



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 55 OF 2016

JOHN KIETI MAKILA PLAINTIFF

VERSUS

ERDEMANN PROPERTY LIMITED DEFENDANT

RULING

1. The application herein is a **Notice of Motion** dated **24th February 2016**. It is brought under Order 40 Rule 1 and Order 5 Rule 17 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya and other enabling provisions of the Law.

2. The Application is seeking for orders that:-

- *That the Respondent be and is hereby ordered to re-connect the sewer connecting the Great Wall Phase III estate to the Waste Water Treatment Plant situated on L.R. No. 12715/6322 pending inter parties hearing and determination of this application.*
- *That there be a temporary injunction and is hereby issued restraining the Respondent whether by himself, his agents, employees and / or servants from interfering with the operations and ownership of the Waste Water Treatment Plant located at LR No. 12715/6322 pending the inter parties hearing and determination of this Application.*
- *That there be a temporary injunction and is hereby issued restraining the Respondent whether by himself, his agents, employees and / or servants from interfering with the operations and ownership of the Waste Treatment Plant located at LR No. 12715/6322 pending the hearing and determination of the suit.*
- *That there be a temporary injunction restraining the Respondent whether by himself, his agents, employees and/or servants from demanding for a further payment from the Applicant and other homeowners, through the management company, for the purchase of the Waste Water Treatment Plant and/or from demanding for payment over and above the normal Waste Water Treatment Plant operating costs pending the hearing and determination of this suit.*
- *That there be a temporary injunction restraining the Respondent whether by himself, his agents, employees and/or servants from interfering with the smooth running of the sewer connection to Waste Water Treatment Plant on LR 12715/6322 at the Applicant's Great Wall Apartments Phase III pending the hearing and determination of this suit.*
- *That, such other orders as the court deems fit in the interest of justice.*

3. The Application is based on the grounds on the face of it and the affidavit sworn in support by **JOHN KIETI MAKILA**, dated 24th February 2016. It is opposed vide the replying affidavit sworn by

RAYMOND ANANGI PHILIP dated 2nd March 2016.

4. The Applicant's case is that the Respondent invited the members of the public vide a Daily Nation Newspaper of 18th July 2013 to purchase various three bed roomed Apartments situated at L. R. No. 12715/6322 (herein after referred to as the "property"). That the said Advertisement described critical components of the Apartment to include inter alia, a Waste Water Treatment Plant. The Applicant, and other home owners, [who have authorised him to swear to the pleadings herein on their behalf] purchased each, a three bed roomed Apartment at Great Wall Apartment Phase III (herein referred to GWA3), at a cost of Kshs. five million (5,000,000), and were duly granted access and right of occupation.

5. The Applicant told the court that, it was a term of the Lease Agreement that a Management Company would be formed to hold a reversionary interest in the land on behalf of lessees and manage the Apartment in the Estate. All the home owners would be shareholders thereof. The said company was subsequently registered by the Respondent. The Applicant further stated that, it was also a term of the Lease Agreement that, the Apartment owners would pay service charge and monthly operation of costs of the Waste Water Treatment Plant ["herein referred to as WWTP"] and the Applicant was only supposed to pay this operating costs of the same to the Management Company. The WWTP stands on the property. That, there was no clause in the Sale Agreement requiring the home owners to pay purchase money towards the purchase of the said Plant.

6. In the year 2015, through a duly registered deed, dated **3rd March 2015**, the Respondent Company handed over the WWTP to the Management Company. However, they subsequently demanded that, the Apartment owners pay a monthly amount of Kshs.200, 000 to be paid for a period of 30 years towards the purchase of the said Plant. The Apartment owners objected to that demand. The Respondent then disconnected the homes from the waste water services, thus making the Estate uninhabitable and posing serious health hazards.

7. The Applicant submitted that, the introduction on the new fee is a breach of the Sale and Lease Agreements, and amounts to extortion on the part of the Respondent, therefore null and void ab initio. That, by imposing the new fee of Kshs.298,695 towards the purchase of the said plant, the Defendant/Respondent acted in bad faith. That, Deed of Assignment relied on, to the demand the said fees, was signed by one Director on behalf of the Vendor, the Purchaser and the Management Company. It was thus so signed in bad faith and in a clear case of conflict of interest. Hence, the need to deter the Respondent from making a demand of the said sum of money and they be ordered to reconnect the services of WWTP.

8. The Respondents opposed the applications vide the replying affidavit sworn by **RAYHOLD ANANGI PHILLIP**, the property manager of the Respondent Company. He admitted that, the Respondent shut down the sewer line to Great Wall Apartment Phase III, as the Applicants had previously issued a cheque of Kshs.500,000 as part payment of the pending sewer bill of Kshs.1,626,156 but that cheque of Kshs.500,000 was dishonoured. He submitted that the said sum of Kshs.1, 626,156 was for the consumption period between 30th October 2015 to 15th January 2016 and they shut down the WWTP on 10th February 2016. That when they shut down the sewer line, the Applicants immediately made arrangements to hire Exhauster Trucks to carry the sewer, hence there is no health hazard or risks.

9. He further submitted that after the disconnection, Mavoko Municipal Council intervened and met the parties. The Applicant was instructed to pay the sewer bill to enable the Respondent run the Waste Water Treatment Plant. The Applicant agreed to pay and issue another cheque but has failed to do so.

10. The Respondent stated that the Waste Water Treatment Plant is an investment of Respondent which has cost Kshs.90, 000,000, and serves the Three Phases of Great Wall Apartments. The Three Phases consist of phase I, with 528 units, phase II has 384 units and phase III has 288 units, with a total estimate of 6,000 residents. That, the Plant has to run by itself by charging the residents for treatment of Sewage, and it's cost is recoverable in 25 years. The Respondent disputed the Applicants averments that, the purchase price of the Apartments included the investment of the Waste Water Treatment Plant and stated

that, the Apartment were sold at discounted prices. The Respondent further submitted that since 2010, the start of the operation to date the plant has made a total loss of 12,839,364 due to lack of payment by the Apartment owners in the three phases. That, the current bill of the Applicants, stands at Kshs.1, 626,156 as at 15th January 2016, which the Applicants should pay. The Respondent submitted that, it incurred a cost of Kshs.377, 000 being the cost of blockage of the sewer line of Great Wall Apartments Phase III from 10th February 2016 to 2nd March 2016.

11. That reconnecting the services without payment will over burden the Waste Water Treatment Plant operations which will result in the shutdown of the entire WWTP Plant. This will in effect expose Great Wall Apartments Phase I and II houses into encountering health hazards and risks of no sewer services. The Respondent argued that, the Application lacks merits and should be dismissed with costs.

12. The parties filed written submission, to dispose of the application and relied on several authorities cited therein. I have considered the same in this ruling. In his submission, the Applicant told the court that the alleged sum of Kshs.1,626,156 claimed by the Respondents as pending sewer bill, includes monthly sum of Kshs.298,695 which has no legal basis at all. The said arrears are devoid of any serious computation and the breakdown of how the arrears arose and that there is a need for an expert to calculate the same. The Applicant submitted that, in the meantime, they can only pay a monthly sum of Kshs.101, 183.80 as computed by an expert.

13. The Applicant refuted the claims by the Respondent, that, the WWTP has its own Title independent of the Titles of GWA Phases I, II and III. The Applicant further refuted the averments in the replying affidavit by the Respondent that, the Apartments were sold at a discounted price, and argued that, to the contrary the WWTP was captured under clause 1.1 and clause A, of the Individual leases as an “add on and a shared infrastructure convenience”

14. The Applicant invited the court to invoke the provisions of Article 46 of the constitution of Kenya 2010 to protect them as consumers. He further submitted that, the court has power to protect the Apartment owners under Section 12 the Consumer Protection Act No. 46 of 2012 from the Respondent’s false misleading and deceptive representation.

15. The Applicant’s counsel distinguished authorities cited by the Respondent

To the effect that, the case of *Kamau – vs – Kenya Power and & Lighting Company Limited HCCC No. 364/13* arose under different circumstances and hence, cannot apply in this case, and the cases of *Zadarack Oyaro and Everlyne . A. Bonyo vs Mombasa Water Supply and Sanitation Company Ltd* are totally irrelevant. The Applicant relied on the cases of *James Muigai Thungu – vs- County Government of Transzoia and 2 others (2015) eKLR* and *Gella – vs- Cassman Brown + Co. Ltd E A 38*.

16. The Respondent on their part submitted that, the Applicant has concealed material facts from the court, wit that he has failed to pay for sever bills and in a purported payment, they issued a bad cheque for Kshs.500,000 which was dishonoured by the Bank. That, the general rule of law is that “Equity does not aid a party at fault or assist a person in extricating himself or herself from the circumstances that he or she has created”. The Respondent, also invoked the principles of Equity that states that:-

- **He who comes to Equity must do Equity.**
- **He who comes to Equity must come with clean hands.**
- **Equity aids the vigilant, and not those who slumber on their rights.**

The Respondent submitted that in the instant case the Applicant is in breach of these principles because:

- He came to court after about a month.
- Has previously issued a cheque of Kshs.5000, 000 being part payment of the sewer charges but it was dishonoured upon presentation to the bank.
- Is guilty of non disclosure of material facts hereof.

- Has not proved payment of sewer charges.
- Has not discharged his legal obligation to pay pending dues charges and therefore is in breach of the said principles of Equity.

17. The Respondent cited the following authorities in support of their case.

- *Zaddock Oyaro Achoki Grace Kemunto Mokuu – vs – Consolidated Bank of Kenya Ltd.HC Civil Case No. 739/12.*
- *Everlyne A. Bonyo – vs – Mombasa Water Supply & Sanitation Company Limited. HCCC (MSA) 571 of 2011.*
- *Djoe Gatebu Komau – vs – Kenya Power & Lighting Company Limited. HCCC No. 364.13*

He submitted that, in all these authorities, the court ordered the Applicants to pay any outstanding dues before they could enjoy injunctive orders. The Respondent invited the court to note that the Applicants herein have not paid huge arrears of sewer charges and ought to be ordered to pay the same. They submitted that application should be dismissed as it lacks merit and is an abuse of the court process.

18. I now turn to the prayers herein, and find that, other than prayer 2 which was granted temporary on 29th February 2016, and which seeks for re-connection of the GWA Phase III Estate to the Waste Water Treatment Plant (WWTP), all the other prayers are seeking for Injunctive orders. The principle's for granting an injunction are well established in the case of **Geilla –vs- Cassman Brown & Company Limited 1973 EA 358**. The principles laid state inter alia that:-

- An applicant must demonstrate a prima facie case with probability of success.
- An injunction will not be granted unless the applicant will suffer irreparable loss which cannot be adequately compensated with damages.
- If the court is in doubt, it will decide the application on the balance convenience.

19. In the instant case, there is no doubt that there is a serious disagreement between the parties as to whether the WWTP was an “add on and a shared infrastructure convenience” and whose cost was included in the purchase price of the individual Apartments or whether it is a private investment of the Respondent. Also in dispute is whether the same plant is operated by the Respondent or the Applicant Managing Committee. There is also a dispute as to how much the Applicant should pay as a monthly fee towards the operational cost of the plant or purchase thereof.

20. All these issues can only be resolve once the main suit is heard and determined. However, I find that, if indeed the Applicant has to be granted the reliefs sought, they must come with clean hands. The Applicants have admitted they issued a cheque for Kshs.5000, 000 in favour of the Respondent which they claim they stopped payment thereof after the Respondent reneged on the promise to reconnect the sewer services. The Applicant indeed stated in their affidavits in support of the application that:

“Although the administrator requested us to issue the Respondent with a cheque, we felt that the matter be better brought to court owing to past dishonest position of the Respondent and based on the business of the observation of the administrator”

21. My considered opinion is that, the mere issuance of the cheque of Kshs.500,000/= is an acknowledgment of indebtedness by the Applicant. The Applicant further stated that **“... in the meantime the Applicant can only pay a monthly sum of Kshs.101, 183.80 as computed by an expert”**. Thus, they acknowledge the fact that, they are liable to make monthly payments towards the operation of the WWTP save for the figure sought. Obviously then, the Applicant must show that they are ready to pay whatever amount, they are agreeable to, and have no arrears, if they are to be granted the injunctive orders sought.

22. I however find in conclusion that, generally the Applicants have demonstrated presence of a prima facie case subject to proof and in respect to the principles laid down in the case of Geila. This is based on the facts and documents availed to the Court. Similarly the nature of subject matter, being a sewer

services, cannot be compensated in the form damages. The disconnection of the Plaintiffs/Applicants from the said services will lead to very serious health risks.

23. I therefore allow the application herein, the Notice of Motion dated 24th February 2016 on the following condition and / or terms:-

a) Prayers 2, has already been granted and will remain in force subject to the compliance with the orders set here below.

b) Prayers 3, spent by virtue of this ruling,.

c) Prayers 4, 5, 6 are granted on the following conditions.

- The Applicants will issue the Respondent with a cheque for Kshs.5000, 000 to replace the cheque that was “dishonoured, and/or stopped” WITHIN 14 DAYS of this ruling. Payment thereof must be confirmed.
- The Applicant to pay sum of Kshs.101, 183.80, they have conceded to pay, with effect from the date of their last payment, to date. (Last date of payment is determined from documentary records).
- This amount payable will be determined taking into account, the payment of Kshs.500, 000 stated above.
- The parties to file in court WITHIN 21 DAYS their Statement of account as to what each one of them regards as owing or being owed by the other. The parties are at liberty to engage experts to assist. This will enable the court to determine, the monthly payments to be made by the Applicants pending the hearing of the main suit.

d)If the Applicant fails to comply with the terms and condition set under order (c) above, as regards the payment to be made, the Respondent is at liberty to apply for discharge of the injunctive orders.

e) The suit should be set down for hearing on Priority basis.

f) As neither of the parties have fully won or lost. I order the costs of the application be in the cause.

It is so ordered accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 20TH DAY OF JUNE 2016.

**G.L.
NZIOKA**

JUDGE

Ruling Read in open court in the presence of:

..... for Plaintiff

..... for Defendant

Teresia ----- Court Clerk