



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NUMBER 500 OF 2012**

**KIRIGITI THATI-INI MUGUMO WATER CO. LTD. ....  
APPLICANT/PLAINTIFF**

**VERSUS**

**KIAMBU WATER AND SEWORAGE COMPANY LTD.....  
RESPONDENT/DEFENDANT**

**R U L I N G**

The plaintiff sought a temporary order of injunction to restrain the defendant from terminating and breaching a water services agreement dated 12<sup>th</sup> October, 2009 between the parties and/or taking over itself, the water supply services, the subject of the stated agreement.

The applicant conceded that the defendant had already repeatedly breached the said agreement which should be altered (according to the applicant) only through a notice under an arbitration clause in the agreement. The applicant further argued that the breach has and will cause irreparable loss and damage assessed and claimed at Ksh.16.6 million.

The Respondent/Defendant, on the other hand, submitted that the agreement or contract in question, provided a 3 months' notice to either party to terminate it. It also stated that before it gave the termination notice which is acknowledged by the Applicant, the applicant had breached the main terms of the contract and the Defendant had a step-in to provide the essential services of supplying the water to the community. It further argued that the injunction sought is belated since termination was effected before the orders sought were granted. The Respondent also argued that the orders sought are not issuable in this case because the alleged breach is contractual and easily assessable and compensatable and that indeed the plaintiff has even already assessed the possible damages at Ksh. 16.6 million although that figure is subject to strict proof.

I have carefully considered the merits of this application taking account of the facts on record. It is not denied by the applicant that the alleged breach by the Defendant has already taken place. It is neither denied that the relationship between the parties from which the breach is alleged is purely contractual. Thirdly, the application does not deny that this suit is majorly a compensatory suit where specific damages have been sought or are easily assessable. If the plaintiff finally wins the case, it has not demonstrated that the Defendant will have no capacity to compensate.

In the court's view, the issues on which the applicant concedes or cannot deny are the same that are to be demonstrated as existing before a court can grant a temporary injunction, as stated in the famous case of **GIELLA VS CASSMAN BROWN & CO. LTD [1973] EA 358**. That is to say, the applicant has to demonstrate that he has a prima facie case with probability of success; that he stands to suffer irreparable loss or damage that cannot be compensated by damages; and that the balance of convenience is in his favour.

In this case, as already discussed and hereby found, the three conditions are all against the applicant. The order of injunction would therefore be not available to it.

Furthermore, the alleged breach arises from a contract. The relevant legal position is that stated in **Giant Holdings Limited Vs Kenya Airport's Authority [2010] eKLR: -**

***“Since the relationship of the parties was contractual in nature, it follows that the contract was terminated in accordance with the notice of termination ..... the contract remains terminated in law until court declares otherwise. .... Thus an order of injunction ... would not only have no foundation but also, it would have the effect of reviving a contractual relationship which does not now exist...”***

In this case an order of injunction sought, if granted, will revive the contract which was already probably terminated by the notice served by the Respondent as conceded by both sides, and probably not now in existence.

For the above reasons, this application dated 10<sup>th</sup> October, 2012 shows no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 25th day of September, 2014.

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**D A ONYANCHA**

**JUDGE**