



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OMOLO, O'KUBASU & GITHINJI JJ A)**

**CIVIL APPEAL NO. 209 OF 2004**

**BETWEEN**

**1. STEPHEN ONYANGO ACHOLA .....1ST APPELLANT**

**2. PAUL OBUYA MOLA .....2ND APPELLANT**

**AND**

**1. EDWARD HONGO SULE .....1ST RESPONDENT**

**2. KISUMU MUNICIPAL COUNCIL ..... 2ND RESPONDENT**

**(An appeal from the ruling and order of the High Court at Kisumu (Tanui J)**

**in**

**KSM HCCC No 244 of 1998)**

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**JUDGMENT**

By their amended plaint lodged in the High Court at Kisumu, the two appellants, Stephen Onyango Achola and Paul Obuya Mola, as plaintiffs, had alleged against the two respondents, Edward Hongo Sule and Kisumu Municipal Council, as defendants, that:

“(a) During the year 1994 the defendant (sic) acting jointly and or severally fraudulently misrepresented to the District Lands Officer, that the said parcels of land was private land belonging to the 1st defendant.”

The appellants then set out the particulars of the fraudulent misrepresentation and the land in dispute between the parties were identified as Kisumu/Kasule/3606 and 3604. The plaint is not very clear on this aspect of the matter for while paragraph five of the plaint sets out the two numbers above, paragraph 8A sets out parcel No Kisumu/Kasule/ 3605 which the second appellant was alleged to have been in occupation for some fifty yers as at the date of the amended plaint. We suppose these matters will have to be sorted out during the trial of the suit.

Kisumu Municipal Council, the second respondent, is a local authority within the provisions of section 3 of the Public Authorities Limitation Act, ie Act No 5 of 1974. Section 3 (1) of that Act Provides:

No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued”

The appellants alleged the tort of fraudulent misrepresentation against the two respondents and when the matter came up before Tanui, J the second respondent took a preliminary objection to the claim, arguing that the suit brought against it was time-barred as the tort alleged was said to have been committed in 1994 and the original plaint in the High Court was only filed in 1997.

The difficulty we find with the 2nd respondent’s preliminary objection based on limitation and which was upheld by Tanui, J is that in its defence filed in the High Court on 22nd September, 1997, the second respondent did not plead the defence of limitation. The second respondent pleaded in paragraph 15 of its defence that:

“The second defendant contends that this suit is completely tainted with malice and is frivolous, vexatious and an abuse of the process of law. The second defendant further avers that this suit does not disclose a cause of action and should be dismissed”.

but it was never stated why the suit did not disclose a cause of action. Certainly nowhere in that defence was it specifically pleaded that the claim was time-barred under the provisions of the The Public Authorities Limitation Act.

Order VI rule 4 (1) and (2) of the Civil Procedure Rules is in these terms:

“4(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality.

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleadings.

(2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

The claim by the two appellants was for recovery of land. The second respondent was relying on the provisions of a statute, that is Act No 5 of 1974 to defeat that claim. The provisions of order VI rule 4 (1) and (2) required him to specifically plead the statute on which provision he relied to defeat the appellants’ claim. Support for order VI rule 4 (1) and (2) is to be found in *Halsbury’s Laws of England*, 4th Edition, vol 36 at paragraph 48 page 38 headed:

“Matters which must be specifically pleaded: The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality. Other matters which must be so pleaded are the Statute of Frauds, and the provision of the Law of Property Act, 1925 which requires contracts for the sale or disposition of land to be in writing, and, it seems, any ground of objection to the jurisdiction of the Court.”

Mr Onsongo, the learned counsel for the second respondent, simply raised the issue of limitation by way of a preliminary objection. Under order VI rule 4 (1) and (2) the respondents were obliged to specifically plead limitation based on statute, that is, Act No 5 of 1974, before being allowed to sue it as the basis of their preliminary objection, Had they done so, the appellants could have probably answered that even though the fraudulent misrepresentation alleged and relied on by them was perpetrated in 1994, they did

not discover the fraud until much later on and we presume the appellants would then have been bound to disclose the date when they had discovered the fraud. Section 26 of the Limitation of Actions Act provides that in cases of fraud, the period of limitation only starts to run from the time the fraud is discovered or ought to have been discovered if reasonable diligence had been applied. Mr Onsongo contended that the date on which the fraud was discovered was part of the factual issues which would show whether or not the appellants' claim disclosed a cause of action, and ought to have been pleaded. We do not think that is correct. A plaintiff is not bound to plead in his pleadings issues which would negate possible defences such as limitation, fraud, mistakes and so on long before such issues are raised. He can only deal with such defences if and when they are actually raised in the defence. That must be why order VI rule 4 (1) starts:

“A party shall in any pleading subsequent to a plaint....”

The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.

We have gone through the authorities which Mr Odunga, learned counsel for the appellants, cited to us. They really add nothing to what we have already stated, except perhaps, to refer to the remarks of Madan, JA made *obiter* in *D T Dobie & Company (Kenya) Ltd v Muchina* (1982-88) 1KAR 1 to the effect that:

“The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

In the circumstances of the present case, we think Tanui, J was not right in first, allowing the issue of limitation to be raised when it had not been pleaded, and secondly, in upholding the preliminary objection of the second respondent based on that issue and thus terminating the appellants' claim against the second respondent.

It is clear from this judgment that we have not considered the individual grounds of appeal listed in the appellants' memorandum of appeal. We must add that these grounds did not directly cover some of the issues of law which we have dealt with in the judgment.

We accordingly set aside the ruling and order of Tanui, J dated 1<sup>st</sup> November, 2001, dismissing the appellants' suit against the second respondent and we substitute that order with one dismissing the preliminary objection raised by the second respondent to the appellants' claim. The appellants' suit against the second respondent is restored to be heard in the usual way. We are of the view that neither the appellants nor the second respondent is entitled to the costs of this appeal or the costs occasioned in the High Court by the preliminary objection.

Accordingly we order that each party shall bear their own costs in this appeal and also the costs of the proceedings in the High Court.

**Dated and Delivered at Nairobi this 30th day of April 2004.**

**R.S.C.OMOLO**

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**JUDGE OF APPEAL**

**E.O.O'KUBASU**

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**JUDGE OF APPEAL**

**E.M.GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a true copy  
of the original

**DEPUTY REGISTRAR**