



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. CASE NO. 131 OF 2013

ETHICS AND ANTI CORRUPTION COMMISSIONPLAINTIFF/RESPONDENT

- V E R S U S -

YELAN INVESTMENTS 1ST DEFENDANT

ALCOP LIMITED2ND DEFENDANT

ROTHMAN'S HOLDINGS LIMITED 3RD DEFENDANT/APPLICANT

WILSON GACANJA4TH DEFENDANT

RULING

[1] The applicant brings this application and prays for the plaint herein to be struck out and he sets out the following prayers.

1. *That the plaint is scandalous, frivolous and/or vexatious and an abuse of the process of the Court because of inter alia the fact that the Plaintiff's claim has no basis in fact or law and the same is time-barred under the provisions of the Limitation of Actions Act, Cap.22, Laws of Kenya and is unsustainable as set out hereunder:-*

(a) *The facts alleged as constituting the cause of action herein occurred on or about 29th August 1994.*

(b) *The Plaintiff's cause of action based on fraud and breach of Public Trust which is tort should have been brought within three (3) years of the date of the cause of action.*

(c) *In the event it is shown from the facts as pleaded, which are denied, that the cause of action is for the recovery of land for and on behalf of the Government then the said suit is still time barred.*

[2] Mr. Karega Learned Counsel for the applicant argued that the suit is scandalous, frivolous and an abuse of the process of the court. He gave a reason for that the fact, that the suit is time barred by

provisions of Cap. 22 since he alleged the cause of action arose in 1994. He relied on para 7 of the plaint. He further argued that the breach of trust is a tort and the limitation period for bringing action on such a case is 3 years from the time the cause of action arose. He contended that the statutory period for bringing a case for public land is 12 years and that the 12 years lapsed in 2006. He argued that the land is already alienated and his client has title to the same. He argued that Sec. 41 (a) of the Cap. 40 Government Proceedings Act does not apply as the land is no longer public land. He relied on that assertion on Article 64 of the Constitution and Sec. 2 of the Land Act. He stated that Cap. 40 Sec. 2 (2) the act is defined as Government Proceedings Act and it refers to proceedings by Government and against Government or its departments. He contended that the plaintiff in this case the Ethics and Anti-Corruption Commission is not the Attorney General, it is not a statutory body and is not covered by Cap. 40.

[3] Mr. Kagucia learned counsel for the applicant opposed the application. He relied on his grounds of opposition filed by the applicant and the submissions he had filed. He relied on Section 41 of the Limitations of Actions Act that prohibits a person from pleading limitation on Government land. He argued that the first allottee is suspected to have been allotted this land fraudulently and that it is that allocation that the applicant was challenging.

Mr. Kagucia further argued that the application had not shown that the plaint is scandalous in that it had pleaded irrelevant facts and that the applicant had not showed that the plaint is frivolous in that it lacks seriousness or that it is vexatious in that it is annoying. He contended that this matter is based on Public Trust. He stated that the particulars set out in Para 1 of the plaint show fraud, illegality and breach of trust. He stated that the Ethics and Anti-corruption Commission is established under Article 79 of the Constitution and that its independent mandate is well spelt out in the EACC Act especially Sec 11 on recovery of Public Land. He stated that no reasons have been given by the applicants to strike out the suit filed.

[4] The respondent in this case is a constitutional body established under Article 79 of the Constitution for the purposes of ensuring compliance with, and enforcement of, the provisions of Chapter 6 on leadership and integrity. Under Chapter 80 of the Constitution parliament is mandated to enact legislation establishing procedures and mechanisms for the effect administration of Chapter 6 of the Constitution. Using that mandate it enacted the Ethics and Anti-Corruption Commission Act. No. 22 of 2011. In that Act was inserted Section 11 for recovery of public property belonging to the Government of Kenya. Following the mandate under Sec. 11 of the Act the plaintiff brought this suit to recover the land now known as Mombasa/Block XXVI/68.

[5] The plaint sets out the basis of the plaintiffs claim and set out the particulars of fraud illegality and breach of public Trust against the defendants. Can it be argued therefore, that the applicant is not a public body, has no mandate to bring this suit when it is established by Constitution itself and its mandate spelt out by an Act of Parliament as mandated by Article 79 and 80 of the Constitution? I do not think so.

Is this suit frivolous, vexatious and an abuse of the process of the court as alleged by the applicant?

The plaint is elaborate, it sets out various facts, and allegations. it sets out the particulars of fraud, illegality and breach of public trust. To my mind this plaint is far from that. It raises issues that should be canvassed and proved at the trial. The issue whether this suit is exempt from Sec. 41 (a) (i) on whether it is time barred or whether the applicant is covered by Government Proceedings Act are issues that can be raised and canvassed at the trial.

[6] In D.T. Dobie & Company (Kenya) Ltd v Muchira [1982] KLR 1 at Page 9 Madan JA said

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing . . . No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurably by amendment. If a suit shows a mere resemblance of a cause of action, provided it can be injected real real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it"

I do not find this plaint scandalous, frivolous or vexatious. It cannot be said to be an abuse of the process of the court. The issue whether Limitations of Act Cap. 22 applies shall be an issue in the suit and should be canvassed at the trial.

This application is dismissed with costs to the plaintiff.

Dated and delivered in open court at Mombasa this 3rd day of June 2014.

S. MUKUNYA

JUDGE

3.6.2014

In the presence of:

Urshiwin Khanna Advocate holding brief for Mr.Karega Advocate for the the applicant.