Ng'ang'a v National Water Harvesting & Storage Authority & 3 others (Environment & Land Case 71 of 2018) [2022] KEELC 15388 (KLR) (8 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15388 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 71 OF 2018

LN GACHERU, J

DECEMBER 8, 2022

BETWEEN

DANIEL MWANGI NG'ANG'A ..... PLAINTIFF

AND

NATIONAL WATER HARVESTING & STORAGE AUTHORITY .... 1ST DEFENDANT

ATHI WATER WORKS DEVELOPMENT AGENCIES ..... 2ND DEFENDANT

BOARD TRUSTEES, GATANGA COMMUNITY WATER SCHEME .... 3RD DEFENDANT

MURANG'A COUNTY EXECUTIVE COMMITTEE DEPARTMENT OF WATER AND IRRIGATION ..... 4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed the instant suit against the Defendants vide an amended Plaint dated 3rd February, 2021, wherein he sought for the following Orders against the Defendants Jointly and Severally; -

    a. Declaration that the water reservoir/ tank is illegally constructed on the Plaintiff's land title No. Loc.16/Kimandi-wanyaga/589.

    b. A mandatory injunction compelling the Defendants to demolish the said water reservoir on the land Loc.16/Kimandi-wanyaga/589 and or cease the use of the same

    c. In the alternative, the Defendants to compensate the Plaintiff for the construction of the tank and its continued use on condition that the Defendants repair, properly maintain and ensure that the tanks stop leaking henceforth

d. General damages

e. Mesne profits

f. interest on (c) and (d)

g. Any other relief the Court may deem fit and just to grant

2. It is the Plaintiff's case that he is the registered owner of all that parcel of land known as LOC.16/ Kimandi-wanyaga/589. He contends that sometime in 1972, Kandara Water Project was formed under the Ministry of Water Development and which Project was constructed on his parcel of land. He added that in 1990, the 1st Defendant took over the management of Kandara Water Project and he was never compensated for the use. The Plaintiff posits that the project has been negligently used and managed and has resulted to massive loss on his land. He enumerated the particulars of negligence which he attributes to the Defendants and the particulars of loss he has suffered.

3. The Plaintiff further averred that he filed a claim against the Defendants in Nairobi HCC No. 976 of 2001, for the same Orders herein, but the suit was by an order of Court and pursuant to Gazette Notice No. 133 transferred to Water Appeals Board for determination. He also averred that the Water Appeal Board rendered judgment in his favour, but the same was quashed by the High Court for want of jurisdiction, necessitating the instant suit.

4. The 2nd Defendant filed its Statement of Defence on 18th October, 2019, and denied in toto the contents of the Plaint terming it as unfounded, bad in law and an abuse of the Court process. The 2nd Defendant questioned the jurisdiction of this Court.

5. The 3rd Defendant too filed its Statement of Defence and also denied all the averments and urged this Court to discharge it from this suit since the Plaint does not disclose a reasonable cause of action against the 3rd Defendant. It denied the jurisdiction of this Court.

6. Equally the 1st Defendant Entered Appearance and filed its Defence and averred that the Water reservoir, was constructed but not on the Plaintiff's land and he was thus not entitled to any compensation. It is the 1st Defendant's Defence that it does not have control, management or rights over the reservoir and it is thus not responsible for the leakage and overflow. The 1st Defendant denied the jurisdiction of this Court and added that there have been previous litigations of the same subject matter and that the suit is res judicata.

7. By its statement of Defence filed on 30th July 2020, the 4th Defendant denies the contents of the Plaint and avers that it was not part of the proceedings in the previous suits. It further averred that this Court lacks jurisdiction to entertain this suit.

8. The matters was dispensed by way of viva voce evidence.

Plaintiff's Case.

9. PW1 Daniel Mwangi Nganga adopted his witness statement dated 13th August 2018, as evidence in chief and also produced the documents contained in the List of Documents as exhibits. The Plaintiff further reiterated his averments in the witness statement claiming that his land has been adversely affected by the Defendants acts of negligence.

10. It was his further evidence on cross examination that the alleged leaking started in 1990's but there were little trickles from 1974. He added that due to some landslides in the area, repairs were carried out causing damage to his land, but the Company had promised to compensate him, but it failed to do so

to date. He also testified that the tank was erected on land parcel No. 589, which is his parcel of land. He added that the water tank is fenced, but the said fence was erected by the owners of the land.

11. When examined by Counsel for 2nd Defendant, he testified that when the water tank was constructed, he was not the owner of the land. Additionally, that he was not aware whether the previous owner was compensated or not. Further that the project is currently owned by Athi Water, but he has never visited their offices to lodge a complaint.

12. On re-examination, he testified that the Water tank was built by a Member of Parliament called Mwicigi and that the leakage begun in 1974, and despite repeated demands, no repairs have been done.

13. PW2 COLLIN MUTURI NGUGI testified that he is an Engineer by Profession and was instructed by the Plaintiff's Advocate to investigate the Plaintiff's complaint. He testified on the defects of the Water tank to the extent that, there was an outflow defect with the tank that drained water to a river and when it overflowed, it would sweep away the soil and damaged the Plaintiff's land. He informed this Court that the remedy for the defect was to construct gabions to avoid erosion.

14. On cross-examination, he testified that there was an outlet to the piping system, but he did not inspect it. It was his further evidence on cross-examination that the area is prone to landslides and when he visited the area, there was no overflow and he could not tell what caused the soil erosion. He was put to task on his qualification to carry out the investigation, and it was his testimony that the investigation could be carried out by an Engineer or Quantity Surveyor.

15. PW3 Ngaruyia Charles Njenga, a Valuer by profession produced the Valuation Report as his evidence. It was his testimony on cross-examination that he relied on the information given to him by the Plaintiff to conduct his Valuation. He also testified that there was difference in boundaries and he was not aware whether there was a sub-division of land. He also testified that he valued the loss at Kshs. 27M, which he alleged is a culmination of a rental income of Kshs. 15,000 annually. On re-examination, he testified that the water overflow happened in 1979, and he could not tell whether there has been any damage again. His assumption is that the damage was caused to the tea leaves and the Plaintiff is thus eligible for compensation.

Defence Case

16. DW1 Reuben M Itiko adopted his Witness Statement dated 14th April 2021, as evidence before this Court and produced the documents contained in the list of documents dated 14th April, 2021 as exhibits. He testified that he works with the 1st Defendant as a Water Engineer, where he has worked since 1988, and is tasked to manage specific supplies. It was his testimony that prior to 1972, the 1st Defendant did not exist and Kandara Water Project was under the Ministry of Water Development. According to his testimony they are not in charge of the management of the said project and their role includes construction of dams, flood control, borehole drilling and flood mitigation. He also testified that Kandara Water Project was handed over to Tana Water Services Board and as a Corporation they have never received any complaint on the alleged leakage.

17. He reiterated his role and that of the Corporation on cross-examination and maintained that the Corporation is not seized with the present matter. He told the Court that the tank is on a separate parcel of land to that of the Plaintiff. He added that the project is not under the control of the 2nd Defendant, but Tana Water Service Board. In re-exam, he testified that the Project is currently controlled by the 2nd Defendant.

18. DW2 Martha Wanjiku Mugo, the Principal Legal Officer of the 2nd Defendant adopted her Witness Statement dated 27th April 2021, as evidence in Chief and produced the documents in the list of

documents dated 28th January, 2021 as exhibits. She testified that Athi Water Service ceased to exists. It was her testimony that the Project was never under them and that before the creation of Counties, Water Management was under the control of Water Boards.

19. It was her testimony in cross-examination that with the enactment of the *Water Act* 2016, Water Services was devolved and the Water Service providers are Companies. She added that what was devolved is provision of Water Services, but the development of water works remained with the National Government. She further stated that the Project which is in Gatanga area is not one of the Projects that they maintain. She also testified that the function of infrastructure cannot be undertaken by a State Corporation. She exonerated the 2nd Defendant from the management of the Water Tank and insisted that they never acquired its management. Further that they undertake infrastructural development and once done they hand over to Counties or to Boards as it was previous that they would use and would maintain, but the 2nd Defendant remain the principal owner.

20. DW3 John Kiarie Kairu, adopted his witness statement dated 21st September 2021, as evidence and testified that he is the Managing Director of the 3rd Defendant, which was incorporated on 10th March, 2005. He testified that Kandara Water Project was not handed to them and their role is only limited to operating and maintaining. His testimony was that the project having been established in 1972, belonged to the Ministry of Water as the developer. He also told the Court that he has never received any complaint from the Plaintiff and he could not confirm if the Plaintiff comes from his locality since he has no water account with the 3rd Defendant.

21. He reiterated the role of the 3rd Defendant on cross-examination and added that the infrastructure is a reserve of the Ministry of Water. He testified that there is a laid down procedure for institution of complaints and that he never saw any complaint by the Plaintiff.

22. The Plaintiff filed his written submissions dated 23rd May, 2022 through the Law Firm of Kinyanjui Njuguna & Co. Advocates and raised six (6) issues for determination by this Court.

23. On whether the Plaintiff is the owner of Land Parcel No.Loc. 16/Kimandi-Wanyaga/589, and whether he has locus to sue the Defendants, the Plaintiff relied on Section 26 of the *Land Registration Act* 2012, and submitted that he is the absolute and registered owner of the suit land and therefore he has the requisite locus to institute the instant suit against the Defendants.

24. On whether the water reservoir is illegally constructed on the Plaintiff's parcel of land Loc. 16/ Kimandi-Wanyaga/589, the Plaintiff submitted that the water reservoir was constructed on his land and the Engineer and the Valuer confirmed the same. That though the Defendants' denied that the water tank being on the Plaintiffs land, they failed to produce any evidence to support their claim. He further submitted that neither he nor his father were compensated by the Defendants for the said construction on their parcel of land and for that reason, the water reservoir was illegally constructed.

25. On whether the suit was res judicata and/or time barred, the Plaintiff submitted that the issue was heard and determined by Lady Justice Kemei via a Ruling delivered on 26th November, 2019, and therefore it could not be determined again.

26. On whether the Plaintiff has a cause of action against the Defendants, the Plaintiff submitted that Kandara Water Project was constructed by the Ministry of Water Development in 1972. That though the Defendants herein were not in existence at the time, the *Water Act* 2002 and 2016 established the Defendants' offices and they were mandated to take over the functions and assets of the Water Conservation and Pipeline Corporation. That the 1st Defendant has a duty to maintain the impugned water reservoir and it owed the Plaintiff a duty of care as described in the case of Donogue vs. Stevenson (1932) ALL ER 1.

27. Further that the Plaintiff has a cause of action against the 2nd Defendant and that the 1st and 2nd Defendants had recorded a consent to repair the damage caused by the overflow from the impugned reservoir. That the said consent was still in force and the 2nd Defendant was bound by it and could not now claim that the Plaintiff has no cause of action against him. In addition, the Plaintiff submitted that he had also proved and established a cause of action against the 3rd and 4th Defendants respectively.

28. On whether the Plaintiff has suffered any damage as a result of the Defendants negligence, it is the Plaintiff's submissions that he had proved that indeed the Water Reservoir was constructed on his land and that he had suffered damages amounting to Kshs. 67,004,952/=. The Plaintiff relied on the case of William Kabogo Gitau vs. George Thuo & 2 Others (2010) 1 KLR 526 and the case of Palace Investments Limited vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Courts defined the burden of proof on a balance of probability. It was the Plaintiff further submissions based on this definition that he had proved his case on a balance of probability and that he had quantified the damages of Kshs. 67, 004, 952/= That he had suffered as a result of the overflow from the reservoir tank. He further submitted that the Defendants failed to call any expert witnesses to challenge the Plaintiff's case and therefore the evidence of his expert witness remained uncontroverted.

29. He relied on the case of Kenya Power and Lighting Company Ltd. Vs. Rassul Nzembe Mwadzaya (2020) eKLR, where the Court held that where an expert is properly qualified in his field and he gives an opinion together with reasons for the said opinion and there is no other evidence in conflict with such opinion, there is no basis upon which such opinion could be rejected. The Plaintiff urged the Court to be bound by the above decision and find that the Plaintiff has proved the damages suffered and award him Kshs. 67, 004, 952/= as compensation in addition to directing the Defendants to repair the impugned water reservoir.

30. On costs' the Plaintiff urged this Court to award him costs of the suit after finding in his favour as prayed.

31. The 1st Defendant filed its written submissions dated 1st July, 2022 through the Law Firm of B. M. Musyoki & Co Advocates, wherein he raised three issues for determination.

32. On whether the Water reservoir/water tank was illegally constructed, it is his submissions that the said water tank that was built was with free will and consent of the owner of the suit land at the time of construction. That the Plaintiff became the owner of the suit land in 1997, while the water tank was constructed in 1972, and the Plaintiff could not therefore claim that the construction was done illegally. In addition, it is the 1st Defendant's submissions that the damages suffered by the Plaintiff if any was not attributable to the 1st Defendant.

33. On the issue of whether mandatory injunction should be issued compelling the Defendants to demolish the water tank, the 1st Defendant's submitted that the water tank is a public utility and demolishing the same will not serve the ends of justice.

34. On whether the Plaintiff is entitled to the reliefs sought, it is the 1st Defendant's submissions that Legal Notice No. 101 of 2005, which was published in accordance with Sections 110 and 113 of the *Water Act* 2002, transferred the 1st Defendant's assets to the respective Water Services Boards and therefore the 1st Defendant cannot be liable for the Plaintiff's claim. Further that there exists another suit being HCCC No. 976 of 2001, in respect of the same issues and cause of action and that the instant suit is time barred as the cause of action arose in 1972.

35. The 1st Defendant based on the foregoing urged this Court to dismiss the Plaintiff's claim as against him with costs.

36. Similarly, the 2nd Defendant filed its written submissions On 22nd July 2022, through the Law Firm of Mulekya & Co Advocates and raised ten issues for determination.

37. It is the 2nd Defendant's submissions that on the instant suit is res judicata and time bared as per the Provisions of the *Limitation of Actions Act*. That contrary to the Plaintiff's submissions, this Court in its ruling on the Notice of Motion Application, dated 3rd May 2019, did not substantively deal with the issue of the suit being filed out time and the same cannot be said to be res judicata. The 2nd Defendant relied on provisions of Sections 7 and 17 of the *Limitation of Actions Act* and submitted that the cause of action arose in 1972 after the Water Tank/Reservoir was built on the suit land, and the same flies on the face of the aforementioned provisions. He urged the Court to strike out the suit on grounds that the instant suit is time barred.

38. On whether the Plaintiff was the owner of the suit land at the time the impugned Water tank was constructed and if he was capable of being compensated by the 2nd Defendant, it is the 2nd Defendants, submissions that the impugned water tank was constructed in 1972 while the Plaintiff acquired the suit land on 25th March 1997. That the Plaintiff found the Water tank on the suit land when he acquired it and cannot factually disclose what led to the construction of the water tank. That the original owner had neither protested nor complained against the construction of the impugned water tank. That the Water tank and its infrastructure formed part of the overriding interests described in Sections 25 and 28 of the *Land Registration Act*, and the said overriding interests were not extinguished by change of ownership of the suit property. That the Plaintiff could neither revoke, deny them nor claim compensation for the same.

39. In addition, the 2nd Defendant submitted that 2nd Defendant neither constructed the impugned water tank nor did manage or run it and it cannot be held responsible for any liability that arises from it. That the Plaintiff has failed to prove his claim against the 2nd Defendant and the said claim should therefore be dismissed with costs.

40. The 3rd Defendant similarly filed its written submissions dated 4th August 2022, through the Law Firm of Mwangi Mwaura & Advocates and submitted that the Plaintiff's claim should be dismissed with costs for failing to disclose any cause of action against the 3rd Defendant. In addition, that the Plaintiff had failed to prove his claim to the required degree against the 3rd Defendant. Reliance was placed on the case of Kirugi & Another vs. Kabiya and 3 Others (1987) KLR 347, where the Court of Appeal stated that the burden of proof is always on the Plaintiff to prove his case on a balance of probabilities and that the balance is not lessened even if the case was heard by way of formal proof.

41. Further reliance was placed on the case of Kanyugu Njogu vs. Daniel Kimani Maingi (2000) eKLR, where the Court stated that when a Court is faced with two probabilities, it can only decide the case on a balance of probabilities, if there is evidence to show that one probability was more probable than the other. Based on the preceding grounds, the 3rd Defendant prevailed on this Court to dismiss the Plaintiff's suit with costs.

42. This Court notes the existing confusion on the ownership and management of Kandara Water Project as well as the inconsistence on where the said Project is erected. While the Plaintiff alleges that the same is built on his parcel of land being land parcel No. Loc.16/Kimandi-Wanyaga/589, the Defendants hold a contrary view. The Court also notes that the impugned Project was constructed in 1972, while the Plaintiff was registered as the proprietor of the suit land on 25th March, 1997. However, it is not clear to whom the suit land belonged to prior to 1997, when the project was commenced. Additionally, this Court notes that the Plaintiff had previously moved the High Court in Nairobi HCC No. 976 of 2001, where he sought similar orders as herein. The suit was transferred to the Water Appeals Board

and the Board rendered a Decision in favor of the Plaintiff herein against the 1st and 2nd Defendants herein. The 1st Defendant herein; being dissatisfied with the Decision of the Water Appeals Board; filed a Judicial Review Cause No. 253 of 2011, in Nairobi, and the High Court in delivering its Judgment on 23rd August, 2013, quashed the decision of the Water Appeals Board for want of jurisdiction. The Plaintiff subsequently filed the instant suit on 12th September, 2018, about five years since the delivery of Judgment in JR No. 253 of 2011.

43. The Defendants in opposing the Plaintiff's claim challenged the jurisdiction of this Court on the premises that the suit filed is time barred in accordance with the provisions of the *Limitation of Actions Act* and that the suit is res judicata to the Water Appeals Board Case and JR No.253 of 2011.

44. Having stated as above, the issues for determination are;

    i. Whether this Court has jurisdiction to entertain the instant suit

    ii. Whether the Plaintiff is the owner of the parcel of land on which the water reservoir is constructed

    iii. Whether the water reservoir was illegally constructed on the Plaintiff's land

    iv. Whether the Plaintiff has established a cause of action against the Defendants jointly and severally

    v. Whether the Plaintiff is entitled to the prayers sought

    vi. Who shall bear the costs of the suit

Whether this Court has jurisdiction to entertain the instant suit ?

45. The jurisdiction of this Court has been challenged on two fold firstly that the instant suit is res judicata and secondly that the instant suit as filed is time barred.

46. The law of res judicata is settled under Section 7 of the *Civil Procedure Act* which provides:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

47. The Court in Samwel Kiiru Gitau v John Kamau Gibui HCCC No. 1249 of 1998, had this to say:

> " For a matter to be res judicata, it must be one which the Court has previously exercised its judicial mind and has, after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to be res judicata."

48. Similarly, in John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR, the Court of Appeal set out the ingredients of res judicata as follows:

> " From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the

same title and lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83."

49. The purpose of res judicata is to prevent parties from abusing the process of Court by re-litigating over the same issues. It is meant to bring sanctity to Court and to respect the process of the Court.

50. In order to determine whether the instant suit is res judicata, to Water Appeals Board Case Application No. 2(WS) of 2008 and JR No.253 of 2011, this Court will examine the following

    1. Whether the parties in the two suits are the same

    2. Whether the issues raised in the present suit are directly and substantially the same in the previous suit

    3. Whether the issues raised herein have been determined by a Court of competent jurisdiction

51. The prayers sought in the instant suit are similar as the prayers sought in HCC Nairobi Civil Suit No. 976 of 2001, which suit was transferred to the Water Appeals Board for determination. At Water Appeals Board, the suit being Application No. 2(WS) of 2008, was heard and determined in favor of the Plaintiff on the issue of compensation against the 1st and 2nd Defendants herein. This decision was subject to the Judgment of the High Court in Judicial Review Cause No. 253 of 2011, where the Court quashed the decision of the Board for being ultra vires on the basis that the Board did not have jurisdiction to determine the matter on the strength of the provisions of Section 85(1) of the *Water Act*.

52. A cursory look at the foregoing pleadings informs this Court that the 3rd and 4th Defendants were not parties to the previous suits. While the issues in the previous suits are directly and substantially similar to those raised in the instant case, this Court is of the view that the said issues were not determined by a Court of competent jurisdiction as was held by the Court in Nairobi JR No. 253 of 2011. Further this Court is not well guided on whether any Appeal arose from the decision of the Court in Nairobi JR No. 253 of 2011. The decision of the said Court was final and this Court being a Court of equal status cannot purport to re-adjudicate on the issue of jurisdiction as doing so will mean that this Court will be sitting on Appeal. It follows that the issues herein have not been substantively and conclusively determined by a Court of competent jurisdiction and the instant suit cannot therefore be said to be res judicata.

53. The second limb for determination on the issue of jurisdiction is whether the instant suit as filed is time barred. The Defendants have challenged the instant suit for being time barred pursuant to the provisions of Sections 7 and 17 of the *Limitation of Actions Act*. The Plaintiff opposes this allegations and submits that the issue of jurisdiction on this premise was substantively dealt with by this Court vide its Ruling delivered on 26th November, 2019.

54. The Court has perused the copy of the aforementioned Ruling and notes that in paragraphs 21 & 22 of the said Ruling, the Court did not substantively and conclusively determine the issue of this suit being statutory barred on the basis that the same required the calling of evidence to determine when the cause of action arose. It follows therefore that the issue of statutory limitation was left for determination by this Court during trial.

55. A perusal of the Plaint indicates that the Plaintiff is claiming against the Defendants on the grounds that his use of the suit land has been curtailed by alleged illegal construction of the Kandara Water Project. The said Plaint alludes to the tort of nuisance and negligence, particulars of which are enumerated in paragraph 9 of the Paint. The Plaintiff alleges that he has suffered substantial loss as particularized in paragraph 10 of the Plaint as a result of the said nuisance and negligence.

56. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date the cause of action arose. Similarly, Section 3(1) of the *Public Authorities Limitation Act* Cap 39, provides that no proceedings founded on tort shall be brought against the Government or a Local Authority after the end of 12 Months from the date on which the cause of action accrued. Proceedings under Cap 39 are defined to mean Civil proceedings in the High Court or a subordinate Court. Government on the other hand includes the Attorney-General, any Government Department, any public officer and Local Authority (now the County Governments) or any persons employed by them.

57. Presently, it is not in doubt that the Plaintiff has indeed instituted the instant suit against various government entities both at National and County Levels. As to when the cause of action arose, PW1 testified that "the leakage started in 1990's. However little trickle of water started leaking in 1974..." In Clerk and Lindsell on Torts, 17th Edition page 1354 paragraph 24. Cited in Nakuru Industries Limited...Vs...S.S Menta & Sons (2016) eKLR, 'Nuisance' is defined as

> " "As an act or omission which is an interference with, disturbance of or annoyance to, a person's rights used or enjoyed in connection with land. It is caused usually when the consequences of a person's actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour's use and enjoyment of his land".

58. The Plaintiff testified that the cause of action arose in 1974, but he averred that the negligence on the part of the Defendants caused the reservoir to overflow and which continues to overflow. He makes an allegation of a continuing injury. In Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 1697 paragraph 32-20 continuous injury is elucidated as follows :-

> "Continuing Injury: If the act complained of creates a continuing source of injury, and is of such a nature as to render the doer of it responsible for the continuance, then in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises de die in diem, and in cases in which damage is of the essence of the action, as a nuisance, a fresh cause of action arises as often as fresh damage accrues. Whenever one person wrongfully puts something upon the land of another, he is not only liable to pay damages for the trespass in placing the thing there, but he is further under an obligation to remove it, and is guilty of a continuing trespass as long as he neglects to do so."

59. As to whether the injury is continuous or not can only be established through production of evidence or testimony. PW2 and PW 3 testified that as of 2018, when they visited, there was no overflow. No evidence was placed before this Court to show that the nuisance was in any way continuing. PW1 and PW2 admitted that the area is prone to landslide and despite testifying so, PW2 an Engineer attributed the alleged nuisance to the water overflow. With all due respect, PW2 is no expert on environmental matters and a report from an environment expert would have aided the Plaintiff's case. The photographs produced were taken in 2018, and nothing was tabled before this Court to show the status of the nuisance if any as of the time the suit was filed. However, the evidence of PW2 remains uncontroverted to the extent that, he testified that there was a defect to the side of the outflow that caused water to flow onto the Plaintiff's land when the Water tank was full and the that the said defect was yet to be corrected.

60. Based on the foregoing, it appears that the nuisance persisted since the 1990's and was still ongoing. Therefore, it follows that the Plaintiff has been able to establish a continuous injury and it cannot be

said that the nuisance happened only once in 1990's. This Court therefore finds and holds that the instant suit is not time barred and will proceed to determine the same on merit.

Whether the Plaintiff is the owner of the parcel of land on which the water reservoir is constructed and whether the water reservoir was illegally constructed on the Plaintiff's land?

70. The Plaintiff maintained that the reservoir is constructed on his parcel of land, an allegation sustained by both PW2 & PW 3 who visited the site. On cross-examination by counsel for the 1st Defendant, the Plaintiff testified that his parcel of land was a portion of LR No. 388, which was his father's parcel of land. That after sub-division of land Parcel LR No. 388, the tank fell on land parcel No. 589, which is the Plaintiff's parcel of land. As per the photographs, it is not possible to tell where the reservoir is constructed on. DW1 testified that the tank is constructed on a separate parcel of land, but he did not have details of the said land. DW 3 on the other hand corroborated the evidence of the Plaintiff and confirmed that indeed the water tank was constructed on the Plaintiff's land.

71. This Court has no reasons to doubt the above evidence and in any case no evidence to the contrary has been produced before it. Based on the foregoing, the Court finds and holds that the project is erected on the Plaintiff's parcel of land.

72. On whether the water reservoir was illegally constructed on the Plaintiff's land, this Court takes cue that the impugned Project was commenced in 1972, and became operational in 1973. The Plaintiff alleges that the project was built by an MP called Mwicigi. It was his submissions that there being no compensation, the construction on his parcel of land was illegal.

73. It is trite law that he who alleges must prove. In this case the burden squarely lies on the Plaintiff to lead evidence on his assertion with regards to the said illegality. The Court has perused a copy of a title deed showing that the Plaintiff was registered as proprietor of the suit land on 25th March 1997. As at 16th May 2018, the land was still under the Plaintiffs name as per a certificate of official search produced in evidence. Conversely, the impugned project as stated above was constructed in 1972 and no evidence was placed before this Court as to the ownership of the suit property at that time. The Plaintiff testified that his parcel of land in which the impugned project sits on was as a result of sub-division from land parcel No. 388 which parcel belonged to his father. No evidence was adduced before this Court to buttress his claim.

74. There is no cogent or material evidence that has been placed before this Court to demonstrate ownership of land at the time of the said construction in 1972. Within the *Water Act* of 2002, repealed, a Landholder was defined as in relation to land, means the registered owner of the land or the person in whom the land is otherwise vested by law, and includes

    (a) Any person who by any established right, custom or estate whatsoever is, or is entitled to be, the holder or possessor of land;

    (b) Any person lawfully holding or occupying land in accordance with the provisions of any law empowering the allotment of land upon the promise of title, subject to the fulfillment by the allottee of prescribed conditions; and If indeed the Plaintiff's father was the owner of the land through adjudication process, the Plaintiff ought to have at least produced a document showing that the father was indeed allocated the said parcel of land. The Plaintiff acquired ownership of the suit land with the project on it. He only raised a complaint in 2001, about 29 years, after construction of the said water tank via Plaint dated 12th June, 2001 against the 1st Defendant. Undoubtedly, this was an afterthought and the Plaintiff alleges that there was no compensation, yet he failed to tender any evidence before this Court either through

testimonies or documented evidence to that effect. In the absence of evidence on illegality, this Court cannot find in favor of the Plaintiff.

Whether the Plaintiff has established a cause of action against the Defendants jointly and severally?

75. The Plaintiff is claiming against the Defendants and it should be noted that in all the cases cited hereinabove, the Defendants kept changing but the 1st Defendant remained constant. In 1972 the law on water was the *Water Act* of 1952, which was subsequently repealed. It is not clear which management caused the construction of the said Kandara Water Project. Interestingly the Plaintiff testified that the reservoir was constructed by a Member of Parliament called Mwicigi. The Defendants have distanced themselves from the Project. Attached to the Plaintiff's document is a letter by National Water Conservation & Pipeline Corporation, the contents of which do not give details of the correspondence between the corporation and the Plaintiff's counsel.

76. Section 55 of the *Water Act* 2002, which repealed the *Water Act* of 1952, allowed the Water Service Board to enter into agreement with Water Service Providers, to maintain, rehabilitate and develop infrastructure and facilities of the Board. The Water Service Boards took over the overall administrative and legal responsibility for provision of water services, previously from the Department of Water in the Ministry. Also the Central Government transferred all the facilities to these Boards.

77. The 1st Defendant, the Water Harvesting and Storage Authority, is established under Section 30 of the *Water Act*, 2016. Previously, it was a State Corporation established by National Water Conservation and Pipeline Corporation Order, 1988 within the mandate of the State Corporation Act. It was mandated to inter alia develop water projects.

78. Pursuant to section 149 of the *Water Act* 2016, the 1st Defendant took over the assets rights and liabilities of the National Water Conservation and Pipeline Corporation. The said Section 149 provides to wit that;

> "(1) All property, assets, rights, liabilities, obligations, agreements and other arrangements not linked to water services provision as provided for in section 148, existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the National Water Conservation and Pipeline Corporation established by the National Water Conservation and Pipeline Corporation Order, 1988 shall, upon the commencement of this Act be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Water Harvesting and Storage Authority to the same extent as they were enforceable by or against the National Water Conservation and Pipeline Corporation before the commencement of this Act.
>
> (2) Any legal proceedings pending in any Court, the Water Appeal Board or other tribunal by or against the National Water Conservation and Pipeline Corporation in respect of any matter, shall continue by or against the National Water Harvesting and Storage Authority"

79. According to the evidence of DW1, Kandara Water Project was handed over to National Water by the Ministry of Water and Development. He added that in 2002, Water Service Boards were created and the 1st Defendant was left with the mandate of construction of dams, flood control, drilling of boreholes and flood mitigation. That as a result, Kandara Water Scheme was handed over to Tana Water Service Board. On cross-examination he maintained that the 1st Defendant did not manage the impugned project as the same was handed over to Tana Water Service Board. It was his testimony that

the 2nd Defendant did not manage the project, since it operated in Nairobi area, but on re-exam he testified that the project falls under the Athi Water Service Board.

80. The 2nd Defendant on the other hand maintained that they have never been furnished with any documentation bequeathing them with the mandate and/ or responsibility of managing Kandara Water Project. The 2nd Defendant stated that they neither know the source of the tank water nor the beneficiaries of the said tank. DW2 testified that Gatanga Water Project was started in 2019, and it supplied water within Gatanga area and not Kandara. It was her testimony that they manage water supplies that is pipeline, water treatment, boreholes and dams. That once they develop infrastructure, they hand it over to Counties unlike before where they handed over to Boards. She testified that they only hand over maintenance and operation of the projects but they remain the principal owners.

81. Further, the 2nd Defendant produced a list of the water infrastructure it held as at 30th June 2019. This Court having perused the said list notes that Kandara Water Project does not appear on the said list. Further, this Court notes that Gatanga Water Project and Muranga Water Supply are part of that list which corroborates the evidence of the 2nd Defendant. This evidence was not rebutted either through evidence and /or production of documents by the Plaintiff.

82. The 3rd Defendant through the testimony of DW 3 denied being the owners of Kandara Water Project. DW 3 testified that the 3rd Defendant was not in existence at the time, when the impugned reservoir was constructed. He testified that the role of the 3rd Defendant was to manage and maintain water infrastructure developed by the Ministry of water. He maintained that the 3rd Defendant was incorporated in 2005, and since the impugned project was developed in 1972, the Ministry of Water was the developer.

83. The 4th Defendant filed a Defence dated 24th February, 2020 but did not call any witness or produce any evidence to support their averments made in the said Defence. This Court is well guided by the decision of the Court of Appeal in Michael Maina Kamami & Another v Attorney General [2019] eKLR, where the Court in determining the burden of proof in undefended matters held:

> " In the case of Haji Asuman Mutekanga vs Equator Growers (U) Limited, Civil Appeal No 7 of 1995 this Court emphasized;
>
> "This rule applies where a suit proceeds interpartes or exparte. It follows that even where as in the instant case, the defendant neither enters appearance not files a Defence, the Plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less."
>
> The case of Milka Wanjiku Kinuthia & 2 Others vs Attorney (supra) notwithstanding, the petition had to be determined on the basis of the proven facts that were placed before the Court. The non-filing of a Defence or response does not divest a petitioner of his duty to prove his case."

84. In the instant case, the Plaintiff had a duty to prove his case as against the 4th Defendant even if the 4th Defendant did not testify or adduce any evidence in support of its Defence.

85. As noted herein above, there exists confusion as to the body or organ responsible with the management and maintenance of Kandara Water Project. To get to the bottom of this confusion, this Court has to look into the institutional and legal framework established under the *Water Act* 1952, which was the Law in force at the time the impugned water reservoir was constructed.

86. Section 9(1) of the *Water Act*, CAP 372 of 1952 (repealed) gave power to the Minister of Water on recommendation of the Water Resource Authority, on reasonable notice to the Land owner concerned and for public interest to construct and maintain upon any land any such work the Minister considered necessary or desirable for interalia the conservation, distribution, apportionment and measurement of water. Further, under section 25 of the said Act, there is established a Water Apportionment Board appointed by the Minister which shall undertake such duties as may be delegated by the Minister from time to time. The Water Apportionment Board under Section 28(3) requires every operator storing water in a reservoir to construct, fix, and maintain in a sound and efficient manner valves or other controlling and measuring devices on each and every stream or body of water discharging into or from such reservoir. In addition to these, Section 97 of the said Act makes it mandatory for every Operator to maintain and retain his or her works in a good, proper and workmanlike manner to the satisfaction of the Water Apportionment Board, failure to which he shall be liable to pay a fine.

87. Part VIII of the said repealed Act makes provision for the issuance of Water permits. It makes mandatory under Sections 35 & 36, for an Operator to take out a permit before the commencement of any water works as defined in Section 2 of the said Act. Section 108 requires that an operator who has a permit to construct works upon land which is not held by the said operator must acquire an easement on, over, or through the land on which the works will be situated unless such works are constructed under any lawful authority not amounting to an easement.

88. Instantaneously, the Plaintiff testified that the Defendants are in charge of the project and therefore they are liable for the damage suffered by the Plaintiff as a result of their negligence and/or the nuisance occasioned. This Court takes cognizance of the respective roles and responsibilities of the Defendants as per the *Water Act*, 2002 (repealed) and the *Water Act* 2016. This Court is also alive to the provision of the *Water Act* CAP 372 of 1952, and the institutions established there under.

89. The Plaintiff maintains that the disputed water project did not belong to the Ministry of Water as it was built by Kandara Water, which was a Government and Community Project. On re-examination he testified that it is not the community that built the project, but an MP called Mwicigi. The Plaintiff did not adduce any evidence to show that the said Mwicigi was either working in conjunction with the Ministry of water, or was an operator within the meaning of the *Water Act*, 1952. Further the Plaintiff did not adduce any evidence to prove that the said MP had acquired the necessary permits to construct the said Water Reservoir and that he had transferred the said infrastructure to either of the Defendants herein. The Court notes that indeed from the evidence of the Defendants, they denied acquisition and ownership of the impugned project.

90. It is trite law that he who alleges must prove. The legal burden as provided for in Section 107 of the *Evidence Act* rests with the Plaintiff. The Supreme Court in Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR held:

> (129) The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black's Law Dictionary defines the concept as "[a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production." With that definition, the next issue is: who has the burden of proof?
>
> (130) The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the *Evidence Act*, Cap 80 of the Laws

of Kenya, legislates this principle in the words: "Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

91. The Court in finding that such a burden may shift held:

> " Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the Plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

92. The Plaintiff called two witnesses who testified that there was indeed a Water tank on his premises, but none of the witnesses gave evidence as to the ownership of the water project. At no point throughout the proceedings did the burden shift to the Defendants. It appears that Kandara Water Project was a politically instigated project and Mr. Mwicigi being the alleged Member of Parliament responsible for the said project did not follow the laid down procedure under the *Water Act*, 1952. Additionally, it appears that he did not properly hand over the project to the responsible Government entities for management and maintenance. However, since the said Mr. Mwicigi was not a party to this suit, this Court guided by the principle of audi alteram partem cannot make any pronouncement against him as it would be against the provisions of Article 50 of *the Constitution*.

93. The upshot of the above is that the Plaintiff has failed to establish a cause of action against the Defendants herein jointly and severally.

Whether the Plaintiff is entitled to the prayers sought

94. This Court has already found hereinabove that the Plaintiff has failed to establish a cause of action against the Defendants jointly and severally. This Court has perused the photographs produced by the Plaintiff in support of his case and is also alive to the testimonies of PW2 and PW3 on the state of the water tank. What this Court can do is only empathize with the Plaintiff since liability can only accrue based on evidence. It follows therefore that the Plaintiff has failed on a balance of probability to prove his case against all the Defendants herein and is not deserving of the prayers sought.

Who shall bear the costs of the suit?

95. It is trite law that costs shall follow the events and the successful party is entitled to costs. Even so, Section 27 of the *Civil Procedure Act* gives this Court the discretion to award costs. This being an environmental matter, this Court shall exercise its discretion and direct that each party to bear their own costs.

96. Having carefully considered and analysed the evidence as above, the Court finds that the Plaintiff has failed to prove his case against the Defendants herein jointly and severally on the required standard of balance of probabilities.

97. For the above reasons, the Plaintiff's suit is dismissed entirely with an order that each party to bear their own costs.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr Kirori H/B Mr Kinyanjui for the Plaintiff

Mr Kassim H/B for B N Musyoki for the 1st Defendant

Mr Muuo for the 2nd Defendant

3rd Defendant – Absent

4th Defendant – Absent

Court Assistant – Joel Njonjo

L. GACHERU

JUDGE

8/12/2022