



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 294 OF 2018

UMOJA OLD NGARA ESTATE WELFARE ASSOCIATION.....PLAINTIFF

VERSUS

NAIROBI WATER & SEWERAGE COMPANY LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 19th December 2018 and filed on 20th December 2018 was brought under Section 1(A), 1B & 3A of the Civil Procedure Act, Order 40 Rule 2 (1), 4 and 8 of the Civil Procedure Rules (2010) and all other enabling provisions of the law. *Prima facie*, Prayer No (1) was spent. It sought the following remaining prayers:-

1. Spent.

2. That pending *inter partes* hearing, this Honourable Court be pleased to issue temporary injunction compelling the Respondent by itself; its employees; agents and or (sic) servants to forthwith reconnect water supply to the members of the applicant association.

3. That Temporary Injunctions (sic) be issued against the defendant by itself: its employees: agent and or servants restraining them from continuing disconnection of the Plaintiff's/Applicant's water supply pending the inter partes hearing.

4. That the Respondent be condemned to bear the costs of this application.

2. The Plaintiff's Written Submissions were dated 3rd April 2019 and filed on 4th April 2019 while those of the Defendant were dated 27th February 2019 and filed on 16th May 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

4. The Plaintiff's present application was supported by the Supporting & Supplementary Affidavits of its Chairman, Martin Ireri Njoroge, that were sworn on 19th December 2019 and 3rd April 2019 respectively.

5. The gist of its case was that whilst some of its members had outstanding water bills, others had fully paid and had no arrears at all. It was its contention that the Defendant had entered into payment plans with other members and they had faithfully honoured the said agreements.

6. It pointed out that the Defendant's employees had at all material times accessed the water metres that were located on top of the building since 1945 but that after the subsequent relocation of the said water metres far from the premises, the Defendants vandalised the same making the sourcing of plumbing and piping materials to enable its members access water, unaffordable. It was its assertion that it could not interfere with the structural design of the house by relocating the water metres as the Defendant had demanded.

7. It was its further contention that the Defendant had acted with malice because it was disconnecting water without giving its members an opportunity to be heard and its action, was thus illegal.

8. It therefore urged this court to allow its application as prayed for as its members would continue to suffer if the same was not allowed.

THE DEFENDANT'S CASE

9. In opposition to the said application, on 13th February 2019, the Defendant's Central Region Finance Coordinator, Titus Nganga, swore the Replying Affidavit on behalf of the Defendant.

10. The Defendant's assertion was that the Plaintiff's members had not been paying water bills and had continued to enjoy water supply for a long time leading to the accumulation of water bills in the sum of Kshs 1,344,333,577/=.

11. It pointed out that when it disconnected water in 2017, the Member of Parliament (MP) of the area the Plaintiff's members' estate was situated intervened on their behalf and it reconnected the water on condition that they would pay for the water. However, they failed to honour their promises.

12. It stated that some water metres could not be traced, others had no corresponding accounts at their offices while other houses had no water metres. It averred that the water metres that were located at the roof top ceiling of the premises hindered access for metre reading, inspection and disconnection when necessary.

13. It averred that it issued the Plaintiff's members seven (7) days' notice to relocate the metres and that upon liaising with the Nairobi City County which owned the premises, it relocated twenty three (23) water metres near the main pipe. It was emphatic that the relocation did not bring any structural alteration to the building's fitting as the Plaintiff had contended.

14. It dismissed the Plaintiff's assertions that it had vandalised the water pipes as baseless as it only disconnected the water, which it was entitled to do under the law, as it was only enforcing paying of the arrears owed to it by the Plaintiff's members.

15. It was its averment that it was not opposed to the Plaintiff's members being reconnected to water supply provided that they cleared the arrears and also ensured that the water meters remained at the relocated position with a safe enclosure chamber.

LEGAL ANALYSIS

16. The Plaintiff placed reliance on the case of **Keroche Industries Ltd vs KRA & 5 others (2007) eKLR**

"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

17. It also relied on the case of **Republic vs Attorney General & Another – Ex parte Waswa & 2 Others [2005] 1 KLR 280** where Odunga J held as follows:-

"The principle of a legitimate expectation...is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidence. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

18. It further placed reliance on Article 43 (1,b,d) (sic) of the Constitution of Kenya, 2010 and Section 63 of the Water Act, 2016 that both provide that every person in Kenya has a right to clean and safe water.

19. On its part, the Defendant referred this court to the cases of **Giella vs Cassman Brown [1973] EA 358** and **Mrao vs First American Bank of Kenya Ltd [2003] KLR 125** to argue that the Plaintiff herein had not established a *prima facie* case or demonstrated that it had met the threshold of being granted an interlocutory injunction pending the hearing and determination of the suit herein.

20. It also referred to the case of **Kyangaro vs Kenya Commercial Bank Ltd & Another [2004] 1 KLR** amongst other cases to buttress its argument that the Plaintiff was not entitled to the equitable relief of injunction.

21. It was categorical that its supply of water to the Plaintiff's members was based on a contract for supply of clean and safe water for domestic use and which the said members undertook to pay for. It placed reliance on the case of **Kenya Breweries Ltd vs Okeyo [2002] 1**

EA.

22. The cases the Plaintiff relied upon and the case of **Kenya Breweries Ltd vs Okeyo** (Supra) seemed to buttress the respective parties' positions on the merits of the case. Evidently, the two (2) cases that were relied upon by the Plaintiff interrogated the principle of legitimate expectation which was an issue that could only be determined during trial.

23. At this juncture, the court was only been asked to establish whether or not the Plaintiff had demonstrated that it had met the criteria that had been set out in the case of **Giella vs Cassman Brown Ltd** (Supra) in which it was held as follows:-

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

24. Right at the outset, this court found itself in agreement with the Defendant that the Plaintiff did not demonstrate that it had met the pre-requisite conditions as set out in the case of **Giella vs Cassman Brown Ltd** (Supra) before being granted an interlocutory injunction. Instead, the Plaintiff delved into the merits of the case which was premature at this stage.

25. The above notwithstanding, this court considered the merits or otherwise of the present application despite having established from the very first instance that it could not grant any of the orders that had been sought in the present application for the reasons that Article 159(2) (d) of the Constitution of Kenya mandates courts to administer justice without undue regard to procedural technicalities and further, because it took the view that if it dismissed the said application for having been overtaken by events, it would have been a waste of judicial time to hear and determine a similar application filed by the Plaintiff based on the same facts and prayers.

26. Notably, Prayer (b) and (c) of the present application sought orders pending *inter-partes* hearing. There was no indication that the said orders had been sought pending the hearing and determination of the suit herein. Put another way, there was no order seeking injunctive orders pending the hearing and determination of the suit herein rendering the application spent.

27. In addition, there was no prayer for a permanent injunction in the suit which would have been the basis for the granting an interlocutory injunction at this stage. Relief No (iii) of the Plaint that was dated 19th December 2018 and filed on 20th December 2018 under which the Prayers (b) and (c) of the Plaintiff's present application were hinged was interlocutory in nature

28. The said Relief showed that the Plaintiff was seeking judgment against the Defendant for:-

An interlocutory injunction restraining the defendant by itself, its agents, employees and/or servant from demanding any alterations and constructions of the buildings from the members of the plaintiff association who are mere tenants.

29. As this court held in the case of **George Ileri Mukindia t/a Gim Fresh vs K-Rep Bank Ltd [2015] eKLR**, a court will only grant injunctive orders that are hinged on the Plaint. If not, the court must down its pen forthwith as there would be no valid order to grant.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 19th December 2018 and filed on 20th December 2018 was not merited and the same is hereby dismissed with costs to the Defendant.

31. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of October 2019

J. KAMAU

JUDGE