Meru Water & Sewerage Services Trustees (MEWASS) & 2 others v M'Mbijiwe (Acting as the Legal Representative of the Estate of the Late Hon. Kabeere M'Mbijiwe) (Environment & Land Case 28 of 2012) [2023] KEELC 20891 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20891 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 28 OF 2012

CK NZILI, J

OCTOBER 18, 2023

BETWEEN

MERU WATER & SEWERAGE SERVICES TRUSTEES (MEWASS) ..... 1ST APPELLANT

TANA WATER SERVICES BOARD ..... 2ND APPELLANT

COUNTY GOVERNMENT OF MERU ..... 3RD APPELLANT

AND

KINYUA M'MBIJIWE (ACTING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE HON. KABEERE M'MBIJIWE) ..... RESPONDENT

(Being an appeal from the judgment of the Water Appeal Board in Appeal No. 3 (W.S.) all of 2008 dated 2.03.2012)

JUDGMENT

1. Before the court are Appeals No. 28 of 2012 consolidated with Appeals No. 30B of 2012 and 31 of 2012, under an order made on 13.3.2017, with Appeal No. 28 of 2012 being the lead file.

2. The 1st appellant, by a memorandum of appeal dated 27.3.2012 faulted the judgment and an award of the Water Appeal Board in Appeal No. 3 (W.S.) of 2008 dated 3.3.2012 on the ground that:-

    i. It erred in law in entertaining, hearing, and determining a matter touching on trespass that fell outside its jurisdiction under Section 85 of the *Water Act*.

    ii. It erred in law in finding that the 1st appellant was an agent for Tana Water Services Board and, therefore, could not be sued jointly with its principal.

iii. It erred in law in failing to find the appeal before it offended the cardinal principle of common law that where the principal is disclosed, the agent should not be sued.

iv. It erred in assessing and awarding damages to the respondent without jurisdiction.

v. It erred in wholly relying on expert evidence of Gitonga Aritho, whose credibility was questionable, and therefore, the Board should have rejected the said evidence.

vi. It erred in law in failing to find the claim as statutorily time-barred and filed without leave whose reasons for the inordinate delay could not excuse the party from the *Limitation of Actions Act* (Cap 22).

vii. For relying on contradictory and speculative evidence lacking any sound legal basis.

3. The 2nd appellant, Tana Water Services Board, by a memorandum of appeal dated 27.3.2012, faulted the judgment and award made on 2.3.2013 for:

i. It is contrary to the provisions of the Registered *Land Act* (Cap 300) (repealed) and the Land Disputes Tribunal Act 1990 (repealed), in determining the issue of land ownership, exchange, and trespass.

ii. It occasioned an injustice to it.

4. The 3rd appellant, who is the County Government of Meru, as the successor of the defunct Municipal Council of Meru by a memorandum of appeal dated 26.3.2012, faulted the judgment on the ground that the Water Appeal Board erred in law in;- (1)entertaining the appeal in the absence of a decision or order as required under Section 85 of the *Water Act* 2002.

i. Erred in adjudicating on a claim based on trespass

ii. Ordering it to pay damages of Kshs.Nine million to the respondent

iii. Erred in assessing damages that were neither pleaded nor strictly proved.

iv. The award had no basis in law.

5. As a first appeal, the court is mandated to rehear, re-appraise, and re-assess the lower court record and come up with independent findings on law and facts while mindful that the tribunal had the benefit of hearing and assessing the demeanor of the witnesses and parties first hand. See Abok James T/A Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR and Gitobu Imanyara & 2 others vs AG (2016) eKLR.

6. Before the Water Appeal Board, the respondent had filed a further amended appeal dated 27.9.2010. He had sued the appellants herein as respondents, claiming that he was the registered owner of L.R. No. Ntima/Igoki/2032, within the municipality of Meru, a freehold title (hereinafter the suit premises). He complained that the 2nd appellant, as a Water Services Board, was in charge of the 1st appellant. It was averred that the 1st appellant, as the managing agent of the 2nd appellant, was the one in occupation of the suit premises, storing, treating, and supplying water to consumers at a fee and profit, while the 3rd appellant was a stakeholder in the 1st appellant.

7. The respondent had averred that the decision he was appealing against was over the appellants' refusal to admit liability for trespass to his land, failure to remove the water tanks and works allegedly unlawfully constructed on his land, declining to pay damages for trespass and compensation based on profits earned out of the water sales processed on his land.

8. The respondent's grounds of appeal were that, about 1990, the 3rd appellant's Council, without his permission, trespassed on the suit premises and caused to be constructed thereon water treatment works. In doing so, the respondent averred that the 3rd appellant took advantage of his illness and extended absence from the suit premises while seeking treatment overseas to trespass on his land. He averred that the Ministry of Water Development constructed water storage and treatment works as a joint venture between it and the Council and was operated by one or both. It was averred that the Council purported to allege that the respondent had surrendered the suit premises for use as a public utility in exchange for a commercial Plot No. 51 at Gakoromone area within the Council area. Further, the respondent averred that he did not enter into any negotiations, agreement, or exchange of the suit premises with any other plot or show interest in doing so. The respondent averred that the 1st and 2nd appellants were liable for the wrongful acts because of all the water assets, processing, management, and services on his land.

9. As a consequence, the respondent averred that he had been deprived of the use and enjoyment of the suit premises because of the appellants' joint and several wrongful acts and had thus suffered loss and damage, including being denied the opportunity of utilizing the suit premises for an intended construction of a multimillion macadamia nuts processing factory and its attendant income.

10. The respondent averred that in addition to the damages and other compensation, he was entitled to an order of eviction, removal of the developments, and an order restraining the appellants from trespassing into his land.

11. As to particulars of loss and damage, the respondent pleaded that the appellants;

    i. entered the suit premises without his authority;

    ii. committed acts of wanton wastage;

    iii. denied him the enjoyment of the suit premises;

    iv. erected illegal structures;

    v. remained on the land without rights;

12. Therefore, the respondent prayed for:

    a. An order that the appellant so were not entitled to enter and occupy the suit premises.

    b. The appellants to surrender, give up possession, remove their facilities and apparatus, and vacate the suit land,

    c. an order of eviction to be issued.

    d. Damages for trespass.

    e. An order that the appellants account and pay him a fair share of proceeds generated and or earned from the water sold from the treatment works with interest.

13. The 1st, 2nd, and 3rd appellants responded to the appeal by responses dated 29.6.2010 and preliminary objection dated 15.7.2010, 12.11.2008, and 16.3.2009, respectively.

14. The 1st appellant denied that it was a limited liability company but admitted being an agent of the 2nd appellant. It denied any alleged trespass since its activities on the suit premises were lawful and had crystallized out of prolonged usage and possession, extinguishing any rights belonging to the respondent.

15. Further, the 1st appellant averred that the suit premises had been acquired for public purposes and that the respondent had been duly compensated with an alternative Plot No. 51 Meru Municipality Block II/99, hence why the respondent had not staked any claim on the suit land for a considerably long period. Additionally, the 1st appellant denied any liability to the respondent's claim for it had not trespassed on the land or for any compensation or damage. The 1st appellant averred that it was unaware of the particulars of loss and damage, the claim did not lie in law, and being an agent of the 2nd appellant, it had been unnecessarily sued in the appeal.

16. In the notice of preliminary objection dated 15.7.2010, the 1st appellant averred that the Board lacked jurisdiction under Section 85 of the *Water Act* 2002 to hear and determine the matter, the appeal was incompetent and a gross abuse of the tribunal's process and that it was improperly sued contrary to Section 3 of (Cap 164) Laws of Kenya.

17. The 2nd appellant denied the allegations of liability or trespass, refusal to remove water tanks, or pay damages. It averred that there existed no contract or otherwise to pay any compensation to the respondent since the 2nd appellant took possession of the suit premises with the consent, knowledge, and understanding of the respondent, who had surrendered the premises in exchange for a commercial Plot No.51, which he had taken possession of and started utilizing. They denied any wrongful acts committed by the 2nd appellant, for the respondent was never deprived of the use and enjoyment of the premises, since he had been adequately compensated.

18. Further, the 2nd appellant averred that the reliefs sought for eviction could not arise for the property had been acquired legally and procedurally, with the respondent's knowledge, consent, and participation and should be ready to transfer the suit premises to it, having been compensated.

19. The 3rd appellant denied the alleged trespass or construction and operation of the works thereon or by it solely or in conjunction with the Ministry of Water Development. The 3rd appellant averred that it was not liable for the respondent's claim, nor could any such claim lie in law.

20. This is quite unfortunate that the record of appeal filed on 19.12.2022 and the supplementary record of appeal dated 12.10.2023 is at variance with the Water Appeal Board (W.A.B) file forwarded to this court; for instance, the typed proceedings start from a date of 22.2.2002 and are followed by an entry of 18.6.2011 on page 34 of the supplementary record of appeal, the date given for hearing is on 19.5.2020. On page 39, the date for cross-examination is given as 17.2.2011. So, instead of the proceedings starting from the front, the 1st page of the proceedings is on page 55 of the supplementary appeal record, moving backward. The handwritten notes are tampered with.

21. Additionally, the handwritten proceedings were not serialized chronologically. Be that as it may, the proceedings on page 55 of the supplementary record of appeal do not indicate the date the W.A.B. started hearing the appeal and the board members present. There is, however, an indication that the issue of jurisdiction was raised and directions given for an objection to jurisdiction to be filed within 14 days. The appeal was listed for hearing on 12.7.2010. The 1st appellant had raised two issues: the jurisdiction of the Board to entertain the matter and how the 1st appellant had been joined in the appeal.

22. The record shows that the respondent testified on 26.11.2010 as per page 49 of the supplementary record of appeal. It is unclear from the handwritten notes whether the witnesses were sworn. Briefly, the respondent's evidence was that he owned L.R. No. Ntima/Igoki/2032, which he bought in 1970, was issued a title deed dated 29.10.2017, as per the official searches dated 26.11.2007, 13.7.2010. He produced the official searches and a copy of the title deed as exhibits. The respondent testified that he had charged the property with Barclays Bank of Kenya in 1972 and which was discharged in 1979,

when he took another loan with Agricultural Finance Corporation (AFC), but the loan was cleared on 7.12.2006.

23. As to why he was before the Board, the respondent said that the Ministry of Water Services Development had brought water tanks onto his land in 1990, alleging that the land had been given to them by the Meru Municipal Council, yet he had no such agreement with either of the appellants. He said that he was informed at the time by both the Ministry of Water and the Municipal Council of Meru that they would acquire the land for their use but did not value the land.

24. The respondent denied receiving compensation through an exchange with Plot 51, now Meru Municipality Block 11/199, ever taking possession of it since he had never applied for such a plot as compensation for the suit land. Similarly, the respondent denied appearing before any committee regarding the said plot.

25. The respondent told the Board that he then instructed his lawyers, who wrote a letter dated 22.3.2020 to the 1st appellant, who referred him to Tana Water as the responsible entity. In a letter dated 18.4.2007 to 2nd appellant and the Ministry of Water dated 11.6.2010, he said he was told that the Municipal Council of Meru had compensated him with Plot No. 51, and one Dr. Mwangi was given Plot No. 52. The respondent said that he several wrote another letter to the 2nd and 3rd appellants for trespassing on his land and demanding compensation who never replied to his letters. He denied receiving any letter of allotment dated 25.8.1992 from the Municipal Council of Meru since the address allegedly used to forward the letter was not his, nor had he been shown where the plot was. As a result, the respondent said the Board visited the site on 29.9.2010. He denied having been approached by the Municipal Council of Meru about his land or holding any discussion with them about the plot. He believed his plot was 0.2 ha, while the plot he was being offered was 0.0360 ha. He stated that he never met the conditions set in the allotment letter.

26. The respondent said he had intended to put up a processing plant and a macadamia factory on his land but could not do so since he was denied access to or enjoyment of his land. Consequently, the respondent said he instructed M/s Gitonga Ritho Associates to value his land, which he did as per the valuation report marked as exhibit AP1 of April 2009. He denied the allegations made in a council meeting of 19.9.1989 that he had been served with such a letter or a communication alluded to in the meeting of 13.3.1990 as the Council of the one alleged of 6.2.1992 at the District Commissioners offices. The respondent stated that he had consistently paid land rates for his land with the county as per the receipts he produced as exhibits. The respondent said he was claiming compensation as per the inspection and valuation report by Mr. Ritho's Associates and since water was important to the public and would not like to inconvenience the public; a compensation for the land at its current value; profit for the same and costs for the appeal could be appropriate so that he could transfer the property to the appellants.

27. In cross-examination, the respondent admitted that he had contacted the Ministry of Water through Mbaabu Inoti Advocates by a letter dated 9.2.2001, but was soon taken ill and went overseas for treatment. His view was that the 2nd appellant was part of the Ministry of Water to which he had written a letter to the permanent secretary and the Hon. Attorney General dated 4.6.2001, together with a letter dated 13.7.2001 to the clerk Meru Municipal Council. The respondent said the Ministry referred him to the Municipal Council of Meru. His view was that the 1st appellant, as per a letter dated 2.4.2007, was a managing agent of the 2nd appellant. He denied having been invited to any consultation meetings by the appellants. Similarly, the respondent denied that the appellants had compulsorily acquired his land.

28. Gideon Maitima Gitonga Aritho was the respondent's first witness. As a registered valuer and a qualified graduate of the University of Nairobi, Bachelor of Arts Land Economics since 1972, he told the Board that the respondent had contracted him to evaluate his land, and following a visit to the site on 19.3.2009, he carried out a valuation assessed the mesne profits at Kshs.55,787,000/= for the period 2002 – 2008; covering the value of the land. He produced the report as exhibit number 19.

29. In cross-examination, the witness said his terms of reference had implied a valuation of the land but could not get any accounts of 1990 – 2002 of the 1st appellant since there was no construction before 2002. He said note 6 of page 17 of the report was based on the assumption that the respondent had intended to build a factory on the land. After being stepped down, the witness made some corrections and additions to his report and told the Board that the earlier one was based on mesne profits while the new one included a profit ratio based on the production and supply.

30. The witness told the Board that the Ministry of Water had put up water tanks on the plot because the Council had assured them there had been an agreement with the respondent to give out his plot, yet no minutes or negotiations to that effect had taken place leading to the respondent taking up the alternative plot or handing over his land through a formal transfer process. The witness said the net surplus was used to calculate the profit, including the grants. In cross-examination, the witness said his terms of reference had implied the valuation of the land for the period in dispute.

31. Cross-examined by Mr. Kariuki advocate, the witness stated that page 17 of the report was based on water production and supplies as per the record held by the 1st appellant. He admitted that he had not verified the same with the 1st appellant. Asked about the capacity, the witness said there appeared to be a variance; hence, the figure of 4364 m^3 was not actual. The witness also admitted that the 1st appellant may not have been operating at 100% efficiency, so it was not every day that the four tanks would be expected to hold 960m^3 each. He admitted that the figure of 960m^3 was the one he had used to arrive at a figure of Kshs.4,428,150/=. Similarly, the witness admitted that some sewerage activities were happening at the suit land, whose billing differed from Water's services. Additionally, the witness admitted that in his report, he had not calculated the exact figure for the sewerage activities out of the profits generated. Further, the witness admitted that the revenue shown on page 13 of the report included the grants that were not direct from the water expenses. Regarding the waterworks, the witness acknowledged that not all water treatment units were situated in the suit premises.

32. Regarding the backwash appearing on note 3 of page 17 of the report, the witness said it was based on an assumption; hence, 4.1% was not valid in the same case, with the rate of return indicated as 20% of the capital. Therefore, the witness acknowledged that the Kshs.21,250,000/= was based on the assumption that profits would always be generated, which could not be guaranteed. On page 16 of the report, the witness said that the figure was not from any reference material but based on assumptions and expenses.

33. In re-examination, Mr. Aritho said that in Table 1 of his report, the figures were drawn from the 1st appellant's records, though they had not been presented sequentially. Regarding efficiency in operations, the witness said that his report on page 14 had taken into consideration for 2002 – 2007. On the authenticity of the figures based on the report from the 1st appellant, the witness said the report was drawn from the 1st appellant's offices, even if it was not on the Internet. He could not tell where the capacity of 4364m^3 was coming from.

34. On sewerage activities, the witness said there was a meter indicating how much Water had gone into the sewerage system and that the total profit was Kshs.20,736,986/=. On how much was for both sewerage and water activities, he admitted that grants were not a direct profit from the suit land. On

the annual water consumption calculations, the witness acknowledged that the report did not factor in any attendant disruptions of the services. Similarly, the witness admitted that the 1st appellant was unaware he was doing the valuation process since he did not seek their authority to access the site to carry out the exercise.

35. The 2nd appellant called Kereke Kamwaro as its first witness. As an employee of Tana Water Board based in its region offices in Nyeri, his evidence was that the Board was established in 2005. He testified that the Ministry of Water had put up the assets on the suit land before the 2nd appellant acquired them in October 2005, as per the transfer plan vide Gazette Supplement No. 38 dated 12.8.2005, Legal Notice No. 101. He told the Board that the role of the 2nd appellant was to use those assets to provide adequate Water to all the districts under its jurisdiction as licensed by Water Services Regulatory Board (WASREB).

36. The 2nd appellant said that the 2nd appellant had contracted the 1st appellant to run water services from 26.7.2005 as a water services provider approved by WASREB in Meru Town and its suburbs. According to the transfer plan, the witness said the 1st appellant was contracted to operate and maintain water supply to the Meru Township residents and pay a monthly levy of 9% of all the revenue generated from the assets therein, which remained the property of the 2nd appellant.

37. The 2nd appellant denied that the 2nd appellant interfered in any way with the respondent's property since it was not in existence when the water tanks were being put on the suit premises. The witness said that the dispute only came to their knowledge in July 2007 and, in the process, it received several communications before its existence between the 1st appellant, the Ministry of Water, and the defunct Municipal Council of Meru where the respondent was accusing the Ministry of Water for trespass. He said the claim was invalid since, from his investigations, minutes indicated a land transfer by the Meru Municipal Council to the respondent, in exchange for the suit premises for the Ministry of Water to expand the water supply. Further, he said that according to the records, the respondent had been compensated with Plot No. 51, at Gakoromone market and was supposed to have surrendered his title deed to the 2nd appellant to process its title. He could not tell why the respondent did not surrender the title deed.

38. In cross-examination by the respondent, the witness said that the 2nd appellant did not acquire any agreed liabilities, save for some debts of chemicals owed to some suppliers, and was unaware of a liability such as the suit land when they took over. The witness said the assets taken over from the Ministry of Water by the 2nd appellant were the intake component, grants, mean system treatment units, pumping stations and their pumps, filters, operational offices, and the land. He said this was contained in the inventory prepared per the transfer plan. In his view, the evidence of ownership should have been included in the letter of allotment and the title deed, which were not handed over to it.

39. As to whether the 2nd appellant sought for the nullification or change of the title deed held in the name of the respondent as per his title deed before the court, the witness said that no such actions had been taken but was aware a team from his office who had visited the site. He also clarified that the 2nd appellant did not acquire any deed of surrender of the plot to them or their predecessors from the respondent. His view also was that they did not have documents showing that the respondent had taken possession of the land and or utilized it apart from them.

40. In cross-examination by Mr. Ringera for the county, the witness said that all the properties or developments on the suit land initially belonged to the Ministry of Water, which constructed them in 2000, since the Ministry of Water owned an adjacent land to the suit land.

41. In re-examination, the witness said that the gazette notice contained the procedure of transferring assets and liabilities from the Ministry of Water and the Municipal Council of Meru and that the respondent had made no objection to the takeover. Further, the witness said that the role of the 1st appellant was purely to provide water and surrender 9% of the revenue monthly to them. The witness said they did not have any report regarding the site visit of 29.9.2010. Likewise, the witness confirmed that the water board did not formally communicate with the respondent over the issue. Further, the witness confirmed that the Board had not challenged the respondent's title deed or sought a title deed for the plot from either the Ministry of Water or the Municipal Council of Meru. Similarly, the witness said that the Board was not privy to the compensation negotiations regarding the property; otherwise, the source of information on the surrender of the property had come from the municipal Council of Meru.

42. Joseph Muthimba testified as the 3rd defense witness on behalf of the 3rd appellant. He told the Board that he knew of the dispute, having worked as a works officer for 20 years. According to him, the council record or property registers showed that Plot No. 51 was in the name of the respondent. He denied the alleged trespass to the suit land since the mandate to provide water services was with the 1st appellant, before which the Ministry of Water was in charge. He said that initially, the Ministry of Water was in an adjacent plot, but the municipality participated in acquiring the suit premises. After the government of Kenya had approached the defunct Council, the witness said that the plot allocations committee, out of a consultation held on 6.2.1992 at the District Commissioner's Offices directed parcels number L.R. No. Ntima/Igoki/2032 and 1903 be identified, of which the plots allocations committee recommended Plots No. 51 and 52 be prepared by the physical planner for allotment by the Commissioner of Lands to the respondent and his neighbor. He produced the minutes for 19.7.2010 as exhibits YAF.

43. The witness said that the allocation committee's recommendations were implemented and a letter of allotment issued to the respondent on 25.8.1992, whose conditions were to surrender L.R. No. Ntima/Igoki/2032. He could not confirm if the respondent received the letter of offer. Subsequently, the witness said that the Ministry of Water did not ask the 3rd appellant for anything else, nor did the latter have any other interest in the suit premises. As to land rates, the witness clarified that no land rates were demanded from the respondent for the allocated plot. He clarified that he was not aware of any full council meeting minutes for the allocation of the plot, nor could he tell if the respondent was aware of the locality of the plot.

44. Cross-examined by the respondent, the witness told the Board that he was unaware of any meeting where the Council had invited the respondent to discuss the allocated plot save to add that documents were there to show that the two parties negotiated on the issue. His view was that despite non-compliance with the terms and conditions of the offer, the plot still belonged to the respondent and not the Ministry of Water. The witness said that the transfer process for L.R No. 2032 was not followed to completion and that the Council may have had no mandate to negotiate a freehold plot without the owner. Similarly, the witness said that in 1992, the Council had no interest in the suit premises and could not tell the basis upon which the Ministry of Water put up the water tanks on the land or why the respondent never took possession of the land from the Ministry of Water or 2nd appellant.

45. The witness, cross-examined by Mr. Kariuki advocate, stated that exhibit number 13 was a land rates receipt for 28.2.2011 for Kshs.5,684/= paid by the respondent but could not verify the outstanding rates owed. On the surrender of the property, the witness said that though the respondent had consented to the same, the due process had not been followed; otherwise, the council record would not have reflected him as the owner.

46. On the plot allocated to the respondent, the witness confirmed that it was only temporarily occupied by hawkers who paid a daily fee of Kshs.30/= to the Council, which remained an open space. Similarly, the witness said that no records existed that the government of Kenya had compulsorily acquired the suit premises.

47. George Karanja testified as the 4th defense witness. As the technical manager of the 1st appellant, he told the Board that the 1st appellant, as an agent of the 2nd appellant, undertook water and sewerage activities as a trust established under the law, over Meru town and its environs. He said the 1st appellant commenced its operations in 2002. Concerning the equipment on the suit land, the witness said there were four water treatment units owned by the 2nd appellant, which the 1st appellant used to treat and supply water to the residents of Meru on behalf of 2nd appellant. He said the four units were part of the eight units designed to treat 960 cm^3 per day. The witness said that the eight units did not operate at 100% efficiency since the demand for water was low, so the optimum operational capacity was approximately 50% as opposed to what was contained in D. Exh No. (19) at pages (7) & (17). The witness said the 1st appellant generated revenue from the sale of water, sewerage charges, and donations. He said sewage was treated on a separate plot in Gakoromone area but covered only specific clients based in CBD Meru Town. As to the backwash captured on page 14 of Exh No (19), the witness said it had no relationship with the record held by his organization, whose mandate fell under four departments: technical, commercial, procurement, and human resource. He disputed the correctness of the report, since there were official ways of retrieving information from the agency. He said any profits generated were ploughed back to extend and improve its services; otherwise, it was not a profit-making enterprise.

48. In cross-examination by the respondent, the witness said the correct name of the agency was Meru Water and Sewerage Services Registered Trustees. He said that it only learned of the land ownership dispute in 2007 and escalated the matter to the principal. His evidence was that he visited Plot No. 51 and had no doubt it belonged to the respondent regardless of his development.

49. The witness denied that the 1st appellant had trespassed on the suit premises. Asked about an alternative report to counter Exh No. (19), the witness insisted that the figures on operations and the basis of the findings were unjustified since Meru town was the only town with excess water. He said that as an agent of the 2nd appellant, it was bound by the position taken in the dispute and could not, therefore, be evicted from the land. The witness cross-examined by Mr. Kariuki advocate confirmed that the 1st appellant was a registered trust and that the correct data on its operations, revenues and expenses was available to anybody upon official request. Therefore, the witness said that the report by the respondent had not been verified as authentic and as emanating from the agency.

50. After the close of defense testimony, parties were directed to file written submissions by 28.6.2011. The respondent on 18.6.2011 reiterated that the case about trespassed was rightly and duly before the Board.

51. The 1st appellant submitted that the land was acquired with the knowledge and consent of the respondent, who raised no objection to Gazette Supplementary Notice No. 61 of 2005 and had earlier on negotiated with the Municipal Council on the exchange of property. In the absence of the objection to the legal notice, the 1st appellant submitted the legal notice remained unchallenged; hence his title was null and void.

52. The 2nd and 3rd appellants relied on the written submissions dated 10.6.2011, and 21.6.2011 save to distinguish the case of Isaac Karuri Nyongo & another vs Ruiru Sports Club (2005) eKLR as the trustees, in this case, should have been sued as individuals.

53. After reviewing the evidence and the written submissions, the Board rendered its judgment dated 2.3.2012, which is now appealed against before this court as per the above memorandum of appeals.

54. With leave of court, parties were directed to canvass the appeal through written submissions. The 1st appellant relied on written submissions dated 2.8.2023 and isolated four issues for the court's determination. On whether the Board had jurisdiction to hear and determine the appeal, the 1st appellant submitted that W.A.B. was a creature of Section 84 of the *Water Act* and under Section 85 thereof, an appeal could only lie at the suit of any person with proprietary interest affected by a decision or order of the Authority, Minister for the regulatory Board concerning a permit or license under the Act or on other disputes conferred or imposed by the Act or any other Act. To this end, the 1st appellant submitted that the respondent's appeal at the Board was that the appellants had trespassed into his land and declined to admit liability for trespass.

55. Therefore, the 1st appellant believed a decision or order as envisaged under Section 85 of the *Water Act* was non-existent. That trespass was not one of the matters envisaged in Section 85 of the Act, as held in Motor vessel "Lillian S" vs. Caltex Oil (K) Ltd (1989) K.L. 11, Samwel Kamaru Macharia & another vs. K.C.B. Ltd & other (2012) eKLR, ODM vs Yusuf Ali Mohamed and five others (2018) ekLR, Tony Kipkemei Chirchir vs Public Service Commission (2019) eKLR. The 1st appellant urged the court to find that the Board entertained a claim where there was no decision by the authority, the Minister, or the regulatory Board concerning a permit or license, and the one based on trespass was without jurisdiction and that the award or judgment became a nullity.

56. On whether the claim was statute-barred, the 1st appellant submitted that in paragraph 10 (a) of the further amended appeal, the respondents admitted that the 3rd appellant trespassed and constructed the waterworks in 1990 but took no action until 2008, which was 18 years after the alleged trespass. Therefore, the 1st appellant submitted that a claim for land recovery under Section 7 of the Limitations of Actions Act could not be brought after the end of 12 years from the date the right accrued. Reliance was placed on Edward Moonge Lengusuranga vs. James Lenaiyara and another (2019) eKLR.

57. On whether the joinder of the 1st appellant offended the legal principle that where the principal was disclosed, the agent should not be sued, the 1st appellant submitted that in paragraph 6 of the appeal, the agency was disclosed, and so was in paragraph 7 of the response and the submissions by the 2nd appellant regarding the water (the plan of transfers of water services) Rules 2005. Therefore, the 1st appellant submitted that the ownership of the water infrastructure was transferred from the central government to the water services board, now vested in the 2nd appellant. It was, therefore, submitted that the 1st appellant was improperly enjoined in these proceedings. Reliance was placed on Victor Mabachi & another vs. Nurtun Bates Ltd (2013) eKLR, where the court cited with approval Anthony Francis Wareheim t/a Wareham & 2 others vs Kenya Office Savings Bank.

58. On whether the Board erred by relying on the expert's opinion evidence in making its award of Kshs.11,427,246/= & 6,376,248.1/=, the 1st appellant submitted that the report was based on unverified data purportedly originating from the 1st appellant; the computation of the profits earned included profits from other sources from sewerage works not generated from the suit premises and that the entire water treatment plant occupied three different parcels of land and not just the suit premises which the report did not factor into. Reliance was placed on Dhalay vs Republic (1995-1998) E.A 29. On rejection of an expert opinion that was not soundly based but one full of speculation, assumptions, and erroneous conclusions.

59. The 2nd appellant, by written submissions dated 18.8.2023, raised four issues for determination. On whether the Board had jurisdiction to hear and determine the suit, the 2nd appellant submitted that

under Section 13 of the Environment and Land Court (ELC) Act and the *Land Act*, the respondent's case revolved around infringement of the property right and that trespass to land was within the province and jurisdiction of the E.L.C. Court. On the other hand, the 2nd appellant submitted that the province of the powers and functions of the water appeal board revolves around hearing and determining of disputes from the decisions of the Water Resources Management Authority, the Minister, and the Water Services Regulatory Board. The 2nd appellant submitted that the Board could only hear an appeal under Sections 28, 36, 37, 57, 63, 64, 73 (6), 76, 85, and 93 (3) of the *Water Act* 2002 in terms of its mandate under sections 85 (1) and 87(2) and (4) thereof.

60. The 2nd appellant submitted that the appeal before the Board did not relate to any of the above sections of the *Water Act* and could, therefore, not be supported by any law governing the Board and its 2007 Rules as Gazette No. 144 of 2007, specifically in Section 32 (1) of the Act where it could only affirm the original decisions, vary the same and lastly, make an appropriate decision under the Act.

61. Therefore, the 2nd appellant submitted that the Board failed to consider its jurisdiction, did not include claims for an award of damages relating to a land dispute or matter about trespass. Therefore, its decision could not be final as per Sections 32 (6) thereof since the Board immensed itself on matters touching on law, whose province is in the court. Reliance was placed on Jessee Kamau Kinuthia vs Teresia Wanjiku Kamande (2008) eKLR.

62. Further, the 2nd appellant submitted that the Board formulated its prayers and rendered a decision contrary to the prayers in the appeal. Similarly, the 2nd appellant submitted that the Board based its decision on reliefs not prayed for, specifically pleaded and proved.

63. On the second issue, the 2nd appellant submitted that the respondent had not been in possession of the suit premises, unlike the 2nd appellant, who had been using the land for over 12 years and whose claim for adverse possession had crystallized in its favor, unlike the findings of the Board. Reliance was placed on Kyeyu vs Omutat (1990) KLR 709.

64. The 2nd appellant submitted that the respondent's claim was time-barred and filed contrary to the provisions of the Limitations of Actions Act as to doctrines of delay and laches. The explanation for the delay submitted by the 2nd appellant was not plausible; the respondent slept on his rights for a long time, and the medical evidence did not explain why there was a delay, and therefore, the claim was unenforceable in law.

65. The 2nd appellant submitted that the legal and evidentiary burden rested with the respondent to prove his case against the appellants. In this case, the Board failed because the respondent did not ascertain how mesne profits of Kshs.55,787,000/= were reached since there was no value for comparable land, and the loss of user valuation clause, did not show how the average income was arrived at. Similarly, the 2nd appellant submitted that no mesne profits were pleaded or claimed in the appeal dated 18.9.2008. Reliance was placed on Peter Mwangi Mbuthia & another vs Samow Edin Osman (2014) eKLR and Karanja Mbugua & another vs Maybin Holdings Co. Ltd (2014) eKLR.

66. Therefore, the 2nd appellant submitted that the respondent had just prayed generally in the pleadings but had not specifically pleaded the amounts he was seeking, and therefore, there was no cause of action against it for an order of mesne profits to attach, more so when the Board gave no formulae or valid assessment to warrant the figures issued.

67. Lastly, the 2nd appellant submitted that the award or judgment offended Section 32(4) of the *Water Act* since it was not signed and duly sealed by the chairman and the sitting members' names ascribed to the signatures.

68. The 3rd appellant, by submissions dated 2.8.2023, submitted that its defense throughout the proceedings was that the Board lacked jurisdiction to hear and determine a claim based on an alleged trespass given its mandate was limited in law to the matters stipulated under the *Water Act* but unfortunately it assumed a jurisdiction it did not possess hence its award was and remained a nullity.

69. The 3rd appellant submitted that the issue of trespass raised in the appeal was a matter strictly within the jurisdiction of civil courts and urged the court to overturn the judgment. Reliance was placed on St. Nicholas School vs. Nairobi City Water and Sewerage Co. (2013) eKLR Dirie Olow Mohamed vs Tavevo Water and Sewerage Co. Ltd (2015) eKLR and Embakasi East Co. Ltd & another vs. Nairobi City Water and sewerage Co. (2015) eKLR.

70. The 3rd appellant submitted that despite being bereft of jurisdiction, the Board proceeded to award damages on a claim lacking particulars or strict proof of special damages. Therefore, the court was urged to find the claim not specifically pleaded nor strictly proved.

71. The respondent, by written submissions dated 20.8.2023, submitted that an appeal under Section 85 (1) of the *Water Act* lies with the Board on a suit of any person having a right to proprietary interest directly affected by a decision or order of the Authority, Minister or the Regulatory Board concerning a permit or license under the Act or under Sub Rule (2) thereof, where any written law has imposed such right.

72. The respondent submitted that in 1990 or thereabout, a decision was made by the appellants to place water treatment works on the respondent's land without his knowledge or consent, after which a license was issued to the 1st appellant by the 2nd appellant, since the 3rd appellant had misrepresented to the 1st and 2nd appellants that the respondent had been given an alternative land as compensation for the suit premises.

73. Therefore, the respondent submitted that those uncontroverted facts placed the dispute within the jurisdiction of the Board, contrary to the submissions by the appellants that the facts and evidence suggested otherwise. The respondent urged the court to refer to page 27 of the judgment as to how the invasion of the land occurred out of deception and misrepresentation by the 3rd appellant, misinforming the Ministry of Water, which proceeded to construct the water treatment plant as per the letter by the Registrar, Water Rights, Mr. John Rao Nyaoro dated 21.7.2007. The respondent submitted that the appellants could not turn around and allege an agreement was reached between the 3rd appellant and the respondent. Reliance was placed on Nairobi City Water and Sewerage Co. vs St. Nicholas School (2013) eKLR.

74. As regards an action filed out of time, the respondent submitted that he sought and obtained leave to file his appeal out of time, which the Board admitted under Section 86 of the *Water Act* 2002, since there was no written notice communicated to him on the invasion of his land as required under Section 86 (b) of the *Water Act*. Reliance was placed on leave granted by Osiemo J as he then was in Gilbert Kabeere M'Mbijiwe vs Municipal Council of Meru Tana Water Services Board (2005) eKLR.

75. On whether the 1st appellant was properly sued, the respondent submitted that the 2nd appellant was established under the Water (Plan of Transfer of Water Services) rules 2005, Legal Notice No. 8 of 2002, which then provided the 1st appellant with a permit, and that following 2015 the 3rd appellant by operation of the defunct municipality mandate. The respondent submitted that the 1st appellant was properly in the suit, since it was running its business while interfering with the respondent's proprietary rights and interests. Consequently, the respondent submitted that the 1st appellant was sued correctly its wrongs notwithstanding its principal-agency relationship, for it could sue or be sued as a duly incorporated company, which could not hide under the guise of agency to escape liability.

76. The respondent submitted that once the 1st appellant was granted a license or permit to operate by the 2nd appellant, it became liable for its actions. The respondent submitted that the 1st appellant could not be conferred an agency relationship where none existed, which, on page 34 of the judgment, the Board distinguished each of the appellants and the tort it was liable for.

77. Regarding the award, the respondent submitted that the decision was sound and proper based on expert evidence, which the appellants did not counter through another expert report. The respondent submitted that the expert report was factual, detailed, and used as a proper guide by the Board in arriving at its decision.

78. The issues commending themselves for my determination are:

    i. If the Board had jurisdiction to hear and determine the appeal.

    ii. If there was any appeal before the Board as envisaged by law.

    iii. If the claim by the respondent was statute-barred.

    iv. If the respondent sued the right parties.

    v. What was the implication of the gazette notice to the respondent's claim, if any?

    vi. Whether the appellants and their predecessors in title erected developments on the suit land with the respondent's consent, approval, or knowledge.

    vii. If the failure by the respondent to seek the recovery of his land on time or object to the transfer in 2005 amounted to a surrender, acquiescence, or acquisition by operation of law.

    viii. If the respondent pleaded and proved mesne profits.

    ix. If the respondent was entitled to any special and general damages.

    x. If the appeals have merits

79. Jurisdiction refers to the authority that a court has to decide matters litigated before it or to take cognizance of matters presented formally for a decision. See Black's Law Dictionary 9th Edition cited in Constantine Joseph Advocates LLP vs Attorney General (2022) eKLR. In Samuel Kamau Macharia and another (supra), the court held that a court's jurisdiction flows from either *the Constitution* or legislation and that a court of law can only exercise jurisdiction as conferred by *the Constitution* and other written law and cannot arrogate a jurisdiction exceeding that which is conferred to it by law.

80. In ODM vs Yusuf Ali (supra), the court observed that a party could not, through pleadings, confer jurisdiction to a court where none existed, and neither it through draftsmanship or legal craftsmanship couch and convert an election petition into a constitution petition. The court went on to say that the substance of the claim and the reliefs sought to determine the jurisdictional competence a court.

81. In Tony Kipkemei Chirchir (supra), the court cited Owners of Motor Vessel Lillian "S" (supra) the words of Nyarangi J that a question on jurisdiction must be raised at the earliest opportunity since jurisdiction was everything; without it, a court has to down its tools. Further, in Edward Moonge Lengusuranga (supra), at issue was a claim for land recovery after 12 years. The court cited with approval Bosire Ongero vs. Royal Media Services (2015) eKLR, that the time limitation went to the court's jurisdiction to entertain the claim, and where a matter was statute-barred, the court had no jurisdiction to entertain the same. The court proceeded to uphold the preliminary objection since the suit for the recovery of the land had been made after 14 years, contrary to Sections 7 and 8 of the *Limitation of Actions Act*.

82. In the appeal before the Board, the respondent had pleaded that he owned L.R. No. Ntima/ Igoki/2032, in which the 1st appellant, as the managing agent of the 2nd appellant, was occupying, storing, treating, and supplying water to consumers at a fee and or profit. The respondent had averred that he was appealing against the refusal by the appellants to admit liability for trespass, committing acts of constructing water works therein, refusal to pay damages for trespass, and compensation for profits earned out of the water sales.

83. In paragraph 10 thereof, the respondent had pleaded that the 1st and 2nd appellants, without his consent or permission, trespassed into the suit premises and constructed water treatment works, took advantage of his sickness and his absence from the suit premises and purported to allege that he had surrendered the suit premises in exchange of a commercial Plot No. 51. He denied the alleged entry at any given time into any negotiations, agreements or exchange of the suit land with any other plot and in particular plot No. 51.

84. Further, the respondent pleaded that because of the transfer of all water assets, processing, management and services, the 1st and 2nd appellants were now liable for the wrongful occupation acts, loss, and damage on the deprivation of use and enjoyment of the suit premises. The respondent prayed for an order declaring the appellants as trespassers, vacant possession, or eviction from the suit premises and for accounts to be taken and payment of a fair share of the proceeds generated out of water sales from the water treatment plant.

85. The jurisdiction of the Board is set out under Section 85 of the *Water Act* 2002, now repealed. It provides that an appeal shall lie to the Board out of a suit of any person having a right or proprietary interest directly affected by a decision or order of the authority, the Minister, or the Regulatory Board concerning a permit or license under the Act Sub-Rule (2) thereof provides that in addition, the Board shall have jurisdiction to hear and determine disputes and shall have such powers and functions as may be conferred or imposed on it by or under the Act or any other Act. Under Section 86, the time for appealing must be the period prescribed by or under the Act for the lodging an appeal against the reasons or order, and where no period is prescribed, then within thirty days after the date on which written notice was served on the appellant notifying him of the decision or order against which he wishes to appeal, provided that the Board may in any case for good cause shown, admit an appeal after the time limited for lodging of an appeal has expired.

86. Coming to the determination of appeal and disputes, Section 87 thereof grants the Board powers as are exercisable by Commissioners under Sections 10, 11, and 13 of the *Commissions of Inquiry Act* (Cap 102), in addition to the formulation of its own rules for the lodgment, hearing, and disposal of appeals before it under Section 88 of the *Water Act*.

87. In the case of Dire Olow Mohamad vs Tavevo Water (supra), the court had to determine the Board's jurisdiction under Sections 85 (2) and 87 (3) & (4) of the *Water Act*, vis a vis Articles 159 and 165 3 (a) of *the Constitution*. The court cited with approval Isaiah Ngotho Watheka vs Nairobi City Water & Sewerage Co. Ltd (2013) eKLR, that the Board's mandate was precise. The court looked at the powers and functions of the Water Resources Management Authority (WARMA) under Section 8 of the Act as including any developments, principles, guidelines, and procedures to allocate water resources, monitor the National Water Resources Management Strategy, receive and determine applications for water permits, monitor and enforce conditions attached to permits, regulate and protect water catchments, determine charges for the use of water from any water resources; gather and minute information on water resources; liaise with other bodies for better registration and management of water resources and lastly, advice the Minister concerning any matter in connection with water resources. The court said that the word "appeal" was not generic or synonymous with any dispute and

would not be interpreted to encompass any dispute relating to water. The court cited with approval Nairobi City Water and Sewerage Co. vs St. Nicholas School (2013) eKLR, that the jurisdiction of the Board was confined to any decision emanating from the Water Services Board and was limited to disputes set out under the *Water Act* or any other written law.

88. In the case of Republic vs Water Appeal Board exparte National Water Conservation and Pipeline Corporation and others (2013) eKLR, the court cited with approval Kuldip Singh Jandu vs Nairobi Water Company (2012) eKLR, where the court held that the additional jurisdiction under Section 85 (2) of the *Water Act* was limited and did not confer jurisdiction to determine all disputes under the Act but only those disputes where jurisdiction was conferred to the Board by the Act or any other legislation. The court cited with approval Motor Vessel Lillian "S" (supra) that the limits to authority are imposed by statute by the kind and nature of the actions and matters and that jurisdiction depends on the existence of a particular state of facts, the tribunal must inquire into the existence of the facts to decide whether it had jurisdiction to entertain the matter. As to the tort of negligence, the court observed that the Act did not confer jurisdiction to the Board to hear any dispute touching on negligence resulting in damages out of an overflow or leakage from water tanks under the management of Athi Water Services Board and the National Water Conservation and Pipeline Corporation. The court proceeded to quash the award of damages.

89. In Mwiki Water Project B and others vs Nairobi City Water and Sewerage Co. Ltd, Misc. Appeal No. 318 of 2008, the court observed that the intent and purpose of the *Water Act* 2002 was that all disputes arising under the Act should follow the machinery laid therein. In Kuldip (supra), the court held that to trigger the jurisdiction of the Board, there must be a decision or order of a permit or license from the three named authorities under Section 85 (1) of the *Water Act* and that, therefore the jurisdiction of the Board was dependent on a particular set of facts namely; the decision or order on a license or permit by the named authorities and that where those set of facts did not exist, no jurisdiction could be invoked. The court found Water Appeal Rules 2007, ultra vires the Act for conferring powers to the Board not expressly provided for in the Act. See also Kensalt Ltd vs. Water Resources management authority (2020) eKLR, where at issue before the court was who could levy charges for the use of sea water since sea water was res nullius and incapable of ownership, see Republic vs. Nairobi city water and Sewerage Co. Ltd exparte Osman Batul Dedeoglu (2021) eKLR.

90. In Embakasi East Court C. Ltd & another vs. Nairobi County Water & sewerage Co. (2015) eKLR, the court declined to refer the dispute to the Board since it was based on a claim for an alleged illegal and unlawful connection of Water to property allegedly illegally occupied by the consumers.

91. In this appeal, the whole of the respondent's claim was based on an alleged trespass to his land and the commission of acts of wastage and denial of access by the appellants. The claim was not based on any decision or order regarding water permits or licenses by the Authority, Minister, or the Water Service Board. It was not based on any specific decision or order by the three bodies under the Act declining to vacate or hand over vacant possession of the suit land. The Board was not dealing with a claim where the respondent had stopped the appellants from entering into and operating any water works or erecting equipment on the suit premises. The issuance of permits and licenses in 2005, possession, occupation, and water works had already been made on the land in 1990, by the Ministry of Water Development. The 1st and 2nd appellants were creatures of the *Water Act* 2002, whose mandate and assets ownership were defined by the law.

92. In their defenses or responses to the appeal, the appellants raised issues of consent knowledge, approval, acquisence and public or overriding interests to provide water which outweighed the respondent's interest and that an alternative plot had also compensated the latter. Further, the appellants had raised the defenses of the time limitation of the claim to recover land after 12 years.

93. In BoM Muranga High School vs Water Regulatory Board and others James Muchoni Muthoni (interested party) (2020) eKLR, the court held that even though the petitioner had raised matters of an alleged infringement of its constitutional right to enjoyment of property and the right to clean and healthy environment, which fell under the court's mandate the core of the dispute centered on the contractual relationship between the petitioner and the 2nd respondent falling under the jurisdiction of the Water Appeals Board, by dint of Section 121 of the *Water Act* 2016.

94. In the case of Western Water Service Co. Ltd vs Lake Victoria North Water Services Board (2011) eKLR, at issue was a claim of trespass and unlawful occupation of the premises despite a service provision agreement. The reliefs sought were for a declaratory order that there were acts of trespass and interference with the plaintiff's business operations. The defendant had raised a jurisdictional issue under Section 85 of the *Water Act*. The court held that the dispute at hand was over a forceful takeover and, therefore, did not fall under the Board since there was no complaint in any way that the Regulatory Authority had been involved in the takeover or it had taken sides against one provider. The court held that the matter was outside the mandate of the Board as per Section 55 (1) (8) of the Act.

95. As to whether the claim of the statute- barred the recovery of land, the respondent pleaded that the entry into the suit property occurred in 1990. Trespass was defined in John Kiragu Kiamni vs Rural Electrification Authority (2018) eKLR, as any unjustifiable intrusion by one person upon the land in possession of another and that the onus was on the plaintiff to provide that the appellants had invaded the land without any justifiable reasons.

96. In the Blacks Law Dictionary, trespass is the entrance of a permanent invasion of another's right. In Glady Koskey vs Benjamin Mutai (2017) eKLR, the court held that a suit founded on trespass was a tort and that an action founded on tort had to be filed within three years. In Nguruman Ltd vs. Shompole Group Ranch and 3 others (2007) eKLR, the court held that every continence of a trespass was a fresh trespass in respect of which a new cause of action arose from day to day as the trespass continued. In this appeal, the appellants have admitted that they were still on the suit premises through registered under the respondent's name. The 1st and 2nd appellants have admitted that the suit land was yet to be formally transferred to them by the respondent. Trespass can also be continuous, as held in KPLC vs Ringera and others KECA 104 (4th February 2022) (judgment). On that score alone, I find the defense that the claim was time-barred lacking merits.

97. Looking at the question of whether the Board arrogated to itself jurisdiction it did not possess, the review of the caselaw cited above indicates that the jurisdiction of the Board under Section 85 of the *Water Act* is specific and restricted to matters relating to appeals from the authority, appeals arising from the powers, functions and the duties of the three named authorities, on matters and issues touching on the issuance of permits and licenses relating to water services.

98. To the instant appeal, the respondent had not specified a single decision or order by the named three bodies touching on the licensing or the issuance of permits to abstract water to the appellants from the suit premises or the law provides that the appeal must be filed within 30 days from the date of the decisions or order. In the appeal before the Board, the date when the appellants were authorized by the three named authorities to take over, and erect water works over the suit was not mentioned or indicated.

99. If that occurred in 1990 or 2005, the gazettement 30 days had long elapsed by the time the appeal was lodged with the Board. Even if leave to appeal out of time had been granted by the court, the Board had to determine if it had mandate. The facts the respondent relied upon do not relate to issues falling under the mandate of the Board. The determination of who owned and the manner of acquiring the suit

premises and, by extension, matters relating to trespass to land, fall outside the purview of the Water Appeals Board as held in Kuldip (supra).To that extent, therefore, my finding is that the respondent had no legal basis for filing a claim of trespass, and by extension, the Board acted without jurisdiction in hearing and determining the appeal, which was not only undefined in terms of the date of the decision or order and from which party among the appellants. Even though the issue of jurisdiction was raised at the earliest opportunity, the Board failed to determine it in limine or on the judgment conclusively. I find it was bereft of jurisdiction.

100. The claim by the respondent was based on damages or compensation on account of trespass and denial to use and enjoy the suit premises. It is trite law that special damages must be pleaded and proved. The respondent had not pleaded any special damages like mesne profits. There was no pleading on willful misrepresentation, deception, fraud, illegality, or irregularity in occupying the suit premises. There was no claim for future profits.

101. The next question was whether the respondent correctly sued the 1st appellant and if the joinder offended the legal principle that the agent should not be used where the principal is disclosed. There is no disputed that the respondent, in paragraph 6 of the further amended amended appeal, described the 1st appellant as the managing agent of the 2nd appellant. The 2nd appellant also admitted that the 1st appellant was its water service provider. The 1st appellant, relying on Victor Mabachi & another vs Nurturn Batles Ltd, which cited Anthony Francis Warehein t/a Wareham & 2 others (supra), urged the court to find the claim against it was unstainable. Since it could not be answerable in law for the acts or omissions of the principal whose relationship had been disclosed and should the claim fail for offending the common law principle alluded above? Was it necessary for the respondent to continue impleading the 1st appellant even after the principal had clarified the position? Was the continued appearance of the 1st appellant warrant up to this level? Were there vitiating factors or reasons for the respondent to continue impleading the 1st appellant?

102. To answer this question, one has to look at the legal infrastructure governing the water sector from the time the cause of action allegedly occurred to the time of filing the claim and the appeal before this court. In 1999, parliament adopted the national water policy as Sessional Paper No. 1 of 1999. It redefined the role of government, moving away from direct water provision to regulation functions.

103. The policy justified the handing over of water services. The existing water infrastructural facilities were handed over to those responsible for operations and maintenance. The *Water Act* of 2002 separated the responsibility of water resources management from that of the water supply and created new institutions. Section 7 established the Water Resources Management Authority whose main function was to develop guidelines and procedures for allocating water resources and issuing permits or licenses for water use.

104. Section 46 of the Act established the Water Services Regulatory Board whose primary function was issuing water resource provision licenses. Section 51 of the Act mandated the Minister to establish Water Services Boards by way of the gazette notice, which the WASREB would license to provide water and sewerage services. The Water Service Board would then appoint an agent to exercise and perform all its powers and functions as (W.S.P.) under Section 55 of the Act. The law prohibits the W.S.B. from engaging in direct water service provision. Section 55 (5) of the Act allows the W.S.B. to agree with more than one W.S.P. regarding its supply area.

105. Section (113) thereof requires a gazettement by the minister of a plan for the transfer of the management and management of water services, which had to provide details of the institutional contractual and financial arrangements, capacity building, organizational restructuring, transitional and other measures necessary to ensure an efficient and orderly transfer of water services and operation

of water services and prescribe appropriate arrangements for transferring to Water Services Board, the ownership of plant equipment or other assets used by the government in connection with other services and prescribe appropriate arrangements for the Water Service Boards to obtain the use of plant equipment or other assets used by a local authority or other persons connected with water services.

106. Under the above provisions, the Minister promulgated the Water (the Plan of Transfer of Water Services) Rules 2005, which were gazetted on 12.8.2005 Legal Notice No. 101 providing the names of the W.S.B. including the 2nd appellant herein. Under subheading part II, the transfer rules 7 and 8 process provided that the local authority providing water services under the previous water undertakings had six months to comply with Sections 55 (1) and 57 of the Act, by obtaining licenses and entering into agreements with the Water Service Board (W.S.B). The minister, on behalf of W.S.B., was to negotiate with other government ministries, departments, and parastatals for the transfer of ownership to W.S.B. of system facilities that they hitherto owned or used for the provisions of water and sewerage service in compliance with Section 113 (2) (b) of the Act. The transfer schedule was set out under the rules and commenced from 1.7.2005 to 30.6.2006. It covered the transfer, execution of transfer agreements, supportive activities, and the identification and engagement of successor water service providers. Each transfer agreement had to contain a plan for completing the transfer by 30.6.2008. The effect of the rules was that the mandate of local authorities on water and sewerage services was automatically curtailed by Sections 112 and 114 of the Act. See Kapa Oil refineries Ltd & 7 others vs E.P.Z. Authority & others (2019) eKLR, Rwanyange Resident self-help group vs Tana Water services Board and another (2019) eKLR Kahuti Water and Sanitation Co. Ltd vs Governor Murang'a county & another (2018) eKLR.

107. As indicated above, the water reforms started with the national water resource management strategy and were completed in 2006. The primary purpose of the reforms was to separate water resources management and development from water services delivery, while the Ministry in charge of water affairs dealt with policy and strategy formulation, funds mobilization, coordination, and monitoring. To this end, the *Water Act* commenced on 18.3.2003 under Section 70 thereof. It came up with WASREB regulating water service provisions. See Section 79 of the Act Water Services Board in charge of the assets and the contracting Water Service Providers (W.S.P.) See section 77 of the Act and WARMA in charge of Water Resources Management. All these institutions would report to the Board representing different stakeholders' interests.

108. The water infrastructure as of 2002 had at the local level consumers, Water Resources User Association (WRUAS), Water Service Providers (WSPS) at the regional level board (N.I.B.), Catchment Areas Advisory Committee (CAAC's) regional WARMA offices and Water Services Board (W.S.B.).

109. At the national level, there was the Water Appeal Board (W.A.B.), National Water Conservation and Pipeline Corporation (NWCPC), Water Services Trust Fund (WSTF), Kenya Water institute (KEWI), Water Resources Management Authority (WARMA) and Water Services Regulatory Board (WASREB) and overall the Ministry of Water (M.W.I.).

110. Rule 5 provided that on the transfer date, all rights, powers and, duties, liabilities relating to the provision of water services, whether arising under any written law or otherwise which immediately before the transfer date, were vested in imposed or enforceable by or against the Director of Water, government or its corporation shall be transferred to and vested in imposed on or enforceable by or against the Water Services Board.

111. Sub-rule 5 (c) provided that all funds, assets, and other property, movable or immovable, which immediately before the transfer date were held for or on behalf of the Director of Water, government,

or its statutory corporation in the name of the permanent secretary to the treasury shall vest in the Water Services Board.

112. From the foregoing, it is evident that the 1st and 2nd appellants, as of 2005, were creatures of the new law who assumed the assets by the Ministry of Water in Meru township and, by extension, the suit land. In 2005, the respondent had not pleaded or taken any action or demand for stoppage of the works or recovery of his land, which he has admitted had been taken over by 1990.

113. Going by the preceding, the key roles and responsibilities of the institutions under the Act were clarified in Legal Notice No. 101/2005, the Water(plan of transfer of water services) rules 2005 under Section 113 of the Act, under the schedule table 1, the 2nd appellant was to plan for improvement in provisions of water and sewerage services, appoint and contract water service providers and be the asset holders of central government facilities while the Board would adjudicate disputes between water sector players.

114. Under the Rules, the 2nd appellant was gazetted as a Water Service Board among the seven boards in charge of Kirinyaga, Muranga, Nyeri, Embu, Mbeere, Kitui, Meru central, Tharaka, Meru South, Meru North, Mwingi and Maragua Districts.

115. Regarding the transfer of ownership of government-owned water services facilities to the W.S.B, part 1 of the Rules provided that under Section 113 (1) of the Act, the transfer would include the management and operation of water services and that the ownership transfer would encompass fixed assets, systems, facilities and plants, operational assets, equipment, books and records, and the agreed liabilities and accounts receivable under the transfer agreement.

116. Further, the Rules provide that there would be a framework between the W.S.B. and the respective local authorities on the terms and conditions of the W.S.B. accessing systems facilities owned by the local authority specifies the instruments of such access, including purchase, lease, acquisition, or any other arrangement under Section 53 (3) of the Act. The Rules further provided that the transfers shall be completed by 30.6.3006. The road map for the transfer was also included in the rules.

117. Regarding land acquisition, section 53 (3) of the Act grants the service board powers to purchase, lease, or otherwise acquire land as approved by the Minister and arrange for its compulsory acquisition under Section 78 thereof.

118. On the relationship between the service board and the water service providers, Section 55 of the Act, requires that there be a written agreement regarding the powers and functions under the license to be exercised by and performed by the service provider during the currency of the agreement including the maintenance, rehabilitation and development by the W.S.P. providers of water services, infrastructure and facilities of the W.S.B.

119. Further on the land acquisition, Section 78 of the Act provides that a licensee or an applicant for a license who requires the compulsory acquisition of land for any of its purposes could apply to the Minister who may, on advice by the Regulatory Board, take steps necessary to secure the compulsory acquisition in line with the *Land Act* for public purpose.

120. On entry by a permit holder or licensee to the land of another person, Sections 89, 90, 91, and 93 of the Act allow such a permit holder or licensee to enter therein to preserve or remove or exercise any right conferred on the licensee to execute and maintain works or take other action. Under Section 93, an authorized person means a person entering any land or premises pursuant to a right or permission conferred by or under the Act.

121. Section 100 of the Act requires that any order, notice, consent, approval, permission, demand, objection, application, or other thing authorized or required by the Act be in writing. The same applies to any authentication of documents under the Act as provided in Section 101.

122. Concerning any existing water rights before the commencement of the Act, section 112 of the Act provides that a right to the use of water before the coming of the Act and which was acquired in the repealed Act, by agreement or otherwise shall be deemed to be a right conferred by a permit under the Act, any instrument by which the right was conferred shall be deemed to be such a permit and may be dealt with under the Act accordingly.

123. Regarding easements as per Section 28 of the Act, the Third Schedule provides that an easement includes the right of access and shall be registered against the title holder effected by the Registrar of Titles, with the title holder having the right to appeal to the Authority if opposed to the easement.

124. As regards the Water Appeals Board, Rules 2007 under L.N. No.144 of 2007, an appeal refers to any application made to the Board under the relevant section of the Act which has to be filed within 30 days from the date on which the decision appealed against was notified to the applicant. As to the contents of the appeal, Rule 10 of the Rules requires that the facts and grounds of appeal specify the issues alleged to have been decided wrongly and the nature of the decision for which it is proposed to pray to the Board, including any principle or policy, law or the water management procedure relied upon in the appeal. Copies of all documents relating to it must also accompany the appeal.

125. Having gone through the operative law, it is quite evident that had the respondent conducted due diligence; he would not have sued the 1st appellant in the first instance since, under the law, the waterworks on the suit land and the attendant rights as at 18.5.2003 vested with the 2nd appellant by operation of the law. Before the water reforms were enacted, there is no doubt that it was preceded by a Sessional Paper No. 1 of 1999. The reforms were highly published, and the 2nd appellant was eventually established in compliance with the law. Additionally, timelines were set for transferring assets and liabilities between the national government and the local authorities in line with the *Water Act* 2002.

126. The handing over of the water services involved all the relevant actors in the water sector. Therefore, when the appeal was made, the respondent was deemed to have known the legal infrastructure governing the water sector, including where he should have channeled his claims. In this appeal, the respondent should have specifically engaged the Ministry of water, over the decision or order, if any, on the acquisition of his land made against him by the water sector institutions existing before the enactment of the *Water Act* 2002 and before the deadline to transfer water services in 2008 as per the timelines set under the Water Rules 2007.

127. Additionally, the appeal as lodged did not specify, as required under the Board appeal Rules, any specific section of the Act under which the decision or order he was appealing against had been made.

128. Looking at the pleadings, the respondent alleged that entry into his land occurred in 1990. At that time, there is no evidence that the 1st and 2nd appellants existed for him to plead that they were liable for any wrongful acts. In Pizza Harvest Ltd vs. Felix Midigo (2013) eKLR, the court cited with approval Amon vs Raphael Truck & Sons Ltd (1956) 1 ALLER 273, that the only reason which makes it necessary to make a person a party to an action was so that he could be bound by the result of the action and the question to be settled therefore must be a question in the action which cannot be wholly and effectually be settled unless such a person was a party.

129. The claim by the respondent was essentially about the legality of the acquisition of the suit property in which the waterworks stand and how the entry, occupation, and possession were undertaken. The

respondent did not specifically plead the role of the 1st appellant in the acquisition, occupation, and utilization of the suit premises. The 1st and 2nd appellants' rights, duties, and functions on the suit premises were ring-fenced by the *Water Act* as of 18.3.2003, when the Act became operational. The wrongful acts complained of by the respondent were not attributable to the 1st appellant but to the 2nd appellants, who admitted that the 1st appellant was a mere agent exercising statutory duties on its behalf for a defined period as provided under sections 51, 53, and 55 of the Act. The water service provision agreement between the 1st and 2nd appellant was not produced before the Board as a basis for finding that the 1st appellant was liable for any alleged wrongful acts. Section 3 of the *Water Act* 2002 vested water resources in the state. See Gabriel Amok & others vs Mombasa Water Supply and Sanitation Co. Ltd (2015) eKLR. All that existed between the 1st and 2nd appellants was a contractual relationship.

130. Under Schedule IV of *the Constitution*, water resources are vested in the national government. The state regulates the use of water. See Geoffrey Mungathia & others vs Diocese of Meru Registered Trustees (2021) eKLR. The 2nd appellant's rights over the respondent's land accrued rights before the *Water Act* came into effect through the Ministry of Water. Those easement rights, whether consented to or approved by the respondent, were conferred to the 2nd appellant when it was created by operation of the law and given the statutory mandate under the *Water Act* 2002. The title deed held by the respondent was subject to those overriding domain rights held by that state, including waterworks erected in pursuance of or under any power conferred by any written law, in this case being the *Land Act* and *the Constitution*. See Karolyne Mwatha Mburu & others vs. Athi Water Services Board and WRUA (2019) eKLR. My finding is that the 1st appellant ought not to have been impleaded in the first instance and any claims against it were therefore untenable in law.

131. As to the loss of user and quiet enjoyment of the suit premises, the respondent had not pleaded any value for his property, the nature of the loss, and the damages incurred between 1992 and 2010. The respondent testified that he had even taken up a loan using the suit property as security on two occasions. The nature of developments by the respondent had not been pleaded and proved.

132. In the body of the appeal, the respondent did not raise specific claims regarding special damages against any of the appellants. Additionally, there was no response from the respondent against the responses by the appellants on the legality or justification in law in occupying the suit premises with his acquiescence, knowledge, exchange, and lack of objection since 1990 on account of overriding interests, public interest, and surrender.

133. The expert evidence by Mr. Aritho included information illegally obtained from the 1st appellant. How and under whose authority the information was accessed or the manner of retrieval was not clarified. In Okiya Omtatah Okoiti & 2 others vs. AG & 4 others (2020) eKRL, the court held that a constitutional petition could not be founded on documents whose source or origin had not been disclosed or authenticated and to use public documents without disclosing the source, amounted to a breach of the owner's right to fair hearing. The court held that as much as *the Constitution* guaranteed a right to information under Article 35, *the Constitution* did not permit self-help or illegalities in obtaining public documents clandestinely and without following Section 80 of the *Evidence Act*. See also RC vs KLR (2021) eKLR.

134. In Stephen Kirimi Wangondu vs Ark Limited (2016) eKLR, the court observed that expert evidence, like all other evidence, must be given only appropriate weight in the context of all other evidence. The court said it could not trump all other evidence; expert evidence must be tested against known facts and cannot be considered in a vacuum. In Kimatu Mbuvi t/a Kimatu Mbuvi & Boos vs Agustine Munga Kiongo (2007) 1 E.A 239, it was held that medicine, like all other sciences, was not an exact science.

135. In this appeal, the expert testimony went beyond what was pleaded by the respondent. The Board also entirely relied on the expert evidence in making the mesne award contrary to the reliefs sought.

136. In trite law, parties are bound by their pleadings, and issues flow from them. The respondent had not pleaded fraud, misrepresentation, deception, mesne profits, and punitive and exemplary damages. The profits, expenses, and books of accounts for the 1st & 2nd appellant were never pleaded in the further amended appeal. The loss of the user had not been pleaded or particularized. The specific physical facilities of the 1st appellant and its annual income from the facilities had not been pleaded. The suit premises' valuation from 1992 to 2008 had not been pleaded. The taking of accounts, though prayed for, did not feature in the appellant's evidence.

137. There was no pleading for loss of any anticipated or intended use of the suit premises by the respondent and loss of the expected income for a specific number of years. The respondent had not pleaded the nature, status, and specific activities the 1st and 2nd appellants had carried out in the suit premises. The respondent did not specifically plead about the aspect of water and sewerage services, its estimated or actual income, and the percentages the 1st and 2nd appellants drew as income from the same. Apart from Exh. No (19), the public audited annual incomes of the 1st and 2nd appellants were not presented before the board to authenticate the figures relied upon by the respondent. The basis of sharing the benefits was not pleaded.

138. In Dhalay vs Republic (supra), the court observed that an expert's opinion must be based on an excellent, cogent, and sound basis for the court to accept it. The report did not factor in that the respondent was enjoying a loan facility of Kshs.5,800,000/= for the suit property up to 2006 and beyond. The report was not based on profit and loss accounts, balance sheets, income statements, income tax returns, and annual returns for 2001 – 2009 of the 1st and 2nd appellants. Even though the respondent, by an application dated 27.10.2010, had sought to discover such information, there was no evidence that an order to produce the said books of account was extracted and served upon the 1st and 3rd appellants.

139. In Raila Omolo vs IEBC & others (2017) eKLR, the court said that in the absence of pleadings, evidence, if any, produced by the parties could not be considered, and a party should not be allowed to travel beyond its pleadings.

140. Section 2 of the *Civil Procedure Act* defines mesne profits as those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom, together with interest on such profits, but does not include profits due to improvement made by the person in wrongful possession. In Mistry Valji vs Janedra Rainchard & others (2016) eKLR, the court adopted with approval Inverugie Investment vs Hacketh (1995) e ALL ER 842 that mesne profits were a form of an ordinary claim in trespass to land.

141. The tort of trespass involves wrongful entry into another's land. The evidence before the Board was that the 1st and 2nd appellants entered the land by operation of the law. Before 2005, the respondent had allowed the state to enter into the land and carry out permanent activities on it for the benefit of the residents of Meru township. No evidence was produced to show that the 1st and 2nd appellants made new developments on the land in 2005, save for that which had existed since 1992. In Sande vs K.C.C. 1992 LLR 314 (C.A.K.), the Court of Appeal declined to award damages based on the loss of profits that should have been pleaded and proved. The exact position was taken in Cosmo Air vs Diani Beach 1998 L.L.R. R 757 (C.A.K.), that mesne profits were ascertainable and quantifiable.

142. The respondent had an alternative route he would have followed if his land had been illegally or wrongfully acquired in contravention of *the Constitution* and the land laws. (see Coastal Aquaculture vs A.G.). He has not yet subjected himself to that process and invoked the jurisdiction of the National Land Commission under Section 127 of the *Land Act*. A Land Acquisition Tribunal is also an available avenue for the respondent. See N.L.C. vs Estate of Sisiwa Arap Malakwen & another (2017) eKLR in Haji Asuman Mutekunga vs Equator Growers Ltd Co. In No. 7 of 1995, the court said special damages and loss of profit must be specifically pleaded and proved. See Arucherry Ltd vs AG (2014) eKLR.

143. In N.L.C. vs. Estate of Sisiwa Arap (supra), the court said that the compensation rate should be based on the property's value when the initial valuation or project was conducted and not the property's value at the determination of the suit. The respondent failed to state the value of his property as of 1992 or 2005. Compensation is a way of mitigating loss or a disadvantage suffered by a party but not an opportunity for unfair gains.

144. In Priscal Enterprises Ltd vs Kengen (2018) eKLR, the court said a land owner was only entitled to compensation to the extent to which he lost the use of the land and not the entire property.

145. Section 148 (5) of the *Land Act* grants the court power to determine the amount of and method of compensation regarding leaves public right of way created for the benefit of the public. Section 145 of the *Land Act* grants a right of way to authorized persons to enter into servient land to execute works, buildings, and in setting all works, installations, and structures on the servient land and to pass and repass along the way leave in connection with purposes of those organizations, authorities or bodies. In his testimony, the respondent agreed that the 1st and 2nd appellants were on the land for the benefit of the public. He was categorical in his evidence that he did not wish to jeopardize the said public purpose and that he was seeking compensation to transfer the land to the 2nd appellant. Unfortunately, the respondent went to the wrong forum, which arrogated itself a statutory mandate to determine compensation and award damages for an alleged compulsory acquisition of private land for public use. There was no invitation by the board to be valued by a government land valuer. The jurisdiction to determine just compensation lay with the Land Acquisition Tribunal established under Section 133 A, B, & C of the *Land Act*.

146. The appellants have averred and testified that the respondent was compensated with alternative land, and a letter of allotment was issued. The appellants took the Board to Plot No. 51 who was found to be an open space and still available to the respondent.

147. In Wreck Motors vs. Commissioner of Land and others (1997) eKRL, the court said that title to a landed property typically comes into existence after issuance of a letter of allotment meeting the conditions therein and actual issuance thereafter a title document. In Vijendra Rampgubka and others vs. AG (2014), eKLR Mutungi J held that rights of compulsory acquisition were conferred by specific provisions of the law under Article 40 of *the Constitution* and Sections 107 – 133 of the *Land Act*, which replaced the provisions of the Land Acquisition Act.

148. In Patrick Musimba vs N.L.C. (2016) eKLR, the court said that the national or county government ordinarily prompts the National Land Commission. through the Cabinet Secretary or County Executive Member to initiate land acquisition for a public purpose through a Kenya gazette.

149. Parties in this appeal all agreed that though there were some negotiations, the same did not go through out of sickness and change of governance structures relating to the water sector for the property to vest in the 2nd appellant under Sections 120 – 122 of the *Land Act* after just compensation as provided in Section 111 thereof. See Anthony Mulima Lubalthellah vs County Government of Kakamega Land Registrar.

150. In Africa Gas & Oil Co. Ltd vs. AG (2016) eKLR, the court observed that in Section 120 (2) of the *Land Act*, in cases of urgent necessity, land could be acquired after publishing a notice and taking possession after 15 days. This is the only time land can be acquired without compensation. Compensation can only be quantified under the equivalence principle per the Land Value Amendment Act 2019. See Katra Jama Issa vs AG (2018) eKLR. Exh No. (19) was not based on the principles set under the law. See Patrick Musimba (supra) and Ravaspaul Kyalo Mutisya vs NLC (2022) eKLR.

151. Given the foregoing, the availability of an alternative compensation offered to the respondent, an alternative forum in law, procedures on valuation and compensation of land acquired for public use, the Board had no jurisdiction, capacity, and basis in law and *the Constitution* to award the figures in the judgment. See Speaker of National Assembly vs Karume (2008) KLR 425

152. The upshot is that the three appeals are hereby allowed. The award is hereby set aside. The court in exercise of its powers under Order 42 Rule 32 of the Civil Procedure Rules, Section 78 of the *Civil Procedure Act* and Section 68 of the *Land Registration Act* issues an inhibition order against the title LR No. Ntima/Igoki/2032 to preserve it for a period of six months from the date hereof as the parties herein take the appropriate legal avenues to regularize the ownership of the suitland under Section 78 of the *Water Act*. For avoidance of doubt, the respondent shall not take any more loan facility against the suit premises to the detriment of public facilities existing on his land.

153. This being a public interest matter and given that each of the parties have stake to the subject matter, I direct that each party bears its own costs for both the appeal and the proceedings before the Board guided by the case of Jasbir Singh Rai vs Tarlochan Singh Rai & 4 others (2013) eKLR. I take this opportunity to appreciate the erudite exposition of the law by counsels appearing in this matter.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18TH DAY OF OCTOBER 2023

In presence of

C.A Kananu

Gitari for 1st appellant

Mr. Kariuki 2nd appellant

Mrs. Muia for the respondent

HON. CK NZILI

ELC JUDGE

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