



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 87 OF 2019

JOSEPH BUNDI.....1ST APPELLANT

SAMUEL KIMATHI.....2ND APPELLANT

LUCY KITHIRA.....3RD APPELLANT

VERSUS

JOSEPH MUGAA.....1ST RESPONDENT

JOHN GITONGA.....2ND RESPONDENT

MUTHAURA MIKUA.....4TH RESPONDENT

MANAGEMENT COMMITTEE OF

KIGENE MARITATI WATER PROJECT.....5TH RESPONDENT

(Being an appeal from the judgement of Hon. Mrs L. Ambasi,

Chief Magistrate made on 4TH July 2019 at Meru Cmcc No. 186 of 2014)

JUDGEMENT

1. The Respondents herein sued the appellants in the trial court seeking an order of permanent in junction restraining the Appellants, their agents or servants from interfering with KigeneMaritati Water Project or illegally and unlawfully connecting non-members with water supply contrary to the by law of the project.

2. The appellants filed a defence and counterclaim on 13/06/2014 denying the allegations in the plaint. They also stated that they are the *bonafide* elected members of the project and had taken over the management of the project ide elections conducted on 13/06/2014.

3. The Respondents filed a reply to the defence and counterclaim reiterating he allegations in the plaint.

4. The matter proceeded for hearing. Both parties called one witnesses. On 4/07/2017 the trial Court delivered its judgement allowing the prayers sought by the Respondent and dismissing the Appellants counterclaim.

5. Aggrieved by the said decision the appellants filed their memorandum of appeal dated 24th July 2019 raising five grounds of appeal i.e.;

(i) The learned trial Magistrate erred in law and in fact by her failure in her judgement to analyse and isolate all the salient issues for determination as contained in the pleadings of all the parties in the case before the trial court.

(ii) The learned trial magistrate erred in law and in fact by not considering that the appellant had substantially demonstrated that the respondents' suit was hopeless and miserable as presented.

(iii) The learned trial magistrate erred in law and fact by not giving proper reasons supporting her judgement.

(iv) The learned trial magistrate erred in law and in fact by wholly misappropriating the relevant laws and facts as required

as far as civil suits are concerned.

(v) **The learned trial magistrate erred in law and in fact by misappropriating facts presented to her by the appellants plus their weighty submissions.**

(vi) **That the judgement of the learned trial magistrate is against the law and the weighty evidence on record by the appellants in support of their counterclaim.**

6. On 15/10/2019 this Court directed the parties to canvass the appeal through written submissions. The appellants submitted that the trial Magistrate failed to attach any weight to which party was recognised by the Ministry of Labour Social Security and Services and in turn failed to state the provisions of the law which guided her judgement. They relied on the cited case of **Meru HCCA No. 25 of 2005 Elizaphan Nyaga M'Bunda & 35 others vrs Festus Ndeke & 9 others**. The Respondents on their part agreed with the determination of the trial Court. That they produced an Original Certificate of Registration whereas the appellants produced a photocopy of a letter addressed to the appellants advocates which purported to recognise the appellants as elected officials in the sham elections.

Analysis and Determination

7. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

8. The main borne of contention in the trial court was who were the valid members of the project i.e. Kigene Maritati Water Project?

9. During the trial two witnesses testified. **Pw1 Joseph Muga** testified that he is the chairman of the 5th Defendant a registered Welfare organisation under the Ministry of Gender, Children and Social Development vide Certificate No. 102438 issued on 5th July 2010. That he was elected as its chair in the year 2004. Elections were held consecutively after every three (3) years the last of which was in 2014 when he was also elected as chair. That they have since embarked on a water expansion and repair project which have cost them a fortune. That the defendants now wish to illegally and unlawfully interfere with the management and operations of the water project.

10. In cross-examination he stated that he is not aware that the Appellants were registered and/or had elected officials. That they neither participated in the elections nor were they notified of the same. He relied on the following list of exhibits; **Certificate of Registration for Kigene Maritati Water Project Pexh1, Receipts totalling Kshs. 158,480/= from Silverspread Hardwares Ltd Pexh 2, Kigene Maritati Water Project By laws Pexh3.**

11. **Dw1 Samuel Kimathi also testified** that he is secretary of Kigene Maritati Water Project through elections held on 6/2/2014. He averred that the Respondents have interfered with the project by failing to pay dues for repair and dues to Water Resources Management Authority. That they have also declined to hand over all the project documents e.g. Certificate and/or prepare balance sheet during the period they were in office i.e. 17/12/2003 to 16/02/2014. They have also failed to attend the meetings and/or pay their share of the monies required. He produced the following list of exhibits; **Statement Pexh1, Minutes of the Meeting Pexh2, Letter from Social Services dated 29/7/2016 Pexh 3, Project By-laws Pexh 4.**

12. The Trial magistrate listed the following issues for determination i.e. **who are the bonafide members of the project? Which of the certificates in possessions? Are the defendants entitled to the Counterclaim? Are the Plaintiffs entitled to the reliefs sought.** From the evidence on record and the submissions by the parties in the trial court i find that the trial court raised the salient issues to be determined. This therefore discounts the first payer of appeal by the appellants.

13. In its determination the trial Court found that the Appellants did not provide evidence of service for the meeting. That from the provisions of clause 6.1 the committee tenure was 3 years renewable unless the provisions of clause 2 are invoked. That the removal of a committee member can only be done at a general meeting. There is also no provisions that anyone can call a meeting. From the meetings held by the appellants on 6/2/2014, 1/6/2014 and 3/4/2016 it was unclear who called for the meeting and who was present. The elections therefore were fatally flawed as they failed to meet the requisite procedure that bound the project.

14. The trial magistrate also compared the certificates produced by the Respondents and the photocopy of a letter addressed to the appellants advocated. The trial magistrate found that the correspondence cannot be said to be a certificate of registration. She therefore held that the holding of the meetings and purported elections amounted to interference as these functions are only endowed on the plaintiffs, until they are properly removed from office.

15. The extract of the trial courts analysis and determination clearly shows that she duly considered the evidence on record and gave clear reasons why she came to her determination. This very well dissuades the Appellants averments that the trial Magistrate did not consider all factors on record. It very well determines the 2nd to 4th grounds of appeal.

16. The fifth ground is whether the trial magistrate misappropriated the facts and the weighty submissions of the appellants.

17. **Clause 6.3 of the 5th Respondents By-laws provides as follows;**

Members of the management committee shall be elected at the annual general meeting from among paid up members and who do not owe the project any money. Nominated by each zone or administrative location of the water supply except the office bearers who can be drawn from any zone.

CLAUSE 10.3 provided;

A special general meeting may be convened by the management committee for any specific purpose. Notice in writing of such meeting shall be sent out to all members not less than 14 days before the date thereof.

Clause 10.9 provided that voting for members of the management committee shall be by secret ballot and all decisions shall be by simple majority.

18. I have looked at the record and I cannot find any evidence showing that the Respondents were summoned to the meeting held on 6/2/2014. There is also no indication as to who called the meeting. It is also peculiar that all the members of the management committee who are mandated to call the meetings were absent on this occasion.

19. I also agree with the trial magistrate that the letter dated 29/07/2016 cannot supersede the certificate of registration issued to the Respondents and had been renewed to the years ending 15/3/2016.

20. The record clearly shows that the Appellants engaged in an elections to oust the Respondents but they did not conduct the same within their by-laws and therefore did not follow due procedure. The alleged ouster of the Respondents was illegal hence its implications null and void.

21. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1) (2) of the Evidence Act** that provides thus:

“(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.”

22. **Section 112 of the Evidence Act** provides thus:

“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.”

23. The appellants clearly did not provide the essential evidence that would have justified the holding of a free, fair and credible election and therefore sustain their election to the respective positions.

24. In contrast the Respondents positions was admitted by the appellants. Without any clear evidence that they were ousted from such positions any activities conducted by the appellants as a representative body of the members of the 5th Respondent’s water Project was only tantamount to interference of their activities. The same raised a prima facie case, the Respondents clearly suffered irreparable harm and one which could not be compensated by an award of damages.

25. Having fully agreed with the determination of the trial Court it naturally follows that the Appeal herein lacks merit and the same is dismissed with costs to the Respondents.

HON A. ONG’INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 6th DAY OF FEBRUARY, 2020.

In the presence of :

C/A: Kinoti :-

1st Appellant :-

2nd Appellant:- Mr Murithi Advocate holding brief for Kaimenyi for

3rd Appellant:- Appellant

1st Respondent:

2nd Respondent:-

3rd Respondent Mr Muthama Advocate for Respondent.

HON A. ONG'INJO

JUDGE