



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 37 OF 2019**

**KIAO WATER PROJECT**

**(Suing thro' IBRAHIM BAARIU (Chairman), MIRITI M'IKINDA (Secretary) &  
JOSPHAT KIRIINYA (Treasurer).....APPELLANTS**

**VERSUS**

**JOSEPH MUKARIA MUNGANIA .....1<sup>ST</sup> RESPONDENT**

**JULIUS GITHINJI MURACHIA.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. J. Wang'ang'a (R.M.) delivered on 21<sup>st</sup> January, 2019 in Maua CMCC 295 OF 2015)*

**JUDGMENT**

1. By a memorandum dated **6.2.2019**, **Kiao Water Project** sued through **Ibrahim Kaariu Chairman, Miriti M'ikinda Secretary and Josephat Kiriinya (Treasurer)** hereafter appellants appeals against the judgment delivered on **21.1.2019** by **Hon. J. Wang'ang'a SRM in Maua CMCC No. 295 of 2015** in which the appellants were the defendants while the respondents were the plaintiffs and sets out the following grounds of appeal:-

- i. The learned trial Magistrate erred in law and in fact in that he failed to appreciate that the plaintiffs' suit was/is time barred.*
- ii. The learned trial Magistrate erred in law and in fact in that he failed to appreciate that he did not have the jurisdiction to hear and/or determine the subject suit.*
- iii. The judgment of the learned trial Magistrate is bad in law*
- iv. The learned trial Magistrate erred in law and in fact in that he decided the said suit against the weight of the evidence.*
- v. The learned trial Magistrate erred in law and in fact in that he failed to appreciate that the respondents failed to prove their case to the required standards.*

2. The respondents by a plaint dated **7.12.2015** sued the appellants for a permanent order of injunction restraining them, their agents, servants or employees from disconnecting their supply and, or interfering with the respondents' quiet use of the said water.

3. By a defence dated **20.1.2016** the appellants admitted the contents of **paragraph 2 and 3** of the plaint but denied the respondents were bonafide members of the project, maintained they were not entitled to water reconnection as alleged or at all since the 1<sup>st</sup> respondent had voluntarily resigned from the project on **25.10.2009**, for violating the project rules and regulations..

4. Further, the appellants alleged the suit was fatally defective, a non-starter, scandalous, frivolous, vexatious and an abuse of the court process. At **paragraph 8 and 9** of the defence the appellants pleaded the suit was time barred and that the court had no jurisdiction to hear and determine it.

5. This being a first appeal it is the duty of this court to re-assess, re-evaluate and reappraise itself of the pleadings, evidence and judgment draw its own conclusions to establish if the lower court based its judgment on both facts and law as held in **Selle & Another –vs- Associated Boat Co. Ltd [1968] EA 123**, bearing in mind it neither heard witnesses and should make due allowance in that respect.

6. In his evidence the 1<sup>st</sup> respondent adopted his witness statement dated **18.6.2018**, claiming he was an ordinary member of the respondents project though he had tendered his resignation as a secretary. He produced a membership card as P Exh 1 and a resignation letter as P Exh 2. He maintained he never ceased to be a member as there were two types of membership – executive and ordinary membership. He stated the project had been registered with the **Ministry of Social Services** as well as with **Water Resources Management Authority**.
7. As a founder member the 1<sup>st</sup> respondent testified he had formulated the original rules and regulations of the appellant which he produced as **P Exh 3**. Further the 1<sup>st</sup> respondent stated his water was disconnected long after he resigned as an official in 2015 by the persons he had sued without notice or giving any reasons but suspected it was because he had demanded for elections as per **Rule 9** of P Exh 1.
8. Further the 1<sup>st</sup> respondent testified there was no pending debt, he reported the disconnection both in Maua police station and the **WARMA offices** in which the appellants did not comply, other than making a false claim with the police that he had allegedly destroyed some water pipes as per OB which he produced as **P Exh 4**.
9. The 1<sup>st</sup> respondent further testified he wrote a letter dated 22.6.2016 which he produced as **P Exh 5**, to the **sub-County manager for WARMA Meru** who ordered reconnection. He also produced **P Exh 6, a document showing the appellants were in arrears of Kshs. 6,000/=**. He also produced a **P Exh 7 a demand letter through his lawyers** and hence prayed to be reconnected with water as prayed in the plaint.
10. In **cross-examination** the 1<sup>st</sup> respondent maintained **P Exh 3** was clear on election; wanted his water to be reconnected; maintained he had paid any claimed money to the appellants and further told the court he resigned as the appellants were not accountable to the committee and members.
11. In **re-examination** the 1<sup>st</sup> respondent maintained it was the appellants in individual capacities who disconnected his water, he still participated in the project activities as a member hence was entitled to have water services. He claimed though entitled to water, he was not accessing it due to the actions of the appellants, which he maintained were illegal and in breach of his rights as a member.
12. The 2<sup>nd</sup> respondent told the court his water was disconnected in 2010 for failure to attend meetings but was never issued with any notice. He specifically told the court the 1<sup>st</sup> appellant and a plumber were the ones who disconnected his water pipes and demanded his water be reconnected. He stated he remained member as No. 21 in the list of membership. He further testified he knew the project rules since he was one of the founding members, and who adopted the project constitution.
13. **DW1** testified he was the chairman of the appellant; adopted his statement dated **12.4.2018**, admitted the project had a constitution and was registered with Social Services; and WARMA Meru told the court the project had 20 people though the respondents had left it; claimed failure to abide by rules led to their removal from membership.
14. Further he told the court he had not been served with either a notice by the respondents claiming breach of the governing rules or a judicial review order challenging the decision for removal from membership.
15. Further **DW1** testified, the resolution to have the 1<sup>st</sup> respondent water be disconnected in **July 2016** was an unanimous decision. He did not produce the constitution nor the minutes to that effect. Similarly **DW1** alleged the 1<sup>st</sup> respondent ought to have gone to the High court within 6 months to challenge that decision through judicial review.
16. Regarding the 2<sup>nd</sup> respondent, **DW1** told the court he did not attend group meetings leading to a fine of Kshs. 500/= which he did not pay leading to his water disconnection.
17. Further **DW1** testified, the 1<sup>st</sup> respondent had written a resignation letter, which was accepted by the group and reported him to police for vandalism. **DW1** was categorical there was freedom of association and though the 1<sup>st</sup> respondent had reported to the water engineer, the appellants could not be forced to re-admit him or reconnect his water. He produced **D Exh 2** a letter dated 19.6.2015 from the 1<sup>st</sup> respondent addressed to the water engineer. Further **DW1** produced the 1<sup>st</sup> respondent's demand letter as **D Exh 3**, resignation letter as **D Exh 4**, and photographs showing the alleged damage of pipes as **D Exh 5**.
18. He claimed members of the project had rejected the respondents and bringing them back would be tantamount to breach of the constitution. **DW1** confirmed he had authority to defend the suit which he produced as **D Exh 6**.
19. In **cross examination DW1** admitted he was a long serving chairman of the project for over ten years; admitted the 1<sup>st</sup> respondent was once the secretary but was no longer a member since he had resigned.
20. Regarding membership card in possession of the 1<sup>st</sup> respondent, **DW1** stated it was by mistake he was issued with one; acknowledged receiving Kshs. 5,000/= from the 1<sup>st</sup> respondent; admitted disconnection was in 2015, though there was no notice given since he had allegedly breached group laws. He did point out the breached rules.
21. About the police report, **DW1** admitted the 1<sup>st</sup> respondent had made a complaint both Maua police station and at WARMA offices Meru.
22. On the issue of overdue elections, **DW1** admitted he had no documents calling for elections and that the last elections were held in **2014**. Further **DW1** admitted he didn't respond to 1<sup>st</sup> respondent's demand letter and acknowledged there were arrears with **WARMA** offices though the project was still registered therein.

23. In **re-examination DW1** maintained there was no demand from **Social Services Department** for group elections and neither had the group be de-registered by the said department, nor with the WARMA offices Meru.
24. Lastly, **DW1** maintained the 1<sup>st</sup> respondent had insulted members, threatened to poison DW2's water, got the membership card erroneously and had not re-applied for membership; claimed they took immediate step to stop the 1<sup>st</sup> respondent and that the group was under no obligation to persuade the respondents to rejoin the group.
25. **DW2** adopted her statement dated 18.4.2018 and admitted she became a member in 2015 but did not report the 1<sup>st</sup> respondent for the alleged threats to poison her water.
26. In **cross-examination** she alleged the respondents had issues with the group; her water was disconnected by the 1<sup>st</sup> respondent after which she reported to DW1.
27. The appellants sought for time to call government officials. The court gave them time to do so, but later on closed their case.
28. Parties filed written submissions dated **20 and 29<sup>th</sup> November 2018** respectively.
29. The first ground of appeal is that the respondent's suit was time-barred. The appellants pleaded in their defence the suit was time barred. In their view the claim was based on tort. The respondents' pleadings and evidence, both oral and documentary was that they had a contractual relationship with the appellants by virtue of being bonafide and paid up members of the project. The appellants pleaded and testified the respondents were initially members but later on ceased or voluntarily resigned over breach of the group rules. Paragraph 3 & 6 of the defence it did not state any tortious claim but a contractual relationship allegedly breached by the respondents
30. Further, evidence tendered by **DW1, DW2 and DW3** was over whether or not the respondents were still members, if they had resigned or breached project rules and regulations and lastly if by virtue of resignation, breach or expulsion they could continue being supplied with water. This position appears both in the appellants, pleadings, witness statements at **page 39-40**, issues of determination (**Page 34**), case summary (**page 35**) of the Record of Appeal.
31. The first time the issue of tort was introduced was through the appellants' written submissions yet no evidence was laid to that effect during defence testimony. In cross-examination DW1 was categorical there were no judicial review proceeding challenging their decision within 6 months to disconnect water supply to the respondents in 2015.
32. The suit was filed on **9.12.2015**. D Exh 3 & 3 state the disconnection occurred on 11.6.2015. Clearly the learned trial magistrate in her judgment established and based her determination on the alleged breach of user rights. In my view therefore, the learned trial magistrate rightly found the suit was based on contract for supply of water services whose breach occasioned the respondents to bring forth the suit. No evidence was led the claim was on tort.
33. As regard to issue of capacity the appellants relied on *Daniel K. Yego & 3 Others -vs- Paulina Nekesa Kode [2016] eKLR, East Africa Pentecostal Churches Registered Trustees & 1754 Others -vs- Samuel Muguna Henry & 4 Others [2015] eKLR.* The pleadings show the respondents sued three persons who personally disconnected their water alleging breach of the project rules and regulations. There is nowhere the appellants produced the alleged constitution, notice of breach, minutes for expulsion and or discontinuation of both membership and water user rights by Kiao Water Project.
34. The respondents were categorical the appellants acted contrary to the project rules and regulations, and were on a frolic of their own. PW1 and PW2 were categorical it was the DW1 who personally disconnected the water and not the group.
35. Further it was pleaded and **P Exh 6** was produced showing the project is governed by **Water Resources Management Authority** which issued **permit No. MN/WB/522** under **Water Act 2016**. The 1<sup>st</sup> appellant produced **D Exh 6** in which he was authorized and consent was given to plead, sign, appear, consent and or otherwise deal with the suit on behalf of Kiao Water Project. It was prepared and filed by his advocates on record.
36. In my considered view the case of **Daniel K. Yego (supra)** though not binding over this court is distinguishable from the instant case in view of the permit issued and consent granted to DW1. By doctrine of estoppel he cannot turn around and deny the obvious that he committed the alleged breach both in his official capacity as an official of the project and in his personal capacity. Projects do not commit breach of contractual relations but the individuals behind them. The appellants have not demonstrated in their testimony otherwise hence are answerable as individuals who went against the law. As a water permitted service provider Kiao Water Project cannot purport to be lacking capacity to be sued for breach of user rights in line with the **Water Act 2016**.
37. On the issue of jurisdiction, the **Water Act 2016** establishes a water tribunal. Its mandate does not cover the instant dispute of breach of the contractual rights. It is therefore my finding that the trial court had jurisdiction to hear and determine the dispute.
38. **Regarding ground No. 3, 4 and 5** of the appeal, the appellants did not counter the respondents' evidence on resignation and breach of the project constitution by bringing a copy of the constitution and rules to challenge the one supplied by the respondents. Secondly, there were no minutes produced to show the respondents were lawfully expelled or resigned from the group in accordance with the group constitution. Above all there was no evidence produced in accordance with **Section 107 and 108** of the **Evidence Act** to back the appellants' pleadings that they were justified both under the group rules and regulations and the **Water Act** to disconnect water services to the respondents.
39. **Article 43 of the Constitution** has elevated access to water as a constitutional right. **Section 63** of the **Water Act 2016** gives every

Kenyan right to access water. Any person or body duly licensed and permitted to facilitate access of water to Kenyans must play by the rules and regulations governing the water sector. If the court was to let loose acts of the appellants, to play roughshod without following the regulations set up in the **Water Act 2016 and the Water Rules** made thereunder, it would amount to anarchy.

40. The appellants' evidence looked into totality depicts a situation of non-compliance with its constitution, directives by the water engineer exercising a mandate under the **Water Act 2016** and denial of the respondents rights as to fair hearing. The respondents' had paid up-to-date subscriptions and membership cards, were entitled to membership rights. Their removal and denial of water services was unjustified under the circumstances.

41. The respondents sought for permanent injunction to be reconnected with water. In ***Jamii Bora Bank Ltd. & Another –vs- James Owek Ochieng [2020] eKLR*** the court held a permanent injunction requires a high level of proof than ordinary injunctions. The appellants acted in utter disregard of the law; there were special circumstances and or compelling reasons for the trial court to order reconnection otherwise the respondents were being denied constitutional and statutory rights to access water.

42. In the circumstances it is my considered view the appeal herein lacks merit. The same is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED IN VIA MICROSOFT TEAMS AT MERU THIS 27<sup>TH</sup> DAY OF OCTOBER, 2021**

**In presence of:**

Michael Ngunjiri for appellant present

Wambua for respondents present

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**