



**Kogo Flats Company Limited v Eldoret Water & Sanitation Company Limited
(Appeal E051 of 2024) [2025] KEELC 4307 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
APPEAL E051 OF 2024**

**CK YANO, J
MAY 21, 2025**

BETWEEN

KOGO FLATS COMPANY LIMITED APPELLANT

AND

ELDORET WATER & SANITATION COMPANY LIMITED RESPONDENT

RULING

1. What is before me is the Appellant’s Notice of Motion dated 11th October, 2024 where it seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That the respondent be restrained from disconnecting water supply to the appellant’s premises known as Eldoret Municipality/Block 6/59 and 60 in enforcement and/or collection of the disputed sum of Ksh. 1,017,167.09 which was the subject of the matter before the Tribunal and now appeal to the Superior Court vide Nairobi ELC Appeal No. E106 of 2024 - Kogo Flats Company Ltd v Eldoret Water & Sanitation Company Ltd pending the hearing and determination of the appeal.
 - d. That costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and on the Supporting Affidavit sworn on the same date by its Manager, Vincent Wanyonyi. He deponed that the Appellant was dissatisfied with the ruling of the Water Tribunal delivered on 26th July, 2024 and exercised his constitutional right to lodge an appeal in accordance with Section 124 of the *Water Act*. That the Appellant had earlier sought an injunction pending appeal at the Tribunal, but its Application was dismissed. He invited



the court to exercise its powers under Order 42 Rule 6(6) of the Civil Procedure Rules to grant an injunction pending an appeal against the decision of a Tribunal.

3. Mr. Wanyonyi averred that the appeal raises fundamental juridical issues over the exercise of jurisdiction by the Tribunal, and set out the grounds of Appeal contained in the Appellant's Memorandum of Appeal. That the said matters are sufficient to warrant issuance of the orders sought to avoid rendering the appellate court's decision otiose should the appeal succeed. He deponed that the Appellant will suffer substantial loss as the amount in dispute is colossal and does not arise from the Appellant's consumption. Further, that the amounts were deemed settled per the Rates Clearance Certificate issued under Section 21 of the *Rating Act*.
4. Mr. Wanyonyi also deponed that there is need to maintain the status quo as disconnection would disrupt the Appellant's business and lead to a health hazard that will result in tenants moving out. He urged that the Application had been made without undue delay, and that the Appellant was ready to abide by the terms for granting the order.
5. The Application was opposed through an Affidavit sworn on 17th February, 2025 by Sammy Lenon Kapsin, the Respondent's Debt Collector. He explained that the tribunal dismissed the Appellant's Application for an injunction pending appeal on grounds of lack of jurisdiction. That in its ruling of 13th October, 2023 the Tribunal held that the Appellant could only bring suit in a representative capacity on behalf of the tenants, since the Respondent had shown that it had separate contracts and accounts with each individual tenant on the Appellant's premises.
6. Mr. Kapsin explained that the Tribunal gave the Appellant time to amend its claim to this effect, but the Appellant did not comply. He averred that the Appellant failed to demonstrate privity of contract between itself and the Respondent and thus lacks standing to claim relief from the disconnection. Further, that the Respondent has no obligation to continue supplying water to the new tenants on the Appellant's premises without entering into individual agreements with them. He explained that the reason for disconnection was due to unpaid water bills incurred by previous tenants and not the Respondent's failure to install water meters horizontally.
7. He further explained that the Respondent as a public institution relies on revenue collected from water supply and sanitation services for its operations and maintenance costs, and thus cannot supply water without compensation. He added that the Respondent has already suffered substantial losses due to the unpaid water bills and will continue to do so unless the Appellant's tenants are compelled to settle the outstanding bills. He urged that the Respondent is well within its rights to disconnect water in the circumstances, and asked that the application be dismissed with costs as it lacks merit and the prayers sought are untenable.
8. The Appellant then filed a Supplementary Affidavit dated 22nd April, 2025 again sworn by Vincent Wanyonyi, who deponed that the matters raised on merit of the impugned decision would be addressed by the court in the Appeal. He reiterated the depositions in the Supporting Affidavit that the appeal raises serious matters, and added that when determining an application for injunction pending appeal, the main consideration is that the Appeal is not frivolous. He repeated that the Appellant would suffer substantial loss by being compelled to settle debts that have already been settled as shown in the Rates Clearance Certificate. Further, that disconnection of water supply will have an astronomical impact on its operations, thus the orders sought in the Motion should be granted.

Submissions

9. When this matter was mentioned on 18th February, 2025 the court directed that the application would be canvassed by way of written submissions, and the parties have complied.



Appellant's Submissions;

10. In the Appellant's Submissions dated 22nd April, 2025, Counsel cited Section 124 of the [Water Act](#) that allows a party aggrieved by the decision of the Tribunal to file an appeal in the Environment and Land Court (ELC). Counsel also cited Order 42 Rule 6(6) that empowers this court to grant an injunction pending an appeal from a subordinate court or tribunal.
11. Counsel reiterated that the Appeal raises weighty matters, which he contended were sufficient to warrant issuance of the orders sought, and again reproduced the Memorandum of Appeal. He urged that this would avoid rendering the decision on the appeal being rendered otiose should the appeal be allowed.
12. Counsel further submitted that the Appellant would suffer substantial loss if the orders sought are not granted. Counsel reiterated the averments in the Supporting Affidavit, and relied on the case of [Butt vs Rent Restrictions Tribunal, Civil Application No. Nai 6 of 1979](#) in support of the Appellant's Application. He prayed that the Motion be allowed.

Respondent's Submissions;

13. On the Part of the Respondent, the submissions filed are dated 11th April, 2025. Counsel submitted on behalf of the Respondent that an injunction is an equitable remedy to be granted to an applicant whose conduct is approved by a court of equity. Counsel for the Respondent listed the factors to be met before granting an injunction as set out in *Vic Preston Murithi Ruchabi vs Mary Wangari & 3 Others* (2018) eKLR and *Giella vs Cassman Brown* (1973) EA 358. On the first requirement of a prima facie case, Counsel laid out the background of the dispute and restated the contents of the Replying Affidavit, asserting that the Appellant had not established a prima facie case. He relied on *Mrao vs First American Bank of Kenya Limited* (2003) KLR and *Mark Otanga Otiende vs Dennis Oduor* (2021) eKLR.
14. Counsel submitted that the applicant must also show that it stands to suffer irreparable loss if the order is not granted, and that an award of damages would not be an adequate remedy. Counsel contended that the Appellant is not going to suffer any injury, and that in any event, any such damage could be compensated by way of damages. She urged that it was the Respondent who would in fact suffer injury in the form of loss of revenue. Counsel submitted that in the circumstances, the balance of convenience does not favour the Appellant and instead tilts in favour of the Respondent.
15. On the issue of costs, Counsel submitted that under Section 27 of the [Civil Procedure Act](#), costs follow the event, and that they are awarded at the discretion of the court. He cited *Narok County Government vs Livingstone Kunini Ntutu & 2 Others* (2018) eKLR and *Jasbir Singh Rai vs Tarlochan Singh Rai & 4 Others* (2014) eKLR. Counsel asked that the costs of the application abide the outcome of the case.

Analysis and Determination:

16. I have considered this application, the responses filed as well as the submissions and authorities cited and I am of the view that the only issue for determination is whether the injunctive order sought should issue.
17. The Appellant is in effect seeking an interlocutory injunction to restrain the Respondent from disconnecting water supply to its premises known as Eldoret Municipality/Block 6/59 & 60. Before a court grants such an injunction however, it must be satisfied that the Applicant has satisfied all the requirements for grant of an injunction.



18. The requirements are enunciated in the case of *Giella vs Cassman Brown* (1973) EA 358, and were reiterated in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) (2014) eKLR, where the Court of Appeal held that;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

19. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Limited and 2 others* (2003) eKLR, explained as follows:

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”

20. Evidently, a prima facie case is one that can be easily discerned from the pleadings before the court, and indeed, the Appellant bears the onus of proving that the case before the court is a prima facie one. It must be borne in mind, however, that the court at this stage is not required to determine the merits and demerits of the Appellant’s claim, but whether on the strength of the material before it, the Appellant has established a prima facie case. In the case of *Silvester Momanyi Marube vs Guizar Ahmed Motari & Another* (2012) eKLR, Odunga J. held that:-

“In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the court cannot find conclusively who is to be believed or not, the court is not excluded from expressing a prima facie view of the matter and the court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”

21. The Appellant has in its Supporting Affidavit alleged that the amount claimed by the Respondent is disputed. Further, that the amount due and owing to the Respondent is with regards to unpaid water bills accrued by previous tenants, which allegation the Respondent has acknowledged in its Replying Affidavit.



22. This allegation has not been denied. At paragraph 14 of the Respondent's Replying Affidavit, it was deponed that:-

“That the reason for the disconnection of water supply was due to the unpaid water bills incurred by the previous tenants, and not because of the alleged failure by the Appellant to install water meters horizontally.”

23. The Respondent has also alluded to the fact that it had water supply agreements with the previous tenants, who are the ones who left unpaid water bills. The Respondent claims that it cannot supply water to the new tenants without entering individual water supply agreement with them, which will have them assume responsibility to pay water bills. This, however, is a discussion to be heard by the court at the hearing of the Appeal. At the moment though, it is my finding that from the material placed before me, a prima facie case has been established, and the Appellant has successfully surmounted the first hurdle.

24. The second requirement is that an applicant must demonstrate that they stand to suffer irreparable harm and/or loss. In *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR, the court stated as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

25. I must also bear in mind the following paragraph from the Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352, where it is stated that:-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question...”

26. Under this head, mere allegation that one stands to suffer irreparable harm is not sufficient, a party need to set out the kind of loss that they stand to suffer. The Applicant herein has clearly explained the irreparable loss that it stands to suffer if the orders are not granted. It has been explained that disconnection of water supply will disrupt its business and economic activities as it relies on the water supply. It was further explained that such disconnection would lead to a health hazard as the premises is occupied by many people, make the premises inhabitable and result in tenants moving out.

27. There is no doubt that disconnecting the water supply to the Appellant's premises will affect its business, especially since the Respondent has conceded that the amount claimed was for water supplied and consumed by individuals who are no longer tenants in the said premises.



28. No doubt that the Respondent is well within its rights to seek to collect the outstanding balance by disconnecting the water supply to the Appellant's premises. But not at the expense of the Appellant and its tenants, who the Respondent has admitted are not the ones who incurred the outstanding balances. The consequences of the intended disconnection will surely have far reaching effects on not just the operations of the Appellant but also the tenants currently occupying the premises.
29. Evidently, therefore, if the Respondent is not stopped by way of a temporary injunction then the Appellant is likely to suffer substantial harm. Thus, I find that the Appellant has surmounted the second hurdle.
30. The final factor is that, when the court is in doubt, it should determine the matter on a balance of convenience. In *Amir Suleiman vs Amboseli Resort Limited (2004) eKLR*, the court explained what the term a 'balance of convenience' means by stating that:-

“The Court in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than the higher risk of injustice.”

31. The subject matter of the appeal is the unpaid arrears amounting to KShs. 1,017,167.09/-, which if not paid, the Respondent will disconnect the water supply to the Appellant's premises. The sum is disputed for reasons earlier explained. The balance of convenience would thus require, that the court determine through this appeal if the Appellant is at all indebted to the Respondent and the extent of that indebtedness, before the Respondent is allowed to disconnect the water.
32. As far the balance of convenience is concerned, I am satisfied that the same tilts in favour of the Appellant herein by granting the injunction sought pending the hearing and determination of the Appeal.
33. For an injunction to be issued, the applicant must satisfy all the three requirements. See the *Nguruman Limited Case (Supra)*, where the Court of Appeal very clearly held that:-

“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

34. I am satisfied that in this instance, the Appellant has satisfied all the conditions necessary for the grant of the injunction order sought. The Appellant is thus entitled to the said order.

Orders:-

35. In light of the above findings, I allow the application dated 11th October, 2024 as follows:-
 - a. The Respondent be and is hereby restrained from disconnecting water supply to the appellant's premises known as Eldoret Municipality/Block 6/59 and 60 in enforcement and/or collection of the disputed sum of KShs. 1,017,167.09 which was the subject of the matter before the Tribunal and now appeal to the Superior Court vide Nairobi ELC Appeal No. E016 of 2024 - Kogo



Flats Company Ltd vs Eldoret Water & Sanitation Company Ltd pending the hearing and determination of the appeal.

- b. The costs of this application shall be costs in the cause.

36. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at ELDORET on this 21ST day of MAY, 2025 vide Microsoft Teams.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Mr. Mogambi for the Appellant.

No appearance for the Respondent.

Court Assistant - Laban.

