



Nairobi City Water & Sewerage Co Ltd v Bibi Properties Limited (Miscellaneous Civil Application 311 of 2017) [2023] KEHC 21084 (KLR) (Civ) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 311 OF 2017**

JN MULWA, J

JULY 27, 2023

BETWEEN

NAIROBI CITY WATER & SEWERAGE CO LTD APPLICANT

AND

BIBI PROPERTIES LIMITED RESPONDENT

RULING

1. Before the Court is an Application dated 14/7/2022 brought by the 1st Respondent Nairobi City Water and Sewerage Company Limited against the Respondent Bibi Properties for orders:
 1. That the matter be dismissed for Want of Prosecution.
 2. That the sum of Kshs.419,200/- deposited in Court be released to the 1st Respondent/Applicant together with the accrued interest.
 3. That the Applicant/Respondent be directed to pay all the outstanding current water bills due to the 1st Respondent.
 4. That the costs of the Application be provided for.

Upon grounds stated at the face of the application and Supporting Affidavits sworn on the 14/6/2022 and 14/6/2022.

2. The Application is opposed by a Replying Affidavit by one Mary Kioko Advocate having Conduct of the Matter for the Respondents, who depone to be well aware of the matters pertaining to the matter before the Court.

The Parties Advocates argued the Application orally before me on the 5/7/2023.



3. The Court has Considered the pleadings, the Affidavits for and in opposition to the application and the oral submissions.
4. The Applicants Case is that by a Consent order recorded in Court on 16/5/2018, the then disputed sum from January 2018 to May 2018 was to be deposited in Court which was done, upon which the 1st Respondent was to reconnect the Applicants borehole Meter; that the 1st Respondent would continue sending Water Bills to the Applicant on a monthly basis, but that the 1st Respondent would not demand payment for the bills pending determination of the Application dated 27/7/2017.
5. Upon hearing of the Application, some further orders were made by the Court on the 7/2/2019 on an application dated 14/12/2018 that:
 - a. The water meter was to be reconnected by close of business on the 8/2/2019.
 - b. That the dispute between the Applicant and Nairobi City Water & Sewerage Company was to be set down for hearing paid Water Bills on the within six (6) months, and the 1st Respondent was at liberty to demand for payment of bills issued to the Applicant; and further that the 1st Respondent was allowed to claim the unpaid water bills on the basis that the Applicant failed to comply with the terms of the Consent Order recorded on the 16/5/2018, but continues to enjoy water consumption as directed by the Court.
6. On the matter of dismissal of the Suit, it is the 1st Respondents case that since 2019, the Applicant has not progressed the matter to hearing yet continues to consume water from the 1st Respondent without paying the bills which is highly prejudicial to the 1st Respondents interest; and thus the 1st Respondent prays that the Application dated 14/7/2022 be allowed, for the interests of Justice and equity, and particularly the Court Orders of 14/12/2018 when the Court directed the Applicant to set the matter for hearing within 6 months, being on or before the 15th June, 2019, which was not done.
7. The Respondent's Case (Plaintiff – Bibi Properties Limited) is found in the Replying Affidavit to the Application sworn on the 7/10/2022 by its Advocate Mary Kioko.
8. On why the dispute was not set down for hearing within six months as per Court Orders dated 7/2/2019, it was argued that the Water Appeals Board being the relevant body which ought to hear the dispute was not properly constituted, and despite numerous letters attached as exhibits in the Affidavits, the Chief Executive Officer by a letter dated 22/7/2019, indicated that there was an active Chairman and would commence operations upon appointment and gazettelement of two (2) Board Members who had not been appointed as at the date (22/7/2019) despite numerous interventions from the Chief Registrar of the Judiciary (Letter dated 6/8/2019), and therefore the failure was beyond the Respondents control, and thus urges the Court to accord grant an opportunity to the Respondent to be heard when the Board becomes operational.
9. In her oral Submissions before this Court, Ms. Kioko Advocate for the Respondent argued that the alleged unpaid water bills were not annexed to the application and the specific loss to the applicant had not been demonstrated; and that any of the parties to the dispute could have listed the dispute for hearing.

Mr. Muchiri Advocate for the 1st Respondent argued that the Water Bills were forwarded following the Consent Orders dated 16/5/2018 and the Respondent continues to consume water without payment as at date of the application.



Analysis and Determination

10. The Consent Orders recorded on the 16/5/2018 stated at Paragraph 3 that:
3. The 1st Respondent shall continue to send bills to the Applicant on monthly basis but payment of the said bills shall not be demanded pending hearing and determination of the application dated 27/7/2017.

At paragraph (1) thereof, pursuant to the order, water connection was done thus the Applicant continued to use water but not paying for the same. At the time, the disputed amount of Kshs.419,200/- was deposited in Court. Obviously, the continued usage of the 1st Respondent's water must be now well beyond the sums deposited in Court, being well over three years since.

However, the unpaid Water Bills have not been provided to the court despite the Court's Order that the 1st Respondent was to continue to send water bills to the Applicant. Equally, the Applicant has not denied that the 1st Respondent has not been sending water bills to it since execution of the consent orders.

11. The Proviso to the consent Court Order dated 16/5/2018 stated;

“.....but that the 1st Respondent would not demand payment for the bills pending determination of the application dated 27/7/2017...” must have caused the Applicant to not take any steps to get the application dated 27/7/2017 heard as it continued enjoying use of the water without payment as the 1st Respondent could not demand payment of the Bills.

This however did not bar the 1st Respondent from sending the Bills to the Applicant which fact has not been disputed.

12. I have looked at the application dated 27/7/2017 filed by the applicant. The bills amounting to the sum of Kshs.419,200/- were deposited in Court and were for the period upto 24/10/2017.

I have earlier rendered that since then the water bills must be much more and continue to accrue hence the Applicant's desire to have the suit dismissed to apparently pave way for discharge and vacation of the Court Orders in place, and demand payment of the outstanding unpaid Water Bills.

13. The Court further finds that the dispute could not have been listed down for hearing during the period stated in the Court orders dated 7/2/2019 as the Water Board was not properly Constituted.

However, the Applicant ought to have moved to Court to extend the period of the orders before their expiry date but opted to sleep and did nothing while the order expired and the application remained in limbo.

At the time of filing the application under review on the 14/7/2022, there was no competent Application -(suit) before the Court, the same having stood dismissed by virtue of the failure to fix the same for hearing within the time stated in the Consent Orders of the 7/2/2019, and none extension of the orders before the expiry date. The Application/ Suit therefore stood dismissed on the 8/9 2019.

14. Consequently, there is no competent Application/ Suit that the court may proceed to dismiss.

15. The application having been dismissed as stated above, and the Respondent having failed to comply with any of the Consent Orders recorded on the 7/2/2019, I find that the said Applicant/1st Respondent is at liberty to demand for payment of all unpaid bills from the Applicant from the 16/5/2018 in terms of prayer number 3, taking into account the sum of Kshs. 419,200/= deposited into court that the court directs and orders to be released forthwith to the Applicant/1st Respondent.



There shall be no orders on costs.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2023.

JANET MULWA

JUDGE.

