



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 19 OF 2017

JONES MUTHAMI T/A MUTHAMI ENTERPRISES.....APPELLANT

VERSUS

JOHN MWANIKI MWANAKE.....RESPONDENT

J U D G M E N T

1. The Respondent, **John Mwaniki Mwanake** sued **Jones Muthami T/A Muthami Enterprises**, the Appellants claiming **Kshs. 1,242,000/=**, interest on contractual rate of **20%**, costs and any other relief that the Court would find it necessary to grant.
2. It was pleaded that the Respondent contracted the Appellant who represented himself as an expert in the field of hydrological survey and borehole drilling, did a hydrological survey at a cost of **Kshs. 60,000/=** and issued a positive report to the effect that the Respondent's land was suitable for borehole drilling. As a result the Respondent entered into an agreement dated **7th July, 2015** followed by an addendum of **27th July, 2015** where the Appellant was to drill for him a borehole at all inclusive cost of **Kshs. 7,500/=** per metre upto a maximum depth of 150 metres, the total sum being **Kshs. 1,125,000/=**.
3. It was further agreed that in case of default, the defaulter would refund a bonafide party the total amount paid plus interest at **20%** of the sum paid.
4. The Respondent paid the Appellant **Kshs. 1,242,000/=** in total. He drilled the borehole upto the depth of 145 metres. On realizing that no substantial water would be realized he abandoned the project and ignored the effort of the Respondent to recover the amount.
5. In his statement of defence and counter claim the Appellant stated that following their agreement drilling commenced and the Respondent defaulted in payment of **Kshs. 150,000/=** having failed to meet his obligation, a sum that he was demanding.
6. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant did breach the contract and ordered him to refund the Plaintiff **Kshs. 1,035,000/=** and **Kshs. 45,000/=** for a pump testing. She ordered the Appellant not to pay the **20%** contractual fee as he drilled the borehole though shallow and has a bit of water. In the result the Appellant was not entitled to **Kshs. 150,000/=** and awarded the Respondent costs of the suit.
7. Aggrieved by the decision of the learned trial Magistrate, the Appellant appealed on grounds that she misdirected herself when she failed to establish that it is the Appellant who carried out duties and

obligations as agreed between the parties; That the decision was based on extraneous matters that were not in issue; the Magistrate was biased; the decision reached was contrary to the law and **Order 21 Rule 4** of the **Civil Procedure Rules** was not complied with.

8. The Appeal was canvassed by way of written submissions. It was urged on behalf of the Appellant that he did the survey for water as agreed and drilling work commenced and was completed. That the pump testing was done and a certificate to that effect issued. An analysis of water report was issued. That the allegation that the water quantity found was not what was expected was not proved. Therefore it is the Respondent who failed to discharge his duty.

9. That the Magistrate was biased as she failed to follow the law with an intent to favour the Respondent and as a result failed to put into consideration all that was done by the Appellant as part of the contract and within the terms agreed upon.

10. It was urged on the part of the Respondent that the agreement was to be enforced in accordance with the law but he failed to comply with the law. That the borehole drilled by the Appellant is illegal under the law. The technical report was given by a person who was not a hydro-geologist. He cited the case of **Stephen Kilonzo Nyondo vs. Samuel Wahome Kibuthu (2015) eKLR** where reference was made to the case of **Joseph Constantine Steamship Co. vs. Imperial Smelting Corporation Ltd (1871) LR 6 Exch. 269** where **Lord Wright** observed that:

“In ascertaining the meaning of the contract and its application to the actual occurrences, the Court has to decide, not what the parties actually intended but what reasonable men should have intended. The Court personifies for this purpose the reasonable man.”

11. That the Respondent expected that the Appellant had all the required licences and permits under the law, he relied on the Appellant’s skill and expertise. That the Appellant intimated that he would dig 100 metres that would produce 10,000 litres of water daily but no such water was found. He dug 145 metres out of the agreed 150 metres but no such water was found. That fairness therefore calls for the Appellant to refund the sum.

12. That the Appellant abandoned the project on realizing that the borehole would not bring forth any substantial quantity of water as earlier alleged in the survey report therefore he was in breach of the contract.

13. As a first Appellate Court, it is my duty to re-examine a fresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123** and **Williamson Diamonds Ltd vs. Brown (1970) EA 1**).

14. At the hearing in the Lower Court each party came up with his own issues for determination that were consolidated thus:

- Whether the Appellant and Respondent entered into a contract.
- Whether the hydro geological survey was conducted.
- Whether the Appellant provided the amount of water that was indicated in the hydro geological survey?
- Whether the contract was complied with.
- Is the claim of **150,000/=** recoverable?

15. The hydro-geological survey undertaken at the proposed site for drilling the underground water to

ascertain the most suitable site for exploration of significant quantity of water was done by DW2, **Joseph Kyalo Ndambuki** following instructions given by the Appellant.

16. The witness described himself as a designs and hydro-geologist without required qualifications. On cross examination he stated that he has a diploma in art and design and it was within his knowledge that to be qualified one required to be seized of a degree in science and geological engineering. To undertake the work of a hydro-geologist one would be expected to have a first degree in geology, environmental science, geophysics, science or engineering, with a postgraduate qualification in hydro-geology.

17. Exhibit 1 adduced in evidence was a preliminary information (Hydrological Survey) prepared by **J. Ndambuki** dated **4th July, 2015**. It was DW2's evidence that he did the survey but the report was to be prepared by the surveyor. That he took his findings to a Geologist, **Mr. Ituli** but he could not tell if the Appellant got the report from the Geologist and that a report was required from a licensed Geologist.

18. At the outset, the Appellant relied on an unqualified person who represented himself as a hydro-geologist. Only a qualified hydro-geologist would give a detailed measurement and description of underground aquifer that would have an influence on the water quality and quantity.

19. Following the report of DW2, parties herein entered into an agreement to drill the borehole dated the **7th day of July, 2015**. The agreement was in respect of drilling the borehole and cost of the work. At the point of signing the agreement that was witnessed by **William Muli Nguli**, **80%** of the total sum was paid and the work was to commence on the **9th July, 2015**. Subsequently, on the **27th day of July, 2015** an addendum to the agreement was made between the parties. The total depth of metres to be drilled was approximated at 150 metres. The cost of extra metres drilled was to be paid upon completion of the project at the rate of **Kshs. 7,500/=** per metre. **20%** balance was to be paid upon the driller producing to the client the Water Analysis Report. The commencement date was given as the **29th day of July, 2015**. A default clause was included. It stipulated that in case of default by any of the parties, the defaulter was required to refund the bonafide party the amount already paid for the work plus an interest of **20%** and the agreement was to be governed by, construed and enforced in accordance with the Laws of Kenya.

20. DW3 **John Kiilu Mbindyo** was sub-contracted to do the drilling. It was his evidence that he drilled 150 metres and covered the well. The only thing they did not do was graving and without graving the work was not complete.

21. According to the law in Kenya before drilling a well, there is need for authorization by the Water Resource Management Authority (WARMA). The abstraction of water in the instant case involved employment of workers therefore a permit could only have been issued after a successful hydro-geological survey would have been carried out from the proposed borehole. No notice was however given as required. As a result there is no indication as to whether WARMA would have objected to the drilling exercise being carried out.

22. According to DW3 he only drilled the length as instructed. The hole was left open. They did not do anything else. Therefore there was no casing of pipes, and no gravel was put outside the casing. This would mean that there was no development done that would have enabled the air to jet out hence allowing water to come out as expected.

23. To be able to tell the quantity of water that can be pumped out of the borehole, test pumping must be done. It was urged by the Respondent that it was done but there was no evidence of the yield of the well. The Appellant on the other hand urged that there was a report of pump testing which was evidence that he struck water.

24. The Respondent through his Advocate wrote a demand letter dated the **26th August, 2015** that the Appellant stated he received two (2) weeks later. The demand was for water analysis report and/or the sum paid **Kshs. 1,035,000/=** plus interest at **20%**.

25. It was the duty of the Appellant to keep records of the progress report of the work done, measurements of the levels of the water struck, measurements of the quantity of the water obtained. All these should have been included in the completion report that should have been submitted to WARMA and the Respondent.

26. The pumping test data dated **1st December, 2015** was availed after the suit had been instituted in **September, 2015**. Similarly the water Analysis Report was availed after the demand letter was sent out and no borehole number was obtained as required.

27. The question to be answered is therefore who was in breach of the agreement. From the foregoing, it is apparent that the Appellant herein breached clause 5 of the agreement, as he did not comply with the Laws of Kenya regarding drilling of the borehole.

28. The Respondent on the other hand from the outset demonstrated some indifference to the legislation governing drilling either out of ignorance of the law or a deliberate move. I say so because having retained the Appellant to drill for him the borehole the land had to be surveyed. It was within his knowledge that the survey was done by DW2 and he was issued with a report. The report itself which is handwritten (**see Exhibit 1**) having been prepared and signed by **J. Ndambuki** does not disclose his designation. Instead of questioning the document he proceeded to enter into an agreement with the Appellant. The agreement was in respect of the work to be done and the cost to be met. According to the agreement he gave a deposit of **Kshs. 600,000/=** which was **80%** of the total cost for a depth of 100 meters. He was required to pay for any further metre on the site following advice to be given. The outstanding balance was to be paid after pump-testing.

29. The addendum to the initial agreement was entered into twenty (20) days later and signed before his advocate per the terms of the agreement. The terms of the initial agreement were upheld. It was further agreed that **20%** of the balance of the sum paid would be paid upon the driller producing to the client the water analysis report. The date of commencement of the work was varied to the **29th July, 2015** but the expected date of completion was not indicated.

30. Evidence adduced proves on a balance of probability that the well was drilled and some water deposit was struck. DW3 **Fredah Gitau** a borehole technician did pump testing. She stated that she inserted a pump at a depth of 145 metres. What she noted was that the water was rising slowly. She took the water sample and did a report and recommended the type of pump to be used. According to her expertise the borehole could produce 1000 litres per hour for five (5) hours.

31. It is stated by the Respondent that at the time of abandonment of the project he had paid **Kshs. 1,035,000/=**. Circumstances in which the additional sum of money was paid are not stated. The balance could only have been paid after extra metres in dept had been drilled. A water analysis report was availed later on. It was done in **September, 2015** and received on **23rd September, 2015**. This was before the case was filed in Court. The question to be answered is why the Respondent breached the agreement by making further payment before the production of the water analysis report? Since the date of completion of the work was not set, it cannot be alleged that the Appellant caused the Respondent to pay money upfront knowing that the project was not viable.

32. The learned trial Magistrate in the circumstances should have looked at the seriousness of the breach of either party that affected the contract.

33. In this case the Appellant who should have been conversant with the law regarding drilling of the borehole, drilled an illegal borehole without authorization from WARMA having failed to instruct a qualified person to carry out the hydro-geological survey an act that will make the Respondent start of the process of following the laid down legislation to come up with a proper borehole.

35. Since the breach was by both parties it was erroneous on the part of the learned Magistrate to fully comply with clause 4 of the agreement.

35. In the premises I set aside the Judgment entered and substitute it with the following orders.

i. Judgment is entered for the Respondent (Plaintiff) in the sum of **Kshs. 60,000/=** that he paid for the hydro-geological survey.

ii. The counter claim is hereby dismissed.

iii. Costs of the suit in the Lower Court and on Appeal are awarded to the Respondent plus interest.

36. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of September, 2018.

L. N. MUTENDE

JUDGE