



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CIVIL SUIT NO 3 OF 2015

DIRIE OLOW MOHAMED.....PLAINTIFF

VERSUS

TAVEVO WATER AND SEWERAGE CO LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 19th August 2015 and filed on 20th August 2015 was brought pursuant to the provisions of Order 40 Rule 2 of the Civil Procedure Act (**sic**), Secs 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Rules (**sic**) and all other enabling provisions of the law. Prayer No 1 was spent. The said application sought the following remaining orders:-
 - a. **Spent.**
 - b. **THAT pending the hearing and final determination of this suit this Honourable Court be pleased to issue a mandatory injunction compelling the Defendant by itself, its employees, agents and/or servants to forthwith restore the plaintiff's water supply by reconnecting and/or re-fixing the supply pipes which it had been removed (sic) and/or destroyed.**
 - c. **Alternatively the plaintiff be given leave by the Honourable Court to fix the said pipes by himself at a cost to be recovered from the Defendant.**
2. When the matter came up in court on 28th September 2015, the court gave directions pertaining to the filing and serving of response by the Defendant as well as the filing and serving of the parties' respective written submissions and listed the matter for mention on 10th November 2015 to enable it give further orders and/or directions in respect of the Ruling herein.
3. The said directions were not given for the reason that on 10th November 2015, counsel for both the Plaintiff and the Defendant informed the court that they both wished to canvass the Defendant's Preliminary Objection that was filed on 2nd October 2015. The said Notice was dated 1st October 2015.
4. The main ground of the Defendant's Preliminary Objection was as follows:-

“That this Honourable Court does not have jurisdiction to hear and determine this matter in view of the provisions of the Water Act, 2002.”

5. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Notice of Motion as the same touched on its

jurisdiction.

LEGAL ANALYSIS

6. Through its counsel, the Defendant argued that this court did not have jurisdiction to deal with the matter at hand as Section 82 of the Water Act, 2002 provides that the jurisdiction of the Water Appeals Board is to determine appeals concerning matters that arise out of the Water Act.
7. It was emphatic that the dispute herein was not an appeal but rather, it was a dispute that was envisaged under Section 85(2) of the Water Act. Its counsel based her argument on the provisions of the said Section 85(2) of the Water Act that states that the Water Appeals Board shall have jurisdiction to hear and determine disputes and Section 87(3) and (4) of the Water Act that stipulates that the Water Appeals Board shall have power to affirm, quash or vary the decision of the appeal
8. The Defendant also referred the court to the provisions of Section 91(2)(b) of the Water Act that empowers the water boards, licensees and water service providers to enter into customer's premises to disconnect water and Rule 21(1) which grants the Water Appeal Board to issue interlocutory orders.
9. It argued that since the dispute herein was one of disconnection of water, the dispute herein ought to be referred to the Water Appeals Board as any application made to the said Board was deemed to be an appeal. It placed reliance on the provisions of Article 159 of the Constitution of Kenya which makes reference to tribunals that exercise judicial powers.
10. It was its further contention that the said Board's decision on all matters of fact would be final and that an appeal from the said Water Appeals Board to the High Court could only lie from a point of law.
11. On his part, through his counsel, the Plaintiff submitted that Article 165(3)(a) of the Constitution of Kenya had given the high court unlimited and original jurisdiction to hear any dispute that was civil or criminal in nature. He was categorical that it could not be said that the high court did not have jurisdiction to hear and determine the said dispute as this power could not be taken away by an Act of Parliament but rather, that if the court were to find that it was the Water Appeals Board that should hear and determine the dispute herein, then it could only direct that the procedures by the said Board be followed but.
12. It was his further averment that the Water Appeals Board was an appellate body dealing with appeals challenging the authorities that had been established under the Water Act with the disputes being enumerated in Section 8(1) of the Water Act. He was adamant that the reference to "other disputes" in Section 85 of the Water Act was not left for guesswork but rather the same had to be presented by the Water Act or any other Act.
13. The Plaintiff pointed out that disputes from water services were taken over by and/or transferred to the water boards that were established by the Water Act. However, the court did not find this argument to have been properly articulated so as to have been relevant in the circumstances of the case. The only issue that the court found to have been material and/or relevant was whether or not it had jurisdiction to entertain the dispute that had been placed before the court.
14. In determining the preliminary objection raised herein, the court had due regard to the provisions of Sections 85 and 86 the Water Act Cap 372 with a view to establishing whether indeed it has jurisdiction to deal with the dispute herein.
15. Section 85 of the Water Act reads as follows:-

1. An appeal shall lie to the Water Appeal Board at the suit of any person having a right or proprietary interest which is directly affected by a decision or order of the Authority (emphasis court), the Minister or the Regulatory Board concerning a permit or license under this Act and the Board shall hear and determine any such appeal.

2. In addition, the Board shall have such jurisdiction to hear and determine disputes, and shall have such other powers and functions, as may be conferred or imposed on it by or under this or any other Act.

16. This court thus concurred with the holding of Ougo J in the case of **Isaiah Ngotho Watheka v**

Nairobi City Water and Sewerage Co. Ltd[2013]eKLR where she stated as follows:-

“The plain reading of this section 85 (1) is that an appeal shall lie with the appeal Board and therefore the jurisdiction given to the Water Appeals Board in the Water Act is appellate in nature. The matters to be dealt with are very specifically spelt out as “a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or license”. This is not the subject of the application before this court. The matter relates to a dispute between the licensee and a customer on an alleged illegal disconnection.”

17. Section 8 of the Water Act provides that the Water Resources Management Authority shall have the following powers and functions:-

- (a) to develop principles, guidelines and procedures for the allocation of water resources;**
- (b) to monitor, and from time to time re-assess, the national water resources management strategy;**
- (c) to receive and determine applications for permits for water use;**
- (d) to monitor and enforce conditions attached to permits for water use;**
- (e) to regulate and protect water resources quality from adverse impacts;**
- (f) to manage and protect water catchments;**
- (g) in accordance with guidelines in the national water resources management strategy, to determine charges to be imposed for the use of water from any water resource;**
- (h) to gather and maintain information on water resources and from time to time publish forecasts, projections and information on water resources;**
- (i) to liaise with other bodies for the better regulation and management of water resources;**
- (j) to advise the Minister concerning any matter in connection with water resources.**

18. It was evident from the provisions of the Water Act that it relates to applications made by Water Services Boards. Under Section 70 of the said Act, these Water Services Boards have power to ensure that water services, associated works and facilities are provided, maintained and progressively maintained.

19. A perusal of Section 85 of the Water Act clearly demonstrates that an appeal from such a water services board would lie to the Water Appeals Board. Disconnection of water would not fall under the jurisdiction of the Water Appeals Board as it is not a decision that would have emanated from a decision of a water services board. It is a decision of a water services board to its customers.

20. The court was thus not persuaded by the Defendant’s submissions that the dispute relating to the disconnection of water to the Plaintiff’s premises was an appeal or that the appeal under the Water Act was so wide as to include any dispute that relates to disconnection of water. It must be a dispute contemplated under Section 8 of the Water Act, a fact that was rightly pointed by the Plaintiff’s counsel.

21. In any event, it was very clear from the provisions of Section 85 of the Water Act that an appeal was a process of hearing and determining a question that had emanated from a decision of a water services board. The use of the word “**appeal**” is not generic or synonymous with “**any dispute**” and cannot be interpreted to encompass any dispute relating to water as had been suggested by the Defendant.

22. The question of the High Court having unlimited and original jurisdiction by virtue of Article 165 (3)(a) of the Constitution of Kenya, 2010 as was argued by the Plaintiff, though correct, was not

one that persuaded the court to find that the Water Appeal Board did not have jurisdiction to hear the dispute between the Plaintiff and the Defendant. In this case, the court is not jostling to guard its jurisdiction jealously in line with Article 165(3) (a) of the Constitution of Kenya, 2010. Rather, it was the fact that the dispute relating to disconnection of water to a customer would not be a dispute that could be heard and determined by the Water Appeals Board.

23. Once again, just as Ougo J found in the case of **Nairobi City Water & Sewerage Company v St Nicholas School [2013] eKLR**, this court took the firm view that the jurisdiction of the Board was confined to decisions emanating from the Water Services Board and limited to the disputes set out in the Water Act or any other Act as stipulated in Section 85 of the said Water Act.

24. Accordingly, having considered the oral submissions by counsel for both the Plaintiff and the Defendant, the court came to the conclusion that it was properly vested in hearing and determining the dispute herein as the Water Appeals Board had no jurisdiction to hear and determine the dispute regarding the disconnection of water by the Defendant to the Plaintiff.

DISPOSITION

25. For the reasons foregoing, the Defendant's Notice of Preliminary Objection dated 1st October 2015 and filed on 2nd October 2015 was not merited and the same is hereby dismissed with costs to the Plaintiff herein.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of November 2015

J. KAMAU

JUDGE