



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.344 OF 2000

PHILIP NJOKA KAMAU APPELLANT

VERSUS

GITAU MBIRIRESPONDENT

JUDGMENT

The Plaintiff filed a suit in the court of the Senior Resident Magistrate at Githunguri on 11th April 1995 and claimed the following from the defendant, namely

- (a) General damages for breach of contract
- (b) Refund of Ksh.50,000/=
- (c) Costs of the suit
- (d) Interest on (a) (b) and (c)
- (e) Any other relief the court may feel expedient to grant thereon.

The parties had entered into an agreement wherein the plaintiff was to supplyTo the defendant unlimited amount of water from his borehole.

The plaintiff alleged the defendant unlawfully and unilaterally breached the agreement by disconnecting the water supply where he said he suffered loss.

Hence the claims made as stipulated herein before The Senior Resident Magistrate (S.B.A. Mukabwa) wrote a judgment which he delivered on 14th June 2000, hence this appeal.

Five grounds of appeal were set out in the memorandum of appeal filed herein on 11th July 2000. They are that the trial Magistrate erred in ordering the appellant to refund Ksh.50,000/= to the respondent on the basis of legality of Goodwill agreed upon by the appellant and the respondent which was never an issue during the trial of the case hence arriving at wrong conclusion; that he erred in not confirming himself to the parties pleadings and the evidence hence arriving at a wrong judgment on the materials before the court, that he erred in considering that the appellant had invested over Kshs.2 million personal money to dig the borehole and that therefore the respondent was entitled to the agreed good will; that he erred in finding that the respondent was in breach of agreement and proceeding to order the appellant to refund the goodwill contrary to the agreement of the parties and pleadings and thereby arriving at a wrong

conclusion; and that he erred in finding that the respondent was estopped from denying the goodwill, after, by his conduct, had caused the appellant to suffer in agreeing to enter into water supply agreement with the respondent hence arriving at a wrong judgment.

Counsel for the parties appeared in court on 19/2/2002 to either urge or oppose the appeal. Counsel for the appellant submitted that in his judgment, the magistrate found the plaintiff was the one who had breached the water supply agreement and had not paid water bills amounting to Kshs.635/= and had sourced water from another party.

That in fact the magistrate found that goodwill was not refundable, yet he went on to order refund of the money referring to it as a deposit.

Counsel submitted that the magistrate was wrong in purporting to write the agreement for the parties and prayed that the appeal be allowed and the order of the magistrate to set aside.

Counsel for the respondent opposed the appeal saying the magistrate's judgment was sound and based on legal principles. According to counsel the amount of Kshs.50,000 was pleaded in paragraph 4 of the plaint.

That evidence was adduced on this amount and was canvassed according to the respondent's counsel, the amount of Ksh.50,000/= was in form of deposit and was rightly awarded. That there was no purpose for the plaintiff paying goodwill in a water contract hence appellant was bound to refund the sum of Ksh.50,000/=.

He prayed for the dismissal of the appeal with costs.Paragraph 4 of the plaint termed the Ksh.50,000/= "Goodwill costs for the intended water supply".

If it was paid out in form of deposit, there would be absolutely no reason why this sum would not have been included in the agreement, To pay a deposit is completely legal, unlike Goodwill which is not, hence it is not usually shown in any agreement.

In this light, therefore, the sum of Ksh.50,000/= was deliberately omitted from the agreement dated 11th July 1994 for the parties to avoid repercussion of it being sported.

The magistrate was categorical that Good will is never refundable and there was no reason for him going round the problem to order refund of this sum as deposit.

The plaintiff did not ask for refund of his deposit, a simple word to express, but claimed Goodwill money.

It was not for the lower court to imagine what the plaintiff had prayed for and award the same or to award him what he did not claim.

And if the plaintiff had paid a deposit on account of water supply his bills would have been deducted therefrom given that they were not very high (See the claim of Ksh.635/= sought from him between July and October 1994).

Given these set of circumstances, I am convinced the Ksh.50,000/= was not in form of deposit, but Goodwill costs as the plaintiff himself put it.

The magistrate blamed the plaintiff wholly for the breach of this agreement and the best order in the circumstances would have been to dismiss his claim with costs.

Given the evidence adduced in the lower court I would not say the plaintiff proved his claim against the appellant on a balance of probabilities.

I allow this appeal, set aside the lower court order and direct that the respondent pay costs of this

appeal and the case below to the appellant. These shall be the orders of this court.

Delivered and dated this 26th day of February 2002.

D.K.S. AGANYANYA

JUDGE