



REPUBLIC OF KENYA



**Mnyaya v County Government of Taita Taveta (Environment & Land Case E002 of 2023)
[2024] KEELC 5980 (KLR) (Environment and Land) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E002 OF 2023
EK WABWOTO, J
SEPTEMBER 19, 2024**

BETWEEN

BENSON MWAKIO MNYAYA PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TAITA TAVETA DEFENDANT

JUDGMENT

1. The Plaintiff Initiated this suit through a plaint dated 4th October 2023 seeking the following verbatim reliefs against the Defendant; -
 - a. An order of injunction banning the Defendant or its agents, contractors from trespassing, building, exploring the Kishenyi dam into the Plaintiffs land known as Werugha/Mwarungu/667
 - b. An order directing the Defendant and the plaintiff to appoint surveyors to do proper beacons between Kishenyi dam and the Plaintiffs land.
 - c. Costs of the suit and interest at court rates.
2. The Plaintiff's case is that he is the owner of the parcel of land known as Werugha/Mwarungu/667 Measuring 3.04 Hectares. The land borders a public dam known as Kishenyi dam and that the Defendant with the intention of expanding the dam encroached into the Plaintiff's land and encroached into the Plaintiff's land to a tune of approximately one acre. The Plaintiff argued that the actions of the Defendant necessitated the suit and that his claim against the Defendant is for a resurvey to return the boundaries between the dam and the Plaintiff's land.



3. The Defendant despite being served with the pleadings and summons by the Plaintiff never entered any appearance, filled any Defence nor participated in the trial herein. Consequently, the suit was heard as an undefended cause.
4. During trial, the Plaintiff relied on his witness statement dated 4th October 2023 in his evidence in chief. He also produced a survey report dated 5th July 2024 which was prepared by B.C Mwanyungu, a licensed surveyor. The Plaintiff also produced a bundle of documents dated 4th October 2023 in support of his case and he added that the Defendant had encroached on his land and hence the reason why he had filed this case. The Plaintiff testified as the sole witness in the case.
5. When cross examined by the court, he stated that the dam was constructed in the 1960s and expanded in the year 1982 and later in the year 2000. He also stated that the dam is providing water serving members of the public. He also stated that he was not certain whether the dam is currently owned by the National or County Government.
6. The Plaintiff filed written submissions dated 12th August 2024. Counsel for the Plaintiff submitted that his evidence remains unchallenged that he is the registered owner of the parcel of land known as Werugha/Mwarungu/667 measuring 3.4 Hectares in Taita Taveta County. It was also submitted that he acquired the land by way of inheritance from his late father who actually settled in the land as early as 1950s. He also stated that the dam has been in existence since 1960s and has been expanded twice. It was also submitted that the Defendant intends to expand the dam in a manner that would encroach into his parcel and hence a need for a permanent injunction order against the Defendant. He also submitted that his evidence was unchallenged as the Defendant refused to either appearance nor file a Defence. The court was urged to grant the prayers sought in the plaint.
7. I have considered the pleadings, evidence and submissions tendered in this suit. The suit is undefended. Two key questions fall for determination in this suit. The issues are; -
 - i. Whether the Plaintiff has discharged his burden of proof under the law.
 - ii. Whether the reliefs sought by the Plaintiff are available.
8. I will dispose the two issues sequentially in the above order.
9. Notwithstanding the fact that the suit was undefended, the legal framework in Sections 107, 108 and 109 of the *Evidence Act* obligated the plaintiffs to place before this court evidence that would constitute proof on the balance of probabilities.
10. Even though this suit proceeded as undefended cause, the Plaintiff equally has a duty to prove her case to the required standard. In the case of *Kirugi and Another Vs Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
11. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”



12. From the evidence tendered herein, it emerges that the dam in question was constructed way back in the 1950s for public use. The said dam was expanded in the 1980s and later in 2000. It also emerges that while the same encroached onto the Plaintiff's land known as WERUGHA/WARUNGU/667, the plaintiff when being cross examined by the court stated that the dam was last expanded in the year 2000. The plaintiff was also not certain whether the same belonged to the National or County government, it also emerged that the dam provides water serving members of the public, essentially being designated for public use.
13. In view of the foregoing this court is not satisfied that the Plaintiff has proved his claim against the Defendant to the required standard. The Dam has been in existence since the 1950s and one wonders why the Plaintiff has never taken any action since then until the year 2023 when he filed the instant case. Its also not certain as to whether exactly the dam belongs to the National or the County Government. The Plaintiff was not able to prove this position and the court cannot make any assumptions.
14. Is this a suitable case to invoke the doctrine of laches; "equity aids the vigilant and not those who slumber on their rights". In the case of Abigael Barma Vs. Mwangi Theuri ELC No.393 of 2013, the court made reference to "Snell's Equity, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in Smith v Clay (1767) 3 Bro. C.C. 639n. at 640n) where it was asserted that a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."
15. In the Court of Appeal Case No.16 of 2012 Nairobi (Civil Application), reference was made to Lord Selbourne L.C. delivering the opinion of the Privy Council in The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221 , where at page 240 it was stated thus:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material...”
16. Thus one of the legal basis of the doctrine of laches is ensuring that legal claims are brought forth in a reasonable timely period so that evidence and reliable witnesses are can be found. Consequently, it is equally the finding of this court that the reliefs sought are not for granting.

Final Orders

17. In the end, it is the finding of this court that the Plaintiff's claim has not been proved to the satisfaction of this court and the following final orders are issued; -
 - a. The Plaintiff's suit is dismissed.
 - b. Each party to bear own cost of the suit.

Judgement accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH SEPTEMBER 2024.

E.K. WABWOTO

JUDGE



In the presence of

Ms. Atieno for the Plaintiff.

N/A for the Defendant.

Court Assistant, Mary Ngoira and Norah Chao.

