



REPUBLIC OF KENYA



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Mwihaki v Safaricom PLC (Formerly Known as Safaricom Limited) (Environment & Land Case E165 of 2021) [2023] KEELC 19802 (KLR) (30 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19802 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E165 OF 2021
EK WABWOTO, J
AUGUST 30, 2023

BETWEEN

RUTH MWIHAKI PLAINTIFF

AND

SAFARICOM PLC (FORMERLY KNOWN AS SAFARICOM LIMITED) DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 17th May 2021 seeking for the following orders against the Defendant.
 - i. General and exemplary damages.
 - ii. A permanent injunction to restrain the Defendant either by itself, agent, servant assign or any person whosoever from entering into KABETE/KARURA/2426 without the Plaintiff's consent.
 - iii. An order compelling the Defendant to remove the fibre optic cable and inspection chamber and all related equipment and apparatus situate on KABETE/KARURA/2426.
 - iv. An order compelling the Defendant to restore KABETE/KARURA/2426 to its original condition before installation and laying of the fibre optic and inspection chamber.
 - v. Any other suitable order that this honourable court may deem just and expedient to grant under the circumstances.
 - vi. Costs of this suit.
2. The Defendant upon being served with the pleadings filed a statement of defence dated 8th December 2022 and also a Notice of Preliminary Objection dated 19th April 2023. The Defendant in its defence



urged the court to dismiss the suit and also sought to have the suit dismissed in its notice of Preliminary Objection on account of having been instituted out of time contrary to section 4(2) of the Limitations of Actions Act.

The Plaintiff's case

3. The Plaintiff's case is contained in her plaint dated 17th May 2021, her evidence tendered in court during trial and the written submissions dated 11th April 2023. Besides the oral evidence which the Plaintiff tendered, she adopted her witness statement and bundle of documents dated 17th May 2021 as her evidence in chief.
4. It was the Plaintiff's case that the Defendant entered into her land sometimes in the year 2013, excavated and caused a Fibre Optic Cable traversing approximately 105 meters together with an Inspection Chamber to be laid/installed thereon. It was also averred that the Defendant continued to frequently enter into the property Kabete/Karura/2426 more specifically to maintain the cable and access the Inspection Chamber without her knowledge and or consent and it was only until March 2020 that she became aware of the same and she engaged the defendant via email and letters from her advocates severally but the same were ignored.
5. The Plaintiff also averred that the defendant's action amount to negligence, trespass and nuisance particulars of which were pleaded at paragraph 14 of the plaint. The Plaintiff has sought to have the Defendant regularize its continued use of her land and compensate her for trespass to no avail.
6. The Plaintiff testified as PW1 and the sole Plaintiff's witness. She added that she has never given permission to the Defendant to access her land and neither has she ever been compensated for the same.
7. In cross-examination, she stated that she became aware of the trespass in 2020. She stated that the same was within her property which had not been fenced. She also stated that she knows the boundaries of her property which is just 1 acre even though she does not stay in the said property.
8. In re-examination she stated that the man hole had fibre cables and a checking chamber. She also stated that the defendant's workers have to access her land for them to access the inspection chamber.

The Defendant's case

9. The Defendant's case is contained in the defence dated 8th December 2022, witness statement by Joseph K. Mwangi dated 24th January 2023 and the oral testimony tendered therein by Joseph K. Mwangi on behalf of the Defence. The Defence also filed a Notice of Preliminary Objection to the effect that the Plaintiff claim was filed out of time. The Defence also filed written submissions dated 19th April 2023.
10. It was the Defendant's case that the Plaintiff's cause of action is a tortious claim of trespass and that the same ought to have been filed at the very latest sometimes in the year 2016 upon expiry of the three years.
11. At the hearing, Joseph Mwangi a Technical Engineer working with the Defendant testified as the sole defence witness DW1. He relied on his statement dated 24th January 2023 as his evidence in chief. It was his testimony that the Defendant never trespassed onto the Plaintiff's property since prior to laying the cables, the Defendant sought and obtained approval from Kenya National Highways Authority (KeNHA) who confirmed that the identified stop upon which the fibre optic cables are laid is within the road reserve and therefore on public land and further that the maintenance works were done in the open and during the day.



12. During cross-examination, he stated that he did not participate during the laying of the cables. He also stated that he does not know if the same were laid into the Plaintiff's property since all the approvals were sought from the relevant government authorities.
13. When asked whether the Defendant had engaged the Plaintiff before laying the cables and the checking chamber, he stated that there was no report confirming the same and that no compensation had been made.
14. In re-examination he stated that he had visited the property and that there was a river close to the said property. He also reiterated that they had approached KeNHA which gave them permission prior to the laying of the cables. He also stated that the cables were laid within the way leave area of the road.

The Plaintiff's submissions

15. The Plaintiff filed written submissions dated 11th April 2023. The written submissions were filed by Gikunda Miriti & Co. Advocates. Counsel outlined three issues for determination;
 - i. Whether the Defendant trespassed into the suit properties without authority of the Plaintiff.
 - ii. Whether the Plaintiff is entitled to general and exemplary damages.
 - iii. Whether the order of permanent injunction restraining the defendant from dealing with the suit property should be given.
16. Counsel submitted that the Defendant entered into and has remained in occupation from 2013 to date. The Defendant's continued occupation from 1st date of entry in so far as it is unauthorized amounts to trespass and has continued to date.
17. Relying on the case of *Park Towers Ltd v John Mithamo Njika & Others* (2014) eKLR, the Plaintiff submitted that she is entitled to a sum of Kshs 10,000,000 as general and exemplary damages.
18. The Plaintiff also submitted that the court should make an order of permanent injunction restraining the defendant from dealing with her property. The Plaintiff made reference to the following authorities which the court has duly considered. *Giella –v Cassman Brown & Co. Ltd* (1973) EA 358, [Rhoda S. Kiilu v Jiangxi Water and Hydropower construction Kenya Limited](#) (2019) eKLR and [Ochako Obinchi v Zachary Oyoti Nyamongo](#) (2018) eKLR.

The Defendant's submissions

19. The defendant filed written submissions dated 19th April 2023 through Mahmoud Gitau Jillo Advocates.
20. It was submitted that the Plaintiff's claim is a tortious claim which was filed out of time beyond the three years' limitation period from 2013.
21. The Defendant also submitted that from the evidence that was tendered, the Defendant's testimony is more believable to the effect that the fiber optic cables are on the road reserve and done with the authority of KENHA.
22. Counsel for the Defendant also submitted that the Plaintiff had failed to discharge the burden of proof of trespass. Reliance was made to the case of [Justin Gatumatu v Kenya Power & Co. Ltd](#) (2018) eKLR.



Analysis and Determination

23. I have considered the pleadings, the parties written submissions and evidence tendered. The key issues that fall for determination are as follows:
- i. Whether the Plaintiff suit is time barred.
 - ii. Whether the Plaintiff has proved her case to the required standard.
 - iii. Whether the Plaintiff is entitled to the remedies sought.
 - iv. Who should bear costs of the suit.

I shall now proceed to analyze all the issues raised sequentially.

Issue No. I

Whether the Plaintiff's suit is time barred.

24. This is the first fundamental issue for consideration. The Defendant in its notice of Preliminary Objection and written submission challenged the suit on the basis that the same is time barred having been filed after 3 years basing on when the cause of action arose. It was argued that the Plaintiff's cause of action is based on the tort of trespass which occurred in 2013 and ought to have been filed at the very latest in 2016.
25. During the hearing the Plaintiff maintained that she knew of the trespass in March 2020. The same was also pleaded in her plaint.
26. Section 3(1) of the *Trespass Act*, Cap 294 provides that:
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
- This trespass is an intrusion by a person into the land of another who is in possession and ownership.
27. Trespass is considered an action of tort. Section 4(2) of the *Limitation of Actions Act* Cap 22 provides that;
- “An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”
28. In the instance case, it was the Plaintiff's case that he discovered the actions of the Defendant in March 2020 and to date the Defendant continued occupation is and still remains to date. From the foregoing, it is evident that the act of trespass as pleaded herein is an act of continuous trespass. Every continuous act of a trespass is a fresh trespass of which a new cause of action arises from day today as long as the trespass continues.
29. The onset of the trespass was in 2013. It is still continuing to the present day and solely for the benefit of the Defendant. In the case of *Gladys Koskey v Benjamin Mutai* (2017) eKLR the court held as follows:
- “On the first issue, the suit is founded on trespass which is a tort. Under section 4 of the *Limitation of Actions Act*, an action founded on a tort must be instituted within three years.



However, as the plaint indicates, the trespass is continuous and the *limitation of Actions Act* does not come into play. This is supported by the case of *Nguruman Limited v Shample Group Ranch & 3 others* Civil Appeal No. 73 of 2004 reported in 2007 KLR. Citing clerk and lindsel on Torts 16th Edition Paragraphs 23 – 01 the Court of Appeal stated that, “every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues.”

Similarly, in *Jospeh Koech v County Government of Uasin Gishu & 3 others* (2022) eKLR the court held that;

“The particulars of the trespass in the Plaintiff’s claim are clear that the 1st and 4th Defendants have entered the suit property and have remained on the same and have denied the Plaintiff’s entry to the same. It is therefore clear that trespass is a continuous one which cannot be barred either by the *Public Authorities Limitation Act* or the Law of Limitations Act.”

30. Being guided by the aforementioned authorities, it is evident that in the instant case the trespass first occurred in 2013 and continues to present day. As such the Defendant’s objection on whether the Plaintiff’s suit is time barred is unfounded. It is the finding of this court that the Plaintiff’s suit is properly before this court.

Issue No. II

Whether the Plaintiff has proved her case to the required standard.

31. It is trite law that whoever alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. It is not disputed that the Defendant entered into the Plaintiff’s property Kabete/Karura/2426 in 2013 and laid fiber optic cables and an inspection chamber. The Defendant however averred that the same were laid in a road reserve and upon approval from Kenya National Highways Authority.

33. During the hearing, the Plaintiff was able to adduce evidence and indeed testify that the said fiber optics were laid in her property. The Defendant did not produce any evidence to controvert the Plaintiff’s testimony on the issue. Neither did they produce any approval from KENHA to confirm that indeed the cables had been laid on a road reserve and with the approval of the KENHA. In the circumstances, this court is satisfied that the Plaintiff has been able to prove her case to the required standard.

Issue No. III

Whether the Plaintiff is entitled to the prayers sought.

34. The Plaintiff has sought for general and exemplary damages for trespass, an order for permanent injunction and costs of the suit.



35. As earlier stated, the onset of trespass was in 2013 and it is still continuing to the present day for the benefit of the Defendant. Hence therefore damages that ought to be awarded should be commensurate to the loss suffered by the Plaintiff from the Defendant's continuing trespass onto her land.
36. In her submissions the Plaintiff urged this court to award her Kshs 10,000,000 on account of general and exemplary damages for trespass. In the case of *Kenya Power & Lighting company Ltd v Ringera & 2 others* (Civil Appeal E247 of 2020 (Consolidated) (022) KECA 104(KLR) 4 February 2022) (Judgment), the Court of Appeal in considering an action of continuous trespass that had commenced in 2013 awarded Kshs 2,000,000 and Kshs 4,000,000/- respectively to the 1st and 2nd Respondents. Being guided by the above, I will equally proceed to award Kshs 2,000,000/- to the Plaintiff as general damages of trespass.
37. In respect to the prayer of a permanent injunction as sought against the Defendant, I wish to state that a permanent injunction prohibits a party from engaging in certain activities or mandates specific actions to be taken, typically for an indefinite or extended period. It is a final and binding remedy issued at the conclusion of a legal proceeding. Permanent injunctions are equitable remedies designed to prevent irreparable harm, protect rights, and ensure compliance with legal obligations. They are characterized by their enduring nature and ability to provide ongoing relief beyond the resolution of the immediate dispute a court will issue a permanent injunction only where momentary damages will not suffice. One of the essential elements in a suit for a permanent injunction is the absence of an adequate legal remedy. The plaintiff must demonstrate that seeking monetary damages or other legal remedies would not sufficiently address the harm caused or prevent future harm. This requirement emphasizes the unique nature of injunctive relief, which is sought when monetary compensation alone is deemed insufficient to protect the plaintiff's rights or interests. The inadequacy of legal remedies can arise due to the difficulty in quantifying the harm, the ongoing or irreparable nature of the harm, or the inability to fully restore the plaintiff's rights through monetary means. The court will consider whether an injunction is necessary to provide effective and equitable relief in the given circumstances.
38. In the instant case, the court is of the view that there exists an alternative remedy to the Plaintiff and further that the laid fiber cable continues to serve the general public and it will not serve any meaningful purpose in granting such prayer for permanent injunction as sought by the Plaintiff. In the circumstances the same is declined.
39. In respect to costs, as a general rule, costs follow the event unless the court for good reason orders otherwise. In the present case the Defendant's action triggered the filing of this suit by the Plaintiff. In the circumstances the defendant shall bear the costs of the suit.

Final orders

40. In conclusion, this court having been satisfied that the Plaintiff has proved her case against the Defendant to the required standard makes the following orders:
- a. General damages for trespass for Kshs 2,000,000/-
 - b. The Defendant shall bear the costs of the suit.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF AUGUST 2023.

E.K. WABWOTO



JUDGE

In the presence of:-

Mr. Gikunda for the Plaintiff.

Ms. Biegon h/b for Mr. Etemere for the Defendant.

