



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 107 OF 2014**

**1. ANDREW MUIA MUSYOKI NGAU**

**2. FRANCIS NGAU MUSYOKI**

**3. MARGARET MBULWA NGAU.....PLAINTIFFS**

**VERSUS**

**1. JOSEPH KIPROTICH KOSKEI**

**T/A LAND REGISTRAR KWALE & OTHERS.....DEFENDANTS**

**RULING**

1. The Plaintiffs herein have sued the Defendants seeking the reliefs in the Plaint dated 13<sup>th</sup> May 2014 and filed on 16<sup>th</sup> May 2014, against the defendants jointly and severally. Among the reliefs sought by the Plaintiffs are damages and losses suffered by the Plaintiffs as specified in the Plaint; a declaration that the Government of Kenya is vicariously liable for damages and losses that are a direct, foreseeable and proximate result of actions of the defendants as they were acting as servants of the Government and costs of the suit. It is the Plaintiffs' case that the defendants fraudulently induced them to enter into two land purchase transactions with the 8<sup>th</sup> Defendant.

2. In their defence dated 18<sup>th</sup> August, 2016 the 1<sup>st</sup> to 7<sup>th</sup> Defendants denied the Plaintiffs' claim and raised a preliminary objection to have the plaintiffs' suit against the 1<sup>st</sup> to 7<sup>th</sup> defendants struck out on the ground that the suit in its entirety offends the provisions of Section 3 of the Public Authority Limitations Act, Cap 39 Laws of Kenya. This ruling is in respect of the said preliminary objection.

3. The preliminary objection was canvassed by way of written submissions. The 1<sup>st</sup> to 7<sup>th</sup> Defendants filed their submissions on 23<sup>rd</sup> April, 2018 in which they submit that it is clear from the plaint that the alleged cause of actions in this suit arose way back in 2012. They cited paragraphs 30,31, 41, 93 and 167 – 178 of the Plaint. Relying on Section 3 (1) of the Public Authorities Limitation Act Cap 39, they submit that the Plaintiffs' right to file the suit against the Government or Government Officials for tort was one year from the date on which the cause of action accrued. They relied on the case of **Kateregga –v- Attorney General (1973) EA 286**, and the case of **Iga –v- Makerere University (1972)EA 65** and urged the court to dismiss the suit as against them.

4. The Plaintiffs filed their submissions on 23<sup>rd</sup> April 2018 in which they submit inter alia, that they discovered the fraud allegedly executed by the 1<sup>st</sup> to 7<sup>th</sup> Defendants on 21<sup>st</sup> May 2013 and 22<sup>nd</sup> May 2013. It is their submission that at the time of filing the suit twelve months had not lapsed since the time the Plaintiffs discovered the allegations of fraud and misrepresentation against the 1<sup>st</sup> to 7<sup>th</sup> defendants and that additional fraudulent transactions occurred less than 12 months before the suit was filed. They cited **Kenya Pipeline Company Ltd – v- Redate Investments Limited & 3 Others (2013)eKLR** in which the court adopted the opinion in the case of **Municipal Council of Garissa –v- Ahmed Siad Mohamed and Another, HCCC No.7 of 2011 (Garissa)** which stated as follows:

***“ Section 26 (of the Limitation Actions Act) makes it very clear in dealing with claims where fraud or mistake is alleged, then time starts to run from the moment such fraud or mistake is discovered. Fraud alleged in this case and therefore under the provisions of Section 26, time starts to run when the fraud was discovered....”***

5. The Plaintiffs further submitted that the 1<sup>st</sup> to 6<sup>th</sup> Defendants violated Section 103 of the Land Registration Act and therefore the 1<sup>st</sup> to 7<sup>th</sup> Defendants are necessary parties to the suit. Further, that the Public Authorities Limitations Act is not applicable to the 8<sup>th</sup> to 20<sup>th</sup> defendants who are neither government officers nor statutory bodies. It was also the Plaintiffs' submission that they served notice of intention to sue on the Attorney General before the institution of the suit.

6. The 11<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, and 18<sup>th</sup> defendants supported the preliminary objection although they did not file any submissions. The rest of the defendants did not participate in the preliminary objection herein.

7. I have considered the pleadings filed, the preliminary objection raised and the submissions made. The main ground of objection is that the suit was time barred as against the 1<sup>st</sup> to 7<sup>th</sup> defendants for reasons that it offends the provisions of Section 3 of the Public Authority Limitations Act which stipulates that any action against the Government and its officers has to be brought within 12 months. The cause of action in this case is indicated to have arisen in 2012 but the suit was filed in 2014 which was far beyond the twelve months period. Section 3 (1) of the Public Authorities Act Cap 39 stipulates;

***1) 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.***

Section 2 (1) of the Public Authorities Limitation Act specifies “proceedings” as civil proceedings in the High Court or the subordinate Court. Subsection (2) provides that for the purposes of the Act, proceedings against the Government includes proceedings against the Attorney General or any public officer as such.

8. Section 42 of the Limitation of Actions Act Cap 22 provides that the Limitation of Actions Act does not apply to proceedings to which the Public Authorities Limitation Act applies. In the case of **Richard Oduol Opole –v- Commissioner of Lands & 2 Others (2015) eKLR** it was stated that the answer to whether the provisions of the Limitation of Actions Act may be read together with the provisions of the public Authorities Limitation Act would probably be found in Section 6 of the Public Authorities Limitations Act which states thus:

***“Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Section 22 of the Act shall not apply in respect of the provisions of this Act, and in section 27 of the Limitation of Actions Act the reference to Section 4 (2) of that Act shall be read and construed as reference to Section 3 (1) of this Act; but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.”***

The Court of Appeal went on to state that from the above provisions, it is evident that the Public Authorities Limitations Act in and of itself incorporates Part III of the Limitation of Actions Act, more particularly, Section 26 of the latter Act which stipulated thus: where in the case of action of which a period of Limitation is prescribed, either –

- a) The action is based upon the fraud of the defendant or his agent, or nay person through whom he claims or his agent; or**
- b) The right of action is concealed by fraud of any such person as aforesaid; or**
- c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it;**

9. In this case, the Plaintiffs argue that they discovered the fraud allegedly executed by the 1<sup>st</sup> -7<sup>th</sup> defendants on 21<sup>st</sup> and 22<sup>nd</sup> May 2013 while the suit was filed on 16<sup>th</sup> May, 2014 which was before the expiry of twelve months. The Plaintiffs have attempted to persuade this court that limitation under the Public Limitations Act does not apply in this case as the twelve months had not expired from the time they discovered the alleged fraud by the 1<sup>st</sup> to 7<sup>th</sup> Defendants. However, in my view such are matters of fact to be proved at the trial of the suit. The court cannot properly make a finding on whether the suit is caught by Limitation of time unless it investigates on evidence when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. This cannot be regarded as a pure point of law as it requires investigation of some facts. At this stage, I am only beholden to look at the pleadings rather than consider any statement of fact detailed in submissions. Instead, these are matters that are fit and proper for arguments in the substantive suit. In this regard, I would be persuaded by the sentiments of Mutuku, J, in the case of Municipal Council of Garissa (supra) where he stated thus:

***“The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage.”***

10. For the foregoing reasons, I am inclined to dismiss the preliminary objection and decline to dismiss the suit as requested by the 1<sup>st</sup> to 7<sup>th</sup> defendants. Costs shall be in the cause.

**DATED, DELIVERED and SIGNED at MOMBASA this 11<sup>TH</sup> day of October, 2018**

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**C. YANO**

**JUDGE**