



**Njoka v Embu Water & Sanitation Co. Ltd (Civil Appeal
64 of 2022) [2023] KEHC 19349 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 64 OF 2022
LM NJUGUNA, J
JUNE 27, 2023**

BETWEEN

MARCLUS NTHIGA NJOKA APPELLANT

AND

EMBU WATER & SANITATION CO. LTD RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment of Hon. H. Nyakweba (SPM) delivered on 08.12.2022, in Embu CMCC No.231 of 2018 in which suit, the appellant sued the respondent for an order compelling the respondent to inter alia reconnect the appellant's water meter and/or supply. Exemplary and/or general damages for breach of contract and the costs of the suit.
2. The appellant listed his grounds of appeal as enumerated on the face of his memorandum of appeal dated 21.12.2022.
3. The appellant prayed that the appeal herein be allowed, the judgment by the trial court be set aside and the respondent's counter claim be dismissed.
4. The appellant's cause of action was premised on the fact that the appellant and the respondent entered into an agreement wherein the respondent was to supply the appellant with water vide metre no. 46459 and the appellant's other responsibilities inter alia were to pay for the amount of water consumed. The agreement subsisted till sometime on diverse dates between the months of October and November 2018 when the appellant allegedly tampered with the metre and illegally consumed the respondent's water, which after computation was found to be at Ksh 66,872 inclusive of penalty which the appellant was required to pay before a reconnection could be effected. The appellant being aggrieved by the said sum, moved the trial court for orders inter alia to compel the respondent to reconnect his water metre and for damages for breach of contract.



5. The matter proceeded to hearing and in its judgement delivered on 08. 12. 2022, the trial magistrate dismissed the appellant's case against the respondent with costs; entered a judgment for the respondent for payment of Kes. 66,872/= with interest at court rates from 21.11.2018 till payment in full and further awarded costs of the counter claim to the respondent herein.
6. Being dissatisfied with the said judgement, the appellant filed the appeal herein in which he has listed nine (9) grounds of appeal in the memorandum of appeal dated 21.12.2022.
7. The appeal proceeded by way of written submissions. In his submissions, the appellant submitted in reference to grounds 1, 2 and 4 that the trial magistrate erred by dismissing his claim against the weight of evidence by the appellant. That the evidence that the meter was tampered with was not true as there was no illegal connection by the appellant. It was argued that the award of Kes 66,872 was not justified as the same was not proved. The appellant submitted that the fact that the respondent was a body corporate, the same did not diminish its responsibility to prove a special claim which led to the appellant herein being condemned unheard.
8. On grounds 3,5,6 and 9, the appellant submitted that the learned trial magistrate ignored the pleadings, issues, submissions by the appellant That it was erroneous for the trial magistrate to believe the respondent's witnesses who did not have first-hand information in regards to the history of the matter in that the said metre had previously been installed and thereafter removed but also admitted that every time a metre is removed, the seals are tampered with, within the meaning provided for under clause 5 of the contract and that the respondent was responsible for the said interference.
9. In regards to grounds 7 and 8, the appellant submitted that the appellant produced exhibit in the form of a demand letter outlining how the metre was installed sometime in the month of February 2018. That the actions by the respondent to remove and re-install the same metre and failing to return it without any explanation, caused lots of prejudice to the appellant.
10. The respondent on the other hand submitted that the appeal herein has no merit and the same should be dismissed with costs. In respect to grounds 1, 2 and 3, it was submitted that the evidence tendered before the trial court discharged the respondent from any form of liability and the same explained why the court found in its favour. That unless the appellant fulfils the conditions to warrant a reconnection, the court cannot compel the respondent to reconnect the appellant's water.
11. In regards to ground 4, the respondent argued that the appellant had illegally consumed the respondent's water thus the figure of Kes. 66,872/- claimed in the counter claim was computed as the estimates for the appellant's water use. That the amount was based on empirical and provable data and could not have been done without regard to logic or common sense and therefore this court was urged to find so.
12. In reference to grounds 5 and 6 the respondent submitted that upon it's team visiting the appellant's home for metre inspection for customer account no. 46459 the same had stalled for a long period. The field technical team and the respondent's DW1 managed to inspect and found that the meter was fixed in reverse with safety tamper seals removed and also the inbuilt gadgets of the metre were missing. It was averred that though there was no evidence of damage to the metre, what was found was an interference as was stated in DW1's examination in chief wherein it was confirmed that the metre was fixed in reverse with the safety tamper seals removed and also the inbuilt gadgets of the meter missing and hence illegal consumption.
13. On grounds 8 and 9, it was the respondent's case that the burden of proof was discharged by the respondent by tendering evidence to prove that indeed the appellant had tampered with the said metre. That the respondent's witness testified that the field technical team and DW1 managed to inspect the



said metre and it was found that the same was fixed in reverse with the safety tamper seals removed and further, the inbuilt gadgets of the meter were also found missing. The respondent argued that the appellant was in breach of clause 5 on the General Terms and conditions which provide that the consumer shall not interfere with the water meter in whichever way, and shall undertake plumbing work after the matter. Any water that leaks after the meter is the customer's responsibility, but works from the meter towards the main supply is the duty of EWASCO. The respondent therefore urged this court to dismiss the appeal herein for want of merit.

14. The court has considered the grounds of appeal and the submissions by both the appellant and the respondent and it finds that the main issue it has been called upon to determine is whether the orders sought herein can obtain.
15. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by Section 78 of the [Civil Procedure Act](#) which espouses the role of a first appellate court which is to:

‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’

16. This was buttressed by the Court of Appeal in the case of [Peter M. Kariuki v Attorney General](#) [2014] eKLR where it was held that:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence..... (See [Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche](#) [2019] eKLR).

17. On grounds 1,2 and 4 whereby the appellant submitted that the trial magistrate erred in dismissing the appellant's case and allowing the respondent's counterclaim against the weight of evidence by the appellant thus relying on the evidence of the respondent only to reach an erroneous determination, the respondent submitted that each party presented its case before the trial court and the respondent discharged its burden unlike the appellant and therefore, the court was right to reach the determination it did and that the same was backed by facts and the law.

18. The appellant herein was expected to meet the standard of proof in regards to evidential burden. The appellant was required in order to succeed in its claim to discharge evidential burden in relation to the facts in issue. The facts in issue were whether the respondent was justified to disconnect the appellant's water supply and whether, the respondent was justified to charge the amount of Kes. 66,872/= from the appellant before the said water metre could be reconnected. Lord Nichol of the House of Lords in the case *Re H And Others (Minors) (Sexual Abuse: Standard Of Proof)* (1969) stated the Civil standard of proof to be:-

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the



event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

19. A similar case to this appeal was decided by the Court of Appeal and the holding of the Court of Appeal in that case is applicable to this case. That is *Mary Wambui Kabguo v Kenya Bus Services Limited* (1997) eKLR. The Court of Appeal stated:-

“The age long principle of law is that he who alleges must prove. The appellant’s case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent’s driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. “

20. In the case herein, save for the allegations by the appellant, no evidence was placed before the court to show that the stalling of the metre was for any other reason(s) apart from the allegation(s) fronted by the respondent. In my considered view, there was no evidence that was placed before the court by the appellant to controvert the allegations by the respondent. The appellant instead submitted that upon the metre stalling, the respondent disconnected the water and at that point, he issued a demand notice. Of importance to note is the fact that the demand letter was only issued after the fact. The appellant did not demonstrate that upon stalling of the meter, any communication, if at all, was made to the respondent notifying it that it’s metre had stalled; the alleged removal of the meter by the respondent and thereafter the reconnection of the meter. As a consequence, I am not convinced that the appellant is being truthful as his actions were more of after the fact after his water supply had been disconnected. It was his burden to not only lay but also prove his case to the required standards. As a result, I hold the view that the appellant did not shift the evidential burden to the respondent.
21. On grounds 3, 5, 6 and 9, the appellant submitted that it was erroneous for the learned magistrate to believe the respondent’s witness who did not know the history of the metre. That the metre had previously stalled; the same was thereafter removed after which it was reinstalled. That the respondent admitted that every time a metre is removed, seals are tampered with within the meaning provided for in the agreement and therefore, it could not be authoritatively said that the appellant was responsible for the said alleged tampering. In opposition, the respondent submitted that it disconnected the metre as a result of the fact that the appellant breached the agreement between them and that if the appellant were to comply with the penalty, then the respondent would easily reconnect the said water. As already stated above the appellant did not adduce evidence to warrant the respondent not to disconnect his metre, and further, in relation to the agreement between the appellant and the respondent which was signed on 07.04.2014, clause 9 tackles the issue of illegal water use. It therefore follows that the respondent was justified to rescind the alleged contract after the appellant. Breach the terms of the same.
22. On ground 5, 6 and 7, the appellant faulted the trial court for failing to consider the appellant’s evidence that he did not tamper with the metre and he never connected the said water illegally; and therefore, the penalty of Kes. 66,872/= was uncalled for. The respondent in supporting the finding by the trial court



submitted that the trial court having found that the appellant was in breach of the contract between them, in reference to clause 5 of the said contract, it was necessary that the appellant be liable for the water consumed and the penalty payable. From the evidence on record and with regard to water that was consumed, it is quite evident that from October 2017 to September 2018 when the metre started stalling, the appellant allegedly consumed water as enumerated from the statement as (3,348 + 260 + 260 + 260 + 260 + 260 + 260 + 468 + 260 + 260) = 6,156/=. Of importance to note is the fact that the appellant submitted that the respondent did not justify how the penalty was arrived at. The appellant further submitted that the fact that the respondent was a body corporate, the same did not diminish its responsibility to prove a special claim as the same was akin to the appellant herein being condemned unheard.

23. In his evidence, DW1 testified that there are times when a meter could stall and in the process of disconnecting the metre, its seal could also be tampered with. That the complaint herein was raised by one Joseph Irungu on 18.08.2018; further that, there were no arrears but interestingly enough, the debit balance of Kes 66,872/= was realized by the end of November 2018.
24. In as much as the appellant had the burden to prove his case, it equally befell upon the respondent to prove how it arrived at the said penalty. DW1 in his evidence stated that they were not able to measure the amount of water consumed as the metre for that period of time had stalled and that there was a uniform figure which was charged. A perusal of the said contract between the appellant and the respondent and specifically clause 9 which spells out that illegal water use shall be penalized based on tariff/estimated usage; it therefore translates to the fact that the penalty that ought to be levied against the appellant ought to be one that is estimated based on the estimated usage of the appellant and not any alien figure without empirical backing and further, the same ought to be within the confines of the contract signed by the parties herein.
25. It is my view, therefore, that the amount of Kes. 66,872/= was not proven.
26. As a consequence of the above, I find and hold that:
 - i. The appeal herein partly succeeds to the extent indicated above.
 - ii. Each party to bear its own costs.
27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

