



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 502 OF 2013

ISAIAH NGOTHO WATHEKA.....PLAINTIFF

VERSUS

NAIROBI CITY WATER AND SEWERAGE CO. LTD.....DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 28th November, 2013. The same is brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rule 2(1), 4 and 8 of the Civil Procedure Rules (2010). The applicant seeks a temporary injunction against the defendant restraining them from disconnecting or continuing with disconnection of the plaintiff's water supply pending the inter-parties hearing. That the court issue an order restraining and or stopping them from disconnecting water supply on Account number 1229442, 129442, 1298977, 1251963, 1215774, 1216379. That the costs be in the cause.

2. The application came up for inter-parties hearing on 4th December, 2013 and the defendant raised a preliminary objection dated 2nd December, 2013 and filed on 3rd December, 2013. The Defendant argued that this court lacks jurisdiction, that the application was an abuse of the court process, that jurisdiction has been conferred upon the Water Appeals Board under section 85 of the water Act Cap 372. That the court has no jurisdiction to transfer this suit and application to any other court having been filed in the wrong forum in the 1st instance, that the water appeals Board is operational having been established under the Act pursuant to L.N 144 of 2007. That the application and the suit be struck out with costs.

3. Mr. Koceyo for the Defendant argued that the nature of the preliminary objection is that the court lacks jurisdiction to hear the matter as it is based on the Water Act no.3 of 2002. It created the defendant as a service provider and the plaintiff as a consumer under the Act Section 85 creates a special court, the water appeals board that is to hear and determine disputes under the Act. He further submitted that the High Court is given jurisdiction at Section 87 of the said Act. The same he argued is an appellate jurisdiction given to the High Court and therefore at this time the court lacks jurisdiction.

4. Mr. Koceyo in concluding submitted that the Water Act at Section 96 provides that in the event there is a dispute the 1st place the consumer should go is to report to the resources management authority under section 96 (1). The decision of the Water Resources and Management Authority will then appeal to the Board and then the next appeal to the High Court. He urged the court to strike out the application as it can't even transfer the suit to the said body. He sought costs as he had already entered appearance and filed the objection and as such the client had insured expenses.

5. Mr. Sato submitted that section 85 of the Act reads;

i. 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, the Minister or the Regulatory Board concerning a permit or license under this Act and the Board shall hear and determine any such appeal.

ii. 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.

He argued that the same concerns a permit or license and the body would hear the dispute. That Section 58 defines the license. He stated that the defendant is a licensee and the plaintiff is a consumer. He added that the defendant being a licensee in case of a dispute he would go before the Board. He further submitted that a permit as defined in Section 25 and 26 of the said Act - any use for a water resources. In this case he argues it is the defendant who requires the permit not the plaintiff. He argued that what he was seeking were prerogative orders against the defendant and exemplary damages. He further added that this was a debt collection issue and this being a civil court it has the power to determine the matter. He added that Article 165 creates the High Court and the High Court has unlimited civil jurisdiction. It was his submissions that the Water Act does not give the Board exclusive jurisdiction and the same does not cater for the consumer like the plaintiff. He sought the court's guidance of appeals. The person aggrieved is a licensee and he believes that this court has jurisdiction to hear the matter.

6. Mr. Koceyo in reply submitted that the plaintiff talks of Section 85(1) but there is Section 85(2) which he did not read. One of the disputes is in section 91(2) (b) which is disconnecting the water. On the issue of jurisdiction he stated that the water appeals board has jurisdiction to deal with tariffs.

7. In determining the preliminary objection raised I have read the provisions of the Water Act Cap 372 as a whole but more specifically section 85 and 86 relied upon by the defendant on the objection raised. **Section 85** provides 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, 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.

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”***.

8. 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.

9. Under section 87 of the said Act the nature of appeals as listed are those that lie with the Water appeals Board are the ones that touch on section (10) the establishment of the regional officers, section (11) formulation of the water resources management and section (13) determination of a reserve there is no mention of conflict arising between a licensee and a consumer.

10. Critical reading of section 25 and 26 of the said Act it is clear that these sections relate to the water right and works and not to licensee consumer.

11. Article 165(3) (a) of the constitution confers on the High Court unlimited original jurisdiction in civil and criminal. In my views the Water Appeals Board is an appeals board for matters stipulated under section 85. I therefore find there is no merit in the said preliminary objection, this Court has the jurisdiction to hear this matter and I dismiss the preliminary objection. Costs shall be in the cause. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS **11TH DECEMBER 2013**.

R. E. OUGO

JUDGE

In the presence of:-

.....For the Plaintiff

..... For the Defendant

.....Court Clerk