



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ELC CIVIL SUIT NO. 87 OF 2012**  
**EVANSON JIDRAPH KAMAU WAITIKI.....PLAINTIFF/RESPONDENT**  
**-VERSUS-**  
**KENYA POWER & LIGHTING COMPANY LTD.....DEFENDANT/APPLICANT**  
**RULING**

1. The defendant/applicant has filed a notice of motion dated 30.3.2016 seeking for an order that the plaint dated 14<sup>th</sup> May 2012 be struck out for being scandalous or abuse of the Court process. The application is based on the provisions of Order 2 rule 15 (1) (d) of the Civil Procedure Rules. It is supported by the grounds listed on the face of the application.

2. The application is also supported by the affidavit of Emily Kirui. The applicant states that the plaintiff/Respondent while aware of the existing electric infrastructure on the suit property successfully negotiated a settlement/one off purchase of the suit property by the government of Kenya (GOK). Therefore the applicant states there is reason to believe that the plaintiff has been fully paid and adequately compensated by the government.

3. The applicant further stated that the intervention by the government to offer compensation to the plaintiff was to give an all inclusive compensation to the plaintiff for losses suffered after squatters took over his land which squatters were beneficiaries of the electric infrastructure laid by the defendant. The applicant contends that any payment being pursued by the respondent is against public policy and the same should be disallowed.

4. The application is opposed by a replying affidavit sworn by the plaintiff/respondent. In the affidavit, he narrated how he acquired the land and how the invasion by youths took place from December 1999. He also explained the processes he undertook to claim the land back particularly by filing of the suit Miscellaneous Application No 40 of 2000. He deposed that he placed a caveat on 30<sup>th</sup> September 2004 cautioning the general public against dealing with the parcels of land in dispute.

5. The respondent deposes that he discovered in 2008 that the applicant had erected transformers and power lines on this land without his consent. He deposes that until he sold the land to the Government of Kenya in January 2016, the applicant still continued with the acts of trespass by adding more transformers, power lines and cables in breach of section 46 of the Energy Act.

6. The respondent was aggrieved by these actions of the defendant and filed this suit on 14<sup>th</sup> May 2012 seeking various reliefs. In paragraph 24, he deposed that the trespasses increased due to power supply provided by the defendant. He admitted negotiating with the government to sell the land so as to resolve the squatter problem and an agreement was signed on 6<sup>th</sup> January 2016. He admitted that the transfer to the Government of Kenya and later issuance of titles to the squatters is a matter of public knowledge.

7. The respondent contends that the effect of transfer to Government of Kenya was to stop the continuing acts of trespass by the defendant. That his claim of trespass before the transfer is valid and is still pending. Besides he states his claim is also based on breach of statutory duty under section 46 and 52 of the Energy Act. He deposes that there is nothing contrary to public policy about this suit. He urged the Court to find that this application is a gross abuse of Court's process and ought to be dismissed with costs.

8. Mr Munyithya advocate for the applicant submits that parties are bound by their pleadings and that the prayers in the plaint can only be pursued if the respondent is the registered proprietor. He submits that it is public knowledge from reports circulating in the Kenyan website and media that the government purchased the land and fully compensated the respondent. This implies that prayer 14 (b) and (c) of the plaint cannot be sustained. In regard to prayer 14 (a), he invited the Court to look at paragraph 4 – 7 of the plaint.

9. The applicant submits that when the claim for trespass which is a tort was filed outside the time permitted by law (section 4 (2) of the Limitation of Actions Act). It is their case that compensation paid was inclusive. That for the respondent to dispute this, he must show/produce the settlement agreement. He continued that whatever payment this Court can find to be due to the respondent would be against public policy. He urged the Court to grant the orders sought.

10. Mr Gacheru in response submitted that there was no prayer for the plaintiff to produce the sale agreement. He submits that a suit can only be struck out if it is so weak that it cannot be amended. He also submitted that he who alleges must prove and that this burden was on the applicant/defendant. The Respondent submits that the newspapers cuttings annexed have no evidencial value and that the Court is being asked to assume the plaintiff was fully compensated.

11. Mr Gacheru submitted that the transfer of the land to the Government of Kenya did not affect the substance of this case. As regards limitation of time, he referred to paragraph 8 and 11 of the witness statement and stated that the cause action begins when the respondent discovered the act in 2008 and that the action was based on a continuing trespass. He referred the Court to page 5 of his list of authorities to show that his claim was not extinguished. Mr Gacheru admitted prayer (b) and (c) of the plaint is not sustainable. He urged the Court to dismiss the application to allow the suit to proceed to hearing on merits.

12. After reading the application and having considered the submissions rendered, I find two issues for my determination ;

**(i) Whether the plaintiff's claim was extinguished upon purchase of the land by the Government of Kenya.**

**(ii) Whether the claim is statute barred.**

13. The applicant filed a list of authorities which having read them I find they are all in regard to arbitral awards. The applicant did not highlight the parts relevant to their case neither did he refer to them in his submissions so I was unable to find their relevance to the matter before me. The respondent's cases and texts cited relates to the claim for trespass generally. They did not address me on a scenario where there is a change of ownership of the property as in this instance. The page 5 referred to by the applicant only discusses the meaning and effects of a continuing trespass.

14. It is public knowledge and that the Court takes judicial notice too the plaintiff also has admitted so that the subject parcels of land were purchased by the government. Subsequent to this sale, the

government issued title deeds to the squatters. Currently, the plaintiff has no interest on these parcels. However he maintains that he is entitled to damages for actions of trespass “committed” by the defendant before the sale hence this suit should proceed on merits.

15. The defendant thinks otherwise as in her view, the compensation paid by the Government of Kenya was all inclusive and therefore this suit should be struck out. The plaintiff admits prayer (b) and (c) cannot be sustained any more due to the change of ownership. Prayer (b) required the defendant to remove the electric infrastructure put on the suit parcels. Prayer (c) was seeking for an order of permanent injunction to stop the trespass. The only prayer remaining for determination is for general damages and costs of the suit **(prayer (a) and (d) of the plaint)**.

16. Can the respondent sustain this claim having passed his interest in the land to the Government of Kenya? He is claiming damages from 2008 when he discovered the acts of trespass by the defendant to when the sale agreement was executed on 6<sup>th</sup> January 2016. The plaintiff pleaded that the squatters invaded this land from 1999 and he got an order for their removal in 2007 vide an order of Court in Miscellaneous No 40 of 2000. He was unable to have the order executed but later entered into negotiations with the Government of Kenya to purchase the land.

17. The negotiations were successful and he was paid. The effect of this sale has regularised/legalised the squatters stay and remaining on the parcels of land as they have/are being issued with title deeds. My interpretation of this is that whatever action that previously was an act of trespass now ceased to be. If the squatters are no longer called trespassers but now are owners of the suit land then I do not see why the defendant's infrastructure on the land would still amount to trespass. In my opinion the transaction between the plaintiff and the government compromised the suit.

18. The defendant pleaded that the compensation paid to the plaintiff was all inclusive. The plaintiff on his part averred that it was incumbent upon the applicant to produce the settlement agreement to prove that the compensation was inclusive. I do appreciate that section 107 and 108 of the Evidence Act requires that he who alleges must prove. The respondent has not denied receipt of compensation from the Government of Kenya. In this instant, it was also incumbent upon him to rebut the allegation put forth by the defendant that the compensation paid did not include a settlement of this claim to enable him to sustain this suit. He intentionally did not annex a copy of the settlement agreement.

19. In light of the above observation, I am of the opinion that the effect of the settlement having regularised what was previously an action of trespass; the plaintiff's claim cannot be sustained against the defendant due to that settlement. The tort of trespass is only maintained where the claimant is the owner of the land. I am equating the plaintiff that he is entitled to damages ante 16<sup>th</sup> January 2016 to a person selling his land then telling the purchaser that the sale is minus the developments on the land. If that were so then there was no better way to demonstrate this than by letting this Court know the terms of that settlement/sale.

20. The second issue is whether the claim was time barred. The plaintiff pleaded that he discovered the acts of trespass in 2008 and when the defendant continued, he filed his suit on May 2012. As at the time when the negotiation with the Government of Kenya took place, the defendant's electric infrastructure was still on the suit parcels. The defendant's actions in my view were probably acts of “continued trespass”. I do not therefore comprehend the basis upon which this claim could be said to be time barred. The allegation of the claim being statute barred is misplaced and is hereby dismissed.

21. In conclusion, I am satisfied that the application has merit and allow it. This suit is struck out. I do make an order that each party bear their respective costs because at the time the suit was instituted there was a valid claim.

**Ruling dated and delivered at Mombasa this 13th day of July 2016**

**A. OMOLLO**

**JUDGE**