



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**ENVIRONMENT AND LAND COURT**

**ELC CIVIL SUIT NO. 254 OF 2013**

**JOSEPH SOMBO SAID.....PLAINTIFF**

**-VERSUS-**

**MARGARET WANJERI NDUNGU.....DEFENDANT**

**RULING**

1. The plaintiff sued the defendant seeking two prayers one of which is an order directing the land registrar Kwale to correct the anomaly and revert the stolen acreage to the plaintiff. The second prayer was for injunction to be issued against the defendant to restrain him from interfering with the plaintiff's parcel of land Kwale/Mwanguda/1128.
2. The defendant filed her defence to the suit and a counter – claim seeking a permanent injunction to issue against the plaintiff restraining him from interfering with her plot No Kwale/Mwanguda/1140. Thereafter on 23<sup>rd</sup> March 2015 the defendant filed a notice of preliminary objection on the ground that the suit is time barred.
3. The defendant filed written submissions to argue the objection. The plaintiff did not file any. The defendant submits that the cause of action arose on the 11<sup>th</sup> June 1997. It is her argument that the suit ought to have been filed before the lapse of 12 years which was on 11<sup>th</sup> June 2007. She relied on the provisions of section 7 and 9 of the limitation of Actions Act.
4. An reading of the plaintiff's pleadings reveals two claims. First is a prayer for rectification of the register as he is accusing the defendant of engaging in fraud. The second prayer is for a permanent injunction from interfering with his plot. If there was no prayer for injunction then I would have considered whether the suit is time barred. Once the prayer for injunction is introduced then the entire suit cannot be argued to be time barred as there is no time barrier set for making such a claim.
5. In any event, the defendant also made a prayer in the counter – claim. Therefore the suit will have to proceed to a full hearing. The principle of striking out suits is that a suit should only be struck out in the clearest of cases. The instant suit does not meet such criteria as I can only strike out a part of the prayers if found to be time barred and proceed to hear part of the suit on injunction.
6. Consequently I find no merit in the preliminary objection raised and hereby dismiss it with no costs as the plaintiff did not present any arguments to oppose the objection.
7. In light of the new amendments to the Magistrate's Court Act, specifically section 7 (3) which became operational on 2.1.2016 this Court own its motion hereby immediately transfer this matter to Kwale Principal Magistrate's Court for hearing and determination.

**Ruling Dated and Delivered in Mombasa this 12<sup>th</sup> day of February 2016**

**A. OMOLLO**

**JUDGE**