Nyamwange & 2 others v Mabeya & 3 others (Environment and Land Appeal 11 of 2021) [2022] KEELC 2378 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2378 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND APPEAL 11 OF 2021

JM KAMAU, J

JUNE 27, 2022

BETWEEN

YUNES BOERA NYAMWANGE ..... 1ST APPELLANT

GEORGE NYAMWANGE ..... 2ND APPELLANT

CHARLES NYAMWANGE ..... 3RD APPELLANT

AND

STEPHEN MABEYA ..... 1ST RESPONDENT

JAMES OGATA ..... 2ND RESPONDENT

LAKE VICTORIA SOUTH WATER SERVICES BOARD ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an Appeal against the Ruling of Hon. M. C. Nyigei – PM Nyamira dated and signed on the 16th day of June 2021 in the original Nyamira Chief Magistrate's Court ELC Case No. 24 of 2020)

RULING

1. This appeal arises from the Ruling and Order of the Honourable Maurine C. Nyigei – Principal Magistrate in Nyamira CM ELC No. 24 of 2020 delivered on June 16, 2021. In the plaint before the Honourable Magistrate's Court, the plaintiffs/applicants claimed that their respective parcels of land were trespassed onto by the 1st, 2nd and 3rd defendants who were laying water pipes through the said parcels and in the process their crops, trees, grass and other vegetation as well as the fences of the lands worth Kshs. 8,000,000/= were destroyed. They further claim that they were not consulted nor did they consent to the exercise before the same was commenced. Their prayers are: -

(a) A declaration that the setting up of the pipeline on land parcel No. Gesima/settlement Scheme/5was illegal, null and void.

(b) Removal of the water pipeline passing through land parcel No. Gesima Settlement Scheme/5or payment of adequate compensation in the event that the defendants intend to compulsorily acquire the same.

(c) A permanent injunction restraining the defendants by themselves, their agents and/or servants from trespassing, wasting and/or in whatsoever manner deal with land parcel No. Gesima Settlement Scheme/5.

(d) Costs of this suit.

(e) Interest on lost gains since 8th March, 2017.

(f) Any other relief the court deems fit to grant."

2. On November 10, 2020 the 1st and 2nd defendants made an Application asking the court to order that the suit against the 1st and 2nd defendants be struck out for being misplaced and intended to harm their reputation since the project of laying the water pipes was initiated by the Government of Kenya and was being implemented through the 3rd defendant, Lake Victoria South Water Services Board and therefore the two had no role in the development and the project had not been handed over to the community. They also claimed that they would suffer irreparable loss and damage and that the retention of their names in the suit would lead to delay in the disposal of the matter.

3. Stephen Mabeya, from Keginga Sub-location of Borabu Sub-county, Nyamira County swore an Affidavit in support of the Application which was undated but filed in court on December 2, 2020. He deponed that he was elected the Chairman of Nyamache Water Project while the 2nd defendant was the Project's Secretary. The objective of the project was to lobby the Government for provision of water which was to act as an economic booster. The Association was registered with the Registrar of Societies on May 25, 2007. The project was later temporarily stopped by the High Court in Kisii HCCC No. 63 of 2007 on May 30, 2007. The deponent further stated that the aforesaid suit was eventually dismissed but no evidence to this was tabled. It is important to note that the 1st defendant deponed in paragraph 12 of his aforesaid affidavit as follows: -

> "……during the pendency of the suit similar issues arose and we instructed our Advocate on record to enjoin the Attorney General whereby a Third Party Notice was issued and the Attorney General took over the conduct of the matter……."

4. The applicants therefore persuaded the court that there lay no proper and/or reasonable cause of action against them in the lower court.

5. On their part, the plaintiffs, now appellants, through the 3rd plaintiff swore an affidavit on February 22, 2021 where the deponent claimed that the 1st and 2nd defendants took part in the events leading to the suit which was given weight by the 1st and 2nd defendants confirming it in the supporting affidavit of 1st defendant (mentioned above).

6. In her Ruling dated June 16, 2021, the Learned Honourable Principal Magistrate relied on Order 1 Rule 10 (2) of the *Civil Procedure Rules* and the cases of *Pizza Harvest Limited v Felix Midigo* [2013] eKLR and *Elisheba Muthoni Mbae v Nicholas Karani Gichohi & 2 others* [2014] eKLR to allow the Application by the 1st and 2nd defendants and consequently struck out the suit against the 1st and 2nd

defendants with costs leaving the suit against the 3rd and 4th defendants only. This is the summary of the Application and its Ruling which aggrieved the plaintiffs in the lower court leading to this Appeal.

7. In the Memorandum of Appeal dated June 30, 2021 the Grounds set out for appeal are as follows: -

    1. The Learned Magistrate erred in fact and in law in finding that the 1st and 2nd respondents are not a necessary and proper parties to the suit.

    2. The Learned Magistrate erred in law and in fact in not holding that the 1st and 2nd respondents were among the initial instigators and perpetrated the act of trespass and/or the wrongful and unlawful construction of the pipeline through the appellants' parcel of land No. Gesima Settlement Scheme/5.

    3. The Learned magistrate erred in law and in fact in not holding that the appellant had demonstrated a reasonable cause of action against the 1st and 2nd respondents.

    4. The Learned Magistrate erred in fact and misdirected himself fundamentally in holding that the appellants had not demonstrated that the 1st and 2nd respondents played any role in the implementation of the project.

    5. The Learned Magistrate erred in fact and misdirected himself fundamentally in holding that the appellant had failed to demonstrate that the 1st and 2nd respondent were necessary and proper parties."

8. The summary of the Grounds of Appeal is that the trial Magistrate erred in law in not finding that the 1st and 2nd respondents were a necessary party in the suit. At a casual look at the Plaint and the application dated November 10, 2020 one would imagine that the 1st and 2nd defendants' roles in the exercise was very minimal and that they were not involved in the actual day to day activities. One would be excused to think so because the 3rd respondent ought to carry out its work professionally without seeking any other person's advice. She has enough expertise and the 1st and 2nd respondents have not demonstrated that expertise. However, there are particular claims attributed to the 1st and 2nd defendants that, if proved, would amount to individual liability. The same are contained in paragraphs 8, 9 and 10 of the Plaint dated March 4, 2020. The said paragraphs read as follows: -

    8. Sometimes on March 8, 2017 the Borabu sub-county Commissioner accompanied by administration police, 2nd defendant, 3rd defendant and officers of the 1st defendant entered into the land parcel No. Gesima Settlement Scheme/5 and forcefully passed water pipes through the said land.

    9. The trespassing and/or setting up of the pipeline was done without the consent of the plaintiffs, and no consultation whatsoever was conducted by the 1st, 2nd and 3rd defendants on the proposed pipeline on land parcel No. Gesima Settlement Scheme/5.

    10. In the process of setting up the pipeline, the 1st, 2nd and 3rd defendants destroyed crops, trees, grass, other vegetation, and the fence of land essentially acquiring a portion of the suit land valued at more than Kshs. 8,000,000/=."

9. I need to note that no Defence to the instant suit has been brought to my attention. We cannot at this stage and in the absence of such Defence tell whether the 1st and 2nd defendants would admit the claim or deny it. The two have been specifically pointed out as the tortfeasors particularly on the issue destroying crops, trees, grass, other vegetation, and the fence of land essentially acquiring a portion of the suit land valued at more than Kshs. 8,000,000/=. This destruction may have nothing to do with the laying on of the pipeline. It may even turn out to be wanton destruction. They therefore need to be

accorded an opportunity to plead to the said allegations. The same could be hopeless but it is beyond the scope of this appeal to interrogate it. But however hopeless a claim could be the appellants must be heard on it. Supposing the Ruling of the Learned trial Magistrate is upheld and this claim is then proved? The 1st and 2nd defendants will have been condemned unheard. In the case of *Gudka Ltd v Alfred D. T. Dobie & Company (kenya) Ltd v Muchina* [1982] KLR 1 Madan J. A. as he then was observed as follows: -

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

10. In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."

11. Also I wish to bring to the attention of the 1st and 2nd respondents here that they have shot themselves on their legs by stating in paragraphs 11 & 12 of the undated supporting affidavit of Stephen Mabeya, the 1st respondent herein which reads as follows: -

> " 11.....the project was commenced but the same was stalled as a few days to its launch one of our neighbours namely Zachary Obutu went to court being Kisii HCCC No. 63 of 2007 and obtained an injunction against the project stalling the completion of the same.
>
> 12.....we instructed our Advocate on record to enjoin (sic) the Hon. Attorney General whereby a Third Party Notice was issued and the Attorney General took over the conduct of the matter....."

12. From the above, it is clear that the first two respondents did not want to be left behind in any step and progress of the project work of the 3rd respondent. They were quite in the picture all along but now when they are specifically sued for a tort they claim that they had nothing to do with the project they ask the court to expunge their names. I feel they need to be given an opportunity to file a Defence and defend themselves on the allegation of destruction of crops, trees, grass, other vegetation and the fence on LR No. Gesima Settlement Scheme/5. By saying that the 1st and 2nd Respondents need to be given an opportunity to defend themselves against destruction I don't mean to say that they are liable. It is first an allegation which should be responded to. A "cause of action" is not synonymous with liability or legal responsibility. It just means a claim that is attributed to the defendant or any other party. As to whether it has merit or not is not the issue. That is a matter for trial.

13. The upshot of the above is that this Appeal is allowed with costs and the 1st and 2nd defendants are forthwith reinstated as defendants in Nyamira Chief Magistrate's Court ELC Case No. 24 of 2020 respectively.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF JUNE 2022.

MUGO KAMAU

JUDGE

<u>In the Presence of:</u>

Court Assistant: Sibota

Appellants: Ms. Nyaenya

Respondents: N/A