



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 90 OF 2010**

**BENJAMIN MWONGERA.....APPELLANT**

**VERSUS**

**BENJAMIN MUTUMA (Chairman).....1<sup>ST</sup> RESPONDENT**

**JOSHUA MURURU (Secretary ).....2<sup>nd</sup> RESPONDENT**

**(Sued on behalf of KIBURINE WATER PROJECT)**

**JUDGEMENT**

By an amended plaint dated 6<sup>th</sup> May 2004 the appellant herein sued Benjamin Mutuma and Joshua Murugu Chairman and Secretary respectively of Kiburine Water Project seeking a declaration that the disconnection of his water supply on diverse dates between November 2002 and February 2003 by the defendants was unlawful and that the court to order a permanent injunction to restrain the defendants from future interference and disconnection. He sought general damages as well as special damages for the frustration of not having the water supply and the damage to his water tank and plastic pipes which were uprooted and ferried away.

The appellants case was dismissed by the trial court for the reason appellant was not certain of the dates when water was disconnected from his farm and therefore the plain was defective for uncertainty. The trial court also concluded that defence remained unchallenged as far as the cost and number of pipes were concerned because they were pipes that reached his boundary but not into his farm.

It was also held that the appellant didn't prove that his tank was damaged because of lack of water because PW2 who inspected the tank alleged there were cracks and he concluded the tank was damaged beyond repair but it turned out that the tank was still holding water. That PW2 could not tell if the crack was normal wear and tear as he could not also assess the age of the tank. That actual cost of tank was not pleaded or even proved.

The suit was also dismissed for reasons the appellant sued as a member of the water project. When he was not and ought to have known that he was such a member because the decision was reached in his presence.

There was the issue of time limit. That appellant sought leave to file suit out of term and was given 21 days within which to sue but filed suit 50 days after order was issued without seeking extension of the leave to sue out of time. Being aggrieved by the trial courts determination the appellant filed this appeal on the grounds that:

- The Principal magistrate erred in law by holding that the plaint was defective by virtue of indicating that water was disconnected on 10.10.2002 when the defendants admitted having disconnected the water supply to the plaintiffs homestead.
- That the trial magistrate erred in holding that the suit was filed out of time and yet leave was granted in Miscellaneous Application No. 131 of 2003.
- That the Principal magistrate erred to find that the amended plaint was bad in law.
- That the trial magistrate failed to make a finding that the defence offered was that the appellants had failed to follow rules and regulations of the water project hence the disconnection when there was no evidence of any breach of the rules.
- That the trial magistrate failed to consider the plaintiffs/appellants evidence on record in totality and basically ignored the plaintiffs evidence.
- That the trial magistrate arrived at a wrong decision after failing to adhere to the oxygen rule.
- That the trial magistrate erroneously, irregularly, unlawfully and without any justification kept judgment for a period of 8 months before it was eventually delivered.
- That the trial magistrate failed to note that the defence exhibits were purposefully prepared for the case.

The appellant sought that the trial courts judgment be set aside and that a decree do issues allowing his prayers with costs of appeal. The appeal was canvassed by way of written submissions and the appellants counsel confirmed that leave had been sought in Misc. Appl. No. 131 of 2003 to file suit out of time and so the same was not time barred. It was submitted that the trial court erroneously found that the Respondents are not the ones who disconnected the water.

That the Magistrate ignored the evidence adduced by the appellant and relied on procedural technicalities to dismiss the suit and disregarded provisions of Article 159 (2) (d) of the constitution.

The Respondents on the other hand submitted that pleadings of appellant at paragraph 5 of the plaint is not supported by the evidence he gave in court. It was submitted that the alleged water disconnection of 10<sup>th</sup> October 2000 was not subject of this suit but the alleged disconnection of between November 2002 and February 2003 which the plaintiff failed to prove.

It was submitted that the appellant was bound by his pleadings and even when allowed to amend his plaint he didn't remedy the anomaly so that pleadings are in tandem with the evidence. The authority of **Dakiangi Distributor (K) Ltd vs Kenya Seed Co. Ltd (2015)** was relied upon. It was submitted that the project issued appellant with a notice to disconnect him and he responded to the letter and copied to chief seeking intervention and he can't be heard to say that no notice was issued to him as the disconnection was done after expiry of the notice.

It was also submitted that the appellant breached mandatory terms of order 8 Rule 7 and his plaint was rightly dismissed.

It was submitted that the trial court rightly dismissed the appellants claim and the appeal should be dismissed from the memorandum of appeal and submissions by both parties and from the proceedings and judgment of the lower court this court is to consider whether in arriving at the determination in the trial court the magistrate considered the right principles of law against the evidence tendered.

The 1<sup>st</sup> prayer by the appellant was for an injunction to restrain defendants from future interference. The appellant's water was already disconnected by the time he came to court and there was nothing to prevent from happening.

The appellants claim was that the defendants had disconnected his water on diverse dates between November 2002 and February 2003 when he gave his evidence in court he said that the 2 defendants with others not in court had on 10<sup>th</sup> October 2002 disconnected his water. He said that he was not at home when the disconnection was done and he had not been given a notice but 1<sup>st</sup> Respondent in his testimony showed the appellant was given a notice which he responded to and copied to chief seeking his intervention. It was also said that appellant hit the secretary on the head due to anger because he had been fined for disobeying the projects rules and regulations. 1<sup>st</sup> Respondent said the water was disconnected on expiry of 14 days as per the notice issued to the appellant.

The fact that the appellants water was disconnected is true and though his pleadings as to date is not consistent with the evidence, the reason why he was connected were justified. He went against the rules and regulations of the water project which he was a member. He disconnected another member and did not follow what the other committee members told him. The only reprieve this court can give is to direct the committee of the Respondent water Project to reconnect the appellant to the water supply if at all the project still exists but the appellant has to give an undertaking to abide by the rules and regulations of the water project for its smooth running. The costs of the appeal will be borne by each party. It is so ordered.

**HON. A.ONG'INJO**

**JUDGE**

**12.10.18**

**Before Adwera Ong'injo J**

C/A:Penina

Mr Mutegi Advocate for Respondent

1<sup>st</sup> Respondent – Present in person

2<sup>nd</sup> Respondent – Present in person

M/s Ondari & Co. Advocate for appellant – N/A

**Court**

Judgment delivered, dated and signed in court.

**HON. A.ONG'INJO**

**JUDGE**

Copies of the judgement to be supplied to parties upon payment of copying charges. DR to notify the appellants counsel of the judgment.

**HON. A.ONG'INJO**

**JUDGE**