



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 321 OF 2017

EDWARD MUTINDA NDETEI

JAMES MUTUA MUTHOKA

DANIEL MAKAU MWOLOLO (ALL SUING ON BEHALF OF AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF MAITHYA MATIVU CHRISTOPHER, SAMUEL KITILILU KILONGWE, ESTHER MASAI, ELIZABETH NDUKU NDAKA, PENNINAH ONESMUS MASAI, JANET MASAI, BRIAN W. MASAI, MORRIS MASAI, ERICK N.MASAI, KELVIN M. MASAI, LYDIA MUYOA MUNYAO, VERONICA MUTUA KALUSI, ELIZABETH MBULA WAITA, NDILA K. MAVIA, STEPHEN WARUI KABUGI, PETER WAMBUA MUTUA, KISILU KIONGWE KATILU, PILISILA MUKAMI NZEKELE, MAY MUENI MUTHOKA, KALONDU MULINGE SAIDI, PRISCILLA MUVENGI WAMBUA, WISLON MUMO MUSYIMI, NTHENYA NDOLO, CHARLES MUSAU MUTHOKA, EUNICE MUTINDA MUTYETUMO, ESTHER NTHAMBI WAEMA, LOIS KALEWA MULI, MADGDALENE NZEMBI NZEKELE, MURINDOKO MAREKERO LEKIBOLA, JOYCE NDANDU MUASYA, TERESIA KIIO, SAMMY KUNGA MAKATO, SIMON MBUTA , GIBSON NZYUKO KIATINE, AGNES WAYUA KIOKO, JOSEPHAT MUASYA NZIVO, TABITHA MUTE KINEEENE, CHARLES MAKAU MUIA, PIUS MULEI MASILA, GEOFFREY MUTUA KIOKO, REDEMPTA NZILANI NZIUKO, THOMAS MUANGE, PETER KYUVI, KIMUYU, VINCENT NGANGA NGUTA, NICHOLAS MUSYOKI NTHOKOI, PAUL NGUMBI MATATA, MARY KAINDI KITONE, MULEE MBINDYO, KIVUVA MULINGE, SAMUEL TAMA, DANSON MWALIMU MAKENGA, PRISCILLA MUVENGI WAMBUA, MANG’OKA MBUSU, SIMON MBUTA).....PLAINTIFFS/RESPONDENTS

VERSUS

DIRECTOR OF LANDS AND URBAN PLANNING GOVERNMENT OF

MAKUENI COUNTY.....1ST DEFENDANT/APPLICANTS

THE COUNTY GOVERNMENT OF MAKUENI.....2ND DEFENDANT/APPLICANTS

RULING

1) By their application dated 19th January, 2018 and filed in court on 22nd January, 2018, the 1st and the 2nd Defendants/Applicants pray for orders that:-

1. THAT the Plaintiffs/Respondents suit filed on the 2nd August, 2017 be struck out with

costs.

2. THAT cost of this application be provided for.

2) The application is expressed to be brought under Section 26 of the Government Proceedings Act, Section 3(1) of the Public Authorities Limitations Act and Order 51 Rule 1 of the Civil Procedure Rules. It is predicated on the grounds on its face and is supported by the affidavit of Bill Ng'eny sworn at Nairobi on the 19th January, 2018.

3) The Plaintiffs/Respondents have opposed the application vide the replying affidavit of Edward Mutinda Ndeti, the 1st Plaintiff/Respondent, sworn at Nairobi on the 8th March, 2018 and filed in court on the 9th March, 2018.

4) The court directed that the application be disposed off by way of written submissions.

5) The 1st and the 2nd Defendants/Applicants in their submissions raised three issues for determination.

These were:-

a) The Plaintiffs' cause of action.

b) Whether the Plaintiffs' claim is statutorily time barred; and

c) Whether the 1st Defendant, the Director of Lands and Urban Planning in the County Government of Makueni is wrongfully enjoined in this suit.

The Plaintiffs' cause of action

6) The counsel for the 1st and 2nd Defendants/Applicants cited the case of **Attorney General & Another V Andrew Maina Githinji & Another [2016] eKLR** where the Court of Appeal defined a cause of action as :-

“8. A cause of action is an act on the part of the Defendant, which gives the Plaintiff his cause of complaint”

That definition was given by Pearson J. in the case of Drummond Jackson Vs Britain Medical Association (1970) 2 WLR 688 at Pg 616.

In an earlier case Read Vs. Brown(1889), 2 QBD 128. Lord Esher, M.R had defined it as:-

“Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgement of the court”

Lord Diplock, for his part in Letang Vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

7) Arising from the above, the counsel submitted that in paragraph 4 of the plaint herein, the Plaintiffs/Respondents have averred that they are the owners and proprietors of various plots within Emali Town whereupon they have erected permanent structures. He went on to submit that in paragraph 10 of the plaint, it is averred that;

“ Despite service and existence of the said order on the Defendants, their agents, servants or

persons claiming under in flagrant disobedience of the said order proceeded to demolish the structures on the ground”

8) The counsel was of the view that based on the aforesaid averment in the plaint, the Plaintiff's/Respondent's cause of action is that the Defendants/Applicants unlawfully and illegally entered into their land and demolished property therein causing them loss and damage. The counsel pointed out that a tort is a private wrong against a person for which the injured person may recover damages i.e monetary compensation and referred to Blacks Law Dictionary 9th (ed) page 1626 which defines, tort as:-

“a civil wrong, other than breach of contract, for which a remedy maybe obtained, usually in form of damages. Intentional Tort is committed by someone acting in general or specific intent. Examples include, battery, false imprisonment, and trespass to land.”

9) The counsel also referred to Clerk & Lindsell on Torts, 18th Edition at Paragraph 18-01 where trespass to land has been defined as;

“ Any unjustifiable intrusion by one person upon land in possession of another.”

10) The counsel cited the case of County Council of Nyamira V Mageka Oseko & Another [2014] eKLR where the Respondent averred that :-

“on or about 19th December 2006 the Appellant through agents and/or servants, and/or employees without any lawful cause or basis trespassed upon the suit property and while thereon damaged and demolished the entire building that had been put up thereon by the Respondents, thereby subjecting the Respondents to loss and damages. The Respondents contended further that the Appellant did not give to the Respondents any prior notice before the said demolition and that as at the date of the said demolition no rents and/or rates were due and outstanding by the Respondents to the Appellant their particulars of loss, the Respondents put the cost of the damaged building at Kshs. 700,000/=. They also set out loss of rental income the particulars of which they indicated would be supplied at a later date.”

and Okongo, J held that the cause of action based on the above facts was a tort of trespass to land.

11) The counsel submitted that the Plaintiffs herein have in specifically under paragraphs 1, 10,14 of their plant dated 1st August, 2017 averred that the Defendants or their agents illegally, unlawfully and unjustifiably entered their land and demolished property therein and that the Defendants'/Applicants' action caused them loss and damage, particulars of which they have quantified as sum of Kshs. 270,239,500/=, the suit herein fits squarely within the definition of a tort of trespass. The counsel termed the Plaintiffs'/Respondents' argument specifically under paragraphs 3 and 4 of the replying affidavit dated 8th March, 2018 that their cause of action isn't trespass but ***“a prayer of compensation for loss and damage suffered from illegal and unlawful acts of the Defendants”*** as nonsensical, unsound and mistaken.

Whether the plaintiffs' claim is statutorily time barred

12) The counsel for the 1st and 2nd Defendants/Applicants submitted that having seen that the cause of action in this suit is **Trespass on Land** , an action of tort against a public officer and a County Government falls under the provisions of Sections 2(2) and 3(1) of the Public Authorities Act.

13) The counsel further submitted that the Plaintiffs have deliberately left out in their plaint, witness statement and in the Replying Affidavit dated 8th March, 2018 the date when the alleged demolitions happened. He said that upon perusal of the Plaintiffs'/Respondents' bundle of documents and particularly :-

a) County Government of Makueni Enforcement Notices

Pg 24 to 35 of the Plaintiffs' Bundle of Pleadings

b) Makueni County Government Hansard Proceedings

Pg. 51 of the Plaintiffs' Bundle of Pleadings

c) Valuation Reports

Pg. 72 to 704 of the Plaintiffs' Bundle of Pleadings

it is easily ascertainable that;

a) All the Enforcement Notices in the Plaintiffs' Bundle of Documents were issued on 6th May, 2014 and served on the 7th May, 2014 as stated in paragraph 5 of the plaint.

b) The Makueni County Government Hansard Proceedings in page 51 of the Plaintiffs bundle of pleadings that the alleged demolitions happened on the 22nd and 23rd May, 2014; and

c) Each and every of the Plaintiffs' Valuation Report forming part of Plaintiffs' List of Documents states that the alleged demolitions happened on the 22nd May, 2014.

14) The counsel was of the view that from the Plaintiffs'/Respondents' own pleadings that the cause of action herein arose on the 23rd May, 2014 and pointed out that the time between this date and 1st August, 2017 when the suit was filed, is three (3) years and two (2) months and nine (9) days. The counsel cited section 2(2) of the Public Authorities Act which provides as follows:-

"2. for the purposes of this Act:-

a) Proceedings against the Government includes proceedings against the Attorney –General or any Government department or any public officer as such;

b) Proceedings against a local authority includes proceedings against any person employed by a local authority and sued or intended to be suit as such"

15) He went on to cite section 3(1) of the aforesaid Public Authorities which provides that:-

"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."

16) The counsel further cited the case of *Anaclet Kalia Musau(suing on behalf of the estate of Vincent Mangala Kalia (Deceased) V Attorney General & 2 others [2015] eKLR* where Aburili, J stated thus ;

"... I also agree with Odunga J in Republic Vs Principal Magistrate P. Ngare Gesora & 2 others Exparte Nation Media Group Ltd (2013) eKLR stated;

"However, where a certain cause of action is disallowed by law, the issues of the path of justice being clogged does not arise since in that case justice demands that a claim should not be brought. Justice, it has been said time without a number, must be done in accordance with the law " It must however be remembered that what the law of Limitation Act provides is that certain causes of action may not be brought after expiry of a particular period of time. In other words, the Act bars the bringing of particular actions after the specified periods of Limitation"

"The above principles of law are in my view applicable to this case. Irrespective of the merits of

the claim, the law is clear that such action shall not be brought against the Government after the expiry of twelve months and upon such expiry, the claim is extinguished such that the Limitation of Actions Act which allows similar causes of action against private individuals to be filed out of the stipulated statutory period with leave of court does not apply.

In addition, it cannot be said that the matter of Limitation of Actions is a procedural technicality curable by Article 159(2) (d) of the Constitution or the overriding objectives principles espoused under Sections 1A and 1B of the Civil Procedure Act. In my view, statutory provisions limiting time within which a substantive cause of action should be brought cannot be equated to procedural technicalities envisaged under Article 159(2) (d) of the Constitution. They are not procedural lapses that do not go to the root or substance of the matter under consideration such as filing suit by way of Notice of Motion instead of plaint or citing wrong provisions of the law. I therefore find that in as much as the court would have wished to assist the Plaintiff to access justice in the court for the sad and sudden regrettable loss of his beloved son, failure to institute suit against the Government within the stipulated statutory period of one year or twelve months from the date when the cause of action arose, extinguished the suit in limine. Consequently, I proceed and strike out the incompetent suit against the 1st and 2nd Defendants.”

17) The counsel submitted that pursuant to the Public Authorities Act, the Government Proceedings Act and case law, the Plaintiffs'/Respondents' claim brought by the plaint dated 1st August, 2017 is two years, two months and nine days late. He added that where such cause of action has accrued over a period of twelve (12) months, the law is clear that no suit can be brought against the Government or a Local Authority.

18) The counsel further submitted that the issue of a suit being statute time barred isn't just a mere technicality for it goes to the jurisdiction of the court and termed the suit as incompetent and a waste of judicial time and, therefore, it ought to be struck out in its entirety with costs to the Defendants.

Whether the 1st Respondent is Wrongfully enjoined in this suit

19) The counsel submitted that the 1st Defendant/Applicant is the Director of Lands and Urban Planning in the County Government of Makueni and an employee of the 2nd Defendant/Applicant and a Public Officer pursuant to Article 260 of the Constitution which defines a public officer as :-

“public officer” means:-

a) any state officer; or

b) any person, other than a State Officer, who holds a public office; “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the officer are payable directly from the Consolidated Fund or directly out of money provided by Parliament”

20) In addition, the counsel cited section 4(3) of the Government Proceedings Act which provides that:-

“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.”

21) He also cited the case of **Kenya Anti-corruption Commission V Judith Marilyn Okungu & Another [2013] eKLR** where J.M Mutungi, J held that:-

“21.The Plaintiff has submitted that the 1st Defendant is sued in her personal individual capacity

since it is alleged she abused her office and/or acted in excess of her powers as the Commissioner of Lands in allocating the 2nd Defendant land that was not available for allocation. The fact of the matter is that she was the Commissioner of Lands at the time the transaction took place and she states she was acting as Commissioner for Lands and not in her individual capacity. Without any allegation and/or evidence that the 1st Defendant accrued a personal benefit, I am not able to hold that she was acting otherwise than in her official capacity as the Commissioner. She may have made mistakes and/ or committed acts that were tortious but then Section 4(3) of the Government Proceedings Act Cap 40 envisages that and that is why public officers are not made liable for any tortious acts they commit in the course of their duties. In the premises I would hold that the 1st Defendant is not properly enjoined in this suit as in my view she was acting as the Commissioner of Lands when she executed the certificate of Title for the suit property in favour of the 2nd Defendant. I hold that she cannot be personally liable for those acts.”

22) The counsel was of the view that guided by the provisions of the Constitution, the Government Proceedings Act and the aforementioned case law, the 1st Defendant/Applicant is wrongfully enjoined in this suit for the reason that he is a public officer who cannot be sued in his own capacity in tortious claims committed in the course of his duties.

23) Lastly, the counsel in response to paragraphs 14 and 15 of the Replying Affidavit dated 8th March, 2018 submitted that a Judicial Review application is neither a criminal nor a civil suit. The counsel pointed out that as such, the application is brought against the person who is bound to comply with the order sought therein. The counsel added that it is wrong for the Plaintiffs/Respondents to aver that since an order was issued against a public officer in Judicial Review Proceedings, then that public officer should be party in a tortious proceedings against the Government.

24) On the other hand, the counsel for the Plaintiffs/Respondents in his submissions raised four(4) for determination namely:-

i. Whether the suit is time barred.

ii. Whether the court has jurisdiction to hear and determine the Plaintiff's suit

iii. Whether the 1st Defendant/Applicant is capable of being sued.

iv. Grounds of opposition by the Plaintiffs/Respondents.

Whether the suit is time barred

25) The counsel for the Plaintiffs/Respondents submitted that the Defendants/Applicants application is misconceived as to the date when the cause of action arose. The counsel added that whereas it is true that the Defendants/Applicants trespassed the Plaintiffs'/Respondents' property, the latter have averred that they had already filed a suit against the Defendants on the same in **Edward Mutinda Ndeti V Bii Kenneth Ngenyi [2017] eKLR (JR No. 187 of 2014)** where despite temporary orders of injunction being issued against the demolitions of the structures, the Defendants/Applicants herein disregarded the said orders forcing the Plaintiffs/Respondents to file a suit for contempt where the 1st Defendant/Respondent was found to be in contempt and was fined Kshs. 200,000/=. The counsel submitted that although this suit is closely related to Judicial Review no. 187 of 2017, it is not for trespass but compensation caused by the continued acts of demolitions by the Defendants/Applicants and as such, this suit is not time barred as alleged by the Defendants/Applicants. The counsel termed the Defendants/Applicants on the provisions of Public Authorities Limitation Act that the suit is time barred as one that does not apply to the case herein.

Whether the court has jurisdiction to hear and determine the Plaintiff's suit.

26) It was submitted that the Plaintiffs moved the court in the Judicial Review No. 187 of 2014 to stop the

building of the structures and an injunction was issued against the Defendants. That upon defiance of the said orders, the matter was overtaken by events as the bus park and the structures thereon had already been put up forcing the Plaintiffs to file a suit for compensation which is a matter touching on land, a jurisdiction which this court has to hear and determine as provided for under Article 162(2) (b) of the Constitution and Section 13(7) of the Environment and Land Court Act No. 19 of 2011. The latter Section provides as follows:-

“ In exercise of its jurisdiction under this Act, the court shall have power to make any order or grant, any relief as the Court deems fit and just including:-

§ Interim or permanent preservation orders including injunction

§ Prerogative orders

§ Award of damages

§ Compensation

§ Specific performance

§ Restitution Declarations or

§ Costs

27) The Plaintiffs’/Respondents’ counsel cited the case of **Mark Maina Kamau V the Attorney General [2017]eKLR.**

Whether the 1st Defendat/Applicant is capable of being sued

28) The counsel for the Plaintiffs/Respondents submitted the allegation by the Defendants/Applicants that the 1st Defendant/Applicant lacks capacity to be sued in light of Section 4(3) of the Government Proceedings Act has no basis as the 1st Defendant/Applicant was already found in contempt of the previous HC Judicial Review No. 187 of 2014 which shows that he had the capacity to be sued. The Plaintiffs’/Respondents’ counsel cited Section 57 of the County Government Act which provides for Establishment of County Public Service Boards. The aforementioned Section provides:-

There is established a County Public Service in each county which shall be;

a) A body corporate with perpetual succession and a seal; and

b) Capable of suing and being sued in its corporate name.

29) The counsel further cited the case of **George Albert Ambuya V Kajiado County Government & Another[2013] eKLR** where J.L. Onguto, J was of the view that:-

“perhaps, I may also add that in my view the Government Proceedings Act (cap 40) applies to the national government. It does not apply to county or devolved governments. The latter are rather independent of the national government and under section 6(1) of the County Governments Act, No. 17 of 2012 are corporate bodies with perpetual succession. It is certainly unlikely that the intention of Kenyans in promulgating the Constitution in 2010 was that the county governments were to wield the same powers and enjoy the same privileges as the National Government. Consequently, unless and until the Government Proceedings Act is amended to extend its application expressly to county government, the Act cannot be deemed by implication to apply to the devolved or county governments. The two levels of government though constitutionally expected to liase and cooperate with each other are not equal partners and do not enjoy the same

powers and privileges, unless expressly stated under the Constitution or any written law”

30) The counsel added that in light of the aforementioned case, reliance on section 4(3) of the Government Proceedings Act is, therefore, bad in law as the section applies to proceedings against the National Government.

Grounds of opposition by the Plaintiffs/Respondents

i. Application is vexatious waste of court’s time and an abuse of the court’s process.

31) The counsel for the Plaintiffs/Respondents submitted that the fact that the Defendants/Applicants have purposely omitted to include in their application that a suit was filed against them in HC Judicial Review Case No. 187 of 2014 shows their application is not brought in good faith and is a tactic to delay the Plaintiffs’ suit and defeat the ends of justice. The counsel cited the case of **Transcend Media Group Limited V Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR** where the court stated thus;

That power of striking out pleadings or suit should only be exercised after the court has considered all facts and not the merits of the case.

The substantive law governing striking out of pleadings is founded in the provisions of Order 2 Rule 15 of the Civil Procedure Rules. Sub-rule 15(1) of the aforementioned Order , enacts that:

“(1) at any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that-

- a) It discloses no reasonable cause of action or defence in law; or***
- b) It is scandalous, frivolous or vexatious; or***
- c) It may prejudice, embarrass or delay the fair trial of the action; or***
- d) It is otherwise an abuse of the process of the court;***

And may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”

The above provision gives the court power to strike out pleadings.

In Dev Surinder Kumar Bij v Agility Logistics Limited Civil Suit no. 311 of 2013 [2014] eKLR it was held, inter alia, that:

“For a pleading to be dismissed pursuant to the provisions of Order 2 Rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant.”

The Plaintiff’s contention is that the defence is scandalous, frivolous and vexatious and may prejudice or delay the fair trial of the case. The Plaintiff also claims that the defence is an abuse of the court process and raises no reasonable cause of action or defence against the Plaintiff’s claim. In my view the following sufficiently expound the principles underlying the striking out of pleadings under Order Rule 15(1) of the Civil Procedure Rules.

A pleading is scandalous if it states;

- i. matters which are indecent; or***

ii. matters that are offensive ; or

iii. matter made for the mere purpose of abusing or prejudicing the opposite party; or

iv. matters that are immaterial or unnecessary which contain imputation on the opposite party;

v. matters that charge the opposite party with bad faith or misconduct against him or anyone else; or

vi. matters that contain degrading charges; or

vii. matters that are necessary but otherwise accompanied by unnecessary details.

See Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.

However, the word “scandalous” for the purpose of striking out a pleading under Order 2 Rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See JP Machira vs Wangechi Mwangi vs Nation Newspapers Civil Appeal no. 179 of 1997. But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

A matter is frivolous if;

i. it has no substance; or

ii. it is fanciful; or

iii. where a party is trifling with the court; or

iv. when to put up a defence would be wasting court’s time; or

v. when it is not capable of reasoned argument.

See Dawkins vs Prince Edward of save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1QBD 186.

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen & leake and Jacobs precedents of Pleading (12th Edn.) at 145.

A matter is said to be vexatious when;

i. it has no foundation; or

ii. it has no chance of succeeding; or

iii. the defence (pleading) is brought merely for purposes of annoyance; or

iv. it is brought so that the party’s pleading should have some fanciful advantage; or

v. where it can really lead to no possible good.

See Willis vs. Earl Beauchamp (1886) 11 PD 59.

A pleading tends to prejudice, embarrass or delay fair trial when;

i. it is evasive; or

ii. obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if

iii. it is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble delay and expense; or

iv. it is a pleading the party is not entitled to make use of; or

v. where the Defendant does not say how much of the claim he admits and how much he denies.

See Strokes vs. Grant (1878) Ac 345; Hardbord vs. Monk(1876) Ex. D.367; Preston vs. Lamont (1876)

A pleading which tends to embarrass or delay fair trial is described is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegation which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See Trust Bank Limited vs. Hemanshu Sirayakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.

A pleading is an abuse of the process where it is frivolous or vexatious or both”

ii. The Defendant application is misconceived both in law and facts

32) The counsel for the Plaintiffs/Respondents submitted that the grounds that the Defendants/Applicants have used to strike out the suit lacks merits and urged the court to dismiss the application.

33) I have read the application together with the supporting and replying affidavit as well as the submissions that were filed by the counsel on record. In my ruling, I will address the issues for determination raised by the parties herein together.

34) Firstly, the averments in paragraphs 4,10 and 14 of the plaint clearly show that the suit before this court is one of the tort of trespass. Even though the Plaintiffs have not specifically pleaded when the cause of action arose, perusal of their bundle of documents show that the same arose on 23rd May, 2014. The suit ought to have been filed within twelve months from 23rd May, 2014. The Plaintiffs/Respondents argument that this suit is one of compensation and their reliance on the case of Edward Mutinda Ndeti Vs Bil Kenneth Ngenyi [2017] eKLR (JR No. 187 of 2014) is tenous since they have not disclosed about the judicial review proceedings in their pleadings. I agree with the Defendants’ /Applicants’ counsel that the suit as pleaded is caught by the Provisions of Section 3(1) of the Public Authorities Act [Rev 2012] Chapter 39 of the Laws of Kenya. The attempts by the Plaintiffs /Respondents to show that their case is one of compensation and not the tort of trespass is, in my view, an act of splitting hairs.

35) Secondly, whereas I agree with the Plaintiffs’ counsel that the 1st Defendant/Applicant is capable of being sued, in light of the reasons I have given herein, this suit cannot stand as it is caught up by Section 3(1) of the Public Authorities Act aforementioned.

36) The upshot of the foregoing is that the application by the Defendants/Applicants has merits. It is not vexatious, waste of court’s time and an abuse of the court’s process nor is it misconceived both in law and facts as the Plaintiffs would want this court to believe.

37) In the circumstances, I hereby allow the application in terms of prayers (1) and (2). It is so ordered.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 5TH FEBRUARY, 2019.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF;

Mr. Hassan holding brief for Mr. Mwangambo for the Plaintiffs/Respondents

Mulekyo & Co. Advocates for the Defendants/Applicants absent

Ms Nzioka Court Assistant

MBOGO C.G, JUDGE

5/2/2019