REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 28 OF 2014

ROBERT NGARI KANIARU

JOSEPH NDUNGU

RAHAB WANGECHI MWANGI (sued as office bearers of

Treffos Kiburuti Water Project)……APPELLANT

VERSUS

WILSON MACHARIA RUKWARO…….....……RESPONDENT

JUDGMENT

This appeal arises out of a judgment by the magistrates' court in **Nyeri Chief Magistrates' Court Civil Case No. 196 of 2012** (Hon. Christine Wekesa) in which the respondent sued the appellants for what he stated in the plaint as:-

> "***1. The defendants be ordered to reconnect the plaintiffs water supply and pay the plaintiff Kshs 10,000 subsistence while attending Nyeri Criminal Case No. 1078/09 and losses of Kshs 30,000 for dead fish and crops due to disconnection of water illegally and expenses of Kshs 10,000 when sorting out the issue before the chief and water offices.***
>
> ***1a. A declaration that the defendants wrongfully disconnected the plaintiff's water supply and wrongfully suspended the plaintiff from membership.***
>
> ***2. Costs and interest."***

Apart from prayer 2 it is difficult to make out what exactly the respondent was praying for but somehow the learned magistrate was able to encrypt what appears to me to be a puzzle in the plaintiff's prayers and entered judgment against the appellants for what is described in the decree as:-

> ***"a) Kshs 10,000 subsistence.***
>
> ***b) Kshs. 30,000 for loss of dead fish and crops***
>
> ***c) Costs and interests at court rates from the time of delivery of this judgment till payment in full.***
>
> ***d) Defendant is also ordered to reconnect the plaintiff water supply."***

All that I can gather from the respondent's amended plaint is that that the respondent was at one point a member of Treffos Kiburutu Water Project; it is not clear from the plaint whether this was a registered organisation and what business it was established for but whatever its nature or its objects, the respondent's membership in the group was terminated and his water supply disconnected. It his case therefore, that the decision to eject him from this group and to disconnect his water was oppressive and unfair and that he was condemned unheard.

The respondent averred that the water project owed him Kshs 10,000/= in travelling allowances for attending a criminal in Nyeri law courts. He demanded the amount together with interest calculated at 25% per annum and the expenses he incurred in recovering the amount which according to his pleadings amounted to Kshs 10,000/=!

He also claimed Kshs 30,000/= allegedly for the "death of fish and crops under cultivation". Again it is not pleaded the circumstances under which the fish died or the fate of the crops said to be under cultivation.

The appellants denied the respondent's claim and filed a defence to that effect.

Even with all its glaring ambiguities, the respondent's suit succeeded and as noted, judgment was entered in his favour. It is against this judgment that the appellants appealed; in their memorandum of appeal, the appellants raised only four grounds; these are that:-

1. The learned magistrate erred in law and in fact in entertaining a claim in which it had no jurisdiction to hear.

2. The learned magistrate ought to have struck out the suit and advised the respondent to exhaust the machinery set out by the Water Act to resolve the dispute.

3. The learned magistrate erred in law and in fact in awarding compensation for loss of fish and crops without sufficient evidence to support the claim.

4. The learned magistrate erred in law and in fact in concluding that the respondent was condemned unheard yet he was given ample opportunity to appear before the committee but that he declined.

In his evidence the respondent testified he was the chairman Treffos Kiburutu Water Project until sometimes in 2009 when its office bearers stepped down to pave way for investigations into allegations of misappropriation of funds. Although he stepped down, the respondent continued attending a case in court at Nyeri on behalf the water project; in that case one of the members of the project had been charged for stealing the project's pipes and it was the respondent's evidence that he was to be paid his allowances which amounted to Kshs 10,000/=.

The respondent admitted having received a letter dated 20th June, 2011 in which the accusations levelled against him by the appellants were raised. The letter asked him to respond to the accusations. He contested in court the truth of those the allegations. At his cross-examination the respondent admitted that he responded to the letter by the appellants vide his letter dated 21st June, 2011.

He also admitted that he had not paid for what was described as the monthly water maintenance fee since January, 2011 and that his water was disconnected in the same year more particularly on 17th July 2011. The water was connected June, 2009. According to him, the appellants ought to have deducted whatever he owed from the sum the water project owed him.

He said that contrary to the appellants' allegations, he stopped paying for the water in 2011 and not in 2009. The respondent denied knowledge of the project's constitution and the bylaws and in particular clause 10 thereof under which disciplinary measures and procedures were stipulated.

The respondent also testified that as a result of the disconnection his onion and cabbage seedlings were

destroyed. His animals were also starved and that his fish fingerlings also died. He approximated his loss to amount to the sum of Kshs. 30,000/=.

The respondent's father testified as his witness and said that his son's water was disconnected on 17th July, 2010 in his absence. He, however, admitted that if the water services were not paid for then the water would be disconnected.

The chairman of the water project, the 1st appellant herein testified on behalf of the appellants and said that the project was initiated way back in 1996 and that he took over the chairmanship of the project in **December, 2009;** the previous chairman was the respondent who left after there arose problems with the management of the project.

Inorder to manage the project effectively, this witness and his team came up with the Constitution to run the affairs of the project; the Constitution took effect on **9th October, 2010** and that it was approved by members of the project who included the respondent.

The witness testified that the respondent had his water connected in January, 2009; he paid for the connection and monthly remittances, referred to as maintenance fee up to June, 2009. For the next two years or so the respondent did not make any payments and therefore the project committee resolved to suspend him for six months and have his water disconnected forthwith. These actions were taken in accordance with the constitution of the organisation and whose bylaws provided that water would be disconnected if payment was not made by the 5th day of every succeeding month. In the respondent's case he did not pay for the water for two years and therefore the disconnection was long overdue. It was the chairman's testimony that if the respondent paid the sum due, his bid to be supplied with water again would be referred to the committee for consideration.

On the respondent's allowances of Kshs 10,000/= the witness admitted that the respondent was going to be refunded this sum but that before he sued for this sum he never issued the appellants with any notice of intention to sue.

Thus far went the material evidence of both the respondent and the appellants. While analysing this evidence, the learned magistrate concluded that the respondent's suit ought to succeed partly because he was never given a hearing, or rather, he was condemned unheard when the committee resolved to suspend his membership from the water project and disconnect his water.

My own evaluation of the evidence seems to suggest the contrary; by his own admission the respondent acknowledged receiving the appellant's letter dated letter dated 20th June, 2011 which contained the allegations against him. In fact, he referred to this letter relatively extensively in his testimony and not only outlined every complaint levelled against him in that letter but also responded to each of those allegations. The pertinent part of that letter as far as the respondent's argument that he was condemned unheard is concerned is in the final paragraph; it said:-

> ***"If you have any explanation in your defence, it must be received in the project within seven days from the date of this letter. Thereafter the determined disciplinary action will be taken against you without further reference to you…"***

The respondent responded almost immediately and wrote back on 21st June, 2011; in his letter the respondent was emphatic;

> ***"Please note that you may be acting on rumours and all manner you may be executing the powers at your disposal that is an abuse of office. There is no court in this world which discipline (sic) a (sic) anyone without a trial.***
>
> ***Please also note you are not entitled to write threats letter to me because you are not one of the law enforcement team. Follow justice to the latter(sic) but not threat letters.***

The boulderies (sic) of my father's land are not part of your core service rather you are not a beneficiary or a relative of the same. Please keep-off and history will judge your actions in the best way possible. I will not be cowed by threats and intimidations."

The appellants' letter suggests to me that the respondent was given opportunity to defend himself; his letter in response, on the other hand, suggests that rather than answer to the issues raised by the appellants, the respondent chose to ventilate his anger against the author and dismiss his letter as nothing more than rumours, threats and intimidations.

A careful consideration of the respondent's evidence at the hearing of his suit reveals that he was able to identify the questions raised by the respondent and that he had answers to each of those questions; whether those answers would have persuaded the project committee to reach a different decision from the one it took is a question which this court cannot answer but as far as the determination of this appeal is concerned, it is important to appreciate that the respondent had the opportunity to present the appellants with the kind of response that he gave in his evidence.

If the respondent clearly chose not to respond to the allegations against him even after he had been given opportunity to do so, I am reluctant to agree with the learned magistrate that the respondent was not given a hearing or that he was condemned unheard. In my humble view, the learned magistrate misdirected herself on the evidence and the law and arrived at the wrong conclusion on this issue.

One of the questions that was central in the dispute that culminated in the suspension of the membership of respondent from the water project and the disconnection of his water was the non-payment of the monthly subscription of Kshs 200/= which both parties described as the maintenance fee.

In his evidence, the respondent admitted that he had defaulted in remittance of this monthly fee but not to the extent alleged by the defendants; however, he did not produce any evidence to prove that he had made payments for any particular period ever since he started enjoying the services of the water project. I understood him to say that he had misplaced his receipts. The receipt he produced was what he admitted to be composite payments by several members of the project; in his own words that receipt was "only to show that money was paid by members which I used to collect".

According to the project's constitution which the applicant feigned ignorance of, default in payment of the maintenance fee would warrant disconnection of the water, amongst other punitive measures that the appellants were entitled to take. In the face of the respondent's own admission and in the absence of any evidence that he had been paying the requisite monthly fees for the services he enjoyed, there is no particular reason why the appellants would be restrained from taking the kind of action they took against the respondent.

The only other issue in this appeal is whether the claim of Kshs 30,000/= for 'loss of dead fish and crops under cultivation' was proved; in my view, it was not and ought not to have been awarded. In the first place, this part of the claim was so ambiguously pleaded and prayed for that it would require one to tax his mind to make out the basis of this particular cliam. All that the respondent said in the body of the plaint on this claim is this:-

"Particulars of loss

Death of fish and crops under cultivation, Kshs 30,000"

It is a cardinal principle in pleadings that so far as possible, every pleading must be concise and precise, clear and definite. I suppose this is what **Order 2 rule 3** of the **Civil Procedure Rules** adverts to when it says:-

3. (1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be

proved, and the statement shall be as brief as the nature of the case admits.

With due respect to the learned counsel for the respondent, the plaint drawn and filed on the respondent's behalf did not measure up to the standards envisaged in this Order; I cannot see a statement in a summary form of the material facts on which the claim of Kshs 30,000 is based. The pleading was neither concise and precise nor clear and definite.

Pleadings aside, the claim for Kshs 30,000/= was not proved. The respondent did not provide any evidence of how he had suffered a loss of this amount. All that he produced was an exercise book in which there were two lines of writings in kikuyu language purporting to be sale agreement for fish fingerlings; in the absence of the English translation, it is not clear from those writings whether any fingerlings were purchased as alleged or how much they cost and whether any payments were made or received. In essence there was no evidence of purchase of the fingerlings at all. The other deficient aspect of this claim is that it is not clear how much loss was attributed to the "death of fish" and "crops under cultivation."

To compound the respondent's claim even further, the respondent testified that the sum of Kshs 30,000/= was the approximate loss he suffered. It must be noted that the sum claimed was special damages which in all cases must be ascertainable; it is trite that special damages must not only be specifically pleaded but they must also be proved. I have already expressed my reservations about the standard of the respondent's pleadings but on this particular issue of proof all I can say is that without any proof of loss there is no basis upon which one would award damages under the head of special damages; the learned magistrate erred in law in awarding this sum.

The only award that the respondent was entitled to, in my view, was the sum of Kshs 10,000/= which the appellants admitted that their organisation owed the respondent and that this sum would even have been paid to him except that the respondent filed his suit without any notice of such an intention. Indeed there is no evidence that any notice of the respondent's intention to sue was ever issued before the suit against them was instituted. In these circumstances the respondent was entitled to his claim of Kshs 10,000/= but he would not get costs.

In the ultimate I am persuaded that the appellants' appeal is merited and is hereby allowed. For avoidance of doubt the award of the lower court is varied to Kshs.10, 000/= together interest at court rates from the date of judgment in the lower court but with no costs. Since the appeal has partly succeeded each party will bear their own costs.

Dated, signed and delivered in open court this 12th day of February, 2016

Ngaah Jairus

JUDGE