



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 776 OF 2012
SIMON NJENGA NDABA.....PLAINTIFF
VERSUS
KENYA POWER & LIGHTING CO. LTD.....DEFENDANT
RULING

1. This Ruling is on the Preliminary Objection raised by the defendant.
2. The said objection is that the plaintiff's cause of action was time-barred.
3. In order to put the issue within perspective, it is necessary to give a brief background to the objection.
4. The plaintiff filed this suit on 20th December 2012. The suit is premised upon the contention that the defendant had previously filed the case **K P L C VS. JOHN NJENGA NDABA HCCC NO. 1019 OF 2005** out of malice. The suit was said to have been filed with the sole intention of stopping the plaintiff herein from proceeding with the lawful construction works which he had started on his property L.R. NO. 209/178/20.
5. In that suit, the defendant herein had alleged that the plaintiff's actions (of carrying on with construction) had interfered with the defendant's way leaves.
6. The plaintiff is said to have commenced the construction too close to the defendant's High Power Overhead Transmission Lines. By so doing, the plaintiff herein was said to have been courting grave danger.
7. If the construction were allowed to continue, the defendant asserted that it would have been denied the ability to access the power lines quickly, in the event that there was either an emergency or alternatively when there was need for routine maintenance of the power lines.
8. It was the defendant's contention that if it was unable to quickly access the power lines, when necessary, that would expose the defendant to loss, avoidable claims and litigation.
9. The defendant asserted that it therefore had a duty to take reasonable care to avoid or prevent actions which were likely to endanger life and property of the members of the public.

10. Contemporaneously with the plaint, the defendant herein filed an application for an injunction to restrain the plaintiff from continuing with the construction.
11. Kubo J. heard the application and thereafter granted the injunction sought by the defendant. The court's injunction remained in force pending the hearing and determination of the application. In other words, the orders which were first granted *ex parte*, were extended from time to time, whilst awaiting the *inter-partes* hearing of the application.
12. The plaintiff says that the application against it was never heard *inter-partes*.
13. Instead, the defendant herein withdrew the whole suit on 16th November 2009.
14. The withdrawal of the suit against the plaintiff herein convinced him that the defendant had all along been actuated by malice, when it sued the plaintiff.
15. Meanwhile, because the injunction had stopped the construction works which the plaintiff would have been undertaking, the plaintiff attributes the losses he has sustained to the suit which the defendant had filed against him.
16. As a part of its answer to the claim, the defendant has asserted that the plaintiff's claim was time-barred, under the provisions of the Limitation of Actions Act.
17. When urging the Preliminary Objection, the defendant submitted that the claim which the plaintiff had mounted against it was founded on tort.
18. And, as Section 4 (2) of the Limitation of Actions Act stipulates that actions founded on tort should be brought within 3 years of the accrual of the cause of action, the defendant submitted that the plaintiff should have brought his claim by 16th November 2012.
19. Given that the plaint was filed on 20th December 2012, the defendant asked me to strike it out, because it was filed after the expiry of the limitation period.
20. In his answer to the Preliminary Objection the plaintiff described it as a non-starter which was far-fetched and frivolous. It was also said to be pre-mature.
21. The plaintiff concedes that the suit was withdrawn on 16th November 2009. However, he emphasized that time did not begin to run until 24th February 2010, when the court issued the certified copy of the order.
22. The plaintiff submitted that the defendant had the onus of proving that time begun to run from 16th November 2009.
23. The plaintiff further submitted that his claim against the defendant was substantive in nature, and it could not constitute an abuse of the process of the court.
24. The plaintiff quoted the following words of the Supreme Court of Uganda in **BWIRIZA VS. OSAPIL** [2003] 1 E.A 30, at page 38;

“The court held among others, that the principle of law that a person was entitled to recover damages in an action on the case of loss or harm, suffered as an inevitable consequence of the unlawful, international and positive act of another only applied if the act was illegal or forbidden by law, and did not apply to an act which was merely null and void and incapable of affecting legal rights”.
25. The Supreme Court of Uganda was commenting on what the Pirvy Council had said in the case of

DUNLOP VS. WOOLAHRA MUNICIPAL COUNCIL [1981] 1 ALL E R 1201.

26. The significant issue which Lord Diplock commented on is that these kinds of claims are known as “*Innominate torts*”.
27. I say that that is significant because the plaintiff, by relying on the case of **BWIRIZA VS. OSAPIL** [2003] 1 E.A 30 must be presumed to have acknowledged that his claim is founded on tort.
28. At any rate, the plaintiff did not assert that his cause of action was founded upon any other basis, other than that of tort.
29. I find and hold that the plaintiff’s claim is founded on tort.
30. Secondly, I do not understand the defendant to have asserted that the claim is without any substance, and that it was for that reason that the claim was an abuse of the process of the court. The plaintiff appears to have misunderstood the defendant.
31. In any event, if the defendant had suggested that the plaint should be struck out for lacking in substance, I would most probably have said to the defendant that such a submission would be premature at this stage.
32. The substance of a case or the lack thereof, ordinarily requires to be assessed on the basis of evidence and merit.
33. The defendant has asked this court to strike out the plaint because it was brought after the expiry of the Limitation period. In effect, it would not matter whether or not the claim was substantive: it was simply brought too late.
34. The provisions of Section 4 (2) of the Limitation of Actions Act provide as follows:
- “An action founded on tort may not be brought after the end of three years from the date on which the cause action accrued:*
- Provided that an action for libel or slander may not be brought after the end of twelve months from such date”.*
35. At paragraph 20 of the plaint, the plaintiff stated as follows:
- “The plaintiff avers that the Defendant’s suit against him was finally withdrawn on the 16th November and an order by this Honourable Court was issued to that effect on 24th February 2010”.*
36. There is no doubt at all that it was the withdrawal of the suit against the plaintiff that triggered this current suit. The said withdrawal was done on 16th November 2009.
37. Immediately after the suit was withdrawn, the cause of action accrued. There was no reason in law or in fact to warrant the waiting for the court to issue a formal certified order for the withdrawal of the case.
38. In similar manner, the issuance of the order for the withdrawal of the suit cannot constitute the accrual of the cause of action. The cause of action had already accrued from the 16th of November 2009. That meant that the Limitation period started running from 16th November 2009.
39. The plaintiff erred by contending that the limitation period started running from 24th February 2010.
40. In the circumstances, whether or not the plaintiff’s claim may have been substantive in content, he has

to be told that he moved the court too late in the day. Section 4 (2) of the Limitation of Actions Act makes it clear 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.

41. Therefore, the plaintiff was estopped, by law, from bringing his claim after the end of three years from 16th November 2009.

42. Accordingly, the Preliminary Objection is upheld. I therefore strike out the plaint. The plaintiff will pay to the Defendant the costs of the suit.

DATED, SIGNED and DELIVERED at **NAIROBI** this July day of 22nd 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Matwere for the Plaintiff.

Ken Fraser for the Defendant.