



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 52 OF 2018

MOURINE MUKONYO.....APPELLANT

VERSUS

EMBU WATER AND SANITATION COMPANY.....RESPONDENT

(An Appeal from the judgment of Honourable S.K Mutai Principal Magistrate Embu dated 18/09/2018 in Embu Chief Magistrate Civil Suit No. 311 of 2016)

J U D G M E N T

A. Introduction

1. This appeal was instituted vide a memorandum of appeal date 15/10/2018 and challenging the judgment/decree given on 18/09/2018 in CM Civil Case No. 311 of 2016. The appellant urged the court to set aside the said Judgment and dismiss the entire suit. The appellant raised eight (8) grounds which can be summarized as follows: -

- 1) *That the learned magistrate erred in law and fact and gravely misdirected himself by ordering that the suit be disposed of by way of written submissions.*
- 2) *That the learned magistrate erred in law and fact by making judgment in favour of the respondent and against the weight of the evidence of the appellant*
- 3) *That the learned trial magistrate erred in law and in fact by relying on untested evidence by the plaintiff and failing to consider the appellant's evidence and defense and without considering the facts of the case.*

2. The parties consented to have the appeal disposed by way of written submissions and the parties filed submissions in that regard.

B. Submission by the parties

3. The appellant in support of the appeal submitted that she was never served with a demand letter and further that she was not the registered owner of Land Parcel No. Gaturi/Weru/6206. The registered owner was one Martin Njue Njeru according to the land registry records. Further that she had an account with the respondent whose function was water supply within Embu County.

4. The Respondent on its part submitted that its evidence was never challenged by the appellant during the trial and further that the consent recorded in the trial court to have the matter proceed by way of written submissions was never set aside and neither did the appellant change the advocates on record. Further that the issue on the ownership of the suit land was never raised in the pleadings.

C. Re-evaluation of evidence

5. It is trite law that the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof and taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect (See **Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123**).

6. The appellate court further ought not to interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See **Ephantus Mwangi and Another -vs- Duncan Mwangi Wambugu (1982) - 88) IKAR 278**).

7. Under Section 78 (2) of the Civil Procedure Act the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this act on courts of the original jurisdiction in respect of suits instituted therein.

8. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to. What matters in the analysis is the substance and not its length. (See Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634 and Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)- both decisions being from the Supreme Court of Uganda). Further what is expected of a trial court is to identify the legal and factual issues for consideration and to analyze the evidence tendered to determine what facts have been proved or disliked. (See John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR).

9. The brief facts of this appeal are that the respondent's herein instituted a suit in the lower court for judgment against the appellant herein for Kshs. 177,600/= amongst other remedies. The basis of this claim was that the appellant was found by the respondent's field workers having connected water illegally. That the appellant admitted liability in a meeting held on 12/02/2016 and undertook to pay the damages for illegal connection and which damages were assessed at Kshs. 177,600/=.

10. The appellant was granted leave to file her statement of defense and in which she denied the averments in the plaint. When the matter came up for hearing on 13/03/2018, the parties recorded consent to have the suit disposed of on the pleadings, documents and statements filed. The parties further agreed to file written submissions in support of their arguments. The judgment was delivered on 15/10/2018.

D. Issues for determination

11. I have considered and analyzed the pleadings and the record of the trial court as well as submissions of the parties. The main issue for determination is whether the appellant has satisfied the court as to his grounds of appeal to justify overturning the said judgment.

E. Determination of the issue

12. It is on record that the parties herein consented to proceed by way of pleadings and statements filed by them in support of their cases.

13. The appellant further raised the issue that the trial magistrate erred in law and fact and gravely misdirected himself by ordering that the suit be disposed of by way of written submissions. However, the records are clear to the effect that the parties' advocates recorded a very clear consent on 13th March, 2018 that the matter disposed in that manner. I am of the opinion that the appellant is legally bound by all the actions of her advocates on the mode of hearing before the trial court so long as the advocates were on record as acting for her at that material time.. The record is clear that one Mr. Njage was on record for the appellant on 13/08/2017 when a consent on directions was recorded while Ms. Muriuki was for the respondent. The consent was dictated upon the court and confirmed by both counsels. Both parties to the consent are therefore bound by the said consent.

14. It is trite law that he who alleges must prove. Section 107 of the Evidence Act provides that: -

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

15. It is thus trite that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. Section 109 and 112 of the Evidence Act provides for the evidential burden of proof. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that: -

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

16. It follows that the initial burden of proof lies on the plaintiff, now the respondent in this appeal to prove his case on the balance of probabilities.

17. In the instant case, the respondent, in support of its case, filed a list of documents and witness statement by Catherine Mukami and David Kaburi. Amongst the list of documents were photographs taken on the site when the illegal connection was detected, minutes of the technical meeting held on 12/02/2016 and wherein she admitted to the liability and offered to pay the assessed damages. The appellant did not object to the production of the said documents and witness' statements during the trial. The appellant must be estopped to bring the issue on appeal. The trial court relying on the said documents found that the respondent proved its case that the appellant had made an illegal water connection.

18. It is surprising that the appellant never filed any document in support of her case or to substantiate the claim that she never connected water illegally. Without any documents to counter the minutes and the resolution tendered by the respondent as to her having participated in the meeting by the Ad hoc committee, it is my considered opinion that the respondent's case was proved on the balance of probabilities. The appellant did not adduce any evidence to controvert the documentary evidence of the respondent.

19. The appellant submitted that the land in question was not registered his name and that for that reason, he ought not to have been found liable. It is trite law that a party is bound by her pleadings and issues are raised in pleadings as well as by her/his evidence. The appellant did

not deny the respondents averment that she was the occupier of the house where water had been illegally connected. In fact it has been held that a court has no jurisdiction to decide an issue not raised before him and that the only way to raise issues before a court arise from through the pleadings as was held in the case of **Nairobi City Council v Thabiti Enterprises Limited [1997] eKLR1996 Court of Appeal-Akiwumi, Tunoi & Lakha, JJ.A Lakha JJ.A dissenting.**

20. The appellant in the affidavit in support of the application to set aside the judgment in default of appearance, deposed that she owns a home at Muthatari area within Embu municipality L.R. No. Gaturi/Weru/6206. The respondent's evidence was that the home where there was illegal connection was in Muthatari area. The appellants affidavit forms part of the evidence on record. The appellant did not say or demonstrate that she had more than one home at Muthatari in Embu. The evidence remains that the respondent sued the appellant in connection with the water supply account in her home at Muthatari.

21. I take judicial notice of the fact that a home may either be owned or rented. For this reason, the land on which the home stands must not be necessarily registered in the name of the home occupier for them to bear responsibility of services like water and electricity. Even if the issue of land proprietorship had been raised in the pleadings, it would not have changed the finding of the court on liability.

22. I have perused the evidence on record and note that the respondent produced documentary evidence to support his case while the appellant's case was devoid of any evidence to controvert it. I come to the conclusion that the judgment of the trial court was based on cogent evidence.

23. I find no merit in this appeal and dismiss it accordingly.

24. It is hereby so ordered.

DELIVERED, DATED and SIGNED at EMBU this 19th day of November, 2020.

F. MUCHEMI

JUDGE