



**Thuranira & 2 others v Itabari (Civil Appeal E103 of 2022)  
[2024] KEHC 3247 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3247 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E103 OF 2022  
TW CHERERE, J  
MARCH 14, 2024**

**BETWEEN**

**ALBERT MWENDA THURANIRA ..... 1<sup>ST</sup> APPELLANT**

**RECELIUS KARUTUNYU ..... 2<sup>ND</sup> APPELLANT**

**SUED THRO REGISTERED TRUSTEES ..... 3<sup>RD</sup> APPELLANT**

**AND**

**SEBERINA KAIMURI ITABARI ..... RESPONDENT**

*(An Appeal from the Judgment and Decree in Tigania PMCC  
E015 of 2020 by Hon. P.M. Wechuli(SRM) on 14th July, 2022)*

**JUDGMENT**

**Background**

1. The genesis of the dispute between the parties herein is a grant of KES. 309,000/- to Kobimo Water Project and Sanitization in the year 2019 which by a letter dated 21<sup>st</sup> January, 2020 to Equity Bank Meru the Respondent applied to freeze which application was effected but was later resolved in favour of Kobimo Water Project and Sanitization.
2. As a result of the foregoing which Appellants say was gross misconduct on the part of the Respondent, her water was disconnected on 11<sup>th</sup> February, 2020.
3. Consequently, by plaint dated 28<sup>th</sup> September, 2020, Respondent sued Albert Mwenda Thuranira and Recelius Karutunyu (1<sup>st</sup> and 2<sup>nd</sup> Appellants respectively) in their capacity as chairman and secretary of Kobimo Water Project and Sanitization (3<sup>rd</sup> Appellant) for what she referred to as malicious disconnection of water supply to her property leading to loses and sought the following orders against the Appellants:



- a. Special damages of KES. 260,100/-
  - b. Damages for loss of user at KES. 500/- per day
  - c. An order directing the reconnection of water
  - d. An order of permanent injunction restraining the disconnection and interference with the water supply
  - e. Costs of the suit and interest
  - f. Any other relief
4. Respondent by statement of defence dated 26<sup>th</sup> October, 2021 denied the Respondent's claim. They however conceded that Respondent was a member of the 3<sup>rd</sup> Appellant until she was expelled in 2020 for flouting the 3<sup>rd</sup> Appellant's bylaws and attempting to defraud the 3<sup>rd</sup> Appellant of KES. 109,000/- granted by Hon. Kawira Mwangaza through the NGAAF
  5. After the conclusion of the trial, the court by judgment dated 14<sup>th</sup> July, 2022, the trial court found the Respondent's claim proved and allowed the plaint in terms of orders (a), (b) and (c).

### **Appeal**

6. Appellants has appealed the judgment mainly on the ground that 3<sup>rd</sup> Respondent was not properly sued; Respondent's claim was not proved to the required standard and that the defence was not given due consideration.
7. When the matter came up for hearing, the court directed that the appeal be canvassed by way of written submission. Both parties complied and Appellant filed their submission on 09<sup>th</sup> November, 2023 and the Respondent on 06<sup>th</sup> February, 2024.

### **Appellants' submissions**

8. It is the Appellants' case that 3<sup>rd</sup> Appellant a water project group is not body corporate with capacity to sue and be sued and that the sued and the judgment ensuing against it are fatally defective. In support thereof, Appellants relied on *Makutano Makumba Self Help Group v Abdul Wahab Majid* [2020] eKLR where it was held that:
  - (11) " At the outset, I must say that I have a serious problem with the suit. First, the plaintiff is noted to be "Makutano Makumba Self Help Group." It is trite that this is not an entity that has capacity to sue or to be sued. Whether a Self-Help Group can sue in its own name was considered in the case of *Senti Kumu Community Self Help Group vs Kenya Maritime Authority & Another*, Mombasa ELC Petition No.2 of 2019. In that suit, a petition was filed in the name of a Self-Help Group. A preliminary objection was raised that the suit is incompetent for having been filed by an unincorporated entity. The preliminary objection was upheld, the court (Yano J), affirming that an unincorporated body cannot sue in its own name. It is critical that a suit by an unincorporated group be filed by a person or persons with capacity to sue or to be sued. That is not the case here and it follows that the case, as filed, is fatally defective, and must be dismissed."
9. Concerning loss of user, Appellants submitted that Respondent was lawfully suspended from enjoying the water services for breaching the group's by-laws which she conceded in her evidence in that she wrote to the bank to stop a check in favour of the group and asked for money from the group on behalf of Jitengemeo without providing a list of members who consented to asking for their money.



10. Concerning special damages, it was contended that other than the SAgricultural officer's report, Respondent did not tender in evidence receipts in support of her claim for KES. 260,100/- and that the same ought not to have been awarded.
11. In support thereof, Appellants placed reliance on *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, where the Court of Appeal reiterated the fact that:

“.....special damages should not only be specifically pleaded but must also be strictly proved...”
12. Appellants also relied on *Simon Sunkuyia Shira v Kilonzo Nganga Kinila* [2020] eKLR where the court held as follows:

(55) “I have carefully perused the assessment report accepted by the trial court for KES. 112,076. The report also merely gives estimates without explaining their source. For instance, there was no cost of ploughing, cost of firm inputs and possible output. The damage payable would be considered against these facts. There was no evidence that the respondent spent any money in the farm. PW4 did not say that he saw receipts to prove that the respondent purchased farm inputs that enabled him calculate the possible damage, and none were produced. What the respondent did was to throw figures at the court and asked the court to award the money.”
13. Additionally, Appellants relied on *Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 others* [2017] eKLR where the court quoted B. Casson and I.H. Dennis, *Odgers: Principals of Pleading and Practice in Civil Actions in the High Court of Justice* at pp. 170 to 171 that:

“Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote.”
14. Appellants contend that Respondent did not prove ownership of the land on which the crops were damaged and her claim ought to have been disallowed and in support thereof relied on *Ziporah Naipanoi Ndunda v Peter Mwanja Maundu* [2019] eKLR where the court held that to prove of ownership of land where crops are alleged to be destroyed was importance.
15. Appellants have faulted the trial court for finding that the 3<sup>rd</sup> Appellant's by-laws of 2014 used to remove Respondent from the group were forged yet that was a matter that was not pleaded and have placed reliance on *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the court held that:

(42) “..... Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.”



16. On this same issue, Appellants relied on *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 where he made the following findings: -

“... The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing...”

17. Appellants additionally relied on *Ndishu & another v Muriungi* (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR) (21 January 2022) (Judgment) which quoted the Court of Appeal decision in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited* [2015] eKLR where the court rendered itself that:

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

### **Respondent's submissions**

18. It is the Respondent's case that the suit as drawn is proper for the reason that the 3<sup>rd</sup> Respondent is sued through its registered trustees.
19. Respondent argued that she did not breach any by-laws and that the action taken against her by the Appellants was unlawful.
20. Concerning disconnection of water supply to the Respondent, it was contended that Appellants relied on forged by-laws of 2014 and forged minutes of a meeting allegedly held on 26<sup>th</sup> January, 2020 and particularly minute 5/2/2020 and disconnected the water supply before investigations into her conducted was completed which is alleged to be against the rules of natural justice.
21. Concerning special damages, Respondents contends that the Agricultural officer's report buttressed her claim for damage to her crops and that the same was properly awarded.
22. Concerning loss of user, Respondent submitted that it was to be assessed as a general damage and ought not to have need specifically proved. In conclusion, Respondent urged the court to find that Appellants' actions were arbitrary and that an order of permanent injunction ought to have been granted.

### **Analysis and Determination**

23. I have considered the appeal in the light of the trial court record, the submissions and authorities cited by the parties.



24. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle vs Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR).
25. From the evidence on record, I have deduced the issues for determination as follows:
1. Whether the 3<sup>rd</sup> Appellant was properly joined to the suit
  2. Whether the Appellants' action against the Respondent was justified
  3. Whether Respondent proved she suffered damages
  4. What orders should the court issue
26. I shall now proceed to determine the issues as hereunder:

### **1. Whether the 3<sup>rd</sup> Appellant was properly joined to the suit**

27. From the pleadings, it is apparent that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were sued as registered trustees of the 3<sup>rd</sup> Appellant. No doubt he 3<sup>rd</sup> Appellant was therefore mis joined as a third defendant.
28. The foregoing notwithstanding, the Respondent's suit cannot be defeated for misjoinder. The Court of Appeal in *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* (2016) eKLR held that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

29. This is further supported by Article 159(2)(d) of *the Constitution* which abhors procedural technicalities at the expense of substantive justice and states that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”

30. In *Raila Odinga Vs IEBC and 4 Others* Petition No. 5 of 2013 by the Supreme Court dealt with the application of Article 159(2)(d) and held thus:

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome”



31. From the foregoing, I find that the Respondent's suit cannot be defeated for by reason of the misjoinder of the 3<sup>rd</sup> Appellant as a party to the suit but no substantive order ought to have been issued against the said party as happened in this case.

## 2. Whether the Appellants' action against the Respondent was justified

32. As stated at paragraph 1 of this judgment, the genesis of the dispute between the parties herein is a grant of KES. 309,000/- to Kobimo Water Project and Sanitization in the year 2019 which by a letter dated 21<sup>st</sup> January, 2020 to Equity Bank Meru the Respondent applied to freeze which application was effected but was later resolved in favour of Kobimo Water Project and Sanitization.

33. According to the Appellants, Respondent's conduct amounted to gross misconduct under the 2014 by-laws and that's why her water supply was disconnected. Contrary to the trial magistrate's finding that the 2014 by-laws were a forgery, no evidence of forgery was tendered and the finding was erroneous and against the weight of evidence.

34. Having said that, I have considered whether the Appellants conformed to the provisions of the 2014 by-laws.

35. According to the Appellants' minutes dated 26<sup>th</sup> January, 2020, Appellants' accusations against the Respondent were threefold i.e attempting to con the Appellants KES. 109,000/-, was spending propaganda against the Appellants and other members and had formed another group.

36. According to the Appellants 2014 by-laws that was relied upon to take action against the Respondent, Article 1 on Registration provides that a member could lose membership and benefits if:

- a. a member becomes a nuisance to the spirit of group solidarity
- b. takes the group secrets to outsiders
- c. ...if a member cons the group, such a person will be judged heavily on more than one meeting and face dismissal if so deserves

37. Cambridge Dictionary defines con to mean deceive someone by using a trick, or to cheat someone of money.

38. It is trite law that "whoever alleges must prove. Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya states as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

39. The court of appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:

- (16) "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to



the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

40. As rightly found by the trial magistrate, the Appellants failed to place before the court any evidence that Respondent had either attempted to con the Appellants nor formed a competing group. Consequently, I find as did the trial magistrate that the action taken by the Appellant was unjustified and was unlawful.

### **3. Whether Respondent proved she suffered damages**

#### **a. Special damages**

41. Respondent claimed to have lost crops valued at KES. 260,100/- and relied on an agricultural report dated 09<sup>th</sup> September,2020.
42. It is worth noting that Respondent did not plead on which land the damages were occasioned. However, the agricultural report dated refers to farm number F/No. 425 Karama Adjudication Section.
43. As rightly submitted by Respondents, there is no evidence that farm number F/No. 425 Karama Adjudication Section belongs to the Respondent and as was held in *Ziporah Naipanoi Ndunda v Peter Mwanja Maundu (supra)*, there was no evidence that there was any damage of crops on land that belonged to the Respondents.
44. Other than that, the Respondent did not prove that crops were damaged on her land. Respondent similarly failed to demonstrate that she had planted any napier grass, miraa or bananas nor invested in any irrigation system.
45. It is trite that special damages must be specifically pleaded and strictly proved. (See *Capital Fish Kenya Limited vs. The Kenya Power and Lighting Company Limited (supra)*). What the Respondent did was what the Court of Appeal said in *David Bagine v Martin Bundi (supra)* throw damages at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; without proving them and they ought to have been rejected.

#### **b. Damages for loss of user**

46. Unlike what was submitted by the Respondent, the plaint demonstrates that the damages for loss of user were pleaded in the form of special damages which also ought to have been specifically pleaded and proved. None was proved and the award by the trial magistrate was against the weight of evidence.
47. Having found that the disconnection of Respondent’s water supply was not justified, the learned trial magistrate rightly made an order of an order for reconnection and to in future only disconnect after following the law and procedures set by the group.
48. From the foregoing, the appeal partially succeeds and is hereby order:
1. The award for special damages is set aside in its entirety
  2. The award for loss of user is correspondingly set aside in its entirety
  3. The order for connection of water supply to the Respondent’s premises is confirmed but only as against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in their capacity as trustees of the 3<sup>rd</sup> Respondent



4. The order that Appellants can only disconnect the Respondent's water supply after following the law and procedures set by the group is likewise confirmed but only as against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in their capacity as trustees of the 3<sup>rd</sup> Respondent
5. Respondent shall get the costs of the trial
6. Each party shall bear its own costs of the appeal

**DATED AT MERU THIS 14<sup>TH</sup> DAY OF MARCH 2024**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances**

Court Assistants - Kinoti/Munene

For Appellants - Mr. Mwirigi for Mwirigi Kaburu & Co. Advocates

For Respondent - Mr. Mutinda for KIthome L.Mutinda & Co. Advocates

