Mathenge & another (Both suing as the Chairman & Treasurer of Kagaki Irrigation Water Self Help Group) v Murimi (Civil Appeal E015 of 2023) [2024] KEHC 6917 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E015 OF 2023

DKN MAGARE, J

MAY 14, 2024

BETWEEN

GEORGE KABIRU MATHENGE ..... 1ST APPELLANT

HELLEN WAKONYU HIUHU ..... 2ND APPELLANT

BOTH SUING AS THE CHAIRMAN & TREASURER OF KAGAKI IRRIGATION WATER SELF HELP GROUP

AND

SYLVANUS KINYUA MURIMI ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Honourable E. Kanyiri delivered on 27/2/2023 in Karatina PMCC No. 28 of 2021.
2. The Appeal is on the grounds that the Learned Magistrate erred in law and fact:
    a. In failing to appreciate that the Appellant was governed by rules and regulations binding to all members
    b. In holding that the Respondent was not aware of the disconnection notice for failure of requisite payments
    c. In issuing a permanent injunction against the Appellant
    d. By awarding the Respondents Kshs 174,450 being loss occasioned due to the disconnection
    e. By ordering the Appellant to reconnect the water supply to the Respondent

3. The Appellant as such prayed for reliefs that the Judgement be set aside and replaced with an Order dismissing the Claim with costs.

Pleadings

4. In the Plaint dated 30th March 2021, it was pleaded that on 31/12/2018, the Appellants illegally and arbitrarily disconnected water from the Plaintiffs parcel of land No. Iriaini/Chehe/385 as a result of which the Respondent suffered loss.

5. It was averred that the Respondent was a member of the Appellant formed with the object of supplying water to its members to be used for irrigation.

6. The Respondent particularized loss of Kshs. 397,450 arising from the Appellant's action of disconnecting the water and sought a permanent injunction restraining the Appellants from interfering with the irrigation Plaintiff's water.

7. The Appellant as Defendant in the Trial Court entered appearance. They also filed Defence dated 6th May 2021.

8. It was averred that the Appellant was bound by the Constitution with rules and regulations.

9. That the Respondent was in breach of the laws and resolutions of the Appellant.

Evidence

10. During trial, the Respondent as Plaintiff relied on his witness statement and bundle of documents filed on 30/3/2021.

11. He produced the documents in Court as his evidence.

12. On cross examination, it was his case that they disconnected the water because the water bill of Kshs. 500 was not paid.

13. He testified that he had water crops on the shamba that dried due to the disconnection.

14. Further that the procedure required that he be notified before the disconnection but the Appellants did not notify him.

15. That he was paying Kshs. 20 per jerrycan to compensate for the water owing to the disconnection.

16. On the part of the Appellants, they called Anthony Mugo Gatungu. He testified that and relied on his witness statement.

17. In cross examination, he stated that the deadline for collecting money had passed. It was in August. They disconnected water on 31st December 2015.

18. The lower court heard the dispute and made the following findings:

> " Defendant to pay Kshs. 178,450 being loss occasioned by the disconnection of water.
>
> An order is hereby issued to reconnect the water supply to the Plaintiff's parcel of land.
>
> An Order for permanent injunction is issued restraining the Defendants from interfering with the Plaintiff's water.
>
> Costs of the suit to the Plaintiff.

19. Aggrieved, the Appellants lodged the Memorandum of Appeal against the whose decision of the lower court.

Submissions

20. There were directions for parties to file submissions. However, I have not had sight of submissions by both parties.

Analysis

21. I have considered the appeal. The issue is whether the Learned Magistrate errd in law and fact in allowing the Respondent's suit.

22. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

23. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of *Selle and Another vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

25. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Ltd v Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

26. Therefore, the Trial Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

27. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

28. It is the common ground of the parties that prior to the disconnection of the water, the Appellant had the obligation to notify the affected members in water bill arrears. However, on my reevaluation, I note that the Respondent was noncommittal even by failure to remit the arrears of Kshs. 500 only when demand was made or this suit filed.

29. I also note from the Appellant's case that they blamed the Respondent for being in violation of the resolutions and regulations of the Appellant. The burden to prove the Respondent's case was on the Respondent. In *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

30. Section 112 of the *Evidence Act* provides as doth: -

> " Proof of special knowledge in civil proceedings. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

31. I am also fortified by the holding of the Court in the case of *Kenya Akiba Micro Financing Limited V Ezekiel Chebii & 14 Others* [2012] eKLR where the court held that

> " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:-
>
> > In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.....where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party."

32. I have perused the pleadings and evidence produced by the 1st Respondent in this case. I have perused the Report dated 20th May 2019 and produced by the Agricultural Officer from the State Department of Agriculture. I note the amount stated therein as loss to be Kshs. 178.450/. The report was produced in evidence. As I have above observed, the amount assessed by the Agricultural Officer would have been mitigated and found unnecessary if the Respondent found the need to remit the arrears. The Respondent was thus the author of his own misfortunes and if the trial court had directed its mind at this fact, it would have arrived at unescapable conclusion that the assessed amount was to fail. I therefore set aside the finding on the award of Kshs. 178,450/.

33. I have to ultimately determine whether it was improper for the lower court to issue a permanent injunction against the Appellants as lamented by the Appellant.

34. The court is tasked to find whether an injunction was appropriate as prayed. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) establish his case only at a *prima facie* level,
>
> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

35. The Court of Appeal in the case of *Nguruman Limited vs*. (*supra*) further opined that:

> "...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration."

36. The injunction sought by the Plaintiff was in the nature of a permanent injunction against the Respondent to give vacant possession and remove the erected tension cable and pole. It was common position of the parties that the electric pole was removed.

37. Emanating from the above authorities, I have perused the Constitution of the Appellant Self Help Group. I note that the Appellant Self Help Group was created with the objective of ensuring that registered and fully paid up members have access to safe and clean water derived from a branch of Chehe Irrigation Water Project for domestic and Irrigation use. This is stipulated under Clause 2 the Constitution. Under clause 3 thereof, the Group draws membership from interested individuals who must apply through the Chairman and be ratified through the management committee.

38. From the above provisions of the Appellants' constitution, it is clear that a permanent order of injunction restraining the Appellants, their servants and or agents from interfering with the Respondent's water would be tantamount to assuring the Respondent of water connection regardless of whether the Respondent was or continued to be a fully paid up member and Applicant for the water supply. This is not supported by the Respondent's conduct as alluded above. The court could not countenance the Respondent continue to benefit from the water services without meeting the necessary charges. It was in error.

39. The Respondent as such failed to satisfy the conditions for granting a permanent injunction and his claim was bound to fail. The learned magistrate did not consider the absence of a *prima facie* case and irreparable injury as factors that would support the injunctive order. I also find that the balance of convenience would lie in favour of the Appellant and not the Respondent who did not come to court with clean hands having fallen in arrears.

40. Therefore, a permanent injunction was not appropriate in the circumstances of this case and I set it aside.

Determination

41. In the upshot, I make the following orders: -

    a. The Appeal is allowed, the judgment of the lower court, Karatina PMCC No. 28 of 2021 is set aside and in lieu thereof an order is issued dismissing Karatina PMCC No. 28 of 2021 with costs to the Appellant

    b. The Appellant shall have the costs of the Appeal assessed at Kshs. 55,000/-payable within 30 days.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 14TH DAY OF MAY 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

.....

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Respondent in person

Court Assistant- Brian