



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.334 of 2016**

**GEORGE NGWENA OBONYO.....1<sup>ST</sup> PLAINTIFF**

**PETER OCHIENG OPIYO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION**

**COMPANY LIMITED.....DEFENDANT**

**RULING**

1. **Kenya Electricity Transmission Company Limited (Ketraco)**, the Defendant, seeks vide the notice of motion dated 14<sup>th</sup> February 2017 to have the suit commenced by **George Ngwena Obonyo and Peter Ochieng Opiyo**, the Plaintiffs, through the plaint dated 28<sup>th</sup> September 2016 struck out and or dismissed with costs. The application is based on the six (6) grounds on its face and are summarized as follows;

- a) That the suit is scandalous, frivolous, vexatious and otherwise an abuse of the process of the court.
- b) That the suit does not disclose any reasonable cause of action.
- c) That the suit is statutorily time barred as the cause of action arose on 1983.
- d) That the suit is likely to prejudice and embarrass the Defendant and this application should be allowed in the interest of justice.

2. The application is supported by the affidavit sworn by Antony Mbunya Kiarahu, a Senior legal officer with the Defendant, on the 14<sup>th</sup> February 2017 in which he depones to the following among others;

- a) That the Defendant was incorporated as a limited liability company on the 2<sup>nd</sup> December 2008 and hence not in existence in 1983 when the alleged act of trespass occurred.
- b) That as the alleged cause of action occurred in 1983, the suit filed in the year 2016, which is 33 years later, is barred by the Limitation of Actions Act.
- c) That the Defendant's surveyors have established that none of the Defendants electric transmission power lines traverses land parcels **Kisumu/Kasule/2375, 6708 to 6710**.
- d) That the Defendant has not dealt with the Plaintiff or his representatives.

3. The application is opposed by the Plaintiff through the grounds of opposition dated 15<sup>th</sup> June 2017 which sets out two grounds as follows:

- a) The application does not meet the criteria for the grant of orders sought therein.
- b) The application is misconceived and lacks merits.

4. The application came up for hearing on the 30<sup>th</sup> January 2018 when Mr. Bukania and Achura, learned counsel for the Defendant and Plaintiff respectively, made their oral submissions.

A) MR. BUKANIA'S SUBMISSIONS ARE AS SUMMARIZED BELOW;

- a) That the Defendant is non-suited as they were not in existence in 1983 when the alleged trespass occurred.
- b) That the suit having been filed in 2016, which is 33 years after the alleged trespass, is statute barred under **Section 7 of the Limitation of Actions Act**. The learned counsel referred to the following cases;
  - **Haron Onyancha –V- National Police Service Commission & Another** [2017] eKLR.
  - **Bhundia Builders and Erectors –V- Ima Agencies Limited** [2014] eKLR.
  - **John Michael Wanjau –V- Municipal Council of Eldoret** [2013] eKLR.

B) MR. ACHURA'S SUBMISSIONS ARE AS SUMMARIZED BELOW;

- That the suit is not time barred as the trespass is continuing for the poles are still on the land. The learned counsel referred to the case of **Peter Mwangi Kabui –V- Rural Electrification Authority** [2016] eKLR.
- That pursuant to **Order 1 Rule 9 of the Civil Procedure Rules**, the suit should not be struck out for reasons of misjoinder. That the party sued as the defendant is the owner of the poles and transmission lines in issue, which were erected without the plaintiff's consent.

5. The issues for determination by the court are as follows:

- a) Whether the Defendant is non-suited in this case.
- b) Whether the suit is statute time barred.
- c) Whether the suit discloses a reasonable cause of action against the Defendant.
- d) Who pays the costs.

6. The court carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, oral submissions, pleadings filed, authorities cited and come to the following determinations;

- a) That the copies of title deeds in respect to land parcel **Kisumu/Kasule/6708 and 2375** annexed to the Plaintiff's list of documents confirms that Peter Ochieng Opiyo, the 2<sup>nd</sup> Plaintiff, became the registered proprietor of the two parcels on the 17<sup>th</sup> October 2014 and 28<sup>th</sup> October 1998 respectively. That further, the copy of the title deed for **Kisumu/Kasule/6710** also annexed to the said list confirms that the land got registered with the 1<sup>st</sup> Plaintiff on the 29<sup>th</sup> September 2014. That though the copies of the title deeds for **Kisumu/Kasule 6708 and 6710** indicates at page 2 that they are subdivisions from parcel 1261, that is doubtful as the copy of the green card for parcel **Kisumu/Kasule/1261** annexed to the Plaintiff's list of documents shows that the title was closed upon subdivision to parcels **1817 and 1818**. That the copies of the green card for parcel **Kisumu/Kasule/1817 and 1818** were not availed to the court.
- b) That though the Plaintiffs pleadings are unclear especially paragraph 6 to 8, it is however obvious that their case is that the electricity power lines were erected in 1983 and were still on the land by the time this suit was filed. That though the limitation period for an ordinary tort based claim as provided for under **Section 4 of Limitation of Actions Act Chapter 22 of Laws of Kenya** is 3 (three) years, the Plaintiffs claim is based on a continuing trespass. That like in the case of **Peter Mwangi Kabui – V- Rural Electrification Authority** [2016] eKLR, where a similar ground was raised in a preliminary objection and rejected, the court finds no merit in the objection based on the limitation for the continued presence of the poles and power line on the land makes the trespass, if established continuous.
- c) That having found as in (b) above, that the Plaintiffs claim is based on a continuing trespass, then the Defendant's ground that they only came into being in 2008, and therefore could not be held answerable for an act done in 1983 has no basis, as the trespass alleged by the Plaintiffs is continuing to date.

7. That for reasons set out above, the Defendant notice of motion dated 14<sup>th</sup> February 2017 is without merit and is dismissed with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF MAY 2018**

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Mr. Adeva for the Plaintiffs

Mr. Lugano for Simiyu for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**