



**Kenya Electricity Transmission Co Ltd v Obonyo & another (Civil Appeal 142 of 2018) [2023] KECA 1089 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1089 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 142 OF 2018  
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**KENYA ELECTRICITY TRANSMISSION CO LTD ..... APPELLANT**

**AND**

**PETER OCHIENG OPIYO ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE NGWENA OBONYO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling of the Environment and Land Court of Kenya at Kisumu (Kibunja, J.) dated 2nd May, 2018 in ELC Suit No. 334 of 2016)*

**JUDGMENT**

**JUDGMENT OF TUIYOTT JA**

1. On May 2, 2018, Kibunja, J. held that the application by Kenya Electricity Transmission Company Limited (KETRACO) (the appellant) dated February 14, 2017 seeking to strike out the suit by the George Ngwena Obonyo and Peter Ochieng Opiyo (the respondents) was without merit and dismissed it with costs.
2. The suit, being Kisumu Environment and Land Court Case No.334 of 2016, was commenced by the respondents against Ketraco vide a plaint filed on 8<sup>th</sup> December, 2016. In the suit, it was alleged that Ketraco erected and maintained a power line on Land Parcels described as Kisumu/Kasule/6708, Kisumu/Kasule/6709 and Kisumu/Kasule/6710 without the consent of the owner Jane Ocheng'e Obonyo (deceased), a step mother to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is now the registered owner of Kisumu/Kasule/6708 and also Kisumu/Kasule/2375.



3. The respondents asserted that the lines were erected without compensation and that Ketraco refused, neglected and/or otherwise failed to compensate them. In that plaint dated September 28, 2016 they sought the following prayers:
  - “(a) A declaration that the plaintiff is entitled to the compensation of the said land parcel.
  - b. A declaration that the defendant company removes their power line if they failed to compensate the plaintiff.
  - c. A permanent injunction restraining the defendant company, whether by themselves or their servant or agents or otherwise however from leaving their power line and continuing in occupant of the suit property.
  - d. Vacate possession of the land parcel.
  - e. General damages for trespass.
  - f. Costs of this suit together with interest thereon at such rates and for such period at times that the Honorable Court may deem fit to grant.
  - g. Any such other or further relief as this Honorable Court may deems appropriate.”
4. Ketraco resisted the claim and, as a bulwark, asserted that it was incorporated on December 2, 2008 and was not in existence in 1983 when the respondents alleged it entered and erected the power lines complained of. Further, that it does not own the offending electric transmission power lines.
5. Ketraco did not think much of the suit and hoped that the Environment and Land Court (ELC) would make short shrift of it in a striking out notice of motion dated 14<sup>th</sup>, February 2017. The ELC correctly summarized the grounds upon which the motion was premised to be that the suit was:
  - a. scandalous, frivolous, vexatious and otherwise abuse of the process of court.
  - b. did not disclose any reasonable cause of action.
  - c. was statutorily time barred as the cause of action arose on 1983.
  - d. is likely to prejudice and embarrass and the application should be allowed in the interests of justice.
6. In determining the motion, the learned trial Judge, inter alia, made the following findings:
  - “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 2nd Plaintiff, became the registered proprietor of the two parcels on the 17th October 2014 and 28th 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 1st Plaintiff on the 29th September 2014. That though the copies of the title deeds for Kisumu/Kasule 6708 and 6710 indicates at page 2 that they are subdivisions form 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 (tree) years, the plaintiffs claim is based on a continuous 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. During plenary hearing Mr. Wesonga, appearing for Ketraco, informed the Court that his entire appeal turned on one issue; whether the appellant should be liable for trespass caused by power lines which it does not own and which were erected before it was incorporated in 2008. In the meantime, Ketraco abandoned its criticism of the learned Judge's holding that the suit was not time barred.
8. Counsel submitted that the learned Judge did not consider that Ketraco, incorporated in 2008, could not trespass on the respondents' property in the absence of any evidence that Ketraco took over ownership of the power lines after it was incorporated. He contends that it was pleaded by Ketraco, and not controverted by the respondents, that it did not take over the management and control of the power lines.
9. Citing the decision of this court in *Clement Muturi Kigano v Kibera Development Company Limited* [2019] eKLR, Ketraco contends that tortious liability cannot attach to it for acts allegedly committed in 1983 when it was not incorporated.
10. Ketraco further asserts that, at the very least, the respondents did not plead or prove that the appellant took over the power lines.
11. The respondents neither filed submissions nor attended hearing.
12. The decision of this court in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR is considered to be the gold standard on the principles applicable when a court is determining a striking out application. There Madan JA (as he then was) stated:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."
13. There is no dispute that Ketraco was incorporated on December 2, 2008 and did not exist in 1983 when the trespass is alleged to have commenced. Yet the case by the respondents is that while trespass



commenced in 1983, it continues to date. The success or failure of the respondents' case turns on whether it will be able to prove that Ketraco assumed ownership of the offending power lines after it was incorporated. I understand counsel for Ketraco to be arguing that the respondents cannot discharge this burden because they have not in the first place pleaded that Ketraco is the owner of the power lines.

14. I have read the pleadings in this matter. Right away, the plaint is inelegant but what is to be made of paragraph 8?

“(8) By reason of the matter aforesaid the plaintiff has suffered loss and damages.

Particulars of loss damages

- a. The plaintiff has been deprived of the use and quite enjoyment of the suit property/land parcel.
- b. The defendant misuse of the land parcel of erecting line on the property has occasioned determent to the plaintiff.
- c. Further, the defendant company has prevented the plaintiff from accessing land parcel contract their homes thereon as the grandchildren of the land Jane whom the 1<sup>st</sup> defendant held laid in truth for have grown.
- d. The defendant erection of power line on the land parcel in an eye sore and has therefore defend and devalued the land parcel.

15. To be deduced from this clumsy pleading is that the respondents are accusing Ketraco of not only unlawfully entering the land but also of continuing to occupy it by maintaining the power lines. It is an averment that Ketraco either owns or has control over the power lines which remain erected on the suit property. It is not the business of the courts to punish inelegant pleadings if they somewhat reveal the case of a party. The respondents' pleadings are the type that can be revamped through amendment and should not suffer the fatal fate of a striking out. That is the counsel of the decision in *D.T. Dobia & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.

16. It is clear to me that the issue of ownership of the offending transmission line properly emerges from the pleadings and must be preserved and left for resolution through the taking of evidence. In the end, the learned Judge reached a correct decision by declining the striking out motion.

17. I would propose that the appeal be dismissed with costs.

#### **CONCURRING JUDGMENT OF JAMILA MOHAMMED, J.A**

18. I have had the benefit of reading in draft, the judgment of my brother, F. Tuiyott, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

#### **JUDGMENT OF JOEL NGUGI, JA**

19. I have had the advantage of reading in draft the judgment of Tuiyott, J.A. I entirely concur with his findings and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU, THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**F. TUIYOTT**



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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed.*

**DEPUTY REGISTRAR.**

