



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 39 OF 2020**

**GEOFFREY MUNGATHIA.....1<sup>ST</sup> APPELLANT**

**JOSEPH KAILUTHA alias KAILUTHA MAILANYI.....2<sup>ND</sup> APPELLANT**

**PAUL KANYINKA.....3<sup>RD</sup> APPELLANT**

**STEPHEN MAKENDA.....4<sup>TH</sup> APPELLANT**

**FRANCIS KANG'ETHE.....5<sup>TH</sup> APPELLANT**

**VERSUS**

**DIOCESE OF MERU REGISTERED TRUSTEES.....RESPONDENT**

**JUDGMENT**

1. The appeal herein involves a water project, namely Mbaranga Water Project which is registered in the name of the Respondent. The Respondent sued the Appellants in the lower Court over claims of vandalism including destruction of water pipes and interference with water supply to other beneficiaries of the water project.

2. Vide Judgement delivered on 4<sup>th</sup> May 2020 by Hon. P. M. Wechuli SRM, the Court issued a declaration that the Project belongs to the Respondents and granted a permanent injunction restraining the Appellants from continuing the unlawful acts of interfering and making any illegal connections or from diverting the water from the project works and pipes in any manner that interferes with the Respondent's rights in the project and it also issued a mandatory injunction compelling the Appellants to remove and disconnect the water connections that they had made from the project without the Respondent's authority.

3. Being dissatisfied with the outcome of the Judgment of the lower Court, the Appellant has filed the instant appeal which is premised on the four (4) grounds of appeal as set out in the Memorandum of Appeal dated 15<sup>th</sup> July 2019 as follows: -

*a) The Learned Senior Resident Magistrate erred in law and fact in failing to find that all water resources are vested in and held by the National Government in trust for the people of Kenya and therefore erroneously proceeding to vest Mbaranga Water Project solely to a private entity.*

*b) The Learned Senior Resident Magistrate erred in law and fact in failing to find that the Appellants have contributed: -*

*i) Their lands/farms for passage of the water project installation;*

*ii) Labour for construction of the water project;*

*iii) Maintenance of the water project*

*iv) Water project membership*

*Then the Respondent was estopped/precluded from excluding the Appellants in the Mbaranga Water Project and therefore erroneously divesting them of their entitlement.*

*c) The Learned Senior Resident Magistrate erred in law and fact in not relying on the correct legal grounds in determining the suit that was before him.*

d) *The Judgment/Decree is against the weight of the evidence before the lower Court.*

4. Ultimately, the Appellant seeks to have the impugned Judgement set aside, and substituted with an order dismissing the Respondent's case with costs.

#### ***Appellants' Submissions***

5. The Appellants submit that the lower Court erred in finding that the Project belonged to the Respondent. According to the Appellants, all water resources are vested in and held by the national government in trust for the people of Kenya. The Appellants rely on Section 5 of the Water Act 2016 which provides as follows: -

#### ***Every water resource is vested in and held by the national government in trust for the people of Kenya.***

They submit that the learned magistrate failed to address the aspect that all water resources have a public interest in terms of the above stated legal provisions.

6. The Appellants further submit that this could be the reason that the Respondent allowed the Appellants to be members of the project, making monetary contributions towards the running of the project. They submit that the import of the learned magistrate's judgment is that the entire Mbaranga Water Project vests to and is the property of the Respondent and that they, the Appellants had no right thereof and that the Respondents could henceforth run roughshod on the Appellants' rights. This, according to the Appellants is against the spirit of Section 5 of the Water Act, 2016 which precludes any individual from divesting any other member from using the scarce and life bearing water resource.

7. They further submit that they contributed their lands/farms for passage of the water project installations; their labour for construction of the water project; maintenance of the water project and as such, the Respondents were estopped/precluded from excluding the Appellants in the Mbaranga Water Project as this erroneously divested them of their entitlement. They submit that both themselves and the Respondent played a vital role in the running of the water project although it is the Respondent who had the registration documents and who paid for the licenses.

8. They further submit that the allegation made by the Respondents in their Complaint that they destroyed the water installations of the project was not proven and had this been proven, only then would that have been inconsistent with their claim to the right of ownership of the project. They further submit that it would have been criminal for the Appellants to make themselves a 'terror and illegal gang,' in the manner pleaded and go on a rampage destroying the water project installations as alleged at paragraph 4 of the Complaint. Had this been the case, they submit that they ought to have been charged for malicious damage to the Respondent's property.

9. Concerning the other allegation made by the Respondents in their Complaint that the Appellants had connected themselves to the water illegally, they submit that it was undisputed that they were connected to the water but there was no evidence that the connection was done in a violent manner. They urge that the connection was done when all parties enjoyed a cordial relationship before disagreements came in as is the norm with most water projects and that it is these disagreements that led the Respondent to file the suit at the lower Court.

10. They submit that there is evidence that they, the Appellants were attending the project meetings and they contributed in the fundraisers and participated as official(s) and at one time even as a bank signatory of the project. They further submit that even if the Respondent was the legal owner of the project instruments of ownership, the Respondent thereafter pursued such a course of conduct as to evince an intention to waive their right. The Respondent rely on the case of *John Mburu v Consolidated Bank of Kenya Limited (2018) eKLR* that the principle of estoppel applies here because the Respondent allowed the Appellants to believe and act as owners of the water project and to now throw them off would leave them without water and at a big disadvantage.

11. They submit that water is a scarce resource protected by the government under Section 5 of the Water Act so that no individual can use it entirely to the exclusion of the other for no good reason and besides, the Respondent allowed the Appellants to believe that they were also members of the project and allowed them to participate as such to the Appellant's detriment and that the Respondents should therefore be estopped from denying the Appellants their right. They pray that the Appeal be allowed.

#### ***Respondent's Submissions***

12. The Respondent submits that the suit in the lower Court touched on vandalism, trespass and interference. It is submitted that the Respondent successfully demonstrated in the lower Court that it is the one that has developed, controlled, supervised and managed the water projects through Mbaranga Parish which falls under the Diocese of Meru Registered Trustees and that the said Diocese has a trust deed for Diocese of Meru Water and Sanitation Services which governs all the water projects. It is submitted that the Respondent is authorized under the Water Act as all management and operation of the Mbaranga Water Project was transferred to the Respondent/Plaintiff through the water services board established under Section 113 (1) of the Act, consequently issuing the Respondent/Plaintiff with a permit and license authorizing them to draw 915 cubic metres of water every day and that the receipts of payment made to the government are in the record. They submit that the Appellants never challenged the management, control and payments made by the Respondent but they, the Appellants only contended that the water project is a public utility and that the water was supplied by different springs which is not supported by any evidence.

13. The Respondent urges that the Appellant is opting to selectively apply certain sections of the Water Act and ignoring other provisions of the same which deal with matters of management, reserves, licenses, and permits as in the present case. It is further submitted that the Act spells out how matters are to be dealt with if they involve a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister of the Regulatory Board concerning a permit or license. It is submitted that the Appellants do not have a permit and/or license to deal with the project and the acts complained of in the lower Court are indeed illegal and contrary to Section 56 (1) of the

Act. It is further submitted that the capacity of the dam cannot sustain the supply of water for both the projects and the Appellant's irrigation and domestic purposes.

14. On the second ground of appeal, the Respondent submits that the project is the property of the Diocese of Meru Trustees Registered which was initiated and built for the good of the community in the area and that the Respondent made an application for easement and permit under the previous Water Act and it thereafter sourced financiers to support the project. Further, that the project supplies water to various learning institutions around Mbaranga including St. Mary's Secondary School, St. Catherine of Siena the hospital and the church. It is submitted that there is a list of members and register of the project and that the members including the Respondent pay maintenance fees and receipts are issued to members. That pursuant to the new Water Act, the Respondent sought new authorization which it got in 2005 and was issued with the permit, water extraction and water tax.

15. It is submitted that the Appellants were employees of the project but were dismissed and that it is only after their dismissal that they started a campaign and held illegal meetings swearing to take the project from the Respondent and consequently started damaging pipes and doing their own unlawful connections to the miraa farms and homes, thereby disrupting the supply of water to the community. The Respondent submits that it reported the matter to the police and the Appellants were arrested but released without being charged. That upon their release, the Appellants vandalized, connecting and disconnecting water pipes and generally interfering with the flow of water.

16. The Respondent submits that it has in no way excluded the Appellants from using the water pipes but it is the Appellants who have denied the schools and other institutions and community at large the benefit of the water owing to their illegal actions. The Respondent further submits that the issue of estoppel raised in the Appellants submissions does not arise since the provisions of the law under the Water Act have all been complied with.

17. The Respondents highlights that in the lower Court, the Court had found that the project was a community project as it was supplying water to community members and that the lower Court also found that the Appellants need to work in harmony with the Respondent to further the interests of the community. They submit that the Appellants rights have not been waived and the Appeal has no merit and should be dismissed.

#### **Issues for Determination**

18. The Appeal raises two (2) main issues for determination as follows: -

***i) Whether the trial Court erred in failing to find that all water resources are vested in and held by the National Government in trust for the people of Kenya and therefore erroneously proceeding to vest Mbaranga Water Project solely to a private entity.***

***ii) Whether the Appellants were wrongly excluded from the Mbaranga Water Project***

***Whether the trial Court erred in failing to find that all water resources are vested in and held by the National Government in trust for the people of Kenya and therefore erroneously proceeding to vest Mbaranga Water Project solely to a private entity.***

19. It is the Appellants' case that all water resources including the instant project are vested and held in trust by the National Government by virtue of Section 5 of the Water Act.

20. The Respondent on the other hand submits that it is the one that has developed, controlled, supervised and managed the water projects through Mbaranga Parish which falls under the Diocese of Meru Registered Trustees for which there is a registered Trust Deed. The Respondent also states that the management and operation of Mbaranga Water Project was transferred to it through the water services board established under Section 113 (1) of the Act. The Respondent states that it was issued with a permit and license authorizing it to draw 915 cubic meters of water every day and that the receipts of payment made to the government are in the record.

21. To begin with, this Court takes note of the status of the Respondent as a legal person and/or entity. The Respondent, namely the Diocese of Meru Registered Trustees is a **'Trustee'** and not a company and neither is it an organization. To this Court's mind, a trustee implies a body that 'holds' property or interests in trust for another, subject to personal obligations to manage and apply it in accordance with the terms of the Trust Deed. This is done for the benefit of the beneficiaries under the Trust Deed.

22. In the Australian case of **Re Scott (1948) SARS 193**, Mayo J. held as follows while defining a trust: -

***'The word "trust" refers to the duty or aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence, the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestuis que trust, or beneficiaries, if there be any; if not, for some purpose which the law will recognize and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest.'***

23. It is thus clear that the ultimate goal of a trust is to protect the interests of beneficiaries by way of assigning certain duties and obligations to the trustees. A trust does confer ownership rights upon the trustee although a trustee may also be a beneficiary of the trust himself.

24. It appears that both parties are in agreement that the project is meant to serve the interests of the community. The Appellant asserts that the project cannot be owned by a private entity because it involves a water resource which is a public utility vested in the national

government. The Respondent on its part has asserted that the project is for the community and it has gone ahead to indicate the sources of funding for the project, being international organizations. In fact, the Respondent has enlisted some of the beneficiaries of the project including St. Mary's Secondary School, St. Catherine of Siena the hospital and the church. This being the situation, this Court is convinced that both parties are in agreement as to the purpose of the project, which is to serve the community at large, and not the private interests of any individuals.

25. In determining the issue of who has the proper registration documents, which issue culminated in the Court's finding, the trial Court considered the various documents owned by the parties. The Court found as follows: -

***The Plaintiff has registration documents that are governed by the then Co-operatives Act, the Lands Act and the Water Act. They have a copy of the Trust Deed (pex 1) for the Diocese of Meru Water and Sanitation Services. They have a copy of an application for easement for Mbaranga Project under the Water Act. They further have a permit from the Water Resources Management Authority. There is authorization from the Water Apportionment Board. Other documents under the Water Act have similarly been annexed.***

***The Defendants on the other hand have a Certificate of Registration of a self help group under the Ministry of Gender, Children and Social Development. It shows that Mbaranga Water Project was registered as a community based self help group with the Ministry of Gender, Children and Social Development. They did not have any documents under the Water Act.***

***It is the Water Resources Management Authority which has the sole mandate to issue and otherwise deal with issues concerning water permits.***

***No provision is made for issue of the permits by the Ministry of Gender.***

***No provision provides that a registration under the Ministry of Gender will apply under the Water Act.***

***The upshot of all this is that it is the Plaintiff who has the proper registration documents to run a water project under the Water Act.***

It is on the basis of the above findings that the trial Court found that the Respondent is the **owner** of Mbaranga Water Project. Whilst Court does not find fault in the analysis of the lower Court on who has the proper registration documents, this Court finds that it could not have been the intention of the lower Court to confer ownership of the water resource, as distinguished from the project for the provision of water therefrom, to the Respondent. It is not in dispute that the registration documents merely allowed the Respondents to operate and run the water project, noting that the management of dams is one that the government is heavily invested in. Schedule 4 of the Constitution of Kenya specifically provides that the function of hydraulic engineering and ensuring the safety of dams is a function of the national government. This Court finds it necessary to elaborate and clarify that the finding of the lower Court did not confer any ownership rights but merely affirmed the fact that it is the Respondent who has authority to operate the project, if that means owns in common parlance.

26. Furthermore, the heavy involvement of the government in the construction, management and operations of dams is an indication that dams are scarcely considered private property. Indeed, in the Water Act and in the Water Resources Management Rules, 2007, there are numerous provisions for dams. This court therefore finds that a dam constitutes a water resource and like all other water resources, it guarantees the citizens access to safe and equitable water. As mentioned by the Appellants, under Section 5 of the Water Act, all water resources are vested in and held by the government in trust for the people.

27. The Appellants herein have indicated that they contributed their land and labour in the construction of the dam. It is however admitted that the project was funded by other international organizations including the British Council and that members, including the Appellants, make regular contributions towards the project's fund. The project is therefore one for the community. In fact, this is the very argument advanced by the Appellants.

28. Ultimately, this Court finds that whereas the Respondent rightfully has the authority to manage and operate the dam by virtue of the permits and licenses it holds, the same do not confer ownership rights to the Respondent in a private capacity. In any event, this Court has already found that Trustees, such as the Respondent merely hold property in trust but do not acquire ownership and/or proprietary rights.

29. With the above clarification, it is clear that the declaration granted by the lower Court to the effect that the Respondent is the **owner** of the Project does not confer any ownership rights to the Respondent. It is one thing to own something and it is another thing *to own in the capacity of a trustee*. The learned Magistrate clarified as much at page 10 of the Judgment as follows: -

***The said project is not private, rather it serves various institutions and the community members. It is for the good of the community.***

Ultimately, this Court reiterates that the Respondent has the rights to manage and operate the project, but only does so in its' capacity as trustee. This Court is therefore not convinced that the lower Court erred in its finding, although this Court recognizes that the above clarification may help to clear any perceived ambiguities.

30. As a point of concern, this Court observes a material flaw in one of the arguments raised by the Appellants. Relying on the case of **John Mburu v Consolidated Bank of Kenya Limited (2018) eKLR** the Appellants purport to invoke the principle of estoppel to the extent that the Respondent allowed the Appellants to believe and act as **owners** of the water project and cannot therefore disentitle them. This submission reveals the unmeritorious nature of the Appellant's ground of appeal. While on the one hand, the Appellant claims that there can be no private owner of the project, they now purport to be owners since they have all along been allowed to act as owners. Needless to say, this submission offends the rules of approbation and reprobation. Significantly, there can be no estoppel against the law.

31. The law on the matter is summarized as follows:

1. Under the Constitution of Kenya Fourth Schedule and the Water Act the **ownership** of water resources is vested in the National Government.
2. Water resource is defined in the Act Water as –  
  
“**water resource**” means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground, and includes sea water and transboundary waters within the territorial jurisdiction of Kenya.”
3. The use of a water resource is regulated by section 36 and 27 of the Water Act providing generally for a permit for use of water from a water source.
4. The Water Act provides for the licencing of water service providers with a qualification that a licence for the provision of water service does not amount to proprietorship as provided for under section 88 of the water Act.
5. Ownership, administration, regulation of water resources is provided for under the Water Act and no valid authority can be founded on ministerial registration of a selfhelp group outside the water Act, and consequently, the purported ownership claim to the suit water project on account of registration of the appellants as a self help group under the **Ministry of Gender, Children and Social Development** is invalid, null and void.

32. The Respondent is the bona fide operator of the water project on the water resource subject of this suit upon a permit and licence granted for that purposes under the relevant provisions of the Water Act and, consequently, the respondent has legal standing to obtain legal relief including injunction granted the trial court for the protection of its interest as trustee for the Community.

#### ***Whether the Appellants were wrongly excluded from the Mbaranga Water Project***

33. The lower Court granted a permanent injunction restraining the Appellants from interfering and making any illegal connections or from diverting the water from the project works and pipes in any manner that interferes with the Respondent’s rights in the project. It also issued a mandatory injunction compelling the Appellants to remove and disconnect the water connections that they had made from the project without the Respondent’s authority. These injunctions to this Court’s mind are what the Appellants claim to be wrongful exclusion.

34. To begin with, the Respondents have indicated that they have not excluded the Appellants from using the water. Indeed, this is not what the orders of the trial Court communicated. The orders of the trial Court simply prohibited any illegal acts that would interfere with the operation and management of the project for the benefit of the community. The wording of the orders used the terms **‘illegal connections’** and **‘without authority’** respectively. These terms do not infer absolute deterrence from accessing the water, but only deterrence that would conflict with the purpose of the project and the authority of the Respondents as the body responsible for managing the project dam. See sections 36 and 37 of the Water Act.

35. Materially, the Appellants do not claim to have been denied water. They merely claim that they have been denied their entitlements. This Court find that the most pressing issue demanding the Court’s attention would have been where the Appellants had been denied access to the water to be utilized in a manner as per the objects of the trust deed. The term ‘entitlements’ is one too abstract for this court to decipher what exact tangible right has been denied.

36. In issuing the permanent and mandatory injunctions it so issued, the Court considered the claims by the Respondent that the Appellant had destroyed the water installations and the claim that the Appellants made illegal connections to their private *miraa* farms, which act is not sustainable since the water is supposed to serve the entire community.

37. The Court established that the Respondent had the proper registration documents and had authority not only by virtue of the Trust Deed but also by virtue of the licenses, permits and arrangements made pursuant to the provisions of the Water Act.

38. One of the arguments raised by the Respondent is that the Appellants had diverted the water connections to suit their own private interests in the irrigation of their *miraa* farms. It goes without saying that the quantity of water needed to sustain *miraa* farms is substantial and would most likely compromise the level of access to water for the other beneficiaries. The Appellants have not rebutted this claim by the Respondents.

39. On the issue of vandalism, the Appellants have submitted that had they indeed been guilty of vandalism, they ought to have been charged with the offence of malicious damage to property. This Court finds that the decision to press charges in the criminal process does not in any way affect the progression of civil matters. (See Section 193A of the Criminal Procedure Code) The criminal process is separate and distinct from the civil process. In any event, it is on record that the matter was reported at Muthara Police Station and an O.B number was issued. The fact that the criminal process did not progress is not, necessarily, indicative of the Appellants’ innocence as it could also point to the apparent inadequacies in execution of duty by the relevant authorities as alleged in the letter written by the Respondent’s law firm at page 74 of Record of Appeal.

#### **Conclusion**

40. The statutory scheme of ownership, administration, regulation of management and use of water resources is provided for in Fourth Schedule of the Constitution of Kenya 2010 and the Water Act 2016.

“6. Regulation of the management and use of water resources

The Authority established in [section 11](#) shall serve as an agent of the national government and **regulate the management and use of water resources.**”

41. The Respondent has a permit/licence under the Water Act from the Authorities Regulation Board and as such it has the permission of the national Government, which is legally vested with the ownership of the water resources, as contemplated under section the Act.

42. As holders of a legal licence under the Water Act with regard to the management of the dam, the respondent has as a **licensee’s interest** which is known in law and capable of protection by injunction. If criminal charges of malicious damage to property and or theft of property, the respondent has the legal status of a “**special owner**” of property within the meaning of the Penal Code.

43. In issuing the injunction, the trial Court would also have considered the balance of convenience in the fact that the community interests of the project superseded the private interests of individuals. The injunctions were intended to serve the interests of the community for whose benefit the project was initiated and thus the trial Court cannot be faulted for granting the same.

44. All in all, the Appellants have not claimed that their membership status has been interfered with. This means that they are still eligible to benefit from the project. The Respondents on their part have asserted that the Appellants have not been stopped from accessing water. This Court finds that save for the clarification it has so made pursuant to sections 5 and 7 of the Water Act in issue of ownership of the water resources above, the Appellant’s appeal is unmeritorious.

### **ORDERS**

45. Accordingly, for the reasons set out above, this Court makes the following orders: -

**1. For avoidance of doubt, the ownership, regulation of access and use of water and administration of the water resource subject of the suit, as with all other water resources in the country, vests in the national Government through the Water Resources Authority and its executive Boards in terms of sections 5, 6, 7 and 9 of the Water Act.**

**2. As with any other person, the appellants have a right to access the water resource subject to administrative regulations of the national Government through its Water Resources Authority and Board, and the Water Services Regulatory Board and to such limitations on the use of water as set out in sections 36 and 37 of the Water Act.**

**3. As a holder of a permit/licence issued under the Water Act by the Water Resources Authority through its respective Boards, the Respondent is entitled to operate and manage the usage of the water resource in accordance with the water Act and such regulations as are issued by the Authority.**

**4. As such licensee the respondents have a legal interest, which although not amounting to proprietorship in terms of section 88 of the Water Act, is capable of protection by injunction and other legal remedies and are entitled to the permanent injunction issued by the trial court.**

**5. (Obiter) The Respondents are in law the special owners of the pipes, equipment and materials used in the water project subject of these proceedings and as such can as complainants properly found criminal proceedings with respect to the theft (as in section 268 of the Penal Code), destruction or other damage of such property.**

**6. As the appellants have not been denied access and use of the water from water resource subject of the appeal but only a limitation as to the use of the water is imposed as with all the other members of the community who access the dam, there is no substantive merit in the appeal and the same is hereby dismissed.**

**7. In view of the public element of right to use and access water resource, there shall be no order as to costs of the appeal.**

Order accordingly.

DATED AND DELIVERED ON THIS 6<sup>TH</sup> DAY OF MAY, 2021.

EDWARD M. MURIITHI

**JUDGE**

**Appearances:**

M/S Mwirigu Kaburu & Co. Advocates for the Appellant

M/S Maitai Rimita & Co. Advocates for the Respondent.