



REPUBLIC OF KENYA



KENYA LAW
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Ethics and Anti-Corruption Commission v Anyega & 4 others (Environment & Land Case 249 of 2018) [2024] KEELC 613 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 249 OF 2018
SM KIBUNJA, J
FEBRUARY 14, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

LYDIA BOSIBORI ANYEGA 1ST DEFENDANT

COASTAL HIGHLANDS INVESTMENTS LTD 2ND DEFENDANT

SAID MOHAMED NASSER LAMKI 3RD DEFENDANT

SAMMY SILAS KOMEN MWAITA 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

RULING

Notice of Motion Dated 11th September 2023

1. Vide notice of motion dated the 11th September 2023, the 3rd defendant prays for:
 - a. The plaintiff's suit to be struck out for offending section 7 of the *Limitation of Actions Act* chapter 22 of Laws of Kenya.
 - b. That the plaintiff's suit be struck out for want of service of summons on the defendants.
 - c. The costs be awarded to the 3rd defendant.

The application is premised on the fourteen (14) grounds on its face and supported by the affidavit of Said Mohamed Nasser Lamki, the 3rd defendant, sworn on the 11th September 2023, in which he inter alia deposed that the suit to recover the suit property should have been brought within the twelve (12) year period from the date of discovery of the fraud, and not later than June 2016; that as the suit was filed on 24th October 2018, it offends section 7 of the *Limitation of Actions Act*; that further, the



summons to enter appearance were issued on the 1st November 2018 and served on the 20th November 2019 after obtaining leave for substituted service on 17th October 2019; that the summons having been issued on the 1st November 2018 had expired on 30th October 2019 and were not capable of being served on the 20th November 2019 without extension; that the suit should therefore be struck with costs.

2. The application is opposed by the plaintiff through the grounds of opposition dated the 3rd November 2023 and replying affidavit of Dedan Okwama, an investigator with the plaintiff, sworn on the 9th November 2023 in which he inter alia deposed that the application contravenes Article 159(2)(d) of *the Constitution* and section 26 of the *Limitation of Action's Act*; that the 1st defendant has not disclosed he had instructed Ms. Balala & Abeid Advocates who filed the memorandum of appearance on 25th October 2020 and has been on record and participating in the proceedings; that the plaintiff had investigated the fraud and irregular alienation of the suit land in 2008 and filed the recovery suit against 1st defendant & another, being Mombasa HCCC No. 169 of 2009; that on 8th November 2017, the plaintiff discovered from the land registry records that the land had been transferred to 2nd defendant and later to 3rd defendant and notified the court; that on advice by the court, the plaintiff withdrew that suit and filed the instant one incorporating the 2nd & 3rd defendants; that the suit property was part of twenty units of public land reserved for Kenya Civil Aviation staff quarters and several suits for their recovery have been filed; that seven units have been recovered and recovery of others are pending in the various ELCs for determinations; that the titles to the said twenty units, including the suit property, were revoked by the Government on 20th November 2010; that the 2nd, 3rd and 4th defendants were served with the suit papers through their last known addresses appearing on the title documents on the 13th November 2018 and an affidavit of service filed on 4th December 2018; that service upon the 3rd defendant was through P. O. Box 82621 Mombasa that appears on the rate payment receipts and transfer documents at the then Municipal Council offices and Land Registry respectively; that upon directions of the Deputy Registrar of 29th February 2019, the plaintiff applied for substituted service on 19th June 2019 that was granted on the 17th October 2019; that the service was advertised on the 20th November 2019, which was within the stipulated time that was to lapse on the 21st November 2019; that the application should therefore be dismissed and the suit be allowed to proceed to hearing on merit.
3. The court issued directions on filing and exchanging submissions on the 18th September 2023, starting with the 3rd defendant, within the timelines given. The learned counsel for the plaintiff filed their submissions dated the 13th December 2023, which the court has considered.
4. The issues for the court's determinations are as follows:
 - a. Whether the suit is statute time barred.
 - b. Whether summons were served upon 3rd defendant, and if so, when.
 - c. Whether the suit should be struck out.
 - d. Who pays the costs of the application?
5. The court has carefully considered the grounds on the 3rd defendant's application dated the 11th September 2023, affidavit evidence by 3rd defendant and plaintiff, grounds of opposition, submissions by counsel for the plaintiff, superior court's decisions cited, the record and come to the following conclusions:



- a. The record confirms that this suit was commenced through the plaint dated the 23rd October 2018 and filed on the 24th October 2018. That at paragraph 32 of the plaint, the plaintiff averred inter alia that there has been no other suit between the parties “save for Mombasa ELC No. 169 of 2009 – KACC v Lydia Bosibori & 3 Others, in which case the court granted the plaintiff’s the latitude to file this suit so as to enjoin more defendants.” The copies of the summons in the record is dated 1st November 2018. That in the record is the affidavit of service by Patrick Chirongo sworn on the 3rd December 2018 and filed on the 4th December 2018 on service of summons and other suit papers upon the 1st to 4th defendants through registered post and upon 5th defendant through the Hon. Attorney General chambers.
- b. That the instant application dated the 11th September 2023 was filed by the 3rd defendant through Ms. Muriu, Mungai & Company Advocates who filed their notice of appointment of advocates on the 26th June 2023. The plaintiff has at paragraph 4 of the replying affidavit deposed that the 3rd defendant had instructed Ms. Balala & Abeid Advocates on the 25th October 2020 through who he filed the memorandum of appearance. The court has confirmed that the notice of appointment of advocates dated the 25th October 2020 has been annexed to the replying affidavit and is marked “DO1” and is drawn and filed by Balala & Abeid Advocates for the 3rd defendant. That deposition has to date not been rebutted or challenged through a supplementary or further affidavit by the 3rd defendant. Indeed, the coram in the proceedings of the 8th February 2022, 28th July 2022 and 21st November 2022 indicates the 3rd defendant had a counsel who was absent.
- c. The affidavit of service by George Njoroge sworn on the 28th November 2019 confirms that the summons were advertised on the 20th November 2019 after the application for substituted service was allowed on the 17th October 2019. That as held in (a) above, the copy of the summons to enter appearance that is in the court record are dated the 1st November 2018. That as the lifespan of summons is one year from the date of issue, it follows that the summons dated the 1st November 2018 had lapsed on the 31st October 2019. It was upon the plaintiff to apply for a reissue of the summons once their application to serve it through substituted service was granted on the 17th October 2019 but it appears it did not do so. That notwithstanding, the 3rd defendant instructed Ms. Balala & Abeid Advocates to act for him, and the said firm of advocates proceeded to file their notice of appointment of advocates dated the 25th October 2020 without any protest. It cannot be true for the 3rd defendant to allege as he appears to do that he has not been served with the summons to enter appearance. The failure by the plaintiff to have the summons reissued after lapsing has not resulted to any injustice or prejudice on the part of the 3rd defendant or any other party. The court is in agreement with the decision on the issue in the case of *Tropical Food International & Another v Eastern and Southern African Trade and Development Bank* [2017] eKLR. It is the finding of the court that the 3rd defendant had been served with the suit papers first, through the registered post as detailed above, and secondly through the newspaper advertisement of 20th November 2020.
- d. That on the issue of the suit being statute time barred the court has considered the import of sections 7, 26, 41 and 42 of the *Limitations of Actions Act* chapter 22 of Laws of Kenya, sections 51 and 52 of *Anti-Corruption and Economic Crimes Act*, 2003 and the various superior courts decisions cited by the learned counsel for the plaintiff’s including the case of *Dina Management Limited v County Government of Mombasa & 5 Others* Supreme Court of Kenya Petition No. E010 of 2021, and find that this suit being for recovery of public land, and considering



the time the plaintiff got to establish that the alienation was fraudulent in 2008, then the suit is not time barred.

- e. That having found no merit with the 3rd defendant's application, then in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, he should pay the plaintiff's costs.
6. That flowing from the above conclusions, the court finds and orders as follows:
- a. That the 3rd defendant's notice of motion dated the 11th September 2023 is without merit and is dismissed.
 - b. The 3rd defendant to meet the plaintiff's costs in the application.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 14TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the Presence of:

Plaintiff : M/s Songole for Abdulrahim

Defendants: Mr. Rutto for 4th Defendant

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC Mombasa.

