



REPUBLIC OF KENYA



KENYA LAW
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**Boera & 2 others v Mabeya & 3 others (Environment and Land Appeal
E002 of 2023) [2023] KEELC 22320 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

JM KAMAU, J

DECEMBER 20, 2023

BETWEEN

YUNES BOERA 1ST PLAINTIFF

GEORGE NYAMWANGE 2ND PLAINTIFF

CHARLES NYAMWANGE 3RD PLAINTIFF

AND

STEPHEN MABEYA 1ST DEFENDANT

JAMES OGATA 2ND DEFENDANT

LAKE VICTORIA SOUTH WATER SERVICES BOARD 3RD DEFENDANT

THE ATTORNEY GENERAL OF KENYA 4TH DEFENDANT

JUDGMENT

1. The Appellants herein filed a suit in the Lower Court being ELC Nyamira Chief Magistrate's Court Case No. 24 of 2020 seeking for: -
 - a. A Declaration that the setting up of the pipeline on Parcel No Gesima Settlement Scheme/5 was illegal, null and void.
 - b. Removal of the water pipeline passing through the said Parcel of land or payment of adequate compensation in the event that the Respondents are interested to compulsorily acquire the same.
 - c. A permanent injunction restraining the Respondents from trespassing, wasting or in whatsoever manner dealing with land Parcel No Gesima Settlement Scheme /5.
 - d. Costs of the suit.



- e. Any other relief the court deems fit to grant.
2. In a nutshell they averred that the Respondents had unilaterally and forcefully trespassed in the suit land and caused water pipes through the said land thereby destroying crops, trees, glass, other vegetation and the fence around the land all valued at Kshs. 8,000,000/-.
3. All the above averments were denied by the Respondents since consent to lay the said water pipes on the suit land had been granted by the Appellants and that the filed suit was an afterthought.
4. On 10/11/2020, the 1st and 2nd Respondents made an Application asking the court to order that the suit specifically against them be struck out on the grounds that the water project in question was initiated and implemented by the Government of Kenya and that the 2 had no role in it. They would therefore suffer irreparable loss and damage if they continued in the suit. In the Supporting Affidavit of the 1st Respondent he depones that the 2 were elected Chairman and Secretary respectively of Nyamecheo Water Project and their role was to be a caretaker committee to oversee the day to day running of the project upon land owner of the same to the community. In the Replying Affidavit by the 2nd Appellant, Charles Nyamwange, the Appellants deponed that they still insist that the Respondents had everything to do with the installation of the Project. After this Application came for hearing and the same canvassed, the trial Magistrate Honourable M.C Nyigei, Principal Magistrate found that the 2 were not necessary parties in the suit in the lower Court and granted their Application so that their names were struck out of the suit with costs. The said Ruling is dated 16/06/2021 in Nyamira.
5. Then on 21/10/2012 the 4th Respondent filed a Notice of Preliminary Objection praying that the suit against the 4th Respondent be struck out for offending the mandatory provisions of section 3(i) of the Public Authorities, Limitation Act (cap 39 Laws of Kenya). The 3rd Respondent supported the Preliminary Objection.
6. The Appellants certainly opposed the Preliminary Objection and on 25/1/2023 the Court ruled in favour of the 4th Respondent. It is against this Ruling that a Memorandum of Appeal was filed on 3/2/2023 with the following grounds of Appeal; -
 1. The Learned Magistrate erred in law and in fact in striking out the Plaintiff's case.
 2. The learned Magistrate erred in fact and in law in holding that the suit against the 3rd and 4th Defendants is statutorily time barred.
 3. The Learned Magistrate erred in fact and in law and failed to appreciate that the trespass contemplated in the Plaint was a continuing trespass in respect of which a new cause of action arose from day to day and so it is continuous.
 4. The Learned Magistrate erred in law and in fact in not appreciating that justice would better be served by hearing the case on merit.
7. The Appellants, therefore ask this court to order that: -
 - a. The Ruling and Order of the Magistrate's Court be set aside and be substituted with an order allowing the Appellants' Appeal.
 - b. The costs be borne by the 2nd and 4th Respondents.
8. I called upon the parties herein to make written submissions which I have considered and I agree with the Appellants that if indeed there were pipes that were laid on the suit land then the same constitute a continuing trespass (tort) and therefore section 3(i) of the Public Authority Act is not applicable in



this case. This was not a proper case for striking out on a Preliminary Objection as laid down by the case of *Mukisa Biscuits Manufacturing Co. Ltd. v End Distributors*.

9. Consequently, the orders made by the Honourable M.C. Nyigei (Principal Magistrate) on the 25/1/2023 are hereby set aside and I further order that the matter in Nyamira Chief Magistrate's ELC. No. 24 of 2020 do proceed to full hearing.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF DECEMBER, 2023.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: - Brenda

G. S. Nyandoro holding brief for Mr. Bosire for the Appellant

Miss. Migaliza Holding brief for Mr. Ominde for the 1st Respondent

