



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELC CASE NO. 293 OF 2017**

**JOHN KIBOR KIPKORIR (Suing as the administrator  
of Estate of WILLIAM KIBOR RUTO  
also known as CHEBOR RUTO.....PLAINTIFF**

**VERSUS**

**KENYA RURAL ROADS AUTHORITY.....DEFENDANT**

**RULING**

This is the ruling in respect of a notice of a Preliminary Objection dated 5<sup>th</sup> March 2018 by the defendant/applicant on the ground that the plaintiff's suit is time and statute barred pursuant to the express provisions of section 67 of the Kenya Roads Act No. 2 of 2007.

Parties agreed to canvass the Preliminary Objection by way of written submissions which were filed.

**Defendant's Submissions**

Counsel for the defendant gave a brief background to the plaintiff's case stating that the plaintiff filed this suit on 25<sup>th</sup> August 2017 claiming that the late William Kibor Ruto was the registered owner of parcel of land known as MOSOP/CHEPKORIO/17 measuring 2.5 acres (hereinafter called "the suit property") and further that the Defendant has encroached onto the suit property. Counsel further stated that despite the Plaintiff acknowledging that official search on the suit property indicates the suit property had been sold by the deceased to the Ministry of Works in the year 1979 the Plaintiff disputes any such arrangement for sale of the suit property.

Counsel listed two issues for determination by the court as:

- a) Whether the suit as instituted is time and statute barred by dint of section 67(b) of the Kenya Roads Act No. 2 of 2007 and the effect(s) thereof;
- b) Whether this Honourable Court has the requisite jurisdiction to hear and determine the suit as filed and grant the prayers sought therein.

On the first issue whether the suit is time and statute barred as having been filed outside the limitation of actions period stipulated under section 67 (b) of the Kenya Roads Act No. 2 of 2007, Counsel cited the said section which provides thus:

67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—

(a)...

(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

Counsel submitted that in considering whether or not the suit is barred by the limitation of actions clause under section 67 (b) of the Kenya

Roads Act, it is imperative to establish when the cause of action arose. He stated that the cause of action in the instant suit arose when the Defendant entered the suit property. Counsel cited the case of **Sumac Development Company Limited v George Munyui Kigathi & 2 Others [2017] eKLR** where it was held as follows:

*On the 2<sup>nd</sup> limb, it can be deciphered from the pleadings that the cause of action against the 3<sup>rd</sup> Defendant arose on 8<sup>th</sup> October 2010 when it is alleged to have entered into the suit premises and caused to be printed and/or marked with a sign of letter X denoting that the property is erected on a road reserve.*

It was therefore Counsel's submission that the Plaintiff through the Firm of M/S W. Kigen & Co. Advocates vide a letter to the Defendant's Director General dated 30<sup>th</sup> January 2015 alleged that in the 1980s the Ministry of Works entered the suit property and used it as a roads camp without the consent of all the family members, now the beneficiaries of the estate of the late Chebor Ruto. That it is clear from the said demand notice that the act complained of (namely entry into and occupation of the suit property) arose in the 1980s.

Counsel also listed several correspondences between the plaintiff and various authorities regarding the Plaintiff's complaints of the entry into and occupation of the suit property by the Defendant which include:

- a) Letter from the Plaintiff dated 12<sup>th</sup> September 2014 and addressed to the area Chief Marichor Location, Chepkorio;
- b) Letter from the Deputy County Commissioner, Chepkorio dated 19<sup>th</sup> September 2014 and addressed to the County Public Works Officer, Iten;
- c) Letter from the KeRRA Regional Manager, Keiyo Marakwet dated 17<sup>th</sup> October 2014 and addressed to the Defendant's Director General.

He therefore stated that the suit ought to have been filed within twelve months after the complaints were communicated in 2015. Counsel submitted that the current suit was filed outside the mandatory twelve months' limitation period from the date of occupation of suit property by the Defendant herein as provided for under section 67 (b) of the Kenya Roads Act.

It was Counsel's further submission that Courts have conclusively addressed the fate of a suit filed outside the limitation of actions period such as the instant one. He stated that in respect to section 109 of the Kenya Posts and Telecommunications Corporation Act (now repealed) which is in pari materia with the provisions of section 67 of the Kenya Roads Act the Court of Appeal in the case of *Langat -Vs- Kenya Posts and Telecommunications Corporation [2000] 1 EA 147* held as follows:

*It is plainly obvious from this section that appointment, discipline and dismissal of staff is an act done by the Kenya Posts and Telecommunications Corporation in pursuance of execution of the Act within the meaning of Section 109 thereof. It must follow from this that if the Appellant wished to contest his dismissal by Kenya Posts and Telecommunications Corporation he had to institute proceedings within the time frame fixed under Section 109 of the Act. He did not nor did he institute the action within twelve months from the date of his dismissal. The result of this default is that the suit brought by the Appellant was incompetent and did not lie. [Emphasis added].*

Counsel further submitted that the limitation of actions period as provided under section 67 of the Kenya Roads Act is also in pari materia with the provisions of section 87 of the Kenya Railways Corporation Act. That the said limitation of actions period stipulated under the Act must be strictly adhered to and any action instituted out of the stipulated limitation of actions period must fail as was held by the High Court in the case of **Joyce Kavulani Ligame vs Kenya Railways Corporation Case No. 483 of 2012:**

*"The Claimant brought this suit to court four years after the event complained about. This is clearly outside the period of limitation and there is no evidence of leave having been granted so to act. Further the requisite written notice of intention to sue was never sought or obtained from the Corporation. This Claim, like in the Langat case aforesaid therefore fails."*

Mr.Omollo also submitted that despite the express limitation of actions period stipulated under section 67 (b) of the Act for commencing suits against the Defendant herein the Plaintiff instituted this suit in outright disregard of the aforesaid provision and that no explanation for delay has been advanced. Further that no leave of the court was sought or granted to enable the plaintiff institute this suit out of time.

Counsel further submitted that the Defendant being governed by the Kenya Roads Act, an Act of Parliament purely providing for matters relating to the establishment and functioning of the Defendant and other roads authorities thereunder, it is imperative that any action undertaken by any party affecting the functioning of the Defendant, as sought by the Plaintiff herein, must comply with the provisions of Kenya Roads Act. That other than the Limitation of Actions Act Cap 22, which is a general statute of limitation for actions, specific statutes such as Kenya Roads Act also provide for the periods of limitation of actions as is the case in section 67 of the Act.

Mr Omollo cited instances where the specific statute such as the Kenya Roads Act fix limitation of actions clauses and such limitation for action override the provisions of the general statute of limitation as was held by the High Court case of **Ephantus Mucheru Mwangi -Vs- Kenya Railways Corporation & Another [2005] eKLR:**

*I would state further that the Act having its own limitation clause supercedes the Limitation of Actions Act Cap.22 and the three years to file a suit in tort would not apply.*

That the Kenya Roads Act provides a specific limitation of actions clause which supersedes the operation of any provision of the Limitation of Actions Act. Counsel further relied on the case of **Sumac Development Company Limited v George Munyui Kigathi & 2 Others [2017] eKLR** where it was held as follows:

*A clear perusal of the court record reveals that the 3<sup>rd</sup> Defendant was enjoined in the proceedings by way of an amended plaint filed in court on 2<sup>nd</sup> June 2015. Clearly, there is no doubt that by then, the time within which to file suit against the third defendant expired and therefore the suit against it, is incompetent. The consequence of this is that the preliminary objection has merits and is allowed. The plaintiffs' suit as against the 3<sup>rd</sup> Defendant is hereby struck out with costs.*

It was Counsel's submission that the suit before the court offends Section 67 (b) of the Kenya Roads Act and therefore the court does not have requisite jurisdiction to hear and determine the suit.

On the second issue on court's jurisdiction to hear and determine the suit, Counsel cited the case of **Clatus Odhiambo Macowenga -v- Kenya Civil Aviation Authority [2008] eKLR** where the Court held thus:

*The issue of limitation goes to the jurisdiction of the Court... The suit as filed is incompetent and the Court has no jurisdiction to entertain it. In the circumstances, I dismiss the Plaintiff's argument, allow the application as prayed with costs both of the application and the suit.*

Counsel therefore urged the court to find that the instant suit is time and statute barred hence the court lacks jurisdiction to hear and determine it.

### **Respondent's Submissions.**

Counsel for the plaintiff/ respondent opposed the Preliminary oBjection and stated that it is not in dispute that there has been various correspondences between the Plaintiff, the defendant and various authorities regarding the plaintiff's complaint of encroachment by the Defendant and that a demand notice was issued on 30/1/2015.

Counsel adopted the same issues for determination by the court as the applicant's. It was Counsel's submission that the plaintiffs cause of action arose on the date the defendant was served on 12/6/17 with a demand letter and that the suit was filed on 25/8/17 which is barely than 3 months.

Counsel cited the Court of Appeal case of **Shire Vs Thabiti Finance Co. Ltd Civil Appeal No. 76/200 (2002)1 EA 279** which dealt with the issue of whether an acknowledgement can revive a statute barred suit. It was held;

.....Acknowledgement or part payment not only extends the limitation period but also revives or otherwise statute barred action falling within that provision

**Counsel submitted that actions in land are subject to limitation period of 12 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. He stated that Section 23 of the Limitation of Actions Act provides for fresh accrual of right of action on acknowledgement or part payment where:-**

a) The person in possession of the land or moveable property acknowledges the title of the person to whom the right of action has accrued. ...the right accrues on and not before the date of acknowledgement or payment

It was therefore Counsel's submission that from the various correspondences between the plaintiff and the defendant that the defendant has not been in free, open and uninterrupted possession of the suit land. He urged the court to dismiss the preliminary objection with costs to the plaintiff.

### **Analysis and determination**

The issues for determination in this Preliminary oBjection are as to whether the suit as instituted is time and statute barred by dint of section 67(b) of the Kenya Roads Act No. 2 of 2007 and the effect(s) thereof; and whether this Honourable Court has the requisite jurisdiction to hear and determine this suit.

From the pleadings and the documents annexed it is clear that this transaction took place in the 1980s and there were correspondences between the plaintiff and various institutions in respect of the suit land. The plaintiff issued a demand notice dated 30/1/15 but never followed through with filing of a suit as required by law. Section 67 (b) of the Roads Act is very clear on the limitation of actions against the authority. It specifically provides that :

67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—

(a)....

(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

The drafters of this Act knew why this provision was found necessary and that is why it was crafted in mandatory terms. It should also not escape our minds that unless this provision is amended then the same must be adhered to as non-compliance will lead to striking out of suits

like the current one. This is a statute specific requirement and the argument by Counsel for the plaintiff that an acknowledgment of a demand letter would revive the suit is with due respect to Counsel not tenable.

Counsel for the plaintiff submitted that the current case involving land is governed by the Limitations of Actions Act which provides for actions in land to be brought before the lapse of a 12 year period. Counsel also alluded to the doctrine of adverse possession which has not been pleaded by the defendant and it is not the case in this suit.

It is trite law that other than the Limitation of Actions Act Cap 22, which is a general statute of limitation for actions, specific statutes such as Kenya Roads Act also provide for the periods of limitation of actions as is the case in section 67 of the Act.

The issue of limitation is a preliminary issue which goes into the jurisdiction of the Court. I am also guided by the case of **Paul Gachanga Ndarua v Kenya Posts & Telecommunications Corporation [2014] eKLR** where it was held as follows:

*Having determined the issue of defence of limitation in the affirmative, it is evident that this Court has no jurisdiction to hear the claim herein. Therefore, I see no reason to delve into the merits of the claim.*

*In the upshot, the Plaintiffs claim as stated in the amended Plaint dated 9<sup>th</sup> April 2001 and filed in Court on 10<sup>th</sup> April 2013 is hereby dismissed. The costs of the suit shall be for the Defendant.*

Having found that the plaintiff did not comply with section 67 of the Roads Act, it follows that this court does not have jurisdiction to hear and determine this case and therefore down my tools. The court cannot go against the grain to hold otherwise on the issue of jurisdiction. Having downed my tools, I therefore uphold the Preliminary Objection and strike out the plaintiff's suit with no orders as to costs.

**Dated and delivered at Eldoret this 18<sup>th</sup> day of October, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Ngetich holding brief for Mr. Kigen for Plaintiff/Respondent and Mr. Kandie holding brief for Omollo for Defendant/Applicant

Mr. Koech: court Assistant.