



Mathenge v Nyeri Water & Sewerage Company Limited (NYEWASCO) (Environment and Land Appeal 12 of 2020) [2024] KEELC 1463 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 12 OF 2020**

**JO OLOLA, J
MARCH 20, 2024**

BETWEEN

ROBERT WANJOHI MATHENGE APPELLANT

AND

**NYERI WATER & SEWERAGE COMPANY LIMITED
(NYEWASCO) RESPONDENT**

(Appeal from the Ruling of the Honourable F. Muguongo, Senior Resident Magistrate delivered on 10th March, 2020 in Nyeri CMCC No. 61 of 2019.)

JUDGMENT

1. This is an Appeal from the Ruling of the Honourable F. Muguongo, Senior Resident Magistrate delivered on 10th March, 2020 in Nyeri CMCC No. 61 of 2019.
2. By a Complaint dated 8th February 2019, Robert Wanjohi Mathenge acting on a Power of Attorney donated to himself by one Rachel Wangui Mathenge (the Appellant) had sought the sum of Kshs.3,278,000/- from the Respondent as compensation for loss and damage visited upon a parcel of land known as Ruguru/Gachika/1178 registered in the name of the said Rachel Wangui Mathenge.
3. It was the Appellant's case that in September 2018, a water pipe belonging to the Respondent got burst in an area adjacent to the subject parcel of land and that the water that gushed out therefrom caused extensive damage to the land by carrying away top soil, trees and other vegetation thereon and leaving huge trenches and gullies on the land.
4. In response, the Nyeri Water and Sewerage Company Limited (the Respondent) denied that the Appellant had the capacity and locus standi to institute the suit. The Respondent further denied that its pipe burst in an area adjacent to the Appellant's land and/or that the water that came therefrom had caused any damage to the said parcel of land.



5. The Respondent further denied the jurisdiction of the Court to hear and determine the dispute citing the provisions of the [Water Act](#) 2016.
6. Subsequently and by a Notice of Preliminary Objection dated and filed in Court on 25th September 2019, the Respondent objected to the entire suit on the grounds that:
 1. The (Appellant) has no capacity and/or locus standi to file (the) suit;
 2. The Power of Attorney registered on 29th October, 2018 long after the cause of action accrued does not give the (Appellant) any capacity in this matter nor does it apply herein;
 3. The Honourable Court has no jurisdiction by dint of Section 121 (2) of the [Water Act](#), 2016; and
 4. The suit is misconceived and incompetent.
7. Having heard the objection and in a Ruling rendered on 10th March 2020, the Learned Trial Magistrate made a determination that the Court lacked the jurisdiction to hear the dispute and proceeded to uphold the Respondent's objection.
8. Aggrieved by the said determination, the Appellant moved to this Court and lodged the Memorandum of Appeal herein dated 31st March, 2020 urging the Court to set aside the said Ruling on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in upholding the Preliminary Objection that the Court had no jurisdiction to hear and determine the matter;
 2. The Learned Magistrate erred in law and fact when she misdirected herself by holding that the suit was incompetently before her and proceeded to allow the Preliminary Objection whose effect was to dismiss the suit;
 3. The Learned Magistrate erred in law when she made an order on costs after making a finding that she had no jurisdiction;
 4. The Learned Trial Magistrate erred in law in failing to hold and find that the dispute before her was purely damages occasioned on a parcel of land under the Rules of Rylands -vs- Fletcher which could be completely filed before the Nyeri Chief Magistrates Court so long as the facts in issue are in relation to breach of the duty of care;
 5. The Learned Trial Magistrate erred in law and in fact in upholding the defendant's preliminary objection dated 25th September 2019 despite the clear wording of the proviso to Section 121 of the [Water Act](#) which clearly spells out the jurisdiction of the Tribunal;
 6. The Learned Trial Magistrate erred in law in failing to hold and find that the dispute before her was not applicable by virtue of Section 121(2) of the [Water Act](#) as the dispute does not stem from a business contract;
 7. The Learned Magistrate further erred in failing to apprehend the issues of law and facts by failing to consider that the cause of action as pleaded was as a result of a tortfeasor's breach of its duty of care and thus being a tort the jurisdiction of the Court is not ousted by virtue of Section 121(2) of the [Water Act](#) as an aggrieved party can opt to pursue his claim in Court by virtue of the common law doctrine resulting from the breach of the defendant's duty of care;



8. The Learned Trial Magistrate erred in law and in fact in upholding the defendant’s Preliminary Objection despite the same failing to meet all the three ingredients forming the threshold for sustaining a preliminary objection; and
 9. The Learned Magistrate erred in law and fact in that she disregarded and failed to consider the weight of the evidence of the Appellant’s submissions and the judicial authorities tendered before the Court.
9. As was stated in *Selle & Another -vs- Associated Motor Boat Company Limited & Others* (1968) EA 123, the duty of a first Appellate Court such as this is to re-evaluate the evidence before the Trial Court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the Appeal. A first appellate Court is empowered to subject the whole of the evidence adduced before the trial Court to a fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
10. I have accordingly carefully perused and considered the Record of Appeal as well as the Ruling delivered as aforesaid on 10th March, 2020. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
11. By his Memorandum of Appeal, the Appellant has raised some nine (9) grounds as to why the Ruling by the Learned Trial Magistrate should be set aside. In my considered view, those grounds only turn on the issue as to whether or not the dispute between the Appellant and the Respondent was a dispute falling within the meaning of Section 121(2) of the [Water Act](#), 2016 and, secondly, whether or not the Lower Court properly interpreted the law in arriving at the conclusion that it had no jurisdiction to hear and determine the dispute.
12. From a perusal of the Ruling by the Lower Court, the conclusion that it has no jurisdiction to hear and determine the dispute was predicated on the provisions of the said Section 121(2) of the [Water Act](#), 2016. Having considered the said Section, the Learned Trial Magistrate delivered herself at Paragraphs 6 to 9 of the Ruling as follows:

“6. ...

The locus classicus of jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” -vs- Caltex Oil Kenya Limited* (1989) KLR. An objection to the jurisdiction to this Court has been raised. I have looked at Section 121(2) of the [Water Act](#), 2016 and the entire Part VI of the Act. Section 119 of the Act creates the Water Tribunal and Section 121 speaks out of the jurisdiction of water services at Section 2 of the Act which states, “Water services means any services of or incidental to the supply or shortage of water and includes the provision of sewerage services”

7. I agree with the defendant that the instant dispute concerning a burst pipe that allegedly destroyed the Plaintiff’s property resulting into losses amount to a water service incidental to the supply of water and whose proper forum (for) adjudication should be the Water Tribunal and not the Courts.
8. It is my view that creation of a body to revoke disputes (sic) touching on water services did not in any way lock out any aggrieved party like the plaintiff herein from pursuing a relief for any wrong done against the party.



Having held that this Court lacks the jurisdiction to hear and determine the instant dispute, I do not find it necessary to take time making a finding on the other ground of objection raised. It will be mere scholarly. Thus I immediately down the pen; and

9. The preliminary objection is thus upheld, with costs to the defendant.”
13. This Court has had occasion to peruse the said Section 121 (2) of the Water Act, 2016. The same provides as follows:
 - “(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”
14. In my considered view, the operative words in the said Section 121 (2) of the Water Act are the words – “any dispute concerning water resources or water services where there is a business contract.” What that provision is stating, is that for the Water Tribunal to have jurisdiction to hear any such dispute, the Parties in the dispute must have a water resources or water services contract between them.
15. As it were, by his suit before the Lower Court, the Appellant was claiming compensation from the Respondent for damages allegedly brought upon his farm by water said to have gushed out of a broken water pipe that was operated by the Respondent. The basis of the Appellant’s dispute with the Respondent can be found at paragraphs 4 to 7 of the Plaint wherein he avers as follows:
 - “4. In the month of September 2018, a water pipe belonging to the Defendant burst at an area where the same pipe runs adjacent to the Plaintiffs’ land parcel above said. It is a huge pipe that carries a huge volume of water and when the water gushed out, it made a ferocious moving water body that run down the Plaintiff’s land thereby causing extensive damage to the said property;
 5. The said water carried away, soil, trees and other vegetation down to the valley leaving huge trenches and gullies. All the top soil in the area the water passes was carried away to the valley below and was lost;
 6. The Plaintiff initiated a valuation to be done of the damage caused to the land by a registered land valuer. The total damage was set to be approximately Kshs.3,278,000/=;
 7. The Plaintiff therefore claim(s) from the Defendant for compensation for the loss of the said sum of Kshs.3,278,000.00 as it is the Defendant that brought an object and/or item to the Plaintiff’s property, which later caused harm and damage. The claim is therefore based on the principles and rule laid down in the case of Rylands -vs- Fletcher.”
16. Arising from the foregoing, I was unable to see how the trial Court could arrive at the conclusion that the claim amounted “to a water service incidental to the supply of water” and that the proper forum for its adjudication was before the Water Tribunal. There was nowhere in the pleadings filed by both the Appellant and the Respondent where any reference was made to a business contract involving water services or resources between the Parties herein.



17. While it may as well be true that the Respondent company is involved in the business of supplying water, there was no business contract between them and the Appellant in this respect and the submissions by the Respondent that if any damage occurred the same was as a result of the Respondent performing its duties of supplying water services to the citizens of Kenya does not hold any water.
18. In the premises herein, it was apparent that the Learned Trial Magistrate had misapprehended the dispute before her as the Water Tribunal has no jurisdiction to entertain the issues raised in the Appellant's claim.
19. It follows that this Appeal must succeed. Accordingly I hereby set aside the Ruling and orders issued by the Trial Court on 10th March, 2020. The same is hereby substituted with an order dismissing the Respondent's Notice of Preliminary Objection dated 25th September, 2019 in its entirety.
20. An order is hereby made that this matter be remitted back to the Lower Court for hearing and determination on merit by a Magistrate other than F. Muguongo, Senior Resident Magistrate.
21. The Appellant shall have the costs of this Appeal.
22. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 20TH DAY OF MARCH, 2024.

In the presence of:

No appearance for the Appellant

Mr. Ng'arua holding brief for W. Gikonyo for the Respondent

Court Assistant - Kendi

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J. O. OLOLA

JUDGE

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