

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO. 550 OF 2009
KENYAPOLYTECHNICUNIVERSITY
COLLEGEPLAINTIFF/APPLICANT
V E R S U S
FRANCIS NJUGUNA WAWERUDEFENDANT/RESPONDENT
R U L I N G

The Plaintiff owns land parcel LR. 209/8726 in South B in Nairobi and has drilled a borehole thereon to serve its students hostels. The Plaintiff alleges that the Defendant has recently drilled a borehole on his adjacent land L.R. 209/3598 and that this will interfere with its borehole and will cause it to dry up. It is alleged that the Defendant's construction of a borehole within a hundred meters of an existing one is illegal and prejudicial. The Plaintiff has complained to the Water Resources Management Authority but without success and says that it cannot go to the Water Appeal Board because its chairman has not been appointed by the Minister.

The Defendant is saying he has drilled a borehole on L.R. 209/3598 but with the permission of the Water Resources Management Authority and therefore that his actions are not illegal. The Defendant then pleaded that this court has no jurisdiction to hear or determine the Plaintiff's suit which sought a permanent injunction to restrain the construction of the borehole on L.R. No. 209/3598 and/or the abstraction of water from the borehole. The Plaintiff filed a chamber application for a temporary injunction under **Order 39 rules 1(a), 2 and 9** of the **Civil Procedure Rules**. In response, the Defendant raised a preliminary objection to the same on the ground that the dispute belongs to the Water Appeal Board and this court has no jurisdiction to determine it. I listened to Mr. Bundotich for the Defendant and Mr. Misati for the Plaintiff on this issue.

The Defendant says he has a permit from the Water Resources Management Authority to drill a borehole on his land. The Plaintiff is saying the Defendant does not have a permit and/or that it is aggrieved by this subsequent borehole. The Plaintiff is essentially aggrieved by the decision to allow the Defendant to drill his borehole. This is a dispute that can only be properly heard and determined by the Water Appeal Board under **section 85 (1) of the Water Act (Act No. 8 of 2002)**. This court lacks the jurisdiction to hear or decide the dispute. It follows that both the suit and the application are incompetent and are struck out with costs.

DATED AND DELIVERED AT NAIROBI
THIS 27TH DAY OF OCTOBER 2010

A. O. M UCHELULE
J U D G E