



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 124 OF 2012

JUMA ABDALLAH VITU

RAJAB ABDALLA MWANGALIA

MWANAISHA ABDALLA VITU.....PLAINTIFFS

-versus-

KWALE WATER & SEWAGE COMPANY LIMITED.....1ST DEFENDANT

COAST WATER SERVICES BOARD.....2ND DEFENDANT

MOMBASA WATER SUPPLY AND SANITAION

COMPANY LIMITED.....3RD DEFENDANT

JUDGMENT

1. The 1st Plaintiff, JUMA ABDALLAH VITU filed this case against the 1st Defendant KWALE WATER & SEWAGE COMPANY LIMITED on 27th June 2012. On 14th May 2015, the case was amended by filing an Amended Plaint whereupon the 2nd and 3rd Plaintiffs as well as the 2nd and 3rd Defendants were respectively added to the case.
2. The Plaintiffs pleaded that they brought this case as administrators of the estate of their deceased father, Abdalla Juma Vitu who is the registered owner of plot number KWALE/WAA/1101 (hereinafter also called “the suit property”).
3. The Plaintiffs averred that in 1976, the Government through Kwale Water and Sanitation Project and by the sponsorship of Swedish International Development Co-operation Agency (SIDA) started sinking boreholes on private land. That the Government entered into an oral contract with the Plaintiffs’ father upon which the father offered the suit property to the Government to sink boreholes at a monthly rent of Kshs. 6,000.00 with effect from September 1976.
4. The Plaintiffs pleaded that the Government sank boreholes, placed pumps and built maintenance house on the suit property but failed to pay their father the agreed amount of Kshs. 6,000.00. They further pleaded that by failing to pay the agreed amount, the Government breached the contract it had with their father and that the continued breach has occasioned the Plaintiffs loss and damage.
5. The Plaintiffs prayed for judgment against the Defendants jointly and severally for:

- a) A declaration that the Defendants or either of them is in breach of contract
- b) A permanent injunction restraining the Defendants from harvesting water from Plot Number KWALE/WAA/1010 until the liable Defendant(s) pay the sum of Kshs. 6,000 per month plus interest from September 1976 up to the time of filing of suit.
- c) A mandatory injunction compelling the Defendants to vacate the Plaintiffs' Plot Number KWALE/WAA/1101 for breach of contract.
- d) An order directed to the liable Defendant to close and fill up the boreholes at their own costs.
- e) An order for payment of Kshs. 2,778,000 due to the Plaintiffs at the time of filing suit plus the amount that shall be unpaid at the time of determining suit.
- f) General, punitive and aggravated damages for breach of contract.
- g) Costs of this suit.
- h) Interest on (e) and (g) above at court rates
- i) Any other relief as this court may consider just.

6. The 1st & 2nd Defendants filed their respective Statements of Defence in which they denied liability. I have not seen the defence filed by the 3rd Defendant. The 1st Defendant pleaded that it was incorporated in September 2005 and therefore could not have been a party to the contract entered into in 1976.

7. The 2nd Defendant stated that the suit is a non-starter as no reasonable cause of action exists between it and the Plaintiffs. The 2nd Defendant pleaded that the suit is irreparably defective because:

- a) It is statute barred
- b) It is in contravention of the Government Proceedings Act
- c) By virtue of the provisions of the Water Act 2002, any dispute between the parties herein should be heard before the established mechanism of Water Appeals Board.

8. The Plaintiffs called three witnesses. JUMA ABDALLA VITU, PW1 (hereinafter simply called "Juma" testified on 11th March 2016. He told court that his father entered into an agreement with S.I.D.A pursuant to which the Defendants dug boreholes on the property known as KWALE/WAA/1101 belonging to his father. That the agreement was made in 1976 and was drawn by the area Chief and Councillor.

9. Juma testified that his late father was paid Kshs. 2,000.00 for the trees on the suit property and the Defendants fenced off the portion that they wanted. He produced the title deed for the suit property and stated that the family has not been paid fully.

10. The witness told court that his father died in 1995 and he produced the letters of administration as exhibits. Juma said that he did not have the subject agreement but there were people who witness the signing among them Abdalla Salim Moyo who has since passed on. He could not produce the witness statement of Abdalla Salim Moyo because the production was objected to by the 1st Defendants counsel and the objection was sustained by the court. The witness stated that the Defendants are still extracting water from the property and he did not disconnect them because he respects the law.

11. On cross examination by the 1st Defendant counsel, Juma stated that although he was not there when the agreement was drawn, he knew of the contents because the councilor told him of the same. He also

stated that he did not know when the 1st Defendant was incorporated. He further stated that he did not know which of the Defendants owns the boreholes.

12. On cross examination by the 2nd Defendant's counsel, Juma stated that Coast Services Board was not present when the agreement was done. He stated that he did not know who among the Defendants is extracting water from the boreholes. The witness stated that the agreement was burnt. On being cross examined by the 3rd Defendant's counsel, Juma stated that at the time the agreement was made in 1976, there was no representation by the 3rd Defendant.

13. SALIM MABANDA MWANYENDE, PW2 (hereinafter simple called "Salim") also testified for the Plaintiffs. He stated that the Plaintiffs are his neighbours and that he knows the case against the Defendants. Salim testified that he was present when the people of S.I.D.A came to the Plaintiffs' father's home together with the area chief. That the Plaintiffs' father was paid Kshs. 2,600 or Kshs. 2,500 for the trees and they agreed to pay him Kshs. 600 per month.

14. On cross examination by the 1st Defendant's counsel, Salim stated that it is the people of S.I.D.A who first came then later Mombasa Water. He said that there were many people in the meeting but he did not know whether the 1st Defendant was one of them. The witness stated that the minutes were reduced into writing but the agreement, which was between Mzee Abdalla and S.I.D.A, was burnt in the Chief's office.

15. On cross examination by the 2nd Defendant's counsel, Salim stated that the agreement was between S.I.D.A and Abdalla and that the Defendants took over the boreholes. On being questioned by the 3rd Defendant's counsel, Salim said that the agreement was made in the 70s. He stated that he saw a group but could not tell if there was anyone from the 3rd Defendant in the meeting.

16. GEORGE DAN KILIRU, PW3 (hereinafter simply "Kiliru") - a valuer, testified for the Plaintiff on 23rd June 2016. He stated that he visited the suit property on 17th March 2015. That there are various improvements on the land including office block, ablution, domestic staff quarters and two boreholes. Kiliru stated that he assessed the value of the property at Kshs. 4,500,000.00 and produced his Valuation Report as an exhibit.

17. On cross examination by the 1st defendant's counsel, Kiliru stated that he could not confirm that the boreholes were working. He also said that he could not confirm that he is a valuer as he did not avail his practicing certificate as at the time he did the valuation. On being questioned by counsel for the 2nd Defendant, Kiliru explained that he arrived at his figure by taking the plinth area of the buildings and applying the estimate costs of construction. On being questioned by counsel for the 3rd Defendant, the witness stated that he did not ascertain the owners of the borehole.

The Defence Case

18. Each of the Defendants called one witness.

19. ATHMAN GUNDA, DW 1 (hereinafter simply "Athman") testified for the 1st Defendant. He stated that he is the 1st Defendant's Managing Director having started working in that capacity on 1st July 2015. Athman testified that the 1st Defendant was incorporated on 9th September 2005 and produced its Certificate of Incorporation in court.

20. The witness stated that the 1st Defendant's mandate is to buy water in bulk from the 2nd Defendant and sell it at retail to residents of Kwale pursuant to Services Provision Agreement which he produced in evidence. Athman stated that the Plaintiffs' claim is not true since the 1st Defendant does not operate the two boreholes in issue and the water is extracted by the 2nd Defendant. He said that he was not aware of any agreement between the Plaintiffs and the 1st Defendant as the 1st Defendant was only registered in September 2005.

21. On cross examination by the Plaintiffs' counsel, Athman agreed that the two boreholes are on the Plaintiffs' land. He stated that it is true that the 1st Defendant had bought water from the 2nd Defendant in regard to borehole No. 4 and 7. On cross examination by the 2nd Defendant's counsel, Athman stated that all infrastructures as regards water are done by the Coast Water Board and that the borehole is owned by the 2nd Defendant. On cross examination by the 3rd Defendant's counsel, Athman stated that the 1st Defendant is the one who pays for boreholes No. 4 and 7.

22. MUNYI MUGO, DW 2 (hereinafter simply "Mugo") testified for the 3rd Defendant. He told court that he is a Legal Officer of the 3rd Defendant. Mugo told court that all infrastructures dealing with water are owned by the 2nd Defendant both upstream and downstream. He told court that the 3rd Defendant was incorporated on 18th March 2011 and produced the Certificate of Incorporation in evidence. The witness stated that the 3rd Defendant has a Service Provision Agreement with the 2nd Defendant which he produced as an exhibit.

23. On cross examination by Plaintiffs' counsel, Mugo confirmed that borehole No. 4 and 7 were sunk on the Plaintiffs' land and stated that to the best of his knowledge, the 2nd Defendant is the owner of the boreholes. On cross examination by the 2nd Defendant's counsel, Mugo confirmed that the boreholes were sunk by NWC & Corporation and stated that he could not confirm when the same were sunk.

24. HAJI SALIM MASSA, DW 3 (hereinafter simply "Haji") testified for the 2nd Defendant on 30th September 2016. He stated that he works with Coast Water Services Board as a quality assurance officer. That he also looks at the environment and people's property. Hajis stated that the wells belong to Coast Water Services currently but were previously owned by National Water and Pipeline Corporation. The witness said that boreholes No. 4 and 7 are situated on plot no. 515 and produced a transfer plan to confirm the same. He stated that the boreholes are not on plot no. 1101.

25. Haji testified that plot no. 515 initially belonged to Swalek Kambi. He produced a Gazette Notice which he stated was published pursuant to compulsory acquisition of Plot No. 515 and that one Omar Swaleh Mwama was paid Kshs. 22,425 in respect thereof. Although the witness stated that he could remember about S.I.D.A, he said that he had no details of any agreement entered into between S.I.D.A and the Plaintiffs' father in 1978.

26. On cross examination by the Plaintiffs' counsel, Haji told court that he was aware that S.I.D.A was engaging in drilling boreholes on private land and that the boreholes so drilled now belong to the community in different areas and are not in the control of the 2nd Defendant. The witness said that he did not have a report to show that the borehole is not on Plot 1101. He testified that the 2nd Defendant sells water from boreholes no. 4 and 7 to the 1st Defendant but could not tell how much water is sold in a month.

27. The parties filed written submissions which I have had occasion to read. Besides stating the summary of the evidence adduced, the plaintiff submitted that the 2nd Defendant did not adduce any evidence to show that plot no 515 was later subdivided to give plot no 1101 to support their argument that the boreholes were sun in plot no Tiwi/515. On whether their suit is time barred, the Plaintiff said that although the cause of action arose in 1976, the wrong continues todate as the 2nd Defendant continues to harvest the water every day without maing the daily payments as was agreed. The Plaintiff also submitted that at the commencement of the suit, they did not know who to sue. However the evidence adduce now reveal the 2nd Defendant is the one liable in damages.

28. The submission by the 1st defendant was brief quoting the plaintiff's submission that they are exempted from liability. The 1st asked the court to dismiss the suit against them with costs. The 2nd Defendant picked out the issues for determination inter alia, whether there was proof of the alleged contract made in 1976. In answering this question, the 2nd Defendant submits that the agreement was written but since it was destroyed by a fire, the Plaintiff's cannot ascertain its terms. Secondly the

evidence that the bore holes sunk are being controlled by the members of the public was not challenged.

29. The second issue taken by this defendant is on which plot the boreholes nos 4 & 7 are located. It is their case that they are on plot no TIWI/515 owned by SWALEE SAIDI KAULI who was compensated. The 2nd Defendant also argues that this suit is caught up with the doctrine of laches and relied on the decision of **Rose Wambui Wahito v John Ian Maingey (2013)eKLR** since the Plaintiffs are seeking equitable reliefs. Further he relied on the maxims that equity does not aid the indolent and that delay defeats equity. The last issue picked in the submission is that the dispute is improperly before this court. To support this, the 2nd Defendant quoted the decision in *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others* that stated thus; **“...Where the law provides for procedure to be followed, the parties are bound to follow that procedure before they can resort to a Court of law as the court would have no jurisdiction to entertain the dispute.”**

30. The 2nd Defendant submitted that the Plaintiffs ought to have taken their grievance if any before the Water Appeals Board created by section 40 of the Water Act, 2002. Section 40 deals **with variation of a permit at the request of a permit holder** in relation to water use. In the preamble to this Act, It states thus, **“To provide for the management, conservation and use & control of water resources and for the acquisition and regulation of rights to use water.”** The Act does not provide for resolution of disputes such as the one presented by the Plaintiff. The 2nd Defendant has therefore quoted the case of *Godfrey Mwaki* above out of context.

31. The second important point is whether this suit is time barred. It is not denied by the Plaintiff that the agreement creating the basis of their right was entered into in Sept 1976. But he qualified it by stating that the rights subsisted and continues to subsist. He also states that the Defendants continue to breach that right therefore the same cannot be time barred. The dispute this court is called upon to resolve is whether the plaintiffs are entitled to a monthly rent of Kshs 6000 accruing from the use of borehole no 4 & 7 sunk on their plot no 1101. The fact that the boreholes are still in use is admitted by all the Defendants. The water from the said boreholes is used to supply the residents of South Coast via a licence issued to the 1st Defendant. It follows therefore that the cause of action is regenerating month to month. Unless this court makes a determination that no such right existed, the averment that the claim is time barred has no legs to stand on.

32. My duty now is to determine whether the plaintiffs have proved their case within the standards provided in law. It is not in dispute that several bore holes were drilled in Kwale County some time ago. The bore holes drilled were given numbers with the ones in this dispute being referred to as nos 4 and 7. According to the plaintiffs, the two wells are their plot no 1101. While according to the 2nd Defendant, the wells are on plot no 515. Because of the disagreement on the location of the wells, it was incumbent upon the Plaintiffs to prove that the same is on their land. They did this by calling the evidence of 3 witnesses as set out above. PW1 and PW2 stated that they live on this land. PW3 who is a valuer said he also visited this plot where the two boreholes are located and did a valuation on behalf of the plaintiffs. In his report, he included the developments on the land besides the wells inter alia office blocks and ablutions. The Defendants questioned the authenticity of his report mainly on the value he attached to the plot and whether he had a practicing certificate. But they did not refuse the description given on what is on the land.

33. On the part of the Defendants, DW1 and DW2 admitted they are extracting water from borehole number 4 & 7 which is on the Plaintiffs land pursuant to a license issued to them by the 2nd Defendant. DW3 who works with the 2nd Defendant however gave contradictory evidence that the bore holes are on plot no 515 and not 1101 as alleged. The 1st Defendant is the one who does the actual extraction of the water. The 2nd Defendant is given mandate under the Water Act to regulate and control use thus the reason they issue the 1st Defendant with the requisite licence.

34. With the overwhelming evidence given in favour of the plaintiff given before the 2nd Defendant testified as relates to the location of these wells and given that the 2nd Defendant owns other boreholes

beside the two in dispute. The responsibility of clarifying to this Court that the boreholes no 4 & 7 were on plot no 515 and not 1101 vested in them. DW 3's evidence does not discharge burden as all he did was to introduce documents relating to plot no 515 which documents in my view does not counter the evidence of the plaintiffs and DW1. Accordingly I make a finding that indeed there are two boreholes on the plaintiffs parcel of land no 1101 and which boreholes are given nos 4 & 7.

35. The remaining issue is the question whether the plaintiffs are entitled to compensation and in the manner prayed for in the plaint. The 1st defendant is extracting water in bulk from the two boreholes which it sells to members of the public who are its customers. The extraction is done pursuant to the service agreement signed between the 1st and 2nd Defendant in accordance with the law. The 2nd defendant is legally the person who owns and maintains the two boreholes as per the evidence of DW2. There is no evidence adduced by the 2nd defendant that plot number 1101 was compulsorily acquired. The fact that the two boreholes are in use leaves no doubt in this court's mind that the Plaintiffs cannot use the portion of this land in any manner that would bring conflict to supply of water for general good of a wider public. The plaintiffs are therefore entitled to the relief in prayer --- to compensate for the portion of land in use by the Defendants jointly and severally.

36. The 2nd Defendant contended that since the agreement signed in 1976 was destroyed, the plaintiffs' claim is based on speculation. This may be so but the plaintiffs went ahead to support their claim first by stating that the agreement provided for them to be paid of Kshs 200/ daily and by calling an expert witness in PW3 who then presented a report giving the value of the land in its current use. This in my view is good enough reference point to begin from. If the Defendants felt the valuation as given by PW3 was exaggerated, there is nothing that barred them from presenting their own report just in case the judgement would turn to be in favour of the Plaintiff on this limb. In the absence of contrary evidence proposing a different figure, I find no reason why I should not enter judgement for monthly rent of Kshs 6000 as pleaded. Accordingly, I enter judgement as prayed in prayer (e) of the plaint. The limbs of prayer (b)

37. And (d) is disallowed the plaintiffs having conceded. The costs of the suit is also awarded to the plaintiffs.

Dated, signed and delivered at Mombasa this 8th day of May, 2017

A. OMOLLO

JUDGE