



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 594 OF 2015

EMBAKASI EAST COURT COMPANY LIMITED.....1ST PLAINTIFF

AARM INVESTMENTS COMPANY LIMITED.....2ND PLAINTIFF

=VERSUS=

NAIROBI CITY WATER & SEWAGE COMPANY.....DEFENDANT

RULING

Background

1. On 18th June 2021 this matter was listed for notice to show cause why it should not be dismissed for want of prosecution. The Advocate for the Plaintiffs appeared and explained that her clients were still keen on prosecuting this matter. They had already complied with the provisions of Order 11 of the Civil Procedure Rules and the matter had even been certified ready for hearing. She pleaded with the court to give the Plaintiffs an opportunity to proceed with the matter and have it determined on merit. The Plaintiffs' advocate sought for a hearing date.

2. The court brought the attention of the Plaintiffs' advocate the preliminary objection dated 22nd May 2019 filed by the Defendant in this case. The preliminary objection raises the issues of the jurisdiction of the court to hear and determine this matter. The Advocate for the Plaintiffs informed the court that she was not aware of the preliminary objection and therefore needed time get a copy of the preliminary objection and consider it. She requested for two weeks.

3. On the 9th November 2021, when the matter was listed for mention both the Advocates for the Plaintiffs and the Defendant appeared before this Court. The Advocate for the Plaintiffs informed the court that she had considered the Preliminary Objection by the Defendant and was requesting the court to transfer the matter to the Water Appeals Board in agreement with the Preliminary Objection by the Defendant. The Defendant's advocate did not object to the application by the Plaintiffs' Advocate. In essence that is what her preliminary objection was seeking.

4. The Court then directed that the matter be mentioned later at 2.30 pm on the same day to give the court time to consider it in view of the application by the Plaintiff's advocate. That is what gave rise to this ruling.

Analysis of the Plaintiff's case and the preliminary objection.

5. This case was filed by the Plaintiffs on 26th June 2015 by way of a Complaint dated 17th March 2015. The plaintiffs' case is that sometimes in July 2014, the Plaintiffs discovered that the Defendant - a water services provider, had illegally and unlawfully connected water to trespassers who had entered into and illegally occupied their parcels of land reference No. 209/13413, 209/1314 and, 209/13417 in Nairobi County. The Plaintiffs had not applied for water connection into their properties nor had they consented to any such action by the Defendant. The Plaintiffs' case is that the action by the Defendant was not only negligent but amounted to trespass into their properties. The Plaintiffs pray against the Defendant for an order declaring their action of connecting water to the trespassers illegal & unlawful. They further seek for a mandatory injunction compelling the Defendant to disconnect the water supply in their parcels of land.

6. The Defendant filed a statement of defence in response to the Plaintiffs' claim. Noteworthy, that the Defendant raised the issue of the jurisdiction of this court in that statement of defence. Later, on 8th August 2019, the Defendant filed the Preliminary objection dated 22nd May 2019.

7. The Defendant in the Preliminary objection states that the Preliminary Objection is raised pursuant to the Complaint dated 17th March 2015.

The Defendant's objection is that:-

- i. The issues raised in the Plaint ought to have, firstly, been referred and determined by the Water Appeal Board as provided for under the Water Act, 2002 (now repealed) especially Section 84 to 87.**
- ii. Pursuant to section 84(4) of the Act, it is expressly provided that this Honourable Court only draws appellate jurisdiction, subsequent to determination upon merit by the Water Appeals Board (now the Water Tribunal), therefore it cannot be called upon as a court of first instance.**
- iii. Further, the jurisdiction of this Honourable Court is limited, only to determination of an appeal arising out of a law from a decision of the Water Appeals Board/Water Tribunal.**
- iv. The pertinent provisions hereto contained in the previous repealed legislation are similar and are mimicked in the present operative Act and are evident in section 119-125 of the Water Act, 2016.**
- v. It is settled law that where there is a prescribed manner, by parliament, of undertaking a procedure or seeking recourse then it is not open for a party to bypass or attempt to bypass the stipulation available but is duty bound to be complicit and adhere thereto.**
- vi. Therefore, this Honourable Court does not draw jurisdiction, save for appellate jurisdiction on an item of law, to seize and determine this matter as a court of first instance.**
- vii. Consequently, in upholding the rule of Law, pursuant to Article 10 of the Constitution of Kenya, 2010, this Honourable Court be pleased to refer this matter to the Water Tribunal, as presently constituted, prior to it being elevated to the appellate court if at all .**
- vii. The prayers sought herein ought to be seized and determined by the Water Tribunal hereby satisfying, too the doctrine of hierarchy and separation of powers.**
- ix. Further, it is judicial policy that parties ought to categorically observe and uphold the Rule of law together with items of pertinent procedural substance.**
- x. Further, such action and/or further action falls afoul of the provision of Article 159 (6) of the Constitution of Kenya, 2010 as this does not comprise of a technicality but an item of procedural substance that permeates core of the suit.**

8. In a nutshell, the Defendant is objecting to the jurisdiction of the Court basing its objection on the repealed Water Act, 2002 on one part and the Water Act, 2016 on the other part. So, the only issue for the Court is to determine is whether the jurisdiction to deal with this matter is with the Water Appeals Board/Water Tribunal or with the Court.

9. The Defendant avers that the Plaint (read the Plaintiff's case), ought to have been referred and determined by the water Appeals Board as provided for under sections 84 to 87 of the repealed water Act, 2002. The Defendant's contention is that this Court only has appellate jurisdiction on matters of law and should not hear a matter as this one before it at the first instance.

10. The Defendant further argues that the pertinent sections of the law in the repealed Water Act, 2002 have been replicated under the new Law, the Water Act, 2016.

11. The Defendant in paragraph 7 of his Preliminary Objection urges the court to refer this matter to the Water Tribunal (as presently constituted), prior to its being elevated to the appellate court if at all.

Court's determination.

12. The Advocate for the Plaintiffs conceded to the Defendant's objection and requested court to refer the matter to the Water Appeals Board for determination.

13. This Court is conscious of the warning of **Sir Barclay Nihil, P in Jashbhai C Patel Vs BD Joshi (1952) , 19 EACA 42 at 43, 44** when he warned that,

“A trial judge should not descend into the arena where his vision may become clouded by the dust of the conflict. Where the parties are represented by counsel, it is preferable that ordinarily the conduct of the case should remain in their hands. Not to do so might indeed lead to error of descending into the arena”.

14. However, **“if the hands of the court were tied by some rule that the case should remain entirely in the hands of the parties, the trial of such cases might present great difficulty and the end of justice might be perverted”.**

15. It is the responsibility of the court to remain vigilant at all times and ensure that its orders or directions emanating from the court do not result into absurdity or perversion of justice.

16. This court is not convinced that the Water Tribunal as established under the Water Act 2016 has the jurisdiction to handle the issues in dispute in this case.

17. The Water Appeals Board that had been established under the water Act 2002, would also not have had the jurisdiction to handle the issues herein. In any event, it is no more.

18. The jurisdiction of the Water Tribunal is to be found in Section 121 of the Water Act, 2016. It spells out the jurisdiction of the Tribunal as follows:-

(1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”.

21. Do I need say more? The matters in dispute in this suit do not fall either under subsection (1) or under subsection (2) of section 121 of the Water Act, 2016.

22. The Court in **Dirie Mohammed Vs Tavevo Water and Sewerage Co. ltd (2015) eKLR** had occasion to look into the jurisdiction of the Water Appeals Board then established under the Water Act, 2002.

23. The said court concurred with the holding of Ougo J in the case of **Isaiah Ngotho Watheka Vs Nairobi City Water and Sewerage Co. Ltd (2013) eKLR** where she had stated as follows:-

“The plain reading of this section 85 (1) is that an appeal shall lie with the appeal Board and therefore the jurisdiction given to the Water Appeals Board in the Water Act is appellate in nature. The matters to be dealt with are very specifically spelt out as “a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or license”.

Conclusion

24. Referring the matter to the Water Tribunal would be engaging in futility. The Water Tribunal does not have the jurisdiction to entertain the issues in this case. This Court’s finding is that it is properly vested with the jurisdiction to hear and determine this matter. The preliminary objection by the Defendant has no merits and is hereby dismissed but with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF NOVEMBER, 2021

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Nyabuto for the Plaintiffs

Ms. Mose for the Defendants

Court Assistant: Hilda

M.D. MWANGI

JUDGE