REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 157 OF 2014

MODE OF TRACK..FAST TRACK

KEFWA MAKOYI...PLAINTIFF

VERSUS

CHESIKAKI COFFEE FARMERS SOCIETY LTD..................................DEFENDANT

J U D G M E N T

When Counsel takes up a brief and files a Notice of Appointment to act in a matter where the pleadings have been drawn by a party previously acting in person, the first point of call should be to take advantage of the wide latitude allowed by the law and consider whether it may be desirable to amend the pleadings. I understand that some litigants prefer to draw their own pleadings and only instruct Counsel to lead them during the trial. In most cases however, these so – called ***"home - made pleadings"*** end up serving no useful purpose. It's like a patient who diagnoses his ailment, prescribes and purchases what he believes are the appropriate drugs and thereafter consults a doctor seeking advise on how and when to take them. That can be catastrophic. And with respect to pleadings, even the broad spectrum drug known as **Article 159(2) (d)** of the **Constitution 2010** may be too little too late to offer any meaningful relief. Unfortunately for **KEFWA MAKOYI** (the plaintiff herein) that is the quagmire in which he now finds himself as will soon be clear from this Judgment. By what I like to refer to as a **"home – made"** plaint filed herein on 22nd August 2014, before he instructed **MR DAVID WERE** to come on record for him some 3 years later on 25th September 2017, the plaintiff then acting in person sought Judgment against **CHESIKAKI COFFEE FARMERS SOCIETY LTD** (the defendant herein) in the following terms with respect to the land parcel **NO MALAKISI/EAST SASURI/499** (the suit land):-

a. The defendant be compelled by this Honourable Court to pay me for all the time they have operated on my said piece of land or vacate from the same.

b. Costs of this suit.

c. Interest on (a) and (b) herein above at Court rates.

d. Any other relief.

The basis of the plaintiff's claim is that he is proprietor of the suit land which measures 6.2 acres and in 1954, the defendant illegally occupied it with a promise that he would be paid once it's operations become financially stable. However, although the defendant is now making profits, it has ignored his demands for payment thus necessitating this suit.

Together with the plaint, the plaintiff also filed a copy of the Land Certificate and Certificate of Search showing that he was registered as the proprietor of the suit land on 25th November 1968. He also filed his statement and those of his witnesses namely **HENRY MORIKISI NGEYWO**, **NELSON KANGOTA KAPTUNWO** and **JEPHNEAH OPICHO**.

In his brief statement, the plaintiff claims that in 1954 the defendant illegally occupied the suit land presumably to construct a factory (his statement is not very clear) with a promise that he would be paid later. He therefore became patient but to-date, there has been no agreement on any payments and he therefore demands that the defendant either pay him or vacate from the suit land.

In his statement **HENRY MORIKISNGEYWO** who is a neighbour to the plaintiff in **CHESIKAKI VILLAGE OF MT ELGON SUB COUNTY** states that in 1954 some white men in the company of some Africans went to their village looking for a place on which to put up a factory. They agreed with the plaintiff that his land was suitable and that he would be paid once the factory is operational and stable. Todate, the factory is still situated on the suit land. The statements of **NELSON KANGOTWA KAPTUNWO** and **JEPHNEAH OPICHO**

were also in similar terms.

The defendant filed a defence in which it denied having occupied the suit land and adding that it operates on it's own parcel of land known as **MALAKISI/SASIRI/739**. The defendant also denied having entered into any agreement to pay the plaintiff for the use of his land. It sought the dismissal of the plaintiff's claim.

In a reply to the defence however, the plaintiff reiterated the contents of his plaint and even questioned how the defendant obtained the title to the land parcel **NO MALAKISI/SASURI/739**.

The defendant also filed witness statements of it's **CHIEF EXECUTIVE OFFICER CHARLES WANDABWA** and **JOSEPH WABUYELE MUKEWA**.

In his statement dated 11th May 2015, **CHARLES WANDABWA** stated that the plaintiff is infact a member of the defendant being member NO 19. He however denied that the defendant occupies the suit land adding that the defendant has its own land being parcel **NO MALAKISI/EAST SASURI/739** which it has owned since 1965. He denied that the defendant had agreed to pay the plaintiff for the use of his land and asked that documentary proof of that be availed.

JOSEPH WABUYELE MUKEWA also states in his statement dated 20th November 2017 that he was the first **CHIEF EXECUTIVE OFFICER** of the defendant between 1952 to 1964 and that the defendant has it's own parcel of land being **MALAKISI/EAST SASURI/739**. That he is surprised that since 1952, the plaintiff has never complained and he is therefore shocked about this case. The defendant also filed a copy of the Certificate of Search in respect to the land parcel **NO MALAKISI/EAST SASURI/739** showing that it was registered in the name of the then **COUNTY COUNCIL OF BUNGOMA** on 8th March 1965 and was reserved for the **CHESIKAKI COFFEE FACTORY**.

The trial commenced before **MUKUNYA J** on 3rd November 2016 when the plaintiff testified and called his witnesses. The defendant's witnesses testified on 26th April 2017 and 21st November 2017.

All the witnesses adopted as their evidence their witness statements and produced their list of documents in support of their respective cases.

Prior to the plenary hearing however, and with the consent of the parties, the Court on 14th May 2015 directed the Deputy Registrar and the County Surveyor to visit the suit land and ***"give a report on the relationship between the plaintiff's land MALAKISI/EAST SASURI/499 and the defendant's land MALAKISI/ EAST SASURI/739 and whether there is any encroachment by any party on the other's land."*** That exercise was carried out and **KWAMBAI K. DAVID** the **COUNTY SURVEYOR BUNGOMA** prepared a report dated 5th July 2015 which was filed in Court on 24th August 2015 and was read to the parties on 23rd September 2015. However, on 11th November 2015, the plaintiff informed the Court that he was not satisfied with the report of the **COUNTY SURVEYOR BUNGOMA** and requested to have his own surveyor prepare a report. His request was granted and a second report prepared by **AUGUSTINE A. MASABA** of **THAGISHU & ASSOCIATES LICENSED LAND SURVEYORS** was filed on 30th May 2016. Both reports therefore form part of the record herein.

At the end of the trial, submissions were filed both by **MR D. WERE** instructed by the firm of **D. L. WERE & COMPANY ADVOCATES** for the plaintiff and by **MR J. W. SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by both parties and the submissions by Counsel.

As I stated at the commencement of this Judgment, the plaintiff filed this plaint in person. It is not clear whether his claim seeks to enforce an agreement for the sale of the suit land to the defendant or whether it is premised on trespass to his land or both. In paragraph 3 of his plaint, he has pleaded that: -

> **3. "The defendants occupied my piece of land namely MALAKISI EAST SASURI/499 in the year 1954 illegally.'**

In paragraph 6, he has pleaded as follows: -

> **6 ."The said land was occupied by the said defendant by pretense that they will pay me later when it will grow financially stable."**

The main remedy that he seeks in paragraph 12(a) of his plaint is that: -

> **a. "The defendants be compelled by this Honourable Court to pay me for all the time they have operated on my said piece of land or vacate from the same."**

In his submissions, Counsel for the plaintiff appears to suggest that the claim is premised on trespass to land. At page 2 of his submissions, he states: -

> **"Furthermore, the report by THAGISHU ASSOCIATES surveyors leaves no doubt that the defendant is in occupation of the plaintiff's land"**

On his part, Counsel for the defendant made the following submission: -

"The plaintiff and his witnesses all alluded to the fact that he sold part of his suit parcel to the defendant in 1952. He could not tell the acreage sold. He also did not have a sale agreement. Most of his witnesses had no idea of what transpired. Be that as it may, the sale is definitely not enforceable. The years between 1952 todate is over 60 years. No action can be maintained after such long period."

An agreement for sale of land must contain the obligations of both parties. The terms must be clear and if any consideration is to be paid, it must not be left to conjecture. The plaintiff has simply pleaded that the defendant agreed to pay him later. If there was any such agreement, surely it must have been clear what amount the defendant was going to pay him for the suit land. That would have been a cardinal obligation on the part of the defendant in such an agreement. The defendant has pleaded in paragraph 4 of it's defence thus: -

"The defendants deny having occupied the defendants (sic) parcel known as MALAKISI/E. SASURI/499 in 1954 or any other time as pleaded nor that they entered an agreement to pay for the same hence strict proof is hereby invited"

Even the plaintiff's witnesses did not allude to any evidence that suggest what the defendant was to pay him for the suit land. In order to be enforceable, any agreement whether oral or written, must be clear and unambiguous.

In any event, if the plaintiff's claim is to enforce a contract or reclaim the suit land, it is caught up by the strict provisions of the **Limitation of Actions Act**. **Section 4(1) (a)** of the **Limitation of Actions Act** provides as follows: -

4(1) "The following actions may not be bought after the end of six years from the date on which the cause of action accrued –

a. actions founded on contract."

Section 7 of the same Act provides that: -

7: An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

It is of course true that the defendant did not plead the issue of limitation in it's defence. Counsel for the defendant has therefore launched on that failure and questioned why the issue of limitation has been raised by **MR SICHANGI** Counsel for the defendant through his submissions. Counsel for the plaintiff, **MR WERE**, citing the provisions of **Order 2 Rule 4 (1)** of the **Civil Procedure Rules** has submitted as follows: -

"It's our submission that the defendant cannot properly raise the issue limitation of time in submissions unless the issue was raised in the defence. The provision of Order VI Rules 4(1) and 2 required them to be specifically plead any fact showing illegality which they rely upon to defeat the plaintiff's claim."

Although **MR WERE** did not cite any Judicial authority for that proposition, I am aware that in the case of **ABDULLAHI IBRAHIM AHMED** (suing as the Personal Representative of the Estate of **ANISA SHEIKH HASSAN -** (deceased) **.V. LEM LEM TEKLUE MUZOLO 2013 eKLR**, the Court of Appeal took the view that an issue of limitation must be pleaded and cannot be taken up by the Court suo moto. Citing the provisions of **Order 2 Rule 4 (1)** of the **Civil Procedure Rules** which **MR WERE** has referred to, the Court held that: -

"In terms of Order 2 Rule 4(1) <u>the issue of limitation must be specifically pleaded before a Court can act on it</u>." Emphasis added.

That Judgment was delivered on 18th October 2013. However, in a Judgment delivered on 24th April 2020 in the case of **ANACLET KALIA MUSA .V. A –G & OTHERS C.A. CIVIL APPEAL No 111 of 2017 (2020 eKLR)** the Court of Appeal held thus: -

"The solitary issue in this appeal is whether the suit before the High Court was statutorily time barred. <u>To demonstrate that time limitation is a jurisdictional question and that if a matter is statute – barred a Court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of NASRA IBRAHIM IBREN .V. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & OTHERS</u>, Supreme Court Petition No 19 of 2018 where that Court stressed the fact that <u>jurisdiction is everything and that a Court may even raise a jurisdictional issue suo moto</u>." Emphasis added.

The Court then went further and cited the following passage from the then **EAST AFRICAN COURT OF APPEAL** in the case of **IGA .V. MAKERERE UNIVERSITY 1972 E.A 62** where it was held that: -

"The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for and <u>when a sit is time barred, the Court cannot grant the remedy or relief ………</u>

<u>The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint and no grounds of exemption are shown in the plaint, the plaint must be rejected</u>." Emphasis added.

The route that this Court has always taken is that an issue of jurisdiction to grant a particular relief is one that the Court can raise on it's own even without the prompting of the parties – see for example **EDWARD LILUMBI & 3 OTHERS .V. DIPHINA AHEMBELWA & 6 OTHERS 2019 eKLR** and also **FRANCIS SIMIYU WEKESA** (represented by **ELIUD SAHENYI .V. JOSEPH NAMASAKA NATO**

& 10 OTHERS 2020 eKLR. This is both a Court of justice and a Court of law and where the statute prohibits a party from litigating a particular claim, it means that the Court cannot grant that relief. To do otherwise would amount to a travesty of justice as the Court would be wading out of it's jurisdiction. Indeed, jurisdictional issues are so cardinal that they can be raised even on appeal for the first time – **PAULINE WANJIRU THUO .V. DAVID MUTEGI NJURU C.A CIVIL APPEAL No 278 of 1998**.

In this matter, it is clear from a plain reading of the plaint that the plaintiff's cause of action arose in 1954 when, according to the plaintiff, the defendant occupied the suit land pursuant to an agreement that he would be paid some undisclosed amount of money. This suit was filed on 22nd August 2014 some 60 years later well in contravention of the relevant provisions of the Limitation of Actions Act. In a situation such as this where the salient facts as to the time when the cause of action arose are not in controversy, the Court must without further ado, inform the plaintiff that he is not entitled to the remedies which he seeks.

Therefore, other than the fact that there is really no evidence to demonstrate that the parties entered into any agreement over the suit land, it is also clear that any claim to the suit land based on such agreement would not be actionable in law.

From the trajectory taken by the parties in this suit, it would appear that the plaintiff also hinged his claim on trespass upon the suit land by the defendant. In that event, a trespass being a continuing tort, it will not be defeated by the statute of limitation. This is because, as stated in **CLERK & LINDSEL ON TORTS 16TH EDITION** paragraph 23 – 01: -

> **"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues."**

The above provision was cited with approval by the Court of Appeal in the case of **NGURUMAN LTD .V. SHAMPOLE GROUP RANCH & OTHERS C.A CIVIL APPEAL No 73 of 2004 [2007 eKLR]**. Therefore, even if the defendant trespassed onto the suit land and put up a factory thereon in 1954, then for as long as the offending factory remains on the suit land, the trespass continues until the offending structure is removed. A claim for trespass would therefore not suffer the same fate as the other claims described above.

However, the onus remains on the plaintiff to prove the trespass. The consent order recorded herein on 14th May 2015 becomes relevant and I shall reproduce it in extensor: -

> **"BY CONSENT**
>
> **The Deputy Registrar of the Court will visit the lands in dispute with the County Surveyor to give a report on the relationship between the plaintiff's land MALAKISI/EAST SASURI/499 and the defendant's land MALAKISI/EAST SASURI/739 and whether there is any encroachment by any party on the other's land.**
>
> **The cost of the surveyor shall be borne by the defendant. All parties to be informed in good time of the visit and to be there with their original title documents and survey maps shown to Court today (14.5.2015).**
>
> **The report shall be filed within 60 days. Mention for the report shall be on 13.7.2015 for further orders."**

The report was not ready by 13th July 2015 but an extension was granted to 23rd September 2015 when the report dated 5th July 2015 by the **COUNTY SURVEYOR BUNGOMA MR KWAMBAI K. DAVID** was filed. As stated earlier in this Judgment, the plaintiff was not satisfied with that and on his request another un – dated report by **MR AUGUSTINE A. MASABA** of **THAGISHU & ASSOCIATES LICENSED LAND SURVEYORS** was filed on 30th May 2016. Both reports having been called for by the Court and admitted as part of the record herein, the most that the Court can do is consider each of them to determine their veracity. Before I do that, however, it is instructive to note that the plaintiff produced as part of his documents, the copy of land certificate for parcel **NO MALAKISI/EAST SASURI/499** registered in his names on 25th November 1968 while the defendant produced the Certificate of Search in respect to the land parcel **NO MALAKISI/EAST SASURI/739** showing that it was registered in the names of the then **COUNTY COUNCIL OF BUNGOMA** on 8th March 1996 and reserved for **CHESIKAKI COFFEE FACTORY**.

Again, and for purposes of completeness, it is important to reproduce the two reports because their purpose was meant to confirm if the defendant has encroached onto the suit land. The report by the **COUNTY SURVEYOR BUNGOMA MR KWAMBAI K. DAVID** is dated 5th July 2015 and reads: -

> **"REF: <u>SURVEY REPORT ON LAND & ENVIRONMENT COURT CASE ON CIVIL SUIT No 157 of 2015 IN THE HIGH COURT OF KENYA AT BUNGOMA</u>.**
>
> **In reference to the above Court order, I did visit land parcel NO MALAKISI/E.SASURI/499 and 739 on 1.7.2015 and found out the following: -**
>
> **1. That both land parcel of land are in different map sheets as indicated on the attached map sheets, map sheet 7 and map sheet 12**
>
> **2. That both parcels share a common boundary that is distinct and marked by overgrown trees and shrubs.**
>
> **3. That there is no encroachment on both sides of the boundary, the boundary is has (sic) its is on both the map sheets.**

Report by

KWAMBAI K. DAVID

FOR COUNTY SURVEYOR BUNGOMA."

The report by **MR AUGUSTINE A. MASABA** is undated and reads: -

"SURVEYOR'S OBSERVATION

i. The existing boundaries of parcel NO NORTH MALAKISI/E. SASURI/499 are clearly defined and correspond with Registration Index Diagram.

ii. We further observed that the portion demarcated for Chesikaki Coffee Grower's Co-op Society falls within parcel NO E. SASURI/499.

iii. The boundaries for the society are well defined by three sides and enclosure of the portion is controlled by river MALAKISI as the forth side.

iv. Ground area for the society is approximately 2.30 Ha (5¾ acres).

Conclusion: - Survey ended at 13.33 hrs on a cloudy sunny

Say. (sic).

Thanks in advance

Your faithfully

AUGUSTINE A. MASABA

(Reg Surveyor)."

It is clear from the report filed by the **COUNTY SURVEYOR BUNGOMA** that whereas the two parcels of land ***"share a common boundary which is distinct and marked by overgrown trees and shrubs,"*** there is no ***"encroachment on both sides of the boundary."*** This report clearly exonerated the defendant from any accusation of trespass onto the suit land and obviously infuriated the plaintiff who called for a second report by a surveyor of his choice. However, that report does not appear to support the plaintiff's claim of trespass. Paragraph III states that ***"the boundaries for the Society are well defined by three sides and enclosure of the portion is controlled by river MALAKISI as the forth side."*** That implies that the defendant's factory is within the boundaries of its's land parcel **NO MALAKISI/EAST SASURI/739** which are ***"well defined."*** If the boundaries are well defined, then that can only mean that there is no encroachment by the defendant onto the suit land. In paragraph II of the report however, the Surveyor makes the observation ***"that the portion demarcated for Chesikaki Coffee Growers Co – op Society falls within parcel NO E. SASURI 499."*** That would suggest that the defendant's factory has encroached onto the suit land. However, the surveyor ought to have gone further than that and given figures to demonstrate how much of the suit land has been encroached upon by the defendant since the parties own distinct parcels of land which share a boundary. A trespass is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

"An unlawful act committed against the person or property of another; wrongful entry on another's real property."

If the boundaries for the defendant's land are "well defined" as **MR AUGUSTINE A MASABA** observes in his report, then it does not make sense to conclude, as he has done, that the defendant's land ***"falls within parcel NO E. SASURI/499"*** without explaining exactly how much of the defendant's land falls within the suit land. This second report was clearly devised to bolster the plaintiff's case but, unfortunately, it has not aided him at all. Trespass is also defined as an ***"unjustifiable intrusion by one person upon the land in the possession of another"*** – see **CLERKS & LINDEL ON TORTS 7TH EDITION 17 – 07**. The plaintiff had the burden of leading congent evidence to prove that the defendant has unjustifiably intruded onto the suit land. The evidence adduced has fallen far short of the required standard and that claim must similarly collapse.

The up – shot of all the above is that I find no merit in the plaintiff's case. It is accordingly dismissed with costs.

BOAZ N. OLAO.

J U D G E

27TH MAY 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF MAY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

27TH MAY 2021.