IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 253 OF 2011

BETWEEN

TANA AND ATHI RIVERS DEVELOPMENT AUTHORITY …….……. APPELLANT

AND

JOSEPH MBINDYO …….....…….. 1ST RESPONDENT

DAVID MUNYAO …….....…….. 2ND RESPONDENT

ELIUD NTHIWA …….....……..…… 3RD RESPONDENT

JOHN MUSYOKA …….…….…….....……... 4TH RESPONDENT

(An appeal against the judgment and decree of the High Court of Kenya at Embu (Khaminwa, J.) dated 1st October, 2009

in

H.C.C.C NO. 108 OF 2001)

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JUDGMENT OF THE COURT

1. By a plaint filed in the High Court, the respondents herein, suing on their own behalf, as well as on behalf of other 484 persons, sought Kshs. 100,000,000/= plus interest thereon as compensation for their eviction from Mbondoni Sub-Location, Makina Location in Mbeere District (suit land) by the Government which eviction was aimed to pave way for the construction of the Masinga dam.
2. Sometime in 1976, the Government compulsorily acquired the suit land which was a trust land for the ongoing hydro dam construction project by the appellant. Some of the 484 inhabitants

represented by the respondents were resettled on other parcels of land. The appellant resolved to compensate all the inhabitants for the developments that had been carried on the suit land prior to the construction of the dam. To this end the District Agricultural Officers from the Ministry of Agriculture conducted assessments to establish the value of developments undertaken by each inhabitant. After the said assessment they compiled a report and forwarded the same to the appellant to be used as the basis for compensation. However, according to the appellant, the said assessment was not accurate because firstly, some developments on the suit land were undervalued or overvalued and secondly, it included assessment of developments on portions of the suit land that were not affected by the construction of the dam. Consequently, the appellant commissioned John Kuti, an independent surveyor who prepared another assessment report which formed the basis of compensation made by the appellant.

3. On 17th November, 1980 the appellant in liaison with the Provincial Administration paid out an estimated amount of Kshs. 2,000,000/= to some of the inhabitants. Disputes arose as some of the inhabitants claimed they were not compensated or that the developments that they had carried out on their respective plots had been undervalued. Subsequently, the appellant formed a committee to handle the above mentioned complaints which according to the appellant led to the successful complainants being paid.
4. The respondents claimed that they were not fully compensated and that the estimated cost of developments undertaken on the suit land was Kshs. 200,000/= per person making a total of Kshs. 100,000,000/= being the compensation payable to the 484 inhabitants. Subsequently, after being granted leave to file suit out of time the respondents filed the above mentioned suit in the High Court in December, 2001.
5. The appellant in its defence averred that it had compensated all the inhabitants of the suit land that had been affected by the construction of the dam. It was the appellant's case that compensation was only for the developments that had been undertaken on the suit land. That the figure claimed by the respondents as compensation was unrealistic because the inhabitants had not carried out similar developments on the suit land. The appellant argued that the respondents had not proved that they were entitled to the amount they claimed as compensation. The appellant further averred that the respondents' suit was time barred, the cause of action having arisen in 1976; and that the trial court had the obligation to consider whether the *ex-parte* leave to file the suit out of time granted to the respondents was valid.
6. After hearing the matter, the High Court (Khaminwa, J.) on 1st October, 2009 entered judgment in favour of the respondents in the sum of Kshs. 96,800,000/= plus interest at the rate of 14% from the date of filing the suit until payment in full. It is against the said judgment that the appellant has filed this appeal based on the following grounds:-

i. ***The learned Judge erred in fact and in law in her judgment in awarding the plaintiffs' (respondent's herein) the amount of Kshs. 96,800,000/= when it was clear that the said amount was not supported by evidence.***

ii. ***The learned Judge misapprehended the law and erred in failing to consider the defendant's (appellant herein) arguments that the plaintiffs' special damages were not specifically pleaded nor were they strictly proved by evidence.***

iii. ***The learned Judge misdirected herself in holding that the plaintiffs' ex-parte application to file suit out of time was allowed and could not therefore be challenged at the trial despite the defendant having pleaded the defence of limitation of action and amply submitted on the same.***

iv. ***The learned Judge erred in law in failing to consider the defendant's submissions and authorities cited therein on the issue of whether the plaintiffs' suit was time barred as pleaded in the defence and other proceedings on the court record and as such came to a wrong conclusion in the judgment.***

v. ***The learned Judge erred in fact and in law, by totally disregarding and shutting out the defendant's evidence and as such occasioned injustice to the defendant.***

vi. ***The learned Judge erred in fact and misapprehended the law in holding that the defendant had a duty of producing documents in support of the plaintiffs' case and hence shifting the burden of proof.***

7. Mr. Okeyo, learned counsel for the appellant, submitted that the appellant pleaded in its defence that the respondents' suit which was filed in 2001 was time barred because the cause of action arose in 1976. In relying on this Court's decision in ***Divecon Limited –vs- Shirinkhanu Sadrudin Samnani – Civil Appeal No. 142 of*** 1997, he argued that notwithstanding the fact that the respondents were granted *ex parte* leave to file the suit out of time, the trial court had an obligation to consider if such leave was valid taking into account the provisions of the **Limitation of Actions Act**, Chapter 22, Laws of Kenya. He submitted that the reason given by the respondents for the delay in filing the suit as the ongoing negotiations with successive governments which did not fall under the ambit of granting leave to file suit out of time.
8. Mr. Okeyo argued that the figure pleaded in the Plaint of Kshs. 200,000/= being the alleged amount of loss suffered by each of the 484 inhabitants was not supported by any evidence. He submitted that respondents' evidence in respect of the value of the assessed developments in respect of PW1, Eliud Nthiwa, PW2, Musau Kambo, and PW3, David Munyao, was Kshs. 57,000/=, Kshs. 90,000/= and Kshs. 77,000/= respectively. He further argued that the total amount being claimed was in the nature of special damages which had not been strictly proved by the respondents. He also argued that the value of developments carried out by the inhabitants of the suit property could not have been uniform to justify the claim of Kshs. 200,000/= for each of them. He submitted the assessment report that the respondents' wished to rely on was rejected by the trial court because the same was not signed.
9. Mr. Okeyo submitted that not all the inhabitants of the suit land authorized the respondents to file the representative suit, arguing that nearly 70 people had not signed the authority filed in the High Court.
10. Mr. Mukunya, who appeared with Mr. Mutunga and Mr. Mutiso for the respondents, submitted that the appellant ignored all the procedures of compensation. He conceded that the figures tabled before the High Court as the assessed value of developments were estimates. In respect of the issue of the suit being time barred, Mr. Mukunya argued that the appellant's witness, Shenum Haran Njoroge, testified that the appellant made further compensation to the inhabitants and sent the report thereof to the District Commissioner in 1989. He argued negotiations in respect of compensation continued until 2000 and therefore the cause of action arose in the year 2000. He urged us to dismiss the appeal.
11. Being a first appeal, this Court has the duty of re-evaluating the evidence, assessing it and making its own conclusions without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court we neither saw nor heard the witnesses. See ***Selle –vs- Associated Motor Boat Company Ltd. [1968] EA 123.*** We have considered the record, the grounds of appeal, submissions by counsel and the law.
12. On the issue of whether the *ex parte* leave granted to the respondents to file the suit out of time, the learned Judge (Khaminwa, J.) held that since the said order was not challenged on appeal that the suit should proceed for hearing. By virtue of **Section 4(1)** of the **Limitation of Actions Act** the period within which the respondents' claim for compensation of the developments they had done on the suit land could be filed/commenced in court was limited to six years from the date that the cause of action arose. Therefore, based on the above set of circumstances when did the respondents' cause of action arise? We are of the considered view that the cause of action arose in 1976 when the inhabitants of the suit land were evicted to pave way for the construction of the dam. Therefore, we disagree with Mr. Mukunya's submissions that the cause of action arose when the negotiations failed in 2000.
13. The respondents' were granted leave to file the suit out of time under **Section 28(2)** of the **Limitation of Actions Act** which provides as follows:-

> ***'28(2) where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that***

action, that evidence would be in the absence of any evidence to the contrary, be sufficient-

a. ***To establish that cause of action, apart from any defence under section 4(2); and***
b. ***To fulfill the requirements of section 27(2) in relation to that cause of action.'***

Section 27(2) of the **Limitation of Actions Act** provides,

> ***' 27(2) The requirements of this subsection are fulfilled in relation to a cause of action <u>if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff…</u>' (Emphasis added).'***

From the foregoing provisions it is clear that before the court granted the *ex parte* leave to the respondents to file the suit out of time it had to be satisfied that the material facts relating to the cause of action were not within their knowledge until after time limited for filing the suit had expired. In the instant case, the respondents' argued that the reason for the delay was due to the ongoing negotiations' between the parties. We agree with Mr. Okeyo that the aforesaid reason does not constitute material facts which were not within the knowledge of the respondents as envisaged under **Section 27(2)** of the **Limitation of Actions Act**.

14. Having expressed ourselves as above the next issue that falls for our consideration is whether the trial Judge had an obligation to consider whether the leave granted was valid and if so what was the extent of her jurisdiction over the same. In ***<u>Divecon Limited –vs- Shirinkhanu Sadrudin Samnani (supra)</u>***, this Court held,

> ***' ..it would be convenient to now deal with the issue which had seemed settled, that a Judge can in a trial consider and accept or reject the exparte order granted by any other Judge for extension of time under the Act. This Court in the case of <u>Yunes Oruta & another –vs- Samuel Nyamato</u>- Civil Appeal No. 96 of 1984 unanimously followed the English Court of Appeal decision in <u>Cozens –vs- North Devon Hospital Management Committee & another</u>(1966) 2 ALL E.R 799 where it was held by the majority, Lord Denning,M.R. and Dankwerts, L.J (Salmon, L.J dissenting) that:***
>
> ***"Although it was a general principle in regard to exparte orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intention of the Limitation Act of 1963 to allow a defendant to apply, before the trial of the action, to set aside an exparte order obtained under section 2(1) giving leave for the purpose of section 1(1)(a).."***
>
> ***In Oruta, it was held that the issue of challenge to the granting of leave to file suit out of time, can only arise at the trial. Gachuhi, J.A in the leading judgment of this Court in Oruta, stated as follows:***
>
> ***"It will be up to the Judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act particularly where leave to file an action against the defendant has been granted exparte"***

We find that the learned Judge should have considered at the trial whether the exparte order granting extension of time was valid or not.

15. We cannot help but note that the respondents' claim was in the nature of special damages which are required under the law to be specifically pleaded and strictly proved. In ***<u>Siree Limited –vs – Lake Turkana El Molo Lodges</u> (2002) 2E.A. 521*** this Court stated that:-

> "***As regards the special damages awarded, this Court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages".***

See also the cases of ***Hahn-vs- Signh (1985) KLR 716 & James Mwangi -vs-Alex Njunguna & 2 Others- Civil Appeal No. 41 of 2007.*** In this case the respondents pleaded in the Plaint that all the 484 inhabitants were entitled to Kshs 200,000/= being compensation for the developments they did on the suit land. The respondents also particularized the losses suffered. However, there is no documentary evidence to support the respondents' claim that each inhabitant was entitled to Kshs. 200,000/=. The assessment reports that the respondents mentioned were also not produced in court. Furthermore, the four respondents only gave viva voce evidence as to what each was entitled to in terms of compensation and no documents in support of their claim were tendered. They also did not tender any evidence or documents as to what the rest of the inhabitants were entitled to. Therefore, we find that there was no evidence upon which the learned Judge could have arrived at Kshs. 96,800,000/= as being the amount of compensation the respondents were entitled to. We also find that the learned Judge misdirected herself in faulting the appellant for not producing the assessment reports which would have shed light to the actual entitlement of each inhabitant. In doing so the learned Judge shifted the burden of proof from the respondents who were the plaintiffs in the trial court to the appellant who was the defendant. In ***Central Bank of Kenya –vs-Martin King'ori-Civil Appeal No. 334 of 2002***, this Court held,

> ***'Surprisingly, the learned Judge then shifted the burden of proof on that claim to the bank which offered no evidence at the trial. With respect the bank had no onus of proof of the respondent's claim and the finding was therefore misdirection.'***

16. The upshot of the foregoing is that we find that the respondents failed to prove their claim of Kshs. 100,000,000/= as being the compensation they were entitled to; and that the leave granted to the respondents' to file the suit out of time was not in accordance with **Section 27(2)** of the **Limitation of Actions Act.** Accordingly, we find that the appeal herein has merit and it is hereby allowed with costs to the appellant. The judgment of the High Court is hereby set aside.

Dated and delivered at Nyeri this 3rd day of October 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR