



**Mithamo & 3 others v Mambo & 3 others (Environment and Land Appeal
5 of 2021) [2023] KEELC 21992 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 5 OF 2021
AK BOR, J
NOVEMBER 20, 2023**

BETWEEN

**SABASKY MITHAMO 1ST APPELLANT
PAUL GITARI 2ND APPELLANT
ISAAC KARONJI 3RD APPELLANT
MARTHA MUTHONI 4TH APPELLANT**

AND

**STEPHEN MUKONO MAMBO 1ST RESPONDENT
PETER KIHANDO 2ND RESPONDENT
JEREMIAH MURIITHI 3RD RESPONDENT
SAITA KITONGA (ON BEHALF OF NGARE NDARE WATER
PROJECT) 4TH RESPONDENT**

JUDGMENT

1. Through the memorandum of appeal filed in court on 8/10/2021, the Appellants challenged the judgment of Vincent Masivo, Resident Magistrate delivered on 9/9/2021 in Nanyuki CMCC No. 36 of 2019. The main grounds of appeal are that the Learned Magistrate erred in holding that the 1st Respondent proved his case and in finding that he was entitled to connection of water from the Ngare Ndare Water Project (Water Project) to plot no. 899 whose ownership was not proved yet it was plot no. 898 that he pleaded. Further, they faulted the trial court for making a finding that there was no evidence that the supply of water was pegged on a certain parcel of land or proof of ownership of the land. The other ground of attack on the trial court's decision is for making a finding that the 1st Respondent had complied with the requirements for supply of water from the Water Project.



2. The hearing of the appeal was canvassed through written submissions. In the submissions filed on 29/5/2023, the Appellants urged the court to rely on *the constitution* for the Water Project. They argued that it was not in dispute that the 1st Respondent had already been connected with water from the project and was seeking a second connection. They contended that the 2nd to 4th Respondents colluded with the 1st Respondent and made it appear as if the 1st Respondent could be connected with water as long as he had paid the connection fee.
3. The Appellants submitted that the 1st to 4th Respondents did not follow the procedure for applying for water connection for the second time. They argued that he was required to write a letter to the committee through the chairman or secretary of the group and that the application would be taken to the executive committee for deliberation. If it had merit, they would call a general meeting and present the application to the members for deliberation. If a majority of the members approved the application, an applicant would pay the requisite fees of Kshs. 150,000/=, buy pipes and get connected with water.
4. Further, the Appellants contended that the 2nd to 3rd Respondents received the 1st Respondent's payment and issued a receipt later which was unprocedural. They pointed out that an acceptance letter should have been written after the general meeting had given approval which the 1st Respondent ought to have signed to confirm that he accepted to be bound by the rules. They emphasized that it was not the officials to approve additional water connection but rather, it was the members in a general meeting. They contended that the sum which the 1st Respondent claims to have paid was never paid into the project account.
5. The Appellants relied on clause 9.3 of *the constitution* on the functions of the management committee in support of their argument that the 1st Respondent rushed to court before employing the dispute resolution mechanisms set out in *the constitution*.
6. The Appellants argued that under clause 6.2 (a) of *the constitution*, an applicant must be a landowner within the area of the project yet the 1st Respondent indicated parcel no. 899 which does not belong to him. They concluded that the 1st Respondent was not connected to the project water because the other members opposed the manner in which the 2nd to 4th Respondents handled the matter. They pointed out that the 1st Respondent's clearance was issued in 2016 which was before the receipt was issued on 26/2/2017.
7. The 1st Respondent submitted that the Learned Magistrate did not err in arriving at the decision that he was entitled to connection of water on plot no. 899 as against plot no. 898 which was pleaded. He argued that from the evidence adduced at the trial, it was clear that he was a bona fide member of the Water Project. He maintained that he had paid the requisite fee of Kshs. 150,000/= towards the water project and provided free labour for the project which made it possible for the project to drain water from Ngare Ndare Forest to Kianda village for use by the project members. He added that the officials of the water project refused to connect water to his piece of land yet he did not owe any sum to the project.
8. The 1st Respondent argued that during cross examination, he confirmed that his plot no. was 898 and that it had not been connected with water from the project despite him complying with all the necessary requirements. He relied on the evidence tendered by the 4th Respondent who confirmed that his plot was no. 898 and that it had not been connected with water because he delayed in purchasing water pipes. He argued that the other witnesses confirmed that he was a bona fide member of the water project and that the 3rd Appellant conceded that his own land was connected with water twice because he was a committee member.



9. The 1st Respondent submitted that the court allowed his application to amend the plot number to read 898 in place of 889 on 11/3/2021 and argued that the court did not err when it found that it was plot no. 898 that was to be connected with the project water. The 1st Respondent urged the court to dismiss the appeal and relied on a decision made in a criminal appeal in support of the argument that the court will ignore minor contradictions unless they point to deliberate untruthfulness or they do not affect the main substance of the prosecution. The 1st Respondent maintained that his case was not controverted and that the Respondents admitted paragraphs 7, 8 and 9 of his plaint. He maintained that the 4th Respondent who was the group secretary, confirmed that he made all the requisite payments but the other officials of the project refused to connect water to his land. He pointed out that none of the Appellants was an official of the group.
10. The issue for consideration is whether the court should allow the appeal, set aside the judgment of the trial court and thereafter dismiss the 1st Respondent's suit. In the plaint filed in court, the Plaintiff sought an order to compel the 2nd to 4th Respondents to unconditionally connect water to his plot number 889 on the basis that as a member of the project, he had made the requisite payments and fully participated in the activities of the group which entitled him to water connection but the 2nd to 4th Respondents had refused to connect the Project Water to his land.
11. The 2nd to 4th Respondents who were sued as the 1st to 3rd Defendants, filed a defence in which they averred that they had not refused to connect water to the 1st Respondent's plot but explained that he had delayed in buying water pipes for connection and failed to meet other requirements.
12. The typed proceedings show that vide a consent recorded on 16/1/2020, the Appellants were added to the suit as the 4th to 7th Defendants in their capacity as members of the Water Project. They filed their defence to the suit on 1/7/2019, in which they averred that *the constitution* of Ngare Ndare Water Project stipulated that a member could only have one water connection to their land and that the 1st Respondent had already been connected to water. Further, they denied that plot number 889 belonged to the 1st Respondent. However, the court notes that their defence was not included in the record of appeal.
13. The proceedings of 11/3/2021 confirm that the application to amend the plaint at paragraphs 5 and 6 for the plot number to read 899 instead of 889 was allowed by the court. The court notes that the 1st Respondent produced his membership card for the project and the clearance which gave his plot number as 889. The card was issued on 11/6/2016 and there is a receipt for payment of Kshs. 150,000/= dated 26/12/2019.
14. After evaluating the evidence, the Learned Magistrate issued an order compelling the defendants to connect water to the 1st Respondent's plot number 899. The trial court went by the evidence of the officials of the project that the Project Water had not been connected to the 1st Respondent's plot. The court took into account the evidence indicating that other members had double water allocation while noting that no constitution was produced to prove that a member was only entitled to one water connection to their land. The court observed that only the Project's by-laws had been produced in evidence and went ahead to review its provisions before arriving at the conclusion that supply of the project water was not pegged on certain land or proof of ownership of land as the Appellants contended.
15. Regarding the contention that the suit was premature and should first have been referred to arbitration, the trial court found that the Appellants had acknowledged the claim and they should have applied to stay the proceedings in line with Section 6 of the *Arbitration Act* which they failed to do. The Learned



- Magistrate was satisfied with the 1st Respondent's explanation that his plot was number 898 and that there was a clerical error on the plot number, which was the basis for the amendment of his pleading.
16. Looking at the by-laws of Ngare Ndare Water Project, clause 6.2 deals with membership and states that a person is eligible to membership subject to approval of his application and compliance with certain requirements, one of which is that he must be a land owner within the area of the water project. Clause 6.5 states that the management committee is to discuss an application for water connection and if the applicant meets the qualifications, then the application is to be considered through the general meeting.
 17. The secretary is required by clause 6.6 to send a letter of offer to a successful applicant stipulating the entrance and membership fees if the applicant is successful. On the acceptance of the application for water connection, clause 6.7 requires the secretary to cause the applicant to sign the letter of offer and any other agreement for the supply of water. These constitutes an acceptance by the applicant to be bound by the rules of the water project. Clause 7 gives the rights of members, one of which is the right to equitable benefit. Clause 9.3 (l) gives one of the functions of the management committee as hearing and dealing with complaints of members and resolving disputes. There is no clause stipulating that a member is only entitled to one water connection or that the founding members were the only ones who could get connected to the project water more than once.
 18. After delivery of the judgment, the Appellants applied for stay of execution which the trial court declined to grant on 18/11/2021. The Appellants renewed their application for stay of execution before this court vide the application dated 29/11/2021. They exhibited copies of title deeds for Timau/Timau Block 5/889 and 899 to show that the 1st Respondent did not own either of these parcels of land. In the response filed by the 1st Respondent, he deponed that the judgment of the Magistrates Court had been complied with and that water had been connected to his plot number 894. The Appellants did not respond to this averment yet it directly affects their appeal.
 19. The Appellants maintained in their submissions that the 1st Respondent had already been connected to the project water yet they did not lead evidence to prove when the project water was connected to his land. During the trial, the 1st Respondent's testimony was that the water connected to his plot was from a different entity. The Appellants contended that the 1st Respondent did not produce minutes of the general meeting approving his water connection. Applying the same line of argument to the Appellants, they ought to have produced the minutes of the meeting which approved the first water connection to the 1st Respondent's land and the plot number where the water was connected to.
 20. The Appellants referred extensively to the Project's constitution which was never produced in court. It is only the by-laws which were produced at the trial and which were included in the record of appeal.
 21. The Appellants submitted that the receipt for payment of Kshs. 150,000/= which the 1st Respondent tendered in evidence was forged and that that sum of money was not paid into the Project's account. This issue never arose or fell for consideration before the trial court. It was not taken up by the Appellants in their defence or submissions before the trial court. The position they took was that the 1st Respondent had colluded with the officials of the Project to have water from the project connected to plot no. 889 which did not belong to him.
 22. One of the functions of the management committee under clause 9.3 is to collect water fee from the members. The Appellants faulted the 2nd to 4th Respondents for receiving the 1st Respondent's payment. If the 2nd to 4th Respondents colluded in connecting water to the 1st Respondent as the Appellants argued, then they ought to have moved the general meeting for their removal in line with clause 9.14 of the project by-laws or recalled the elected officials for failure to perform in their office under clause 7.



23. The rights of members of the project listed in clause 7 do not include suing or maintaining a suit against other members. The Appellants lodged this appeal in their capacity as members of the project but not as elected officials. The by-laws give the organizational structure of the water project.
24. The trial court issued orders to compel the defendants to connect the project water to the 1st Respondent's plot number 899. It would seem that the 1st Respondent went ahead to connect water to plot number 894 which is a different plot altogether and which strictly speaking, rendered the appeal moot.
25. The appeal fails. Due to the inconsistencies in the plot numbers which the 1st Respondent gave in the suit and in the appeal, each party will bear its costs for the appeal.

DELIVERED VIRTUALLY AT NANYUKI THIS 20TH DAY OF NOVEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Mercy Kaume for the Appellants

Mr. Victor Onderi for the 1st Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the other Respondents

