



Mathenge & another (On behalf of Mureru Water Project) v Gichohi (Environment and Land Appeal 6 of 2021) [2022] KEELC 15600 (KLR) (20 June 2022) (Judgment)

Neutral citation: [2022] KEELC 15600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 6 OF 2021**

**AK BOR, J
JUNE 20, 2022**

BETWEEN

**CHRISTOPHER GITHUI MATHENGE 1ST APPELLANT
BEATRICE WAMUYU MWAI 2ND APPELLANT
ON BEHALF OF MURERU WATER PROJECT**

AND

JULIUS MURIITHI GICHOHI RESPONDENT

JUDGMENT

1. As a member of Mureru Water Project, the respondent filed Nanyuki CM ELC Civil Suit Number 115 of 2016 against the appellants seeking an order for the reconnection of water supply to his land reference number Naromoru Block 2/Mururu/136 and general damages. The respondent sued the chairman, secretary and treasurer in their own capacities and as officials of Mureru Water Project following the disconnection of the water supply to his farm which he claimed caused his crop to wither leading to loss of a contract to supply food produce to Greenland Company Limited. According to the respondent, the disconnection was caused by the appellants' action of diverting the water to the 3rd appellant's farm. The appellants denied the respondent's claim and contended that the only change in the water network was the relocation of the respondent's water connection to allow for flow and supply to other members of the project, which they urged did not disrupt the respondent's water supply.
2. After hearing and considering the case, the learned magistrate found the appellants liable for disconnecting the respondent's water and awarded him Kshs 300,000/= in general damages. The trial court issued an order for the water supply to be reinstated to the respondent's land parcel number Naromoru Block 2/Mururu/136 and further, that the reconnection should be balanced between the plaintiff's water supply and other upstream users.



3. Being dissatisfied with that judgment, the appellants filed the memorandum of appeal dated December 18, 2018 setting out eight grounds of appeal which are basically against the learned Chief Magistrate's finding on both liability and damages. The appellants seek to have this court set aside the orders issued made by the trial court and substitute those with an order dismissing the respondent's suit.
4. The appeal was canvassed through written submissions. In their submissions dated March 31, 2022, the appellants contended that there was no proof that the respondent's water was disconnected and maintained that the evidence adduced before the trial court showed that the water was redirected and not disconnected. The appellants also argued that there was no evidence to show that the court went for a site visit to ascertain the alleged damage caused to the respondent's farm.
5. The appellants submitted that the respondent's claim for general damages was actually a claim for special damages since the respondent claimed that he suffered loss of contract. That that being the case, the learned magistrate wrongfully awarded special damages to the respondent when he had not specifically pleaded and proved the special damages. Further, the appellants contended that the respondent neither tendered evidence of the crops he had planted on the land nor did he produce a valuation report to show their value. They contended that the trial court did not have discretion to award special damages which had not been quantified and relied on the case of [*Robert Okeri Ombeka v Central Bank of Kenya*](#) [2015] eKLR in support of this contention.
6. The respondent submitted that there was actual water disconnection by the appellants which was done maliciously without informing him and added that he produced photographs of the withered crops in evidence. He further submitted that indeed there was a site visit done by the trial court in the presence of counsel for both parties. He pointed out that the advocate representing the appellants in this appeal was not the one who represented them before the trial court when the site visit was made.
7. The respondent submitted that he did not seek special damages despite availing copies of receipts but that he sought general damages which is what the trial court awarded him. He contended that the appellants cannot purport to re-write the judgment or use this court to correct what they think ought to have been done by the trial court. He relied on [*Savana Saw Mills Ltd v George Mwale Mudomo*](#) [2005] eKLR and submitted that the trial court rightly exercised its discretion in awarding him general damages guided by the material evidence which he provided. The respondent reiterated that he sought general damages due to the loss he suffered and not special damages which was not pleaded in his plaint and relied on the decision in [*Herbert Hahn v Amrik Singh*](#) [1985] KLR 716.
8. The main issues for determination are firstly, whether the respondent's water was disconnected or it was merely diverted by shifting the connection point; secondly, whether there was no site visit by the trial court and lastly whether the court erred in awarding the respondent general damages as it did. This being a first appeal, the court must reconsider the evidence adduced before the trial court, re-evaluate and analyse it so as to draw its own independent conclusions and thus determine whether the trial court's findings and conclusions are consistent with the evidence adduced and the applicable law.
9. The respondent produced photographs which are in the record of appeal showing the trenches excavated for the water supply to his land and how this was rerouted from the main pipeline. During the site visit the trial court assessed the situation and observed that the respondent's crops and farm were no longer being supplied with water as a result of the changes made by the appellants to his water supply.
10. The appellants argued that the respondent's water supply was not disconnected, that it was only diverted. The [*Longman Dictionary of Contemporary English*](#) defines 'disconnect' as to remove the supply of power, gas, water etc. from a machine or piece of equipment; to separate something from



the thing it is connected to, or to become separated; to officially stop supplying a service such as water, telephone, electricity or gas to a house or other building. The synonyms for disconnect include cut off, detach, separate, part, divide, sever, disengage, take apart or uncouple.

11. The ruling delivered by the learned magistrate on 15/5/2017 which is contained in the record of appeal confirms that the court was dealing with an application seeking to cite the appellants for contempt after they failed to comply with the order of 8/11/2016 which directed them to reconnect the respondent's water immediately and unconditionally. The court gave the appellants 24 hours to comply with the court order failing which they were to pay a fine of Kshs 30,000/= each or serve 6 months jail term. This leaves no doubt that the respondent's water was disconnected.
12. The appellants contended that the respondents water was not disconnected, and argued that the pipe was only redirected. In this court's view, the end result is the same, which is that the appellants caused the water supply to the respondent's land to be interrupted as a result of which the respondent suffered loss and damage. The learned magistrate cannot be faulted for arriving at the decision she did regarding the appellants' actions of disconnecting the respondent's water supply.
13. From the record of the proceedings conducted before the trial court, this court notes that a site visit was scheduled for 27/1/17 at 11am. On that date, the trial court indicated that there was no motor vehicle available for the site visit and a new date for the visit was fixed for 2/2/17 at 11am. On the 2/2/17, the record shows that the advocates representing the parties were present and the trial court issued a hearing date for a pending application. Although the court did not specifically record the site visit in the proceedings, in the judgment, the learned Chief Magistrate referred to the site visit and noted that the plaintiff carried out substantial horticultural farming on his land and that his crops had withered due to lack of water occasioned by the defendants' disconnection. The learned magistrate also referred to the site visit elsewhere in her judgment, even though she did not mention the date of the site visit.
14. The court notes that the plaintiff's written submissions before the trial court dated 19/9/2018 also gave details of the site visit by the trial court. The appellants in paragraph 5 of the memorandum of appeal mention the trial court having visited the site on 2/2/2017. From all this, the court is persuaded that the trial court went on a site visit with the advocates who represented the parties then. The appellants' advocate could easily have ascertained this fact from the advocates who previously represented the appellants.
15. In the impugned judgment, the learned Chief Magistrate stated that when the court visited the site, it established that the farm was about 2.5 acres and had withered tomatoes, onions and cabbages. Since the plaintiff had not quantified the loss, the court exercised its discretion and awarded him the sum of Kshs 300,000/= as general damages to compensate the plaintiff for the disconnection of his water. The learned magistrate stated in the judgment that the plaintiff had not quantified his loss and that she was awarding general damages for the loss that was suffered. The appellants' argument that the respondent did not plead special damages at any point and that he should have pleaded and proved this is rather odd since a court has the discretion to award general damages in certain circumstances.
16. According to the *Black's Law Dictionary* 10th Edition, special damages are defined as damages that are alleged to have been sustained in the circumstances of a particular wrong, and they must be specifically claimed and proved before they can be awarded. On the other hand, general damages are defined as damages that the law presumes follow from the type of wrong complained of; compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. The damages the learned magistrate awarded the respondent were properly awarded.



17. The law on interfering with an award of damages on appeal which was settled in *Butt v Khan* (1977) KAR 1 is that the court can only interfere with an award of damages if the trial court considered irrelevant factors or left out relevant factors when assessing damages; or where the amount of damages awarded is so inordinately high or low that the amount awarded must be a wholly erroneous estimate of damages. The appellants failed to demonstrate either of these criteria.
18. The appeal lacks merit and is dismissed with costs to the respondent.

DELIVERED VIRTUALLY AT NANYUKI THIS 20TH DAY OF JUNE 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Wahome Gikonyo for the Appellants

Mr. Solomon Mukhama for the Respondent

Ms. Stella Gakii- Court Assistant

