



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**HCCC NO. 62 OF 2008**

**UCHUMI SERVICES LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

- 1. CHENGO KATANA KOI**
- 2. MUGANGA MWAGUYA KATANA**
- 3. CHIEF LAND REGISTRAR**
- 4. COMMISSIONER OF LANDS**
- 5. DIRECTOR OF LAND &**

**ADJUDICATION & SETTLEMENT .....DEFENDANTS/RESPONDENTS**

**R U L I N G**

**Introduction:**

1. On 28<sup>th</sup> February 2014, I dismissed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Further Amended Defence and allowed the said Defendants to file a valid Defence and Counter-claim upon hearing the Plaintiff's Application.
2. The Plaintiffs have now filed another application dated 28<sup>th</sup> April 2014 seeking for the following orders:
  - (a) **THAT the Honourable Court be pleased to grant an order to review, vary and or set aside the order/Ruling made on 5<sup>th</sup> day of April 2013 (sic) against the Defendants.**
  - (b) **THAT the costs of this Application be on the cause.**
3. The Application is premised on the grounds that on 28<sup>th</sup> February, 2014, this court delivered its Ruling on the Plaintiff's Application dated 13<sup>th</sup> June, 2013 where the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Further Amended Defence was struck out and the Defendants were allowed to file a fresh Defence

- and Counter-claim; that the court overlooked the fact that the Defendants learnt of the fact that the suit property was registered in the Plaintiff's name way back in 1983 and that the court overlooked the fact that there was no existing right of claim the same having been extinguished.
4. In the Supporting Affidavit, the Applicant's director has deponed that at paragraph 48 of the Further Amended Defence and Counter-claim, the Defendants averred that they became aware of the fact that the suit property was registered in the names of the Plaintiff in 1983 and even made correspondence in the year 1988.
  5. It has deponed that this statement of fact by the Defendants does not call for any further evidence as proof of limitation considering the express provisions of the law.
  6. The Plaintiff's director has further deponed that it is clear that the grant relied upon by the Defendants stands revoked and that those are sufficient reasons to vary the order of the court.
  7. In response, the 1<sup>st</sup> Defendant deponed that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground of appeal; that when the order of revocation of the grant was granted, he quickly remedied the situation and was granted with a Grant Ad Litem for the purpose of defending the suit and that the Plaintiffs have not established sufficient cause to vary or set aside the orders granted on 5<sup>th</sup> April 2014 (*sic*).
  8. The parties' advocates appeared before me and made oral submissions. The advocates reiterated their clients' arguments and also relied on authorities which I have considered.

### **Analysis and findings:**

9. The Plaintiff's Application that gave rise to my Ruling of 28<sup>th</sup> February 2014 sought for the striking out of the Defence, the Amended Defence and Further Amended Defence and Counter-claim. The Application was premised on the grounds that the initial Defence had been drawn and filed by an unqualified person and that the Counter-claim was time barred.
10. In my Ruling, I observed that there were only two issues for determination; that is, whether the Defendants claim is time barred and whether the Defence and counter-claim that was filed by an unqualified person is a valid pleading.
11. After analysing the pleadings on record, I held that the Defence and Counter-claim dated 2<sup>nd</sup> September 2008 and the amended Defence and counter-claim dated 20<sup>th</sup> May 2009 and filed by an unqualified person are incompetent and should be expunged from the record. I also held that the question as to whether the Defendants claim was time barred can only be determined at the hearing of the suit.
12. On the issue of whether the Defendants had the locus standi to file a counter-claim in view of the revoked grant, I held that it is the Plaintiff who sued the Defendants and they had the right to defend themselves. I then proceeded to allow the Defendants to file a valid Defence and Counter-claim within 14 days, which they have done.
13. The main complaint by the Plaintiff in the current application is that I did not consider the fact that the Defendants had admitted in their Defence and Counter-claim that they discovered that the Plaintiff was the registered proprietor of the suit property in 1983 and should have filed the suit to recover the land within 12 years. According to the Plaintiff, that is glaring error on a substantial point of law staring one in the face to warrant an for review. (see **Muyodi Vs Industrial & Commercial Development Corporation & Another (2006) 1EA 243**).
14. It is not in dispute that the Plaintiff has a title in respect to the suit property. It is the Plaintiff, pursuant to Section 7 of the Limitation of Action Act, who is barred from recovering land after the end of twelve years from the date on which the right of action accrued. In other words, if a title holder does not assert his right against another person who may or may not have a title over the same parcel of land, he may not recover such land by way of a suit at the expiry of twelve years.
15. On the other hand, the Defendants' position is that they are the ones who have been in possession of the suit property for over 40 years. In the Counter-claim that was expunged from the record, the Defendants averred at paragraph 35 as follows

**“The Koi clan has lived on this parcel of land for many generations. Members of the Koi clan are from the Giriama tribe who are habitually the inhabitants of Kilifi/Madeteni area.....the said clan has planted hundreds of**

**coconut trees on the said suit land which date back to over forty years.”**

16. It is true that in the Further Amended Defence and Counter-claim, the Defendants averred that they discovered that the property was registered in the name of the Plaintiff in 1983. They however, according to the pleadings, continued to stay on the land.
17. The question that arises then is whether the Defendants who do not have a title over the said land are entitled to it even after the lapse of twelve years from the date when they discovered that the land was registered in favour of the Plaintiff. I think they can if they prove that they continued living on the said land without the permission of the title holder for more than twelve years.
18. The Defendants' further case, according to the counter-claim that was expunged from the record, was that the Plaintiff was fraudulently allocated Trust land. They are seeking to recover what they consider to be Trust land and which land was meant for their clan. Section 42 (1) (c) of the Limitation of Actions Act provides that the Act shall not apply to an action to recover possession of Trust land.
19. It is therefore obvious that the question as to whether the Defendants' claim is time barred is not an error on a substantial point of law “staring one in the face”. The Defendants causes of action in the expunged Further Amended Defence and Counter-claim were many and could only be determined on merit.
20. In any event, the Defendants' pleadings were expunged from the record for being invalid and cannot form the basis of the arguments espoused in the Plaintiff's current Application.
21. The issue as to whether the Defendants have the locus standi to file the counter-claim was fully addressed in my Ruling. It is the Plaintiffs who sued them and they had a right to defend themselves by filing a defence and counter-claim. In any event, one does not need a Grant to claim for Trust land on his own behalf and on behalf of the community pursuant to both the repealed Constitution and the current Constitution.
22. In the circumstances, and for the reasons I have given, I dismiss the Plaintiff's Application dated 8<sup>th</sup> April 2014 with costs.

**Dated and delivered in Malindi this 26<sup>th</sup> day of September 2014.**

**O. A. Angote**

**Judge**