



**Nairobi City Water & Sewerage Co. Ltd v Rufus (Civil Appeal E767 of 2021)
[2024] KEHC 11156 (KLR) (Civ) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E767 OF 2021

JM OMIDO, J

SEPTEMBER 24, 2024

BETWEEN

NAIROBI CITY WATER & SEWERAGE CO. LTD APPELLANT

AND

DAVID KIMEMIA RUFUS RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. A.N. Makau, Principal Magistrate delivered on 29th October, 2021 in Nairobi Milimani CMCC No. 5626 of 2018)

JUDGMENT

1. The Appellant, Nairobi City Water & Sewerage Company Limited has brought this appeal, being aggrieved by the decision of the Chief Magistrate's Court (Hon. A.N. Makau, Principal Magistrate) delivered on 29th October, 2021 in Nairobi Milimani CMCC No. 5626 of 2018, against the Respondent, David Kimemia Rufus, challenging the judgement and decree issued therein.
2. In the matter before the lower court, the Respondent (the Plaintiff in the lower court) claimed that the Appellant (the Defendant) unlawfully and unjustifiably installed at the Respondent's premises, where there is a borehole, a sewer meter at the water extraction point next to the water pump with the result that the Appellant overcharged the Respondent as the bills that the Appellant issued to the Respondent were for both sewered and unsewered water.
3. The Respondent contended that as not all the water pumped from the Respondent's borehole was subject to effluent discharge, the actions of the Appellant of installing its meter at the source meant that the readings that would result from the Appellant's meter would include both the water that is subject to effluent discharge, and that not subject to effluent discharge, and that the Appellant would therefore unjustly enrich itself as it was only entitled to charge for water that went into its sewerage system.



4. The Respondent complained that the Appellant ignored and/or refused to use the readings from meter No. 29 that the Respondent installed which recorded the unsewered water
5. The Appellant resisted the Respondent's claims in the suit and specifically denied the same. The Appellant urged that the trial court dismisses the suit.
6. The Appellant counter-claimed against the Respondent and stated that it was mandated to levy sewerage charges against the Respondent and that the Respondent consented to the Appellant to install the meter as the one that the Respondent had installed was unreliable.
7. The Appellant stated that the Respondent was in default in paying levy sewerage charges to the tune of Ksh.1,684,216.11/-, for which it sought judgement against the Respondent, general damages, together with interest and costs.
8. The Respondent opposed the counterclaim and prayed that it be dismissed with costs.
9. In the Judgement delivered on 29th October, 2021, the learned trial Magistrate found in favour of the Respondent and granted him the following reliefs, while dismissing the counterclaim:
 1. That the Defendant be and is hereby ordered to remove their installed meter at the Plaintiff's premises within the next 14 days failure to that the Plaintiff to go ahead and remove it.
 2. That the Plaintiff to present evidence of all monies paid to the Defendant's offices for a refund. The same to be done within the next 30 days from the date of this judgement.
 3. The Defendant to bear the costs of this suit.
10. The Appellant has now presented the following grounds of appeal vide the Memorandum of Appeal dated 12th November, 2021:
 1. That the learned Magistrate erred in law and fact in holding that the Appellant illegally installed the water meter in the Respondent's premises yet no illegality was proved.
 2. That the learned Magistrate erred in law and fact by failing to find and hold that the Appellant is mandated to levy sewerage charges to all water service providers within its jurisdiction.
 3. That the learned Magistrate erred in law and fact by failing to find and hold that the Respondent is a water vendor and therefore liable to pay for water and sewerage services.
 4. That the learned Magistrate erred in law and fact in holding that the Appellant should remove the meter installed in the premises of the Respondent.
 5. That the learned Magistrate erred in law and fact in holding that the Respondent be repaid the charges levied with respect to the meter despite the fact that such relief was never pleaded and/or prayed in the plaint.
 6. That the learned Magistrate erred in law and fact in holding that the Respondent should be refunded yet there was no evidence adduced in support thereof.
 7. That the learned Magistrate erred in law and fact in dismissing the Appellant's Counterclaim.
11. This court directed that the appeal proceeds by way of written submissions and both parties complied by filing their respective submissions.
12. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze



and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

13. In Sielle, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. Going to the matter before the trial court, the Respondent testified as PW1 and adopted his statement dated 14th June, 2018 as his testimony in chief. In his statement, the Respondent stated that he owned a private borehole on his property LR. No. Block 82/3767 Savannah Estate that he sunk and constructed with the approval of the relevant authorities. He stated that he was a water vendor and that he sold water from his borehole to other customers and/or entities.
15. The Respondent stated that he was subsequently granted the necessary permit to operate the borehole and installed a Water Resources Management Authority (WARMA) meter No. H9 as was required of him. He further installed a separate meter No. 29 to record the readings of all the water that entered into the residential house for domestic use which was subject to effluent discharge for purposes of sewerage charges by the Appellant as was required under the Water Act.
16. The Respondent stated further that the Appellant visited his premises and unlawfully removed the WARMA meter and unprofessionally installed its own meter in its place, right next to the water pump, and refused to use the already existing meter that had been installed for purposes of recording sewerage readings.
17. The Respondent stated that the manner in which the Appellant installed its meter meant that all the water that passed through it, including water that was not subject to the Appellant's sewerage services was metered, hence inflated readings, charges and/or bills. That requests by the Respondent to the Appellant to reinstate the WARMA meter and install its meter at a point where it could monitor only the water that was subject to the Appellant's sewerage services had fallen on deaf ears, resulting in losses on the part of the Respondent.
18. The Respondent produced the following documents in support of his case: WARMA authorization letter dated 18th October, 2010. Photographs depicting the metered site. Sewer bills issued by the Appellant for the years 2015 to 2018.
19. The Appellant called its Zonal Officer, Donholm Zone, Esther Githui, as its witness (DW1). The witness adopted the contents of her statement dated 11th May, 2021 as her evidence. In her statement, the witness stated that the Respondent held a water meter account No. 53 (erstwhile meter No. 10) for meter number NCWSC 02, which the Respondent serviced from the year 2013 until the year 2018.
20. That vide gazette notice No. 7335 of 2nd October, 2015, the Appellant gazetted the sewerage tariffs for all the areas that it served. The sewerage tariff, pursuant to the gazette notice was to be charged at 75% of the volume of water read under the metered source of water, for customers with no water connection but with sewer connection.



21. The witness stated that although the Appellant did not provide water to the Respondent, the Appellant lawfully installed the meter connection at the extraction point for purposes of determining the sewerage readings and/or charges.
22. The Appellant's witness produced the following documents in support of the Appellant's case: Copy of Kenya gazette notice No. 7335 of 2nd October, 2015. The Respondent's account statement up to July, 2020.
23. Having considered the grounds of appeal, the record of the lower court and the present record, the submissions of the parties and having reassessed, reanalyzed and reevaluated the evidence adduced in the Magistrate's Court, it is now the duty of this court to draw conclusions while bearing in mind that I did not see or hear the witnesses when they testified. Thus then, I discern the issues for determination in the present appeal to be as follows:
 - a. Whether the trial court had jurisdiction to determine the suit before it.
 - b. Whether the Appellant was mandated by law to levy sewerage charges upon the Respondent.
 - c. Whether the Appellant unlawfully installed the water meter in the Respondent's premises.
 - d. Whether the trial court erred in law and in fact in granting the reliefs in favour of the Respondent.
 - e. Whether the learned trial Magistrate erred in dismissing the Appellant's counterclaim.
24. With regard to the first issue for determination which concerns the trial court's jurisdiction to determine the suit before it, I note that the Appellant raised the issue in its submissions before the trial court but no determination was made on the same. In fact, the learned trial Magistrate did not address in its judgement the issue of jurisdiction at all.
25. In both the Appellants submissions before the trial court and those in support of the appeal, the Appellant proffered that the suit was founded on an action of tort and that the cause of action (being the installation of the Appellant's meter at the Respondent's premises in the year 2013) arose in the year 2013 and that as such, the suit having been brought after the lapse of three (3) years, the same was time barred under Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The Section provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
26. I am in agreement with the Appellant that the learned Magistrate ought first to have considered and determined the issue of limitation, which was an issue of jurisdiction.
27. The failure to so consider and determine the issue in my view amounts to a gross fault on the part of the trial court. I say so because once the issue of jurisdiction is raised, a court is under judicial duty to determine it first before delving into any other issues in the case (see *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR).
28. In his suit, the Respondent pleaded that the Appellant unlawfully installed its meter on his premises in the year 2013 and sought that the same be removed and relocated to a different site on the premises. The cause of action, as properly stated by the Appellant is that of tort – or intentional tort.
29. The law, under Section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya dictates, as stated above, that such an action may not be brought after the end of three years from the date on which the cause of action accrued.



30. The suit before the lower court was filed on 14th June, 2018, without doubt outside the period allowed under Section 4(2) of Cap 22. There is nothing in the trial court’s record that demonstrates that leave was sought and granted to file the suit outside the limitation period.
31. The Respondent argued that the tort was in the nature of a continuing trespass that was not subject to the nature of limitation expressed by the Appellant. Respectfully, I disagree. The installation of the water meter by the Appellant was as per the evidence of both parties a one-off event that occurred in the year 2013. By its very nature, the installation of a water meter cannot be deemed to be permanent. The same was therefore not a continuous tort. The alleged wrongful conduct is the installation of the pump, which was done once and cannot therefore be deemed to be a continuous tort.
32. On the issue of jurisdiction, my finding is thus that the suit before the lower court was barred by time under Section 4(2) of the Limitation of Actions Act and the trial court was therefore not clothed with the jurisdiction to determine it. As was held in *Motor Vessel Lillian “S”* (supra), jurisdiction is what gives a court the power, authority and legitimacy to entertain a matter before it and without jurisdiction, a court must down its tools. The learned trial Magistrate ought to have determined that she had no jurisdiction and ought then to have downed her tools.
33. In an instance where express limitation is placed on the competence of a court to adjudicate over a claim, the effect of such limitation on jurisdiction, where a party brings the action outside the statutory period, is to render the court as lacking jurisdiction to determine the matter.
34. That said, I further note and opine that the parties should also have addressed this court on whether the trial court, and indeed even this court, had/have jurisdiction to handle the dispute in light of the Sections 82(1), 119, 121 and 124 of the Water Act, Cap 372 Laws of Kenya, which seemingly provide for other fora as having competent jurisdiction to handle matters under the Act. But as the issue was not specifically addressed by the parties, I will leave it at that.
35. Although I have found that the trial court lacked jurisdiction to entertain and determine the dispute between the parties, this being an appeal, I am required to address and determine the other issues raised in the appeal, which I will proceed to do, below.
36. I will now turn to the issue whether the Appellant was mandated by law to levy sewerage charges upon the Respondent. The answer to this issue, which is in the affirmative, is happily to be found in Sections 2, 78, 109, 153 and 154 of the Water Act. I note that both parties were in their pleadings in agreement that the Appellant had powers to levy sewerage charges, both under the law and vide the contract entered into between the two.
37. The next issue for this court to address is whether the Appellant unlawfully installed the water meter in the Respondent’s premises. On this, the material that aptly guides me is the gazette notice that the Appellant produced as DExh1. The relevant part provides as follows:
 1. Sewerage tariff
 - a
 - b
 - c. Customers with no water connection but connected in the sewerage system-
 - (i)



- (ii). government, schools, multi-dwelling units, gated communities and commercial/industrial customers: 75% of volume of water used as per the metered source of water.

38. Although the Respondent had no water connection with the Appellant, he was, admittedly, connected to the Appellant's sewerage system. The Respondent readily admitted that he was in the business of selling or vending water. In my view, that then placed him in the category of commercial/industrial customers.
39. From the contents of the gazette notice reproduced above, the sewerage tariff for a commercial/industrial customer who had no water connection but was connected to the sewerage system was 75% of the volume of water used as per the metered source of water. That then meant that the Appellant was within its rights to first determine the volume of water used by metering the source of the water. The tariff would then be 75% of the volume of water.
40. The only manner, in my view, that would have allowed the Appellant to determine the volume of water used for purposes of determining the sewerage tariff, being 75% thereof, was by installing at the Respondent's premises, a meter at the water extraction point/source at the borehole. The Appellant, in the premises, did not act unlawfully by installing the meter as it did, at the source of the water.
41. The third issue for this court to determine is whether the trial court erred in law and in fact in granting the reliefs in favour of the Respondent. As I have already reached a finding that the trial court had no jurisdiction to entertain the dispute as the same was barred by the statute of limitation, it follows that the reliefs that were granted should not have resulted.
42. Turning to the last issue, which concerns the dismissal of the Appellant's counterclaim, the Appellant's witness did not explain the contents of the statements produced as DExh2. She merely stated that the same reflected the Respondent's statement of account for the period up to July, 2020. No explanation was made as to how the sewerage billing was done, in particular whether the same was 75% of the volume of water used by the Respondent during that period.
43. In the absence of a proper explanation as to the billing, it would only amount to speculation if this court were to assume that the billing was as per the gazette notice. That being so, the appeal on that ground would not succeed, in any event.
44. What orders then commend this appeal? When a matter is filed before a court that is without jurisdiction to handle it on the strength of the same being statute barred, what should follow is an order striking out the suit.
45. Accordingly, I allow the appeal and set aside the lower courts findings, particularly all the reliefs granted therein and in its place substitute the same with an order striking out the Respondent's (Plaintiff's) suit before the lower court with costs to the Appellant, (Defendant) in the trial court with a further order that the counterclaim before the lower court stands dismissed from the date of the judgement of the lower court, with no order as to costs.
46. Each party shall bear their own costs in the present appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 24TH DAY OF SEPTEMBER, 2024.

JOE M. OMIDO

JUDGE

For The Appellant: Mr. Wilson.



For The Respondent: Mr. Nduati.

Court Assistant: Ms. Njoroge.

