



**Salford Investment Limited v Nairobi City Water & Sewerage Company Limited (Environment & Land Case E346 of 2021) [2022] KEELC 3943 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3943 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E346 OF 2021**

**EK WABWOTO, J**

**JULY 28, 2022**

**BETWEEN**

**SALFORD INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .... DEFENDANT**

**JUDGMENT**

1. Vide an Amended Complaint dated December 6, 2021, the Plaintiff sought for the following reliefs against the Defendant: -
  - i. A declaration that there was wrongful imprisonment of the Plaintiff's agent without the legal right and justification.
  - ii. A declaration that the payment of Kshs 100,000/- as a fine for alleged tampering of the water meter and Kshs 25,800/- for provision and procurement of a new water meter amounted to extortion.
  - iii. Special damages of:
    - i. Kshs 189,950/-
    - ii. Provision of water from a water bowser – Kshs 60,000/-
    - iii. Loss of mobile phone – Kshs 29,999/-
    - iv. Cost of installation – Kshs 5,000/-
  - iv. Mesne profits for trespass.
  - v. General damages
  - vi. Interest on (c) and (e) above from the date of filing suit to payment in full.



- vii. Costs of the suit and interest thereon from filing of suit to payment in full.
  - viii. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The Defendant filed a statement of Defence and counter claim dated January 13, 2022. Through the counterclaim, the defendant sought the following reliefs against the Plaintiff's: -
- a) The sum of Kshs 451,400/-
  - b) Interest on (a) above at court rates from the date of filing the counterclaim until payment in full.
  - c) Costs of the suit and the counter claim.
  - d) Any other reliefs that the court may deem just and appropriate to grant in the circumstance.

**Plaintiff's case.**

3. The Plaintiff's case is contained in the amended plaint dated December 6, 2021, the witness statements dated December 6, 2021, list and bundle of documents dated December 6, 2021, the oral evidence tendered in court on May 11, 2022 and the written submissions filed through the firm of E Kinyanjui & Co Advocates dated May 25, 2022.
4. It is the Plaintiff's case that on or about September 1, 2021, the Defendant's agents, servants and or personal representative gained access to the Plaintiff's premises and with the claim of alleged tempering of the borehole water meter, disconnected and confiscated the water meter without notice or documented proof of confiscation instructions and therein breached the express and implied conditions of the subsisting contract as against the Plaintiff. In the amended plaint the Plaintiff also particularized the particulars of breach which included the following: failure to give notice a reasonable one whether verbal or written form of impending inspection, trespassing on the Plaintiff's property, failure to perform its duties, implied and express under the contract, failure to give and issue due notice of inspection, failure to give and issue documentation of instructions and authority to confiscate the water meter and failure to act in good faith.
5. The Plaintiff also particularized its loss and damages suffered due to the Defendant's actions.
6. The Plaintiff also pleaded that they had a borehole for provision of water on its property L R No 9042/570 along Kabansora Road next to Aviation School on Airport North Road, Embakasi which the Defendant had the mandate and authority in billing from the readings of the water installed to record water supply from the said borehole.
7. It was also averred that on or about September 3, 2021, the Plaintiff's Director Patel Harilal Dhanji upon enquiry to the Defendant was obligated through extortion to part with amounts of money in order for the Defendant to reinstitute water services.
8. It was also the Plaintiff's case that on or about September 4, 2021, the Plaintiff personally purchased and procured a new borehole water meter at Kshs 29,150/- and communicated of the procurement to the Defendant and further requested for their presence in supervising and approving the installation of the new borehole water meter a request which was declined. The Plaintiff contended that the said action by the Defendant breached the express and implied conditions as against the Plaintiff.
9. The Plaintiff also contended that on or about September 22, 2021, the Defendant served the Plaintiff with a disconnection order alleging that there was a pending bill of Kshs 511,995.31 and the



- Defendant's agent disconnected the borehole water meter an action which led to another breach of the express and implied conditions as against the Plaintiff.
10. In its case, the Plaintiff maintained that due to the defendant's action, the Plaintiff was issued with threats and notices of tenants wanting to vacate the premises.
  11. During the hearing of the suit on May 11, 2022, Patel Harilal Dhanji Velji testified as PW1 while Jeniffer Muthoki testified as PW2. PW1 testified as the Director of the Plaintiff's company. He adopted his witness statement dated December 16, 2021 together with the bundle of the documents that were on record. He also stated that he sought for grant of the prayers sought in the amended plaint.
  12. In cross-examination by Counsel for the Defendant, he stated that the Defendant was wrong to disconnect their water meter since their account had an excess payment for the month of April 2021 and further that they had never been told of any error from their meter reading.
  13. In further cross-examination, he stated that he was not in a position to tell whether the meter was faulty or otherwise. He further stated that after making payment for the new meter, the Defendant never replaced the same and he was forced to install a new one at his own cost.
  14. In re-examination by his Counsel, he stated that the arrest of Jenifer Muthoki was made on September 1, 2021 and release was effected on September 3, 2021. He also stated that neither him PW2 Jenifer Muthoki was charged with any offence.
  15. Jennifer Muthoki who testified as PW2 adopted her witness statement dated December 16, 2021. She testified that she was the caretaker to the Plaintiff's property on L R No 9042/570 along Kabansora Road.
  16. In her cross-examination, she stated that she was in charge of settlement of water bills and she had the sole access to the water meter. She also stated that from the water bills that was presented, the bills showed that there was no consumption of water for about three months.
  17. In re-examination, she stated that the water bill would be sent every month and that there was also an officer from the Defendant's Company who would come to read the same. She also stated that she did not understand how and why there was a constant reading from the previous months. She further stated that she had reported to IPOA complaining against the harassment though she was yet to receive any response.

#### **The Defendant's case.**

18. The case of the Defendant is contained in its statement of defence and counter claim dated January 13, 2021 together with the witness statement dated February 14, 2022.
19. In summary, the Defendant's case is that the Plaintiff is not entitled to the prayers sought. The Defendant denied any breach of the subsisting contract between it and the Plaintiff since Section 59(2) and 60(3)(a) of the *Water Act* 2016 grants the Defendant the right of enter into any premises without notice if there is reason to believe that a provision of the Act or any rule or order made under the Act has been or is about to be contravened.
20. The Defendant also contended that it had noticed through it's normal operations that from the three billing cycles, the Plaintiff had negative readings yet there was consumption of water. These discrepancies pointing to willful tampering of the meter was in contravention of Section 145 (d) (ii) of the *Water Act* 2016, thereby granting the Defendant a reasonable believe warranting entry into the Plaintiff's property without prior notice. Further during the visit, the security team of the Defendant duly identified themselves and their purpose of the visit.



21. The Defendant further contended that the Plaintiff's servant Jennifer Muthoki was arrested for offences under the Water Act and booked at Soweto Police Station and any subsequent inactions complained were done by persons who were not their agent.
22. The Defendant also averred that the Plaintiff's agent skipped court on the day she was supposed to attend court under City Court file No 3552 of 2021 leading to the forfeiture of the cash bail of Kshs 10,000/-
23. It was also the Defendant's case that there was no extortion on its part because the Kshs 100,000/- that was paid by the Plaintiff was derived from the water tariff structure which sets out the amount to be paid for water fraud and Kshs 25,800/- was the cost for replacement of the damaged water meter.
24. During the hearing of the suit, the Defendant called only one witness who was Peter Adigora, DW1. He adopted his witness statement dated February 14, 2022. He stated that he was a security officer of the Defendant Company in charge of the Eastern Region.
25. He further stated that the Plaintiff's account had discrepancies for the months of June, July, August and September 2021 and that the Caretaker of the premises was actually interfering with the meter.
26. It was his further testimony that the Plaintiff's meter had been revised from a reading of 2396 to 663 in July 2021 and that when a meter is revised, it reflects a constant reading. This led to the arrest of the Caretaker who was taken to Soweto Police Station. Upon arrest of the caretaker, the Plaintiff sent Austin Odoyo Advocate to negotiate an out of court settlement upon which Kshs 100,000/- was paid for the same and also to cater for the loss of water that had been consumed when the meter was faulty.
27. It was also the testimony of DW1 that the Plaintiff had agreed to pay Kshs 451,400/- which was never paid to date.
28. On cross-examination, DW1 stated that the Defendant discovered the meter having been tampered with on September 1, 2021 upon which Jennifer Muthoki was arrested. He also stated that the O.C.S of Soweto Police Station was the one who set the cash bail at Kshs 10,000/- and thus he is the one who can competently respond to the issues of the cash bail.
29. On further cross-examination, he stated that the Defendant's counterclaim is for kshs 451,400/- though the disconnection order was for kshs 511,995.31/-
30. In re-examination, he affirmed that the meter had been tampered with and the difference of Kshs 511,995.31 which was stated in the disconnection order and Kshs 451,000/- which was stated in the counterclaim arose from a wrong billing, however the discrepancies in the Plaintiff's meter were for the months of June, July and August 2021.

### **Analysis and Determination.**

31. Upon conclusion of the hearing, the court directed parties to file and exchange written submissions. The Plaintiff's filed written submissions dated May 25, 2022 through E. Kinyanjui & Company Advocates. The Defendant never filed any written submissions however the court still has an obligation to consider the defendant's pleadings and evidence adduced during trial in rendering its judgment. The court is of the view that the relevant issues for determination are as follows; -
  - i. Whether the water meter was tampered with an or faulty.
  - ii. Whether the Defendant's agents had a right of entry into the Plaintiffs premises.



- iii. Whether the Plaintiff's agent Jenifer Muthoki was falsely imprisoned by the Defendant's servants.
- iv. Whether the Plaintiff is entitled to the prayers sought.
- v. Whether the Defendant is entitled to the orders sought in the counterclaim.
- vi. What orders should issue as to costs.

## Issue No I

### Whether the water meter was tampered with and or faulty.

32. In its amended plaint dated December 6, 2021, the Plaintiff pleaded that on September 1, 2021, the Defendant's agents and servants gained access to the Plaintiff's premises on allegations of tampering of the borehole water meter and they subsequently disconnected the same without prior notice thus breaching the express implied conditions of the existing contract.
33. During trial, the Defendant's witness DW1 Peter Adigora testified that from the Defendant's normal operations, they noticed that the Plaintiff's meter had inconsistent readings for over three (3) months yet water was still being consumed at the Plaintiff's premises. He further stated that the three billing cycles and the month of July had a previous reading of 2396 units against the current reading of 663 units showing a negative consumption of 1733 units, whereas for the month of August 2021, the meter reads 2396 units against the current reading of 662 units hence a negative consumption of 1734 units an indication that the meter had been tampered with.
34. The Plaintiff in its written submissions pointed out to the court that the pieces of evidence that were produced by the Defendant, were screen shots contained at pages 6,7 and 15 of the defendant's bundle which were readings of July, August and October 2021 which were print outs which had not been proved as required by the Evidence Act with regards to electronic evidence.
35. It was submitted that the water meter readings that were produced by the Defendant, being electronic records, needed to have an accompanying certificate as stipulated by Section 106 of the Evidence Act. The Plaintiff relied on the cases of London Distillers (K) Ltd –vs- Mavoko Water & Sewerage Company & 2 others (2019) eKLR and Republic –Vs- Mark Lloyd Stevenson (2016) eKLR in support of the said position.
36. In the instant case it is evident that indeed there was no accompanying certificate for the said print outs and as such the same cannot be considered by the court as a basis for determining whether or not the Plaintiff's meter was faulty or have been tampered with since doing so would be contrary to Section 106 of the Evidence Act as was held in the case of John Lodinyo –Vs- IEBC (2018) eKLR and County Assembly of Kisumu –Vs- County Assembly Board of Kisumu (2015) eKLR.
37. However, the court notes that from the evidence that was tendered, the Plaintiff in a bid to remedy the situation after the Defendant had disconnected the meter, purchased a new meter. This action could have only been done on the pretext that its current meter was either tampered with or faulty and in view of the foregoing, it is the court's finding that the action by the Plaintiff in procuring a new meter can only point out to the fact that the current meter was either faulty or had been tampered with.



## Issue No II

### **Whether the Defendant's agents had a right of entry to the Plaintiff's property.**

38. The Plaintiff pleaded that the Defendant's agent had no right of entry into its premises without giving reasonable notice. During trial the Defendant's witness DW1 who was also its security officer testified how they entered into the Plaintiff's premises on September 1, 2021 with a view of establishing whether or not the Plaintiff's water meter had been tampered with.
39. In the submissions, the Plaintiff submitted that DW1 was not a gazetted water Inspector nor an "authorized person" and pursuant to Section 60 of the Water Act he had no right of entry.
40. I have perused Section 60 of the Water Act, 2016 which deals with the manner of entry and the same defines an "authorized person" as a person entering onto any land or premises pursuant to a right or permission conferred under this Act and the said authorized person does not need to enter on any land or premises without first giving a reasonable notice in verbal or written form. In view of the foregoing, the court disagrees with the submissions made by the Plaintiff and finds that DW1 being an Officer of the Defendant was indeed an authorized person who had a right of entry to the Plaintiff's premises and in this case his entry was for the purpose of establishing whether or not the Plaintiff's water borehole meter had been tampered with.

## Issue No. III

### **Whether the Plaintiff's agent Jennifer Muthoki was falsely imprisoned by the Defendant's servants.**

41. It was the Plaintiff's case that on September 1, 2021, Jennifer Muthoki PW2 who was the caretaker of the Plaintiff's premises was placed under arrest and illegally detained at Soweto Police Station in respect to false water offences.
42. During the hearing of the suit, PW2 stated in her cross examination that she believed her arrest was maliciously instigated owing to the fact that she was later released without being given any date to attend court and she had also lost her mobile phone during her arrest.
43. Peter Adigora, DW1 testified that Jennifer Muthoki was arrested for water related offences after they had visited the Plaintiff's premises and after her arrest, they were not in control of her whereabouts when she was taken to Soweto Police Station since the same was the mandate of the Officer in Charge of that police station. According to him, he later knew that PW2 was released from the Police Station after the Plaintiff's Advocate Mr. Austin Odoyo had negotiated an out of court agreement and signed a liability form and further paid Ksh 100,000/- to the Defendant.
44. In his submissions, Counsel for the Plaintiff submitted that they had established the two ingredients of false imprisonment. It was submitted that there was imprisonment as the Defendant duly acknowledged that its agents arrested the caretaker of the premises and that DW1 did not have the powers to undertake an arrest as they purported to undertake in the present case. Counsel urged the Court to be guided by the provisions of Rule 65(1) of the Water (Services Regulatory) Rules, 2012 which reserves the power to undertake an apprehension for offences under the Act to inspectors. Reliance was made to the case of *Lumba(WL) v Secretary of State for the Home Department* [2011] UKSC 12, where Lord Dyson held that (at para. 65),

"All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the



defendant to show that there was lawful justification for doing so. As Lord Bridge said in *R v Deputy Governor of Parkhurst Prison Ex p Hague* [1992] 1 AC 58, 162 C-D: “The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.”

45. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the [Evidence Act](#), which provides as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

46. Sections 109 and 112 of the same Act state;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

47. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in [Mumbi M’Nabea vs David M. Wachira](#) [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited* -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

48. With respect to the burden of proof, the learned Judges of Appeal in the case of [Palace Investments Limited vs Geoffrey Kariuki Mwenda & another](#) [2015] eKLR, posited thus:

“Denning J, in *Miller vs Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.





This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

49. The Plaintiff has before this court sought for a declaration that there was wrongful imprisonment of Jennifer Muthoki and damages for unlawful arrest and false imprisonment. Black’s Law Dictionary, Tenth Edition, Page 543 defines detention as: -

“The act or instance of holding a person in custody, confinement or compulsory delay”.

50. False imprisonment constitutes unlawful detention and the above dictionary defines false imprisonment as: -

“The restraint of a person in a bounded area without legal authority, justification, or consent. False imprisonment is a common- law misdemeanor and a tort. It applies to private as well as governmental detention.”

51. The incident involving the arrest of PW2 is not disputed. The question to be considered is whether the Plaintiff has proved on a balance of probabilities that PW2 was unlawfully arrested and detained by the Defendant. Aburili J in Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & Another [2016] eKLR cited with approval the decision in Daniel Waweru Njoroge & 17 Others V Attorney General [2015] eKLR as to the elements comprising the tort of false imprisonment as follows:

“The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as:

1. The unlawful restraint of another;
2. Against their will; and
3. Without justification.

52. Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat or some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying ‘reasonable person’ standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention exist, such as a lawful arrest by law enforcement (agencies). Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.”

53. In the instant case it is clear that PW2 the Plaintiff’s servant was arrested on September 1, 2021 and booked at Soweto Police Station for alleged offences of knowingly cutting the water meter seal and reversing the meter readings of the water meter contrary to section 145 (b) as read with 145 (d) of the Water Act 2016 for unlawful discharge of such like water through a tampered meter with intent to defraud the defendant of its revenue and was granted a cash bail of Ksh 10,000/- and later released to appear in court on September 2, 2021.

54. She did not appear in court because the Plaintiff’s representative signed a liability form acknowledging the tampering and reversing the meter and payment of Ksh 100,000/- for the charge and Ksh 25,800/- for the new meter was made.





55. I have considered the evidence on record and I note that the Plaintiff was asked to pay the sum of Ksh 100,000/- which was made as stipulated in the water tariff structure for water fraud. As such there was no malice on the part of the Defendant in effecting the said arrest and further the imprisonment of the Plaintiff's agent was made at Soweto Police Station which the Defendant had no control of the same.
56. In view of the foregoing, it is the finding of this court that claim of false imprisonment and malicious arrest has not been proven to the required standard.

#### **Issue No. IV**

##### **Whether the Plaintiff is entitled to the orders sought in the Plaintiff.**

57. The Plaintiff sought for various reliefs which have been analyzed in this judgment. Having considered the evidence that was tendered, it is the finding of this court that the Plaintiff has not proved its case to the required standard. However, the only relief that the Plaintiff is entitled to is a refund of Ksh 25,800/ which was paid to the defendant for procurement of new water meter which the Defendant never installed. Considering that the same money is still in possession of the defendant, I will direct that the it be deducted from the subsequent Plaintiff's monthly water bills that may fall due.

#### **Issue No. V**

##### **Whether the Defendant is entitled to the orders sought in the counterclaim**

58. In the counterclaim, The Defendant had sought for several orders, the main one being payment of Ksh 451,400/- by the Plaintiff being the outstanding water bill amount. A counterclaim is a suit and it ought to be proven to the required standard just like any other claim. During the hearing of the suit, DW1 testified that at the time of disconnection of the Plaintiff's water meter there was an outstanding bill upon which the Plaintiff was issued with a disconnection order of Ksh 511,995.31. He further stated that he was aware that the despite the disconnection order being for Ksh 511.995.31, he was aware that the counterclaim was for Ksh 451,400/ and that the difference could have arisen from a wrong billing which would have require further verification from the defendant company since he was not sure of the exact amount.
59. The uncertainty of the testimony of DW1 in respect to the said amount only cast doubt as to what was the exact outstanding bill that was due and payable by the Plaintiff.
60. In view of the foregoing, it is the finding of this court that the Defendant's counterclaim has not been proved to the required standard. There being no evidence in support of the counter claim, the prayers sought cannot be granted.

#### **Issue No. VI**

##### **Who should bear the costs of the suit and counter claim?**

61. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). Considering the circumstances of this case, I will direct that each party bears own costs of these proceedings.

#### **Final Orders**

62. In conclusion, I hereby make the following final orders: -



- a) The Plaintiff is entitled to a refund of Ksh 25,800/= which will be deducted from the Plaintiff's subsequent monthly water bill as and when it falls due.
- b) The prayers in the counter claim are declined.
- c) Each party to bear its own costs of the suit and the counterclaim.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr Michuki for the Plaintiff.**

**N/A for the Defendant.**

**Court Assistant; Caroline Nafuna.**

**E K WABWOTO**

**JUDGE**

