IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 80 OF 2017

BETWEEN

COAST WATER SERVICES BOARD .....APPELLANT

AND

JUMA ABDALLA VITU .....1ST RESPONDENT

RAJAB ABDALLA MWANGALIA.....2ND RESPONDENT

MWANAISHA ABDALLA VITU.....3RD RESPONDENT

KWALE WATER AND SEWERAGE

COMPANY LIMITED.....4TH RESPONDENT

MOMBASA WATER SUPPLY AND

SANITATION COMPANY LIMITED.....5TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Mombasa (Omollo, J.) dated 8th May, 2017

in

***Civil Suit No. 124 of 2012*)**

****

JUDGMENT OF THE COURT

1. Apparently in the year 1976, the government embarked on a project of sinking boreholes on private land to meet the rising demand for water. According to the 1st, 2nd and 3rd respondents, the project was undertaken with the sponsorship of the Swedish International Development Co-operation Agency (SIDA). One of the parcels which had been earmarked for the project was **KWALE/WAA/1101** (suit property) which was registered in favour of Abdalla Juma Vitu (deceased), the 1st, 2nd and 3rd respondents' father.

2. Before the boreholes were sunk, the deceased, on one part and the government and SIDA, on the other part, entered into a contract, at least as per the 1st, 2nd and 3rd respondents. Whether the contract was oral or reduced in writing is a point of contention. Be that as it may, it is alleged that one of the terms of the contract was that in exchange for the boreholes being dug on the property, the deceased would be paid a monthly amount of Kshs.6,000 effective from September, 1976 as consideration. Thereafter, two boreholes identified as Nos. 4 and 7 were sunk on the suit property.

3. In breach of the contract, the government had failed to pay the consideration despite continuing to harvest water from the boreholes in question. After the demise of their father, the 1st, 2nd and 3rd respondents demanded payment of the accrued amount first from the 4th respondent without any success. Eventually, they filed a suit against the 4th and 5th respondents on the basis that they were engaged in the business of distribution, supply and billing of public water within the Counties of Kwale and Mombasa. They also sued the appellant who

they deemed as being in charge of regulating and controlling the 4th and 5th respondents. In a nutshell, they sought to enforce the contract against the appellant, 4th and 5th respondents severally or jointly. They sought *inter alia*:

a) A declaration that the defendants or either of them is in breach of the contract.

b) A permanent injunction restraining the defendants from harvesting water from the suit property 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 suit.

c) A mandatory injunction compelling the defendants to vacate the suit property for breach of contract.

d) An order directing the liable defendant to close and fill up the boreholes at their own cost.

e) An order of 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 determination of the suit.

f) ***General, punitive and aggravated damages for breach of contract***.

4. In response, the appellant, 4th and 5th respondents as if reading from the same script, opposed the suit on the ground that they were not parties to the alleged contract hence, it could not be enforced against them. Further, the claim based on a contract allegedly concluded in 1976 was time bared. As for the 3rd and 4th respondents they denied owning or controlling any boreholes sunk on the suit property. Their positions were that the 4th and 5th respondents were incorporated on 9th September, 2005 and 18th March, 2011 respectively and as such, could not have been party to the alluded contract. By Service Provision Agreement (SPA) between themselves and the appellant, they purchased and supplied water in bulk from the appellant.

5. In addition, the appellant averred that the government embarked on sinking boreholes on private land without any sponsorship or assistance from third parties. Parcels upon which the boreholes were sunk were compulsorily acquired and the owners thereof compensated. The boreholes were given to National Water Corporation and later inherited by the appellant. From its records, the boreholes identified as Nos. 4 and 7 are sunk on Kwale/Tiwi/515 and not the suit property. Compensation of Kshs.22,425.00 for the said parcel was paid to Omari Swaleh.

6. Faced with foregoing, the learned Judge (**Omollo, J**.) in a judgment dated 8th May, 2017 found that the 1st, 2nd and 3rd respondents had established their case. In doing so, the learned Judge in her own words stated:

" The fact the two boreholes are in use leave 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 d to compensate for the portion of land in use by the defendants jointly and severally.

…

In the absence of contrary evidence proposing a different figure, I find no reason why I should not enter judgment for monthly rent of Kshs.6000 as pleaded. Accordingly, I enter judgment as prayed in prayer (e) of the plaint as against the 2nd defendant (appellant herein) because the 1st and 3rd defendants are licenses and not the owner of the boreholes. The limbs of prayer (b) and (d) is disallowed the plaintiffs having conceded. The costs of the suit shall be awarded to the plaintiffs."

7. It is that decision that has provoked the appeal before us which is anchored on a total of 17 grounds. Basically, the appellant complains that the learned Judge erred in law and fact by, failing to appreciate that she had no jurisdiction to deal with the matter; failing to find that the 1st, 2nd and 3rd respondents had departed from their pleadings; shifting the burden of proof to the appellant contrary to the principles of evidence; and finding that the 1st, 2nd and 3rd respondents had proven they were entitled to Kshs.6,000 as monthly compensation.

8. The appeal was disposed by way of written submissions as well as oral highlights by the counsel for the respective parties.

9. Mr. Kibara, appearing for the appellant, begun by stating that the trial court had no jurisdiction to entertain the suit. This is because firstly, the cause of action was founded on a contract allegedly made in the year 1976 thus, the same was statute barred by virtue of ***Section 4(1)(a)*** of the ***Limitation of Actions Act***. Secondly, the 1st, 2nd and 3rd respondents should have first employed the elaborate dispute resolution mechanisms provided under the ***Water Act, 2002 (repealed)***. In particular, they should have approached the Water Appeals Board which was established under ***Section 40*** of the ***Water Act***.

10. Counsel faulted the learned Judge for not appreciating that the evidence led on behalf of the 1st, 2nd and 3rd respondents was a complete departure of their pleadings. In the Amended Plaint the said respondents averred that the contract in question was oral only to lead evidence that it had been reduced into writing but was later destroyed in a fire. This was contrary to the established principle that parties are bound by their pleadings. Even assuming that the agreement was reduced into writing, none of the witnesses could give credible evidence as to the terms thereof for the reason that they were not present when the agreement is alleged to have been concluded. At best the evidence of such witnesses was speculative. What was more, the totality of the evidence with regard to the terms of the agreement was contradictory. Accordingly, the learned Judge's findings were without basis.

11. Mr. Kibara went on to argue that the appellant's evidence to the effect that boreholes in issue were not located on the suit property but on

Kwale/Tiwi/515 was not controverted. In point of fact, the appellant had produced a transfer plan from the Nairobi Water and Pipeline Corporation confirming as much. He reiterated that Kwale/Tiwi/515 belonged to one Swaleh Kauli who had been compensated following the compulsory acquisition of the plot. A letter from the Ministry of lands was also tendered as evidence confirming that Omar Swaleh received compensation on behalf of the said Swaleh Kauli. According to the appellant, the learned Judge ignored the foregoing evidence.

12. In the end, the learned Judge enforced an agreement whose terms were not established against the appellant who was not a party to the alleged agreement. It on those grounds we were urged to allow the appeal.

13. Mr. Saeed who held brief for Mr. Mohammed, learned counsel for the 5th respondent, associated himself with the submissions made on behalf of the appellant and equally urged us to allow the appeal.

14. Mr. Lewa holding brief for Mr. Wachira, for the 1st, 2nd and 3rd respondents, relied entirely on the written submissions filed on behalf of the respondents. Conversely, it was contended that the respondents' cause of action was not barred despite being founded on a contract that was made in the year 1976. In their view, every time the appellant harvested and utilized the water from the boreholes in question without paying the agreed rent, the cause of action was renewed due to the continuing breach.

15. Making reference to ***Section 85*** of the ***Water Act, 2002*** it was submitted that the Water Appeals Board was conferred with an appellate jurisdiction. Besides, the Appeals Board lacked jurisdiction to enforce the contract in question.

16. Admitting that there was a departure between the pleadings and evidence with respect to the contract, the respondents' counsel attributed the same to the illiteracy of the 1st, 2nd and 3rd respondents. He contended that the mix up must have arisen when he took instructions from the said respondent but that the correct position was that which was led in evidence. Moreover, Salim Mabanda (PW2) who was present when the written contract was executed not only testified on the terms thereof but also confirmed that the contract which was stored in the chief's office was destroyed by a fire.

17. It was further submitted that the onus lay with the appellant to establish that the boreholes were not on the suit property which burden it failed to discharge. The 1st respondent, Salim and George Dan Kiliru (PW3)'s evidence established that the boreholes were situated on the suit property.

18. On his part, Mr. Lewa appearing for the 4th respondent, simply stated that the appeal was limited to the decision made against the appellant thus, it had nothing to do with his client. He urged us to dismiss the appeal against the 4th respondent.

19. We have considered the record, submissions made on behalf of the parties and the law. This being a first appeal, we are bound to revisit the evidence on record, evaluate it and reach our own conclusion in the matter. In doing so, we appreciate that as the first appellate Court we ordinarily ought not to interfere with findings of fact by the trial court unless they are based on no evidence, or on a misapprehension of it or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. We also take into account that we did not have the privilege of seeing the witnesses testify as the trial court. See this Court's decision in ***J. S. M. vs. E. N. B. [2015] eKLR***.

20. It is common ground that the suit before the Environment and Land Court (ELC) was based on a contract alleged to have been concluded in the year 1976. The existence of the said contract was disputed by the appellant as well as the 4th and 5th respondents. In our view, the starting point would have been to determine whether indeed the 1st, 2nd and 3rd respondents had established the existence of the same. It is only upon the determination of that issue, we believe, that the learned Judge could have determined the other arising issues. To us, it was a misdirection on her part not to consider this pertinent issue and assume its existence.

21. It is trite that he who alleges bears the burden of proof. This is succinctly set out under ***Section 107*** of the ***Evidence Act*** as follows:

> ***"Whosever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Similarly, ***Section 108*** of the ***Evidence Act*** stipulates:

> ***"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."***

22. The evidence which was led in respect of the existence of the said contract was by the 1st respondent and Salim. The 1st respondent was not present when the contract was allegedly executed and he based his testimony on what he had been informed by a councillor who never testified. This rendered his evidence as hearsay and incapable of establishing the existence of the contract.

23. We also cannot help but note from the record that Salim who was allegedly present when the contract was negotiated and executed was unable to tell who the parties to the contract were. At one point in his evidence in chief, he said that it was between the deceased and the government an in another breath, during cross examination, he stated that contract was between the deceased and SIDA. He was also not sure if the appellant was present during the negotiations. In our view, such evidence brought into question his credibility and did not meet the required threshold of establishing the existence of the contract.

24. Having found that the existence of the contract had not been established, we find that the suit had no legs to stand on and could only be dismissed. Accordingly, we find that appeal has merit and is hereby allowed with costs. The appellant shall also have costs at the ELC.

Dated and delivered at Mombasa this 5th day of July, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR