



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC 869 OF 2017

STEPHEN KARANJA CHEGE.....PLAINTIFF/APPLICANT

VERSUS

RURAL ELECTRIFICATION AUTHORITY....DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Preliminary Objection**, dated **27th June 2018** brought by the Defendant/Objector on the grounds that the filing of the suit contravenes the provisions of **Section 4(3) of the Limitations of Actions Act Cap 22 Laws of Kenya** hence it is bad in law, misconceived, incompetent and incurable defective and the same should be struck out. Further that the same is defective and offends the provisions of signing of pleadings set out under **Order 2 Rule 16**. Finally, that the suit is an abuse of court process and the same ought to be dismissed with costs.

The Preliminary Objection is opposed and the Plaintiff filed grounds of opposition **dated 29th August 2018**, and averred that the Preliminary objection is bad in law, incompetent and an abuse of the court process as the issues raised require evidence by way of affidavit. Further that the objection has not been raised in the pleadings. He further averred that the

case was filed within the limitation period as the injury is continuous and therefore the Plaint is not fatally defective. He contended that the Defendant/Objector is inviting the court by way of preliminary objection to determine the matter of technicalities.

On the **30th of October 2018**, the parties were directed to canvass the Preliminary Objection by way of written submissions and in compliance with the said order, the Defendant/Objector through the **Law Firm of Ochieng, Achach & Kaino Advocates**, filed his submissions on the **17th December 2018**. It was submitted that the cause of action arose more than six years before commencement of the action and therefore the suit should be struck out. The Defendant relied on various case laws amongst them the case of **Margaret Njeri Mbugua ... Vs...Kirk Mweya Nyaga (2016)**eklr where the court stated that;

‘From the above it is clear that an applicant can bring an application to strike out a pleading relying on any of the grounds listed in Order VI Rule 13(1).’

The Plaintiff on the other hand through the **Law Firm of Wangari Ndirangu & Company advocates** filed his submissions on the **21st December 2018**, and submitted that the case has been filed within the limitation period as the same is of the nature that the cause of action or

injury caused is continuous and that the Plaintiff signed all documents and if there is an omission the same should not impeded the cause of Justice. He relied on various cases amongst them the case of **Eliud Njoroge Gachiri v Stephen Kamau Ng’ang’a (2018)**eklr in which the court held that;

‘...However, in the case of a continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day or that the acts in the aggregate form one invisible harm.’

The Court has now carefully considered the instant Preliminary Objection, the pleadings and the written submissions and the Court will first determine whether what has been raised amounts to a Preliminary Objection or not. The Court will first determine whether what has been raised by the Defendant/Objector falls within the rubrics of **Mukisa Biscuits Manufacturers Ltd. ...vs... West End Distributors Ltd. [1969] E.A. 696** which describes a Preliminary Objection to mean;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if

what is sought is the exercise of judicial discretion.

It is evident that a Preliminary Objection has to raise pure points of law

and has capability of bringing a matter to an end preliminarily. It is evident that the Defendant has raised the issue of Limitations of Actions and that the suit herein is bad in law and is an abuse of the Court process. The issues raised herein are pure points of law and this Court finds that the Preliminary Objection falls within the description of a Preliminary Objection as stated in the Mukisa Biscuits case (supra).

Having found that the Notice of Preliminary Objection falls under the description of Preliminary Objection; the Court finds the issues for determination are;

i) Whether the suit for trespass is statute barred according to section 4 of the Limitation of Actions Act.

ii) Whether the Plaintiff is in contravention of the provisions on signing of pleadings.

i) Whether the suit for trespass is statute barred according to section 4 of the Limitation of Actions Act

The Defendant/Objector has averred that the suit is time barred as it contravenes the Limitations of Actions Act section 4. On the other hand it is the Plaintiff's contention that the suit is based on the act of trespass and that the said trespass is a continuous act and therefore not time barred. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”

The Court in John Kiragu Kimani ...Vs... Rural Electrification Authority [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as;

“any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.

The question that we must then ask ourselves is whether the Plaintiff has pleaded acts of trespass by the defendants in his Plaintiff. This Court answers this question in the affirmative. We then move to what is continuous trespass and in this regard how does continuous trespass work? Does it affect the Limitation of action or how do we then start counting time from the time that the trespass occurred?

The **Black Law Dictionary** has defined a continuous trespass as;

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.

Clerk and Lindsell on Torts 16th Edition Paragraph 23-01 has also defined a continuing trespass is defined as;

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

In line with the above definitions of a continuous trespass and this court having carefully gone through the Plaintiff, it is clear that the Plaintiff has alleged that the Defendant is still in the suit land and therefore the Defendant continues to commit fresh acts of trespass for every time that they continue being in the suit land. On this therefore time begins to run afresh and as long as the Defendant is alleged to still be in occupation of the suit property.

It therefore means that the Limitations of actions Act cannot be upheld in this instance. See the case of Gladys Koskey v Benjamin Mutai [2017] eKLR where the court held that;

“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 Plaintiff 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 Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004 reported in 2007 KLR. Citing Clerk and Lindsell 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”

ii. Whether the Plaintiff is in contravention of the provisions on signing of pleadings

Order 2, rule 16 of the Civil Procedure Rules provides that;

“ Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues

or defends in person.”

The court has carefully gone through the pleadings that have been presented before it and has noted that the said pleadings have all been signed and therefore the assertions that they are in contravention of the said order does not hold water.

Consequently the court finds that the suit is **not Statute** barred as the Plaintiff has alleged that the trespass is continuous and afresh actions arises as long as the alleged trespass continuous as pleaded. Further the question as to whether or not the trespass is real can only be determined during trial after the court has gone through the testimony of the parties.

Having now carefully considered the instant **Notice of Preliminary Objection** by the Defendant/ Objector, the court finds it is not merited and the same is dismissed entirely with costs to the Plaintiff. The suit to be set down for hearing and be determined on merit.

It is so ordered.

Dated, Signed and Delivered at Thika this 14th day of June 2019

L. GACHERU

JUDGE

14/6/2019

In the Presence of

.....**for the Plaintiff/Applicant**

.....**for the Defendant/Objector**

.....**Court Assistant**