



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.241 OF 2013

**MUNYEKI WATER & ELECTRICITY PROJECT & 3 OTHERS...APPELLANTS**

**VERSES**

**JOSEPH MUIGAI WANGUNYU & 214 OTHERS.....RESPONDENTS**

(An Appeal From The Judgement Of The Chief Magistrate Court Hon.V. Juma Dated 5<sup>th</sup> December 2013 In Nakuru Criminal Case No.355 Of 2003)

**BETWEEN**

**JOSEPH MUIGAI WANGUNYU & 214 OTHERS.....PLAINTIFFS**

**VERSES**

**MUNYEKI WATER & ELECTRICITY PROJECT & 3 OTHERS...DEFENDANTS**

**JUDGEMENT**

1. The facts of this case are clear and straight forward. The appellants and 38 others registered the 1<sup>st</sup> appellant as a community based organisation hereinafter referred to as CBO, sometimes on **11<sup>th</sup> September 1986** with the sole purpose of having electricity supplied to its members. Upon the said registration, they approached the Kenya Power and Lighting Company hereinafter referred to as KPLC, so that they could get connected with power. The power company gave them a quotation of about Kshs. 10 million and required them to pay some deposit.

2. The appellants in line with the said demand paid some deposit and thereafter there was a meeting with the respondents which they all resolved to join hands so that they could as well be supplied with electric power. This was agreed through the meeting of 4<sup>th</sup> April 1993. The power company then gave another expanded quotation which all the parties agreed and consequently resolved to pay the deposit before the power company could move forward. The amount so required as deposit was about Kshs. 1.3 million.

3. The respondents continued paying the deposits which had been agreed at Kshs.9000 each although as per the proceedings at the lower court it was evident that they each paid different amount the least being kshs.100.

4. In the process the KPLC came and connected power to the 38 persons who were in the initial group only although about 8 of them were left behind. The respondents were alarmed and they sought legal redress in court as they were left out of the deal. In the amended plaint dated **21<sup>st</sup> December 1998**, they prayed for the following reliefs;

**(a) An order for specific performance of the contract for supply of electricity to all the plaintiffs.**

**(b) In the alternative, a refund of the monies paid to the 1<sup>st</sup> defendant through the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.**

**(c) An order of injunction restraining the 1<sup>st</sup> defendant, its agents and or servants from installing and supplying electricity to only 38 members until the issue of supply of power to the rest of the members is determined by the court.**

**(d) Costs of the suit and interest.**

5. The appellants who included the Kenya power filed their defences denying the respondent's allegations and demanding strict proof. The matter went to full trial where the parties called their respective witnesses and the court gave its verdict allowing the respondent's case. The court went ahead to order the appellants to pay back the respondents the amount of money each had contributed. They were also slammed with costs which they were to pay the respondents as well as KPLC.

6. Dissatisfied with the said judgement, the appellants have filed this appeal citing several grounds. Substantively **the grounds of appeal are that there was no legal basis for the court's judgement ;that the respondents' claim was directed at the Kenya power and not the appellants ;the respondents could not depart from their pleadings; that the refund could only be made by whoever received the money and that the claim was for special damages which was not proved ; that it was wrong to hold the appellants who were officials personally liable for the refund and that the court was generally biased against the appellants.**

7. The parties were directed to file their written submissions which they have complied. The court has perused the same as well as the authorities cited and the proceedings herein.

8. In terms of the evidence tendered at the lower court, the 1<sup>st</sup> respondent **JOSEPH MUGA WANGUYU** testified on behalf of the rest and produced the exhibits indicating the amount of money each of them contributed. The money was paid to the CBO as evidenced by the bundles of receipts. It was his case therefore that the appellants went ahead to have power connected to the first initial group and not them despite paying their deposits.

9. He urged the court to order the appellants refund them since after all they had already had electricity connected to their homes through other means. He said that they were discriminated to by the appellants and that they had no problems with KPLC.

**10. PW2 PHILIP WAWERU KURIA** a social development officer from Ol Kalou County Council testified concerning the registration of the CBO and the meetings held concerning the supply of power to their homes. He also produced the list of all the members of the CBO. He confirmed that there were 38 people who started the project and only 30 benefited from the power connection. He said that he was not aware that power was to be supplied in phases.

**11. DW1 NATHANIEL WAITHAKA WANYAGE** testified on behalf of Kenya power and he confirmed that 38 people had applied for electricity connection. He produced the list of those 38 persons. He said that they were to pay kshs1 million as a deposit which they did and he as well produced the exhibits indicating those payments. He denied that they were aware of the other 262 members as they paid as a group and not as individuals.

12. On cross examination he said that they discovered during the wiring that there were other persons who were claiming to be part of the group. The total amount so far paid was Kshs. 1.3 million.

**13. DW2 FRANCIS KARANJA WAINAINA** testified on behalf of the appellants. He admitted that the first people to have formed the membership of the CBO were 38 and they later admitted the respondents. They paid a total of Kshs.1.2 million to KPLC and this was for phase one. The second phase ideally was to incorporate the respondents who frustrated the whole venture by filing the case in court. He said that all the money that was collected was towards the supply of electricity and they therefore cannot be penalised. He urged the court to dismiss the respondent's case.

14. As indicated above the parties have filed written submissions. The appellants have submitted that the respondent's money was paid to KPLC and they have therefore nothing to refund. The respondent's contributed to the breach of contract by failing to pay the agreed sums of money as and when it was required.

15. They also submitted that there was no evidence to suggest that they failed to utilise the money paid by the respondents and that if there is any refund then KPLC ought to be compelled to pay. They also submitted that the respondents failed to plead special damages as required by the rules. They said that it is not very clear how much each of the claimants ought to be paid or refunded.

16. The respondents on the other hand agreed with the findings of the trial court. They said that they pleaded their case very well and it was clear from the amended plaint how much each one of them was to be refunded. They said that the only amount contributed by the 38 persons was **Kshs. 324,859.40** yet what was expected by KPLC was kshs.1.3 million. The appellants therefore benefited from the respondent's contribution as they had not met the 10% expected by the power company. They urge this court to dismiss the appeal.

#### **ANALYSIS AND DETERMINATION.**

17. The duty of this court is to reconsider the evidence afresh and draw its own conclusion with the rider that it did not see nor heard the parties, a benefit which the trial court had. See **SELLE & ANOTHER VERSES ASSOCIATED MOTOR BOAT CO.LTD. (1986) E.A. 123.**

18. What is not in dispute herein is the fact that the first members of the CBO were 38 and later after a general meeting they added the respondents so that all could benefit from electricity connection. The first 38 persons as a matter of fact had gone ahead to negotiate with Kenya power and had been given the amount they were required to pay before proper work could start.

19. It is as well not in dispute that the KPLC began installing power to the 38 original persons and left behind the rest of the respondents on the grounds among others that they were not recognised and thus could not be considered. By that time, they had made payments to the appellants which amount was part of the kshs.1.3 million paid to the said power company.

20. The respondents were thus alarmed and filed the suit seeking several reliefs enumerated above. The court found in their favour. By the

time the suit was finalised the respondents by their own means had had power connected to their premises and the only prayer was the refund of their money.

21. The appellant's grounds of appeal include the fact that the respondents did not plead this on their plaint contrary to the requirements that when a party seeks specific performance, the same must be pleaded concisely. This ground cannot stand for the simple reason that the content of the plaint as clearly found by the trial court does contain what every member paid. They range from ksh.100 to the highest about Kshs. 11,000.

22. There was the question of whether the payments and subsequent connections were to be done in two phases. The minutes of 4<sup>th</sup> April 1993 is worth reproducing here. The same under minute 4/93 states that;

**“The chairman explained to the members that the project survey for the 38 members was already through and that what they were waiting was the final quotation. On new members the chairman explained that since the survey of the initial 38 members was through they could join the project as members awaiting for phase two (2) of the project. He said that before the meeting, they had held consultations with KPLC and had agreed to construct on two phases –phase 1 and 2.”**

23. The minutes went on to state that;

**“After a lengthy discussion the original 38 members agreed that new members could be enlisted in the project and contributed 9000/= just like the they –the 38 members contributed to complete the phase one. Then all members, phase 1 and 2 would contribute together for phase 2.**

**The new members agreed with the proposal and agreed to join as members of the project. The new members agreed to contribute and started paying their contributions there and then.”**

24. The next meeting of 27<sup>th</sup> November 1995 exhorted members to pay urgently as there was delay in payments and the time KPLC had given was almost expiring. The members were urged to pay more and in fact they were loaned Kshs. 37,000 by **MR KIMANI MARECHU** and **T.T .GACHAU**.

25. In essence therefore the project was split into two phases and all payments were to be equal. By the time **KPLC** came to install power to the 38 original members (, although 8 of them were left behind), the appellants had paid Kshs. 1.3 million to KPLC.

26. Did the deposit of kshs.1.3 million come from the original 38 members? I do not think so. That amount was contributed by both the 38 persons as well as the appellants. The court correctly found and it was not disputed that the total contribution by the 38 original members was Kshs. 324,859.40. It therefore meant that the total amount raised by members whether in phase one or phase two was **Kshs. 1,458,194.10**.

27. The appellants and their group of 38 had not in fact met the threshold of Kshs. 1million as directed by KPLC. Had the respondents not been factored in they would not have raised the 10% as was demanded by KPLC. The meeting of 4<sup>th</sup> April 1993 brought all of them together for one cause namely electricity connection. They agreed moving forward to contribute in equal shares.

28. There was therefore no evidence that phase two materialised as they had agreed in the meeting. All that KPLC did was to receive their deposit which of course as Dw1 testified was received from the appellants and went ahead to connect power oblivious of the fact that the contribution was an aggregate of what the appellants paid as well as the respondents.

29. KPLC as was clearly indicated in the proceedings by the witnesses was a neutral party. For it, it never mattered where the funds came from, but as long as the appellants and specifically the CBO had complied.

30. It is therefore the perspective of this court that if the appellants were sincere enough and now that they had agreed to enjoin the respondents in the CBO, they should have put on halt the exercise of having the power connected to the 38 of them or at least continuing to collect the funds for the respondents and ensure that ultimately the respondents were connected.

31. It is therefore hypocritical for the appellants to deny that they forwarded the money to KPLC yet there is sufficient evidence that they got power connection because the respondents contributed to the 10% demanded by KPLC. They were not paying as individuals but as a group as admitted by Dw1.

32. Since the money was paid to the appellants by the respondents as shown by the bundle of receipts produced, it is clear then that they are the ones holding the money. In as much as they may have forwarded the money to KPLC, the same benefited them and not the respondents. As a matter of fact, when the respondents paid their portions they were under an impression that they would be connected. Failure to notify KPLC of the new changes fell squarely upon the shoulders of the appellants.

33. At any rate having benefited from the respondent's contributions, they cannot be heard to complain. The 38 of them whom the appellants led benefited. The best the appellants could do under the circumstances is to demand from them the refund so that they could pay the respondents in settlement of the courts decree.

34. It is worth noting too that from the meeting of 4<sup>th</sup> April 1993, that the appellants and the respondents ideally became one group. They agreed to work together and have power connected to their homes. There was nothing to suggest that power was to be connected first to the appellants and thereafter to the respondents based on the parties' contributions. The respondent's contributions were in anticipation that just like the appellants and the first 38 members they would eventually have the power connected.

35. Although there was the issue of phases, KPLC was not in the know. This was purely an arrangement by the parties. That may have formed an opinion by the said power company to supply electricity to the 38 persons only. It had no idea where the money came from.

36. Contrary to the submissions by the appellants that the respondents frustrated the whole mission of electricity connection, the appellants had the upper hand. They were the ones dealing with KPLC and there was nothing difficult in notifying the said power supplier of the new increase in membership and the need to expand the connection to include them. On the contrary they kept quiet, had their homes connected courtesy of the part contribution by the respondents.

37. Further, there was nothing stopping the appellants even at the time the matter had come to court to seek further directions and guidance from the court especially considering the allegations that the respondents were frustrating the efforts to have power connected to them.

38. There was no evidence tendered to show that the 38 persons completed their payments. All that was produced were correspondences which demonstrated payments and ultimate connection of power to them.

39. The authorities as cited by the appellants are distinguishable. They are basically dealing with the content of pleadings. The bottom line in my view is that the respondents paid their contributions which are well enumerated and each one of them has a clear receipt. They did not get power connection but their contribution benefited the appellants and not them.

40. For the foregoing reasons this court does not find merit in the appeal. The court cannot see fault in the trial court's decision. The appeal is hereby dismissed with costs to the respondents.

**Dated, Signed and Delivered electronically at Nakuru this 17<sup>th</sup> day of December 2020.**

**H. K. CHEMITEI.**

**JUDGE.**