



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 99 OF 2017

KIAMBU MULTI-PURPOSE

CO-OPERATIVE SOCIETY..... PLAINTIFF/APPLICANT

VERSUS

KIAMBU WATER & SEWERAGE

COMPANY LIMITED.....1ST DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.... 2ND DEFENDANT/RESPONDENT

RULING

1. The amended Notice of motion (undated) reflected on the face of it as filed in court on 1st February, 2016 principally seeks orders that an injunction be issued restraining the 2nd Defendant/Respondent by themselves, agents, servants, employees, and/or anybody otherwise howsoever from continuing with the trenching, constructing and/or installation of water pipes to the residents of Kiamumbi Estate pending the hearing and determination of this suit.
2. **Secondly**, that an injunction be issued restraining the Defendants/Respondents by themselves, agents, servants, employees, and/or anybody otherwise howsoever from destroying, interfering with the Plaintiff/Applicant's water treatment plant, water pipeline system, lawful operations and/or any other action whatsoever designed to unlawfully defeat/undermine the Plaintiff's Kiamumbi Water Project operations within Kiamumbi Estate, pending the hearing and determination of this suit.
3. **Thirdly**, that a mandatory injunction be issued compelling the Defendants to reinstate and reconnect the Plaintiff's water pipes which they have irregularly destroyed and to comply with the terms of the Sub-contracting Agreement made on the 17th July, 2013.
4. The application is premised on the grounds stated therein and the affidavit in support sworn on 10th February, 2016 and a further affidavit sworn on 2nd November, 2018 by the Applicant's Chairman, Leonard N. Mbugua.
5. The Applicant has described itself as a corporate entity established under the Co-operative Societies Act No. 12 of 1997 laws of Kenya duly licensed by the Water Resources Management Authority to abstract water from their dam and to distribute water to the residents of Kiamumbi Estate through the Kiamumbi Water Project through piped & metered household connections and water kiosks pursuant the sub-contracting agreement between the parties herein.
6. The 1st Respondent, Kiambu Water & Sewerage Company Ltd is described as a limited liability company registered and wholly owned by the County Government of Kiambu for purposes of exclusively providing water, sanitation and sewerage services to the residents of the Kiambu County.
7. That through a sub-contracting agreement between the 1st Respondent, Kiambu Water & Sewerage Company Ltd on behalf of the 2nd Respondent, the Applicant was to exclusively distribute water to the residents of Kiamumbi Estate through piped metered household connections and through water kiosks in the area.
8. The Applicant's complaint is that although he had been given exclusive rights to distribute water to the residents of Kiamumbi Estate, the Respondents on the 30th November, 2015 and 4th December, 2015, using an excavator manned by an official of the 2nd Respondent in the company of hired goons dug out and destroyed water pipes laid out by the Applicant along a 2 Km stretch along New York Avenue in Kiamumbi Estate in Kiambu County. The value of the damaged property is given as Ksh.487,350/= . It was further averred that the

infrastructure for Kiamumbi Water Project was purchased by the Applicant through capital financing from K-rep Bank under the World Bank funded program.

9. It is further stated that to date the Applicant is still servicing the loan obtained from K-rep Bank courtesy of the World Bank program. That it is unlawful and extremely prejudicial to the Applicant's members for the Respondents to interfere with the contract and further that the Applicant will be unable to continue servicing the loan and stands the risk of foreclosure from the Bank. That unless the Honourable court intervenes, the Applicant is apprehensive that the Respondents will send the hired goons back to completely destroy the Kiamumbi Water Project which was developed at the cost of Ksh.100,565,201/= and thereby leave the residents of Kiamumbi estate without adequate supply of clean water.

10. The application is opposed. It is stated in the replying affidavit that the Applicant lacks the *Locus Standi* to institute the suit herein. That the Applicant has never been issued with a permit to provide water services and has no capacity to do so. That the water permit relied on by the Applicant was issued to Kiamumbi Farmers Cooperative Society Ltd and that the said permit expired on 30th November, 2015 and has never been renewed. That the Applicant was in breach of the sub-contracting agreement for failure to obtain the necessary licenses and permits, failure to have the legal authority to enter into and perform the contract and failure to obtain appropriate insurance cover against claims, losses, damage to assets, accidents, injury and death.

11. It is further averred that the 1st Respondent retained its power to provide services in the area not covered by the sub-contractor. The Respondents accused the Applicant of being economical with the truth and pointed out disparities in the Applicant's affidavit evidence regarding whether the Applicant came into operation since 1990 or whether it was in 1986 when the Applicant became a legal entity; whether the Applicant's water pipes were destroyed on 4th November, 2016 or on 9th February, 2016 and stating that they had been issued with a licence or permit when they had not been issued with any. It is further stated that the 2nd Respondent has never dug any trenches or installed any water pipes as that is the responsibility of the 1st Respondent under the powers donated to them.

12. The Respondents denied the Applicant's claims and stated that there existed numerous complaints from the residents of Kiamumbi regarding the quality and quantity of the water supplied.

13. In the further affidavit filed by the Applicant, it is averred that the Applicant wished to change its name in 1986 from Kiamumbi Farmers Co-operative Society to Kiamumbi Multi Purpose Co-operative Society but the dam was registered in the name of Kiamumbi Farmers Co-operative Society Ltd. That the lease was also obtained in the name of Kiamumbi Farmers Co-operative Society Ltd. That therefore the Applicant continued operating under the two names. That the water permit to Kiamumbi Farmers Co-operative Society Ltd was renewed up to the 1st December, 2020. The Applicant contended that it is not opposed to the Respondents taking over the provision of water, sanitation and sewerage services to the residents of Kiamumbi as long as it is in accordance with the sub-contracting agreement and the law.

14. The application was disposed of by way of written submissions which I have considered.

15. On whether to issue the restraining injunctive orders sought, the principles applicable were well settled in the case of **Giella v Cassman Brown & Co. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss which cannot be adequately compensated by award of damages would be suffered and if in doubt, the court will decide on a balance of convenience.

16. As stated by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**:

“.....a prima facie case” I would say that in civil cases it is a case in which on the material presented to the Court a tribunal 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 latter.”

17. The Plaintiff/Applicant herein is Kiamumbi Multi-purpose Co-operative Society. The water permit issued by Water Resource Management Authority (WARMA) on 3rd October, 2012 which reflects the expiry date as 30th November, 2015 was issued to Kiamumbi Farmers Co-operative Society Company Ltd. The sub-contracting agreement exhibited dated 17th July, 2013 is between the 1st Respondent, Kiambu Water and Sewerage Company and Kiamumbi Multi-purpose Co-operative Society. The same gives the terms and conditions of the agreement which include a dispute resolution clause and termination terms by way of three months notice.

18. There is a certificate of registration exhibited herein dated 12th August, 1996 in the name of the Applicant, Kiamumbi Multi-purpose Co-operative Society Limited. A certificate of registration in respect of Kiamumbi Farmers Co-operative Society Limited has also been exhibited herein. The same reflects that Kiamumbi Farmers Co-operative Society Limited was registered on 12th August, 1986, the same date the Applicant society, Kiamumbi Multi-purpose Co-operative Society Limited was registered. The Applicant has however conceded in the further affidavit that it continued operating under the two names. Thus the affidavit evidence reflects the two are separate legal entities. This raises doubts as to whether the Applicant's have established a *prima facie* case.

19. On whether the Applicant stands to suffer irreparable loss which cannot be compensated by way of damages, it is clear from the sub-contracting agreement that the Applicant's services could be terminated as provided therein. Any restraining injunctive orders can therefore not be appropriately anchored on a plaint that seeks permanent injunctive orders. If the terms of the agreement have been breached, the Applicant can be compensated by way of damages. In any event, in the further affidavit sworn on 2nd November, 2018, the Applicant concedes that the Respondent can take over the services of providing water to the residents of Kiamumbi subject to the terms of the agreement being met. This reinforces this courts view that the Applicant can be compensated by way of damages.

20. On the question of balance of convenience, taking into account this court's foregoing findings, the balance of convenience cannot be

said to be in favour of the Applicant. Clearly, the inconvenienced party herein would be the residents of Kiamumbi area if there is no provision of clean water.

21. On whether to issue a mandatory injunction, the Court of Appeal in the case of **Mohamud Mohamed Mohamud v Athi Water Services Board [2015] eKLR**. while quoting the case of **Locabail International Finance Ltd v Agroexport and Others [1986] 1 ALL ER 901** expressed itself thus:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.

Moreover, before granting a mandatory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than was required for a prohibitory injunction.”

24. In the case at hand, this court has already expressed its doubts on whether the Applicant has established a *prima facie* case with a probability of success. This is not a clear case for the grant of a mandatory injunction at this interlocutory stage.

25. The 2nd Respondent herein is the County Government of Kiambu. No orders of injunction can therefore be issued against the 2nd Respondent. Section 16 (1)(i) of the Government Proceedings Act Cap 40 Laws of Kenya provides as follows:

(1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that

(i) Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;

26. With the foregoing, this court's conclusion is that the Applicant has not met the threshold for the grant of the orders sought. Consequently, I dismiss the application with costs.

Date, signed and delivered at Nairobi this 26th day of Sept, 2019

B. THURANIRA JADEN

JUDGE