



**THE REPUBLIC**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC .CASE NO. 11 OF 2017**

**MICHAEL MWANZIA KITAVI.....PLAINTIFF**

**VERSUS**

**LUKENYA UNIVERSIT TRUST**

**REGISTERED TRUSTEES.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**THE CABINET SECRETARY MINISTRY OF LAND,**

**HOUSING AND URBAN DEVELOPMENT....3<sup>RD</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. On the **21<sup>st</sup> March, 2017** the **1<sup>st</sup>** defendant filed a notice of preliminary objection dated the same date and it seeks to strike out the entire suit as the same is fatally defective as it offends :-

**a. Article 60(1) (b) of the Constitution of Kenya**

**b. The mandatory provisions of Sections 13A and 16 of the Government Proceedings Act (Cap. 40 Laws of Kenya );**

**c. Sections 38 and 41 of the Limitation of actions Act (Cap. 2 Laws of Kenya ) ;and**

**d. Order 37 Rule 7 of the Civil Procedure Rules, 2010**

2. And on **18<sup>th</sup> September, 2017** the court directed that the application be disposed off by way of written submissions. All the parties herein save for the **4<sup>th</sup>** defendant have filed their submission to address the **4 grounds** in the notice of preliminary objection. On the first ground that the plaintiff's suit offends the mandatory provisions of **Sections 38 and 41** of the Limitation of Actions Act, the **1<sup>st</sup>** defendant's counsel submitted that a claim for adverse possession, as in this case, is anchored under **Section 38(1)** of the Limitation of Actions Act where it states:-

“where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Act, he may apply the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”

3. The counsel went on to submit that what is to be deducted from the **section 38(1)** as read with **section 37** of the Limitation of Actions Act is that for one to claim adverse possession, the land has to be registered in the quoted land statutes in favour of the person against whom the order is sought and pointed out this provision has not been satisfied in this case. The counsel added that no title has been pleaded or exhibited under any of the Acts quoted under **Section 37** of the Limitation of Actions Act, either in favour of **1<sup>st</sup>** or any other of the defendants and he urged the court to make such a finding. The counsel referred to the case of **Samuel Kipngeno Koech Vs Agnes Wambui Gitonga in Kerich ELC No.05 of 2015 (OS)** where **Munyao, J** held that :-

“Section 38 above refers to certain Acts Parliament, cited in Section 37. The said statutes are the Government Land Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300) (all now repealed by the Land Registration Act, 2012 but titles still subsist as issued under those statutes). It follows that for a claim of adverse possession to be entertained in this country, the applicant must specifically identify the exact title of land that is the subject to the claim.

The extract of the title also has another significant importance. It does show the history of the proprietorship of the land in issue. This history is important in computing time, for there are some entities against whom one cannot claim the adverse possession. So long as these entities remain the registered owners of the title being claimed, time cannot start running in favour of the occupant of the land in question. These entities are set out in Section 41 of the Limitation of Actions Act...”

4. Secondly, the counsel submitted that **section 41 (a) (i)** of the Limitation of Actions Act states inter alia that:-

“This Act does not:-

(a) Enable a person to acquire any title to, any easement over -

(i) Government Land or Land otherwise enjoyed by the Government”

5. The counsel submitted that the undisputed facts are clear that the subject parcel of land is within a settlement scheme. He pointed out that settlement schemes have been under the Settlement Fund Trustees then established under **section 167** of the Agriculture Act (**Cap 138 – Now repealed as at 17/1/2014 by the Agriculture and Food Authority Act No. 13 of 2013**). He added that the Settlement Fund Trustees are now provided for under the Land Act No. **6 of 2012** as amended by the Land Law (Amendment) Act No. **28 of 2016** at **Section 134** and **135** in part **IX** thereof and are now called the Land Settlement Fund Board of Trustees. He said that the Board, which has not been sued herein, is a body corporate, just as before with perpetual succession and a common seal capable of suing and being sued in its corporate name. The counsel went on to submit that the aforesaid **sections 134** and **135** of the Land Act as amended squarely place implementation settlement programmers on the National Government. The settlement land, just as before, can be either unalienated Government land or land purchased using public funds and referred the court to **Samuel Kipngeno Koech’s** (Supra) on this issue as well as the case of **Ann Itumbi Kiseli Vs James Muiki Murithi in Malindi ELC no. 163 of 2012(O.S)**

6. The counsel went on to submit that law has expressly excluded government/public land, as in this case, from a claim of adverse possession. The counsel added that the **1<sup>st</sup>** defendant is merely an allottee and the land remains public land until a title deed is issued to an allottee and submitted that the land in question is an unalienated government land hence public land as provided for under **Article 62(1)** of the Constitution of Kenya hence it is not amenable to adverse possession and therefore the plaintiff’s claim once against must fail as a matter of law.

7. The submissions by the counsel for the **2<sup>nd</sup>** and **3<sup>rd</sup>** defendants are similar to those of the **1<sup>st</sup>** defendant save that the counsel in addition cited Black’s law dictionary which defines “public land” as crown land or land that belongs to the government who own the title to the land. The dictionary goes to indicate that such land is often vacant unless the government has a good reason to sell it.”

8. On his part, the counsel for the plaintiff submitted that the plaintiff has used **land parcel number 18, Ngai Ndethya** settlement scheme in a manner that is in compliance with the requirement, of **Article 60(1)** of the Constitution and cited the case of **Kahindi Ngala Mwangandi, Vs Mtana Lewa (2014) eKLR**.

9. Whereas the plaintiff claims to have used the land which is the subject matter of this suit in accordance with the principles of land policy as is provided for under **Article 60(1)** of the constitution of Kenya, he has not addressed his mind as to whether or not the land in question is public land as provided for under **Article 62(1) (a)** of the Constitution. I am in agreement with the counsel for the **1<sup>st</sup>** and the counsel for the **2<sup>nd</sup>** and the **3<sup>rd</sup>** defendants that the undisputed facts are that the suit land is within a settlement scheme which the counsel have correctly submitted that it falls under public land. I also do agree with the counsel for the **1<sup>st</sup>** defendant that the plaintiff ought to have pleaded the title or exhibited one as is required under **section 38(1)** as read with **section 32** of the Limitation of Actions Act. I am in agreement with the holding in **Samuel Kipngeno Koech Vs Agnes Wambui Gitonga in Kericho ELC 5/2015(O.S)** on the requirement of compliance with **section 38** of the Limitation of Actions Act by the plaintiff in order to justify a claim for adverse possession. The case of **Kahindi, Ngala Mwangandi Vs Mtana Lewa (2014) eKLR** does not come to his aid because as I understand it, the same concerned private land which is not the case.

10. On the second ground that the plaintiff’s suit offends the mandatory provisions of order **37 Rule 7** of the Civil Procedure Rules, the counsel for the **1<sup>st</sup>** defendant submitted that it is trite law that an application for adverse possession as is provided for under **section 38** of the Limitation of Actions Act can only be commenced by way of Originating Summons by dint of Order **37 Rule 7** of the civil Procedure Rules. Rule **7** of Order **37** also requires that the summons be supported by an affidavit to which a certified extract of the title to the land in question has been annexed where upon the court is required to direct on whom and in what manner the summons shall be served. The counsel added that the court has been unlawfully approached. The counsel for the **2<sup>nd</sup>** and the **3<sup>rd</sup>** defendants did not submit on this ground.

11. The counsel for the plaintiff submissions were that **Article 159 (2)(d)** of the **Constitution 2010** provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles that justice shall be administered without undue regard to procedural technicalities.

12. In addition, the counsel cited **section 1A** of the Civil Procedure Act that provides for the overriding objective whose aim is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. He also cited **section 3A** of the Civil Procedure Act which provides for the power of the court to make such orders as may be necessary for the ends of justice or

to prevent abuse of the process of the court.

13. The counsel referred the court to the case of *Coast Development Authority Vs Adam Kazungu Mzamba & 49 others [2016] eKLR* where it was held that;

“ while it is accepted that both Article 159 and the overriding objective are not a panacea in all and sundry situations of breaches of orders of the court or rules of procedures, they are nevertheless fundamental provision that a court must pay due regard before taking drastic action of dismissing a suit without affording a party an opportunity to be heard, on account of technical breaches committed by the party”

14. The counsel also referred the court to *Lamanken Aramat Vs Harun Maitamei Lempaka in Supreme Court petition number 5 of 2014* where the Supreme Court held;

“The court’s authority under Article 159 of the constitution remains unfettered especially where procedural technicalities pose an impediment to the administration of justice”

15. The counsel went on to submit that failure to comply with the procedural requirement of order 37 Rule 7 does not prejudice the defendants herein and this court should be guided by the overriding objective and **Article 159** of the constitution and allow that matter to be canvassed on its merits by the parties to the suit.

16. I am in agreement with 1<sup>st</sup> defendant’s counsel that by moving the court through a plaint instead of an originating summons that is supported by an affidavit to which a certified extract of the title to the land in question has been annexed, the plaintiff has committed fundamental, substantial, and fatal departures and non-compliance in law which cannot be cured under **Article 159** of the constitution and **section 1A** of the Civil Procedure Act. Indeed the claim cannot stand as the suit is fatally defective ab initio. Order 37 Rule 7 of the Civil Procedure Rules is clear that an application of adverse possession as provided for under **section 38** of the Limitation of Actions Act can only be commenced by way of an Originating Summons.

17. Regarding the ground that the plaintiff’s suit offends the mandatory provisions of **section 13A** and **16** of the Government Proceedings Act, the counsel for the 1<sup>st</sup> defendant submitted that since it is clear that the government has been sued over a government land settlement scheme, it was mandatory for the plaintiff to issue **30 days** notice of his intention to institute proceedings against the government and failure to do so, then no proceedings shall lie against it. The counsel went on to submit that under **section 16** of the aforesaid Act, injunction orders sought under **prayer (c)** of the plaint cannot issue against the government .

18. The counsel for the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants supported the first defendant and proceeded to refer the court to the case of *Miriam Njeru Njau Vs Attorney General [2016] eKLR* where it was held that;

“The appellants suit did not lie and without evidence that the respondent had been served with the mandatory statutory notice, it was misconceived and fatally defective. Rather than dismiss it as the learned magistrate did I would order that it be struck out with costs to the respondent.”

19. The counsel added that the above position was expounded by the Court of Appeal in *Joseph Nyamamba & 4 other Vs Kenya Railway corporation [2015]eKLR* where in dismissing the appeal held that ;

“ the appellant ought to have complied with the requirement on giving notice to the respondent before suit could be filed. Failure to do so made the suit incompetent and the learned judge was right to strike it out. We observe, in passing as we close, that the learned judge allowed the appellant’s to give proper notice and then approach the court for relief but that advice, if advice it was, was ignored. That election by the appellants not to give notice and file suit a fresh would appear to have put them in a rather, dicey situation in view of the time that has elapsed but, again, choices have consequences”.

20. On the other hand the counsel for the plaintiff submitted that **sections 13A** and **16A** of the Government Proceedings Act fail the constitutionality test and pointed out under **Article 48** of the Constitution, the state is obligated to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The counsel cited the case of *Kenya Bus Services Ltd and Another Vs Minister for Transport & 2 others. (2012) eKLR* where **Majanja J** observed that;

“viewed against the prism of the Constitution it also becomes evident that section 13 A of the GPA provides an impediment to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from the common wealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that section 13 A of the Government Proceedings Act as a mandatory requirement violates the provisions of Articles 48.”

21. The counsel also referred to the case of *Joseph Nyamamba & 4 others Vs Kenya Railways Corporation.*

22. I will associate myself with the position that was held by the High Court in the case of *Miriam Njeru Njau Vs Attorney General [2016] eKLR* and the Court of Appeal in the case of *Joseph Nyamamba & 4 others Vs Kenya Railways Corporation.* As such, I hold that the plaintiff ought to have complied with the requirement of giving notice to the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants before filing this suit

correctly. Secondly, as was pointed by the counsel for the 1<sup>st</sup> defendant, injunction orders sought under **prayer (c)** of the plaint cannot issue against the Government.

23. The upshot of the foregoing is that the notice of preliminary objection has merits and in the circumstance I hereby proceed to strike out the entire suit as it is fatally defective with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants.

**Signed, dated and delivered on this 6<sup>th</sup> day of December, 2017**

**MBOGO C.G**

**JUDGE**

Mr. Nabwere holding brief for Mr. Kituku for the 1<sup>st</sup> defendant.

D.M Mutinda for the plaintiff absent

The Attorney General for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant absent .

Plaintiff present

Mr. Kwemboi - Court Assistant

**MBOGO C.G**

**JUDGE**

6/12/2017