



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 63 OF 2019

SATELLITE AVIATION TELECOMMUNICATIONS

SYSTEMS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

CHINA ROAD AND BRIDGE

CORPORATION (K).....2ND DEFENDANT

RULING

1. This Ruling relates to the Notice of Preliminary Objection dated 18th October, 2019 and filed on 14th November, 2019 as well as the Application dated 19th November, 2019 and filed on 21st November, 2019. The two will be addressed chronologically.

2. In the Notice of Preliminary Objection dated 18th October, 2019, learned counsel for the 2nd Defendant submitted that the Plaintiff has no reasonable cause of action as against the 2nd Defendant; that the 2nd Defendant was an agent of the 1st Defendant and that an agent cannot be sued where a Principal is disclosed. Counsel prayed that the suit against the 2nd Defendant be struck out and dismissed with costs.

3. The Application dated 19th November, 2019 and filed by the 1st Defendant on 21st November, 2019, sought for the following orders:

a. That this court does not have the requisite jurisdiction to hear and determine this suit.

b. That the Plaint dated 7th June, 2019 be struck out for being time barred.

c. That the costs of this Application and of the cause be borne by the Plaintiff.

4. The Application is supported by the Affidavit of the 1st Defendant's Senior Legal Officer who deponed that this court does not have jurisdiction to hear and determine this matter by dint of Section 83 of the Kenya Railways Corporation Act and that the appropriate forum would be Arbitration through a single arbitrator appointed by the Chief Justice.

5. It was deponed by the 1st Defendant's Legal Officer that the cause of action herein arose on 13th May, 2016 as a result of the construction of the Standard Gauge Railway; that the present suit was filed over three (3) years after the date that the cause of action accrued and that by dint of Section 87(b) of the Kenya Railways Corporation Act, the suit is time barred.

6. In reply to the Application, the Plaintiff's Director deponed that the Application is misconceived and bad in law; that the Application requires the court to delve into evidence and the merits of the case and that this court has jurisdiction to hear and determine the matter.

7. The Plaintiff's Director deponed that Section 83 of the Kenya Railways Corporation Act deals with issues of compensation arising from compulsory acquisition of land; that this matter has nothing to do with compensation and that Section 83(2)(b) of the Act specifically excludes this matter from the matters that should be referred to Arbitration under that Section.

8. It was deponed that this suit is not statute barred since it was filed within one (1) year after the 2nd Defendant, being the agent and/or contractor of the 1st Defendant, in a letter dated 6th August 2018, refused to deal with the issues raised by the Plaintiff and that before filing this suit, both the 1st Defendant and the 2nd Defendant had engaged the Plaintiff actively in a manner that suggested that they were willing to

settle the issues raised by the Plaintiff.

9. According to the deponent, the cause of action arose on 6th August 2018; that this suit was filed on 7th June 2019 which was well within the twelve (12) months stipulated under Section 87(b) of the Act and that the cause of action is a continuing one as per the expert's report.

10. The Plaintiff's Director deponed that the issues raised in this suit are in respect to poor drainage system and access to the Plaintiff's landlocked land and has nothing to do with issues of compensation to necessitate the participation of the National Land Commission or Arbitration.

11. The Notice of Preliminary Objection and the Application proceeded by way of written submissions. The Defendants' advocates submitted that this court is not cloaked with the requisite jurisdiction to hear and determine the present suit by virtue of Section 83(1) of the Kenya Railways Corporation Act ("*the Act*") which states as follows:

"(1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice."

12. It was the Defendants' counsels' argument that in the event of any damage caused by the 1st Defendant in the course of its statutory mandate, the available recourse is by way of compensation to be determined by the parties or a sole arbitrator and that in the Plaintiff alleges to have suffered damages as a result of floods which he claims are as a result of the works done in the construction of the standard gauge railway.

13. It was submitted by the Defendants' counsel that the Plaintiff's suit is time barred by virtue of Section 87(b) of the Kenya Railways Corporation Act which states as follows:

"Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect:

a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the Plaintiff or his agent; and

b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months after the cessation thereof."

14. It was submitted that the cause of action giving rise to the present Application is pegged on the Plaintiff's complaint by way of a letter dated 13th May, 2016 and that given that this suit was instituted on 20th June, 2019, which was more than three (3) years since the alleged cause of action complained of, then the same is time barred.

15. Reliance was placed on the Court of Appeal case of *Joseph Nyamamba & 4 others vs. Kenya Railways Corporation [2015] eKLR* where the court, while determining an Appeal against a decision to strike out a suit for being time barred as per Section 87 (b) of the Act stated as follows:

"Consequently the plaint and application was filed in contravention or violation of an express provision of a statute which is couched in clear and mandatory terms. We see nothing impairing access to justice and it is for the parties and their advocate to know the law and its consequences. If a party like the appellants sidestep an express provision of the statute, it cannot take refuge after the provision is brought to their attention. We see no fault in the way the trial judge determined the preliminary question. The trial court was right and we can only retreat that position to be the correct determination and interpretation of Section 87 of Cap 397. In the end the appeal has no merit and we consequently dismiss it with costs to the Respondent."

16. The cases of *Maersk (K) Limited vs. Kenya Railways Corporation Limited & Another [2007] eKLR*, *Joseph Sebastian Ringo vs. Kenya Railways Corporation [2015] eKLR*, and *J Wambugu & 8 others vs. Kenya Railways Corporation [2005] eKLR* where the courts struck out suits for being time barred by Section 87 of the Act were cited by counsel.

17. In response, counsel for the Plaintiff/Respondent submitted that this court has jurisdiction to hear and determine this suit because the dispute is about the use of land; that reliance on Section 83 of the Kenya Railway Corporation Act to impugn the jurisdiction of this court is misconceived and that any person seeking to rely on this provision ought to read it together with Sections 13, 15, 16 and 17 of the Act since it is matters that are dealt with under the said Sections that ought not to be filed in court but be submitted to a sole arbitrator appointed by the Chief Justice.

18. Counsel stated that Section 13 deals with powers of the Corporation (*Kenya Railways Corporation*) as a statutory body generally; that Section 15 deals with the Corporation's power to enter land to survey and cart away any material therefrom; that Section 16 deals with the Corporation's power to enter land to prevent accidents; that Section 17 deals with the Corporation's power to enter land to alter position of pipes and that Section 83 does not apply in respect to Section 14, which provides for acquisition of land for the purposes of the Corporation.

19. It was argued that the issues raised in this suit are issues of failure of the Defendants to fix a proper drainage system and failure to grant

access to the Plaintiff's landlocked land which are not issues contemplated under Sections 13, 15, 16, 17 or 83 of the Act. The Plaintiff's counsel relied on the case of *Ubah Ismail Mohamed vs. Gapco Kenya Limited & another [2019] eKLR*, where the court, while dismissing a Preliminary Objection, held as follows:

"15. That provision indeed prohibits bringing of a suit or action for recovery of damages arising out of execution of by the corporation of its mandate under Section 13, 15, 16 & 17 of the Act. Compensation for such damage is then dictated to be agreed between the corporation and the injured and on default an arbitrator be appointed by the Chief Justice. Clearly the claims outlawed from being pursued in court are those seeking compensation for damage occasioned. The sort of activities for which the corporation is shielded are those for which it is entitled to execute as a statutory body and its ancillary right to enter any land and carry out survey and to carry away excavated material or timber, enter land to prevent occurrence of an accident or enter land to alter position of pipes."

20. Counsel submitted that in this matter, the Plaintiff is seeking for orders of specific performance and injunction which are not the types of remedies contemplated by Section 83 of the Act.

21. On the second issue, the Plaintiff's advocate submitted that this suit is not statute barred; that the issue of a proper drainage and access to the remaining part of the suit land as raised in the letter dated 13th May 2016 was not fixed as agreed and that on 6th August, 2018, the 2nd Defendant's advocate unequivocally stated that it would not fix the problem.

22. According to counsel, the cause of action arose on 6th August, 2018 and that this matter was filed on 7th June, 2019, which was well within the twelve (12) months period stipulated under Section 87(b) of the Act. It was further argued that the cause of action complained of is a continuing one. Reliance was placed on Section 87(b) of the Act.

23. On the issue of joinder of the 2nd Defendant, the Plaintiff's advocate submitted that Order 1 Rule 9 of the Civil Procedure Rules provides that *"No suit shall be defeated by reason of misjoinder or non-joinder of parties"* and that the two Defendants are necessary parties in this matter.

Analysis and findings:

24. Having considered the pleadings and submissions of counsel, the preliminary issues for determination are whether the court has jurisdiction to entertain the suit and whether the suit is time barred. The court has also been invited to consider if indeed the 2nd Defendant is a necessary party in these proceedings.

25. This suit was commenced by way of a Plaint dated 7th June, 2019. In the Plaint, the Plaintiff averred that it is the registered proprietor of land known as 337/675 Athi River; that on 17th February, 2017, the National Land Commission gave notice of the government's intention to acquire a portion of the suit property and that the process of acquisition of the suit land was completed for the purpose of constructing the Standard Gauge Railway line.

26. The Plaintiff has averred that on 13th March, 2016, it raised with the 1st Defendant the issue of the lack of drainage around the land that was compulsorily acquired and the issue of the flooding of the remaining land wherever it rains. The other issue that the Plaintiff raised with the 1st Defendant was that after the 1st Defendant acquired a portion of the suit property, it left the remaining portion of the land landlocked, meaning that the Plaintiff's agents could not access the land.

27. In the prayers, the Plaintiff has sought for a mandatory injunction to compel the Defendants to fix the drainage system to prevent the flooding of the remaining portion of the suit property and for the Defendants to create a right of way to enable the Plaintiff access its land. The Plaintiff has also sought for general damages.

28. It is the 1st Defendant's argument that pursuant to the provision of Section 83 of the Kenya Railways Corporation Act (*the Act*), this court does not have jurisdiction to deal with the dispute. The Section provides as follows:

"83(1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice."

29. The applicability of the Section 83 (1) is limited to the acts of the 1st Defendant pursuant to the provisions of Sections 13, 15, 16 and 17, and not any other provisions of the Act. Section 13 of the Act deals with powers of the Corporation (*Kenya Railways Corporation*) as a statutory body generally (*but not compulsory acquisition of land*); Section 15 deals with the Corporation's power to enter land to survey and cart away any material therefrom; Section 16 deals with the Corporation's power to enter land to prevent accidents while Section 17 deals with the Corporation's power to enter land to alter position of pipes.

30. As correctly submitted by the Plaintiff's counsel, this suit has nothing to do with the powers of the 1st Defendant as stipulated under Sections 13, 15, 16 and 17, but has everything to do with the acts of the 1st Defendant that were allegedly committed when the 1st Defendant compulsorily acquired a portion of the suit property pursuant to the provision of Section 14 of the Act.

31. In view of the averments by the Plaintiff that while acquiring a portion of the suit land, the Defendants made the remaining part of the suit land a flood prone area and failed to create a road of access, it is this court that has the requisite jurisdiction to deal with the dispute. The

dispute falls outside the purview of the provisions of Sections 13, 15, 16 and 17 which, when read together with the provision of Section 83 (1) of the Act, ousts the jurisdiction of this court. The Defendants' objection to the jurisdiction of this court therefore fails.

32. The Defendants' counsel submitted that the Plaintiff's suit is time barred by virtue of Section 87 (b) of the Kenya Railways Corporation Act which states as follows:

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect:

a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the Plaintiff or his agent; and

b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months after the cessation thereof.”

33. The Plaintiff's claim is that the 1st Defendant, through the National Land Commission, compulsorily acquired the suit property vide a Gazette Notice number 1181 dated 17th February, 2015. In the Plaintiff's claim, the Plaintiff averred that on 13th May, 2016, the Plaintiff, through its advocate, wrote to the 1st Defendant raising a couple of issues, among them being the lack of drainage and/or proper drainage system around the land compulsorily acquired.

34. It is therefore obvious that as at 13th May, 2016, the Plaintiff was aware that after the 1st Defendant acquired a portion of the suit property, it made the remaining parcel of land a flood prone area wherever it rains and that the remaining parcel of land did not have an access road. That being so, the cause of action in this matter arose on 13th May, 2016, and not on a later date.

35. Indeed, in its letter dated 13th May, 2016, the Plaintiff's advocate informed the 1st Defendant that unless it puts in place drainage to ensure that the running water from the acquired area does not flood his client's land, then he will file a suit. The suit was not filed within twelve (12) months from the date of the said demand letter. Indeed, another demand letter was done on 30th May, 2016 raising the same issues.

36. The cause of action having arisen immediately after a portion of the suit property was acquired, and the Plaintiff being aware that the remaining portion of the suit property was landlocked and was prone to floods in May, 2016, it is my finding that this suit offends the provision of Section 87 (b) of the Kenya Railways Corporation Act, having been filed after the lapse of twelve (12) months from the date when the cause of action arose. That being so, I find and hold that this suit is statute barred as against the 1st Defendant.

37. The Plaintiff has averred in the Plaintiff's claim that a portion of his land was acquired by the National Land Commission on behalf of the 1st Defendant for the purpose of constructing the Standard Gauge Railway line, which has since been constructed to completion. According to the 2nd Defendant, the 2nd Defendant was an agent of the 1st Defendant and that an agent cannot be sued where the Principal is disclosed.

38. The issue of the 2nd Defendant being an agent of the 1st Defendant was admitted by the Plaintiff's Director in his Further Affidavit sworn on 28th August, 2019 as follows:

“3. That this suit is not statute barred since it was filed within one year after the 2nd Defendant being the agent and or contractor of the 1st defendant stated in a letter dated 6th August, 2019, their refusal to fix the issues raised by the Plaintiff...”

39. It is a cardinal rule of law that an agent cannot be sued in a situation where the Principal has been disclosed. In the case of *Anthony Francis Wareheim t/a Wareheim & 2 others vs. Kenya Posts Office Savings Bank, Civil Applications Nos. Nai. 5 & 48 of 2002*, the Court of Appeal held as follows:

“It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.”

40. The above holding was restated by the Court of Appeal in the case of *Victor Mabachi & another vs. Nurtun Bates Limited [2013] eKLR* as follows:

“The principle established in the above case still holds good. In the absence of factors vitiating the liability of the principal, we consider that the enjoinder of the appellants in the case is unwarranted.”

41. Considering that the 2nd Defendant was sued as an agent of a known Principal, and the suit as against the Principal being a nullity, the entire suit collapses on its face. The Preliminary Objection dated 18th October, 2019 as well as the Application dated 19th November, 2019 are allowed as follows:

a) The Plaintiff's claim dated 7th June, 2019 is hereby struck out.

b) The Plaintiff to pay the Defendants the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE