



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MOMBASA**

**Civil Case 264 of 1996**

**KENATCO TRANSPORT CO. LTD**

**(In Receivership) ..... PLAINTIFF**

**VERSUS**

**ALEXANDER MUCHEMI KIAGO ..... DEFENDANT**

**RULING**

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This is an application by the defendant for dismissal of the plaintiff's suit for being statute barred and alternatively for grant of prosecution. The application is brought under the provisions of Section 7 of the Limitation of Actions Act Order XVI Rule 5 and Section 3A of the Civil Procedure Act. The application is based on the grounds that the plaintiff's right to recover the suit property expired on or about 13<sup>th</sup> December, 1990 pursuant to the provisions of the Limitation of Actions Act and that for more than three (3) months from the day the suit was listed for hearing the plaintiff has failed to list the same for hearing. There is a supporting and a supplementary affidavit sworn by counsel for the defendant which affidavits elaborate the above grounds.

The plaintiff has opposed the application on the basis of its counsel's replying affidavit sworn on 27<sup>th</sup> November, 2009 and Grounds of Opposition filed by the same counsel. The gist of the opposition is that the application does not fall within the ambit of the provisions of Order XVI Rule 5 and that Order VI Rule 13 of the Civil Procedure Rules has not been invoked yet the defendant seeks the striking out of the plaintiff's suit.

When the application came up before me for hearing on 3<sup>rd</sup> March 2010, counsel agreed to file written submissions which were duly in place by 15<sup>th</sup> April, 2010. In a nutshell the defendant contends that the suit being for recovery of land, should have been instituted before the expiry of 12 years from the date the cause of action accrued which was in 1977. So, by 1989 the plaintiff's cause of action had expired. The suit therefore, according to the defendant, offends the provisions of Section 7 of the Limitation of Actions Act.

In the alternative, counsel for the defendant submits that the plaintiff is not interested in this suit because any step taken towards fixing the same for hearing has been at the behest of the defendant. In response to those submissions, counsel for the plaintiff argues that the suit was last fixed for hearing on 15<sup>th</sup> October, 2009 but could not take off because the court in which it was to be heard did not sit. Immediately thereafter the defendant lodged this application even before the expiry of three months. With regard to the plea of limitation, counsel submits that the court has not been properly invoked.

I have considered the application, the affidavits filed, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of this matter. The record shows that on 25<sup>th</sup> July, 2002 the defendant was granted leave to amend his defence within 7 days, from the said date. It is in the intended amended defence in which the plea of limitation was raised. The record does not show whether the defendant complied with the order or served the amended defence and counter claim. I have also not traced a reply and defence to counter claim. Under Rule 4(1) of Order VI of the Civil Procedure Rules the plea of Limitation must be express. Without the amended defence, the plea of limitation would not be available to the defendant. I have also perused paragraph 3 of the original defence and counter claim which was maintained in the intended

amended defence and counter claim. The averment in the said paragraph appears to acknowledge the plaintiff's title to the suit property which acknowledgement would oust the plea of limitation.

In the premises, at least for now, I cannot strike out the plaintiff's suit on the ground that the same is statute barred.

With regard to the prayer for dismissal of the suit for want of prosecution, the defendant has invoked rule 5 of Order XVI of the Civil Procedure Rules. Ground 2 in the body of his Notice of Motion suggests that the defendant has moved the court under sub-rules 5(c) and (d) of the said Order. Under the sub-rule, if within three months after the removal of the suit from the hearing list; or the adjournment of the suit generally, the plaintiff or the court of its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.

Counsel for the defendant acknowledges in his supplementary affidavit sworn on 14<sup>th</sup> December, 2009 that the suit was fixed for hearing on 15<sup>th</sup> October, 2009. The hearing date may have been taken at the initiative of the defendant and the plaintiff may have successfully applied for adjournment on 15<sup>th</sup> October, 2009. The fact remains that even before the expiry of three months, the defendant lodged this application for an order dismissing the plaintiff's suit for, *inter alia*, want of prosecution. I agree with counsel for the plaintiff that the application moved the court rather prematurely. I cannot in the premises dismiss the suit for want of prosecution.

In the end the defendant's application dated 27<sup>th</sup> October, 2009 is dismissed. In view of the age of the case, I direct that a hearing date be given at the registry on priority basis and during the current session, failing which the defendant is at liberty to move the court for dismissal of the suit.

With regard to costs, the same will not, in the circumstances of this case, follow the event.  
I order that each party bears his / its own costs.  
Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MAY, 2010.**

**F. AZANGALALA**  
**JUDGE**

Read in the presence of:-  
Mr. Lumatete for the plaintiff / respondent.

**F. AZANGALALA**  
**JUDGE**  
**19<sup>TH</sup> MAY, 2010**