**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Appeal 14 of 2004**

**NYERI WATER SEWERAGE CO. LTD ..... APPELLANT**

**VERSUS**

**JOSEPH WAITIKI NDEGWA ..... RESPONDENT**

***(Appeal from the Judgment and orders of Chief Magistrate's Court at Nyeri in Civil Case No. 182 of 1999 dated January 2004 by Mr. C. D. Nyamweya – S.R.M.)***

**J U D G M E N T**

This appeal arises from the decision of the learned Senior Resident Magistrate C. D. Nyamweya as he then was. On 15th April 1999 Mr. Joseph Waitiki Ndegwa, the respondent herein filed a suit in the subordinate court against the Nyeri Water and Sewerage Company Limited, the appellant herein, seeking special damages of Kshs.85,500/=, General Damages interest and costs. The claim was on the footing that on or about the 15th of October, 1998, the Appellant's agents, and or servants entered upon the respondent's premises without his consent and or knowledge and disconnected his water supply and removed his water meter. It was not until 10th December, 1998 that his water supply was restored again. This caused the respondent unnecessary hardship for 56 days as he was forced to look elsewhere for water supply. He incurred Kshs.82,500/= being costs of water procured by him from elsewhere. He had also to pay penalty surcharge of Kshs.3,000/=. The respondent therefore claimed from the appellant Kshs.85,500/= being the total sum of the special damages aforesaid and General Damages.

The appellant by its defence and counterclaim dated 3rd May 1999 and filed in court on 4th May 1999 essentially denied the respondent's claim. It admitted however disconnecting the respondent's water supply but denied that the disconnection was without any lawful or reasonable excuse. It averred that the water was disconnected for non-payment of the water bill amounting to Kshs.790/= and also for an illegal water connection by the respondent. In the premises the Respondent did not suffer any special or general damages or at all. The respondent was thus not entitled to the special damages nor indeed any damages as pleaded in the plaint. In the same breathe, the appellant counter-claimed Kshs.55,738/80 being the cost of the average water supply of 69 cubic metres per month consumed by the respondent over the years, 1995 to 1998 through the illegal water connection without payment.

The learned magistrate heard the case. Both the appellant and respondent each called two witnesses in support of their case. At the end of it all, the learned magistrate did not find favour with any of the protagonists. It would appear therefore that he dismissed the respondent's claim as well as the appellant's counterclaim. In the decree ensuring from the judgment, it is stated thus:

"**..... This suit coming up for hearing in the presence of both respective counsel. Upon hearing both respective counsel:**

**IT IS ORDERED**

**1. THAT the Plaintiff be and is hereby awarded half costs of this suit.**

**2. THAT the Defendant counterclaim be and is hereby dismissed .....”**

That decree triggered this appeal. In a memorandum of appeal drawn by **Messrs Wahome Gikonyo & Company Advocates**, the appellant has faulted the findings of the learned magistrate on the following grounds:

**1. The Learned Senior Resident Magistrate having found out that the Plaintiff had connected his water supply through an illegal by-pass and had paid a Kshs.3,000/= statutory surcharge as an acknowledgement for this and also had not paid his water bill before the disconnection erred in law and fact in awarding costs to him. A miscarriage of justice was thereby occasioned.**

**2. The Learned Senior Resident Magistrate having found ipso-facto that the Plaintiff had been consuming water through an illegal by-pass erred in law and fact in not entering judgment for the Defendant for the counterclaim for Kshs.55,738.80 being the costs of water illegally consumed. A miscarriage of justice was thereby occasioned.**

**3. The Learned Senior Resident Magistrate erred in law and fact in not finding and holding that the Plaintiff cannot in law be allowed to get away with the fact of consuming water illegally and should be made to pay for the same. A miscarriage of justice was thereby occasioned.**

The brief summary of evidence tendered in this case as can be captured from the record is as follows:-

The appellant carries on the business of water supply and sewerage disposal within the area under the jurisdiction of the municipal council of Nyeri and its environs at a fee. The respondent is one of its customers. On 15th October, 1998 an employee of the appellant visited the respondent's premises to read the meter. He discovered that the water supply was not going through the meter and that the respondent had installed a by pass albeit illegally. The water supply was then disconnected and the respondent was required to pay a penalty of Kshs.3000/= and the outstanding water bill of Kshs.790/=. Having made these payments it was not until 10th December 1998 that the appellant resumed the water supply to the respondent. For the 56 days or so that the respondent remained without water supply he incurred a bill of Kshs.82,500/= in a hiring a motor vehicle to transport water from his other premises in town. This is the amount he claimed from the Appellant together with Kshs.3000/= paid as penalty on the basis that the disconnection was unjustified and that there was no basis for the appellant to have waited for 56 days to pass before it reconnected the water supply after the payments due to it had been made by the respondent in good time.

The appellant admitted that it disconnected the water supply for non-payment by the respondent of an outstanding water bill of Kshs.790/= and also for the illegal by pass installed by the respondent. Before the water supply to the respondent could resume, the respondent was legally required to pay a penalty of Kshs.3000/= and also the outstanding water bill. Before the by pass was discovered, the respondent had apparently been consuming water albeit illegally at the average rate of 69 cubic meters per month from 1995 to 1998 (all inclusive) totalling to Kshs.55,738/80. The appellant claimed this amount by way of a counter claim less the amount already paid by the respondent as aforesaid. Otherwise the appellant sought the dismissal of the respondent's case.

When the appeal came up for hearing, both **Messrs Wahome** and **Muhoho** learned counsel who appeared for the appellant and respondent respectively agreed to have the appeal heard by way of written submissions. The court acceded to the request. Respective submissions were duly filed and I have had occasion to carefully read and consider them.

I am aware that it is my singular duty as a first appellate court to subject the evidence tendered during the trial to fresh evaluation and analysis so as to reach my own decision as to whether the findings of the learned magistrate can be impugned or be left to stand. In so doing however I should bear in mind that I should reluctantly interfere with the findings of fact and demeanour of the witnesses by the learned magistrate as I did not have the benefit which the trial court had in observing the witnesses as they testified.

The proviso to section 27 of the Civil Procedure Act categorically state that the costs of and incidental to all suits shall be in the discretion of the court or judge who shall have full power to determine by whom and out of what property and to what extent such costs are to be paid and to give all necessary directions for the aforesaid purpose. It goes on to further provide that costs in any action, cause or any other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. In this particular case the learned magistrate according to counsel for the respondent exercised his discretion in awarding costs to the respondent. Secondly, counsel for the respondent submits that it has not been denied that there was a demand before action and the respondent herein having been successful then he was duly entitled to his costs. There was therefore no good reason for the learned Resident Magistrate to order otherwise.

The appellant would hear none of the above submissions. It contends that section 27(1) of the Civil Procedure Code could not be any clearer. The appellant having lost his suit could not again have been entitled to ½ the costs.

I agree entirely with **Mr. Wahome's** submissions. The respondent clearly lost his suit. That being the case what was the basis of the learned magistrate awarding half of the costs to him? I cannot think of any. It is true that costs are generally in the discretion of the trial court. However as it has been consistently held such discretion must be exercised judiciously and not capriciously. I can fathom no reason at all why the learned magistrate awarded costs to a party who had lost his claim. As already stated above, costs normally follow the event unless the court or judge shall for good reasons otherwise order. The learned magistrate did not give any reasons for departing from this cardinal principle of law on costs. The respondent having lost the case, one would have in obedience to the above maxim of law on costs expected that the respondent would be penalised in costs. And if the learned magistrate was minded to depart from the said maxim he should have given reasons. He gave no reasons and one may surmise that he exercised his discretion capriciously therefor. The appellant having lost his counterclaim just like the respondent lost his claim, was it not only rational that it too then be entitled to ½ the costs. If the learned magistrate had so ordered then perhaps he could not have been faulted for that would have shown that he was consistent. However the scenario now obtaining clearly show that the learned magistrate was inconsistent and could easily be accused of discrimination.

On the counterclaim, the learned magistrate clearly found as a fact that the respondent had installed a bypass from which he was siphoning water albeit illegally from the appellant's main pipe. He also found that the respondent had paid Kshs.3000/= being the penalty and or surcharge. Having so found, can the respondent be heard to say that the appellant is not entitled to levy charges for the water consumed during the existence of the illegal by-pass? I do not think so. The respondent on the other had contend that the surcharge and or penalty of Kshs.3000/= imposed and paid by the respondent took care of the issue. Secondly, that the nature of the counterclaim by the appellant was such that the counterclaim was special damages. That it is trite law that special damages apart from being specifically pleaded must be strictly proved. According to the respondent, the appellant did not strictly prove the special damage.

My take on this is that the amount of Kshs.3000/= paid by the Respondent was not a surcharge but a penalty. This was made clear to the respondent by a letter from the appellant dated 23rd February 1999 addressed to the firm of Bali-Sharma & Bali-Sharma advocates who were then acting for the respondent. A surcharge is not the same thing as a penalty. It would appear that the penalty was imposed on the respondent for interfering with the appellant's water supply network. When such interference is noted, the offending party is penalised to pay Kshs.3000/= across the board, which case applied to the respondent. This penalty has apparently the backing of the Kenya Gazette notice number 711 dated 7th February 1997 signed by the then minister for local Government, **William Ole Ntimama**. The Gazette

Notice specifically provide:-

"**Penalty charges:**

**Illegal water connection**

**(Kshs.3000/= plus cost of water illegally used during the disconnection period based on the average monthly water consumption before the disconnection) ....."**

From the foregoing it is clear that the argument by the respondent that payment by him of Kshs.3000/= took care of the issue is not sustainable. It is clear that payment of Kshs.3000/= is merely to take care of illegal water connection. Thereafter the offending party is required to pay on the average the water consumed during the disconnection. However in this case it should be the water consumed, since the installation of the illegal by-pass. The appellant proved on the balance of probability that the respondent was consuming on the average 69 cubic litres of water per month. There was sufficient documentary evidence tendered in court to back up the respondent's contention. The respondent did not at all controvert this evidence. This being the case, I do not agree that the appellant did not strictly prove that owing to the illegal by-pass the water consumed could not have amounted to the amount sought in the counterclaim. The amount claimed was specifically pleaded in the counterclaim and in my view was strictly proved at the trial. The learned trial magistrate therefore erred in not finding for the appellant on the counterclaim. A litigant should never be allowed to benefit from his/her acts of illegality.

In conclusion therefore I find that the appeal has considerable merit. Accordingly I allow it and in consequence thereof set aside the judgment and orders of the subordinate court and in substitution thereof make an order dismissing the respondent's suit with costs to the appellant and enter judgment against the respondent on the counterclaim of Kshs.55,738/80 with costs and interest. The appellant shall also have the costs of this appeal. It is so ordered.

Dated and delivered at Nyeri this 31st day of January 2008

**M. S. A. MAKHANDIA**

**JUDGE**