



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 79 OF 2014**

**JOHN KIBOR SERONEY .....1<sup>ST</sup> PLAINTIFF**

**JOSEPH KIBOR.....2<sup>ND</sup> PLAINTIFF**

**CATHERINE CHELAGAT KIBOR .....3<sup>RD</sup> PLAINTIFF**

**SAMWEL KIBET TOO.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**STANLEY KIPTORUS CHEMOSY.....1<sup>ST</sup> DEFENDANT**

**JACKSON KIPNGETICH KOMEN.....2<sup>ND</sup> DEFENDANT**

**JOSEPH SAWENJA WANINGILO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling on a preliminary objection dated 24/3/2017. In summary the 3<sup>rd</sup> defendant's preliminary objection is that the suit is a claim for recovery of land yet it was filed outside the statutory limitation period of 12 years prescribed by Section of the Limitation of Actions Act Cap 22 hence the suit is statute barred and incompetent.

2. The background is that by a plaint dated 30/4/2014, the plaintiffs filed a claim as administrators of the estate of **Mama MarachiChepkemoiMarachi** (deceased). They aver that they have brought this suit pursuant to leave granted by this court in ***Kitale Environment and Land Court Miscellaneous Application No. 19 of 2014*** to enlarge time to bring the cause herein. The plaintiffs claim to be the beneficial owners of land parcels **Kapkoi Settlement Scheme Plot No. 63** measuring **5.0 acres** being an agricultural land allocated to the deceased on **14/3/1974**.

3. The plaintiffs claim that the 1<sup>st</sup> defendant on 3/10/1983 unlawfully and illegally obtained a falsified letter of allotment to indicate that the 1<sup>st</sup> defendant is the owner of the suitland who later, in 1981 unlawfully and illegally transferred the suitland to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant later on purported to sell the suitland to the 3<sup>rd</sup> defendant. The plaintiffs therefore accuse the defendant of fraud. They seek a declaration that the suitland belongs to the Estate of the deceased as well as a permanent injunction to restrain the defendants from trespassing onto the land or in any way interfering with the plaintiffs' use possession and/or ownership, or selling or alienating it. They also seek an order vesting the land and creating a trust over the said land in favour of the plaintiffs, pending full probate and administration.

4. The plaint was filed together with an application for interim orders supported by an affidavit of John KiborSeronei. Annexed to the said supporting affidavit is Exhibit “JKS6 (B)”, a copy of the order of this court granting leave to the applicants to file suit against the defendants out of time. A search for a copy of the application for leave to file suit out of time has not been filed by any of the parties.

5. In his submissions, the 3<sup>rd</sup> defendant appears mistaken when he states as follows:-

**“The plaintiffs in their plaint did not disclose that the suit was filed outside the limitation period and that they had obtained an *ex parte* leave [in Kitale E&C (sic) Misc. Civil Application No. 19 of 2014] to file this suit out of time. This was a material non disclosure. The said motion was an *ex parte* application that the 3<sup>rd</sup> defendant couldn’t have had a chance to object to in those proceedings”.** It has been pleaded so.

6. Several issues arise for determination as follows:-

**(1) Is this a claim for recovery of land which, having been filed outside the 12 years period prescribed by Section 7 of the Limitations of Actions Act and is it therefore statute barred and incompetent or is it a claim under tort?**

**(2) Are the plaintiffs guilty of any material non -disclosure?**

**(3) Can this court entertain a challenge raised against its own order of leave to file suit out of time by way of preliminary objection and possibly vacate such an order upon such objection?**

7. The court has already analyzed the plaint and found that the claim therein lies in the tort of fraud. Classifying the claim under “recovery of land” may be unfair to the plaintiffs who have in their plaint already set out the particulars of fraud alleged against the defendants. It is these particulars that will be proved at the hearing. They relate to the defendants’ conduct in relation to the suitland. In this court’s view a simplistic application of Section 7 of the Limitation of Action to the facts of this case without consideration of evidence to be called at the hearing would be premature. Besides, this court has already noted hereinbefore that the application by which leave was sought to file the suit out of time has not been exhibited in these proceedings. Neither has the supporting affidavit thereof. This is a major hindrance to the court, which may not tell at present what was urged in those documents which may aid in the determination of this preliminary objection. Be that as it may, the court’s finding upon scrutiny of the plaint is that the suit cannot be struck out at the present stage by applying the provisions of Section 7 of the Limitation of Actions Act.

8. (2) Are the plaintiffs’ guilty of any non disclosure”

Again the analysis of the plaint set out hereinbefore partially answers this question. For clarity, however, paragraph 3 of the plaint states as follows:-

**“3 The plaintiffs have brought this (sic) suit against the defendants pursuant to Grant of Letters of Administration Ad Litem in Kitale High Court Ad Litem No. 71 of 2014 and further pursuant to leave granted by this Honourable Court in Kitale Environment and Land Court Miscellaneous Application No. 19 of 2014 to enlarge time to bring the cause herein”.**

What other content could have been included in the plaint to satisfy the defendants’ requirement to know that an order had been made allowing the suit out of time? In consideration of this court, the facts pleaded in paragraph 3 of the plaint were sufficient to do so and nothing more will be said on that point:

9. (3) Can this court entertain a challenge by way of a preliminary objection against its own order granting leave to file suit out of time?

Even if the 3<sup>rd</sup> defendant had had the first issue herein above determined in their favour the question arises as to whether the court may strike out the suit at this stage where only a preliminary objection has

been raised. In the case of *Mary Wambui Kabugu –vs- The Kenya Bus Services Limited 1997 eKLR* the court while addressing the issue of whether leave obtained *ex parte* under the Limitation of Actions Act could be challenged by way of a preliminary objection states as follows:-

**“The jurisdiction of the court to grant leave to file suit out of time is donated by Section 28 of the Limitation of Actions act. Section 27 sets out conditions which must be satisfied before such leave may be granted. If an applicant satisfies those conditions the court handling his application has no discretion in the matter”.**

10. It must be remembered that Ringera J. as he then was had at the hearing of the case appealed from, ruled that the judge granting leave had improperly exercised his discretion in the matter and that the leave he granted was inconsequential. The Court of Appeal was of the view that the grant of an order under Section 28 is not an exercise of judicial discretion but an exercise of jurisdiction where the requirements of Section 27 of the Limitation of Actions Act are fulfilled.

11. The court proceeded to state as follows:- (per Bosire J.A)

**“The English Courts have however held that the leave which a judge in chambers is provisional and may either be confirmed or rescinded when the suit authorized by the leave comes for trial and after the defendant has been heard. The English Court of Appeal said so in *Shingleys case (Supra)* among other cases. The rationale for that is conclusion is the age long principle in the English civil practice that *ex parte* orders are provisional. That until the other side is heard on the matter the leave by which the relevant provision of the Limitation Act 1963 is provisional”.**

**“The Kenyan Limitation of Actions Act is substantially the same or in *parimateria* with the relevant provisions of the English Limitation Actions Act 1963. Because of that, Courts in Kenya have tended to adopt the English reasoning on the handling of orders given in application for leave to file suits out of time pursuant to an application under Section 28 of the Limitation Act. For instance, in the case of *Mweu –vs- Kabai& Another [1972] EA 242 Trevelyon J.* held, obiter that the issue of whether or not leave under that Section was properly given may be:-**

***“Reactivated in the proceedings authorized and that the Sections to which I have drawn attention are based on, and follow those (though they are otherwise numbered) in the English Limitation Act 1963”.***

**“That was a High Court decision. This court in decisions in the cases of *YunesOruta& Another –vs- Samuel More Nyamato Civil Apeal No. 96 of 1984* and *Bernard Mutonga Mbithi - vs- Municipal Council of Mombasa & Another, Civil Appeal No. 3 of 1992* given on 22<sup>nd</sup> June, 1988 and 22<sup>nd</sup> January, 1993 respectively followed the same reasoning applying the English Court of Appeal decision in *Cozens –vs- North Devon Hospital Management Committee [1963] 2 ALLER 799. Kwach J.A.* who gave the leading judgement of the court in the second case to which the other members agreed with stated, I think obiter, as follows:-**

***“It would appear that notwithstanding the provisions of Section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an *ex parte* order has been made can apply to the court which made the order to set it aside”.***

12. In the light of the above position so well outlined by the Court of Appeal the 3<sup>rd</sup> defendant’s preliminary objection dated 5<sup>th</sup> April, 2017 has no merit and I hereby dismiss it with costs to the plaintiff.

Signed, dated and delivered at Kitale on this 30<sup>th</sup> day of May, 2017.

**MWANGI NJOROGI**

**JUDGE**

**30/05/2017**

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

N/A for the parties

Ruling read in open court.

**MWANGI NJOROGI**

**JUDGE**

**30/05/2017**