

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 177 OF 2015

RIVERBANK PLAZA LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

RULING

The Defendant's statement of defence and counterclaim dated 19/03/2016 prompted the Plaintiff to file its preliminary objection dated 05/04/2016 which is for determination before this court. It was based on the grounds that the counterclaim was time barred under the Limitation of Actions Act, it did not indicate the track under which it was brought, and that the verifying affidavit was defective and invalid for not being signed by a Commissioner for Oaths contrary to the Oaths and Statutory Declarations Act.

The matter was canvassed through written submissions. The Plaintiff submitted that its case was based on a transfer between the parties dated 26/02/1993 through which the Plaintiff became the bona fide proprietor of land reference number 3734/843. It contended that the Defendant's counterclaim dated 18/03/2016 seeks among others, the revocation of the transfer dated 26/02/1993. It submitted that the counterclaim was brought more than 20 years since the cause of action arose and is thus time barred pursuant to Section 4 of the Limitation of Actions Act. The Plaintiff relied on the Court of Appeal decision in **Maersk Kenya Limited v Murabu Chaka Tsuma [2017] eKLR**, where the court struck out an action based on contract for being brought after the end of 6 years from the date on which the cause of action arose. It also submitted that the Defendant's counterclaim was bad in law since it was not accompanied by a proper verifying affidavit as envisaged under Order 7 Rule 5(a) of the Civil Procedure Rules and the Oaths and Statutory Declarations Act. It relied on **Priska Onyango Ojuang & Another v Henry Ojuang Nyabende (2018) eKLR**, where the court struck out a counterclaim which was not accompanied by a verifying affidavit at the time the counterclaim was filed.

The Defendant opposed the application and submitted that its counterclaim invited the court to determine the legality of the purported transfer of the suit land to the Plaintiff, and added that the land being government land fell within the exceptions under Section 42(1) (d) of the Limitation of Actions Act on adverse possession of public land. It submitted further that the applicable law was the Public Authorities Limitations Act pursuant to Section 42(1) (e) of the Limitation of Actions Act.

On the Plaintiff's contention that its counterclaim was not supported by a verifying affidavit, the Defendant submitted that the verifying affidavit sworn on 29/0/2016 which accompanied the counterclaim was duly commissioned by S.K. Kivuva Advocate. It added that in any event, any irregularity was curable so as to allow the suit to proceed for hearing on its merits. The Defendant relied on the decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others (2013) eKLR**, where the Court of Appeal held that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect.

The court has considered the preliminary objection, rival submissions filed by the parties and the law applicable. The issue for determination is whether the Defendant's counterclaim should be struck out. The Defendant is a county government and holds land for the use and benefit of the public hence the suit land is public land. Section 42 of the Limitation of Actions Act excludes proceedings to recover possession of government land from the application of the Limitation of Actions Act. That means the limitation period contemplated under Section 4 of that Act does not apply to this claim.

On the verifying affidavit accompanying the counter claim, the Plaintiff relied on the decision in **Priska Onyango Ojuang & another v Henry Ojuang Nyabende (2018) eKLR**. In that case, the counterclaim was not accompanied by a verifying affidavit at the time it was filed and the Defendant sought to introduce it after the case had been closed. In this case, the Defendant filed a verifying affidavit that bears a stamp for a Commissioner of Oaths' but was not signed. Bearing in mind that the case has not taken off, the error on the affidavit does not in the court's view pose any prejudice to the Plaintiff. It is in the interest of justice that the dispute is heard and determined without undue regard to technicalities.

The Defendant is granted leave to file a proper verifying affidavit in support of the counterclaim dated 19/03/2016 within 14 days from today. The preliminary objection is dismissed. The costs for the objection shall be borne by the Defendant.

DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MARCH 2021

K.BOR

JUDGE

In the presence of:-

Mr. Jack Shivugu for the Plaintiff

Mr. Evans Oange for the Defendant

Mr. V. Owuor- Court Assistant