



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 896 OF 1984**

**JOHN MVOO TSUMA.....PLAINTIFF**

**VERSUS**

**THE LAND REGISTRAR**

**KILIFI DISTRICT (CLITONGA TSUMA).....DEFENDANT**

**RULING**

This is a preliminary objection to the plaintiffs suit.

In paragraph 1 of the plaint, plaintiff avers that he is duly authorized to bring this suit for and on behalf of his family. In paragraph 4 of the plaint plaintiff avers that he is claiming Land Parcel No. 125 Nyalani Adjudication section Sibana location Kilifi District awarded to plaintiffs father by in Land Adjudication case no 108/71/72 dated 24.1.72.

He avers in para 6 of the plaint that the decision of the Land Adjudication Committee provided, inter alia, that plaintiff's father being the leader of his family be awarded all the parcels of land (specified) to hold the same as trustee for and distribute the same to members of his family. Lastly, in para 9 of the plaint plaintiff avers and I quote:

“That on the said Register maintained by the first defendant parcel No. 125 appears registered in the name of the 2nd defendant and plaintiff maintains that it is a mistake as the said parcel was awarded to Samuel Jember, Ngolo Tsuma by plaintiffs father in the present of a Demarcation Officer” The reliefs sought in the plaint include:

(a) a declaration that the 2nd defendant holds plot no. 125 on trust for plaintiffs family.

(b) An order directing the first defendant to rectify the register in respect of plot no. 125 ... to comply with the orders in the Adjudication committee case no. 108/71/72.

The first objection is to the plaintiffs capacity to bring the suit. The 2nd defendant pleads in para 1 of the defence filed on 23.7.84 that 2nd defendant denies that plaintiff entitled to bring the suit.

Further, Mr. Wadabwa for 2nd defendant submitted that plaintiff has no locus standi to bring this suit as he has not brought the suit as legal representative of his deceased father. Mr. Mutinda for plaintiff agree that plaintiff is not suing on behalf of his father and that the suit is not a representative suit.

But he does not state the capacity in which plaintiff has brought the suit.

It is clear from para 1 of the plaint that plaintiff has brought this suit for and on behalf of his family.

The plaintiff shows that by the word “family” plaintiff does not refer to his nucleus family but rather to his fathers “Family”.

The plaint also clearly shows that the suit is in respect land parcel no. 125 awarded to plaintiff’s father by the land Adjudication Committee in land case NO. 108/72 and which was awarded to plaintiff’s father to hold in trust for the members of his family.

The land was awarded to plaintiff’s father and not to the plaintiff. The cause of action belongs to plaintiff’s father. Plaintiff could sue over the suit land in the lifetime of his father. Only if he had a power of Attorney from his father.

And if plaintiff’s father is deceased (which is the case here) plaintiff would have capacity to sue only as legal representative of his father. There is no evidence that he has been appointed as a legal representative of his father.

Further, plaintiff avers in para 9 of the plaint that his father awarded land parcel no. 125 to Samuel Jember and Ngolo Tsuma. I have called for copy of the Abstract of title. Plaintiff has instead provided a Certificate of Official Search which shows that on 5.7.77 Chitonga Tsuma, Ngolo Tsuma and Mwangala Ngolo were registered as co-proprietors of Land title Kilifi/Nyalani/125 as tenants in common in equal shares. It is apparent from the plaint and prayers (a) and (b) of the plaint that this suit was brought on the basis that the 2nd defendant was the sole registered proprietor of land parcel no. 125. If the land was awarded by plaintiff’s father to Samuel Jember and Ngolo Tsuma as pleaded in para 9 of the plaint, then, those two people are the ones who have a right of action against the second defendant and not the plaintiff. I am satisfied that plaintiff has no locus standi to bring this suit.

It is also contended that the suit is statutorily time barred because it was filed over 12 years after the cause of action accrued. From para 4 and 11 of the plaint it would appear that the cause of action arose in 1972. However, the Certificate of Official Search shows that the 2nd defendant and two others were registered as proprietors of land on 5.7.77.

The suit seeks, inter alia, an order for rectification of the Register on the ground that the registration of the second defendant was by mistake. This suit was filed on 21.3.84. The suit was thus filed about 7 years after the registration was effected. I am not therefore satisfied that the suit is *ex facie* brought after expiry of 12 years from when the cause of action accrued.

But the Attorney General on behalf of the first defendant pleads in paras 2 of the Defence that the suit is time barred by virtue of the provisions of Public Authorities Limitation of Action Act. By section 2(1) of that Act (cap 35) a suit against the Government should be filed within one year from the time the cause of action accrued. Mr. Mutungi for first defendant prays that suit be struck out on that ground. The suit was filed six years after the first defendant registered the 2nd defendant and others as proprietors of the land.

The suit against the first defendant is undoubtedly time barred.

The counsel for 2nd defendant further contends that in the absence of allegations of fraud, suit against 2nd defendant as the first registered proprietor cannot proceed. The 2nd defendant were registered as proprietors of the suit land as first registered proprietors on 5.7.77. By section 143 (1) of the Registered Land Act, a first registration cannot be rectified whether obtained, made or omitted by mistake.

Thus the relief sought for an order of the rectification of the Register is not available in law in the circumstances of this case.

Lastly, I have already observed that this suit was brought on the basis that the second defendant was the sole registered proprietor of plot no. 125. The Certificate of Official Search now shows that the land is registered in the name of the second defendant and two other persons as tenants in common in equal shares. The relief sought in the plaint cannot be granted without taking away the rights of Ngolo Tsuma and Mwangala Ngolo.

The two have not been joined as defendants and have not been given an opportunity to be heard.

The claim in the plaint is not restricted to the 2nd defendants undivided share of the land.

In my view the suit is incompetent and unmaintainable.

I uphold the preliminary objection with costs and strike out the suit with costs to the defendants.

**E. M. Githinji**

**JUDGE**

**18.3.2003**

Mr Pramond patel holding brief for Rustam Hira present

Mr. Wadabwa absent

Mr. Mutungi absent

Plaintiff present