



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 34 OF 2015

GEORGE KINOTI RINGERA.....APPELLANT

VERSUS

MUKIRIA WATER PROJECT & 9 OTHERS.....RESPONDENTS

(Being an Appeal from the Judgment and Decree of Hon. C.A. Mayamba SRM, in Githongo SRMCC No. 3 of 2015 delivered on 18/9/2015)

JUDGMENT

1. The appellant and the respondents were parties in **Githongo SRMCC No 3 of 2015**. In that case the respondents herein were the defendants and the appellant was the plaintiff. The plaintiff claimed for the following orders:

- a) **An order of mandatory injunction compelling the defendants to reconnect water to the plaintiff's land parcel No. Abothuguchi/ Kithirune/ 1364.**
- b) **An order of permanent injunction from disconnecting or otherwise interfering with the plaintiff's water connected to land parcel No. Abothuguchi/Kithirune/1364.**
- c) **Costs of the suit.**
- d) **Any other relief.**

2. The plaintiff's case was that he was the owner of land parcel No. **Abothuguchi/Kithirune/1364** and has always enjoyed water connected to the said parcel of land by the 1st defendant; that on **5/2/2015** the defendants illegally and for no good reason disconnected the plaintiff's water to the said parcel of land and that the plaintiff has water - dependent potatoes on the said land and stands to suffer loss and damage unless the said water is reconnected.

3. The defendants denied the claim and in defences dated **10th February, 2015** and **11/2/2015** they pray that the plaintiff's suit be dismissed with costs.

4. Judgment was issued on **18/9/2015**. It is this judgment that the appellant is aggrieved by.

The Appellant's Case in the trial court

5. In the plaint dated **6/2/2015** the appellant's case was that he and the 2nd -10th respondents are members of the 1st respondent who are entitled to uninterrupted water supply to their respective parcels of land and that he owned plot number **ABOUTHUGUCHI/KITHIRUNE/1364** which had always a water connection by 1st respondent. However on 5.2.15, the respondents illegally disconnected water supply to the said parcel. The appellant averred that his crops stood to suffer loss and damage unless the water is reconnected he therefore sought an injunction compelling the respondents to reconnect the water and cease interfering there with.

The Respondents' Defence to the case.

6. The 1st respondent filed a defence dated **11/2/2015** signed by its three officials stating that the disconnection complained of was effected without their authority and that they were not liable. The averred that they were ready to have the water reconnected to the Appellants land.

The 2nd -10th Respondents' Defence to the case.

The 2nd - 10th respondents filed their statement of defence dated 10/2/2015 denying the claim and averring that the appellant is *not* a member of the Mukiria Water Project.

The Appellant's Appeal

7. The appellant filed a Memorandum of Appeal dated 14/10/2015 in which he raised the following grounds:-

1. **The Learned Magistrate erred in law and in fact in finding that the 1st respondent was registered under the Co-operative Societies Act.**
2. **The Learned Magistrate erred in law and in fact in find that the provisions of Co-operative Societies Act were relevant in determining the issues raised in the suit.**
3. **The Learned Magistrate erred in law and fact in finding that PW2 could not competently transfer his membership to the appellant.**
4. **The Learned Magistrate erred in law and facts in failing to find that the appellant had become entitled to use water connected to the suit land since the year 2008.**
5. **The Learned Magistrate erred in law and in fact in failing to find that the fact of the appellant's membership was admitted by the 1st respondent.**
6. **The Learned Magistrate erred in law and fact in failing to consider a pending application for judgment on admission.**
7. **The Learned Magistrate erred in law and fact in failing to find in favour of the appellant having conclusively found that the respondents had failed to keep any records to confirm the provisions of any by-laws as well as membership.**
8. **The Learned Magistrate erred in failing to evaluate the evidence tended to the required standards.**

8. The appellant prays that his appeal be allowed, the decree passed by the lower court be set aside with orders that the appellant's claim be allowed as sought in the lower court.

Submissions of the Parties

9. The appellant filed his submissions in the appeal on 27/7/2018. I have perused through the record and found no submissions filed on behalf of the respondents. I have considered those submissions.

DETERMINATION

Issues for Determination

10. The issues that arise for determination in this matter are as follows:

- (a) *Did the Learned Magistrate err in law and in fact in finding that the 1st respondent was registered under the Co-operative Societies Act and whether he further erred in law and in fact in find that the provisions of Co-operative Societies Act were relevant in determining the issues raised in the suit?*
- (b) *Whether the Learned Magistrate erred in law and fact in finding that PW2 could not competently transfer his membership to the appellant and whether the Learned Magistrate erred in law and facts in failing to find that the appellant had become entitled to use water connected to the suit land since the year 2008.*
- (c) *The Learned Magistrate erred in law and in fact in failing to find that the fact of the appellant's membership was admitted by the 1st respondent and whether he erred in law and fact in failing to consider a pending application for judgment on admission.*
- (d) *Whether the Learned Magistrate erred in law and fact in failing to find in favour of the appellant having conclusively found that the respondents had failed to keep any records to confirm the provisions of any by-laws as well as membership.*

11. The issues are addressed as hereunder.

(a) Whether the Learned Magistrate err in law and in fact in finding that the 1st respondent was registered under the Co-operative Societies Act and whether he further erred in law and in fact in finding that the provisions of Co-operative Societies Act were relevant in determining the issues raised in the suit.

12. The fact of registration should be strictly a finding of fact. The applicability of the Act is by inference arising from the fact of registration. The evidence produced before the trial court should determine these issues and therefore this court is inclined to examine and assess that evidence.

13. On an examination of the record of proceedings before the trial court I find no evidence adduced by any party that the 1st respondent was a co-operative society and therefore the provisions of the **Co-operative Societies Act** were irrelevant in determining the issues raised in the suit.

(b) Whether the Learned Magistrate erred in law and fact in finding that PW2 could not competently transfer his membership to the appellant and whether the Learned Magistrate erred in law and facts in failing to find that the appellant had become entitled to use water connected to the suit land since the year 2008.

14. The court found that the Mukiria Water Project is a local society and the plaintiff's land is situated within the local area and that he qualified to be a member of the project.

15. Nevertheless the court observed that the appellant had to prove that he is a member. At this point the court relied on the provisions of **Section 17** of the **Cooperative Societies Act** and observed that the plaintiff had not shown whether he had made any contribution to the society towards membership.

16. The court made a finding that he had not proved to be a paid up member. Relying on the provisions of **section 20(2)** of the Act, he also found that **PW2** could not effectively transfer his share in the project to the appellant who was a non-member.

17. What was transferred to the appellant, the court found, was the land and not the membership; it also found that the appellant had indeed admitted having written to the society and that under **Section 16** of the Act any new members can only be added through an annual general meeting and the officials have no capacity to add new members.

18. Accordingly, stated the court, the appellant needed to apply for his name to be registered before asserting his rights and obligations as a member. Therefore he had not followed to the ultimate end the due process required to make him a member.

19. In this court's view the magistrate's reasoning can not be faulted save in one respect: the application of the **Co-operative Societies Act** instead of only the **Mukiria Project By-laws** produced as **DExh 2**. I have already found that it was not proved that the society was registered under the Act. In the circumstances it was improper to apply those provisions of the Act that he applied.

20. A party to a suit must prove his case and the project having been proved to be an entity comprising of members and officials, this court cannot overlook the need to respect the internal mechanisms that govern such a society in so far as inclusion into membership is concerned.

21. The application by the appellant to the group for inclusion into its membership is relevant in this respect. By applying for membership, he admitted he was not previously a member. He admitted he does not have a membership number. He did not possess any payment receipt issued by the society. He only heard of the bylaws of the project during his cross examination by the counsel for the defendants. This cannot be said to be a person who has proved that he is a member of the society.

22. Therefore, I find that the magistrate was right in his findings on the basis of the evidence on record that the appellant was not a member and I am not inclined to disturb that finding.

23. Consequently, it goes without saying that the Learned Magistrate did not err in law and facts in failing to find that the appellant had become entitled to use water connected to the suit land since the year 2008.

(c) The Learned Magistrate erred in law and in fact in failing to find that the fact of the appellant's membership was admitted by the 1st respondent and whether he erred in law and fact in failing to consider a pending application for judgment on admission.

24. While relying on the provisions of **Section 16** of the Act the trial magistrate found that new members could only be admitted at a general meeting of the society. I have already found that his reliance on the provisions of the Act was not proper in this case. However, perchance he never relied on the Act's provisions, would he have found on the basis of the record that there was an admission by the 1st respondent?

25. **Order 13 of the Civil Procedure Act** states as follows:-

“Any party may at any stage of a suit where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

26. An admission of a fact is proved by evidence. It may appear on the face of a pleading. In the case of **NIC Bank -vs- Tausi Assurance Co. Ltd [2017] eKLR, NAIROBI the Court Of Appeal (MAKHANDIA, OUKO & M'INOTI, JJ.A.)** the court stated as follows:-

“In the principles that guide the court in an application for judgment on admission are well settled. Madan JA stated them as follows in Choitram v. Nazari (supra):

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt...”

(See also *Cassam v. Sachania (supra)*, *Agricultural Finance Corporation v. Kenya National Assurance Co Ltd*, CA No 271 of 1996, and *Harit Sheth v. Shamas Charania*, CA No. 252 of 2008).”

27. In the case of *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [2014] eKLR HIGH COURT OF KENYA AT NAIROBI COMMERCIAL & ADMIRALTY DIVISION CIVIL CASE NO. 301 OF 2013 (per Justice F. Gikonyo) the court stated as follows:

“The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd Hccc No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle.”

28. The defence of the 1st respondent was that the water to the appellant’s land was disconnected by the 2nd to 10th respondents without its authority or participation and that it was willing to reconnect the water. They prayed not to be condemned to any costs. The 2nd -10th defendants on the other hand denied the claim and contended that the appellant was not a member of the society.

29. Is this an admission?

30. The appellant’s case was that his water supply was disconnected by the defendants. What I find in the 1st defendant’s defence is a denial, and an avoidance of liability for the claim by redirecting blame to its co-defendants alleging they committed the acts sued for.

31. In addition, the officials of the society who filed the defence on its behalf never testified in support of the appellant. Therefore whether viewed through the prism of the pleadings, evidence and the provisions of the Act or only on the basis of the pleadings and evidence on the record, the same conclusion ensues: that it is not an admission. The magistrate’s conclusion on this issue, though based on the provisions of the Act, can not be faulted.

32. As to whether he erred in law and fact in failing to consider a pending application for judgment on admission, the record shows that such application was filed on 2/9/2015. The hearing of this suit had commenced on 21/8/2015.

33. On 21/8/2015 Mr. Ringera for the plaintiff is recorded as having told the court that he was ready for the hearing of the main suit on that day. There was no mention of the intention to file any application.

34. All witnesses for the opposing sides were heard and the cases closed on that date. The matter was reserved for submissions and subsequently judgment without mention of the application. Judgment was delivered on 18/9/2015.

35. It is noteworthy that between the date of the filing and the date of judgment there was no record of request for a mention before the magistrate. It is not even known whether the application was ever brought to his notice at all.

36. Some cases may be regarded as open and shut cases, but nevertheless, there are instances where justice may be done and be seen to be done only upon a hearing on the merits of the case. : see **KENYA BUREAU OF STANDARDS v SOCIETE GENERALE DE SURVEILLANCE SA** [2005] eKLR, per Nyamu J, quoting the dicta of *MEGARRY J* in the case of *John v Rees* [1970] Ch 345 at page 402 as follows:

“It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. “When something is obvious, ‘they say, ‘why force everybody to go through the tiresome waste of time involving in framing charges and giving an opportunity to be heard? The result is obvious from the start.’ Those who take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with open and shut cases which, somehow, were not, of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained: of fixed and unalterable determinations that, by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”

37. The magistrate can not be faulted for failing to deal with the application. In my view filing what is supposedly an interlocutory application after a hearing has been concluded is mischievous and intended to embarrass the court process. It can be added that the court’s failure to consider that application served the parties and the process well for the reason that the court delivered a final reasoned judgment on all issues in the suit; and determined it on the basis of the evidence available without any preliminary prompting as to whether there was an admission or not, and by implication of its judgment it failed to find for the appellant on that issue of admission.

(d) Whether the Learned Magistrate erred in law and fact in failing to find in favour of the appellant having conclusively found that the respondents had failed to keep any records to confirm the provisions of any by-laws as well as membership.

38. It is the correct position that the magistrate found that the respondents have not kept any record to confirm the provisions of the by-laws as well as membership. However does this entitle the appellant to an automatic judgment as prayed?

39. In my view, the failure to keep records not being one of the issues pleaded and framed by the appellant, it cannot afford the appellant an automatic judgment. Each case must be dealt on the basis of the pleadings the issues arising therefrom and the evidence to substantiate the

claims.

40. However the court may consider an unpleaded issue under certain conditions in the case of **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR -MOMBASA CIVIL APPEAL NO. 68 of 2016 (per WAKI, KARANJA & KOOME, JJ.A)** the court stated as follows concerning unpleaded issues:

28. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. This position was restated by this Court in *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR* -

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of *Odd Jobs vs. Mubia [1970] EA 476*. Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say:-

“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision...”

41. Under our justice system the plaintiff first establishes his case before the defendant is called upon to tender evidence in support of his defence.

42. It has been established that in considering whether the plaintiff has established his claim to the required standard, it matters not whether the defendant has filed a defence opposing the claim. The Court of Appeal case of **Hon. Daniel Toroitich arap Moi -vs- Mwangi Stephen Muriithi (Civil Appeal No. 240 of 2011 [EKLR])** is oft cited in this regard.

43. I must abide by the position in the Moi Case (Supra) and emphasize that had the appellant produced evidence that could have made out a prima facie case that he was a member of the society, then the trial court could have had occasion to assess that evidence against the disorganization in record keeping exhibited by the defendants, to establish whether it amounted to proof of that fact on a balance of probabilities. Where there was nothing to assess, then the issue of the plaintiff's non-membership could not be deemed to be in dispute as it was clear he was not a member. On this issue I also find that the trial magistrate's decision can not be faulted.

44. For the above reasons, I find that this appeal has no merit and it is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered at Meru this 1st day of March, 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE