



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

Civil Suit 1669 of 1994

1. KIDAYU OLE LEPET)

2. MATILOG OLE MEINGATI)

3. KADIPO OLE MASIKONDE)

4. KUYIA OLE MASIKONDE)

5. SERERIA OLE MASIKONDE)

.....**PLAINTIFFS**

6. LESINKO OLE RATIA)

7. KOITAAT OLE NAEKU)

8. JACOB OLE MASIKONDE)

9. ALDUNG OLE MASIKONDE)

10. SIRONGE OLE SILOMBE)

-VERSUS-

1. NKURUNA OLE MASIKONDE)

2. TIPALA OLE NERISHET)

3. LEMERIA OLE NERISHET)

4. MOSES OLE MASIKONDE)

5. SAMAINO OLE MASIKONDE)

**6. LESINKO OLE
MASIKONDE).....DEFENDANTS**

7. MANILE OLE MASIKONE)

8. LESIRE OLE MASIKONDE)

9. MAPELU OLE OTUNI)

10. ROTIAN-MASIKONDE/)

OLMUKONGO GROUP RANCH)

11. THE LAND REGISTRAR, NAROK)

12. THE REGISTRAR OF GROUP)

REPRESENTATIVES)

RULING

The original plaint in this suit, dated 5th May, 1994 and filed on 6th May, 1994 was amended and filed again on 7th July, 1994. The dispute centres on a Group Ranch, under the Land (Group Representatives) Act (Cap.287), and is in respect of land parcel No. NAROK/CIS-MARA/ROTIAN/4 measuring 1650.378 hectares situate within Narok District. It is claimed by the plaintiffs, as beneficiaries of the Group Ranch, that the defendants as managers of the same, have been in breach of the trust reposed in them, with consequential harm to the plaintiffs.

The statement of defence, dated 16th July, 1994 was filed on 20th July, 1994 and its thrust is that the suit has no basis, as consent for the sub-division of the Group Ranch had been duly given and the land subdivided into individual holdings for all beneficiaries including the plaintiffs.

The parties' agreed statement of issues, dated 25th November, 1998 and filed on 3rd February, 1999 is as follows:

1. Did defendants 1 – 9 mismanage the affairs of the 10th defendant Group Ranch, to the detriment of the plaintiffs?
2. Did defendants 1 – 9 breach their fiduciary duty to hold and manage the group land owned by the 10th defendant and held for the collective benefit of the plaintiffs and all registered members of the Group Ranch?
3. Are the plaintiffs entitled to the prayers sought in the amended plaint?
4. What order should be made regarding costs of the suit?

As late in the day as 12th April, 2005 two new parties were enjoined as defendants, the 11th defendant being the Land Registrar, Narok; and the 12th defendant being the Registrar of Group Representatives. Their joint statement of defence, dated 8th April, 2005 was filed by the Attorney-General's office on 12th April, 2005. In this statement of defence it is pleaded that the two defendants reserve "their right to raise and argue a preliminary objection at the hearing of this suit that the same is brought in contravention [of] the provisions of section 16 of the Government Proceedings Act (Cap.40 of the Laws of Kenya)." It is also pleaded that the two new defendants "shall also raise a preliminary objection at the hearing of this suit that the same contravenes the basic statutory provisions of section 13A of the Government Proceedings Act (Cap. 40 of the Laws of Kenya)."

This case came up before me for the first time on 12th April, 2005 when the plaintiffs were represented by learned counsel, **Mr. Koceyo**, while the 1st – 10th defendants were represented by learned counsel, **Mr. Agina**, and the 11th and 12th defendants were represented by learned counsel, **Ms. Atambo**.

At the very beginning, **Ms. Atambo** of the Attorney-General's office had preliminary objections to raise, based on sections 13A and 16 of the Government Proceedings Act (Cap.40). At the same time, **Mr. Koceyo** contested the propriety of the 11th and 12th defendants' statement of defence; he urged that it be

struck out at the very beginning, before the commencement of trial. His reason was that the newly filed statement of defence raised new issues which were not part of the plaintiffs' pleadings.

Ms. Atambo responded that the 11th and 12th defendants had not been served with the plaint all along, and this justified the filing of their defence so belatedly. In her preliminary objection, Ms. Atambo submitted that the provision of s.16 of the Government Proceedings Act (Cap. 40) allowed a declaratory order but not an injunction or specific performance against the Government. That section provides:

(1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that —

(i) where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties...

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government."

Learned counsel contended that the amended plaint, in its prayers, sought prohibitory injunction as well as mandatory injunction against all the defendants, and so it was contrary to law, as against the 11th and 12th defendants. She sought to rely on this Court's decision (Simpson, J.) in *Matalinga & Others v. Attorney-General* (1972) E.A. 518. The learned Judge had stated (p.521):

"S.16 of the Government Proceedings Act (Cap.40) restricts the court to making declarations only in proceedings against the Government where it might otherwise grant injunctions and prohibits the court from granting any injunction or making any order against any officer of the government the effect of which would be to give any relief against the government which could not have been obtained in proceedings against the government."

Ms. Atambo also relied on the decision of *Mr. Justice Akiwumi in Rwigara Assinapol v. Commissioner of Customs & Excise*, Civil Case No. 2786 of 1992. The following words of the learned Judge are relevant:

"These are civil proceedings brought by the respondent against the applicant. But what I must determine first is whether the applicant is a servant of the Government. It is true that the applicant may sue and be sued in his own name, but judicial notice must be taken of the fact that he is head of a government department which is under the Ministry of Finance and charged with the collection of customs and excise revenue for the Government...And which national revenue collection body in the world is not an agency or department of Government. It is also common knowledge that the applicant is a civil servant whose salary and that of his colleagues are paid from funds appropriated for that purpose by Parliament. The question whether the Commissioner of Customs and Excise was a servant of the Government fell to be decided in the Mombasa High Court case of *Gailey & Roberts Ltd. v. Commissioner of Customs and Excise*, Mombasa Civil Case No. 77 of 1980 (unrep). In that case Kneller, J... held that the Commissioner of Customs and Excise of Kenya was also a servant of the Government of Kenya and as such, that he and his staff constitute a department of the Government. I have considered carefully all the submissions made on this issue and I am also of the view that the applicant is a servant of the Government heading one of its departments..."

Learned counsel then based her submissions on s.13A of the Government Proceedings Act (Cap.40). This provides as follows:

“(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

Counsel stated that the instant suit, which previously was brought against only the 1st – 10th defendants, was later amended to include the 11th and 12th defendants. She stated further that the said amendment to the plaint had been made without the statutory notice being given to the Government. She relied on this Court’s decision (*Ringera, J*) in *Hudson Laise Walimbwa v. Attorney-General*, Civil Case No. 2714 of 1987. The learned Judge thus remarked:

“At the commencement of the hearing... counsel for the Attorney- General raised a preliminary objection to the competence of the suit. She argued that the suit had been instituted before the expiration of a period of thirty days after notice of intention to sue the Attorney- General was issued. The objection was grounded on the provisions of s.13A of the Government Proceedings Act.... “Ms. Oyalo, counsel for the plaintiff, conceded that the suit was filed before the expiration of the thirty days’ notice served on the Attorney-General. She explained that that course of action was taken in order to ensure that the suit was not defeated by the limitation period of one year prescribed by the Public Authorities Limitation Act (Cap. 39)... “I have observed from the pleadings that the incompetency of the suit was never pleaded and no issue was framed on the matter. So the real question before me is whether I should uphold a perfectly valid objection which has not been pleaded. Section 13A of the Government Proceedings Act is in clear mandatory terms that do not admit of any excuses or exceptions. Its plain meaning, to my mind, is that no proceedings against the Government under the Government Proceedings Act can lie or be instituted before the statutory notice has been given and expired. The dictionary meaning of the word ‘lie’ in this context is, according to The Concise Oxford Dictionary, 8th ed., ‘be admissible or sustainable’. A suit which does not lie cannot be tried by a Court of Law. This section is not in the nature of a statutory period of limitation which must be pleaded and which could be waived by the defendant expressly or by conduct. It is in the nature of a substantive peremptory bar to the institution and trial of a suit filed in disregard of its requirements. The Attorney- General cannot waive it. Neither can the Court. And it matters not why it was not complied with. As a point of substantive law, the defendant may or may not plead it. In my opinion, it would be in the interests of justice from the point of view of saving costs to plead the point. But it is not a requirement that it be pleaded. “In the result I would uphold the preliminary objection to this suit on a point of law. I would accordingly dismiss the suit.”

The *Walimbwa* ruling is succinct and unambiguous, on the different legal effect of a plaintiff failing under the *limitation-of-time rule*, on the one hand, and under the required statutory-notice rule, on the other. The latter goes to substantive law and is a matter in respect of which an objection does not have to be pleaded; the former interfaces with fact, must be pleaded, and can be waived. I am in agreement with Ringera, J (as he then was) that that is the correct perception in the application of the law.

Learned counsel also cited the ruling in *Nancy Njeri Njuguna v. Peter Opumbi & Attorney-General*, Civil Suit No. 1925 of 1994 (Nakuru), in which *Lady Justice Ondeyo* held:

“it is argued by the defence that the date...appearing on the stamp on the notice, i.e. 29th December, 1994 is the date when the notice was received by the 2nd defendant. In the absence of a return of service affidavit or evidence of posting, it would be safe to presume that the notice was received by the 2nd defendant on the date which is stamped on it..., eight days after the filing of the suit. The suit was therefore filed in total disregard of the mandatory provisions of s.13A(1) of the [Government Proceedings] Act.”

On the basis of the authorities, counsel submitted that the suit is incompetent and does not lie, and that a

suit which does not lie cannot be tried by a Court of law.

Ms. Atambo further impugned the suit as being unclear as to the cause of action. She contended that by the amended plaint, the cause of action as against the 11th and 12th defendants, appears to have arisen in 1989; but the suit was filed in 1994 – five years later. By s.3 of the Public Authorities Limitation Act (Cap. 39),

“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.”

Counsel contended that since the plaintiffs’ causes of action were described as fraud, dubiousness, failure to perform statutory duty – they could only be categorised under tort; in which case the suit was filed outside the prescribed time-limit. Learned counsel observed that the plaintiffs had made no application in Court for extension of time to file suit against the 11th and 12th defendants; and this should render the suit, as against the 11th and 12th defendants, incompetent.

In *Iga v. Makerere University* [1972] E.A. 65 the East African Court of Appeal had held, in relation to limitation period (p.66 – *Mustafa, J.A.*):

“A plaint which is barred by limitation is a plaint ‘barred by law’...[It] seems clear to me that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exception the court ‘shall reject’ his claim. The appellant was clearly out of time, and despite an opportunity afforded him by the judge, he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is timebarred, the court cannot grant the remedy or relief.”

On the second occasion of submissions on the preliminary objection, learned counsel for the first 10 defendants, **Mr. Agina** urged that it was an error of law for the plaintiffs to enjoin the *first nine defendants*, as the 10th defendant was empowered under the Land (Group Representatives) Act (Cap. 287), section 8, to sue and be sued in its corporate name. Counsel submitted that the 1st – 9th defendants were only officials of the 10th defendant, and that it was improper to sue them in their personal capacities. The allegations made against the 1st – 9th defendants, as set out in paragraphs 6, 8, 9, 10 and 11 of the amended plaint, were dedicated to *their roles as group representatives*; and this group function, it was urged, fell within the corporate capacities of the 10th defendant. The 1st – 9th defendants thus prayed that the suit, as against them, be struck out with costs. And then coming to the 10th defendant, **Mr. Agina** submitted that this entity had been dissolved in August, 1999 – and hence no suit could lie against it. However, Mr. Koceyo for the plaintiffs raised the objection that the dissolution question was a matter of evidence, and so did not properly come under a preliminary objection. To this objection, Mr. Agina submitted that he was only referring to the *documents on file*, including the *pleadings* themselves, but was introducing no evidence and would not require evidence; hence his submission still fell squarely within the ambit of a preliminary objection.

Now this is a point which could very well recur in other matters brought before the Court for determination. It is a well accepted principle: that a preliminary objection is an objection of a legal nature; a pure point of law. No evidence is to be adduced to prove it, and if already there is any evidence on record which is linked to the point in respect of which the objection is being raised, it ought to be the case that that fact is already common cause, and nobody is under obligation to prove the same. If that be the correct position in law, then what of the assertions in the pleadings? Is it proper for the objector to rely on the pleadings? Pleadings are the groundwork upon which counsel base their submissions, so as to persuade the Court one way or the other; and pleadings are the evidentiary beacons in the proof of a case. If the plaintiff has made certain assertions in his pleadings, I think it would not be right that the defendant be barred from relying on such assertions as valid components in the articulation of a preliminary objection; for what the defendant in that case does, is to *presume the truth of the assertion of the plaintiff*.

Mr. Agina stated that he was relying on the content of the plaintiffs' amended plaint of 7th July, 1994 and he was introducing no evidence to establish his preliminary objection. Paragraph 7 of that amended plaint asserted that the Registrar of Group Representatives had given consent for the dissolution of the Group Ranch in question, in August, 1989. Counsel submitted that since the plaintiffs had pleaded that the Group Ranch was authorised to be dissolved in 1989, *the 10th defendant would have ceased then to exist, but for the purposes of winding up as contemplated under s.13 of the Act*. Counsel submitted that in these circumstances, the 10th defendant could not now be sued.

Learned counsel referred to prayer (d) in the amended plaint for an order "that the defendants do account to the members for all the monies received with the attendant statements of account being availed for inspection by members." He submitted that such a prayer was impossible of performance because the issue was not raised at the meeting which dissolved the Group Ranch; and now the claim could not be raised against any of the defendants.

Mr. Agina impugned the character of the suit as a representative suit; there was no evidence that the plaintiffs had sought and obtained leave of Court, to institute a representative suit: "so, as a representative suit, it is totally incompetent and ought to be struck out."

Learned counsel submitted that the plaintiffs' prayer for nullification of the Group Ranch sub-divisions was misdirected in law; the sub-division decision had been authorised by the Land Control Board, but this public body was not made a defendant. In a competent trial, counsel urged, the Land Control Board would have to be given an opportunity to be heard; the suit cannot proceed without the Board, as no one is to be condemned unheard. Mr. Agina justified the 1st – 10th defendants' non-filing and service of the preliminary objections: for it had already been pleaded in the statement of defence (paragraph 11) that a preliminary objection would be raised, for the suit's incompetence. In his rejoinder, Mr. Koceyo sought to distinguish *Matalinga and Others v. Attorney-General* [1972] E.A. 518 on the applicability of injunctive relief against government officers (in relation to s.16 of the Government Proceedings Act (Cap. 40)). He urged that such orders were only being sought against the 1st – 10th defendants; and hence the authority was cited not relevant. For the same reason, counsel sought to distinguish *Rwigara Assinapol v. Commissioner of Customs & Excise*, HCCC No. 2786 of 1992; in his words: "We seek no restraining orders against the 11th and 12th defendants." He contended, however, that the plaintiffs were demanding that the 1st – 10th defendants should conduct the demarcations in a manner approved by the 11th and 12th defendants. He did not, however, state whether there had been any discrepancy between the terms of the approvals and the action taken by the 1st – 10th defendants.

Mr. Koceyo submitted that there was no requirement that the plaintiffs should give to the government notice to sue, under s.16(1) of the Government Proceedings Act (Cap. 40) because, as against the government, only declaratory orders were being sought. As already noted, it is not clear from the plaintiffs' pleadings whether the 11th and 12th defendants had done all the right things in giving approvals for land demarcation, for action by the 1st – 10th defendants. Therefore the claim that no orders to compel actions by the 11th and 12th defendants were being sought, would not appear to be a serious argument. It is clear from the pleadings that the defendants had pleaded that they would raise preliminary objections to the instant suit. In this way the defendants are to be taken to have given due notice of the impending preliminary objections. Preliminary objections are always points of law, and so they are part of the ordinary process of submission in Court and do not, as a matter of law, have to be notified in advance. The only qualification, which has to do in particular with efficiency of trial, is that because they lie at the threshold, they must be raised as early as possible in the trial process. Although almost invariably parties have been filing and serving notices of preliminary objection, prior to commencement of trial, this has been purely a matter of courtesy, and is linked more to practice than to legal obligation. It is not true, in my view, that the plaintiffs have sought no injunctive relief against the 11th and 12th defendants. Paragraph 4F of the amended plaint prays that the 11th defendant be prohibited from deleting the names of the Group Representatives. Paragraph 8 applies to all defendants; so does paragraph 11, and paragraph (c).

It follows that the 11th and 12th defendants have quite properly raised objections based on ss.13A and 16 of the Government Proceedings Act (Cap.40). I am in agreement with the ruling of Mr. Justice Ringera, in

Laise Walimbwa v. Attorney-General, Civil Case No. 2714 of 1987 – that “no proceedings against the Government under the Government Proceedings Act can lie or be instituted before the statutory notice has been given and expired.” This was not done, and it is fatal to the plaintiffs’ suit, as against the 11th and 12th defendants.

Counsel for the 11th and 12th defendants also raised important issues regarding the nebulous character of the suit, which did not show it to be anything but tortious; and if so, then the limitation period had passed when suit was filed against the 11th and 12th defendants.

Learned counsel for the plaintiff did not attempt to meet the contention made for the 1st – 9th defendants, that there was no basis for enjoining them in the suit, as the 10th defendant was a full-fledged juristic person with the requisite capacity to sue and be sued. There is a basis, I think, for finding that the suit against the 1st to 9th defendants was not founded on law.

There is, besides, no basis in the pleadings for concluding that the 10th defendant is in existence and can indeed be the target of a suit such as that brought by the plaintiffs. The two sets of preliminary objection are in my view both cogent, and have gone begging for an effective answer. I have had to draw the conclusion that the suit filed by the amended plaint of 7th July, 1994 is not well founded in law. Taking this suit through the hearing process will not be justified, and it will unnecessarily engage the time and resources of the parties as well as the Court.

I will strike out the amended plaint, with costs to the defendants.

Orders accordingly.

DATED and DELIVERED at Nairobi this 23rd day of September, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs: Mr. Koceyo, instructed by M/s. Kenta Moitalel & Co. Advocates

For the 1st – 10th defendants: Mr. Agina, instructed by M/s. Agina & Associates

Advocates

For the 11th and 12th defendants: Ms. Atambo, instructed by the Hon. The Attorney-

General