grounds of opposition the respondents have stated that the application was incompetent and bad in law as it was brought under the wrong provision of the law. They have further stated that the grounds raised in application were inconsistent with the prayers sought rendering the said application defective. They contended that the grounds raised in the applicants' application went into the merits of the suit and could not support an application to strike out a suit.

At the hearing of the application, Mr Njiru, learned Counsel for the applicants submitted that the respondent's suit did not disclose a reasonable cause of action. He argued that the plaint was vaguely, evasively and ambiguously drawn. He submitted that the plaintiff did not have authority to bring a suit on behalf of the indigenous residents of Mau Narok area. Further the respondents had not stated categorically that Olmororoi was a registered trust. Learned Counsel submitted that the description of the plaintiffs as pleaded in the plaint was ambiguous. The respondents were claiming the suit land as relatives of the inhabitants under customary law. The said inhabitants were however not named.

The applicants further submitted that it was pleaded that the suit land was taken from the Maasai community; who the Maasai community comprised of was not defined. The applicants argued that the respondents had filed a representative suit without first seeking the leave of the court thus rendering the said suit unmaintainable in law. It was submitted that the thrust of the orders sought from this court by the respondent in their suit was the adjudication of the acts by the colonial government. The applicants urged the court to allow their application and accordingly strike out the suit.

Mr Letangule, learned Counsel for the respondents opposed the application. He submitted that the applicants had not established that the respondent's suit was so hopeless that it did not have any merit at all. He submitted that the respondent's suit raised triable issues which should be allowed to be ventilated in a full hearing. He argued that the applicants had not raised the issue of whether or not the respondent's had filed a representative suit in their application and therefore could not be allowed to argue the same in court. Learned Counsel for the respondents submitted that the respondents had filed the suit as trustee of Olmororoi Trust and therefore they had authority to file the suit. It was argued that the respondents had filed the suit on behalf of other members of the trust. Mr Letangule submitted that inconsistencies in the description of the respondents was an issue which could be cured by amendment.

He further submitted that the respondent's suit was not time barred by statute. He urged the court to consider the provisions of **Section 26 of the Limitation of Actions Act**. He further submitted that the applicants had not established a proper case for striking out. He argued that striking out of suits could only be considered and granted by the court in the clearest of the cases: The court should sparingly invoke its jurisdiction in this regard especially where defects in a suit could be cured by amendment.

In response, Mr Njiru submitted that the respondents suit was clearly a representative suit thus requiring the respondents to seek the leave of the court before the suit was filed. He further submitted that this court lacked jurisdiction to deal with the issues of colonialism. He argued that the respondent's suit did not disclose any reasonable cause of action and therefore should be struck out because it was useless.

I have read the pleadings filed by the parties to this suit and the particularly the plaint filed by the respondents. I have carefully considered the submissions made by the learned Counsels of the parties to this suit. Three issues have come to the fore for determination by this court; the first issue is whether the respondents had capacity to file suit on behalf of Olmororoi Trust and on behalf of the Maasai Inhabitants of Kenya. The second issue for determination is whether the suit filed by the respondents is a representative suit and therefore leave ought to have been sought from this court before the said suit was filed. The third issue is, whether the respondent's suit was barred by the Limitation of Actions Act.

In determining the issues raised, I will set out the relevant paragraphs as pleaded by the respondents in their plaint.

Paragraph 1 of the Plaint states that: -

“The 1st and 2nd plaintiffs are trustees of OLMAROROI TRUST which is a trust established to protect and enhance the rights of the Maasai People habitants of Kenya and they have lodged this suit on their own behalf and on behalf of indigenous residents of Mau-Narok Nakuru District in the Republic of Kenya.”

Paragraph 6 states;

“That the plaintiff (s) had an interest in L.R. No.8669/3 Mau Narok being relatives of the original and legitimate owners of (the) land in reference under customary and/or native title but were forcefully and unlawfully dispossessed of the said ownership by the colonial invaders of the 20th century and had the notice in (5) above been published and served upon the plaintiffs, the 1st defendant would have been made aware of this interest accordingly.”

The respondent’s prayed for judgment, *inter alia*, to be entered against the defendant’s (*who include the applicants*) as follows: -

“A declaration that L.R.8669/3 Mau Narok belongs to the members of OLMAROROI TRUST and the purported transfer to any other person or body is null and void.”

From the paragraphs stated hereinabove, the respondents have stated that they had filed the suit in three capacities, firstly as the trustees of Olmaroroi Trust, secondly on behalf of the Maasai indigenous residents of Mau Narok, Nakuru Distrist and thirdly as the relatives of the original and the legitimate owners of the suit land under customary and/or native title. The reading of the said paragraphs clearly shows that the respondents have filed a representative suit. Although they have not stated in the plaint that they have filed a representative suit, from the plain reading of the plaint, there is no doubt that the respondents are purporting to have filed the suit on behalf of the indigenous Maasai residents of Mau Narok, Nakuru District and on behalf of what the respondents claim to be the original and legitimate owners of the suit land under customary and/or native title.

Being a representative suit, the respondents were first required to seek the leave of the court as provided by the **Order 1 Rule 8 of the Civil Procedure Rules**. As was held in the case of **Wanjiru –Vs- Standard Chartered Bank of Kenya Ltd & Anor [2003] 2 E.A. 701**, where a plaintiff files a representative suit without seeking the leave of the court, such suit will be incompetent and would be amenable to being struck out. The respondents having failed to seek the leave of this court before filing the suit, have rendered this suit incompetent. For that reason alone, I would strike out the respondents suit. It does not matter that the applicant did not raise the issue of whether the suit was a representative suit or not in their application. Once it was brought to the attention of the court that a representative suit had been filed without the leave of the court, such suit shall be struck out for being incompetent. For that reason, the respondents lacked capacity to bring this suit on behalf of the persons they are claiming to have brought this suit on behalf without the leave of this court.

On the issue of whether or not the respondent’s suit is barred by the Limitation of Actions Act, having carefully considered the arguments made by the parties to this application certain facts are not in dispute. It is not disputed that the respondents claim is based on an alleged compulsory acquisition of the suit land (*L.R No. 8669/0, Mau Narok*) by the Colonial Government of Kenya from one Mr G. Glass. The respondents are aggrieved that after the said compulsory acquisition and many years later, the suit land was transferred to Mbiyu Koinange (*deceased*) without the respondents’ relatives being given an opportunity to be registered as the owners of the said suit land. The respondents have contended that the suit land was unlawfully transferred to the said Mbiyu Koinange (*deceased*) whose estate is administered by the applicants.

Now, if the respondents have pleaded that they are challenging the transfer of the suit land to the late Mbiyu Koinange, who died more than twenty five years ago, then their suit is definitely barred by **Section 7 of the Limitation of Actions Act** which requires any suit brought to recover land to be filed within

twelve years from the date such right accrued to the plaintiff. The respondents have submitted that **Section 26 of the Limitation of Action Act** covers their suit. I have read the said section of the said Act. It provides that in a claim based on fraud the period of limitation would only run after the discovery of the said fraud. I have carefully read the plaint filed by the respondents. The said plaint does not raise any issue related to an alleged fraud committed by the late Mbiyu Koinange. I therefore find no merit with the respondents' assertion that their suit is not barred by the provisions of the Limitation Act.

For the reasons stated, it is obvious that the respondent's suit cannot be sustained. It is incompetent. It is so hopeless that it cannot be cured by any kind of amendment. I will allow the application by the applicants. The plaint filed by the respondents herein is hereby struck out with costs to the applicants. The respondents shall pay the costs of the suit to the applicants.

DATED at NAKURU this 3rd day of August 2005.

L. KIMARU

JUDGE