



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 197 OF 2017

FORMERLY MERU ELC. 314 OF 2013

JULIUS NJAGI NKUMBARU & 2 OTHERS.....PLAINTIFFS

VERSUS

JOHNSON MUTHOMI KITHURE & 3 OTHERS.....DEFENDANTS

RULING

1. The 2nd, 3rd and 4th defendants filed a Notice of Preliminary Objection dated **10th November, 2017** which states as follows:

TAKE NOTICE that 2nd and 3rd defendants shall before the hearing of this suit raise and argue a preliminary objection on points of law that:

a) This suit offends the express provision of section 3(1) Cap 39 Laws of Kenya.

2. This Preliminary Objection was canvassed by way of written submissions. As I find that the submissions are veritably succinct, I find it necessary to wholly reproduce them herebelow:

2ND, 3RD AND 4TH DEFENDANTS SUBMISSIONS ON THE PRELIMINARY OBJECTION DATED 10TH NOVEMBER, 2017

May it please your Lordship,

We submit on behalf of the 2nd, 3rd and 4th defendants as herein below:

Your Lordship the 2nd, 3rd and 4th defendants filed a notice of Preliminary Objection that the plaintiffs' suit is time barred as against them. They pray for the plaint to be struck out with costs.

Your Lordship paragraph 11 of the plaint states inter alia that... in or about the year 2011, the plaintiff learnt that 1st defendant acted in collusion with 2nd defendant. The paragraph has given the particulars of fraud on part of the 1st defendant and 2nd defendant.

Your Lordship it is our submissions that the cause of action accrued in the year 2011. This suit was filed on 20th December, 2013. This was almost three year after the cause of action accrued. Your

Lordship section 3(1) Cap 39 Laws of Kenya expressly state 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.*** The 2nd, 3rd and 4th defendants are agents of the government, the proceedings against them are thus against the government that is why the Honourable Attorney General has been sued. Your Lordship we submit that a claim on fraud which is a tort ought to have been brought before twelve months lapse from the date the cause of action accrued. In this case cause of action accrued in the year 2011 the suit was filed over 35 months later on **20th December, 2013.**

Your Lordship it is our submission that this is a suit against the government which has been brought beyond the statutory period as submitted and we pray that the plaint dated **16th December, 2013** be struck out with costs.

Your Lordship in support of our case we rely on the Court of Appeal case ***BENNAJIA PROPERTIES LIMITED VS SYEDNA MOHAMMED BURHANNUDIN SAHED & 4 OTHERS [2015] eKLR*** (copy annexed).

This is our humble submission and prayer.

We so pray.

Dated at Meru this 23rd day of November, 2017

J. M. KIONGO,

SENIOR LITIGATOR COUNSEL,

FOR: HON. ATTORNEY GENERAL &

DEPARTMENT OF JUSTICE.

PLAINTIFF'S SUBMISSIONS ON THE PRELIMINARY OBJECTION

Your Lordship, the Preliminary Objection is in the following terms:-

“This suit offends express provisions of section 3(1) Cap 39 Laws of Kenya. The suit is time barred.”

It is therefore necessary to look at the plaintiffs' claim. The plaintiffs' claim is on fraud and recovery of land.

Under the Limitation of Action Act the plaintiff has 12 years within which period to recover land. See section 7 of the Limitation of Actions Act.

There is also fraud pleaded. It is clear from the law on example being section 26 of the Limitation of Actions Act Cap 22 laws of Kenya that time does not run until the fraud is discovered.

In this case fraud is pleaded but since it is denied it is difficult to fix time when the fraud was discovered.

It is therefore our submission that this claim is not time barred as alleged.

Section 3(1) of Cap 39 is not properly relied on as time cannot start running until the fraud is discovered and known. It must be read together with Cap 22 as the Law Provides.

We pray that the Preliminary Objection be rejected and the case be ordered to proceed to hearing.

DATED AT MERU THIS 2ND DAY OF MARCH, 2018

MAITAI RIMITA & CO.

ADVOCATES FOR THE PLAINTIFFS

3. I have carefully considered the pleadings and the submissions proffered by the preliminary objection's proponents and the plaintiff. I have also considered the one authority: ***BENJJA PROPERTIES LIMITED VS SYEDNA MOHAMMED BURHANUDIN SAHED & 4 OTHERS [2015] eKLR***, proffered by the proponents of the Preliminary Objection.

4. I find that the literal meanings of the provisions quoted by the parties in their submissions are correct. However, there are some grey areas which may raise contestations which place the issues raised by the parties as extending beyond the realm of Preliminary Objections which must be based on pure points of law. For example, the parties are contesting the time the alleged fraud was discovered. It is also not clear if or if not, and how, when there is another defendant other than a public authority section 3(1) of the Public Authorities Limitation Act would be applicable. Strict application of section 7 of the Limitation of Actions Act has also been made an issue when juxtapositioned with section 3(1) of the Public Authorities Limitation Act.

5. In the Interest of Justice and to give the parties an opportunity to fully canvass all pertinent issues during the hearing of the suit, I find it necessary to dismiss this Preliminary Objection.

6. Costs shall be in the cause.

7. It is so ordered.

Delivered in open court at Chuka this **15th day of May, 2018** in the presence of:

CA: Ndegwa

Kiongo for 2nd, 3rd and 4th defendants

Johnson Muthomi Kithure – 1st defendant

Other parties absent

P.M. NJOROGE

JUDGE