



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL CASE NO. 17 OF 2018

(FORMERLY HCCA NO. 42 OF 2006)

B.O.G ST. MARY'S KIBABII BOYS

HIGH SCHOOL.....APPELLANT

VERSUS

RICHARD BIGALA WEPUKHULU

MARY NEKESA SITUMA

WAFULA ECHALO (Being officials of

KIBABII COMMUNITY WATER PROJECT).....RESPONDENTS

J U D G M E N T

When this appeal was first placed before me on 25th March 2019, **MR MURUNGA** Advocate for the Respondent informed the Court that the project subject of this appeal had infact already been frustrated following the order sought to be appealed. He took the view that in the circumstances, this appeal would be an academic exercise.

However, **MR WASWA** for the Appellant informed the Court that his instructions were for the appeal to proceed.

The subject of this appeal is the ruling of **HON. F. N. KYAMBIA** (Resident Magistrate) dated 14th September 2006 in which he allowed the Respondents' application for a temporary injunction restraining the Appellants, their agents, servants or any persons claiming through them from interfering with the Respondents construction works going on at **KANGABASI WATER SPRING** on **L.R NO EAST BUKUSU/NORTH KANDUYI/692** until this suit is heard and determined. The application was premised on a suit in which the Respondents pleaded that they have a beneficial interest on land parcel **NO EAST BUKUSU/NORTH KANDUYI/692** having acquired the same for valuable consideration and having obtained funding to the tune of Kshs. 3,319,857/= had commenced a water project for the benefit of the Kibabii Community. However, the Appellants were claiming that the **KANGABASI WATER SPRING** from which the Respondents were construction a pipeline belongs to them and would not allow the Appellants to carry out the project even after several meetings to arbitrate the dispute.

The Appellant filed a defence alleging, inter alia, that the land parcel **NO EAST BUKUSU/NORTH KANDUYI/692** infact belongs to a third party and the suit is incompetent and a non – starter. The Appellant denied having interfered with the Respondents' project adding that the Respondents representative one **MR SIKOLIA** and a water officer had in April 2006 attempted to pull down the building housing the Appellant's water pumping generator and were arrested by the police and the suit raises no triable issue.

The appeal was admitted sometime in 2009 although the date is not clear. It was placed before me some ten years later on 25th March 2019 when directions were taken that it be canvassed by way of written submissions. Those submissions were duly filed by **MR WABWILE** instructed by **WABWILE & CO ADVOCATES** for the Appellant and **MR MAKALI** instructed by **J.O MAKALI & CO ADVOCATES**.

In seeking to have the ruling of the subordinate Court set aside and the whole suit struck out for want of jurisdiction, the Appellants have put forward the following grounds of appeal:-

- 1. The learned Magistrate erred in law and fact in entertaining a matter which was outside his jurisdiction.**
- 2. The learned trial Magistrate erred in law and fact when he granted prayer (c) of the Respondents' application which is**

invariably tantamount to granting the main suit prior to hearing.

3. The learned trial Magistrate erred in law and fact when he granted a permanent injunction on an interlocutory application.

4. The learned trial Magistrate misdirected himself when he entertained the application for injunction without first making a ruling on the preliminary issue of jurisdiction.

5. The learned trial Magistrate erred in law when he withheld his hand from striking out the entire suit for want of jurisdiction and referred (sic) the Respondents to the Water Services Regulatory Board which by virtue of the WATER ACT 2002 is seized of jurisdiction to entertain such matters.

I have considered the record of appeal and the submissions by counsel.

I must start by reminding myself that this is an appeal against an order of a trial Court granting an injunction pending trial. Such an order is an equitable remedy in which the trial Court exercises its discretion and as counsel for the Respondent has correctly submitted, an appellate Court will only interfere with the trial Court's discretion if satisfied that:-

(a) The trial Court misdirected itself, or

(b) The trial Court misapprehended the facts or took into account considerations which it should not have taken into account or failed to take into account considerations which it should have taken into account, or

(c) The decision, albeit discretionary, was plainly wrong – see MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 eKLR and also MBOGO & ANOTHER V SHAH 1968 E.A 93.

Before I consider if the trial magistrate's exercise of his discretion was plainly wrong as to call for my interference, I must first determine whether in fact the trial Court was not seized of the requisite jurisdiction to determine the application before it and indeed the suit itself. That is really the crux of this appeal as per grounds 1, 4 and 5 of the Memorandum of Appeal. An issue of jurisdiction must be determined first because without it, the Court will down its tools. The locus classicus on this is the celebrated case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" .V. CALTEX OIL (KENYA) LTD 1989 KLR 1** where NYARANJI J A held as follows:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Ground 4 of the Memorandum of Appeal faults the trial Magistrate for entertaining **"the application for injunction without first making a ruling on the preliminary issue of jurisdiction."** The question as to whether or not a trial Court is seized of jurisdiction in a matter before it is usually taken up at the first instance as a Preliminary Objection although it can still be raised at any time when the suit is still alive. In all fairness to the trial magistrate, the issue of his jurisdiction in this matter was not raised for determination as a preliminary issue. It was raised as ground No. 2 of the grounds of objection and the trial magistrate considered it among the other grounds put forward as objections to the application for injunction. This is how he addressed it in his impugned ruling:-

"To answer this question, I start by stating that the Water Appeal Board is established under Section 84 of the WATER ACT and its jurisdiction is laid down in Section 85 of the said Act. The jurisdiction of the Board is to deal with disputes relating to decision or order of the Water Resource management Authority, the Minister of the Regulatory Board concerning permit or licence under the said Act. As I have stated herein above, the dispute between the Applicant and the Respondent is basically the access to a water resource and it is my finding that such is not a dispute to be referred to the Water Appeal Board and I do find that this Court has jurisdiction to entertain the application."

In questioning the trial magistrate's jurisdiction to determine the application before him, the Appellant in ground 5 argues that the suit ought to have been referred to the Water Services Regulatory Board established under the **WATER ACT 2002** which is the body seized with jurisdiction. In his submissions, counsel for the Appellant did not refer to any specific provision of the **WATER ACT 2002** as excluding the Magistrate's Court from handling this dispute. This is how counsel submitted on the issue of jurisdiction:-

"The main issue for litigation and determination before the subordinate Court was harnessing and distribution of water from KANGABASI WATER SPRING where the Appellant a learning institution had been harnessing water and pumping it by underground pipes to its premises and neighbours. This issue fell in all fours under the WATER ACT 2002 therefore beyond the Magistrate's Court Act.

Legal Notice No. 101 of 2005 is quite detailed and is the main reference. We apply that the Court peruses the same.

We humbly submit that the National Environmental Management Authorities – NEMA ought to have been involved to carry out an Environmental Impact Assessment Report but this was not done.

Orders issued without jurisdiction OVE VOID AB INITIO."

I have looked at the **WATER ACT 2002** and specifically **Section 47(a) – (s)** which provides for the Powers and Functions of the **WATER SERVICES REGULATORY BOARD** and I have not seen any provision therein to suggest that the dispute herein falls under the purview of the said Board. Indeed counsel for the Appellant did not refer to any specific provision that can be said to oust the jurisdiction of the trial Court to handle the dispute that was before it. I have also looked at **Section 8(1) of the said Act** which provides for the powers and function of the **WATER RESOURCES MANAGEMENT AUTHORITY** and I have seen from the record herein that the said **AUTHORITY** was well informed about the dispute herein and by its letter dated 27th July 2006, the **LAKE VICTORIA NORTH CATHMENT AREA** addressed the **DISTRICT COMMISSIONER BUNGOMA** in reference to the water yield by the **KANGABASI WATER SOURCE** and among its recommendations were that:-

1. –

2. –

3. – **“Kibabii Community Water project be allowed to abstract a maximum of 95.00m³/d to supplement their other three sources already identified to meet their demand.**

4. – **The two disputants to draw an MOU on how to access and abstract the resource.**

5. – **The community to apply and be given an authorization before construction commences.”**

It is also evident from the record herein that the **AUTHORITY** did summon the parties herein to two meetings vide their letters dated 2nd August 2006 on 11th August 2006. The decisions arrived at in those two meetings are not clear. It is also important to note that in their plaint filed on 18th August 2006, the Respondents as plaintiffs were claiming a beneficial interest in land parcel **NO EAST BUKUSU/NORTH KANDUYI/692** where, as per paragraph 12 of the said plaint, the construction works of the **KANGABASI WATER PROJECT** were on-going. The Green Card to that parcel of land shows that it belongs to one **ZAKAYO WEPUKHULU MANYONGE** at least as at the time the suit was filed although the Appellant had placed a restriction claiming a share therein. The said **ZAKAYO WEPUKHULU MANYONGE** is not a party to this suit and on the basis of the evidence before me, none of the parties herein had a greater interest than the other to the land on which the water project was being constructed.

On the issue of jurisdiction, the law is that for a provision of a statute to oust the jurisdiction of a Court, it must be clear and meriting no elaborate arguments.

In the case of **STANDARD LTD & TWO OTHERS .V. CHRISTOPHER NDARATHI MURAGORU 2016 eKLR** the Court of Appeal said of jurisdiction:-

“..... an ouster clause in clear, firm and unequivocal language will be given effect subject to satisfying a number of consideration.”

While it is of course true that the Court’s jurisdiction may be curtailed by legislation, it is clear that such ouster clauses must not be vague or ambiguous because the paramount duty of the Court is to administer justice to the parties and not to turn them away where their dispute is justiciable. I am not persuaded that the trial Court lacks the jurisdiction to handle the dispute before it. I must therefore dismiss grounds 1, 4 and 5 of the appeal as lacking in merit.

Ground 3 of the appeal takes issue with the trial Magistrate for granting a permanent injunction on an interlocutory application. I see no merit in that complaint because in his ruling, the trial Magistrate properly directed himself to the test laid down in the case of **GIELLA V CASSMAN BROWN & CO LTD 1973 EA 358** on when to grant a temporary injunction pending trial. Upon analyzing the evidence before him, he not only found that the Respondents had established a prima facie case but also found that if the project was stopped, irreparable damage would ensue. He further went on to make a finding that the balance of convenience would, in any case, tilt in favour of granting the application which he then allowed. There is nothing to suggest that he granted a permanent injunction and in any event, the application before him was clear in paragraph c as follows:-

(c):“That pending the hearing and determination of this suit, the defendant/Respondent herein be his agents, servants and/or representatives be restrained by way of an injunction from interfering with or in whatsoever manner attempting to interfere with the plaintiffs’ work going on at KANGABASI WATER SPRING on L.R NO. E. BUKUSU/N. KANDUYI/692.” Emphasis added

That is the order that was granted. It is not a permanent injunction and none was sought. That ground similarly fails.

Similarly ground 2 of the appeal which takes issue with the trial magistrate for **“granting the main suit prior to hearing”** is not correct for the same reasons as above.

Having evaluated all the evidence before me, I am not persuaded that the trial Magistrate misdirected himself either in law or fact or took into account considerations which he should not have taken into account or failed to take into account considerations which he should have taken into account or that he arrived at a decision which was plainly wrong. In my view, the trial Court properly exercised its discretion and there would be no justification in interfering with the same.

The up – shot of the above is that this appeal is devoid of merits. It is dismissed with costs.

Boaz N. Olao.

J U D G E

9th October 2019.

Judgment dated, delivered and signed in Open Court this 9th day of October 2019 at Bungoma.

Mr. Waswa for Appellant present

Mr. Murunga for Respondents present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

9th October 2019.