



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 24 OF 2020

AMOS KURIA NJOROGE

STANLEY MWANGI

MARY NJAMA (suing in their capacities

as Treasurer, Chairperson and Secretary of

MURANGA HIGH SCHOOL)..... APPLICANTS /PLAINTIFFS

VS

JAMES MUCHOKI MUTHONI....1ST DEFENDANT/RESPONDENT

MURANGA WATER & SANITATION

COMPANY LIMITED.....2ND DEFENDANT/RESPONDENT

WILLY MWANGI KURIA..... PROPOSED THIRD PARTY

RULING

1. This Ruling is in respect of two Notices of Motion Applications dated 6/10/2020 and 21/10/2020 filed by the Plaintiffs and the 2nd Defendant respectively.

2. By consent of the parties the same are being determined concurrently.

The Plaintiff's Notice of Motion dated 06/10/2020.

3. The Plaintiff/Applicant filed the Application dated 06/10/2020 based on Sections 1B, 3, 3A of the Civil Procedure Act, Order 40 Rule 2, Order 51 Rule 1, of the Civil Procedure Rules, Section 13(1) of the Environment and Land Court Act, Articles 47, 48 and 50(1) of the Constitution and all other enabling provisions of the law seeking the following Orders; -

a. Spent.

b. That pending the hearing and determination of this application inter parties, this Honorable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents either by themselves, their employees, servants, beneficiaries, and or agents or otherwise people acting at their behest from entering and or trespassing in to the Murang'a High School's property Title Numbers LOC11/MARAGI/1453 & 1456 in attempt to reconnect the Defendants/Respondents sewer line with that of the school and or disposing, discharging and or dumping fresh, raw and untreated waste in to the said property or in any other manner whatsoever interfering with sewerage system including the Bio-digester and further from harassing the staff, students and the parents of the school.

c. That pending the hearing and determination of this suit, this Honorable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents either by themselves, their employees, servants, beneficiaries, and or agents or otherwise people acting at their behest from entering and or trespassing in to the Murang'a High School's property Title Numbers LOC11/MARAGI/1453 & 1456 in attempt to reconnect the Defendants/Respondents sewer line with that of the school and or disposing, discharging and or dumping fresh, raw and untreated waste in to the said property or in any other manner whatsoever interfering with sewerage system including the Bio-digester and further from harassing the staff, students and the parents of the school.

school.

d. That the Officer Commanding Police Station, Murang'a Police Station assist in enforcing the orders issued by this Honorable Court.

e. That the costs of this Application be borne by the Defendant.

4. The Application is supported by the Affidavit of Amos Kuria Njoroge and premised on grounds that the 1st Respondent with the assistance of the 2nd Respondent has trespassed in to the Applicant's property and illegally connected the main sewer line from his adjacent property to the Applicant's school's privately developed sewer and bio-digester system. According to the Applicant, the said illegal connection and waste release has affected the optimum performance of the bio-digester leading to the blockage of the school's sewerage system causing spillage and discharge of waste thus making the school inhabitable.

5. The Applicant has recounted that the instant issue had been raised and temporary injunction issued in Murang'a **ELC Petition No. 2 of 2020** between the **Board of Management Murang'a High School-vs- The Water Regulatory Board & 3 others** against the Respondent but was dismissed on 17/09/2020 by this Honorable Court for want of jurisdiction. Upon the said dismissal, the Applicant submits that the Respondent has threatened to reconnect the sewer line and in the process has been harassing and threatening the Applicants and staff of Murang'a High school thus the instant Application and prayers above.

6. In addressing the issue of jurisdiction, the Applicant has admitted that the Water Tribunal established under Section 119 of the Water Act 2016 would have heard and determined this matter but the same not being operational, they have sought redress before this Court. The Applicants conclude by urging the Court to allow their Application in the interests of the students' welfare as guaranteed in the Basic Education Act and the Children's Act.

7. The Application is strongly opposed and the 1st Respondent filed his Replying Affidavit sworn by James Muchoki Muthoni on 19/10/2020. He avers that he is the owner of the plot no. LOC.11/MARAGI/2850 with residential houses next to Murang'a High School and the Applicants' Application is accentuated with malice and bad faith to harass him and his tenants and orders sought therein are meant to obstruct and delay the course of justice. The 1st Respondent is categorical that he applied to the 2nd Respondent for connection of sewer line for his property and paid requisite fees being Kshs. 2,450/= for installation as per annexure marked 'JMM1'.

8. Further the 1st Respondent avers that being unaware of sewerage systems, it is the 2nd Respondent who connected the drainage pipe and upon receipt of the Applicants' complaint letter over the connection, he gave a go ahead for the disconnection.

9. Correspondingly the 2nd Respondent filed a lengthy Replying Affidavit sworn by Eng. Daniel Nganga on 21/10/2020 and reiterated the role of the 2nd Respondent in providing water and sewerage services to Murang'a town and its environs. He denied the allegation that the Applicants solely funded the construction of the sewer line back in 2015 and accredited the joint efforts of Murang'a County Government for the same. He added that on their part, the Applicants were to pay tariffs on a monthly basis for sewerage services alongside the 1st Respondent who was later connected to the sewer line.

10. The 2nd Respondent also averred that the minimal incidences of blockage were occasioned by malicious destruction by a third party at the behest of the Applicants. While acknowledging that the Applicants sought to terminate their contract with the 2nd Respondent in April 2020, the 2nd Respondent was adamant that the accrued bills remained unpaid and that any blockage was as a result of the bio digester inefficiency and failure to install a separate sewer line for the bio digester.

11. While enumerating his professional expertise, the 2nd Respondent swore that the hilly terrain depends on forces of gravity for optimum sewerage functionality and referred to various provisions of the Water Act, 2016, Land Act 2012 in executing its mandate and emphasized the need to enjoin Mr. Willy Mwangi Kuria as a Third party in determining the suit.

12. In a rejoinder, the Applicants filed a supplementary Affidavit and denied any funding of the school's sewer line by the 2nd Respondent or at all and insisted that funding was a joint effort partly by the Murang'a County Government and parents' contributions. The Applicants swore that the sewer line is solely for their private use and the same was maintained as such. They denied giving any consent to the 2nd Respondent's request to connect other users to the school's sewer line vide annexure EDN5 and reiterated that though the school is a public school, the land it sits on has been alienated for any other public use but for purposes incidental to achieving its mandate.

13. The Applicants maintained that the bio digester malfunction was caused by the 1st Defendants channeling their waste into the school sewer line and any connection to the said sewer line was without their consent.

14. On the issue of enjoining the third party, the Applicants oppose the same as an attempt to hold the school principal personally liable for implementing decisions of the school's Board of Management contrary to paragraph 14 of Schedule 4 of the Basic Education Act that absolves the principal from personal liability in executing his duties. In conclusion, the Applicants similarly highlighted a number of provisions in relation to the 2nd Respondents role and requirements to obtain consent or apply for relevant authority from the Water Service Authority in case such consent is denied.

15. The Application was canvassed by way of written submissions summarized below.

16. The Applicants filed their submissions dated 16/12/2020 and addressed the Application dated 21/10/2020 therein and argued that the 2nd Respondent has no right whatsoever to connect the 2nd Respondent through the privately constructed and maintained school sewer line. The

Applicants insisted that the impugned sewer line is private and for any connection to be made, the 2nd Respondent requires the school consent or way leave to do so which the Applicants reiterates was sought and expressly denied by the school. Reliance was placed on **Musa Kipkurui A. Sang –vs- Kericho Water & Sanitation Company (2007) eKLR Civil Case no. 7 of 2007** and **Manubhai Velji Varsani v Nairobi City Water & Sewerage Company Limited [2017] eKLR**.

17. Further, the Applicants outlined the procedure for acquisition of a way leave as provided in the Land Act and Water Act the pointing out Section 110 of the latter requiring the Applicant to apply for compulsory acquisition upon serving notice to do so. They submitted that the 2nd Respondent has not done that and as such has no right to lay claim on the school's property or infrastructure.

18. On the issue of joinder, the Applicants opposed the application to enjoin the school principal, Mr. Willy Mwangi who they state is absolved from personal liability when executing duties and functions of the school's Board of Management as provided under paragraph 14 Schedule 4 of the Basic Education Act. They cited the cases of **Beatrice Tilitai –vs- William Kibet Chiboi [2017]eKLR, Republic –vs- The Secretary, Board of Governors Musingu High School Kakamega (2011) eKLR** and **J.N & 5 Others –vs- Board of Management St. G School Nairobi**.

19. In conclusion, the Applicants urged that they have established a prima facie case to warrant grant of temporary injunction as spelt out in the case of **Giella –vs- Cassman Brown (1973) EA 358** and prayed that their application dated 6/10/2020 be allowed and 2nd Respondent application dated 21/10/2020 be dismissed with costs.

20. The 1st Defendant /Respondent submitted in support of the dismissal of the application dated the 6/10/2020 and urged the Court to grant the application dated the 21/10/2020.

21. The 2nd Respondent in arguing both applications deduced three issues for determination namely; whether the proposed third party should be joined in the case, whether the requirements for issuance of an injunction have been met and who should meet the costs of the Application.

22. On the first issue, they argue that joinder of the third party is necessary based on the contractual relationship between the school and the third party, that the proposed third party and the Applicants jointly damaged the impugned sewer line and the injunctive reliefs sought will affect the third party. Reliance has been placed on Order 1 Rule 10(20) of the Civil Procedure Rules and the Court of Appeal decision in **Central Kenya Ltd –v- Trust Bank & 4 Others, CA No. 222 of 1998**.

23. Secondly the 2nd Respondent has submitted that they have established a prima facie case for issuance of a temporary injunction in line with the requirements set out in the cases of **Giella –v- Cassman Brown (1973) EA 358** and **Rao Ltd –v- First American Bank of Kenya (2003) eKLR**. They add that failure to grant the injunctive orders will be an infringement of the right to a clean and safe environment as guaranteed in Article 43 (1)(b) of the Constitution and that will lead to irreparable harm.

24. Lastly, the 2nd Respondent has reiterated its role and mandate in operating sewerage in Murang'a county as provided for under the Water Act. In addressing the issue of easement, the 2nd Respondent highlighted provisions of the Land Act under Section 140 (4) and urged the Court not to grant the Applicant's orders as the same would occasion great injustice to them and the larger public. The 2nd Respondent prayed that their application dated 21/10/2020 be allowed as whereas the Applicants' Application dated 6/10/2020 be dismissed with costs.

The 2nd Respondents Notice of Motion dated 21/10/2020

25. Turning to the 2nd Respondent's application dated 21/10/2020, the following orders were sought;

- a. Spent.
- b. That Willy Mwangi Kuria, the proposed third party herein be and is hereby enjoined in this suit as a third party.
- c. That pending the hearing and determination of this Application, the Plaintiffs herein and the proposed 3rd party be and is hereby ordered to reinstate the 2nd Defendant's sewer line infrastructure passing through Murang'a High School.
- d. That pending hearing and determination of this application, an urgent temporary injunction do issue restraining the Plaintiffs and the proposed 3rd party their servants, and/or agents from breaking, digging up, blocking the manholes or in any way interfering with the 2nd Defendant's pipeline, manholes, and other sewer infrastructure within Murang'a High School.
- e. That pending hearing and determination the main suit, an urgent temporary injunction do issue restraining the Plaintiffs and the proposed 3rd party their servants, and/or agents from breaking, digging up, blocking the manholes or in any way interfering with the 2nd Defendant's pipeline, manholes, and other sewer infrastructure within Murang'a High School.
- f. That this honorable Court be pleased to grant any other order(s) as it may deem fit and just to grant.
- g. That the costs of this application be provided for.

26. The Plaintiffs opposed the Application vide their Replying Affidavit sworn by Amos Kuria Njoroge on 27/11/2020 terming the application frivolous, vexatious and an abuse of the Court process. He averred that the Application is overtaken by events as Counsel for all

parties herein agreed by consent that the status quo be maintained until hearing and determination of their Application dated 6/10/2020 which was adopted as a Court order which orders have neither been varied nor set aside and therefore the orders sought are overtaken by events. He recapped the history of this suit and contents of his supporting affidavit in the Notice of Motion dated 6/10/2020 and generally opposed the joinder of the proposed third party in his personal capacity and averred the usage of the school bio digester as exclusive to Murang'a High School alone.

27. Likewise, the 1st Defendant opposed the Application vide his Replying Affidavit sworn on 26/11/2020 and reiterated his objection as summarized above in respect to the Application dated 6/10/2020. He deponed that the Plaintiffs alongside the proposed third party disconnected his sewer line without notice to the 2nd Defendant causing the blockage and prayed that the Application be allowed.

28. The issues for consideration are; whether the Plaintiffs application should be granted; whether the 2nd Defendants application should be granted; whether the proposed third party should be enjoined; costs of the applications.

29. The principles for the grant of an injunction as rightly captured in the rival submissions of the parties were laid out in the case of **Giella vs Cassman Brown (1973) EA 358**. In the said case the Court stated that the Court needs to consider three principles. First, that an Applicant has to establish a prima facie case with a probability of success, secondly that an injunction will not normally be granted if damages can be a sufficient remedy, and thirdly, if in doubt decide the matter on a balance of probabilities.

30. According to the 2nd Defendant, in 2015 the Plaintiffs requested for installation of their sewer line that was to be connected to the main sewer passing through/near Murang'a High school. This is an undisputed fact as the Plaintiffs admit in their Supplementary Affidavit save for the contested funding of the project as submitted by the 2nd Defendant.

31. A study of annexure 'EDN2a' attached to the 2nd Defendant's Replying Affidavit reveal the existence of the main sewer and the proposed sewer line shown by a broken line behind the school dormitories or thereabouts. The school's proposed sewer line according to the sketch is 500M long.

32. The said sketch does not reveal the location/existence of the school's bio digester. It is also not contested that the Plaintiffs were obliged to pay tariffs on a monthly for the sewerage services regardless of the installation of the school sewer line. The school continued to enjoy the sewerage services even when the monthly bills remained unpaid.

33. It is therefore uncontested that the School retains its own biodigester and a sewer which has been described as a sewerage system. I have seen correspondences where the 2nd Defendant requested for the schools consent to connect the 1st Defendant. This consent was declined. If indeed the sewerage system of the school was for public purpose and managed by the 2nd Defendant, there would not have been any necessity to seek the school's consent to connect the 1st Defendant.

34. I hold that the Plaintiff s have demonstrated a prima facie case with a probability of success. On the issue of sufficiency of damages, I have found the argument by the Plaintiffs that the biodigester and its system was not designed to handle the kind of waste emanating from the 1st Defendants premises plausible. I also note that the 1st Defendant will not be left without a remedy as he can still be connected to the main sewer operated by the 2nd Defendant.

35. I grant the application dated 6/10/2020 with no orders as to costs.

36. With respect to the application dated the 21/10/2020 by the 2nd Defendant it is the finding of the Court that the 2nd Defendant maintains a sewer line running through the school. The school has not refuted the claim of the 2nd Defendant that it proceeded to disconnect the 1st Defendant from its own the sewer line. It however refutes that it damaged the main sewer. It is the view of the Court that any damage to the main sewer line though unproved at this stage occasions untold environmental injury to the property and the environment at the risk of diseases and it is for that reason that the Court orders status quo in terms of prayer no 5 of the application. That is that the Plaintiff is restrained from interfering with the main sewer line within the School by blocking digging breaking or such other interference.

37. With respect to the issue of joinder of the Principal of the School, having considered the submissions of the parties, I find that the 2nd Defendant did not disclose any cause of action to warrant the joinder of the third party in his personal capacity. The law provides under the Basic Education Act that suits against schools should be filed in the name of the Board of Governors, which is a corporate body with the power to sue and be sued. The Principal cannot be sued in his name or in his personal capacity for the decisions of the School Board. Prima facie nothing has been brought to my attention to demonstrate that the school principal acted outside his mandate to warrant him to bear personal liability.

38. This prayer is declined.

39. In the end the application is granted in terms of prayer 5 alone. Each party to bear their own costs.

40. It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE AT MURANGA THIS 25TH DAY OF FEBRUARY 2021

J.G. KEMEI

JUDGE

Delivered online in the presence of:

Ms. Njeri HB for Wanjohi for the Plaintiff

Kinuthia for the 1st Defendant

2nd Defendant: Absent

Kiroko Ndegwa present for proposed 3rd party but muted

Court Assistants: Kuyiki & Njeri