



Azalea Holdings Limited v Nairobi City Water & Sewerage Company Limited (Environment & Land Case E307 of 2022) [2023] KEELC 16691 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E307 OF 2022**

**AA OMOLLO, J
MARCH 28, 2023**

BETWEEN

AZALEA HOLDINGS LIMITED PLAINTIFF

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED DEFENDANT

RULING

1. For determination is the Notice of Motion application dated September 21, 2022 brought under the provisions of Articles 10, 23, 40, 43 and 47 of the Constitution, 2010; Section 63 of the Water Act, 2016, Section 13(7) of ELC Act, Section 1A, IB and 3A of the Civil Procedure Act and Order 40 * 51 of the Civil Procedure Rules. The Applicant sought several orders some of which have been granted. What is pending are the following:
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary order against the Respondent, its servants, officers, employees, agents and/or assigns from howsoever accessing, disconnecting, removing, closing, trespassing onto, dealing with, and/or in any other matter whatsoever interfering with the plaintiff's private boreholes and Sewage Treatment plant situated in the property known as LR No 1159/466. Darogetti Road, Nairobi County.
 6. Costs of this application be provided for.



2. The application is premised on several grounds listed on its face as follows;
 - a. The plaintiff herein, from 2016, has traded and carried on business as the Hub Karen Shopping Mall, a premier shopping mall consisting of retail premises, offices, medical facilities, a wellness centre, a hotel/conference centre, and parking bays (the Hub) erected on land reference No 1159/466 situated in Dagoretti Road, Nairobi CityCounty (the together the suit property).
 - b. Currently, the Hub Karen has over 85 stores, 1200 parking bays, 1300 eatery seats and hosts over 80,000 visitors each week thereby making it a leading premier shopping mall in Nairobi.
 - c. Without lawful justification, on or about May 6, 2022, 6 years after the Hub Caren opened its doors, the Defendant herein arbitrarily and capriciously demanded that the plaintiff settles disputed service bills amount to Kshs 23,835,348.24/= (the impugned bills) for alleged sewerage services.
 - d. The Defendant has continued to demand the settlement of the impugned Bills despite knowledge and information that the plaintiff has from the year 2016 had its own source of water or sewerage treatment, hence did not utilize the defendant's water or sewerage system.
 - e. In accordance with the Defendant's applicable Gazetted Approved Tariff for the period 2015/2016 and 2017/2018 issued published in Gazette Notice No 7335 of 2nd October, 2015, the Defendant has no right or authority to charge the plaintiff sewer charges because the plaintiff has never been connected to the public sewer system.
 - f. In a clear demonstration of impunity, unreasonableness, high handedness and unfair administrative action, the Defendant proceeded to disconnect the plaintiff's boreholes thereby cutting off the plaintiff its own private boreholes and depriving it, its customers and tenants from access to safe and clean adequate water.
 - g. At all material times since the construction and development of the Hub Karen in 2016, the plaintiff has exclusively utilized its private boreholes as its source of sage and clean adequate water and the sewage treatment plant (STP) to treat and recycle wastewater quietly and peacefully without interference and disturbance from the defendant.
3. The application was supported further by the affidavit sworn by Mr. Joshua Muinde on September 21, 2022 on behalf of the Plaintiff/Applicant. Mr Muinde deposed that the plaintiff has a water permit from Water Resources Management Authority (hereinafter referred to as the Authority) authorising it to utilize the private boreholes from the year 2016 with a copy of the permit was annexed as JM5. The plaintiff averred that it also constructed and developed a Sewerage Treatment Plant (STP) in line with the conditions set out in the water permit where it has since treated and recycled water for toilet flushing system, gardening and its man-made take without use or access to the public sewerage system.
4. The plaintiff argues that the Defendant has no justification for demanding the impugned bills because for the last six years, it (plaintiff) has legitimately and exclusively utilized water from the private boreholes and its STP. That the plaintiff has invited the defendant to a meeting to make them understand the functioning of the STP. It is deposed that the defendant's action of disconnecting the plaintiff's water system was arbitrary, reckless and infringement of the plaintiff's right to safe and clean water in adequate quantities as provided for under article 43(1)(d) of the [Constitution of Kenya](#). The plaintiff urged that the orders sought be granted.
5. The defendant opposed the application vide a replying affidavit sworn on its behalf by Rebecca Weru. Ms Weru deposed that she was giving information based on her knowledge as an employee of the



defendant and also from other sources disclosed. She deposed that she was informed by their Regional Technical Officer, Mr Duncan Ogambi that the plaintiff illegally and without following due procedure connected its STP to the Defendant's Sewer line and she proceeded to attach a copy of the sewer line map. That the plaintiff was advised in the year 2020 to regularise and in doing so, it applied to be allocated account numbers in the year 2022.

6. Ms. Weru averred that at the time of applying to regularize, the Plaintiff had already accrued a bill of Kshs 12,057,293.90 arising from the illegal utilization of the Defendant's sewer. The defendant stated that even though the plaintiff was operating its own boreholes, it was releasing the sewerage sludge by pumping into the defendants' sewer line. Further, that despite the defendant blocking the illegal use, the plaintiff has never stopped as shown in the report annexed as "RW 5." She urged that the plaintiff's plea is unmerited as they have not made good the debt owed to the defendant. The defendant prayed that the application be dismissed with costs to them.
7. The nature of the orders sought in the present application are for the grant of temporary injunction. For the existing interim orders to be confirmed, the plaintiff/applicant must satisfy either of the three principles of prima facie case, irreparable loss or that the balance of convenience tilts in its favour. In determining what is prima facie case, this court is guided by the description as given in the case of *Giella Vs. Cassman Brown E.A* to refer to a case in which the material presented to the court properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.
8. The Applicant/Plaintiff has alleged that the Defendant disconnected its boreholes thereby cutting off the plaintiff's water supply to its customers and tenants. The defendant did not deny undertaking the disconnection but explained that it did so because the plaintiff had illegally connected its Sewerage Treatment Plant to the Defendant's sewer line. Further that for the period of the illegal use, the plaintiff had incurred a bill of Kshs 23,835,348 which remained unpaid to date.
9. Consequently, from the pleadings, the court does observe that there is evidence of an alleged infringement of a right. The Applicant stated that it was using and recycling sewerage generated from within its premises and denied discharging any sewer on to the public sewer line operated by the Defendant. The Defendant on its part rebutted this relying on a report annexed to the replying affidavit filed. Therefore, the issues raised by both sides are weighty and can only be resolved at hearing of dispute but which also demonstrates that the plaintiff has laid out a prima facie case.
10. On the heading of irreparable loss, the plaintiff explained that the premises is comprised of 85 stores and 1300 eateries which hosts over 80,000 people every week. The 80,000 do use visit the facilities that are operating using the water from the boreholes. In the event that the water source is disconnected, the repercussions will be more than monetary losses. I am persuaded that by the very nature of water being equated to life, damages would not be adequate.
11. The balance of convenience tilts in having the orders of injunction in place. The defendant pleaded that the bills were calculated at 75% based on the meter readings of the water consumed. So that if the plaintiff is unsuccessful after determination of the suit, the defendant is still able to calculate the sums of money due and payable to it.
12. In conclusion, I find that the application dated September 21, 2022 is merited. The orders of temporary injunction earlier issued are hereby confirmed in terms of prayer 5 of the motion that;
 1. Pending the hearing and determination of this suit, this Honourable court do hereby issue an order of temporary injunction against the Respondent, its servants, officers, employees, agents and/or assigns from howsoever accessing, disconnecting, removing, closing, trespassing onto



dealing with and/or in any other manner whatsoever interfering with the plaintiff's private Boreholes and Sewerage Treatment Plan situated in the property known as LR No 1159/466, Dagoretti Road, Nairobi County.

2. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH, 2023.

A. OMOLLO

JUDGE

In the Presence of

Ms Simiyu for the Applicant

N/A for the Defendant

