



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 71 OF 2019**

**DANIEL MWANGI NGANGA.....PLAINTIFF /RESPONDENT**

**VS**

**THE NATIONAL WATER CONSERVATION**

**& PIPELINE CORPORATION.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ATHI WATER SERVICES BOARD.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**BOARD OF TRUSTEES GATANGA**

**WATER SCHEME.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MURANGA COUNTY EXECUTIVE**

**COMMITTEE, WATER & IRRIGATION....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant herein filed the Notice of Motion dated 3/5/2019 under Section 4(2) and 7 of the Limitation of Actions Act; Section 7 of the Civil Procedure Rules, Order 2 Rule 15(1) (d) of the Civil Procedure Rules and all other enabling provisions of the law seeking the following;

- a. That the Plaint dated 13/8/2018 and filed in Court on 12/9/2018 be struck out with costs.
- b. The costs of the Application be provided for.

2. That Application was premised on the following grounds;

- a. That the time of the alleged cause of action as per the Plaintiff is 1972, which is approximately 46 years since the cause of action arose.
- b. That on the admission of the Plaintiff, this suit is therefore time barred.
- c. That on the admission of the Plaintiff, this suit is res judicata.
- d. That the dispute presently before this Honourable Court, has by admission of the Plaintiff been adjudicated upon.
- e. That the 2<sup>nd</sup> Defendant stands to suffer irreparable damage if the orders sought are not granted.
- f. That it is only fair and in the wider interests of justice that the orders sought be granted.

3. The application is supported by the affidavit of Ms Mercy Mwinzi Counsel for the Applicant who deposes that the Plaintiff's claim under paragraph 9 of the plaint discloses a cause of action founded on negligence against the Defendants. That the Plaintiff admits that the cause of action arose in the year 1972 in his plaint under paragraph 7 thereof, and thus contends that the suit as filed after a period of 46 years offends the provisions of the limitation of actions Act.

4. Additionally, the Applicant aver that the Respondent/Plaintiff has admitted in his plaint the fact that the matters in issue herein had previously been adjudicated upon vide HCC No. 976 of 2001 by the Water Appeals Board and later by the Misc Civil Application 253 of 2011. That the Plaintiff has contradicted himself by thereafter pleading that the matter had not been previously determined. The Applicant contends it is evident the matter is res judicata and offends Section 7 of the Civil procedure Act. In view of the above the Applicant sought to have the entire suit struck out for offending the clear provisions of the law.

5. The application was opposed through a Replying Affidavit sworn by the Plaintiff/Respondent dated 12/9/2019. In it he posits that the application is devoid of merit for being brought under the wrong provisions of the law hence it lacks any foundation in law. Additionally that the application seeks to curtail the Plaintiff's right to be heard. He further critiques the application for failing to comply with the provisions of Order 19 Rule 3 of the Civil Procedure Rules, 2010 and Rule 8 of the Advocates Practice Rules. The Respondent contends that the negligence in the instant case is continuous in nature and therefore cannot be statute barred. That the subject matter still remains erected on his land and is continuing to occasion him loss. He affirms that he is the owner of the land where the subject matter is erected and that he has remained in its occupation since.

6. In regard to the claim being res judicata the Respondent avers that after the HCC No. 976 of 2001 was transferred to Water Appeals Board ("WAB") the decision emanating therefrom was later quashed by the Judicial Review Application 253 of 2011 and contends that the net effect was that the matters in issue herein were never litigated and determined by a Court of competent jurisdiction. Further that there has not been a previous suit involving the same parties herein.

7. The Respondent has pleaded with the Court to protect his right to prosecute his case from being primarily curtailed by the Applicant as he believes that he has a valid cause of action.

8. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents associated themselves with the application of the 2<sup>nd</sup> Defendant/Applicant but did not file any pleadings.

9. Parties opted to file written submissions, only those of the Applicant are on record.

10. The Applicant in its submissions contend that the Plaintiff had previously instituted the same claim before a Court of competent jurisdiction against the same parties to which a final verdict was delivered and final orders were issued on the 7/5/08. That the Respondent then went before the WAB on his own volition. They contend that despite the quashing of the decision of the WAB the matters in issue herein were determined with a finality and urge that litigation must come to end and seeks protection against being vexed twice.

11. In respect to the Respondent's claim being statute barred the Applicant submits that the Respondents alleged the cause of action is twofold one on a recovery of right in land and the other on negligence to which they assert that the law expressly limits the time frame within which to institute such claims. That claims in land are capped at twelve (12) years. It is their contention that the Respondent's claim seeking compensation for damage to land amount to a claim in land which falls within the meaning of section 7 and 17 of the Limitation of Actions Act. That the previously instituted suit was brought twenty nine (29) years after the right had accrued and the instant suit has been brought after 46 years evidently way out of time and without leave of the honourable Court. That the suit amounts to an abuse of Court process and has urged the Court to decline it.

12. The application raises points of law to wit; resjudicata and statutory bar. Although the application has been urged to strike out the plaint, it is a Preliminary Objection disguised as an application in my considered and respectful view. That notwithstanding I shall deal with the twin issues.

13. Is the suit res judicata? The HCCC No. 976 of 2001 was filed against the National Water Conservation & Pipeline Corporation. While the appeal before the WAB was against the Athi River Services Board and the National Water Conservation & Pipeline Corporation. None of the parties have provided the proceedings or findings made in the HCC No. 976 of 2001. The Respondent claims that the said suit was transferred to WAB for hearing. While the Applicant avers that the suit was heard and determined and orders issued on the 7/5/2008. There is no evidence of such orders on record. The Applicant contends that the Respondent went before the WAB on its own violation in absence of the proceedings before that Court, I am unable to ascertain as to what transpired there under.

14. There is on record the lengthy judgment from the WAB delivered on 18/5/2011 in which certain orders and awards were made to the Claimant therein who is the current Plaintiff/Respondent. The said orders were quashed vide the decision of the High Court in JR No. 253 of 2011 delivered on 23/8/2013 in the following terms;

"the decision of the Water Appeals Board in Appeal no. 2 of 2008 is ultra vires the Water, Act, 2002 and it is hereby quashed."

15. Section 7 of the Civil Procedure Act provides as follows;

"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."

16. For resjudicata to succeed the following must be present;

- i. The suit or issue was directly and substantially in issue in the former suit.
- ii. That former suit was between the same parties or parties under whom they or any of them claim.

iii. Those parties were litigating under the same title.

iv. The issue was heard and finally determined in the former suit.

v. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

17. The decision of the WAB was quashed on grounds of lack of jurisdiction. This means that the matters in issue were not determined by a Court of competent jurisdiction and that there was no final determination of the issues therein. That being the case the issue of res judicata is unfounded.

18. Is this suit time barred? It is the Applicant's contention that the claim relates to compensation on damage allegedly occasioned to the Respondent's land way back in the year 1972. The Applicant seems to say that the Respondent sat on his rights if any for whooping 29 years before instituting the previous suit and a long 46 years before instituting the instant suit. The Applicants condemn the Respondent for abusing the Court process by lodging such a stale suit without leave of the Court.

19. The Respondent on his part contends that his cause of action is twofold; compensation for the use of the land and continuing negligence on the 1<sup>st</sup> Defendant in maintaining the water tank which he has pleaded occasioned him loss and damages.

20. The Limitation of Actions Act section 7 provides that a registered owner of land by the provisions of Section 7 of the Limitation of Actions Act may not bring an action 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 .

21. It is to be noted that though the water tank was constructed in 1972, the Plaintiff acquired the suit land on which the water tank sits in 1997 according to the copy of title of the suit land issued on the 25/3/1997. The issue that the Court would have to determine is when the cause of action arose. This would require calling of evidence which removes the objection from being a pure point of law.

22. What is in issue in this matter is not recovery of land as alluded to by the Applicants. The issue at hand is compensation for the use of the land as well as for the tort of nuisance that has led to the damage of the land. The plea by the Respondents that the negligence is continuing is a matter in my view that requires the Court to investigate and call for evidence.

23. I understand the claim of the Respondent to be that the Defendants entered the suit land and constructed a water reservoir which is in disrepair and is a nuisance on his land and that the disrepair is ongoing and the nuisance is continuous. That the leakage damaging the land continuously. This creates doubt in the mind of the Court as to whether there should be investigation into the facts. Currently it is to be noted that the Court is not seized of those facts and it is advisable to let the matter proceed to full trial. In the circumstances it is difficult to apply the principles of limitations of time. This essentially removes the objection from being a pure point of law.

24. Going by the definition of a Preliminary Objection as defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the Court finds that the objection is not a pure point of law. Both issues raised by the Applicant called upon the Court to consider evidence hence removing it from the province of being a pure point of law.

25. *The application has no merit. It is dismissed with costs to the Plaintiff/Respondent.*

**26. It is so ordered**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26<sup>TH</sup> DAY OF NOVEMBER 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mwangi Ben HB for Otury for the Plaintiff/Respondent

1<sup>st</sup> Defendant/Respondent – Absent

Njoroge Muturi HB for Mulekyo for the 2<sup>nd</sup> Defendant/Applicant

3<sup>rd</sup> and 4<sup>th</sup> Defendant – Absent

Ms Irene and Ms Njeri, Court Assistant