



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ENVIRONMENT AND LAND CASE NO. 134 OF 2013 (OS)**

1. KAZUNGU MOLI CHOGO
2. CHANGAWA MOLI CHOGO
3. SHABAN BAKARI MOLI
4. SAMMY KEAH MOLI
5. KADZITU MOLI CHOGO
6. RAMADHAN RANDU MOLI
7. MWENDA KAHINDI MOLI ..... .. APPLICANTS

- V E R S U S -

1. PERIHAN TORUN
2. CEMALETTIN KANI TORUN
3. FEISAL HASSAN SHERMAN
4. AMIN ALI SWALEH ( all sued as trustees of African University Trust of Kenya)
5. AFRICAN UNIVERSITY TRUST OF KENYA
6. MOHAMED YUSUF HAJI
7. THE ZAYED BIN SULTAN AL NAHYAN CHARITABLE  
& HUMANITARIAN  
FOUNDATION .....RESPONDENTS

**RULING**

[1] The first six defendants raises a preliminary objection and requests the court to declare Section 38 of the Limitations of Action Act unconstitutional and dismiss the notice of motion and originating summons dated 27th June 2013 with costs.

The basis of this preliminary objection is that Article 40 (2) of the Constitution of Kenya 2010 expressly prohibits parliament from enacting any law that permits the state or any person to arbitrarily deprive a person of property of any description or any interest in or right over any property description. The respondents argue that the suit property is such right to property and is protected by Article 40 of the Constitution from arbitrary deprivation.

[2] It is argued that a claim under Section 38 of the Limitations of Action Act Cap. 22 Laws of Kenya is not recognized by section 40 (3) as a constitutional way of depriving the respondent herein his right to the suit property. It was further argued that deprivation to property under Section 38 of the Limitations of Actions Act was provided under Section 75 (a) (vi) of the repealed constitution as an express limitation to protect the deprivation of property. The applicants /respondents argued that Section 38 of the Limitations Act is unconstitutional to the extent that it purports to deprive or provide deprivation of right to property outside the parameters permitted by Article 40 (3) of the 2010 Constitution. It is argued that Section 38 aforesaid offends Article 24 (i) and (2) in that it derogates the core content of the right to land under Article 40 aforesaid.

[3] The respondent argues that the question whether Section 38 of the Limitations Act is unconstitutional is expressly granted by Article 165 (3) (d) (ii) of the Constitution.

The respondent further argued that the Preliminary Objection has no merits. They argued that the rights of an owner under Article 40 are not absolute and that they are subject to limitations by laws made under the Constitution. That the Limitation of Actions is one such law. It was argued that the only right that cannot be limited is right to life under Article 25. It was further argued that if the Constitution wanted to make Article 40 absolute, it should have said so. It was also argued that under Article 162 of the Constitution, the Court has power to determine the right to occupation and right to land. The Court was urged to dismiss the Preliminary Objection and rely on Section 3 of the ELC Act where the court is mandated to proceed without due regard to technicalities.

[4] Article 40 (2) of the Constitution provides as follows

*"40 (2) Parliament shall not enact a law that permits the State or any person-*

*(a) to arbitrarily deprive a person of property of any description or of any interest, or right over, any property of any description; or*

*(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)."*

The key word in 40(2) is **enact**. The enactment envisaged here is a new Act enacted after the Constitution. In 40 (2) (a) the keyword is **arbitrarily**.

*In the Black Laws Dictionary Eight Edition. Arbitrary is described as*

*"depending on individual discretion;*

*founded in prejudice or preference rather than on reason or fact "*

It would appear therefore the enactment of new law that permits arbitrary deprivation of property or interest or right over ownership of land is what is prohibited under Article 40 (2). Limitation of Actions Act Cap. 22 Laws of Kenya commenced on 1st December 1967. This was an Act of Parliament to prescribe periods for limitations of actions and arbitrations and to make acquisition of easements by prescription and for matters incidental thereto and matters connected therewith. This act is not the kind of act envisaged in Article 40 (2) of the Kenya Constitution 2010.

***Is a claim under Section 38 of the Limitation of Actions Act Cap. 22 recognized by Article 40 (3) as way land rights may pass to adverse possessors?***

[5] Section 7 of the Transitional and Consequential Provisions of the Kenya Constitution 2010 states as follows:

### ***Existing Laws***

7 (i) "All law in force immediately before the effective date continue in force and shall be construed with the alterations, adoptions, qualifications and exceptions necessary to bring it into conformity with this Constitution."

The Limitation of Actions Act Cap. 22 Laws of Kenya was in force before the Constitution and was adopted by the current Constitution as part of the laws of Kenya. It is therefore recognized by Article 40 (3) of the said Constitution.

### **Is Article 40 of the Constitution one of the rights that cannot be limited by an Act of Parliament?**

[6] As this court stated in a ruling in Samuel Mwangi Gatoto T/a Diani Farmers Day and Night Club & also T/a. Gombato Guest House v The Attorney General Mombasa High Court Civil Case No. 82 of 2009.

The only rights in the Kenyan Constitution that cannot be limited are found in Article 25 which provides as follows;

*Article 25 - "Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited -*

- (a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- (b) freedom from slavery or servitude;*
- (c) the right to a fair trial; and*
- (d) the right to an order of habeas corpus."*

All other rights are not absolute and can be limited by act of Parliament to the extent that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking it into account the nature, importance, extent of the right and taking account of the prejudice of the right to enjoyment of the right to others and the relation between the limitation and its purpose and whether there are lessor restrictive means to achieve the purpose. Article 40 of the Kenya Constitution 2010 can indeed be limited

[7] The Limitations of Action Act Cap. 22 and to be precise, Section 38 thereof cannot be said to be arbitrary. It sets the period for limitation for actions and arbitrations and makes the provision concerning the acquisition of easement and other matters incidental thereto. This Court stated in the Gatoto case aforesaid that the Constitution of Kenya 2010 and the Acts of Parliament enacted before it and adopted by it under Section 7 of the transition provisions aforesaid must be read together. The Constitution being the supreme law and foundation upon which all other Acts of parliament are based while the Acts of Parliament are the procedure system and channel through which the objects of the Constitution are transmitted.

[8] I find that Section 38 of the Limitation of Actions Act is not unconstitutional, it is not arbitrary inconsistent and/or in contravention of the Constitution. The Preliminary Objection is dismissed with costs.

**Dated and delivered in open Court at Mombasa this 14th day of March, 2014.**

**S. MUKUNYA**

**JUDGE**

**14.3.2014**

In the presence of:

Mr.Mutiso/Mr. Mutubia advocate for the plaintiff

Mr. Sitonik Advocate for the 1st - 5th defendants

Non appearance for 6th defendant

Mr. Khatib Advocate for the 7th defendant