



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Balaji (EPZ) v Nairobi Water & Sewerage Co Ltd (Civil Case 258 of 2018)  
[2023] KEHC 21918 (KLR) (Civ) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21918 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 258 OF 2018**

**AN ONGERI, J  
AUGUST 18, 2023**

**BETWEEN**

**BALAJI (EPZ) ..... PLAINTIFF**

**AND**

**NAIROBI WATER & SEWERAGE CO LTD ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit against the defendant vide plaint dated October 28, 2018, amended on February 5, 2019 and further amended on March 16, 2020 seeking the following remedies against the defendant;
  - i. A declaration that the defendant ought to abate the Ksh 76,650,122.56 water bill attached to the plaintiff's accounts.
  - ii. Punitive damages
  - iii. Specific damages amounting to Kshs 99,165,182.50.
  - iv. General damages.
  - v. Costs of this suit.
  - vi. Any other relief that this court may offer.
2. The suit arose out of a water bill of Kshs 76,656,122.56 which the plaintiff alleged that the defendant arbitrary levied against the plaintiff in respect to account no. 1896740 meter no. 1202613.



3. The plaintiff averred in the plaint that it has been using the said meter account numbers to promptly pay for its water bills at the end of every month for the last seven years after receiving its monthly water bills from the defendant.
4. On the 25<sup>th</sup> of September or thereabout, the plaintiff received a letter from the defendant requesting it to appear before them to discuss an outstanding water bill of Kenya shillings seventy six million two hundred and forty thousand and six hundred and thirty one (Ksh 76,240,631) purportedly having accrued to the plaintiff's account no. 1896740 and meter no. 1202613.
5. The plaintiff further averred that in breach of the said understanding and in total disregard of its records with the defendant, the defendant is purporting to disconnect the plaintiff's water supply for a purported outstanding water bill of Kenya shillings seventy six million six hundred and fifty thousand one hundred and twenty two an fifty six cents (Ksh 76,650,122.56) which amount was arbitrary and whimsical only meant to achieve ulterior motives by the defendant.
6. That despite the foregoing, the plaintiff further averred that the defendant proceeded to disconnect the water supply for a period of two (2) days, occasioning to immense losses to the plaintiff to the tune of Kshs 99,165,182.50.
7. That owing to the nature of the plaintiff's business, water disconnection for a day was detrimental to the operations of the plaintiff's business and as a result the immense losses experienced for the 2 days.
8. The plaintiff maintained that it had no such astronomical bill owed to the defendant and that the bill claimed by the defendant was outrageous and baseless and its business will be gravely affected should the defendant disconnect it from the water supply due to the wrongful purported bill being claimed by the defendant.
9. The plaintiff averred that it has always settled its bills as and when they became due ever since he was connected to the water system and furnished with a meter number and account number and has furnished the defendant with receipts to corroborate this fact.
10. The plaintiff maintained that despite having reached out to the defendant concerning this matter, the latter has refused to demonstrate how the outrageous bill was arrived at and unilaterally a term called a multiplier which did to from part of the contract signed between the defendant the plaintiff. The defendant is put to strict proof hereof.
11. The plaintiff put it to the defendant that its move to request it to settle the purported tentative bill in instalments was not in good faith since the plaintiff has never at any point purposed or requested to pay its water bill in installments.
12. It was the plaintiff's unwavering stand that throughout its relationship with the defendant it has always honored its bills and has never been disconnected from the water supply due to any outstanding water bill.
13. The defendants filed a defence and counter-claim dated 12/2/2019 seeking Kshs 80,231,550.15 allegedly in respect of arrears accrued by the plaintiff between June 2015 to November 2018.
14. The plaintiff called one witness Byju Kuttan Nari who adopted his statement dated October 27, 2018 as his evidenced in chief.
15. PW 1 stated that the company was given the account 1896740 which has been on from January 2012 up to 2018. Over the years he paid the amount due and demanded as per the invoices supplied monthly.



16. He said that he was however issued with a bill of Kshs 76,650,122.56 by the defendants which is without justification.
17. He indicated that after payments were made in the sum of Kshs 2,700,000, the account closing credit balance of October 9, 2018 was Kshs 769,455.05 which is a credit on the company. Previously, before October 9, 2018 was Kshs 330,192.05 which he paid in full on September 12, 2018 vide cheque number 21595867. Further in March 2018 he was billed for the sum of Kshs 70,257.80 which he paid vide cheque number 26163095 and the balance was nil which meant that he had no outstanding payments or arrears.
18. In cross-examination, the plaintiff's witness said they always paid bills in time. He also said they were not aware of the multiplier effect.
19. The defendant also called one witness DW1 Hiram Kabue who also produced his written statement dated 12/2/2019 as his evidence in chief.
20. DW 1 stated that he is the North Eastern Region Finance Coordinator of Nairobi City Water & Sewerage Company Limited. He confirmed that the plaintiff and the defendant entered into an agreement that the defendant would supply water to the plaintiff and the plaintiff would make payments at the end of each month. He acknowledged that the plaintiff had been paying its water bills however the bills that were submitted were erroneous as from the month of June 2015 to November 2018.
21. The meter reading exhibited a factor of 10 which required the unites to be multiplied by 10 to achieve the actual consumption. The inaccuracies were caused by the decline of the factor in the calculation of the amount payable. Following the ascertainment of the errors, the defendant undertook a reconciliation of account for the periods between June 2015 to November 2018 which resulted in the defendant requiring payment from the plaintiff in order to recuperate the monies owed had the error not occurred.
22. He confirmed that the plaintiff owed the defendant a total of Kshs 80,231,1550.15 the defendant held a meeting with the plaintiff on 20<sup>th</sup> September 2018 to notify the plaintiff of the oversight and further inform the plaintiff of the intention to recuperate the remaining monies. The representative of the plaintiff acknowledged that it had noticed a decline in the consumption and billing.
23. He admitted that the inaccurate invoice was a sincere and inadvertent oversight and it was just and proper to demand for the balance of the monies owed for the services rendered to the Plaintiff. He stated that such mishaps occur from time to time and the defendant usually enters into an agreement with the customers for a staggered payment arrangement of the outstanding fees.
24. In cross-examination DW 1 said from May 2015 up to October 2018 during the process of reading and billing, there was an oversight on their end in that the multiplier was not effected when reading the plaintiff's meter.
25. DW 1 also said when they changed the meter they told the plaintiffs that they had changed the meter but they did not tell them that they shall be multiplying the units by 10.
26. The parties filed written submissions as follows; the plaintiff submitted that the defendant was in breach of contract by unilaterally imposing a sum of Kshs 76,241,631 on its bill, demanding immediate payment and using threats to disconnect the water supply if payment of the said sum was not made. The defendant owed the plaintiff a duty to act diligently and let him have quiet consumption of the



water supplied without inconveniencing them and therefore the defendant should be estopped from cutting off the water supply.

27. The plaintiff submitted that the defendants being the only sole water supplier in Nairobi County, it carries out regular inspection on water meter yet they did not detect the error for three years. The plaintiff in support of their argument relied on the case of *Wax and Polypack LTD v. Kenya Power and Lighting Co. Ltd* [2007] eKLR where the court held that the defendant was negligent for not having detected the error in the meter and transformer in the duration of six years and by taking another 3 years to inform the plaintiff of the same error.
28. The plaintiff argued that it has been relying on the water bill sent to them by the defendant to be the correct position of water consumption and therefore the defendant should be estopped from denying it. That it is in the interest of justice the defendants be estopped from levying backdated bills since the defendant delayed in detecting the error. The plaintiff relied on the maxim of equity; delay defeats equity.
29. On general and punitive damages the plaintiff submitted that they are entitled to general damages for the anguishes that they have gone through since receiving the letter purporting that they owed the defendant arrear of Kshs 76,240,631.
30. The defendant submitted that the plaintiff failed to prove its claim for breach of the water supply agreement as they failed to produce the same as evidence. It was their argument that the plaintiff failed to show the terms of the agreement that were breached by the defendant when it demanded payment for services consumed by the plaintiff.
31. The defendant contended that as soon as the error came to its attention the same was communicated to the plaintiff and was invited for a discussion on how to resolve the issue. The defendant pointed out that the correct amount that it claims is Kshs 80,231,550.15 as prayed in the counterclaim.
32. It was their argument that the plaintiff never denied actually consuming and benefitting from the services that the defendant is seeking payment for in unpaid bills. It argued that the erroneous billing is the gist of the present dispute and the company is justly entitled to demand for the same. In support of it case the defendant relied on *Sameer Africa Limited v. Nairobi City Water Sewerage Company* [2019] eKLR where the court in a similar claim held that;

“I am of the view that the explanation given by the Defendant’s witness on a balance of probability indicated the fair amount the Plaintiff should pay for water consumed without paying. The Defendant used the readings of the 4 inch pipe to calculate the amount payable for the 6 inches consumption.

I believe I have here before discussed the inapplicability of the doctrine of estoppel and acquiescence. I do indeed find the Plaintiff liable to pay the Defendant for the water consumed that is Kshs 22,155,046.60. The Plaintiff is also liable to pay the fine for illegal connection of water of Kshs 100,000 as provided under the Gazette Notice No. 7335.”

33. The issues for determination in this case are as follows;
  - i. Whether the plaintiff has proved its case against the defendant to the required standard.
  - ii. Whether the plaintiff is entitled to special damages of Ksh 99,165,182.
  - iii. Whether the defendant has proved its counter-claim against the plaintiff to the required standard.



- iv. Who pays the costs of this suit?
34. On the issue as to whether the plaintiff has proved its case, I find that at the time the defendant applied multiplier effect the plaintiff was paying bills as invoiced.
35. I find that the bill of 76,650,122.56 is arbitrary. It is not clear how the plaintiff arrived at that figure and I find that the same is not payable.
36. The agreement between the parties was for the supply of water by the Defendant and payment of bills by the plaintiff. The parties did not agree on the multiplier levied by the Defendants.
37. The parties are bound by the terms of their contract. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* (2002) 2 EA 503, (2011) eKLR the Court of Appeal at page 507 stated as follows;
- “ A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”
38. On the issue as to whether the plaintiff is entitled to special damages of Ksh 99,165,182.50 I also find that the same has not been proved and it is accordingly dismissed.
39. The law requires that special damages be specifically pleaded and proved. In the case of *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR), the court stated as follows;
- “ The appellant apart from listing the alleged loss and damage, it did not... lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages”.
40. On the issue as to whether the defendants have proved their counter-claim, the same is also not proved.
41. The defendants did not notify the plaintiffs that they were claiming the multiplier amount.
42. I find that the plaintiff's evidence was that they were always up to date even after the multiplier was effected.
43. The defendants are not entitled to the amount they are claiming in the counter-claim since the same is arbitrary.
44. I find that the counter-claim has not been proved and the same is accordingly dismissed.
45. On the issue of general damages, I find that the same are not payable since this claim is based on contract.
46. In the case of *Barclays Bank of Kenya Limited v Mema* (Civil Appeal E011 of 2021) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) Justice Majanja had the following to say;
- “ As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch.



341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

47. I find that both parties did not prove their respective claims to the required standard in civil cases and both are dismissed.
48. However, the plaintiff is entitled to a declaration that he is not entitled to pay the arbitrary bill levied by the Defendant.
49. A declaration be and is hereby issued that the plaintiff is not liable to pay the amount of Ksh 76,650,122.56 levied by the defendant.
50. Since the plaintiff’s suit partially succeeded I direct that each party pays its own costs of this suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant

