



**Sulubu (Suing as the Legal Representative of Morris Sulubu Hare, deceased) v Munyaya & 3 others
(Environment & Land Case 136 of 2015) [2024] KEELC 44 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 44 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 136 OF 2015
MAO ODENY, J
JANUARY 15, 2024**

BETWEEN

**ANDREW KIBONI SULUBU PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF MORRIS SULUBU HARE,
DECEASED**

AND

**ANDREW MOLE MUNYAYA 1ST DEFENDANT
ISAAC JILO ONOTO 2ND DEFENDANT
DANIEL KITSAO BAYA 3RD DEFENDANT
MJANAHERI SELF HELP WATER PROJECT 4TH DEFENDANT**

JUDGMENT

1. By an amended Plaint dated 19th March, 2021, the Plaintiff herein sued the Defendants jointly and severally seeking the following orders:
 - a. A permanent injunction restraining the defendants, their servants, agents and/or employees and representatives from the use of water wells, trespass, occupation and/or utilization of parcel of land No. Ngomeni Settlement/ 1295 in whatever way whatsoever and/or interference with the plaintiff's peaceful enjoyment of the said parcel of land.
 - b. General damages for trespass on the suit premises.
 - c. Exemplary and aggravated damages.
 - d. Costs of the suit.



Plaintiff's Case

2. PW1 Lee Mele Nzoro a Land Surveyor at Hola Survey office told the court that he prepared a survey report dated 9th December .2015 which he produced as Pex. No. 1. According to him, there was a boundary dispute and the Area Chief came to the office with the owner of parcel No. 1295 Mr. Morris Sulubu who showed him the boundaries. He testified that the boundary was not tallying with the documents they had in the office and that there were 4 wells that fall within the parcel of land.
3. On cross-examination by Mr. S. M. Kimani, PW1 stated that he visited the suit land in the presence of the Assistant Chief in September, 2015 and confirmed that he was not aware that plot No. 2011 was a public utility and that the report is in respect of plot No. 1295.
4. PW2 Andrew Kiboni Sulubu adopted his Witness Statement dated 9th May 2022 and testified that Plot No. 1295 is registered in his late father's name Morris Sulubu who entered into an agreement with the Defendants sometime around 4th April, 2013. He stated that the agreement set out the terms as to how the Defendants would enter into, access the said parcel of land, and manage the drawing of water from the three (3) wells therein.
5. PW2 further stated that the Defendants never adhered to the terms set out by not paying the levy as agreed later breached the agreement. It was his testimony that the Defendants instead diverted water vendors to draw water from a fourth (4th) well outside the said 3 wells. Further that his late father sent several notices terminating the said contract but the Defendants have refused and/or neglected to do so. He produced a list of documents dated 4th August 2015 as PEX No. 2 to 7.
6. On cross-examination, he stated that his father acquired the land legally and has a title deed to the suit land. He also stated that he did not know the owner of Plot No. 2011 and that he was not aware whether his late father received money from the Defendants. He finally stated that the 4th Defendant is still trespassing on their land.

Defence Case

7. DW1 Anderson Mole Munyaya adopted his Witness Statement dated 14th September 2015 and testified that they complied with the terms of the agreement and paid the last collection on 9th November 2013. He further stated that they received a termination notice of the agreement by the Plaintiff and moved out to plot No. 1126 owned by Stephen Mranja and later to Plot No. 2011.
8. It was DW1's testimony that the land now claimed by the Plaintiff was illegally acquired, that the Defendants have not trespassed upon the Plaintiff's land, as the owner of the land sanctioned the entry on Ngomeni Squatter Settlement Scheme / 2011.
9. DW1 further stated that in May, 2015, they made it clear to the Plaintiff that he had not shown them where his land was and therefore issued a notice stating that Mjanaheri S/Help Water Project would not pay the money claimed.
10. On cross-examination by Mr. Sumba, DW1 told the court that they signed an agreement with the Plaintiff in 2013 and complied with the terms by paying 20% of total collection of Cess to the Plaintiff. Further that the Plaintiff was to bring a surveyor to identify the boreholes and it turned out that they were on plot No. 2011, which belongs to the County government. According to him, they were operating the project on Plot No. 2011 and that the surveyor was to carry out a survey to establish which wells were on 1295. He stated that the surveyor who did the survey found that there were 5 boreholes in 1295 and that they had one well in plot No. 2011.



11. DW2 Isaac Jilo Omoto Joshua was shown Dexh No.12 to 22 and stated that the payments were made as per the agreement and that they had asked for a borehole on plot No. 2011 from the County Government. He also stated that they paid Kshs. 5,000/- to the Plaintiff's son on 20th November .2016 which was not for the agreement as the same had already been terminated. That they had paid Kshs. 23, 100/- within the agreement.
12. On cross-examination, he told the court that they paid Kshs. 23,100/- as per the agreement since the Plaintiff claimed that they were on plot No. 1295 which agreement was terminated in 2013. He further testified that the injunction had been granted after they had already left the suit premises.

Plaintiff's Submissions

13. Counsel reiterated the contents of the pleadings and evidence by the parties, and submitted that the Defendants took a contrary position to their pleadings filed in court and instead brought a new issue claiming that the Plaintiff breached the said agreement.
14. Mr. Sumba submitted that the Plaintiff and the Defendants entered into a legally binding agreement of which the Defendants were in breach hence they should pay general, exemplary and aggravated damages.

Defendants' submissions.

15. Counsel identified the following issues for determination;
 - a. Were the contracting parties at ad idem when they made the agreement dated 5th April .2013?
 - b. If a valid contract was made, was there a breach of the said agreement on either side, which gave rise to recoverable loss or damage?
 - c. What special or general damages are pleaded and proven; and what is awardable on the evidence tendered in this case.
 - d. Who should bear the costs of this case?
16. On the 1st issue whether there is a valid and legally enforceable agreement, counsel submitted that the agreement sought to be enforced in this suit was made on 5th April 2013 and in respect of 3 water wells which are in issue. He submitted that two were acknowledged to be on the Plaintiff's land while the location of the third one was doubtful.
17. Counsel submitted that the parties acknowledged that a boundary survey was necessary to identify the location of the third well and that payment was initially to be made with regard to sales relative to two wells until the boundary was determined to show if the third was within or without the original Plaintiff's land.
18. It was counsel's submission that the agreement did not provide for a clear mechanism of tracking sales of water from the three wells reportedly on the Plaintiff's land and as such, the uncontroverted record of payments of 20% of water sales made by the Defendants to the original Plaintiff in 2013 has not been challenged.
19. On the 2nd issue, Mr. S M Kimani submitted that if a valid contract is made out, but no breach or actual recoverable loss ensuing such breach has been shown by the original Plaintiff and the witnesses who testified in support of his case. According to him, the loss or damage in this case is not known and there was no plea for special damages.



Analysis And Determination.

20. The issues for determination are as to whether there was breach of the agreement by the parties and whether the Plaintiff is entitled to damages for loss.
21. It is not disputed that the Plaintiff and the Defendants entered into an agreement dated 5th April 2013 where the Defendants would manage the utilization of 3 wells dug on the suit plot on the understanding that 20% payments would be made to him by the Defendants out of the management of the water wells.
22. It was the Plaintiff's case that the Defendants breached the terms of the agreement by not paying the agreed amount as per the agreement hence the demand for damages and a permanent injunction against the Defendants.
23. The defence on the other hand contend that the land now claimed by the Plaintiff was illegally acquired by the Defendants and that the entry upon and the use of the water wells on Ngomeni Squatter Settlement Scheme/ 2011 is clearly not trespass as it was sanctioned by the owner of the land.
24. The issue of ownership is not an issue in this case therefore the Defendant cannot raise the same. The Plaintiff produced a title deed which indicated that he is the registered owner of Ngomeni Squatter Settlement Scheme/1295. The only issue is whether there was breach of the agreement dated 5th April, 2013 in respect of the three wells. According to the agreement, Mjanaheri Water Project was to pay the Plaintiff 20% of net sales on monthly basis from the three wells.
25. It is on record that the Plaintiff was to conduct a survey to ascertain the number of wells that were on the suit land which survey was done and a report produced in court. The finding of the survey revealed that "Four wells were found to fall within plot 1295, one well in plot 2011 and one well in plot 1131 as per the datum used."
26. The agreement specifically indicated the position of the 3 wells which the Defendants were to extract the water from and were to pay 20% of the net sales to the Plaintiff.
27. It is further on record that the Plaintiff issued a termination notice to the Defendants and after consideration, the Defendants agreed to move out to plot No. 2011 which belongs to the County government
28. From the evidence on record, it is clear that the Plaintiff issued a termination notice to the Defendants who moved out and the Plaintiff has not proved that at the time of the notice, the Defendants owed any money and the amount owed. The same was not pleaded to enable the court to establish whether the Plaintiff is entitled to damages as claimed.
29. The court cannot give orders in vain, as both parties have admitted that the Defendants are no longer utilizing the wells. It would be an academic exercise to restrain the Defendants from interfering with the wells yet they are not on the suit plot and further that they are not in any way utilizing the wells.
30. I find that the Plaintiff has failed to prove his case to the required standard and the same is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF JANUARY 2024.

M.A. ODENY

JUDGE



NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

