



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 98 OF 2014**

**REBECCA OKUTOYI AMBAIS ..... APPLICANT/PLAINTIFF**

**VERSUS**

**WILSON OGOLLA OLENDO.....1<sup>ST</sup> RESPONDENT/DEFENDANT**

**NATIONAL BANK OF KENYA.....1<sup>st</sup> INTERESTED PARTY**

**R U L I N G**

1. This is a ruling on a preliminary objection that was set forth as follows in a Notice dated 13/7/2016.
  - (i) The suit is fatally defective for failing to enjoin the Attorney General in accordance with Section 14(a) of Government Proceedings Act, when suing a government official.
  - (ii) Statutory Notice was not issued to the Attorney General before suing Land Registrar, a government official.
  - (iii) The suit is time barred having been filed out of time without leave reasons whereof the Defendant prays the suit be and is hereby struck out with costs.
2. For a better understanding, it is necessary to give some background and history: The Plaintiff – **REBECCA OKUTOYI AMBAISI** – filed the suit herein on 30/4/2014. She pleaded that in 1998 she bought a piece of land which she developed by constructing a semi-permanent residential house of two bedrooms, borehole, toilet and a gate. That land was wrongly registered as parcel NO. L.R. SOUTH TESO/ANGOROMO/1057. According to the Plaintiff, its correct registration should have been LR. SOUTH TESO/ANGOROMO/1047. However, parcel No. 1047 was registered in the name of the Defendant – **WILSON OGOLLA OLENDO**. The Plaintiff complains that the Defendant used the number given to him to obtain a loan from the Interested Party – NATIONAL BANK OF KENYA.
3. According to the Plaintiff, if the Defendant were to default in loan repayment, it is her own parcel of land that would be sold, not that of the Defendant. The suit filed is meant to correct the anomaly so that registration of the parcels of the land can reflect the true situation on the ground.
4. By a defence filed on 8/5/2014, the Defendant denied the Plaintiff's claim and by a defence filed on 28/5/2014, the Interested Party also denied the Plaintiff's claim. The Plaintiff then filed an amended plaint on 10/2/2015 enjoining the Land Registrar – Busia, as the 2<sup>nd</sup> Interested Party. On 15/2/2017, the Plaintiff withdrew the suit against the 2<sup>nd</sup> Interested Party. By then, it had already been agreed that the

preliminary objection herein be canvassed by way of written submissions.

5. The withdrawal of the suit against the 2<sup>nd</sup> Interested Party on 15/2/2017 obviated the need to consider the first and second limbs of the objection. And this is so because these two limbs of the objection were actually a contestation as to the manner in which the 2<sup>nd</sup> Interested Party had been enjoined to the suit. That then leaves us with only the third limb, which is about the suit being time-barred and therefore filed of time.

6. In light of the withdrawal of the suit against the 2<sup>nd</sup> Interested Party, Tarus from the AG's office and who was representing the 2<sup>nd</sup> Interested Party conceded that his submissions filed on 9/3/2017 could be expunged. The Court proceeded to do precisely that on the same day.

7. The Court has written submissions from the parties who remained in the suit. The Defendants submissions were filed on 24/1/2017. The 1<sup>st</sup> Interested Party filed its own on 14/2/2017 while the Plaintiff was the last to file on 24/2/2017.

8. On the issue of limitation, the Defendant submitted, *inter alia*, that the cause of action arose in 1997. The suit was filed on 28/7/2014. According to the Defendant, the cause of action expired 20 years ago and that being the case, the suit was filed without recourse to any known law or practice. The Court was asked to dismiss it.

9. The 1<sup>st</sup> Interested Party submitted that the Defendant was issued with title in 1992. He has been in occupation of the property since and has charged it to it for a loan. It is a matter of contract and the limitation period is six years. It is three (3) years if the Court treats the matter as one of tort. Either way, it is the 1<sup>st</sup> Interested Party's position that by the time the suit was filed, its time had expired. The Court was asked to strike it out.

10. The Plaintiff on the other hand submitted that it is not clear what the issues of limitation is based on. It is the Plaintiff's position that as long as the Plaintiffs land continues to be charged to the 1<sup>st</sup> Interested Party, the issue of limitation cannot arise. The Plaintiff also submitted that for the issue of limitation to be properly raised, the pleadings need to be clear and uncontestable. It was further said that the indication as to when time started running needed to be shown and, finally, the Plaintiff himself was said not to have indicated the date when he made the discovery. The preliminary objection is therefore said to be speculative.

11. I have considered the preliminary objection and the submissions filed. And YES, I agree that the objection seems to be speculative. The Defendant talks of 1997, the 1<sup>st</sup> Interested Party talks of 1992. Which is which? When did time begin to run, 1992 or 1997?

12. More importantly however is this: At paragraph 6 of the initial plaint filed, which is again repeated at paragraph 6 of the amended plaint, the Plaintiff talks of having discovered the interchange of numbers relating to the two parcels of land. She does not state the date when the discovery was made but the tense of her language in these paragraphs does seem to suggest that it is something that occurred several years back. It appears like something that she discovered and made attempts to engage the Defendant in vain then she decided to file the suit.

13. In *MUIGAI vs HOUSING FINANCE COMPANY (K) LTD & 2 Others* [2003] KLR 618, Ombija J (as he then was) held, *Inter alia*, that the time when the cause of action arise is determined by the knowledge of the facts constituting the cause of action. This is actually the legal position in our jurisprudence.

14. It is clear that neither the Defendant nor the 1<sup>st</sup> Interested Party has come out clearly on the issue of running of time. The Plaintiff herself has not stated when she made her discovery. What all this means is that things can only hopefully become clearer during trial. Besides, a preliminary objection is always

made on a point of law that is based on uncontested facts – see **NJOYA & 6 Others vs ATTORNEY GENERAL & Another [2004] IKLR** and **WILLY vs MUCHOKA & 2 Others [2004] 2 KLR 357**. In this matter itself the issue of limitation is not based on uncontested fact. The Plaintiff is disputing it and evidence is therefore required.

15. The upshot is that the preliminary objection herein is not one that can be sustained. It has no merits and its dismissal is the only way forward. I hereby dismiss it with costs.

**Dated, signed and delivered at Busia this 19<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant/Plaintiff: .....

Respondent/Defendant: .....

1<sup>st</sup> Interested Party:.....