



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL SUIT 43 OF 2016**

**1. KENNEDY MUDI MPAPALE**

**2. JOSPHAT M. NZYIMI**

**3. MARTINE OMONDI OLONDE.....PLAINTIFFS**

**VERSUS**

**MOMBASA WATER SUPPLY & SANITATION CO. LTD.....DEFENDANT**

**J U D G M E N T**

1. The plaintiffs approached the court by a plaint dated 10/5/2016 seeking orders that:-

**i) A declaration that the Defendant's unilateral action in disconnecting water supply to the Kiosks owned by the plaintiffs and those they represent, without giving the reasons for the disconnection and according the plaintiffs a chance to defend their cause, is unlawful, illegal, breach of contract and against the rule of law.**

**ii) An Order compelling the defendant by itself, its employees, agents and/or servants to forthwith reconnect Water supply to the accounts mentioned in paragraph 10 hereinabove.**

**iii) An interlocutory injunction restraining the defendant by itself, its agents, employees and/or servant from continuing with the ongoing exercise of mass disconnection of water supply within Mombasa County.**

**iv) Aggravated and exemplary damages for breach of contract.**

**v) Costs of this suit.**

2. Simultaneously filed with the plaint was a Notice of Motion also dated the 10/5/2016 pursuant to the provisions of Order 40 Rule 2 as well as sections 1A, 1B, 3 3A and 63( e) Civil Procedure Act and sought orders of injunctions and leave to file a representative suit

3. That application was placed before a judge and certificate of urgency and granted in terms of prayer 3,4,& 5 essentially certifying the application urgent granting leave to file a representative suit and an interim temporary injunction stopping what the applicants called operation of mass disconnection of water supply to water kiosks within Mombasa. The application came up for hearing interparties on 30.5.2016 when the same was allowed *ex parte* because the defendant although served did not attend

court. On the date it was allowed the court did give directions on how to move the matter forward and among other things ordered that a date be fixed for hearing and agreed issues be filed.

4. Later on parties agreed and recorded a consent, after the defendant had filed a statement of defence, that the matter be heard by way of case stated and three issues were isolated for determination by the court. Those issues were framed as:-

**i) Whether the plaintiffs have the locus standi to institute the suit on behalf of the Mombasa Water Kiosk Operators Association?**

**ii) Whether the plaintiffs' suit offend the *sub judice* and *Res judicata* Rules as outlined under section 6 and 7 of the Civil Procedure Act respectively?**

**iii) Whether the defendants' action of mass is disconnection of the plaintiffs' water supply was justified and whether it was procedurally done?**

**iv) Whether the plaintiffs are entitled to the prayers sought in the plaint?**

5. To understand the relevance of the said issues it is important that the pleadings by the parties and documents filed in support of such pleadings be set out.

### **Plaintiffs Case**

6. According to the plaint, the defendant is faulted and accused of an arbitrary disconnection of the plaintiffs water supply and carrying away the water metres beginning the month of March 2016. The list of the persons whose metres had been carried away and who are said to be represented by the plaintiffs was provided. The plaintiffs deem such actions as unlawful illegal and unconstitutional as well as in breach of contract on the basis that, there had never a notice nor complaint of default on the plaintiffs obligations to pay for the water bills and that the same was done without according to the plaintiffs the right to be heard. To the plaintiff the defendants opted to act as it did while abusing its position as a monopoly of the provision of water services within the County of Mombasa, a position created by provisions of a statute, a fact the plaintiffs contend have accessioned to their suffering loss and damage.

7. In support of their claim the plaintiffs filed a list of documents which included water bill receipts to show that all had paid their obligations to date, certificate issued by Registrar of Societies as well as Water Kiosk Management Policy dated November 2011 and developed by the defendant. In addition there was a list headed '**authority to file a representative**' suit listing a total of 66 people.

8. There was equally filed a witness statement by one Kennedy Mudi Mpalale who basically gave the gist of the claim and commented on the documents filed as they relate to the case.

9. The defendant on its side admits being the sole water service provider and that as part of its service provision it provides stand pipes and water kiosks then licenses individuals in accordance with what it calls '**water kiosk management policy manual**'. That policy sets out conditions to be complied with by the licensees and in particular stresses hygiene; demands display of licence during working hours; record of minimum billed at a defined rate and forbids any tempering, vandalism or extensions from the kiosk.

10. The defendant contends that it did establish that the plaintiffs were violating the policy by among other things; failing to have or display licenses, did vandalize the meters, operated in unhygienic conditions, were charging exorbitant water prices beyond the gazetted tariffs, holding or hoarding water in tanks to sell at exorbitant prices; had illegal connections and had transferred the accounts from one person to the other without resort or concurrence of the Defendant.

11. To the defendant some of the violations called for instant and immediate disconnection without notice as the defendant had carried out a wide sensitization campaign. Finally the defendant admit having carried out the disconnection but asserts that was against those who had breached the conditions and

failed to pay the bills.

### **Do the plaintiff have the *locus standi*?**

12. The plaint, as worded, says that the suit is brought by the three plaintiffs for their own behalf and on behalf of members of the Mombasa Water Kiosk Operators Association. On the 12/5/2016 the Court granted leave under Order 1 Rule 8. That provision says:-

#### **Order 1, rule 8**

##### **One person may sue or defend on behalf of all in same interest**

**(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.**

**(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.**

**(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.**

13. The defendant now challenges the capacity of the plaintiffs to bring this suit as drafted on the basis that Mombasa Kiosk Operators Association can only sue by its registered official. I think the defendant is mistaken on this submission. The suit is not brought on behalf of the association but on behalf of the members of the association. I hold the view that members of that association had the option to either sue by own names or through the association in which even the association would be the litigant through the officials. They opted for the earlier option. I therefore answer the first question in the affirmative. I so find because the *locus standi* as a legal principal is the right one has to approach the court. In this matter there is no doubt that there are documents to show the plaintiff as having accounts with the defendant for water services and that the receipts exhibited show that the water bills had been paid in full as at the date the matter came to court. If one proceeds from the position that the license issued to the plaintiffs is grounded upon payment of the billed sums then it is a legitimate expectation upon the plaintiff that they are then entitled to the service.

14. In any event, the defendant is in the category of those entities called public agencies. They are created by the government, itself a holder of power on behalf of the sovereign, to undertake a particular task for the sovereign. If it were to arise or a situation was to present itself that shows that particular agency is not meeting its mandate, then hold the view that even without a representative action one is entitled to approach the court and say that the public agency is not meeting its mandate or just infringing on the public right. In that event, even before the constitution 2010, one would be free to come to court and have that question determined.

15. Lord Denning in Republic vs Greeter London Council, *ex parte Blackburn* [1976] 3 ALL ER 184 set the law when he said:-

**“I regard it a matter of high constitutional principle that if there is a good ground for supposing that government department or public authority is transgressing the law in a way that offends or injures thousands of her majesty’s subjects, then any one of those offended or injured can draw it to the attention of the court of law and seek to bone the law enforced and the court in their discretion can grant whatever remedy is appropriate”.**

16. That position has been adopted repeatedly by the Kenyan Court and one only needs to read the Court of Appeal in *Adopt-A-Light Ltd vs Municipal Council of Mombasa, CACA No. 47 of 2007*, to appreciate that courts take very liberal stand on the matter. I hold that the plaintiff had the requisite *locus*

*standi* to bring this suit and that the defendant's position is misconceived.

**Is this suit res subjudice or res judicata?**

17. Under sections 6 & 7 Civil Procedure Act, the law forbid any court, this included, from entertaining a matter which is already pending before another court and filed prior or that which has been heard and determined by another court of competent jurisdiction and on the merits. Those provisions merely underscore the fact that judicial resources are scarce and ought to be used proportionately and efficiently so that there is no justification to engage two courts over the same matter or engaged the court a second time on a dispute which has been litigated upon. The principle coded in section 7 is intended to buttress the understanding that litigation must come to an end.

18. And the mischief is that courts applying and interpreting the law should be believed and trusted with that task. If one matter was therefore to be entertained by two different courts at the same time it is a recipe for getting two divergent determinations on the same matter. That is not how to keep the confidence of the public in the law and the administration of justice. Every court would jealously guard against any affront to the dictates of those two provisions. In facts courts have said that to affront the provisions by filing a suit while one is pending on over a matter that has been determined is not only *res subjudice* or *res judicata* but also an abuse of Court Process and have taken the drastic step to strike such matter out. I would in every situation that it is demonstrated to me that a matter affronts any or either of the two provisions strike out and declare the litigant to be in abuse the court process.

19. In this matter, the defendant says that this suit is both *res sub judice* and *res judicata* because:-

**i) There was Mombasa H.C. Petition No. 70 of 2014 which was dismissed by Emukule J on 25/3/2015.**

**ii) There is pending Mombasa CMCC No. 1609 of 2012 between Mombasa Kiosk Water Vendors – selfhelp group vs the defendant.**

**iii) There is pending Mombasa CMCC No. 607 of 2016, between Mombasa Kiosks Operators Association and the dependant.**

20. From the onset, it is evident that this suit is not filed on behalf of any organization at all but by and on behalf of named individuals. It cannot therefore not fit within the description '*between the same parties or parties under whom they claim*'. Secondly the matter determined by Judge Emukule was determined on the finding that no constitutional point was established for the alleged transgression of 2014. It was also by a known entity calling itself, Mombasa Kiosk Water Vendors Self Help Group not the plaintiff nor their Association. This matter therefore cannot be said to be *res judicata* under section 7.

21. Is it *res subjudice*? For accusation of violation of section 6 of the Act to succeed, it must be proved that the matter being litigated here is in issue or substantially in issue in the previously filed matter. That proof must be by some evidence. The evidence of what is in issue in a suit is availed by exhibiting the pleadings in that matter. In this matter the defendant has totally failed to avail to court the pleadings in the previously filed suits. I note that the matters in the lower court are suits and must have been instituted by way of complaints and defences filed. None of such pleadings have been exhibited. That omission leaves this court to second guess what the dispute is before the lower court. It would be a sad day if a court of law would make a determination on no evidence at all. I hold the position that the attack grounded on both section 6 & 7 are not proved by the person asserting and this suit is therefore neither *res subjudice* nor *res judicata*.

**Was the defendants actions justified or justifiable?**

22. I understand and appreciate that upto the year 2002, the water subsector was a function of the then local authorities. Kenyan have their own memories now those authorities conducted their affairs on matters of service delivery. There was a loud cry for change like there were such cries in other sectors.

23. In 2002, Parliament enacted the Water Act, No. 8 of 2002. The Act discloses its purpose to be an act of parliament to:-

**“Provide for the management conservation, use and control of water resources and for the acquisition and regulation of right to use water, to provide for the regulation and management of water supply and sewerage services.....”.**

24. Pursuant to that act, and in particular part IV of it, section 55, there is given a right to a designated Water Service Board to licence water service providers to undertake any or all of its powers and functions. It is clear from the statute that the intention was to create an efficient and reliable, yet prevalent and available water service systems and infrastructure.

25. I take the defendant to be a water service provider as defined and that its dealings with the plaintiff was pursuant to the provisions of section 66 of the Act. The act gives the water service provider the duty to provide, maintain and progressively improve water services and associated works.

26. As in expected, the Act is a broad legal frame work with powers for the making of Regulations and Policies for better and finer details. For that reason the document produced by both parties and called ‘MOMBASA KIOSK MANAGEMENT POLICY’ must be seen to be a policy made pursuant to the statute. It is therefore a derivative of the statute and must for all intents and purposes be seen to further its values and purposes and not to deviate from it.

27. The core purpose and aim of the Act is to make water services accessible and available, water being known to be a basic need. The window to license others to help it achieve its mandate was to enable wider access and availability. For the plaintiffs, the purpose is to reach those that do not have own connections by virtue of limited financial resources on the service provider. Indeed once given a license or given the right to operate as a licensee prior to the actual license being issued, one invests resources, even if it be time only, and build expectation to earn and therefore the rules of natural justice must always be observed should there arise any need to tinker with the rights or expectation thereby created. This is not lost to the defendant who has capture the need for a hearing before a licence is revoked in the said policy document.

28. It is not acceptable to say that the policy allows revocation or disconnection without notice. If it is worded to say that, then it will clearly derogate on right to be heard before condemned and therefore contrary to the established principles of fair play under the Constitution. That the defendant is a creature of the law makes even a stranger case for observance of the rules of natural justice and the law that create it. I find that in so far as there is no evidence that any transgressions were identified and proved as against the plaintiffs or any of them and a chance given to them to defend themselves before disconnection, the defendants were not justified and acted irrationally, unlawfully and illegally.

29. It follows that the plaintiffs are entitled to the remedies of a declaration that the defendant’s actions in disconnection prior to notice and a chance to be heard was illegal, unlawful and unjustifiable.

30. I therefore grant an order of mandatory injunction to the compel the defendant to forthwith, and within 14 days from today reconnect all the supply that was disconnected and now declared unjustifiable. It is ordered that in future any disconnection be undertaken only after there is served a notice and a chance to be heard accorded to the kiosk operator.

31. On damages, I have noted that the plaintiffs have prayed for aggravated and exemplary damages, these are punitive damages awarded as against a party who have shown flagrant unmitigated inclination to injure the opponent in the litigation.

32. In this matter, it is clear to me that just a little fidelity to the law would have avoided the action but the defendant did not follow that route. Aggravated and exemplary damage are therefore due to the plaintiffs on the facts presented. I however, appreciate and note that the plaintiffs are, in the architecture of the need for water service provision, an extension of the defendant intended to create the multiple effect of

water service provision and that both side should work towards availing the service to the residents of Mombasa.

33. Theirs is basically a service to humanity for which they should not expect enrichment. I take into account that relationship and order that each of the plaintiffs disclosed to have given authority and named in the plaint gets a nominal award of Kshs.20,000/= for aggravated and exemplary damages. Such awards shall attract interest for the date of this ruling at court rates.

34. I award the costs of the suit to the plaintiffs.

**Dated** and delivered at **Mombasa** this **24<sup>th</sup>** day of **March 2017**.

**HON. P. J. O. OTIENO**

**JUDGE**