



**Muthamia v Tana Water Works Development Agency (Environment & Land Case E005 of 2023) [2024] KEELC 947 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 947 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E005 OF 2023  
CK NZILI, J  
FEBRUARY 21, 2024**

**BETWEEN**

**WASHINGTON MBAYA MUTHAMIA ..... PLAINTIFF**

**AND**

**TANA WATER WORKS DEVELOPMENT AGENCY ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff sued the defendant for trespassing into his L.R No. Nitma/Igoki/2068, which is located in Meru Township, on diverse dates without his consent, erecting a water distribution point and remaining therein to date, thereby denying him quiet enjoyment and use of the suit land. The plaintiff averred that despite promises and undertakings to compensate him, the defendant has failed to honour them. He prayed for the value and loss of user of the land at Kshs.22,970,000/=.
2. By a defence dated 18.5.2023, the defendant opposed the claim. While admitting that the plaintiff was the registered owner of the suit land, he denied the alleged trespass, loss and damage. It termed the claim based on trespass and recovery of the land as statute-barred. Further, the defendant filed a preliminary objection after the closure of its case dated 6.2.2024 as statute-barred based on a tort of trespass which accrued in 2005 under Section 3 (1) of the *Public Authorities Limitation Act* and Sections 4 (2) & (7) and (9) of the Limitation of Action Act. The defendant also averred the court having jurisdiction to hear and determine the suit. The statement of defence was not accompanied by any list of witness statements and documents as required under Order 7 of the Civil Procedure Rules.
3. By a reply to the defence dated 22.5.2023, the plaintiff denied the contents of the statement of defence that the suit was statute-barred since the alleged trespass had been continuous and was still going on.
4. The court record shows the matter came for directions before the deputy registrar on 13.7.2023. The defendant requested more time to amend the statement of defence and file witness statements and



- documents before the pretrial directions scheduled for 24.8.2023. The application was allowed, but unfortunately, none were filed by the time the suit came for pretrial directions on 28.9.2023.
5. In the absence of compliance, the matter was listed before this court on 8.11.2023 counsel present for the defendant told the court he required more time to file two documents, yet to be received from his clients. The court gave parties seven days to comply with Order 11 Civil Procedure Rules before the hearing on 27.11.2023.
  6. Counsel for the defendant appeared for the hearing as scheduled, but again, the defendant had not complied with the court directives. Counsel sought another hearing date alleging involvement in an accident, alleged to have been communicated to the plaintiffs' counsel on record via email on 25.11.2023. Counsel for the plaintiff opposed the request since no such communication had been made to him on time, save for a tele conversation made on Thursday where the defence counsel said he was ready to proceed.
  7. Counsel termed the email reportedly sent in the morning of the hearing as late, an afterthought, misleading on the date of the alleged accident and when his two witnesses were already in court. The court declined to grant the adjournment and listed the matter for hearing at 12.30 pm. The defendant filed a notice of appeal to the orders made on 27.11.2023.
  8. At the trial, the plaintiff testified as PW 1 and called a registered valuer as PW 2. He adopted his witness statement dated 21.3.2023 as his evidence in chief. Briefly, he said he had been registered as the owner of the suit land since 18.12.1987, as per a copy of the title deed and an official search certificate produced as P. Exh No. (1) & (2). PW 1 said that on diverse dates (not particularized), the defendant, without his consent, trespassed onto his land and built a water distribution point thereon, thereby denying him quiet enjoyment and use of the land. He said he caused demand letters to be issued to the defendant's agent in Meru dated 1.3.2005, 5.2.2008 and 11.8.2020, which he produced as P. Exh No's. (3), (4) & (5), respectively.
  9. PW 1 told the court that the defendant's agent acknowledged that the water point was built by and belonged to the defendant as per a document produced as P. Exh No. (5). He said the defendant, in a letter dated 11.8.2020, engaged him and promised compensation after a valuation was done to the property, which the National Land Commission did, dated 28.1.2021 and sent to him via a copy dated 4.3.2021. he produced the two as P. Exh No's. 7 & 8. Further, PW 1 said the valuation did not include the loss of user, and therefore, he engaged Probity Valuers, who made a valuation report dated 8.3.2023 marked as PMF1-9.
  10. In cross-examination by Miss Ndegwa, advocate for the defendant, PW 1 said the construction occurred before he wrote his letter dated 1.3.2005, addressed to the defendant's agent since he did not know the owner of the project until 2010 when he directed his complaint to the defendant who has since contracted his overlay. PW 1 said that he was not aware of who distributes the water from the suit land. He said there were no other developments on his land which measures 0.006 ha since the distribution plant occupies the whole of the land. PW 1 said there was nothing else he could and has done on his land for he was stopped from making any further developments.
  11. PW 1 told the court that the trespass was discovered in 2005, after which compensation was agreed upon in 2010. He said his claim based on trespass was eventually filed in 2023. In re-examination, PW 1 told the court that since 2010, parties have been negotiating over probable compensation until the valuation was forwarded to him on 4.3.2021. He said the defendant's water pipes are still on his land.



12. The next witness was PW 2, a land valuer. He produced MFI P 1 as P. Exh No. (9), a valuation report dated 8.3.2023. PW2 told the court that the plaintiff contracted him to value L.R No. Ntima/Igoki/2068, and after visiting the land, he arrived at a return value of Kshs.22,170,000/=.
13. In cross-examination, PW 2 told the court the valuation was based on the market loss of the user at Kshs.10,170,000/=. He said there was an omission in the report to indicate the market value. Additionally, PW 2 said that the plaintiff was unable to use the suit property from 1.3.2005 up to 8.3.2023, and therefore, the valuation report was based on the prevailing market rental data. Therefore, PW2 said he determined the market investment which would have accrued to the plaintiff if he had exclusive rights over his land since 2005. PW 2 also said that he did not ascertain who constructed the water pipes on the land. He said his valuation covered the whole parcel of land, inclusive of the portion not covered by the water pipes. In re-examination, PW 2 told the court that the water pipes are centrally located on the suit land and, therefore, the plaintiff was unable to utilize the unoccupied portion.
14. In the absence of any list of witnesses and witness statements or documents, filed with the defendant's statement of defence, the defendant's case was marked as closed. Parties were directed to file and serve written submissions.
15. The plaintiff relied on written submissions dated 20.12.2023 and 14.2.2024. He isolated four issues for the court's determination. On whether continuing trespass was proved, the plaintiff submitted his proprietorship to the land remains uncontested as per the admission in paragraph 3 of the defendant's statement of defence and P. Exh No's. 5, 7, 8 & 9. Reliance was placed on Eliud Njoroge Gachiri vs Stephen Kamau Nganga ELC No. 121 of 2017 and John Kiragu Kimani vs Rural Electrification Authority (2018) eKLR.
16. On the reliefs he has sought, the plaintiff submitted that since he has established there is a water distribution centre or infrastructure on his land belonging to the defendant, he is entitled to compensation as per the two valuation reports before the court. He said the water pipes stemming from or towards the water distribution point were underground, making it impossible for him to make any meaningful use of the suit land, which is a commercial plot. Reliance was placed on KPLC vs Fleetwood Enterprise Ltd (2017) eKLR, Fleet Wood Enterprises Ltd vs KPLC (2015) eKLR
17. On jurisdiction the plaintiff submitted the claim was not one of compulsory acquisition of the land under Sections 107-133 of the [Land Act](#) since no such process was commenced by the defendant over the suit land. In any event, none was pleaded by the defendant that entry to the land was based on compulsory acquisition and that there was no adherence to or invocation of the legal process of compulsory acquisition. Reliance was placed on the Commissioner of Land & another vs Coastal Aquaculture Ltd (1997) eKLR and Section 107, 133 of the [Land Act](#).
18. As to the involvement of the National Land Commission by the defendant in preparation for P. Exh No (7), the plaintiff submitted that the National Land Commission, going by the terms of reference on the report, was merely limited to advising the defendant on the market value of the said property and for purposes of the negotiations that were ongoing between the parties, but not for purposes of compulsory acquisition as envisaged in Sections 107 – 133 of the [Land Act](#). The plaintiff submitted that the court is seized of jurisdiction since the National Land Commission or the Land Acquisition Tribunal established under Section 133 of the [Land Act](#) would only have jurisdiction if the dispute emanated from the process of compulsory acquisition as envisaged under Section 107, 133 of the [Land Act](#).
19. On the valuation reports, the plaintiff submitted that the criteria for valuation as introduced by the Land Value (Amendment Act 2019) comes into play only in cases of compulsory acquisition and that



- the valuation criteria laid down in Section 107 A of the *Land Act* would have applied in the case of compulsory acquisition, which was not the case in the circumstances of this case. Reliance was placed on *Harp Investco Ltd vs National Social Security Fund (NSSF) Board of Trustees & 3 others (2022) eKLR* where the court awarded compensation based on the current open market value.
20. Regarding the notice of preliminary objection dated 6.2.2024, the plaintiff submitted that it doesn't fit the definition laid out in the case of *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) E.A 696*. Further to this, the plaintiff submitted that since the defendant failed to plead the defence of limitations of action, the court should not look beyond the pleadings by parties to ascertain whether or not trespass occurred before the year 2005.
  21. The plaintiff submitted his claim was based on a continuous trespass. He relied on *Eliud Njoroge Gachiri vs Stephen Kamau Nganga (supra)*, which cited with approval *Back's Law Dictionary and Clerk and Lindsell on Torts 16<sup>th</sup> Edition*. Further, the plaintiff relied on *KPLC vs Ringera (2022) KECA 104 (KLR)* and urged the court to find that his claim was not statute-barred.
  22. The defendant relied on written submissions dated 27.12.2023 and 14.2.2024. It submitted that whether or not the plaintiff's claim was based on trespass or unlawful acquisition of the suit land, parties were bound by their pleadings as held in *Philmark System Co. Ltd vs Andermore Enterprises (2018) eKLR*. In this case, the plaintiff had pleaded a continuous trespass and prayed for compensation for deprivation of his land in terms of value and loss of user. To this end, the defendant submitted that the claim was disguised as for redress for trespass, yet it was for unlawful acquisition of the land whose remedy is general damages.
  23. On whether the plaintiff was entitled to the reliefs sought, the defendant submitted that the plaintiff does not deserve any such reliefs since the suit was statute-barred, he abstained from asserting his rights for over 18 years, was estopped from so doing and has not proved such trespass.
  24. On limitation of action under Sections 4 (7) and (9) of the *Limitation of Actions Act*, the defendant submitted that the plaintiff was aware of the trespass in 2005 but waited until 2023 to file the suit, which was outside the 12 years provided to recover land.
  25. As to P. Exh No. 7 & 8, the defendant submitted the document with a disclaimer to the effect that there was a need to conduct due diligence to establish the circumstances under which public utilities were constructed on the suit land. Therefore, the plaintiff failed to tender proof of who constructed the water distribution point on the suit land in the first place to be entitled to the reliefs sought or, better still, general damages for trespass based on parameters set by the court in *Philip Ayaga Aluchio vs Chrispinus Ngayo (2014) eKLR*.
  26. The defendant submitted that the plaintiff and the valuer were unable to prove the basis for costs of restoration or loss of user for Kshs.10,170,000/= and how the same was arrived at.
  27. Regarding whether the preliminary objection met the threshold in the context of its late filing, the defendant submitted that, given they did not file pretrial documents and adduce evidence, the plaintiff's documents and evidence remained undisputed or uncontested. The defendant relied on *Sultan Hasham Lalji vs Diamond Hasham Lalji and three others (2016) eKLR* to say that a preliminary objection may be brought based on material contained in the opposing party's witness statements.
  28. On whether the suit was time-barred, the defendant submitted that paragraphs 4 and 7 of the plaint were on a suit based on the tort of trespass, which, as indicated in the plaintiff's witness statement, occurred in 2005.



29. The defendant submitted that if the dispossession of the plaintiff's land occurred in 2005, to file the suit in 2023 was well outside the time, since such a claim should have been filed in compliance with Sections 4, 7 and 9 of the *Limitation of Actions Act*.
30. The defendant submitted that in paragraph 2 of the plaint, the plaintiff had conceded that it was a public authority established by statute to undertake public functions under the *Water Act* and, therefore, any civil proceedings against it were subject to the *Public Authorities Limitation Act*, and which under Section (3) thereof should have been lodged within one year from the date the cause of action accrued.
31. The issues calling for the court's determination are:
- i. If the claim by the plaintiffs is statute-barred.
  - ii. If the plaintiff has proved trespass to his land.
  - iii. If the defendant pleaded and proved any justification, consent or superior rights or interests over the suit land.
  - iv. If the court has jurisdiction to grant the reliefs sought by the plaintiff.
32. It is trite law that parties are bound by their pleadings, and issues flow from them. In *IEBC vs Stephen Mutinda Mule* (2013) eKLR, the court cited with approval *Malawi Railways vs Nyasulu* (1998) MWSC 3 that through pleadings, parties define the agenda in the trial, which the trial court must adhere to since there is no room for any other business. It is through pleadings that parties disclose their claims and or defences so that each can prepare their respective claims to avoid a trial through ambush.
33. Orders 3 and 7 of the Civil Procedure Rules are in mandatory terms. A party filing a plaint, defence, or counterclaim shall accompany it with a list of witnesses, witness statements, and documents to be adduced at the hearing. In any pleading subsequent to a plaint, a party must plead facts. In particular, in a claim for recovery of land under Order 3 of the Civil Procedure Rules, such a pleading must be accompanied by particulars of misrepresentation, fraud, illegality and or performance. A party is not allowed to depart from his previous pleadings or raise a new cause of action or defence inconsistent with a previous claim or defence.
34. In this suit, the defendant, without leave of court, filed a notice of preliminary objection dated 6.2.2024, after the closure of both the plaintiff and defence case. The defendant did not seek leave to amend its statement of defence to align it with the preliminary objection. In law, a party is allowed at any stage before entry of judgment to amend his pleadings. In this case, the defendant has not pleaded any facts relating to permissive, consensual, acquiescence, legality, surrender, justification, lawful entry and or lawful developments of the suit premises by a third party or other than them and eminent domain, public interest, legality and or lack of jurisdiction on account of negotiations leading to a valuation of the suit premises, by the National Land Commission in 2021.
35. Despite the forgoing the defendant, in written submissions dated 14.2.2024, submitted that a preliminary objection can be based on pretrial documents or written witness statements or evidence of an opposite party if undisputed as held in *Sultan Hasham Lalji vs Domain Hasham Lalji* (supra). In particular, the defence submitted the cause of action accrued in 2005, as pleaded in paragraphs 4 and 7 of the plaint and the witness statement of the plaintiff.
36. In the earlier written submissions, the defendant had stated that the plaintiff's cause of action was actually over the unlawful acquisition of land camouflaged as a trespass to land case. The defendant never pleaded to all these facts now being introduced through written submissions. Questions were



- not put to the plaintiff regarding such facts during cross-examination by the counsel present for the defendant.
37. There can be no evidence through written submissions. See *Douglas Apel vs Telkom Kenya (2014)* eKLR. Jurisdictional issues are to be raised at the earliest opportunity possible. The defendant did not plead that the court had no jurisdiction to hear and determine the matter. The issue of unlawful acquisition of the land was neither pleaded by the plaintiff nor the defendant.
  38. At the hearing, the plaintiff relied on P. Exh No. (3). The exhibit shows that waterworks were erected on the land as of 1.3.2005. In P. Exh No. (5), the designated agent of the defendant admitted that the water infrastructure therein belonged to the Tana Water Services Board. In P. Exh No. (6) the plaintiff had not sought for vacant possession, payment of mesne profits or compensation by way of purchase of the land. Additionally, in P. Exh No. 8, the defendant forwarded the valuation report to the plaintiff and sought for services of their agent, MEWASS, to establish the circumstances under which public utilities were constructed on the plaintiff's land.
  39. The plaintiff pleaded that the defendant was and remains on his land. It is pleaded that entry occurred on unspecified dates without the plaintiff's consent, where the defendant built a water distribution point. In his plaint the plaintiff did not plead that the entry to his land was unlawful, unprocedural, illegal and or was intended or amounted to a compulsory acquisition without just and prompt compensation.
  40. Instead, the plaintiff pleaded that the entry and occupation amounted to trespass and had been continuous. In paragraph 6 of the plaint, the plaintiff averred that the defendant had made a promise and undertakings for compensation for the loss and damage, which it has failed to honour to date. In paragraph 6 of the statement of defence, the defendant specifically denied that the parties had been negotiating over compensation. The defendant never pleaded its justification or basis for being or occupying the plaintiff's land, either for private, community or public purposes.
  41. Be that as it may, the court has jurisdiction to take judicial notice of specific facts under Section 60 of the *Evidence Act*. The defendant was a creature of the *Water Act* 2002, now amended. Waterworks and infrastructure fall under Schedule 4 of *the Constitution*. Overriding rights fall under Sections 107-112 of the *Land Act* as read together with Article 40 (3) of *the Constitution* and Section 28 of the *Land Registration Act*. See *Veronica Waithera, Trustee of Christian Churches & others vs KeNHA (2016)* eKLR.
  42. In *MEWASS & 2 others vs M'Mbijiwe (2023) KEELC 20891 (KLR) (18<sup>th</sup> October 2023)* (Judgment), the court citing Black's law Dictionary 9<sup>th</sup> Edition, said jurisdiction refers to the authority that a court has to decide matters litigated before it or to take cognizance of matters formally presented for decision.
  43. In *Samuel Kamau Macharia & another vs Kenya Commercial Bank* the court said jurisdiction flows from either *the Constitution*, statute or both. In *Tony Kipkemei Chirchir*, the court said jurisdiction must be raised at the earliest opportunity for jurisdiction was everything. The court cited *Moonge Lengusuranya*, where a claim was for recovery of land after 12 years, which was a time-barred under Sections 7 and 8 of the Limitations of Actions Act. In *MEWASS (supra)*, the court cited *Kuldip Singh Jandu vs Nairobi Water Company (2012)* eKLR that a tort of negligence was not among the disputes a Water Appeal Board could handle, and jurisdiction was dependent on a particular set of facts, based on the decision or order on a license or permit by the named authorities under the *Water Act*. The court said a claim for an alleged trespass to land, the commission therein of acts of wastage and denial of access rights, was outside the jurisdiction of the Water Appeals Board. The court went on to say that under the *Water Act* 2002, assets ownership by the 1<sup>st</sup> and 2<sup>nd</sup> appellants were defined by law.



44. In the case of John Kiragu Kimani vs Rural Electrification Authority (*supra*), the court observed that trespass was an unjustifiable intrusion by one person upon the land in possession of another and that the burden was on the plaintiff to prove invasion of his land without justification. In the case of Gladys Koskey vs Benjamin Mutai (2017) eKLR, the court said that a suit founded on the tort of trespass has to be filed within three years. See also Nguruman Ltd vs Shompole Group Ranch & others (2017) eKLR and KPLC vs Ringera KECA (*supra*).
45. In this suit, the burden was on the plaintiff to prove how, when, who and on what terms and conditions the defendant or its predecessor in title entered into his land. In paragraph 6 of the plaint, the plaintiff averred there that were public utilities on his land. What the plaintiff has not pleaded is the nature, basis, timelines, terms and conditions of the initial entry and if at all the entry was permissive, conditions imposed or promise made to regularize the occupation by either the defendant or its predecessor in title.
46. This court takes judicial notice of the fact that as of 1.7.2005 and 30.6.2006, water facilities used or were owned by either local authorities at the time or the Ministry of Water. The coming into operation of the Water Act 2002 came up with various changes, including Regulation 11A (8) of the Water Act (Plan of Transfer of Water services) Rules 2005 on the transfer of ownership to water services boards of systems, facilities and sewerage services as per Section 113(2)b of the Water Act by the then Ministry of Water and Irrigation. So, the issue of when the entry occurred and who precisely erected the water infrastructure was crucial for the plaintiff to plead and prove. Liability cannot be attached to the defendant without evidence that it was the defendant who allegedly trespassed and committed acts inconsistent with the rights of the registered owner. Section 39 of the Water Act grants an easement to water permit holders on, over or through the land on which construction works have been undertaken. Further, Section 65 of the Water Act 2016 has established the defendant with defined statutory mandates and functions. Section 83 provides that a county-owned water service provider shall hold assets for the public.
47. The Water Act also allows entry to the land by a permit holder or licensee to the land of another to execute and maintain waterworks. Given the preceding explicit provisions of the law, the onus was on the plaintiff to prove that the entry into the suit premises in the first instance was by the defendant, and it is the defendant in actual possession and beneficial owner or operator of the water infrastructure. Additionally, the burden was on the plaintiff to prove that the entry and occupation were and remain wrongful, unjustified and illegal.
48. As indicated above, the defendant was a creature of law whose handover and takeover of assets and liabilities was through a gazettelement in 2006. There is no evidence that prior to 18.3.2005, the plaintiff had lodged his claim for compensation and or regularization of the entry and occupation after the water law came into effect. Similarly, no evidence was tendered that the water infrastructure was among the assets taken over by the defendant. It was not enough to rely on a letter from MeWASS purporting to indicate that the defendant was the bonafide owner of the waterworks as of 2005. Between 1987, when the plaintiff obtained the title deed, and 2005, when the water infrastructure is alleged to have been affected and transitioned to the defendant, the plaintiff has not pleaded or explained where he was when the works were undertaken and, if so, whether he protested or, resisted and or objected to the entry. It is trite law that water pipes on the land of another may amount to overriding rights. There was, therefore need for the plaintiff to bring evidence to clarify the circumstances under which the water infrastructure was affected on his land. See *Pizza Harvest Ltd vs Felix Midigo* (2013) eKLR and *Gabriel Amok & others vs Mombasa Water Supply & Sanitation Co. Ltd* (2015) eKLR, *Geoffrey Mungathia and others vs Diocese of Meru Registered Trustees* (2021) eKLR, *Karolyne Mwatha Mburu & others vs Athi Water Works Services Board & Warp* (2019) eKLR.



49. My finding is that the plaintiff has failed to prove trespass, lack of justification or non-existent superior rights or interest against the defendant. On jurisdiction to grant the reliefs sought, there is no dispute that the plaintiff, wrote the letters dated 1.3.2005, 5.2.2008, 13.3.2008 and 11.8.2016 all produced as P. Exh No. 3-6, respectively. It appears the parties subjected themselves to the mandate of the National Land Commission to regularize the ownership, who made a valuation report dated 28.1.2021, that was forwarded to the plaintiff by P. Exh No. (8).
50. The plaintiff in this suit is seeking the value and loss of the user of his land. In other words, all that the plaintiff is interested in is compensation for the land. He has not pleaded readiness to surrender the land to the defendant if this court orders compensation.
51. On the other hand, the defendant has denied in toto the claim. After the valuation, the defendant made it clear to the plaintiff that there was a need to establish the history of how the waterworks were erected on the land. The plaintiff's claim is on trespass and not illegal occupation or failure to pay just and prompt compensation. Illegal entry and occupation by the defendant have not been pleaded or proved. Regarding the loss of user, the report by PW 2 is not in line with the Land Valuation Act. The claim therefore, fails.
52. An alternative remedy exists for the plaintiff to pursue his compensation from whoever is on his land. He has not sought for vacant possession or eviction of the defendant from the suit land or in the alternative surrender of the plot to the defendant in exchange for compensation of the land at the rate it was on the date of entry and mesne profits with interest from the date thereof.
53. The upshot is that the plaintiff's suit is dismissed with costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024**

**In presence of**

C.A Kananu/Mukami

Miss Gitari for the plaintiff

Wangu for the defendant

**HON. CK NZILI**

**JUDGE**

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