



Bernardi v Nairobi City Water & Sewerage Company & another (Environment & Land Case 393 of 2015) [2022] KEELC 3158 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 393 OF 2015**

JO MBOYA, J

MAY 26, 2022

BETWEEN

RENZO BERNARDI PLAINTIFF

AND

NAIROBI CITY WATER & SEWERAGE COMPANY 1ST DEFENDANT

ATHI WATER SERVICES BOARD 2ND DEFENDANT

JUDGMENT

1. *Vide* Plaintiff dated 12th May 2015, the Plaintiff approached the court seeking the following Reliefs:
 - i. Mandatory injunction to compel the Defendants either by themselves or through their authorized agents and/or servants to deliver vacant possession of the suit property, namely L.R No. 5xxx/9(original No. 5xxx/6/2) and in default thereon an eviction order to issue against the Defendants.
 - ii. Mesne profits.
 - iii. Costs of the suit together with interest as such rates and for such period as the court may deem just to grant.
2. Upon the service of the Plaintiff and Summons to enter Appearance, the 1st Defendant duly entered appearance, and thereafter filed a Statement of Defense, on the 8th of June 2015, respectively. For clarity, the 1st Defendant denied the claims by and/or on behalf of the Plaintiff.
3. On her part, the 2nd Defendant herein entered appearance on the 24th of June 2015 and thereafter filed a Statement of Defense on the 14th of July 2015. Similarly, the 2nd Defendant also denied the claim by and/or on behalf of the Plaintiff.



Evidence By The Parties:

Plaintiff's Case:

4. The Plaintiff herein, testified as PW1. According to the Plaintiff, same bought and acquired the suit property together with one Annalisa Baruzzo Bernardi, from one namely, Susan Roberts, who was hitherto the registered proprietor and/or owner of L.R No. 5xxx/9 (original No. 5xxx/6/2, hereinafter referred to as the suit property).
5. Further, the witness testified that upon the acquisition and/or purchase of the suit property from the original owner thereof, his (Plaintiff's) co-owner, namely, Annalisa Baruzzo Bernardi, executed an indenture on the 24th of August 2010, wherein the said Annalisa Baruzzo Bernardi transferred her interest over and in respect of the suit property to and in favor of the witness.
6. On the other hand, the witness further testified that upon the acquisition of the suit property, same entered upon and took possession of the suit property, save for a portion thereof measuring 1.3 Acres, which was under the occupation and use of the 1st Defendant herein.
7. It was the witness' further testimony that the portion measuring 1.3 Acres, which was under the occupation and use of the 1ST Defendant, comprises of water tanks, water reservoir, installed water pipes and staff quarters, which were constructed by Nairobi city council. For clarity, the witness stated that the impugned installation and/or developments were standing on the portion of the suit property as at the year 1995, when same acquired the suit property.
8. It was the witness's further testimony that on or about the year 2002, the responsibility for the distribution of water and sanitation services was shifted from the Local authority, namely Nairobi City Council to the 2nd Defendant herein courtesy of the Water Act, 2002.
9. Notwithstanding the foregoing, the Plaintiff testified that the occupation, possession and use of a portion of the suit property by the Defendants herein and/or their agents is illegal and unlawful.
10. In any event, the witness further testified that upon becoming the registered proprietor and/or owner of the suit property, same has endeavored to and engaged the Defendants herein, with a view to entering into an Agreement for sale and disposition of the subject portion of the suit property unto the Defendants, but other than empty promises conveyed by the Defendants and particularly, the 2nd Defendant, nothing tangible has arisen and/or materialized.
11. The witness further testified that on or about 17th May 2012, the 2nd Defendant issued to and in his favor a Letter of comfort, wherein the 2nd Defendant promised to engage the relevant Government Agencies, towards ensuring that the witness was duly compensated. However, the witness testified that no compensation accrued, either as promised or at all.
12. It was the witness's further testimony that as a result of the failure by the Defendants to formalize and/or regularize their occupation and use of a portion of the suit property, same was constrained to and instructed his advocates to issue a demand notice and notice of intention to sue the Defendants.
13. Notwithstanding the foregoing, the witness testified that the Defendants remained adamant and continued to occupy and use a portion of the suit property, albeit without tendering compensation or formalizing their use thereof.
14. Premised on the foregoing, the witness testified that same was thereafter constrained to file and/or lodge the subject suit.



15. Other than the foregoing testimony, which highlighted the Plaintiff's written statement, the witness fully adopted his Witness Statement dated the 15th March 2016.
16. On the other hand, the Witness also adopted the documents vide List of Documents dated the 12th of May 2015. In this regard, the said documents were marked and produced as exhibits P1 to P7, respectively.
17. On the other hand, the witness also referred to the bundle of documents at the foot of the List dated 8th of March 2018 and invited the court to mark same as an exhibit. In this regard, the said documents were marked and produced as Exhibit P8.
18. On cross examination, the witness stated the he was aware that Nairobi city council had been negotiating with the previous owner of the suit property, with a view to acquiring the portion measuring 1.3 Acres, wherein the impugned installations/structures are currently located.
19. It was the Plaintiff's further testimony that even though same was aware that Nairobi city council had been negotiating with the previous owner of the suit property, he (witness) did not deem it appropriate to include the successor of Nairobi city council in the subject matter.
20. Further in cross examination, the witness also stated that same left out the successor of Nairobi city council because according to him it is the Defendants herein who were managing water and sanitation service.
21. On the other hand, the witness conceded that by the time same was purchasing the suit property, same was aware of and alive to the existence of the Water tanks/Water reservoir and the installations, which are now complained of.
22. Besides, the witness also admitted that at the time of purchasing the suit property same was aware of the presence, occupation and use of the subject portion of the suit property by the Defendants.
23. Whilst answering questions by Counsel for the 2nd Defendant, the witness admitted that he bought and acquired the suit property whilst aware of the existence of the Water infrastructure over a portion of the Suit Property.
24. Further, the witness contended that at the time of purchasing and acquiring the suit Property, he was not aware of any Agreement and/or arrangement between his predecessor in Title and Nairobi city council.
25. It was the witness's further answer that at the time of entering into the Sale Agreement with the previous owner, the sale agreement did not include any clause pertaining to the fact that there was any ongoing negotiation between the predecessor in Title and the Nairobi city council.
26. The witness herein further admitted that the person who was in occupation of the portion of the suit property was Nairobi city council and by extension her successor. However, the witness also stated that same has not sued the Nairobi City County because it is the Defendants who are the lawful persons to deal.
27. Other than the foregoing, the witness stated that currently, same is not aware of who owns the Equipments standing on the portion of the suit property.
28. Be that as it may, the witness further stated that according to him, the Equipments under reference belonged to the 1st Defendant.



29. In answer to a question relating to the letter dated 17th December 2009, which is at page 17 of the 2ND Defendant's bundle, the witness has admitted that based on the contents of the said letter, it was admitted that Nairobi city council were already on the suit property as early as 1970.
30. Nevertheless, the witness stated that he would not know under what terms Nairobi city council entered into and took occupation of a portion of the suit property.
31. While under further cross examination by counsel for the 2nd Defendant, the witness admitted that in the year 1995, he bought the suit property while knowing that the developments/equipments were in existence.
32. On the other hand, it was the witness's further response to a question for cross examination that same has not produced and/or tendered in evidence, any Valuation Report to guide the court on the issue of Mesne Profits.
33. In re-examination, the witness testified that when he bought the suit property, same was aware of ongoing negotiation.
34. Further, the witness further admitted that ever since he bought the suit property, no agreement and/or formal arrangement has been realized over the occupation of the suit property by the Defendants.
35. The witness further testified that he had sued the Defendants herein because in his view, it is the Defendants who are in occupation of the suit property.
36. Nevertheless, the witness admitted that if the 2nd Defendant has vacated the suit property, then his claim against the 2nd Defendant would become moot.
37. With the foregoing evidence, the Plaintiff's case was closed.

1St Defendant's Case:

38. On her behalf, the 1st Defendant called one witness, namely, Karaya Kimani, who testified as DW1. According to the witness, same is a Surveyor currently working with the 1st Defendant herein as a Survey Co-ordinator.
39. Besides, the witness also testified that prior to coming to court, same had recorded two witness statements dated the 7th November 2021 and 26th November 2021 respectively, and in this regard the witness proposed to adopt the contents of the written statements.
40. Premised on the foregoing, the witness statements dated the 7th November 2021 and 26th November 2021, were adopted as the witness's Evidence -in- chief.
41. Other than the foregoing, the witness also relied on the Bundle of documents which were filed by and/or on behalf of the 1st Defendant, namely, the bundle dated 7th October 2021, which bundle contained 8 documents. For clarity, the documents at the foot of the said bundle were produced and marked as exhibits D1 to D8, respectively.
42. Other than the foregoing bundle of documents, the witness also referred to the Bundle of documents dated the 26th of November 2021, which contained 13 documents and which were admitted in evidence as exhibits D9 to D22, respectively.
43. It was the witness's further testimony that same has worked with the 2nd Defendant for a period of more than 7 years and that by virtue of his portfolio, same is conversant with the facts of the subject matter.



44. On the other hand, the witness further testified that from the records held by the 1st Defendant, which have been produced as exhibits herein, the City council of Nairobi entered upon and took possession of a portion of the suit property sometime in the year 1985 and thereafter commenced the construction of a Water distribution/water reservoir as well as other installations, whose purpose was to distribute and supply water to Karen and Lang'ata Areas within the city of Nairobi.
45. It was the witness's further testimony that the City Council of Nairobi carried out a survey and thereafter acquired a portion measuring 1.4 acres forming part of the suit property and same was acquired from the previous owner thereof, namely M/s Susan Roberts.
46. Further, it was the testimony of the witness that upon the acquisition of the subject portion out of the suit property, the previous owner was duly compensated and thereafter the portion of land in question was fenced off and has been under the possession and use of Nairobi city council, now defunct and the Nairobi city county government, through the 1st Defendant herein.
47. On the other hand, the witness also testified that despite the acquisition of the portion of the suit property by the City council of Nairobi, the process of survey and subdivision was never completed and/or concluded. Consequently, the witness testified that the subject portion was therefore never transferred and registered in the name of City council of Nairobi, now defunct.
48. Be that as it may, the witness testified that by the year 1995 when the Plaintiff bought the suit property and thereafter became the owner thereof, the purchase/acquisition was subject to the interest of the city council of Nairobi, now defunct.
49. In any event, the witness further testified that upon the acquisition of the suit property by the Plaintiff, same never protested against the occupation and use of the subject portion by the Defendants, not until the year 2012, when the issue of compensation was raised by the Plaintiff.
50. On cross examination by Counsel for the 2nd Defendant, the witness herein testified that the 1st Defendant is a Water service provider, but which is fully owned by Nairobi city County.
51. Besides, the witness also testified that upon the incorporation of the 1st Defendant, same took over the provision of water and sewerage services from the 2nd Defendant. For clarity, the witness stated that the water and sewerage services have been under the control of the 1st Defendant since the 3rd of April 2014.
52. It was further clarified by the witness that as at the time when the suit herein was filed, namely, the 12th of May 2015, the Water and Sewerage services were in the hands of the 1st Defendant and not the 2nd defendant.
53. Further, the witness also testified that in terms of operations and activities on the subject portion of the suit property, same are being carried out and/or supervised by the 1st Defendant.
54. Other than the foregoing, the witness also testified that the subject portion of the suit property is owned by the City county of Nairobi, which is the successor of the City council of Nairobi. In this regard, the witness further stated that the assets, installations and properties erected on the subject portion belongs to the City county government of Nairobi.
55. Further, the witness also testified that the 1st Defendant is not laying any claim over and in respect of the subject portion of the suit property, but however same are operating the water and sewerage services on behalf of the City County government Nairobi.



56. Whilst under cross examination by Counsel for the Plaintiff, the witness contended that the 1st Defendant would be laying a claim over the subject portion of the suit property, albeit through the City county of Nairobi.
57. Further, the witness stated and clarified that if the ownership of the subject portion of the suit property was to be transferred, same was to be transferred to the city county government of Nairobi.
58. As concerns whether any compensation was made to the previous owner of the suit property, the witness testified that there were negotiations between Ms. Bainsbridge and the firm of M/s Howard Humphreys & Associates, the latter who were acting on behalf of Nairobi city council.
59. On the other hand, the witness testified that though compensation was made as signified by the letter dated the 7th of May 1992, same however would not be able to confirm whether a cheque was prepared and paid out.
60. At this point, the 1st Defendant's case was thereafter closed.

2nd Defendant's Case:

61. Similarly, the 2nd Defendant called one witness namely, Martha Wanjiku, who testified as DW2.
62. The witness stated that same is a senior legal officer currently working with the 2nd Defendant and that as concerns the subject matter, same has recorded and filed a witness statement dated the 4th of October 2021.
63. Besides, the witness herein proposed to and indeed adopted her written statement, which was thereafter deemed as her Evidence- in- chief.
64. Other than the foregoing, the witness also referred to a Bundle of documents contained at the foot of the List of documents dated the 24th of November 2017, which contained a total of 17 documents. In this regard, the witness invited the court to admit the said documents as exhibits and same were duly admitted as exhibit D22 to D37.
65. It was the witness's further testimony that the 2nd Defendant herein was/is related to Nairobi city county government by virtue of having been constituted as the Service Board for the provision of water and sewerage services, pursuant to the Water Act, 2002.
66. Further, the witness also testified that the land where the Water Reservoir and project and the distribution of water and sewer services is located was provided by the City council of Nairobi, now defunct and currently by Nairobi city county.
67. Nevertheless, the witness testified that upon the incorporation of the 1st Defendant, the 2nd Defendant handed over the water and sanitation services to the 1st Defendant, who currently operates same on behalf of the City county government of Nairobi.
68. Other than the foregoing, the witness also testified that currently the 2nd Defendant does not occupy and/or use the suit property and neither is same in-charge of carrying out the operations thereon.
69. Based on the foregoing, the witness further testified that the subject claim against the 2nd Defendant did not lawfully lie.
70. On cross examination by Counsel for the 1st Defendant, the witness testified that on or about February 2010, the 2nd Defendant was operating the water project/reservoir, situate on the suit property, albeit on behalf of Nairobi city council.



71. However, the witness further added that the scenario was however reversed vide Legal Notice number 177 of 2013 and the services are now carried out by the city county government of Nairobi through the 1st Defendant.
72. Other than the foregoing, the witness admitted that on or about the year 2012 there was an attempt by the 2nd Defendant to compensate the Plaintiff over and in respect of the portion of the suit property wherein the water reservoir is located.
73. However, the witness added that it was later discovered that the previous owner of the land in question was duly compensated.
74. Further, the witness also stated that though the 2nd Defendant issued a Letter of comfort in favor of the Plaintiff, whereby the 2nd Defendant indicated that arrangements to compensate the Plaintiff were being made, the Letter of comfort was later established to have been made by mistake and/or error.
75. On the other hand, the witness also stated that the 2nd Defendant herein is a developer of Water Plants and that once the water plants/infrastructure are developed, like in the instant case, same were therefore handed over to the City county government of Nairobi.
76. On re-examination, the witness herein clarified that the portion of land on which the water infrastructure is developed was leased by the 2nd Defendant from the city council of Nairobi for purposes of development of infrastructure.
77. Nevertheless, the witness further clarified that the 2nd Defendant herein ceased to be in occupation of the suit property and is not laying any ownership claims thereto.
78. As concerns the issuance of the Letter of comfort, the witness herein clarified that same was issued by the 2nd Defendant on the assumption that no compensation had hitherto been made to the previous owner of the suit property.
79. However, the witness further stated that it was later realized and/or established that compensation had been made and/or paid out to the previous owner.
80. Finally, the witness clarified that if any transfer over and in respect of the subject portion of the suit property were to be made, same would go to the City county government of Nairobi and not otherwise.
81. With that, the 2nd Defendant's case was closed.

Submissions By The Parties:

82. At the close of the Hearing, the advocates for the Parties proposed to file and exchange written submissions and in this regard, directions were thereafter given for the filing and exchange of written submissions.
83. It is worthy to note that the Plaintiff herein filed two sets of submissions, the 1st one being filed on the 14th of February 2022, whilst the 2nd set of Written submissions, which were titled as the Plaintiff supplementary submissions were filed on the 28th of March 2022.
84. On the other hand, the 1st Defendant herein filed her written submissions on the 15th of March 2022, whereas the 2nd Defendant also filed her submissions on even date, namely the 15th of March 2022.
85. Briefly, it was the Plaintiff's submissions that by the time same bought and acquired the suit property, his predecessor in title, namely, Ms. Susan Roberts, had not been compensated over and in respect of the portion of the suit property that was being occupied and/or used by the Defendants.



86. Secondly, the Plaintiff further submitted that even though there had been negotiations between Nairobi city council and Ms. Susan Roberts towards acquisition of the subject portion of the suit property, the negotiations were never completed and/or concluded.
87. Thirdly, the Plaintiff further submitted that despite the fact that the negotiations were never completed and no compensation was ever paid to Ms. Susan Roberts, Nairobi city council entered upon and commenced the construction of the water reservoir and incidental water infrastructure on the subject portion of the suit property and that same have remained in occupation, through the Defendants herein to date.
88. Based on the fact that no compensation was ever paid to Ms. Susan Roberts over and in respect of the subject portion of the suit property, it was the Plaintiff's submission that the actions and/or activities by and/or on behalf of the Defendants herein on the portion of the suit property are therefore unlawful and illegal.
89. In any event, the Plaintiff further submitted that the correspondence which were produced by the Defendants herein and which alluded to negotiations between Ms. Bainsbridge and M/s Howard Humphreys and Associates were irrelevant and of no consequence, because Ms. Bainsbridge in respect of whom Compensation was allegedly made to, was not the owner of the suit property.
90. Finally, the Plaintiff submitted that even though the Defendants herein further contended that compensation was paid out to and in favor of Ms. Susan Roberts, no evidence was ever tendered and/or availed to the court to prove such payments.
91. Based on the foregoing, it was therefore the Plaintiff's submission that the Plaintiff herein, by virtue of being the registered owner of the suit property, was entitled to the reliefs sought at the foot of the Plaint.
92. On her part, the 1st Defendant submitted that to the extent that the water infrastructure complained of was installed on the subject portion of the suit property on or about the year 1985, the claim by the Plaintiff herein, which essentially seeks to recover vacant possession is time barred. In this regard, the 1st Defendant invited the court to take note of the provisions of Sections 7 and 17 of the *Limitations of Actions Act*, Chapter 22 Laws of Kenya.
93. Further, the 1st Defendant also submitted that the water infrastructure complained of constitutes a water course and/or use of water facility, which has been obtaining on the subject portion of the suit property since the year 1985 and to the extent that the water infrastructure has been so obtaining, the Defendants herein have therefore acquired and/or accrued an indefensible easement, pursuant to and in line with Section 32 of the *Limitation of Actions Act*.
94. Thirdly, the 1st Defendant has also submitted that insofar as the Cause of action for the recovery of vacant possession of the suit property first accrued to Ms. Susan Roberts, who was the Plaintiff's predecessor in Title, it was then incumbent upon the said Ms. Susan Roberts to commence and/or institute appropriate recovery proceedings, if any, against the Defendants.
95. In any event, it has further been submitted that to the extent that the Plaintiff herein acquired the suit property with water infrastructure in place, the Plaintiff's claim is intertwined with the claims by his predecessor in Title and hence by the time the Plaintiff filed the subject suit, the statutory 12-year period for filing a suit for recovery of land had long extinguished.
96. Based on the foregoing, it is the 1st Defendant's submissions that the Plaintiff's suit is therefore time barred and thus legally untenable.



97. On her part, the 2nd Defendant has submitted that though the 2nd Defendant was hitherto operating the water project/reservoir standing on the subject portion of the suit property, her services ceased when the 1st Defendant herein was incorporated by the City county government of Nairobi.
98. In any event, the 2nd Defendant has further submitted that during the time when same was rendering the water and sewerage service and using the water infrastructure on the suit property, same was being carried out for and on behalf for the city council of Nairobi, now defunct.
99. Thirdly, the 2nd Defendant has also submitted that having ceased to operate the water and sewerage services for and on behalf of the City county government of Nairobi, no legitimate claim can be maintained and/or sustained as against her. In this regard, the 2nd Defendant has therefore contended that here name therefore ought to be struck out from the suit.
100. Notwithstanding the foregoing, the 2nd Defendant has also submitted that even on the totality of the evidence tendered by the Plaintiff, the Plaintiff has neither proved nor established her claim, to the extent that when the Plaintiff bought and acquired the suit property, the water infrastructure complained of was in existence. In this regard, the 2nd Defendant has therefore submitted that the Plaintiff's ownership to the suit land is subject to the existing Easement.

Issues For Determination:

101. Having reviewed the pleadings filed by and/or on behalf of the Parties, the witness statements as well as the bundle of documents, the latter which were later on admitted as exhibits and having similarly taken into account the Oral evidence tendered, as well as the written submissions filed, the following issues are germane for determination:
 - i. Whether the Plaintiff's suit is time barred by dint of Section 7 and 17 of the *Limitations of Actions Act*, Chapter 22 Laws of Kenya.
 - ii. Whether the Plaintiff's ownership of the Suit Property is subject to the existing Easement based on the existing water infrastructure/water course standing on the subject portion of the suit property.
 - iii. Whether the Plaintiff has any legitimate claim as against the 2nd Defendant.
 - iv. What Reliefs are appropriate.

Analysis And Determination

Issue Number 1 Whether the Plaintiff's suit is time barred by dint of Sections 7 and 17 of the Limitations of Actions Act, Chapter 22 Laws of Kenya.

102. From the totality of the evidence tendered, it is common ground that the water infrastructure/water reservoir which is complained of herein were constructed, erected and/or developed on the subject portion of the suit property on or about the year 1985.
103. Other than the foregoing, it was also conceded by the Plaintiff that by the time the water infrastructure/water reservoir was being constructed on the subject portion of the suit property, the suit property belonged to and was registered in the names of Ms. Susan Roberts.
104. Other than the foregoing, the Plaintiff also conceded that by the time when same entered into the Land Sale Agreement with Ms. Susan Roberts and thereafter acquired Title to and in respect of the suit



property, the water infrastructure/water reservoir complained of, was already developed on the subject portion of the suit property and was thus in existence.

105. Nevertheless, during his testimony the Plaintiff herein contended that by the time when same bought and/or acquired the suit property, there had been negotiation between the City Council of Nairobi and Ms. Susan Roberts, relating to compensation over the portion in question.
106. However, the Plaintiff further contended that despite the negotiations, no agreement and/or formal arrangement had been reached and/or actualized.
107. Be that as it may, the Plaintiff herein did not tender in evidence, any document to show that there was any such negotiations that were being held between the city council of Nairobi and Ms. Susan Roberts, as pertains to any compensation.
108. Other than the foregoing, it is worthy to recall that the Plaintiff therein also conceded during cross examination that the same Agreement between himself and Ms. Susan Roberts did not contain any clause relating to any compensation, in respect of the subject portion of the suit property.
109. Notwithstanding the foregoing, the Plaintiff herein testified that same entered into negotiations with the 2nd Defendant relating to compensation over and in respect of the subject portion of the suit property. However, the Plaintiff has further contended that though same entered into negotiations with the 2nd Defendant, but the said negotiations did not bare any fruits.
110. Nevertheless, the documentary evidence tendered by the Plaintiff showed that negotiations with the Defendants towards compensation over the subject portion were only commenced in the year 2009 vide letter written by Annalisa Baruzzo Bernardi and thereafter responded to *vide* letter dated 17th May 2012 by the 2nd Defendant.
111. In the premises, even though the Plaintiff herein made a sweeping statement that same entered into a negotiation with the Defendants, but same kept on giving empty promises, no evidence was adduced that there were any negotiation between 1995 up to the 17th of December 2009, when Annalisa Baruzzo Bernardi generated the letter addressed to the 1st Defendant herein.
112. For clarity, the letter dated 17th December 2009 which was produced as exhibit D22 on behalf of the 2nd Defendant, was generated 14 years after the transfer and registration of the suit property in favor of the Plaintiff.
113. It is imperative to note that if there were any negotiations between the Plaintiff's predecessor in Title and the City council of Nairobi relating to compensation in respect of the subject portion of the suit property, but which negotiations were never completed, then the cause of action for recovery of vacant possession in respect of the suit property first accrued to the Plaintiff's predecessor in Title.
114. Nevertheless, I have pointed out herein before that no evidence was tendered by the Plaintiff to show that there was any negotiations that were being carried out between the Plaintiff's predecessor in Title and the city council of Nairobi.
115. In the absence of any evidence of negotiations between Ms. Susan Roberts, who was the Plaintiff's predecessor in Title and the city council of Nairobi over and in respect of the subject portion of the suit property which was being occupied, then it was incumbent upon the predecessor to proceed and commence the recovery process.
116. Essentially, the point that I am making is that the cause of action towards recovery of vacant possession, if any, first accrued to Ms. Susan Roberts, namely, the Plaintiff's predecessor in Title in the year 1985.



117. On the other hand, to the extent that the Plaintiff herein bought and acquired the suit property herein from Ms. Susan Roberts, in whose favor a cause of action had accrued, the said cause of action continued to run in favor of the Plaintiff and same was therefore obligated to commence any recovery proceedings from the onset and/or accrual from the cause of action.
118. It is worthy to note that in computing the time line for institution of a suit for recovery of vacant possession herein, the computation is reckoned from time when the cause of action first accrued to the Plaintiff or to the person through whom he claims, namely, his predecessor in Title. In this case, the cause of action, if any, first accrued to Ms. Susan Roberts in 1985.
119. In the circumstances, if the Plaintiff herein was certain that the entry upon and the erection of the water infrastructure/water reservoir on the subject portion on the suit property were unlawful and illegal and in any event without his permission, same therefore ought to have filed the recovery proceedings forthwith, before expiry of 12 years with effect from 1985.
120. In respect of the foregoing observations, it is imperative to take note and cognizance of the provisions of Section 7 and 17 of the *Limitations of Actions Act*, Chapter 22 Laws of Kenya. For convenience, the said provisions are reproduced as hereunder;

Actions to recover land.

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Title extinguished at end of limitation period:

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

121. Notwithstanding the foregoing, it is also worthy to take note of the holding in the case of *Moffat Muriithi Muchai (suing on behalf of the Estate of the Late Milka Njoki Muchai (Deceased)) v Wanjiru Wanjohi Gatundu & 2 others* [2019] eKLR, where the court stated as hereunder;
34. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff's mother having bought the suit land in the 1990's and thereby claiming ownership in the same, he could seek to recover it from the 1st Defendant, but only if he did so within twelve years from the date on which the right of action accrued to him.
35. There is no doubt that a period of about sixteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve-year period has been exhibited before this court. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time he filed this suit, the claim was statute barred.
122. In my considered view, the Plaintiff's claim and/or cause of action for recovery of vacant possession of the subject portion of the suit property, if any, lapsed and/or extinguished in the year 1997, same being the aggregate 12-year period reckoned from when the cause of action first arose and/or accrued.



123. In the premises, by the time the Plaintiff herein and/or his Co-owner, namely Annalisa Baruzzo Bernardi generated the letter dated 17th December 2009, the Plaintiff's claim over and in respect of the subject portion of the suit property stood extinguished.

Issue Number 2 Whether the Plaintiff's ownership of the suit property is subject to the existing Easement based on the existing water infrastructure/water course standing on the subject portion of the suit property.

124. Other than the fact that the Plaintiff ought to have filed and/or lodged the claim for recovery of vacant possession within 12 years from the date of accrual, there is yet another aspect to the subject matter.
125. It is conceded that the nature of the activities that are carried out over and in respect of the subject portion of the suit property include the installation of water infrastructure, water reservoir and assorted water distribution pipes, whose purpose is to distribute and disseminate water to the residents of Karen and Lang'ata Areas.
126. Based on the foregoing, there is no gainsaying that the nature of the activities being carried out on the subject portion of the suit property relates to a watercourse or use of water, which has been used and/or utilized ever since the year 1985.
127. Clearly, premised on the duration of use and access to the watercourse, an Easement has since arisen and/or accrued not only to the Defendants herein, but also to the City county government of Nairobi, the latter which owns and operates the 1st Defendant.
128. Based on the longevity of occupation and use, principally as a water course and I may add as a Water reservoir, the Plaintiff's right to recovery of the subject portion of the suit property, would stand extinguished, upon lapse of 20 years.
129. The foregoing observation, is anchored and/or founded on the provisions of Section 32 of the Limitations of Actions Act, Chapter 22 Laws of Kenya. Similarly and for ease of reference, the provisions Section 32 (*supra*) are reproduced as hereunder;

Means by which easements may be acquired

- (1) Where—
- (a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or
 - (b) any way or watercourse, or the use of any water, has been enjoyed as an easement; or
 - (c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.
- (2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.



130. In view of the foregoing provisions, it is yet again important to note that even computing time from the year 1995 when the Plaintiff herein became the registered owner and/or proprietor of the suit property, the existing water infrastructure/water reservoir or basically the water course has remained in existence for more than 20 years and hence by the year 2015 when the subject suit was being filed, the right to recover vacant possession was negated by the existing easement.
131. In respect of the foregoing position, I can do no better than to adopt and restate the holding of the Court of Appeal in the case of *Kamau v Kamau* [1984] eKLR, where the court sated as hereunder;
- Where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the right of such way or watercourse is absolute and indefeasible according to the written law on the limitation of actions. This period of twenty years is a period beginning before or after December 1967, which is the date the *Limitation of Actions Act* began, ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.
132. In my considered view, the ramification of the provisions alluded to and coupled with the dictum in the decision in *Kamau v Kamau* (*Supra*), would then mean that a land owner who has allowed another to peacefully and peaceably enjoy an easement over his/her land would stand precluded from exercising his proprietary rights against that other person, to the extent of the crystallization of the easement thereof.
133. On the other hand, it also suffices to note that the acquisition and/or crystallization of the right of easement would not be disrupted by change of ownership over and in respect of the subject land. Consequently, the 20-year period in this respect shall be computed and/or reckoned from the year 1985 when the right of water course and the use of water first accrued to the Plaintiff's predecessor in Title.
134. Similarly, I come to the conclusion that the Plaintiff's claim to and in respect of the subject portion of the suit property is extinguished and thus barred by dint of the provision of Section 32 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

Issue Number 3 Whether the Plaintiff has any legitimate claim as against the 2nd Defendant.

135. During the Hearing of the subject matter, the 2nd Defendant witness testified that pursuant to the *Water Act*, 2002, the 2nd Defendant herein was established and/or constituted with a mandate to offer water and sewerage services for and on behalf of City council of Nairobi.
136. Pursuant to the foregoing, the witness testified that the 2nd Defendant therefore took up the mandate for the provision of the water and sewerage services and in this regard, proceeded to and operated the water reservoir, infrastructure and the various installations that had hitherto been constructed over and in respect of the subject portion of the suit property.
137. Nevertheless, the witness further testified that the access to and operations of the 2nd Defendant on the subject portion of the suit property was sanctioned and/or authorized by the city council of Nairobi and thereafter by the city county government of Nairobi.
138. Be that as it may, the witness further testified that her engagement in the provision of water and sewerage services, for and on behalf of the city council of Nairobi, now defunct and the city county government of Nairobi, lapsed and/or ceased on or about the year 2013 *vide* Legal Notice number 177 of 2013.



139. In this regard, the witness testified that the water and sewerage service, including the impugned Water Reservoir reverted to the 1st Defendant herein, who has then been operating the services, albeit on behalf of the City county government of Nairobi.
140. Based on the foregoing, it was the witness's position that by the time of filing of the subject suit on or about May 2015, the 2nd Defendant therefore had no rights, claims and/or interests over and in respect of the subject property.
141. On the other hand, it is also imperative to recall that during his cross examination, the Plaintiff herein stated as hereunder;
- “I have note sued the city county government of Nairobi because it is the Defendants who are the lawful persons to deal with. I don't know who is currently the owner of the equipment on the land. I presume that the person who is currently managing the water equipment's is the 1st Defendant”.
142. Based on the foregoing, it is evident that vide Legal Notice number 177 of 2013, the scenario that had hitherto obtained, whereby the 2nd Defendant who provided water and sanitation services for and on behalf of city county government of Nairobi was reversed and the entire mandate vested in the 1st Defendant herein, to render and/or provide the services on behalf of the City county government of Nairobi.
143. In my humble view, it is apparent that even though in the year 2012 the 2nd Defendant had corresponded with the Plaintiff herein, the right and/or ability of the 2nd Defendant to continue engaging in matters pertaining the water reservoir situate in the subject portion of the suit property was terminated *vide* Legal Notice number 177 of 2013.
144. Consequently and in the premises, the Plaintiff herein would not commence, originate and/or otherwise maintain any legal proceedings as against the 2nd Defendant.
145. In view of the foregoing, I come to the conclusion that the Plaintiff's suit as against the 2nd Defendant, is not only misconceived but is legally untenable.

Issue Number 4 What Reliefs are appropriate.

146. The Plaintiff herein has sought for various reliefs, particulars whereof, were outlined at the beginning of this judgment.
147. Suffice it to note that one of the reliefs that the Plaintiff has sought for is an order of Mandatory injunction as against the Defendants to deliver vacant possession of the suit property.
148. Having sought for an order for mandatory injunction, it is therefore imperative to consider circumstances when and where an order for mandatory injunction can issue.
149. Be that as it may and without belaboring the point, it is imperative to note that an order of mandatory injunction is an interlocutory remedy and/or relief that does apply and/or obtain during the interlocutory proceedings pending trial/hearing in the subject matter in which same is sought. In this regard, the question that does arise is whether an order for mandatory injunction can be sought for and/or obtained at the conclusion of a trial.
150. I am afraid that the seeking of an order for mandatory injunction at the conclusion of a hearing and as a substantive relief is a misnomer and thus a misconception.



151. Nevertheless, even assuming that an order for mandatory injunction could issue as a substantive relief, the claimant for such an order would be enjoined to prove Special and/or peculiar circumstances to warrant the grant of such an order.

152. In this regard, it is imperative to take note and cognizance of the holding in the case of *Kenya Breweries Ltd & 2 Others v Washington Okeyo* (2002) eKLR, where the Court of Appeal observed as hereunder;

The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 *Halsbury's Laws of England* 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

Also in *Locabail International Finance Ltd. V. Agro Export and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

153. From the foregoing excerpt, there is no gainsaying that other than special and exceptional circumstances that must be proven before the grant of mandatory injunction, it is also clear that a mandatory injunction is also an interlocutory relief, to be granted, albeit in appropriate cases.

154. The second relief that has been sought for by the Plaintiff herein relates to an eviction order whose import is calculated to obtain vacant possession of the suit property.

155. As pertains to the prayer of eviction order, what I wish to state is that same cannot issue when the suit has been commenced long after the lapse of the statutory 12-year period provided for the recovery of vacant possession.

156. In the premises, it is my finding that the prayer for eviction is statute barred by dint of Section 7 of the *Limitation of Actions Act*, whose purport and tenor was elaborated upon while discussing issue number one elsewhere herein before.

157. Finally, the Plaintiff had also sought for Mesne profit as against the Defendants. Nevertheless, it is worthy to point out that in the entire body of the Plaint that was filed by the Plaintiff, there is no specific pleading attributed to mesne profit and in any event, no particulars of the Mesne profit have been pleaded.

158. It is important to note that a plea and/or a claim for Mesne Profits is akin to a claim for special damages and in this regard, the law on Mesne profits requires that same be specifically pleaded and the particulars thereof be supplied.

159. Clearly, the Plaintiff herein has not met the established threshold for pleading a claim for Mesne profit.



160. In respect of the foregoing observation, I can do no better than to adopt and endorse the holding in the case of *Karanja Mbugua & Another v Marybin Holding Company Ltd* (2014) eKLR, where the Court stated as hereunder;

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*. The said provisions state as follows with regard to a decree for possession and Mesne profits:

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
 - a. For the possession of the property.
 - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
 - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-
 - i. The delivery of possession to the decree-holder
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

161. In respect of the subject matter, other than failing to specifically plead the claim for Mesne Profits, the Plaintiff also did not tender and/or avail evidence as concerns the subject claim.

162. In the premises, the claim for Mesne Profits as captured vide and as part of the reliefs being claimed, is devoid of any legal foundation and same is hence Misconceived.

Final Disposition

163. The burden of proof in respect of the subject matter laid on the shoulder of the Plaintiff and in this regard, the Plaintiff was called upon to place sufficient evidence before the court.

164. However, the Plaintiff herein has failed to discharge the burden placed upon him. Consequently, the Plaintiff's case was not proven.

165. In any event, though the plea of limitation was raised against the Plaintiff's claim and submissions mounted to that effect by the 1st Defendant, the Plaintiff herein did not find it fit to respond to such pertinent issues that were raised and deliberated upon.

166. Be that as it may, I come to the conclusion that the Plaintiff's case herein was statute barred and hence legally untenable. In the premises, the Plaintiff's suit be and is hereby dismissed with costs.



167. Given the circumstances relating to the subject matter, one would have expected the Defendants and more particularly the 1st Defendant, to raise a Counterclaim for purposes of attracting a positive order to compel the transfer and registration of the subject portion of the suit property in her favor and for purposes of protecting the public interests which has accrued thereto.
168. However, no Counterclaim was raised and/or ventilated and despite the court being alive to the accrued public interests attaching to the subject portion of the suit property, the court is prohibited from making any positive orders, which were not pleaded.
169. In a nutshell, the subject matter is terminated in line with the orders alluded in paragraph 166 hereof.
170. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. Okoth H/B for Etemere for the Plaintiff

Ms. Moturi for the Defendant

Mr. Ashitva for the 2nd Defendant

