REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 73 OF 2016

PAUL MUCHOMBA, ALICE MUKORA, SAMWEL MIRITHI,

GILBERT WACHIRA GODFREY KARAGO & MARY BAIYA

T/AKIROTA BOREHOLE.....APPELLANT

VERSUS

JAMES NGARUIYA KANYORI.....1ST REPONDENT

BENSON HINGA NDUNGI.....2ND RESPONDENT

JUDGMENT

(Being an appeal from the judgement of Senior Principal Magistrate Hon. Komingoi delivered on 21st of June 2016 in Nakuru CMCC no. 1764 of 2005.)

1. This Appeal arises from a judgment and decree entered in ***Nakuru CMCC No. 1764 of 2005***. In that suit, the Appellant (Plaintiff) sued the Respondent (Defendants) by way of plaint dated 7th of October 2005 seeking for the following principal orders:

> *a. An order for injunction restraining the defendants by themselves, there servants and or agents from interfering with the plaintiff's borehole business in Njoro/ Ngata Block 1/1217 (New Kiambu)*

2. The gravamen of the case was that the Appellants were the owners of the parcel land known as Njoro/ Ngata Block 1/1217 (New Kiambu) ("Subject Property") on which there was a borehole which was being used for commercial purposes. The Appellants alleged that the Respondents had unlawfully interfered in the business being carried on at the Subject Property by illegally locking up the pipes of water supply from the borehole.

3. The Respondents filed their defence and counter- claim dated 24th of October 2005, in which they denied the allegations in the plaint and counter-claimed for Kshs. 773,000/- in liquidated damages. In brief, the Respondents denied the allegations contained in the Plaint. They then lodged a claim for the liquidated damages based on an alleged agreement reached between New Kiambu Water Project and Aden Water Project. The Respondents alleged that the agreement required the Appellants to pay the liquidated sum to the Aden Water Project but that the Appellants had failed to do so. The Respondents claimed that they were suing on behalf of Aden Water Project.

4. The Appellants filed a Reply to Defence and Defence to the Counter-claim. The gist of it was to join issues with the entire defence. In terms of the Defence to the Counter-claim, the Appellants denied any agreement to pay any monies to the Aden Water Project. They also challenged that the Respondents were suing on behalf of Aden Water Project or that they had capacity to do so.

5. Before the trial, the prayer with respect to a permanent injunction was compromised by the parties. The parties agreed that the counter-claim would go to full trial. The Respondents called two witnesses while the Appellants called a single witness and closed its case. The Learned Honourable L. Komingoi returned a verdict in favour of the Respondents on the Counter-claim. The Appellants are aggrieved by that decision and have appealed to this Court. In their Memorandum of Appeal dated 01/07/2016 , the Appellants listed eleven grounds of Appeal as follows:

> *a. THAT the Learned Trial Magistrate erred in law and in fact in holding in favour of Respondents on the counter claim*
>
> *b. THAT the Learned Trial Magistrate erred in law and in fact in allowing the counter claim as against the Appellants herein*
>
> *c. THAT the Learned Trail Magistrate erred in law and in fact in failing to hold that the Respondents had no authority to file the*

counter claim against the Appellants herein

d. THAT the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondents were sued in person and they could not maintain a claim on the counter claim in representative capacity without authority of the person so represented by then in the counter claim

e. THAT the Learned Trial Magistrate erred in law and in fact in failing to hold that the Respondents herein were not officials of Aden Water Project and hence no mandate was bestowed upon them to file the counter claim on behalf of the said entity.

f. THAT the Learned Trial Magistrate erred in law and Fact in failing to appreciate that the appellant did not owe the Respondent any money and they were not Aden Water Project.

g. THAT the Learned Trial Magistrate erred in law and in fact in failing to hold that if any money was owed to the plaintiff herein, the same was owed to Aden Group but not Aden Water Project.

h. THAT the Learned Trial Magistrate failed and or refused to properly analyse the evidence presented before her and arrived on erroneous judgement

i. THAT the judgement of the Trial Magistrate was against the weight of the evidence presented before the court

j. THAT the Trial Magistrate relied on the wrong principles and or consideration in entering judgement against the appellants.

6. The Appeal was canvassed by way of written submissions. Neither parties deemed it necessary to orally highlight.

7. I have read and considered the respective arguments in those submissions.

8. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 conclusions 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 judge's findings of fact if it appears either that he has 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 (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

9. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt – vs- Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

10. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

11. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

12. With the above principles in mind, I will now proceed to deal with the Appeal.

13. The Respondents case as it emerged from its pleadings and oral testimony was as follows. That the Respondents are officials of Aden Water Project, a Self-help Group duly registered by the Ministry of Culture and Social Services. That the Aden Water Project collaborated with the New Kiambu Water Project in the "funding and the rehabilitation of the borehole" situated on the Suit Property. That along the way, the two groups disagreed on the future operation of the joint venture leading to the Aden Water Project members requesting to be refunded the funds they had invested in the Project so that the Appellants would be left as the sole owners and operators of the borehole. That by an agreement reached on 24/07/2001, the "New Kiambu Water Project" agreed to pay Aden Water Project the sum of Kshs. 800,000/- as a refund for all the amounts they had expended towards the rehabilitation of the borehole on the Subject Property. That the New Kiambu Water Project paid only Kshs. 27,000/- leaving Kshs. 773,000/- still owing.

14. The Respondents further claimed that the Appellants comprised the members of the New Kiambu Water Project and that they had only changed their business name to be Kirota Borehole. As such, the Respondents claimed that the Appellants were bound to pay the remaining sum of Kshs. 773,000/-. They therefore wanted that sum paid by the Appellants.

15. The main exhibit produced by the Respondents were the minutes of the "Joint Committee" comprising of members from "New Kiambu Farm" and "Aden Group". Herein lay the Appellants' main problem with the Counter-claim and the judgment.

16. The Appellants in their submissions filed on the 12th of November 2018 firstly question the Respondents' capacity to institute a counter-claim on behalf of the Aden Water Project. To this they draw Court's attention to ***Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] Eklr*** where Munyao J. held that members of a Self-help Group can only sue through representatives who must demonstrate to the Court that they have the authority of the other members to bring the suit on their behalf.

17. The Appellants also pointed out that it was erroneous for the Lower Court to hold the Appellants liable for the debts of the "New Kiambu Water Project" without, first, establishing that they were the members of the entity, and, second, that the "New Kiambu Water Project" was no longer in existence, and, third, that Kirota Borehole was the same as "New Kiambu Water Project." The Appellants argue that it was improper for the Court to draw the assumption that "Kirota Borehole" had the same membership as the "New Kiambu Water Project" in the face of the evidence presented. They insist that the unchallenged evidence of DW 1 confirmed that New Kiambu Water Project was still in existence. They further argue that the dispute is between Aden Water Project, Aden Group and New Kiambu Water Project yet those groups were not in Court.

18. The Respondents, in his submissions dated 10th of December 2018, raised the following salient points::

a. That the Appellants are the same members who negotiated with the Respondents being representatives of New Kiambu Group and Aden Water Project. It would appear that the Respondents are arguing estoppel in this regard.

b. That the Appellants sued the Respondents in their individual capacity yet they knew that the Respondents always acted on behalf of Aden Water Project.

c. That the Appellants changed names to run away from their financial responsibility. They draw courts attention to ***Kenya Scientific Research International Technical and Allied Institution Workers Union v Flame Tree Brand s Limited & 2 others [2013] eKLR***, where the Court held that change in business name does not mean the business has ceased to exist if it is still owed by the same people under the same management.

d. They draw Courts attention to ***Multiple Hauliers Ltd & another v John Odongo Hagai [2001] eKLR*** where the Court cited ***Peter v Sunday post (1958) EA 424*** where the Court held that it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses; that this jurisdiction should be exercised with caution.

19. After due consideration of the appeal in its entirety as well as the submissions of the parties, there are two related questions presented:

a. Was the Counter-claim brought by the Respondents on behalf of Aden Water Group competent?

b. If the Counter-claim was competent, does the claim against the Appellants lie?

20. It is trite law that a Self-help group is not a corporeal entity capable of suing or being sued. Consequently, it must be represented in a suit by its officials who sue on behalf of the Self-Group. When they do so, by virtue of Order Order 1 Rule 13(1)(2) of the Civil Procedure Rules, the Representatives are required to file an authority to so sue on behalf of the other members. As was explained in the **Kipsiwo**

Community Self Help Group Case, the reason for this requirement is not merely technical or pedantic: it is so that the parties in litigation can be identified with precision for purposes of assigning the rights and attributing the responsibilities that come with litigation. In the words of Munyao J.:

> *The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.*

21. In the present case, though the Respondents claimed that they were representing the Aden Water Project, they did not produce any evidence that they had the authority to represent the Self-help group. Indeed, it is not entirely clear who the members of that group are. It is telling that despite the issue having been raised in the first instance in the Defence to the Counter-Claim, the Respondents made no efforts whatsoever to demonstrate that they had the authority to sue on behalf of the members of the Self-help group.

22. Even if the Respondents properly represented the Aden Water Project in the suit, there are serious questions whether it was demonstrated that any money owed to Aden Water Project by the Appellants. As aforesaid, the minutes of the "Joint Meetings" were intituled as being between "New Kiambu Farm" and "Aden Group." Aden Water Project, the Self-help group which the Respondents say they represent is not mentioned as represented in the meetings. Then, when one turns to the minutes of the meeting held on 24/07/2001 which the alleged agreement to pay is contained, the exact words are as follows:

> *It was finally agreed by both groups that Kshs. 800,000/- would be an acceptable figure. Nobody objected to that figure of Kshs. 800,000/- to be paid to Aden Group by New Kiambu. However, there was the amount of Kshs. 27,000/- being allowance for Mr. James Ngaruiya Kanyori which had to be taken care of. It was agreed that that allowance was Mr. Ngaruiya's property and therefore it should be from the total amount of Kshs. 800,000/.*
>
> *Mr. Ngaruiya will get his allowance of Kshs. 27,000/- from the total amount of Kshs. 800,000/-.*
>
> *Mr. Ngaruiya said that he would demand the Kshs. 75,000/- from Dr. Apondo and his committee. The money was for expenses during his case with Dr. Apondo.*
>
> *A.O.B.*
>
> *Payments concerning the Kshs. 800,000/- would be as follows:*
>
> > *1. Kshs. 334,000/- - to be paid to the debtors of Aden Group by the Chairman of this Joint Committee.*
> >
> > *2. Kshs. 27,000/- - to be paid directly to Mr. James Ngaruiya.*
> >
> > 3. *Kshs. 439,000/- - to be paid to the New Committee of Aden Water Project.*

23. Five things readily emerge from this:

> i. There is no specific agreement by "New Kiambu Water Project" to pay any monies. The resolution refers to "New Kiambu". From the inscription of the members present, this could refer to "New Kiambu Farm" or "New Kiambu Water Project";
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> ii. It is not indicated who the members of either "New Kiambu Farm" or "New Kiambu Water Project" are. Representatives of "New Kiambu Farm" are named in the minutes but not the members. Since neither "New Kiambu Farm" nor "New Kiambu Water Project" is a legal entity, it would be crucial to know the membership so as to know who bore the liabilities;
>
> iii. There is a resolution that Kshs. 334,000/- will be paid to the debtors of Aden Group by the Chairman of [the] Joint Committee. It is not clear who the debtors of Aden Group are. It seems clear that the "Aden Group" is different from the "Aden Water Project." In any event, this amount (of Kshs. 334,000/-) is not due to Aden Water Project but to the debtors of Aden Group. It follows that at least that amount could not be claimed by the representatives of Aden Water Project.
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> iv. The amount of Kshs. 334,000/- was to be paid to the debtors of Aden Group by the Chairman of [the] Joint Committee who was, according to the minutes of the Joint Committee, Mr. Gilbert Maina Wachira. Mr. Wachira was not a party to the suit. It seems obvious that that amount (of Kshs. 334,000/-) is not owed by the Appellants.
>
> v. The amount of Kshs. 439,000/- was to be paid to "the New Committee of Aden Water Project." However, it is not specified who will make the payment. A purposeful reading of the part of the Minutes extracted above would suggest that it is the "New Kiambu" group that was to pay the amount. However, it is not clear whether the "New Kiambu" refers to the "New Kiambu Farm" or the "New Kiambu Water Project." Further, it is unclear what the nature of those groups are and who the members of either group are.

24. Finally, even assuming that it was the "New Kiambu Water Project" which was liable to pay at least some of the monies indicated in the minutes of the meeting held on 24/07/2001, no evidence was presented to demonstrate that the Appellants were the members of that entity or group.

25. Having come to these conclusions based on the evidence available, it follows that the decision reached by the Learned Magistrate cannot

stand for the following reasons as demonstrated above:

a. It was not demonstrated that the Respondents had authority to sue on behalf of the other members of Aden Water Project as required by law;

b. There is no evidence that Kshs. 334,000/- was owed to the Aden Water Project and not Aden Group;

c. In any event, by the terms of the agreement contained in the minutes of 24/07/2001, the Kshs. 334,000/- was owed by the Chairman of the "Joint Committee" and not by the Appellants;

d. There was no evidence to demonstrate that the remaining Kshs. 439,000/- was in fact owed by the Appellants since the minutes, even by purposeful reading, refer to "New Kiambu";

e. No evidence was presented that the Appellants were liable for the debts of the "New Kiambu" or if, indeed, the debt was owed by "New Kiambu Water Project" that the Appellants constituted the full membership of that group.

26. **Consequently, I find the Appeal meritorious. It is hereby allowed. The judgment on the Counter-claim in Nakuru CMCC No. 1764 of 2005 dated 21/06/2016 is hereby set aside. In its place, a judgment is entered dismissing the counter-claim with costs.**

27. **The Appellants shall also have the costs of this appeal**.

28. Orders accordingly.

Delivered at Nakuru this 18th July, 2019

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JOEL NGUGI

JUDGE