



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 94 OF 2017**

**DUKE MECHA FRANKLIN SAISI .....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff herein claims that on or about 13<sup>th</sup> November 2014, the 2<sup>nd</sup> defendant constructed a road running down the middle of his land L.R. No. West Mugirango/Siamani/3112 rendering it economically unusable. He filed this suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 18<sup>th</sup> April, 2017 seeking special damages for the value of the property which he put at Kshs. 3,450,000/=, general damages for the loss incurred, interest and costs of the suit.

2. The 2<sup>nd</sup> defendant promptly entered appearance and filed its Defence together with a Notice of Preliminary Objection on 16<sup>th</sup> May 2017. The 2<sup>nd</sup> defendant put the plaintiff to strict proof of the averments in his plaint regarding his ownership of the suit property, the 2<sup>nd</sup> defendant's construction of a road through it and his consequent loss. The 2<sup>nd</sup> defendant also raised a preliminary objection to the suit on the basis that it is statute barred by virtue of Section 67 of the Kenya Roads Act No. 2 of 2007 which stipulates that legal proceedings are to be commenced within 12 months of the act complained of.

3. The plaintiff did not take any steps to prosecute the matter within 12 months from the date of filing the suit and this prompted the 2<sup>nd</sup> defendant to move the court to dismiss the suit for want of prosecution. The application dated 25<sup>th</sup> May, 2018 is premised on the grounds appearing on the face of it to wit:

- a. The Complaint dated 16<sup>th</sup> February, 2017 was filed on 18<sup>th</sup> day of April 2017;**
- b. The 2<sup>nd</sup> Defendant's defence was filed on 16<sup>th</sup> May 2017 and served on the Plaintiff on 23<sup>rd</sup> May, 2017;**
- c. The Plaintiff has not taken any step to prosecute this matter for a period exceeding 12 months;**
- d. It is clear that the Plaintiff has lost interest in the suit which now clogs the court system for no particular reason; and**
- e. It is in the interest of justice that the suit be dismissed for want of prosecution.**

4. In response, the plaintiff's advocate swore an affidavit in which he deposes that they received a letter from the 2<sup>nd</sup> defendant in October 2017 proposing a withdrawal of the suit but by that time they had lost contact with the plaintiff. The plaintiff's advocate further states that the plaintiff had been rendered homeless by the 2<sup>nd</sup> defendant's actions and relocated to Kitale and he was only able to get in touch with him sometime in April 2018 when he informed him of the proposal to withdraw the suit. He avers that he is yet to receive final instructions from his client and it will cause him grave injustice if this suit is dismissed and moreover the 1<sup>st</sup> defendant has never filed any pleadings.

5. The 2<sup>nd</sup> defendant filed written submissions in support of its Notice of Preliminary Objection and Notice of Motion to dismiss the suit for want of prosecution. On the former, the 2<sup>nd</sup> defendant submits that this suit is statute barred as the plaintiff should have commenced his suit within 12 months of 13<sup>th</sup> November 2014, when his cause of action arose. As it is, the suit is 2 years and 5 months late. The 2<sup>nd</sup> defendant further contends that this court lacks jurisdiction to hear the suit on merit as limitation of actions goes to the jurisdiction of a court. Unless the party filing such a suit is granted leave to enlarge time, the court ought to down its tools and proceed no further.

6. On its application to dismiss the plaintiff's suit for want of prosecution, the 2<sup>nd</sup> Defendant submitted that a year had lapsed since the Plaintiff took any steps to prosecute the matter. Prior to its filing the application for dismissal, the last pleadings that had been filed were its own Defence and Notice of Preliminary Objection. The Defendant submits that there has been an inordinate and inexcusable delay on the part of the Plaintiff in prosecuting its case which is an abuse of court process, as this hampers the court's ability to meet the overriding objectives set out in section 3 (1) of the Environment and Land Court Act. The defendant submits that it will suffer prejudice by defending claim that is statute barred and that justice requires a dismissal of the instant suit.

7. The Plaintiff on his part sought refuge in Article 159 (2) (d) which stipulates that **"Justice shall be administered without undue regard to procedural technicalities."** It is his contention that the 2<sup>nd</sup> defendant infringed on his right to property as guaranteed in Article 40 of the Constitution. He relies on the principles of natural justice that no one should be condemned unheard and therefore asks this court to allow the matter to proceed to full hearing.

8. The Plaintiff in his submissions in opposition to the application to dismiss the suit for want of prosecution, reiterated the contents of the replying affidavit and further stated that the 2<sup>nd</sup> defendant has neither shown how the delay is being used to afford the Plaintiff collateral advantage over the 2<sup>nd</sup> Defendant nor has it shown how it will be prejudiced by the delay. He submitted that ultimately what should matter to the court is whether it would serve the cause of justice to dismiss the suit and that in this case it would not.

9. The emerging issues for determination in regard to the 2<sup>nd</sup> defendant's application are whether this suit is statute barred and/or whether the suit should be dismissed for want of prosecution. I will first address myself to the preliminary objection. The often cited authority on objections in *limine* is the case of **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors (1969) E.A. 696** where Law JA at page 700 stated;

**"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."**

At page 701 Sir Charles Newbold P added;

**"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

10. The preliminary objection raised here relates to **Section 67 (b) of the Kenya Roads Act No. 2 of 2007** which provides;

**67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect;**

(a) ...

**(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.**

11. The 2<sup>nd</sup> defendant contends that the Kenya Posts and Telecommunications Act which is now repealed was in *pari materia* with the provisions of Section 67 of the Kenya Roads Act. The 2<sup>nd</sup> defendant cited the Court of Appeal decision in **Langat -vs- Kenya Posts and Telecommunications Corporation [2000]eKLR** in relation to that Act where the court held;

**"It is plainly obvious from this section that appointment, discipline and dismissal of staff is an act done by the Kenya Posts and Telecommunications Corporation in pursuance of execution of the Act within the meaning of Section 109 thereof. It must follow from this that if the Appellant wished to contest his dismissal by Kenya Posts and Telecommunications Corporation he had to institute proceedings within the time frame fixed under Section 109 of the Act. He did not ... nor did he institute the action within twelve months from the date of his dismissal. The result of this default is that the suit brought by the Appellant was incompetent and did not lie."**

12. The 2<sup>nd</sup> defendant also opined that where a statute provides a limitation of actions clause, the provisions of the general statute of limitations ceases to apply. This position was upheld in the case of **Ephantus Mucheru Mwangi -vs- Kenya Railways Corporation & Another [2005] eKLR** where the court held;

**"I would state further that the Act having its own limitation clause supersedes the Limitation of Actions Act Cap 22 and the three years to file a suit in tort would not apply."**

13. The 2<sup>nd</sup> defendant is one of the state corporations established by the Kenya Roads Act. The Act governs the 2<sup>nd</sup> defendant's engagements with third parties such as the plaintiff. A look at the Limitation of Actions clause in the Act leaves no room for doubt as the same is couched in peremptory terms. A party who institutes legal proceedings against the 2<sup>nd</sup> defendant ought to commence proceedings within the time lines given.

14. The plaintiff does not deny that the suit was filed outside this limit. He implores that courts should strive to sustain suits rather than dismiss them. He has relied on the case of **P.N.M. -vs- Kenyatta National Hospital & 6 others [2015] eKLR** where Aburili J dismissed a preliminary objection to strike out a suit for being time barred. He also relies on Article 159 (2) (d) and submits that procedural fairness will only be served if the suit proceeds to trial.

15. An analysis of **P.N.M. v Kenyatta National Hospital & 6 others (supra)** shows that the suit did not proceed to hearing unfettered. The plaintiff had sought and was granted leave to file an application for extension of time. The plaintiff in this case has not sought to be granted such leave.

16. The Supreme Court in **Zacharia Okoth Obado -vs- Edward Akong'o Oyugi & 2 others [2014] eKLR Civil Application No. 7 of 2014** was persuaded by the dictum of Kiage, JA in **Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 6 others [2013] eKLR** where he stated;

**“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.**

**I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”**

17. Simply put, it is imperative that litigants are vigilant in upholding procedure as they exist to ensure expeditious and predictable resolution of disputes. The rules and procedure also serve to afford litigants a level playing field in their engagements.

18. In considering the import of Article 40 vis-à-vis the doctrine of adverse possession Ouko JA in the case of **Mtana Lewa -vs- Kahindi Ngala Mwangandi [2015] eKLR Civil Appeal No. 546 of 2014** stated;

**“Applying the Constitutional principles of interpretation that insists on consideration of the whole Constitution (the principle of harmonization), as opposed to a narrow interpretation, one that promotes the purposes, values and principles of the Constitution, advances the rule of law, human rights and fundamental freedoms, I am of the firm view that, if it was the intention of the people of Kenya to say enough is enough with this law, nothing would have been easier than to say so loud and clear, leaving no room for conjecture. That perhaps explains why right to property is not listed among the rights that may not be limited. A right or fundamental freedom may be limited by legislation if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account, inter alia, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation.”**

19. The plaintiff's right to property as protected in Article 40 of the Constitution may be limited for the public good. The 2<sup>nd</sup> defendant is charged with the duty of managing, developing, rehabilitating and maintaining national roads for the benefit of the entire country. The Kenya Roads Act gives the Authority the mandate to acquire privately owned property for this purpose. A party aggrieved by such acquisition may pursue legal action subject to the provisions in the Act. The Plaintiff failed to adhere to Section 67 (2) of the Act and his suit is therefore bad in law. The provision is clear that any action against the authority has to be commenced within a 12 month window from the time the cause of action arises. The plaintiff failed to adhere to this provision and this renders the instant suit unsustainable against the 2<sup>nd</sup> defendant.

20. Having held that the suit is statute barred, the second issue whether the suit should be dismissed for want of prosecution is rendered of no consequence. The 2<sup>nd</sup> defendant is a body corporate with the ability to sue and be sued. The 1<sup>st</sup> defendant was a nominal defendant brought into the suit as a principal legal advisor of the Government and needed not participate in the proceedings particularly when the 2<sup>nd</sup> defendant whose activities provoked the suit was represented by counsel.

21. For the above reasons, the 2<sup>nd</sup> defendant's preliminary objection succeeds. Accordingly, the plaintiff's suit is hereby struck out. Each party to bear their own costs.

22. It is so ordered.

**RULING DATED, SIGNED and DELIVERED at KISII this 14<sup>TH</sup> DAY of DECEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Soire for Keegwe for the plaintiff

N/A for the 1<sup>st</sup> defendant

Mr. Oirere for Omolo for the 2<sup>nd</sup> defendant

Ruth Court assistant

**J. M. MUTUNGI**

**JUDGE**