



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 151 of 2010

LOTUS HOTEL.....APPELLANT

VERSUS

WATER RESOURCES

MANAGEMENT AUTHORITY.....RESPONDENT

RULING

1. This is the Defendant's notice of motion dated 9th March, 2012 seeking the following prayers:
 - a) *The honourable court be pleased to dismiss the suit herein for want of prosecution.*
 - b) *In the alternative, the Honourable Court be pleased to strike out the suit for want of jurisdiction to hear and determine the matter herein.*
 - c) *In the alternative, the Honourable Court be pleased to strike out this suit as the Plaintiff/Respondent is a non-suited party to undertake the proceedings herein.*
 - d) *The costs of this application and the suit be awarded to the Defendant/Applicant.*
2. The application is premised on the grounds, inter *alia*, that since the issuance of a ruling on 4th March, 2011 dismissing the Plaintiff's preliminary objection, the Plaintiff has taken no steps to fix the matter for hearing. In the meantime, the Plaintiff continues to enjoy an interlocutory injunction. Further, that the interim injunction lapsed by operation of the law; that the Plaintiff is neither a legal entity nor a natural person with capacity to sue; and, finally, that by virtue of Section 85 of the Water Act, 2002, only the Water Appeals Board has jurisdiction to determine disputes such as the present case.
3. According to the plaint filed on 14th May, 2010, the dispute concerns the Plaintiff's entitlement to sink a borehole and the Defendant's right to make orders concerning the borehole and to levy various charges in respect thereof.
4. The brief background to this matter is as follows: The Plaintiff, having sunk a bore hole in 1993 to provide water for its use as a hotel, the Defendant on 24th October, 2008, pursuant to the provisions of the Water Act 2002, demanded installation of a water meter, and also demanded payments of various charges and fees for a class 'C' water permit.
5. The Plaintiff filed Grounds of Opposition dated 7th May, 2012. Their answer to the application is as follows:

1. ***THAT the application is a blatant and express abuse of the court process.***
2. ***THAT, the application totally lacks merit and is an afterthought***
3. ***THAT, the parties have already agreed on the issues in this matter, and already there is a consent between them to settle this matter out of court***
4. ***THAT, it is an abuse of Court Process to prosecute a matter that the parties have settled.***
5. ***THAT, it is misdirected application and lacks merit."***

6. The Plaintiff also filed a Replying Affidavit on 5th July, 2012 sworn by Zakayo Kagombe Nderu. He explains that the matter remained unheard because of the shortage of judges in Mombasa after the filing of the suit. Further, he attached a copy of a letter from the Defendant dated 2nd April 2012, and receipts of 2nd and 12th April, 2012 from which it is evident that the parties were engaged in out of court settlement discussions and the Plaintiff had paid some Kshs. 22,440/- for water use fees.

7. The parties filed written submissions to dispose of this application. I have carefully considered the submissions and documents availed by the parties.

I note that the basis of the suit is the order of the Defendant requiring the Plaintiff to pay fees and charges and to obtain a water abstraction permit. I concur with the Defence that pursuant to Section 85 of the Water Act 2002, the Water Appeals Board is the correct tribunal duly vested with authority to determine disputes of the nature herein.

8. Section 85 of Water Act provides as follows:

"85. 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 Authority, the Minister or the Regulatory Board concerning a permit or licence under this Act, and the Board shall hear and determine any such appeal."

9. And Section 87 of the Water Act makes provision for determination of disputes arising from decisions or orders of the Water Resources Management Authority.

"87. (2) In determining an appeal, the Board may affirm, quash or vary the decision or order concerned, as justice requires.

(3) In determining a dispute, or in exercising any other judicial function, the Board shall decide the matter on the merits of the case and may make such order as, in its judgment, will do justice between the parties.

(4) A judgment of the Water Appeal board shall be final: Provided that on a matter of law, an appeal shall lie to the High Court."

An appeal is allowed thereafter to the High Court. Clearly, the first port of call in disputes of this type is the Water Appeals Board, not the High Court. On this ground alone the application would succeed, and I need not go into other grounds.

10. I have perused the record of proceedings and note that the parties had sought to record an out of court settlement, but that the question of costs remained unresolved. Indeed, I note that the present application was pursued essentially to enable a determination on costs.

11. This is how I will deal with costs. It is clear that as at 2nd April, 2012, the parties had been in negotiations, and had independently reached a consensus on the substantive dispute between them. As a result, the Plaintiff submitted payments to the Defendant and agreed to register its borehole. The correspondence annexed to the Affidavit of Zakayo Kagombe Nderu dated 4th July 2012 clearly demonstrates this. The Defendant then affirmed its commitment to:

"fast track your application once it is lodged in our office and make sure that you get your permit within the shortest time possible."

12. Accordingly, the suit having been compromised at the time, only costs remained outstanding and the pursuit of this substantive application was unnecessary. In the circumstances, therefore, the Plaintiff shall carry the reasonable costs of the suit upto 2nd April, 2012, excluding those for the prosecution of the present application. The suit is itself hereby terminated.

Orders accordingly.

Dated and signed this 18th day of October, 2012

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

1. Judge: E.M. Muriithi on 22nd October, 2012
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....