# Muroki v Tatu City Limited (Environment & Land Case E079 of 2022) [2023] KEELC 16773 (KLR) (8 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16773 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ENVIRONMENT & LAND CASE E079 OF 2022**

**BM EBOSO, J**

**MARCH 8, 2023**

**BETWEEN**

**JOSEPH MUIGAI MUROKI ...................................................................... PLAINTIFF**

**AND**

**TATU CITY LIMITED ............................................................................ DEFENDANT**

## RULING

1. The dispute in this suit relates to what the plaintiff described in his pleadings as "a sewerage slab", built on Land Reference Number 12865/9 within Kiambu County. The plaintiff contends that the sewerage slab was built as "a way to a sewerage". The defendant describes the works as a "sewer line".

2. Through a plaint dated 20/7/2022, the plaintiff contends that the said structure was built on his land without his permission. It is his case that the construction of the structure constitutes trespass to his land and violates his right to property under Article 40 of the *Constitution*. Consequently, he seeks, among other reliefs: (i) a declaration that the defendant's entry onto the suit property and the construction of the sewerage slab is unconstitutional, illegal and amounts to trespass; (ii) a permanent injunction restraining the defendant against trespassing onto the suit property or interfering with his quiet enjoyment of the suit property; (iii) an order directing the defendant to remove all deposits of waste, soil, and the sewerage slab from the suit property and to restore the land to its original state.

3. Together with the plaint, the plaintiff brought a notice of motion dated 20/7/2022, seeking an interlocutory injunction restraining the defendant against interfering with the suit property, building on it, erecting any structure on it, or in any way interfering with the status quo of the suit property, pending the hearing and determination of the suit. The plaintiff made an alternative plea for an interlocutory order of status quo pending the hearing and determination of the suit. The said application is the subject of this ruling.

4. The application was supported by the plaintiff's affidavit sworn on 20/7/2022 and his supplementary affidavit sworn on 11/10/2022. It was canvassed through written submissions dated 12/9/2022, filed by M/s Morara Mose & Company Advocates. The case of the plaintiff/ applicant is that he is the registered proprietor of the suit property. Sometime back, on an undisclosed date, he noticed a structure on the suit property. Upon carrying out investigations, he established that the defendant was the one who had put up the structure on the suit property. He did not consent to the construction of the structure. Despite his demand for removal of the structure, the defendant has been unbothered and unwilling to remove it.

5. The applicant contends that due to the presence of the structure on his land, he cannot enjoy the land nor invest in it. It is his position that the application should be granted so as to ensure that the cause of justice is fulfilled.

6. The defendant opposed the application through a replying affidavit sworn on 23/9/2022 by James Marumi, and written submissions dated 7/11/2022, filed by M/s Issa & Company Advocates. The case of the defendant is that it has no proprietary interest in the sewer line, adding that the sewer lines are properties of Arthi Water Services Board who are not a party to this suit.

7. The defendant contends that it owns Land Reference Number 28867/1 which falls within a Gazetted Special Planning Area. Pursuant to Section 55 of the repealed *Water Act*, it entered into an agreement with Arthi Water Services Board pursuant to which the Board authorized it to change the diameter of the sewer structure serving the neighbourhood from DN300 mm to DN400 mm. The defendant adds that it was agreed that upon completion of the works, it would hand over the constructed sewer structure to the Board and the Board would become the asset owners. It is the case of the defendant that at all times, the project was supervised by the Board and KeNHA and the pipes were laid as planned and directed by the Board in conjunction with the Water Resources Management Authority. The defendant denies being the author of the alleged trespass. The defendant adds that the sewer lines serve the public, hence the balance of convenience dictates that an interlocutory injunction should not be granted.

8. The defendant argues that this court does not have jurisdiction to grant the orders sought, contending that the dispute in this suit falls within the jurisdiction of the Water Tribunal established under Section 119 of the *Water Act* which is the successor to the Water Appeals Board. The defendant further argues that the plaintiff did not exhaust the available statutory remedies before coming to this court. The defendant contends the court to strike out the motion.

9. On whether or not the applicant has established a prima facie case, the defendant submits that it had not interfered with the applicant's property, adding that under Section 83 of the *Water Act* 2016, public institutions operating and providing water services hold their assets on behalf of the public. The defendant argues that whereas Athi Water Services Board authorized the laying of sewer pipes, Ruiru – Juja Water and Sewerage Company owns and manages the sewer lines on behalf of the County Government of Kiambu. The defendant contends that the plaintiff has not made out a prima facie case.

10. On irreparable damage, the defendant's positon is that the sewer line having been installed in 2016 without any objection from the plaintiff, this is an indication that there is no irreparable damage likely to be caused to the plaintiff. Counsel adds that the sewer lines serves the public and any injunctive orders would adversely affect the public.

11. I have considered the application, the response to the application and the parties' respective submissions. The key question falling for determination in the application is whether the application satisfies the criteria for grant of an interlocutory injunctive order. Before I dispose the issue, I will briefly

comment on the defendant's submissions urging this court to strike out this suit on the ground of want of jurisdiction.

12. The defendant submitted that the plaintiff had failed to exhaust the available alternative statutory dispute resolution mechanisms. Counsel for the defendant argued that the claim in this suit should have been ventilated in the Water Tribunal established under Section 119 of the *Water Act*. I have reflected on the above submissions. An order striking out a suit is not a casual recourse to be handed down without giving the affected party the opportunity to respond. If the defendant believes that this dispute should not be in this court, the proper procedure to follow is to bring a formal motion or a preliminary objection and demonstrate to the court that the claim in this suit is one of the matters contemplated under Section 121 of the *Water Act*. The plaintiff will have the opportunity to respond to the motion or preliminary objection. The court will in turn consider the issue and render a determination.

13. The view I take is that, it would be an ambush to consider the question of non-exhaustion of alternative remedies without a formal application or a formal preliminary objection, particularly when it is clear that, prima facie, the dispute before the court falls within the court's primary jurisdiction as contemplated under Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*. What I would say is that the question of non-exhaustion of alternative remedies will be considered and disposed when it is properly brought before this court. I now turn to the key issue in the application under consideration.

14. The criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs is well settled. It was outlined in the case of *Giella v Cassman Brown Co. Ltd* 1973 EA 358. The criteria is that: (i) the applicant must establish that he has a prima facie case with a probability of success; (ii) further, the applicant must demonstrate that if the injunctive relief is not granted, he would stand to suffer irreparable loss which may not be adequately indemnified by an award of damages; and (iii) when the court is in doubt on the satisfaction of the above two requirements, the application would be decided on the basis of the balance of convenience.

15. It is important to observe that at the stage of disposing an interlocutory application of this nature, the court does not make conclusive or definitive findings on the substantive issues in the dispute. Definitive and conclusive findings are reserved for trial or any other final hearing.

16. In the present application, it does emerge that the sewer line slab was laid on the land about six or seven years ago. It is contended that the laying plans were done by Athi Water Services Board in consultation with the Water Resources Management Authority. The defendant contends that it was only involved in the exercise as an agent of the Board and its involvement was limited to works relating to replacement of DN 300 mm pipes with DN 400 mm pipes. Upon completion of the exercise, the sewer line was handed over to the Board. The defendant further contends that at the moment, the sewer line is managed by Ruiru – Juja Water Services Company on behalf of the County Government of Kiambu. The defendant adds that it does not have any proprietary interest in the offending sewer line slab. According to the defendant, the sewer line slab is public property.

17. The plaintiff did not deem it necessary to join the County Government of Kiambu, Athi Water Services Board, the Water Resources Management Authority and the local water and sewerage institution as parties to the suit. Without joinder of the above entitles to the suit so that they can be heard on the issue of ownership of the offending sewer line slab, there is doubt that the plaintiff has instituted the claim against the proper owner of the sewer line slab. Put differently, there is doubt that the plaintiff has demonstrated a prima facie case as against the defendant.

18. On irreparable damage, the plaintiff did not disclose when the slab was laid. The defendant stated that the sewer line was laid in 2016. This suit was filed in 2022. No evidence of irreparable damage has been placed before the court in relation to the six years that the sewer line has been in place.

19. There was no controverting evidence against the defendant's evidence that the sewer line is a public asset serving the general public. The view the court takes, on the basis of the above circumstances, is that the sewer line should not be disturbed at this interlocutory stage. It is the view of the court that if, ultimately, the plaintiff's claim succeeds, an award of damages will properly indemnify the plaintiff against any injury which he may have been exposed to as a result of the sewer line slab.

20. In the end, it is the finding of this court that the plaintiff/applicant has not satisfied the criteria upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs. Consequently, the notice of motion dated 20/7/2022 is dismissed for lack of merit. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF MARCH 2023**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Mr Mbaabu for the Applicant

Mrs Ahomo for the Respondent

Court Assistant: Ms Osodo