



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Election Petition 522 of 2012

KULDIP SINGH JANDU.....PLAINTIFF

VERSUS

NAIROBI WATER COMPANY LTD.....DEFENDANT

SAMUEL MBUTHIA.....8TH DEFENDANT

RULING

This ruling is on the preliminary objection raised by the Defendant to the Plaintiff's suit and application. The Plaintiff's suit dated 16th August 2012 and amended on 24th August 2012 is seeking orders that the Plaintiff does not owe the Defendant for any service, and for a permanent injunction restraining the Defendant from interfering with, or disconnecting the Plaintiff's water system connected to its borehole. The Plaintiff's application is also dated 16th August 2012, and is brought under the provisions of Order 40 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. The Plaintiff is seeking two substantive orders in the said application:

1. That pending the hearing and determination of the application inter-parties the Defendants be ordered to re-connect the water which is drawn by the Plaintiff from the borehole situated in Plot L.R. No. 1870/VI/47 Rapha Road Westlands.
2. That pending the hearing and determination of the application and the suit, the Defendants be restrained from interfering, disconnecting the water drawn by the plaintiff from the borehole situated at Plot L.R. No. 1870/VI/47 Rapha Road Westlands.

The main ground giving rise to the Plaintiff's suit and application is that the Defendant has illegally disconnected the water system of the Plaintiff due to an outstanding water bill of Kshs.342,739.61 owed to the Defendant by one Suresh Parmah t/a Software Applications Limited, who had leased a portion of the Plaintiff's premises and who moved out on 24th October 1996. Further, that the Plaintiff does not owe the Defendant any money.

The Defendant raised a preliminary objection to the said application in a notice of preliminary objection dated 28th August 2012, on the ground that this Court lacks jurisdiction to hear and determine this suit, and that the application together with the entire suit be dismissed with costs to the Defendant (sic). The preliminary objection was heard on 17th September 2012, and the parties relied on their written submissions and requested for a ruling based on the same.

The Defendant's learned Counsel in written submissions dated 28th August 2012 argued that that Section 84 (1) of the Water Act, Act No. 8 of 2002, establishes the Water Appeal Board whose jurisdiction is as established under Section 84 of the said Act. Further, that by way of Gazette Notice No.133 dated 8th January, 2008 published on 11th January 2008, it is provided that all disputes under the Water Act should be filed in and determined by the Water Appeal Board. The said Gazette Notice was made pursuant to the provisions of the Water Act No. 8 of 2002 and Water Appeal Board Rules of 2007 published in Legal Notice No. 144 of 2007. The Defendant also relied on the case of Mwiki Water Project "B" & others –vs- Nairobi City Water & Sewerage Co. Ltd. Misc. App. No. 318 of 2008 where Waweru J. held as follows:-

“ . . . it appears to me that the intent and purpose of the Water Act, 2002 is that all disputes arising under the Act should be resolved following the machinery laid therein. I have perused the pleadings in Milimani SPMCC No. 11733 of 2006. The dispute therein concerns water services and licenses thereof. It is a dispute that appears to me to fall within the Water Act, 2002”.

The Defendant argued that if the Gazette Notice had been brought to the attention of the Honourable Court of 16th August, 2012 when the Plaintiff's application was filed and scheduled to be heard, this Court would not have proceeded to issue the orders on the 27th August 2012 to reconnect the water supply since the jurisdiction of the ordinary courts has been ousted by the provisions of the Water Act. The Defendant also relied on the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR, 1 .

The Plaintiff's learned Counsel filed submissions dated 4th September 2012 and argued that this Court has unlimited jurisdiction in both civil and criminal matters under Article 165(3) (a) and (b) of the Constitution. Counsel for the Plaintiff further argued that any legislation that purports to limit the jurisdiction of this court will be inconsistent with the provision of the Constitution, and this Court can make that declaration. Counsel further went on to say that the Water Act of 2002 and any subsidiary legislation made there under are subject to the provisions of the Constitution, and submitted that its rights under Article 43(1) (d) of the Constitution which states that every person has the right to clean and safe water in adequate quantities had been violated by the Defendant.

The Plaintiff's counsel additionally submitted that the license to extract borehole water was issued to the Plaintiff by the Water Resources Management Authority in the year 2008 after it had paid for it, and that the said permit has not been revoked or suspended. Further, that the Defendant has no claim or control over the said borehole and meter as the Plaintiff does not owe them any amount of money. Plaintiff's counsel further submitted that the Defendant had committed a tort for which the Plaintiff claims damages and the claim cannot therefore fall within the preview of the Water Act. The cases cited by the Defendant were distinguished on this ground.

I have read and carefully considered the submissions by the parties to this application. The main issue before this court is whether it has jurisdiction to hear and determine the Plaintiff's suit and application. This Court's jurisdiction is claimed to have been ousted by section 85 of the Water Act which states 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 licence 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.

It is clear from the provisions of section 85 that the jurisdiction of the Water Appeals Board is two-fold: first is to hear appeals from decisions and orders of the Water Resources Management Authority, the Minister, or the Water Services Regulatory Board concerning a permit or licence. The second jurisdiction of the Water Appeals Board is as is conferred by any law.

I therefore find that this is not a dispute that is envisaged by section 85(1) of the Water Act of 2002 as there must be a decision or order on a permit or licence from the three named authorities to trigger the jurisdiction of the Water Appeals Board. I am in this respect guided by the decision in Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR, 1 where it was stated as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

The jurisdiction of the Water Appeals Board under section 85(1) of the Water Act of 2002 is dependent on the existence of a particular set of facts, namely the decision or order on a licence or permit by the authorities named in the sub-section. These set of facts do not exist in the present case and application. There is no decision or order on a permit or licence being appealed from in this suit and application, but rather a dispute between two parties who happen to be licencees under the Water Act as to whether any money is owed, and where the action of the Defendant is being disputed as being unlawful and unconstitutional.

I have also perused the Water Appeal Board Rules of 2007 dated 2nd July 2007 found in Legal Notice No 144 of 2007 published on 6th July 2007, and note that an appeal is defined in the said rules as “any matter or pleading lodged with the Board in an appeal with respect to any dispute arising under the Water Act”. The same meaning is also given to an application to the Water Appeals Board. The Gazette Notice No.133 dated 8th January, 2008 published on 11th January 2008 under the Water Act No. 8 of 2002 and Water Appeal Board Rules of 2007 also gives notice that “all disputes under the Water Act 2002 shall be filed in and determined by the Water Appeals Board”(emphasis mine)

I find the two pieces of subsidiary legislation to be substantively *ultra vires* as they cannot donate powers to the Water Appeals Board that are not expressly provided for in the Water Act, which is the parent Act. This is particularly with regard to the issue of jurisdiction which can only be expressly be granted by substantive law. 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 of 2002 or any other Act. No such law has however been cited by the Defendant, to warrant the application of section 85(2).

It is therefore my finding that section 85 of the Water Act of 2002 does not apply to the facts of this suit and application, and that this Court therefore has jurisdiction to determine this matter as is granted by section 3A of the Civil Procedure Act and Article 165(3) of the Constitution. I therefore do not find any merit in the preliminary objection by the Defendant, and dismiss the said preliminary objection.

The costs shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 16th day of October, 2012.

**P. NYAMWEYA
JUDGE**