



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 401 OF 2013

ST. NICHOLAS SCHOOL.....PLAINTIFF

VERSUS

NAIROBI CITY WATER AND SEWERAGE COMPANY.....DEFENDANT

RULING

1. The plaintiff /applicant filed a notice of motion dated the 19/9/13, brought under Order 40 Rule (2) of the Civil Procedure Rules. The applicant seeks that the defendant/respondent be ordered to return and reconnect the plaintiff's water meter No. 1119540 and be enjoined from removing the plaintiff's said water meter no. 1119540 or in any way from interfering with the plaintiff's water supply until the final determination of this suit and that costs for the application be cost in the cause.
2. When the matter came up for interpartes hearing the defendant respondent raised a preliminary objection on this court's jurisdiction. The said preliminary objection had been filed on the 28/9/13 and is dated 25/9/13. The objection raised is that there is a gazette notice no. 133 dated 11/1/08 issued by the Chairman of the Water Appeal Board and a circular no. 69 by Chief Justice E. Gicheru as he then was stating that all water disputes are to be determined by the Water Appeals Board. That the Appeals Board is established under section 84 of the Water Act and its jurisdiction is given at section 85. That at section 87 the Act provides that the judgment of the Water Appeals Board shall be final except where the matter can go on appeal to the High Court. That the said Act therefore makes this court the appellants court.
3. Mr. Nyamu submitted that a look at the plaint presupposes a dispute, that though articles of the Constitution are cited in the plaint that cannot be an excuse to file this matter in the high court. That where statutes give a specific jurisdiction to a body then a party cannot invite the jurisdiction of this court. That this is not an appeal to be brought under order 40 of the Civil Procedure Rules nor is it a petition. That there is a gazette notice that became law and therefore this application and suit should be dismissed as it is an abuse of the court process.
4. Mr. Kabaru responded as follows; that their dispute is not a dispute under the Water Act. That no basis has been laid to show that it is a dispute under the Water Act. That in the plaint the plaintiff is saying that the respondent acted wrongfully by disconnecting the applicant's water when there was no dispute and thus breached the applicant's right as provided under the constitution. That Article 23 of the Constitution vests this court with the jurisdiction to make an order on fundamental rights and their enjoyment under Article 165 (3) (b) of the Constitution grants the High Court inherent Civil Jurisdiction to hear and determine civil disputes. That the matter is properly before the court and therefore the objection should be dismissed.

5. In reply Mr. Nyamu stated that the legislature created a body to deal with such matters. That water was disconnected by the water authority and there is a dispute and therefore this matter fails squarely within the jurisdiction of the Water Appeals Board.
6. 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 wording of this section 85 (1) in my understanding 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 and whether the customers meter should be reconnected.

7. **Section 85(2)** provides that the Board shall have jurisdiction to hear disputes. This section also confers on the Board powers and functions as maybe conferred or imposed on it under the act or any other Act. In the case of **Kuldip Singh Jandu v Nairobi Water Company Limited & Another, Nairobi Petition No 522 of 2012[2012]eKLR**, Nyamweya J., held that,

1. ***“It is clear from section 85(2) of the Water Act that the additional jurisdiction granted to the Water Appeals Board is in fact limited, and it does not have jurisdiction to determine all disputes under the Act, but only those disputes where jurisdiction is conferred on the said Appeals Board by the Water Act, 2002 or any other Act.”***

I agree with the findings of Justice Nyamweya on this section.

8. I have also been referred to Legal Notice no. 133 and the directions of the Chief Justice E. Gicheru in circular 69 dated 6th February, 2008. On this issue I associate myself with my learned brother Justice Majanja’s holding in the case of **Republic v Water Appeals Board Ex-Parte National Water Conservation and Pipeline Corporation & 2 others [2013] eKLR** where he had this to say regarding the said circular;

“The reference to Circular No. 69 of February 2007 issued by the Chief Justice to the effect that all cases dealing with water matters be transferred to the Board cannot underpin the impugned decision. The Chief Justice cannot by a circular confer jurisdiction to the Board under the Act. Jurisdiction as I have stated, can only be donated by the Constitution or statute, in this case section 85 of the Act. There is no authority under the Act for the Chief Justice, by way of a circular, to imbue the Board with jurisdiction it does not possess.”

9. The Board jurisdiction is confined to the matters stipulated in the Act. As correctly submitted by Mr. Kabaruru Article 165(3) (a) of the constitution confers on the High Court unlimited original jurisdiction in civil and criminal matters. Under Article 165(5) the High Court’s jurisdiction is

limited to matters reserved exclusively for the Supreme Court under the constitution and those falling under the contemplated in Article 162(2). In my view 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