



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 17 OF 2019

SIMON NDWIGA MURAGE.....APPELLANT

VERSUS

EMBU WATER AND SANITATION CO. LTD.....RESPONDENT

(Being an appeal against the Ruling and order of Hon. H. Nyakweba (Principal Magistrate) dated 18th June 2019 in Embu CMCC No. 50 of 2018)

JUDGEMENT

A. INTRODUCTION

1. This appeal arises from the ruling and order of Hon. H.N. Nyakweba (Principal Magistrate) dated 18th June 2019 in *Embu CMCC No. 50 of 2018 – Simon Ndwiga Murage V Embu Water and Sanitation Company Ltd.* By the said ruling, the trial court upheld the Respondent's preliminary objection and found that the Appellant's suit was statute barred under **Section 4(2)** of the **Limitation of Actions Act (Cap. 22)**. Consequently, the Appellant's suit was struck out with costs to the Respondent.

2. The material on record indicates that by a plaint dated 29th March 2018 the Appellant pleaded that sometime in 2011 the Respondent's servants or agents dug some trenches along the boundary of his *Title No. Gaturi/Githimu/6569 (the suit property)* for the purpose of installing some water pipes in consequence whereof the Respondent cut down some napier grass the Appellant had planted to prevent storm water from draining into the suit property. It was also pleaded that the Respondent had destroyed or interfered with the natural storm water drainage path by failing to properly cover up the trenches.

3. The Appellant further pleaded that sometime in 2012 the Respondent's servants or agents installed some water pipes in a different location after the first ones were uprooted by storm water. It was contended that the Respondent had failed to properly cover up the trenches in consequence whereof storm water started draining into the suit property thereby destroying the Appellant's crops and making the suit property unsuitable for agriculture. The Appellant was also apprehensive that the Respondent intended to dig another trench along the boundary of the suit property.

4. As a result of the foregoing, the Appellant sought the following reliefs against the Respondent:

- a. An order directing the Defendant to properly cover up the trench along the border of parcel of land No. Gaturi/Githimu/6569.
- b. Costs of land reclamation in the sum of Kshs. 201,800.00
- c. Mesne profits.
- d. An order of injunction restraining the Defendant by itself, its agents, employees, workmen and/or servants from digging further trenches and/or doing any acts that are likely to interfere with the natural flow of storm water along the boundary of Gaturi/Githimu/6569.
- e. Costs of the suit with interest.

5. By a written statement of defence dated 10th May 2020 the Respondent denied liability for the Appellant's claim. Without prejudice to the denial of liability, the Respondent pleaded that if any damage had resulted to the suit property as a result of natural storm water that was not its responsibility since it was not responsible for the maintenance of public roads and storm water drainage. The Respondent further pleaded

that in any event the Appellant's suit was statute barred and that it shall raise a preliminary objection to that effect and ask the court to strike it out.

6. The material on record shows that the Respondent's preliminary objection on jurisdiction was canvassed through written submissions. By a ruling dated 18th June 2019 the trial court concurred with the Respondent's objection and upheld the preliminary objection. The trial court found that the suit was time barred under **Section 4(2)** of the **Limitation of Actions Act (the Act)** since the statutory period of limitation had expired upon the lapse of 3 years from the accrual of the cause of action in 2011. The court further found and held that the Appellant had not sought an extension of time to file suit out of time under **Section 27** of the **Act**. The Appellant's suit was consequently struck out with costs to the Respondent for failing to disclose a reasonable cause of action.

B. THE GROUNDS OF APPEAL

7. Aggrieved by the said ruling, the Appellant filed a memorandum of appeal dated 17th July 2019 and amended on 3rd July 2020 raising the following eight (8) grounds of appeal:

- a. That the learned trial magistrate erred in law and fact when he held that the cause of action accrued in the year 2011 when indeed the same involved a continuous infringement.
- b. That the learned trial magistrate erred in law and fact when he struck out the Appellant's suit despite the said suit seeking for further restraining orders.
- c. That the learned trial magistrate erred in law and fact when he held that the Appellant's plaint failed to disclose a reasonable cause of action.
- d. That the learned trial magistrate erred in law and fact when he held that the Appellant's suit was statute barred.
- e. That the learned trial magistrate erred in law and fact when he struck out the Appellant's suit without considering the entire evidence on record as tendered by the Appellant.
- f. That the trial magistrate erred in law and fact when he failed to consider the fact that the Respondent's preliminary objection did not meet the legal threshold.
- g. That the learned trial magistrate erred in law and fact when he awarded costs to the Respondent.
- h. That the decision by the trial magistrate was against the law and in contravention of the rules of natural justice.

C. DIRECTIONS ON THE HEARING OF THE APPEAL

8. When the appeal was listed for directions on 14th May 2020, it was directed that the same shall be canvassed through written submissions. The Appellant was granted 14 days upon filing the record of appeal to file and serve his submissions whereas the Respondent was granted 14 days upon the lapse of the Appellant's period to file its submissions. The record shows that the Appellant filed his submissions on 8th July 2020 but the Respondent's submissions were not on record by the time of preparation of the judgement.

D. THE ISSUES FOR DETERMINATION

9. The court has perused the grounds of appeal set out in the Appellant's amended memorandum of appeal. Although the Appellant listed eight (8) grounds of appeal, the court is of the opinion that resolution of the following 4 issues would effectively determine the appeal:

- a. Whether the Respondents preliminary objection met the threshold of a preliminary objection as known to law.
- b. Whether the trial court erred in holding that the Appellant's suit was statute-barred.
- c. Whether the trial court erred in awarding the Respondent costs of the suit.
- d. Who shall bear the costs of the appeal.

E. ANALYSIS AND DETERMINATIONS

a. Whether the Respondent's plea of limitation constituted a preliminary objection

10. The court has considered the material on record and the Appellant's submissions on this issue. The Appellant contended that the Respondent's plea of limitation could not constitute a preliminary objection as known to law because there were certain facts to be established especially on whether the alleged violation of the Appellant's right was a continuing one. The Appellant relied upon the case of **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696 (the Mukisa Biscuits Case)**.

11. In the **Mukisa Biscuits Case**, Law JA. described a preliminary objection as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (emphasis added)

12. In the same case, Sir Charles Newbold P made the following remarks on the nature of a preliminary objection:

“The first relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion ...”

13. It is thus evident that a preliminary objection cannot be raised if there are any facts to be investigated or ascertained or if what is sought is the exercise of judicial discretion. A preliminary objection on a point of law is essentially to be argued on the basis that the **facts** as pleaded by the adverse party are correct. In the suit before the trial court, it was the Appellant who pleaded all the material facts necessary to establish his cause of action. He is the one who pleaded that the Respondent had dug trenches in 2011 and again in 2012 for the purpose of installing water pipes. He is the one who pleaded that the Respondent intended to dig another trench in future. It was on the basis of those pleadings that the preliminary objection was canvassed. The Respondent did not plead any material facts in its defence apart from pleading the defence of limitation.

14. The court is of the opinion that a defence of limitation was properly raised as a preliminary objection by the Respondent and that it was properly entertained by the court. It was canvassed on the basis that all the facts pleaded by the Appellant were correct. There were no other facts to be ascertained. The Appellant himself had pleaded that the Respondent’s actions complained of took place in 2011 and 2012. No further trenches were dug between 2012 after replacement of the water pipes and 2018 when the suit was filed. The court is of the opinion that all the material facts necessary for disposal of the preliminary objection were before court in the form of the parties’ pleadings.

15. In **Haron Onyancha V National Police Service Commission & Another [2017] eKLR** the Plaintiff filed suit in 2016 against the Defendants on account of alleged wrongful occupation of his property in 2002. The Defendants filed a preliminary objection to the effect that the suit was statute-barred under both the **Limitation of Actions Act (Cap. 22)** and the **Public Authorities Limitation of Actions Act (Cap. 39)**. Upon consideration of the preliminary objection the court found that the suit was statute-barred and the Plaintiff’s suit was consequently struck out.

16. Similarly, in **Alfred Mutinda Mutua V C.F.C. Stanbic Bank (K) Ltd [2019] eKLR** the Magistrates’ Court had upheld the Respondent’s preliminary objection contending that the Appellant’s suit was statute barred under the **Limitation of Actions Act (Cap. 22)**. On appeal, the High Court found that the Appellant’s suit which was based on tort was statute-barred and that the preliminary objection had been properly taken. Consequently, the appeal was dismissed with costs to the Respondent.

c. Whether the trial court erred in holding that the Appellant’s suit was time-barred

17. The Appellant contended that the trial court erred in holding that the cause of action accrued in 2011 since his cause of action was a continuing one. The Appellant relied on at least three cases in support of his submission. First, in the case of **Macmillan Kenya (Publishers) Ltd V Mount Kenya Sundries [2008] eKLR** it was held that breach of copyright was a continuing tort and that so long as the Defendant continued to produce and sell the maps in question the violation continued. That was a case concerning breach of copyright and the court rightly held that the fringement continued until the offending map was withdrawn. In the opinion of the court, that case of breach of copyright is clearly distinguishable from the Respondent’s alleged action of digging trenches and cutting napier grass.

18. The Appellant’s second authority was **Eliud Njoroge Gachiri V Stephen Kamau Ng’ang’a [2018] eKLR** whereby the court considered the definition of a continuing trespass as follows:

“A continuing trespass is defined in JOWITT’S DICTIONARY OF ENGLISH LAW 2ND EDITION as follows:-

‘A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land.’

In BLACK’S LAW DICTIONARY 8TH EDITION, a continuing trespass is defined as:-

‘A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.’

Finally, in CLERK & LINDSEL ON TORTS 16th EDITION, paragraph 23 - 01, it is stated that:-

‘Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.’

It is again evident that the nature of continuing trespass described above is of a totally different character from what the Appellant alleged before the trial court. There was no allegation that the Respondent dug any trenches on the Appellant’s land or that some pipes were laid and left on the suit property.

19. The third authority relied upon was **Peter Mwangi Kibui V Rural Electrification Authority [2016] eKLR** which involved the installation of a high voltage power line over the Plaintiff's property. The court rightly held that the trespass was continuing as long as the poles and cables remained over the Plaintiff's property. Again this authority is clearly distinguishable from the nature of the Appellant's claim before the trial court.

20. The court is of the opinion that the Respondent's alleged acts of cutting down napier grass, digging the trenches, and installing the water pipes were not continuing acts. Those acts were all undertaken between 2011 and 2012. The *consequences* of those actions may be long lasting but that would not keep the cause of action alive forever. No authority was cited by the Appellant to demonstrate that consequential damage would prevent time from running under the **Act** for as long as the consequences persisted.

21. It was submitted by the Appellant that the mere fact that he sought a permanent injunction to restrain the Respondent from digging additional trenches in future was clear evidence that his cause of action was a continuing one. No authority was cited in support of such contention hence the court is unable to accept the same. The prayer for injunction was based upon the Respondent's actions which were pleaded in the plaint. Those actions took place in 2011 and 2012. It is inconceivable that the Appellant would have a basis for seeking a permanent injunction against the Respondent other than the actions of 2011 and 2012. An order of permanent injunction could not be sought in a vacuum.

22. **Section 4** of the **Act** stipulates various limitation periods for various causes of action. In particular, **Section 4(2)** stipulates as follows:

“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

23. The object of statutes of limitation was described by Potter J.A. in the case of **Gathoni V Kenya Co-operative Creameries Ltd [1982] 104** at p. 107 as follows:

“... The law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

24. A similar position was taken in the cases of **Rawal V Rawal [1990] KLR 275**, **Mehta V Shah [1965] EA 321** and **Iga V Makerere University [1972] EA 65**. In **Rawal V Rawal** the court stated thus:

“As was stated by Crabbe JA in the case of Mehta V Shah [1965] EA 321 at p. 3301, the object of any limitation enactment is to prevent a plaintiff from prosecuting “stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time.” It is not to extinguish claims ...”

25. The court is of the opinion that the trial court did not err in finding and holding that the Appellant's suit was statute-barred under **Section 4(2)** of the **Act**. The Respondent's alleged violations clearly took place in 2011 and 2012. There was no element of continuing trespass or continuing violation of any sort. The alleged long term consequential damage could not extend the period of limitation *ad infinitum*. The court does not accept that as long as the trenches remained improperly covered then the Appellant's cause of action would remain alive indefinitely. The court is also of the opinion that the trial court did not err when it held that the Appellant's suit did not disclose a reasonable cause of action. It is trite law that a statute-barred plaint cannot disclose a reasonable cause of action.

c. Whether the trial court erred in awarding the Respondent costs of the suit

26. The Appellant submitted that it was unfair for the trial court to strike out the Appellant's suit and at the same time award costs against him. The Appellant did not, however, cite any authority in support of that submission.

27. It is fairly settled in law that costs of an action are at the discretion of the court. However, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 (1)** of the **Civil Procedure Act (Cap. 21)**. The said section stipulates as follows:

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

28. The court is thus of the opinion that a successful party should ordinarily be awarded costs of an action or proceeding unless there is a

good reason to deprive him of such costs. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Once a trial court has made an award of costs in exercise of its discretion an appellate court should not lightly interfere with such an award. The appellate court should only interfere where the trial court has misdirected itself and acted upon wrong principles or where it is manifest from the case as a whole that the discretion was not exercised judicially.

29. In the case of **Mbogo & Another V Shah [1968] EA 93** it was held that:

“We now come to the second matter which arises on this appeal, and that is the circumstances in which this court can upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that, a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”

The court finds no error of principle on the part of the trial court in the award of costs. There is also no material on record upon which it may be concluded that the trial court did not exercise its discretion judicially. Accordingly, the court finds no merit in this ground of appeal.

d. Who shall bear costs of the appeal

30. As indicated above, costs of an action or proceeding are at the discretion of the court subject to the general rule that costs shall follow the event. The court finds no good reason why the successful party in this appeal should be deprived of costs. Accordingly, the Respondent shall be awarded costs of the appeal.

F. CONCLUSION AND DISPOSAL ORDER

31. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. Accordingly, the same is hereby dismissed in its entirety with costs to the Respondent. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **23RD DAY** of **JULY 2020** and delivered via Microsoft Teams platform in the presence of Mr. Andande for the Appellant and Ms. Muriuki holding brief for Mr. Ithiga for the Respondent.

Y.M. ANGIMA

JUDGE

23.07.2020