



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 162 OF 2014**

**NJERU MWANIKI.....PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF KIRINYAGA.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, KIRINYAGA.....3<sup>RD</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

The plaintiff filed this suit on 28<sup>th</sup> May 2014 vide a plaint dated the same date seeking the following orders:

- (a) The defendant be ordered to compensate the plaintiff for the loss of user of the land alternatively the Access Road be removed.***
- (b) Costs of this suit together with interest.***
- (c) Any other relief the Honourable Court may deem fit and just to grant.***

On 12<sup>th</sup> November 2015, the plaintiff amended and filed his plaint and on 27<sup>th</sup> April 2017, he filed a further amended plaint. On 30<sup>th</sup> July 2014, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant filed a joint statement of defence. On 17<sup>th</sup> July 2018, the 2<sup>nd</sup> defendant filed a Notice of Preliminary Objection raising the following grounds:

- (a) This suit is time barred by virtue of Section 7 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.***
- (b) This suit is time barred by virtue of Section 32 (1) and (2) of the Limitation of Actions Act, Cap. 22.***
- (c) That the plaintiff has no title to the suit land and/or the portion curved out by virtue of Section 17 of the Limitation of Actions Act, Cap. 22.***

When this matter came up for hearing, the parties agreed to begin the hearing of this case with the Preliminary Objection which they also agreed to be canvassed by way of written submissions.

**2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS SUBMISSIONS**

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that this suit is time barred by virtue of *Section 7 of the Limitation of Actions Act, Cap. 22*. They argued that at paragraph 6 of the further amended plaint, the plaintiff avers that the defendant in 1981 by way of alleged compulsory acquisition of land without notice or information to the plaintiff entered into his land parcel No. BARAGWI/RAIMU/242 and excavated thereon an excess Road Karia – Rwambiti Factory Road without compensation to the plaintiff. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants further submitted that from the foregoing assertions in the further amended plaint, it is clear that the cause of action arose in 1981 while the plaintiff filed this suit in the year 2014. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants contend that the plaintiff waited for twenty three (23) years to dispute the compulsory

acquisition which he alleged was un-procedural. They submitted that the *Limitation of Actions Act* prescribes that a person may only bring a claim for recovery of land within twelve years from the date on which the right of action accrued to him. They stated that the plaintiff did not bring his claim within the prescribed twelve years but waited for 23 years to file suit. They cited the case of ***Moffat Muriithi Muchai (Suing on behalf of the Estate of the late Milka Njoki Muchai (deceased) Vs Wanjiru Wanjohi Gatundu & 2 others (2019) e K.L.R.*** It is also submitted that ***Section 7 of the Limitation of Actions Act*** provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. They argued that the import of that is that the plaintiff's mother having bought the suit land in the 1990's and thereby claiming ownership in the same, he could seek to recover it from the 1<sup>st</sup> defendant, but only if he did so within twelve years from the date on which the right of action accrued to him. They cited the case of ***Bosire Ongera Vs Royal Media Services (2015) e K.L.R.*** The 2<sup>nd</sup> and 3<sup>rd</sup> defendants also submitted that limitation being a substantive law, the provisions of *Section 1A and 1B of the Civil Procedure Act* cannot be invoked with a view to disregard the provisions of another Act of Parliament.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants further submitted that the suit is barred by virtue of *Section 32 (1) and (2) of the Limitation of Actions Act*. They stated that the said ***Section 32 (1) and (2) of the Limitation of Actions Act, Cap 322 Laws of Kenya*** provides for means by which easements may be acquired. They argued that the dispute in this case relates a public access road which the plaintiff claims to be an intrusion to his land as the same was never compulsorily acquired by the Government and neither was the plaintiff compensated. They submitted that from the pleadings, the said access road was constructed in 1981 and going by the allegations that the land upon which the access road is constructed was never compulsorily acquired and the plaintiff compensated, then the plaintiff's claim is statute barred by virtue of *Section 32 of the Limitation of Actions Act*. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants argued that since the road has been in use for twenty three years prior to filing of the suit herein, such right of access is absolute and indefeasible as provided for by *Section 32 of the Limitation of Actions Act* hence the same cannot be challenged by the plaintiff. It is further submitted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the plaintiff has no title to the suit land and/or the portion curved out by virtue of *Section 17 of the Limitation of Actions Act*.

#### PLAINTIFF'S SUBMISSIONS

The plaintiff on his part filed his submissions in opposing the Preliminary Objection. He submitted that the act by the defendants referred to under paragraph 6 of his further amended plaint constitutes an act of continuance trespass and every act of continuance of trespass is a fresh trespass of which a new cause of action arise from day to day as long as the trespass continues the injury caused is continuous. He cited the case of *Eliud Njoroge Gachiri Vs Stephen Kamau Ng'ang'a (2018) e K.L.R.* The plaintiff also submitted that from the year 1981 when the defendants took over part of the land from the plaintiff to date and the continued denial of the plaintiff for the use of his land, is a day to day affair and the acts in the aggregate form one invisible harm from the year 1981 to date up and until when either the plaintiff will be compensated for the unlawful deprivation of his land and the loss thereof including mesne profits. He cited the following cases:

- (1) *Glady's Koskey Vs Benjamin Mutai (2017) e K.L.R.*
- (2) *Nguruman Limited Vs Shompole Group Ranch & others (2007) e K.L.R.*
- (3) *Stephen Karanja Chege Vs Rural Electrification Authority (2019) e K.L.R.*
- (4) *Lemitei Ole Koros and Another Vs Attorney General (2016) e K.L.R.*
- (5) *Republic Vs Attorney General & 2 others Ex-parte South and Central (Thika) Investments Ltd (2016) e K.L.R.*

#### ANALYSIS AND DECISION

I have considered the pleadings and the submissions by the parties. The plaintiff at paragraph 6 of the further amended plaint averred as follows:

***“6. The plaintiff avers that the defendants in 1981 by way of an alleged compulsory acquisition of land without notice or information to the plaintiff entered into his land parcel BARAGWI/RAIMU/242 and excavated thereon an access road KARIA – RWAMBITI FACTORY ROAD to serve the general public interest and private interest without compensation to the plaintiff”.***

From the foregoing assertion, it is clear that the plaintiff took almost 23 years before instituting this claim. ***Section 7 of the Limitation of Actions Act, Cap. 22*** Laws of Kenya provides as follows:

***“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”.***

The law prescribes the period within which a person can bring an action to recover land as twelve (12) years. The plaintiff waited for a whooping 23 years and sought no leave for extension of time. It follows therefore that by the time this suit was filed, his claim was statute barred. The issue of limitation is a material factor that goes to the jurisdiction of a Court to determine whether or not it can entertain a claim. In the locus classicus case of ***OWNERS OF THE MOTOR VESSEL “LILLIANS” VS CALTEX OIL (K) LTD (1989) K.L.R 1, Justice Nyarangi*** (as he then was) held as follows:

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

I agree with the decision of the learned Judge of the Superior Court which is binding on me and the applicable law aforesaid. I find and hold that the plaintiff's claim is statute barred. Consequently, the Preliminary Objection is merited and the same is hereby upheld and the plaintiff's suit is struck out with costs.

**DATED, DELIVERED and SIGNED in open Court at Kerugoya this 29<sup>th</sup> day of May 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Asimwe holding brief for Wachira for 1<sup>st</sup> Defendant
2. Ms Wambui holdng brief for Kahuthu for Plaintiff
3. 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Advocate – absent
4. Mbogo, Court clerk – present.