



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 102 OF 2005

KARANI MBUTE.....PLAINTIFF

VERSUS

GICOBI KARANI1ST DEFENDANT

JAMES GITHINJI GUTU2ND DEFENDANT

DISTRICT LAND REGISTRAR KIRINYAGA3RD DEFENDANT

R U L I N G

1. This is the chamber summons dated 8th November 2010 for an order that the Plaintiff's suit be struck out with costs. It was filed by the 2nd Defendant.
2. The grounds are that the suit being based on the tort of fraud is time barred as it was filed after three (3) years without leave in contravention of Section 4(2) of the Limitation of Actions Act. Secondly it contravenes Section 2 and 13 of the Government Proceedings Act; Section 3(1) of the Public Authorities Limitations Act, Section 87 and 88 of the new repealed Registered Land Act.
3. The same is supported by the applicant's affidavit in which he tends to state facts of the case and what transpired between the Plaintiff and the 1st Defendant then himself. He says the allegations of fraud are not founded at all. The Plaintiff/Respondent filed grounds of opposition dated 28th October 2011 and filed on 31st October 2011. Both Counsels agreed to file written submissions.
4. **The 2nd Defendant/Applicant's submissions**

Based on the grounds in his application, Mr. Muchiri for the Applicant submitted that the Respondent did not respond to the facts and law in the grounds raised. He submitted that the Plaintiff/Respondent had contravened several provisions of the law as stated in the grounds. And further that the suit against the 3rd Defendant cannot stand as the Attorney General had not been enjoined as a party to the suit. He has cited the cases of;

- i. ***WAMWERE –VS- ATTORNEY GENERAL [2004]1 KLR 166***
- ii. ***KINYATTI –VS- ATTORNEY GENERAL [1988]1 KLR 96***

5. **The Plaintiff/Respondent's submissions**

Mr. Gacheru for the Plaintiff/Respondent made submissions in line with the grounds of opposition filed. He gave a brief history of the matter herein. He raised issue with the way the 2nd Defendant/Applicant appeared to be speaking on behalf of the 3rd Defendant. He said the suit is based on land and not mere fraud, hence it was filed within time.

6. I have otherwise read and carefully considered all the submissions and the material before me. The issues that fall for determination are;
 - i. Whether the Plaintiff's suit is time barred.
 - ii. Whether the Plaintiff did contravene the Government Proceedings Act as claimed by the 3rd Defendant.

7. **ISSUE NO. (i)**

Besides the acts of trespass onto the two parcels of land, the Plaintiff's claim is that the 2nd Defendant induced the 1st Defendant to transfer L.R. KABARE/NJIKU/1521 to him. Secondly the 3rd Defendant in collusion with the 1st and 2nd Defendants issued the 2nd Defendant a title deed in respect of the said land. This matter though relating to trespass and fraud is about **interest in land**. This interest cannot be detached from the land and only touch on the tort of trespass and fraud. The real subject is land. I therefore find that it was filed within the twelve (12) years within which a claim to land maybe filed.

8. **ISSUE NO. (ii)**

The 3rd Defendant has not entered appearance at all. He/she has also not filed a defence. It is therefore not clear how the 2nd Defendant has knowledge of the material stated in grounds (b), (c) of his application. It is only the 3rd Defendant who could have come and indicated that the Attorney General was never served with the various notices. This is therefore information that the 2nd Defendant is not privy to. It has also not been stated by the Plaintiff that when the 3rd Defendant committed the acts complained of, he did it on behalf of the Government in order for the Attorney General to be enjoined. These are averments that can only come out in evidence. In ground (e) and (f) the Applicant appears to give evidence. These are matters where evidence should be adduced in order for the Court to make a determination. To say that the suit is based on false allegations of fraud in an application without evidence being called would be asking the Court to make findings on untested evidence.

9. The 1st and 2nd Defendants have filed their joint defence and its only prudent that the Court proceeds to hear the evidence and makes a decision on merit.

I therefore find the application not to be well founded and dismiss it with costs.

Finally this matter involves interest in land and will therefore be heard before the Environment and Land Court Embu High Court.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

J U D G E

In the presence of:

Mr. Kiama for Gacheru for Plaintiff/Respondent

Both Parties

Mutero/Kirong – C/c