



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 361 OF 2002**

\WILLIE KAZUNGU KARISA.....1ST PLAINTIFF

ROBERT M. BABU.....2ND PLAINTIFF

V E R S U S

KENYA GAME SANTUARIES.....1ST DEFENDANT

ELIUD MWAGUNGA.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

R U L I N G

Chamber Summons filed on 18/2/2002 by 1st Defendant was argued on 4/11/2003. The application is not opposed by 2nd Defendant and 3rd Defendant.

The main prayer is that the suit against the 1st Defendant be dismissed and/or struck out with costs to the 1st Defendant.

The grounds relied upon are written on the body of the application that the suit is scandalous, etc, Order VI rule 13(1)(b) and (d), time barred under Limitation of Actions Act, the Title is impeached under Act 281, the suit cannot possibly succeed, the Plaintiffs will not be able to pay Defendants' costs.

The application is supported by Affidavit of one Tom Correia Director of the 1st Defendant who swears that the land registered as Voi 12905 was sold to his company by 2nd Defendant on 31/12/1997 and that the Plaintiffs' right to claim the land expired on 6/11/1994 (after expiration of 12 years from 1982) and that under Public Authorities Act, Section 3 the claim is time barred and that under Section 23 of Cap.281 no fraud has been pleaded in the Plaintiff.

I have perused the Plaintiff. There is pleaded fraud, trust use and benefit for the Plaintiffs. The prayers contain declarations of the Plaintiffs' rights. The suit is filed for the interest of almost 300 persons who have always resided in a village known as Birikani. Any purchaser of the land in which the village is situated must have noticed that the land was in the possession of several persons. The issue is a matter of evidence.

In my view the Limitation of Actions Acts do not prescribe time for declaration suits. The suit does not seek to recover possession of land. These people are already in possession. They pray that their possession be not interfered with, no change of user, a declaration of trust. The issue of whether these people should be deprived of the possession of land they occupy without compensation and where they are to re-settle is a major legal issue to be determined by court.

I find the application is premature and that the suit should proceed to hearing. The issue involved is so important that the costs of suit should not be a hindrance to litigation of this nature.

Application dismissed with costs in the cause.

Dated this 30th day of July, 2004.

JOYCE KHAMINWA

J U D G E

30/7/2004

Mr. Kasmani

Mr. Mwambi

Mr. Okello

Ruling read in presence of the Advocates.

JOYCE KHAMINWA, J.

30/7/04