



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 579 OF 2007

JOSEPHAT KIMANI MWANGI.....1ST APPELLANT

COMPLEX VIEW ESTATE WELFARE

AND DEVELOPMENT ASSOCIATION..... 2ND APPELLANT

VERSUS

CHARLES MWONGERA MUKINDIARESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi (Hon. Mr. Cherono, SRM) dated 5th June 2007 in CMCC No. 8182 of 2004 between Charles Mwangera Mukindia Verses Josphat Kimani Mwangi & Another)

JUDGMENT

The Appeal herein arises from the judgment of Hon. Cherono Mr. SRM (as he then was) in a judgment delivered on the 5th day of June, 2007 in CMCC number 8182 of 2004 at Milimani.

In the said matter, the Respondent who was the Plaintiff, is the owner of plot No. 7 situated within Complex View Estate Kasarani, Nairobi, in which, he has constructed his residential house which is linked to the existing sewer line in the estate which in turn joins the main sewer line of the City Council of Nairobi. He averred that on completion of his house and/or development of the property, he applied for water connection to the City Council of Nairobi and was duly connected with the water on payment of the required deposit which services the Appellants, on or about the 24th July 2004, wrongfully, illegally and unlawfully disconnected thereby subjecting him and his family to extreme anguish and inhuman suffering for lack of vital, essential and basic facilities as a consequence of which, he suffered loss and damage.

The Respondent therefore, sought for an order of permanent injunction to restrain the Appellants their servants and/or agents from disconnecting his water and sewer and/or otherwise meddling, tampering and interfering with his water and sewer services and/or otherwise interfering with his quiet and peaceful enjoyment of his house and/or property.

The 2nd Appellant is an association of some plot owners within Complex View Estate Kasarani, Nairobi, while the 1st Appellant is a resident of the said estate and he is the chairman of the 2nd Appellant.

The Appellants filed a joint statement of defence and a counter-claim, dated the 8th day of September 2004 in which they admitted that the Respondent is the owner of plot No 7 situated within Complex View Estate Kasarani, Nairobi, in which he has constructed a residential house. They denied that the Respondent's property is connected with water and sewer by the Nairobi City Council and avers that the water and sewerage system within the Estate was installed by members of the 2nd Appellant at their cost and expense with the relevant approval having been sought and granted by Nairobi City council.

The Appellants also denied that the Respondent applied for water and was connected with water by the City Council on payment of the required deposit. They averred that any payments made by the Respondent to the Nairobi City Council were for connection of water and sewerage system from Nairobi City Council's main lines located outside the estate. They further averred that members of the 2nd Appellant have been amenable to permitting the Respondent to connect water and sewerage system from the estate subject to him paying for the cost and expense incurred by members of the 2nd Appellant in installing these services but he has neglected, failed and/or refused to make such payment or any payment at all yet he insists on accessing the services from the estate at no cost to members of the 2nd Appellant.

The Appellants further stated that as a result of the foregoing, they were entitled, as they did, to disconnect the Respondent from accessing

water and sewerage system from the estate, unless and until he paid to the members of the 2nd Appellant the costs and expenses they incurred in bringing these services to the estate and to maintain and rehabilitate the system.

In their counter-claim, the Appellants claimed a sum of kshs. 150,000/- plus interests and costs from the Respondent in order for him to access the water and sewerage system from the estate and for continuous maintenance and rehabilitation of the system.

When the matter came up for hearing before the trial court the Respondent testified as the only witness in support of his case whereas the Appellants called three witnesses including the 1st Appellant.

Upon hearing the parties, the Learned trial Magistrate in his judgment delivered on 5th June, 2007, entered judgment for the Respondent against the Appellants jointly and severally as claimed in the plaint. He also awarded him general and exemplary damages in the sum of Kshs. 100,000/- and kshs. 50,000/- respectively plus costs of the suit and interest at court rates. With regard to the counter-claim, the same was dismissed with costs.

The Appellants being dissatisfied with the said judgment preferred the appeal herein and in their memorandum of appeal filed on 3rd July, 2007, they have listed ten (10) grounds of appeal but counsel for the Appellants abandoned grounds 3 and 9 of the appeal during the hearing thereof. The appeal was disposed off by way of written submissions which both counsels duly filed on behalf of their respective clients.

The court has considered the submissions filed by both parties and it is clear that they have both divided the grounds of appeal into three (3) broad grounds as follows:

a. Failure to adequately consider the lack of a reply to defence and the undefended counter claim filed by the Appellant.

b. Misdirection on framing of issues and consideration of extraneous matters.

c. The status of the water and sewer line within the estate and that of the City Council in relation to the Respondents activities.

This is the first appeal from the decision of the Learned Magistrate. The duty of the court on a first appeal was settled in the case of Selle & Another Vs. Associated Motor Boat Company Limited & Others (1968 EA 123 in the following terms as quoted in the case of Moses Odhiambo Muruka & Another Vs. Stephen Wambembe Kwatenge & Another (2018) eKLR

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of the 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”

With that proposition in mind, the court now proceeds to consider the three grounds of appeal as re-framed by the counsels for the parties herein. As already pointed out earlier in this judgment, counsel for the Appellants abandoned grounds 3 and 9 of the appeal. These two grounds constitute the first ground as reframed and therefore the same does not require any consideration.

With regard to the 2nd ground, the Appellants have faulted the Learned trial Magistrate’s finding arguing that the same was based on misdirection on framing of issues and consideration of extraneous matters. The Appellants contended that the way the Learned Magistrate framed the issues particularly the first two, there was a premeditated outcome sought to be achieved in a biased manner devoid of the real issues in contention and that the issues as framed by the court went beyond the scope of the matters in contention. At this juncture, it is important for this court to set out the issues as framed by the Learned Magistrate which are as follows:-

1. Who is charged with the duty to supply water and to connect sewerage services within Nairobi area?
2. Do the 2nd Defendant have authority to provide the said services referred to under paragraph 1 above?
3. Is the 2nd Defendant entitled to charge the Plaintiff for connection and supply of water and sewerage services?
4. Is the 2nd Defendant entitled to disconnect the plaintiff’s supply of water and sewerage services?
5. Who shall bear the costs of the suit?

In reference to the above issues, counsel for the Appellants while admitting that the City Council of Nairobi is permitted by the law to supply water and sewerage services which fact, she submitted, was not in dispute, argued that the issue as framed, led to the false omnibus conclusion that all such services in every manner and bit whether within or outside private compounds (including infrastructure) must and are in fact provided in all cases by the council and without any other option or exception, and that no private person has a say, which to her, is absurd. Counsel submitted that the issue was only about access to infrastructure constructed and maintained by the Appellants. She averred that the Learned Magistrate having already misdirected himself on his own first two issues as framed, it was inevitable that the substratum of the case was lost.

The Appellants also faulted the learned Magistrate for descending into an unnecessary frolic of branding the 2nd Appellant as an illegal cartel such as “Mungiki” without any basis yet the 2nd Appellant is an entity registered under the Societies Act. They averred that the Learned Magistrate’s descent into branding the 2nd Appellant as a group of imposters exercising unlawful responsibilities and duties and likening them to those of “Mungiki” only served to demonstrate his personal prejudice unsupported by pleadings and arguments before him for determination. That within the aforesaid context, the Learned Magistrate failed to consider the objectives for which the 2nd Appellant was registered and in particular its objectives 2(a)(b) and (c) of its constitution and in particular objective “C” which reads;-

To encourage the plot owners to join in the development of water installation, sewerage construction, road construction and electricity installation by paying the money set by the member”.

On his part, counsel for the Respondent submitted that there was nothing wrong and irregular in the Honourable court re-framing the issues based on the pleadings and the evidence adduced. He submitted that it was the Respondent’s case that he was connected with water and sewer by the City Council of Nairobi which was the only lawful authority in Nairobi with the mandate to provide those services. It was the Respondents further case that the Appellants had no authority whatsoever to charge him for water and sewer services, and that during the hearing none of the Appellants’ witnesses was able to produce such authority. The Respondent therefore submitted that with the reframing of issues, the Honourable Magistrate correctly captured and outlined the issues for determination.

It was also the Respondent’s case that the Appellants were a cartel of group of people who have constructed their homes and have grouped to extort money from Residents who come later to construct their homes in the estate. That as a cartel of extortionists, they had no lawful authority to demand payment from the Respondent and this submission having been picked by the Learned Magistrate in his Judgment, he was perfectly in order to do so. Counsel for the Respondent urged the court to uphold the rule of law and find that the Appellants should not be allowed to disconnect the Respondent’s water and sewer which were connected by a body lawfully mandated to do so, the City Council of Nairobi.

The court has considered the submissions made by both counsels with regard to the second issue. I have also considered the pleadings filed before the Lower Court and the evidence on record together with the issues as framed by the parties in the Lower Court vis-a-vis the issues as framed by the trial Magistrate. As rightly submitted by the Counsel for the Appellants, the issues as framed by the trial court fell short of addressing the issues as covered in the pleadings and the evidence on record.

As agreed by both parties, it is not in dispute that City Council of Nairobi is the only lawful authority in Nairobi with mandate to provide water and sewerage services and that the Appellants have no authority whatsoever to charge the Respondent for those services. A clear reading of the issues as framed by the trial Magistrate were geared towards addressing those two issues which, with due respect to the Learned Magistrate were not the issues for trial before him. The only issue before the court was access to infrastructure allegedly constructed and maintained by the Appellants. I concur with the submissions by counsel for the Appellants that in so doing, the substratum of the case was lost.

On the issue of the Learned Magistrate’s descent into unnecessary frolic of branding the 2nd Appellant as an illegal cartel, the court has noted that the remark was lifted from the Respondent’s submissions but even then, there is ample evidence on record to show that the 2nd Appellant is a registered entity having been so registered on the 26th November, 2001. The certificate of registration was produced as exhibit 2 which shows that it is a legal entity registered under the Societies Rules, 1968, bearing Certificate Registration Number 20993 and having a constitution and rules which were produced as exhibit 3. In view of the foregoing, the comment by the Learned Magistrate was rather unfortunate considering objective 2(b) of the 2nd Appellant’s constitution which is **“To promote and encourage developments, such as provision of water, sewerage, electricity, roads, street lights.....”**

Turning to the 3rd issue for determination, the Appellants submitted that the issue revolves around the status of water and sewer line within the estate which were constructed through contributions by members of the 2nd Appellant in order to address the water and sewage infrastructure within the estate and to connect the same with the city council water and sewer line which is located 2 kilometers away from the estate.

According to the Appellants, the gist of the case before the Lower Court was the status of ownership of the subject water and sewage infrastructure amongst the services offered by the 2nd Appellant and whether the Respondent was entitled to benefit from the same by connecting to those services at no cost yet, the infrastructure had been put up through contributions by members of the 2nd Appellant.

The Appellants further submitted that the steps undertaken by the 2nd Appellant were supported by minutes as seen on pages 150 – 155 of the Record of Appeal. They averred that the 2nd Appellant sought approval from the City Council of Nairobi which approval was granted on 2nd September, 1998 to allow the extension of the sewer line to specifically serve the estate which construction work was acknowledged as ongoing vide a letter dated 10th February, 2006 from the City Council’s Water and Sewerage Company Limited addressed to the 1st Appellant as the Chairman of the 2nd Appellant. The Appellants stated that they had, on a balance of probabilities, demonstrated that they owned the extension of sewer line to the estate but the ultimate service provide remained the Nairobi City Council in whose favour the normal payments were expected to be made by all residents including the Appellants and the Respondents.

With regard to the counter claim, they submitted that they paid for the said extension and they still maintain the facilities alongside many other common facilities for which, the 2nd Appellant make regular payments and therefore, the Respondent is not entitled as of right to connect to the part of the Appellant’s sewer line. The Appellants argued that they are entitled to resort to disconnection of water and sewerage in absence of the Respondent’s financial contribution.

The Appellants also faulted the Learned Magistrate for failing to appreciate the context in which the dispute arose; that the membership of the 2nd Appellant being voluntary, the use of facilities put up by its members should equally be limited to the members; that if the

Respondent is not desirous of being part of the 2nd Appellant's activities, he is at liberty to construct his own septic tank for his waste management or construct a separate and direct extension of water and sewer line to the city council line.

On the part of the Respondent, it was submitted that there is no evidence that the Appellants constructed the sewer line in the estate or brought water to the estate and the costs thereof. He argued that the alleged construction was said to have been done in 1998 at a cost of Kshs. 180,000/- but by then, the 2nd Appellant had not been registered and was not a legal entity capable of suing and being sued having been registered in November, 2001.

The Respondent contended that the Appellants have not sufficiently explained the rise of construction costs from kshs. 180,000/= to Kshs. 1,131,000/= and that the receipts issued by the contractor to the 2nd Appellant were done in the name of Githiomi Primary School. Counsel for the Respondent also questioned the lack of uniformity of payment amounts of Kshs. 70,000/= to 100,000/= for those joining the 2nd Appellant in the year 2000 and thereafter at Kshs. 150,000/=.

Lastly, on the issue of general damages, the Respondent averred that the Appellants have not given good reasons why the court should interfere with the same.

The court has considered the submissions of the counsels on this issue. As rightly submitted by the Appellants, the gist of the case was the status of ownership of the water and sewerage infrastructure being amongst the services offered by the 2nd Appellant and whether the Respondent was entitled to benefit from the same at no cost to the 2nd Appellant. The 2nd Appellant is said to have engaged the services of a contractor who made the design to facilitate the construction of the water and sewerage lines within the estate and link it to the City Council line. On record, is an agreement entered into between Margaret Njoki, Charles Langat and Kathethu Thuku as representatives of the residents of Complex View Estate on one part and Mwaura Githiora as the Contractor on the other part. In it, the contractor, was to install water facility on the terms stated therein. According to that agreement, the contractor was to install the water to the plots from the City Council mains at a cost of Kshs. 180,000/-. The Appellants produced several receipts for water and sewerage connection, all of which were issued in the year 1998. Of importance, is the one dated the 1st September, 1998 issued to the 1st Appellant for Kshs. 5,500/= being payment for sewer connection and supervision.

As already stated, the bone of contention is the ownership of water and sewerage infrastructure from the main line installed by the City Council of Nairobi to Complex View Estate (the estate), which the Appellants contend they installed. They have argued that they obtained the relevant consent and approvals from the City Council of Nairobi vide the letter dated the 2nd September, 1998. The court has perused the record of proceedings and it is noted that the aforesaid letter was the subject of objection during the hearing and in his two rulings, the Learned Magistrate declined to allow its production in evidence. Though the said letter does not form part of the evidence, it was annexed to the replying affidavit of the 1st Appellant sworn on 4th day of August, 2004. The Learned Magistrate having disallowed its production, this court cannot make reference to it as it does not form part of the evidence in the case.

In the premises, the only logical conclusion that can be made is that there is no evidence on record to prove that the Appellants were given the approval to extend the water and sewerage to the estate. Even assuming that the approval was given, the said letter shows that the 2nd Appellant was to comply with some requirements failing which, it would render the joining of the constructed sewer to the Nairobi City Council Sewerage Network illegal, and may not be adopted by the City Council. No evidence was tendered before the trial court to prove that the requirements were met and that the works were adopted by the City Council. In the absence of such evidence, the works would be illegal. The 2nd Appellant had the burden of proving the aforesaid and it failed to do so. As it stands now, this court is not in a position to say if the construction was illegal or not and the 2nd Appellant cannot expect to benefit from an illegal construction.

Regarding the payments made to the contractor, this court notes the following:-

1. The total amount in the receipts is more than the amount agreed upon in the agreement between the contractor and the representatives of the 2nd Appellant.
2. There is no explanation on the discrepancy in the amounts or how the claimed figure of Kshs. 150,000/- was arrived at.
3. Thirdly, all the receipts were issued to Complex View Estate which is a separate legal entity from the 2nd Appellant herein. By the time they were issued, the 2nd Appellant was not in existence having been registered in the year 2001.
4. Fourthly, the receipt for payment of sewer connection and supervision fee was issued in the year 1998 to the 1st Appellant and not to the 2nd Appellant, which as I have stated above, had not been registered by then. As such, the receipt cannot be said to have been evidence of payment by the 2nd Appellant.

With regard to the general and exemplary damages, I find that the same were not satisfactorily proven. The Learned Magistrate erred in awarding the sum of Kshs. 150,000/- . I find that the same was not merited and I do set aside the same. Save for the general and exemplary damages, the other portion of the appeal has no merit. The appeal partially succeeds. For avoidance of doubt, the Appellants were unable to prove their counter claim.

Due to the nature of the case and the orders made in this appeal, each party shall bear its own costs of the appeal.

It is so ordered.

Dated, signed and delivered at NAIROBI this 17TH day of OCTOBER, 2019.

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent