REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 92 OF 2009

KISUMU WATER & SEWERAGE CO. LTD.....APPELLANT

VERSUS

ST. LUKE MEDICAL CENTRE.....RESPONDENT

J U D G M E N T

1). This appeal is premised on the respondent's application for injunction dated 28-8-2008 in which the court ruled in its favour on 20-5-2009. The appellant which supplies water to the respondent did disconnect the same over an illegal connection and failure to pay an alleged admitted bill of Kshs. 139,880/=. The appellant was thus aggrieved by the said order and filed the memorandum of appeal dated 17-6-2009 which boasts 10 grounds.

2). The application for injunction as stated above was based on the grounds that the alleged bill supplied by the appellant to the respondent was illegal and that any admission by it was illegal and through duress. The appellant insisted in its submission that there was sufficient evidence to demonstrate that indeed the respondent had created a bypass where the water was not metered and infact photographic evidence was produce to this effect.

3). In allowing the application the trial court found that the respondent had come to court with unclean hands but it took into account the nature of the work done by the respondent and allowed the same. The substantive issues raised by the appellant in this appeal is that the court allowed the application by exercising judicial discretion unlawfully.

4). I have perused the pleadings herein and what is not in dispute is that the respondent had a contract with the appellant for the supply of water into its premises. There is the allegation that the respondent failed to pay the bills as expected hence the disconnection. The appellant contends that the respondent went further to admit the same in the presence of its officers and agents. This has been denied by the respondent.

5). The issues raised by the appellant are weighty and could not be tackled by way of affidavit evidence but only through oral evidence can its veracity be tested. The court appreciated this fact when it declared that the respondent went to it with unclean hands.

Having found so, it would have been incumbent upon the court to disallow the application totality or impose conditions in allowing the same.

6). The now famous authority of **Mbogo -VS- Shah [1968] EA 93** discusses the discretion which this court has in granting reliefs. The same shall be interfered with if it was exercised in a manner suggesting a misdirection by the court. I find that in this case the court dwelt on other irrelevant though important issues at reaching its decision. Although the respondent is an hospital, it ought to meet its obligation. Part of the obligation is paying the bills if and when required. The water supplied by the appellant undergoes several stages before it arrives at the respondent taps, and these stages requires money. If indeed there was any impending bills, then it cannot be heard to be said that the said respondent duty is to save lives and thus it must have water all the time. This surely is a common sense issue.

7). In light of the above observation I do find that indeed there was prima facie evidence sufficiently as found by the trial court that the respondent had come to court with unclear hands. However, taking into

account the disputed facts, and on the ground that the respondent was a large institution incapable of paying back the sum due if it is proved later that it erred, it ought to have allowed the application conditionally. The continued payment of recurrent bills is of course a matter of common sense.

8). Consequently, I shall allow this appeal and set aside the lower court's ruling. Further, the respondent should deposit in a joint interest earning account in the names of counsel for the parties the sum of Kshs. 139,800/= within the next 30 days from the reading of this judgment pending the hearing and determination of the suit at the lower court..

In default the respondent be at liberty to execute. The appellant shall have the cost of this appeal.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

H.K. CHEMITEI
JUDGE