



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ORIGINATING SUMMONS NO. E171 OF 2020 (OS)

ITSL TRUST COMPANY LIMITED.....1ST APPLICANT

SIMON KAMERE (Suing as administrators of the

Estate of Joseph Kamau Kamere Deceased).....2ND APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE REGISTRAR OF TITLES.....3RD RESPONDENT

RULING

A. Background

1. The Applicants filed the Notice of Originating Motion dated 1st October 2020 filed under Order 37 of Civil Procedure Rules, Section 110 (2) of Land Act No. 6 of 2012 and any other enabling law.
2. They seek that the Notice of Originating Motion be heard for the determination of the following questions: -
 - a. Whether the Government of Kenya acquired a section of 7.660 acres of the aforementioned parcel of land"
 - b. Whether the said acquisition by the Government was for the sole purpose of the construction of Roslyn - Limuru Road extension"
 - c. Whether the government upon acquisition of the land utilized it"
 - d. Whether the Government implemented the purpose for which it had acquired the aforementioned land on the adjacent parcel L.R No. 5989/23 and known as the Northern Bypass"
 - e. whether 7.660 acres portion of LR. NO.5989/6 being unutilized land should revert back to the original owners and/or their beneficiaries"
 - f. whether the caveat registered against Land Reference No.5989/6 in Vol. N35 Folio 390/4 should be removed"

g. Whether the Respondents should pay the Applicants the costs of the suit"

h. That such further or other orders may be issued by the Honourable Court as may attain the ends of justice.

3. This originating motion is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Simon Kamere, the 2nd Applicant herein, sworn on 1st October 2020.

4. The 2nd and 3rd Respondents herein opposed this application vide a Preliminary Objection dated 24th June 2021 seeking the court to dismiss the suit with costs on grounds that the suit is statute barred by the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

B. The Applicant's Case

5. The deceased, Joseph Kamau Kamere & Sophia Muthoni Kamere owned, as joint tenants, the land parcel known as LR No. 5989/6.

6. The Government acquired 7.660 acres of the suit land in 1970 for the sole purpose of construction of Rosslyn-Limuru Road extension. The said acquisition was vide Gazette Notice nos. 3439 & 3440 of 20th November, 1970. The Government later lodged a caveat against the title which was registered on 27th May 1971.

7. The said construction was never undertaken thus the acquired land was never put to its intended purpose. That through a letter dated 26th March, 1971, the Commissioner of Lands wrote to Joseph Kamau Kamere & Sophia Muthoni Kamere now deceased the registered owners of LR No. 5989/6 indicating that the construction of the Rosslyn-Limuru Road extension had been indefinitely postponed.

8. The Applicants' advocates wrote a letter dated 23rd January 2015 to the Cabinet Secretary- Ministry of Transport and Infrastructure enquiring about the status of the said road extension. That the Principal Secretary in the above stated Ministry, by a letter dated 14th April 2015, informed the applicant's Advocates that the said bypass had been redesigned and does not follow the proposed route of 1970.

9. The Applicants' Advocate replied to the said Principal Secretary by a letter dated 22nd September 2016 indicating their intentions and willingness to refund the compensation paid to the deceased so that the land could be reverted back to the Estate as the purpose of the acquisition had failed but the said letter was never responded to. Their advocates also wrote letters to the Attorney General and National Land Commission over this matter but the same did not yield any fruits as they were never responded to.

10. That since the proposed bypass had been redesigned and does not follow the proposed route of 1970 (as confirmed by the Principal Secretary in the Ministry of Transport and Infrastructure through the letter dated 14th April 2015) and since the Northern bypass which passed through the adjoining land has recently been constructed, this means that the purpose for which the land was acquired will not be implemented.

11. The Applicants aver that since the specific purpose for which the suit land was acquired will not be implemented, the said land must revert back to the Estate of the deceased owner.

12. The Government has refused and/or declined to revert back the suit land to the Applicants and remove the Caveat placed on the suit land.

13. The Applicants wish to deal with the suit property in the process of administration of the Estate of Joseph Kamau Kamere.

14. It is in the interest of justice that the orders sought herein are granted.

C. The Respondents case

15. The 1st Respondent (NLC) has not filed a notice of appointment or its response.

16. The 2nd and 3rd Respondents have opposed this Application seeking that the suit be dismissed with costs on grounds that the suit is statute barred by the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

Submissions

17. The parties' counsels canvassed with the Preliminary Objection orally in open court on 27th October 2021 and a Ruling date was reserved.

D. Issues for determination

18. Having considered the Application, the Supporting Affidavit, the 2nd and 3rd Respondents' Preliminary Objection together with the oral submissions made in open court, the following arise as the issues for determination before this court.

a. Whether the suit is time barred.

E. Analysis and Determination

a. Whether the suit is time barred.

19. A valid preliminary objection must be on a pure point of law. The case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** is the locus classicus on preliminary objections in this region.

20. In the case of **Ahmed Noorani & another v Rajendra Ratilal Sanghani [2020] eKLR** the Court of Appeal held that: "For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit."

21. This court will invoke the Equity Maxim that states that 'Equity regards as done that which ought to have been done. This maxim means that when individuals are required by their agreement or by law to have done some act of legal significance, Equity will regard it as having been done as it ought to have done. It is not in dispute that the compulsory acquisition process was completed way back in the year 1971 and the applicant's title extinguished following issuance of Gazette Notices Nos. 3439 and 3440 dated 20th November 1970. The Government was entitled to vacant possession therefrom.

22. Further, evidence shows that the Government went ahead and lodged a Caveat against the title of the suit property herein on 10th June 1971. I am satisfied that the Government of Kenya is the owner of the suit parcel of land and has been so since 1971.

23. In this case, from the material on record, the relevant time that counts for purposes of the applicant's claim to the land is the period between 1970-1971 when the Government became the owner of the suit property and 6th October 2020 when the Notice of Originating Motion was taken out. There is no evidence that acquisition was ever challenged by the late Joseph Kamau Kamere. For clarity, this suit was filed on 6th October 2020, which is 49 years from the time the land was compulsorily acquired.

24. **Section 7 of the Limitation of Actions Cap 22** provides that: "*An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*"

25. **Section 9(1) and (2)** of the same Act provides thus: "*9 (1) where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discounted his possession, the right of action accrues on the date of the dispossession or discontinuance.*

(2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrued on the death of death."

26. The Court of Appeal in the case of **Abdulkhal Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J. Mtila & another [2021] eKLR** held that: “.....*It must be clarified that dispossession did not depend on the latter’s knowledge of the 1st and 2nd appellants’ identity as the registered owners. Rather, what was essential was his intention as the dispossessor to appropriate and use the suit land as his own to the exclusion of all others...*”

27. The above provisions are clear enough. Any suit founded on recovery of land must be brought within twelve (12) years from the date when the cause of action accrued. In this case, the impugned compulsory acquisition happened in the years 1970-1971. Time started running from then and twelve years lapsed in 1983 or thereabouts. This suit was filed on 6th October 2020. It is clear therefore that the suit was filed outside the limitation period and is therefore statute barred and must fail. There is a reason why the Limitation of Actions Act was enacted.

28. In the case of ***Bosire Ongero vs Royal Media Services [2015] eKLR*** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

29. Clearly, this Court lacks jurisdiction, and the matter is at its end. I will have to down my tools and take no further step. The 2nd and 3rd Respondent’s preliminary objection herein dated 24/06/2021 is merited and therefore succeeds in its entirety with the result that the Applicant’s suit is herein struck out with costs to the 2nd and 3rd Respondents.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2021.

.....

MOGENI J

JUDGE

In the presence of: -

N/A..... for the Applicants

N/Afor the 1st Respondent

Mr. Motari for the 2nd and 3rd Respondents

Mr. V. Owuor- Court Assistant



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