



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 1 OF 2020

1. GILU GIRO KOTO

2. YUSUF MOHAMED.....PLAINTIFFS

=VERSUS=

1. GSU CAMP (GALANA KULALU RANCH)

2. THE DIRECTOR OF PUBLIC PROSECUTION

3. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

Before the court for determination is a Notice of Preliminary Objection dated and filed on 29th July 2021 by the 3rd Defendant seeking that the suit against the 1st and 3rd Defendants be struck off or dismissed for being time barred by dint of section 3(1) of the Public Authorities Limitation Act, Cap 39 Laws of Kenya (the Act).

The genesis of this suit can be found in the Plaint dated 25th November 2020 and filed on 2nd December 2020. The Plaintiffs' averments are that around 17th April 2015, they were informed that herds of cattle belonging to their community had been captured by GSU officers while grazing on Galana Ranch. On that same day, and while the 1st Plaintiff was trying to negotiate the release of the cattle, chaos broke out causing the Plaintiffs to be assaulted and injured by the 1st Defendant. Thereafter, the GSU officers handed the Plaintiffs to Malindi Police Station where they were booked and charged in court with unlawfully destroying property belonging to the government and trespass with intent to annoy.

The Plaintiffs prayed for judgment to be entered against the Defendants for malicious prosecution, costs, and general damages for wrongful arrest, assault, causing grievous harm, injury, pain and suffering.

The Notice of Preliminary Objection was canvassed by way of written submissions which I summarize as follows:

The 1st & 3rd Defendants' submissions

The 1st & 3rd Defendants identified three issues in their submissions filed on 10th September 2021. Firstly, when the cause of action accrued; secondly, whether the preliminary objection is merited; and finally whether this court has jurisdiction to hear the suit.

On the first issue, they began by defining a cause of action as it was defined by *Lord Diplock in Letang v Coper [1964] ALL ER 929*. It was submitted that time to institute this suit started to run on 13th September 2018 when the criminal case against the Plaintiffs was withdrawn and as such the present suit is time barred. They relied on the case of *Jacob Juma & Another v Commissioner of Police & another [2013] Eklr.*

Secondly, they submitted that the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited 1969 EA 696* set out the principles to be followed when considering whether a preliminary objection is merited. They argued that their preliminary object is on a pure point of law as hereinafter explained.

That tort proceedings against the government could only be instituted within a period of 12 months as stipulated under section 3(1) of the Act. The present suit having been filed way after the statutory time, this court is precluded from granting the reliefs sought in the Plaint. To buttress these points, they cited the cases of *Newton Ndirangu Gicheha v Attorney General & another [2019] Eklr;* *IGA v Makerere*

University [1972] EA 65 and Haron Onyancha v National Police Service Commission & another [2017] eKLR.

On the final issue, it was submitted that the issue of limitation of time goes to jurisdiction as it was held in *Thuranira Karauri v Agnes Ncheche [1997] eKLR and in Martha Kawira Anthony v Barclays Bank of Kenya Limited [2019] eKLR*. Therefore, so they argued, the present suit being statutorily barred, this court lacks the requisite jurisdiction to entertain it.

The Plaintiffs' Submissions

On their part, the Plaintiffs similarly identified three issues: firstly, whether the plaintiffs' claim is statutorily barred; secondly, whether the plaintiffs have disclosed sufficient facts upon which their claim can be anchored; and lastly whether the Plaintiffs have any relief.

They submitted on the 1st and 2nd issues jointly, citing the cases of *Wachira Weheire v Attorney General [2010] eKLR and Lt. Col Peter Kagume and other v Attorney General Nbi HCC Application No. 128 of 2006*. It was submitted that there was no limitation period for seeking redress for violation of the fundamental rights and freedoms. They explained that the plaintiffs' rights envisaged under Articles 25 (a), 28, 47, 49 and 51 had been greatly violated and that this court should be guided by the provisions of article 159 (2) of the Constitution of Kenya, 2010 and the decision of the court in *Nation Media Group Ltd V Attorney General [2007] EA 261*, to administer justice without undue regard to procedural technicalities.

On the last issue, it was submitted that Article 23 (3) of the Constitution clothes this court with the power to protect and enforce constitutional rights and freedoms. The Plaintiffs suffered a violation of their constitutional rights and ought to be remedied. To support this argument, they cited the cases of South African Constitutional Court in *Minister of Health & Others V Treatment Action Campaign & others [2002] 5 LRC 216* at page 249 and *Tinyefuze V Attorney General of Uganda [1997] UGCC3*.

Issues for determination

1. *Whether the preliminary objection constitutes a pure point of law.*
2. *Whether the preliminary objection is merited.*
3. *Whether this court can grant the orders sought in the preliminary objection.*

These two issues;

- i. *Whether the preliminary objection constitutes a pure point of law and*
- ii. *Whether the preliminary objection is merited.*

I will analyze them jointly.

What constitutes a preliminary objection was determined in the *locus classicus* case of *Mukisa Biscuit case (supra)*. **Newbold P** explained thus:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

As it was pointed out in *Intamba Freights S.A v Kenya Revenue Authority & 3 others [2018] eKLR* the issue of limitation of time is a pure point of law. Section 3(1) of the Act which is the subject of the notice of preliminary objection reads:

3. Limitation of proceedings

(1) 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.

The government is primarily liable for the actions of its officers. Sections 2 (1), 4 and 12 of the Government Proceedings Act provide as such:

2. Interpretation

(1) In this Act, except where the context otherwise requires—

“armed forces” means the military, naval and air forces of the Republic and includes any person who, although not a member of any of those forces, is serving under the control of any of those forces, and whether as a civilian or otherwise;

“officer”, in relation to the Government, includes the President, the Vice-President, a Minister, an Assistant Minister and any

servant of the Government;

4. Liability of the Government in tort

(1) Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject—

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property:

Provided that no proceedings shall lie against the Government by virtue of paragraph (a) of this sub-section in respect of any act or omission of a servant or agent of the Government, unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.

(2) Where the Government is bound by a statutory duty which is binding also upon persons other than the Government and its officers, then, subject to the provisions of this Act, the Government shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity.

(3) Where any functions are conferred or imposed upon an officer of the Government as such either by any rule of the common law or by any written law, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Government in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Government.

(4) Any written law which negatives or limits the amount of the liability of any Government department or officer of the Government in respect of any tort committed by that department or officer shall, in the case of proceedings against the Government under this section in respect of a tort committed by that department or officer, apply in relation to the Government as it would have applied in relation to that department or officer if the proceedings against the Government had been proceedings against that department or officer.

12. Parties to proceedings

(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

As rightly submitted by the defendants, the reliefs sought in the plaint accrued from a criminal case against the plaintiffs. It is also common ground that the said criminal charges were withdrawn on 13th September 2018. It is therefore clear that the cause of action arose on 13th September 2018 when the said criminal case was withdrawn. As this case was brought on 2nd December 2020, against the government it is evidently time barred. The Plaintiffs did not seem to dispute this fact.

The Plaintiffs urged this court to be guided by Article 159(2) (d) of the Constitution of Kenya. The plaintiffs want this court to believe that the issue of limitation is a matter of technicality. This issue has been aptly settled by the courts. The court in **Benjamin Wachira Ndiithi v Public Service Commission & another [2014] eKLR** while relying on the court of appeal decision in the **Thuranira Karauri case (supra)** explained:

“...the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further. To my mind, even in the current constitutional dispensation, parties must come to court in time.”

In the foregoing, the plaintiffs’ failure to file their claim within the statutory time cannot be said to be a mere technicality. It cannot be cured by article 159(2) as argued by the Plaintiffs. Besides, the fact that the plaintiffs waited for 2 years to file the present suit, only shows their casual approach towards the allegations complained of. In the circumstances, I do find that the notice of preliminary objection is merited and the suit is therefore dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10th DAY OF NOVEMBER, 2021

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S.K GITHINJI

JUDGE

In the Presence/absence of: -

1. Mr Gicharu for the Plaintiff

2. Mr Munga for the AG for the 1st and 3rd Defendants