



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 62 OF 2015

JOHN KIRAGU KIMANI.....PLAINTIFF

VERSUS

RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT

RULING

On 11th October 2013, the plaintiff **JOHN KIRAGU KIMANI** filed this plaint at the High Court in Muranga seeking judgment against the defendant **RURAL ELECTRIFICATION AUTHORITY** in the following terms:-

(a) Special damages in the sum of Ksh. 981,939.00.

(b) An order for permanent injunction to restrain the defendant from trespassing onto the plaintiff's land.

(c) An order of mandatory injunction ordering the defendant to remove the high voltage line from the plaintiff's land.

(d) General damages.

(f) Costs and interest at Court rates.

(g) Interest on (a), (b) and (c) above at Court rates.

The basis of the plaintiff's claim is that he is in possession of plot No. LR LOC 9/KIRURI/519 (herein the suit plot) where he has planted Eucalyptus trees for commercial purposes. On or about the month of July 2009, the defendant's servants and/or agents unlawfully trespassed and entered into the plaintiff's land without his consent or permission and unlawfully cut off three hundred 300 mature Eucalyptus trees all valued at Ksh. 981,939.00. The defendant further, and in disregard of the plaintiff's protestations and without following due process, unlawfully installed a high voltage electric line traversing the plaintiff's land and insisted that nothing was to be grown underneath the said high voltage line. The plaintiff pleads that due to the defendant's unlawful destruction and the continuing trespass and insistence that nothing should be grown underneath the said high voltage line, he has suffered and continues to suffer immense loss and damage thus giving rise to this suit.

In its defence, the defendant denied having trespassed onto the suit plot adding that it had in fact sought and was granted wayleave consent by the plaintiff to install the electric line. The defendant further pleaded that this suit is in fact barred by the clear and mandatory provisions of the **Limitation of Actions Act** since the cause of action arose in July 2009 and it would therefore be seeking to have the suit struck

out or dismissed with costs.

The defendant did indeed follow up on that defence by filing a Notice of Preliminary Objection on 12th November 2014 to the effect that this suit is misconceived and incompetent as it is statutory barred under **Section 4 of the Limitation of Actions Act Chapter 22 Laws of Kenya**. That Preliminary Objection is the subject of this ruling and submissions have been filed by both **MWANGI CHEGE advocate** for the plaintiff and **WAHOME GIKONYO advocate** for the defendant.

I have considered the Preliminary Objection and the submissions by counsel.

A Preliminary Objection, as was held in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 896**;

“... 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”

The Preliminary Objection raised by the defendant is couched as follows:-

“Take Notice that the defendant herein shall raise a Preliminary Objection to this suit on the grounds that the entire suit is misconceived and incompetent and it is statutory barred under Section 4, Limitation of Actions Act Cap 22 Laws of Kenya”

In his submissions, however, counsel for the defendant has gone beyond the issue of limitation under the **Limitation of Actions Act** but has also added that this suit should in fact be handled by the **Energy Regulation Commission** established under the **Energy Act** and has cited my own decision in the case of **ALICE MWERU NGAI VS KENYA POWER & LIGHTING CO. LTD 2015 e K.L.R (ELC CASE NO. 287 OF 2014 KERUGOYA)**. Parties are bound by their own pleadings. In **CHUMO arap SONGOK VS DAVID KEIGO ROTICH 2006 e K.L.R**, the Court of Appeal held as follows:-

“The law is now settled that parties to a suit are bound by the pleadings in the suit and the Court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of the parties”.

The issue for my determination therefore is whether or not this suit is barred by the statute of limitation. Counsel for the defendant has cited **Section 4 (2) of the Limitation of Actions Act** which provides 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 occurred. It is therefore submitted that since the cause of action arose in July 2009 and this suit was filed on 11th October 2013, it is well outside the three years limitation period provided in law within which an action founded on tort may be instituted. Counsel for the plaintiff has however submitted that the trespass herein is a continuing one and therefore, a new cause of action arises from day to day and cannot be time barred. Further, two of the reliefs sought are injunctive orders and under **Section 4 (1) (e) of the Limitation of Actions Act**, the limitation period is six years.

It is clear from the plaintiff's pleadings that the trespass herein is a continuing one. In paragraph six (6) of his plaint, he pleads as follows:-

“The plaintiff further states that due to the said unlawful destruction and the continuing trespass and insistence that nothing should be grown underneath the said high voltage line, the plaintiff has suffered and continues to suffer immense loss and damage”.

A continuing trespass is defined in **JOWITT'S DICTIONARY OF ENGLISH LAW 2ND EDITION** as follows:-

“A continuing trespass is one which is permanent in its nature; as where a person builds on his

own land so that part of the building overhangs his neighbour's land".

In BLACK'S LAW DICTIONARY 8TH EDITION, a continuing trespass is defined as:-

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

Finally, in CLERK & LINDSEL ON TORTS 16th EDITION, *paragraph 23 - 01*, it is stated that:-

"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".

It is the plaintiff's case that the defendant unlawfully entered his land, cut down his trees and installed a high voltage electric line traversing the suit plot. The defendant has denied this but pleaded in the alternative that it sought and was granted wayleave consent to enter the land and install the electric line by the plaintiff. Whether or not such wayleave consent was in fact granted will be a matter for trial. However, it is clear that for as long as an alleged trespasser continues to occupy another's land unlawfully, such occupation of land remains a continuing trespass which is actionable from day to day so long as the trespasser remains on the land. In the circumstances of this case therefore, and since the defendant's occupation of the suit plot is a continuing act which is not denied save that the defendant pleads that it has the plaintiff's consent to occupy, I am not persuaded that this suit is statute barred. The Preliminary Objection premised on the **Limitation of Actions Act** is therefore dismissed.

Although the jurisdiction of this Court to handle this dispute in view of the provisions of the **Energy Act** was not specifically pleaded in the Preliminary Objection, both counsel for the plaintiff and the defendant addressed me on that issue in their submissions. I will therefore address it.

In urging this Court to decline jurisdiction in this matter in view of the provisions of the **Energy Act**, counsel for the defendant referred me to my own decision in the case of ALICE MWERU NGAJ (supra). In that case, however, it was not disputed that the plaintiff therein had assented to the defendant's proposal to construct an electric supply line through her land and had even been paid compensation though she challenged the amount awarded to her as being minimal and paltry. I declined jurisdiction and stated that the dispute was the preserve of the **Energy Regulation Commission** since it related to the amount payable in compensation. Any appeal therefrom would lie to the **Energy Tribunal** established under **Section 108 of the Energy Act**. That case is distinguishable from the circumstances obtaining in this case. In this case, the plaintiff has pleaded in paragraph four (4) of his plaint that the defendant has trespassed onto the suit plot **"without his consent or permission"**. The defendant on its part pleads in paragraph six (6) of its defence that it **"sought for and was granted wayleave consent by the plaintiff to enter into and also to install the electric line"**. As indicated above, whether or not the plaintiff consented to the installation of the electric line on the suit plot is a matter to be determined at the trial. It is clear therefore that some of the facts require to be ascertained by evidence and as was held in the case of MUKISA (supra), a Preliminary Objection raises **"a pure point of law"** and cannot be raised where facts need to be established by evidence. The issue as to whether the plaintiff consented to the installation of the electric supply line on the suit plot is clearly not **"a pure point of law"** which is what a Preliminary Objection is all about. Therefore, the Preliminary Objection that this suit is the preserve of the **Energy Regulation Commission** established under the **Energy Act** is not well founded and must be similarly dismissed.

Ultimately therefore, the defendant's Preliminary Objection filed herein on 12th November 2014 is devoid of merit. It is accordingly dismissed with costs to the plaintiff.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016

Ruling dated, delivered and signed in open Court this 25th day of November 2016

Mr. Chege for the Plaintiff/Respondent present

Mr. Maina for Mr. Wahome for Defendant/Applicant present.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016