



KCB Kenya Limited v Nairobi City Water and Sewerage Company (Civil Case 275 of 2019) [2024] KEHC 12643 (KLR) (Civ) (15 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 275 OF 2019
AN ONGERI, J
OCTOBER 15, 2024**

BETWEEN

KCB KENYA LIMITED PLAINTIFF

AND

NAIROBI CITY WATER AND SEWERAGE COMPANY DEFENDANT

JUDGMENT

1. The plaintiff in this case KCB Kenya Ltd(hereafter referred to as the plaintiff only) sued the Nairobi City Water and Sewerage Company Ltd(hereafter referred to as the defendant) vide the plaint dated 18/12/2019 seeking the following remedies;
 - i. An order of mandatory injunction do issue compelling the defendant either by itself, its agents and or servants for forthwith reconnect water supply to the plaintiff's meter number 910410 on the sit premises situated along Jogoo Road in Nairobi.
 - ii. A declaration that the purported demand note dated 22nd November, 2019 claiming kshs.36,831,441.80 under Water Account Number 121XXXX is unsubstantiated null and void ab initio.
 - iii. An order for cancellation and or setting aside of the demand note dated 22nd November, 2019 in respect to the plaintiff's Water Account Number 121XXXX.
 - iv. Costs of the suit.
 - v. Interest on (iv) above at court rates.
 - vi. Such further on other relief which the Honourable court may deem fit to grant.



2. The plaintiff averred in the plaint dated 18/12/2019 that on or about 23rd October, 2019 officers from Nairobi City Water & Sewerage company limited – Eastleigh office visited the Plaintiff's KCB Bank Jogoo road and disconnected water supply on allegations of tampered meter and illegal water connection.
3. The Plaintiff's property managers M/s New Realite Limited reported the incident of water disconnection to the Plaintiff's facilities department who followed up with the Defendant Company and water was reconnected the next day on 24th October, 2019.
4. On 31st October, 2019, the same team from the Nairobi Water Company Limited came back and disconnected water supply on the same allegations that there was an illegal connection.
5. The following day 1st November, 2019, the said property managers and the premises' care taker were summoned to visit the Defendant's Eastleigh offices.
6. On reaching the said offices, a charge sheet was prepared and one of the Plaintiff's property managers Mr. Nahashon Kuria Chege was arraigned before the City Court under Criminal Case No. M 16277/2019 to answer to charges of alleged illegal water connection.
7. The said Nahashon Kuria Chege denied the charges and was released on a cash bail of Kshs.100,000/=.
8. The criminal case before the city Court will be heard on 2nd March, 2020.
9. On 11th November, 2019 a meeting was held between staff from the Plaintiffs facilities department, the bank's property managers and the defendants team where it was agreed that excavation will be done so as to expose the alleged illegal water connection.
10. By letters dated 12th November, 2019 and 18th November, 2019 respectively excavation of the ground for purposes of exposing the alleged illegal connection, but no response was forthcoming from the defendant or at all.
11. Despite reaching an agreement to conduct excavation exercise on the 14th November, 2019 the same was not done as scheduled and is yet to be done up to date.
12. On 22nd November, 2019 the Defendant acting contrary to what was agreed between the parties at the meeting held on 11th November, 2019 went ahead to issue a demand note to the Plaintiff claiming an unsubstantiated amount of Kshs.36,831,441.80 under Water Account No.121XXXX.
13. The said amount of Kshs.36,831,441.80 claimed by the Defendant comprises of Kshs.100,000/= being fraud charges for illegal water connection and Kshs.36,731,441.80 being the pro-rated recovery based on an approximated average consumption equivalent to the premises consumption derived from the period between September, 2010 to April, 2011.
14. That from the onset the Plaintiff maintained that it had not tampered with the meter and or done any illegal water connection. On the contrary, the Plaintiff has been up to date with payment of water and sewerage services to the Defendant/Respondent.
15. The Plaintiff has been desirous and ready for the excavation exercise to be conducted so as to expose the alleged illegal connection of water to its premises if any but there has been no cooperation or at all from the defendant/respondent and or its officers and agents.
16. The Plaintiff continues to suffer heavy prejudice as the water supply to its business premises remains disconnected and currently it is forced to incur expense in buying water from other suppliers.



17. The premises houses the Plaintiff's employees who are at risk of poor hygiene and other infectious diseases due to lack of clean and sufficient water supply and lack of sewer services caused by the Defendant's selfish act of disconnecting water supply to the premises.
18. The Defendant and its agents and or servant's action of disconnecting water is illegal and uncalled for noting that there has been no case for illegal water connection against the plaintiff who has been diligent in making the monthly water utility payments.
19. The Plaintiff continues to suffer great financial loss and damage as currently the premises has no water supply the same having been illegally disconnected by the Defendant's agents and servants unless this Honourable Court makes an order for reconnection of water supply.
20. The defendants filed a defence dated 27/2/2020 which was amended on 12/5/2021 raising a counter claim as follows;
 - i. The plaintiff's plaint be dismissed with costs.
 - ii. Kshs.36,831,441.80 being the amounts outstanding to the defendant;
 - iii. Interest on (ii) above at court rates from November 2019 until payment in full;
 - iv. The costs of this suit and counterclaim.
 - v. Any other relief this honourable court may deem fit to grant.
21. The plaintiff called one witness, PW 1, Nahashon Kuria Chegewho adopted his witness statement dated 18/12/2018 as his evidence in chief.
22. PW 1 stated in the said statement that he is an employee of New Realite Limited which Company manages the Plaintiff's suit premises situated along Jogoo Road.
23. That they have been the Plaintiff's property managers since May, 2012.
24. That he is aware of the facts of the case filed herein and as such well versed with the facts that are subject of the suit herein.
25. That on or about 23rd October, 2019 officers from Nairobi City Water & Sewerage Company Limited-Eastleigh Office visited the suit premises, KCB Bank Jogoo Road premises and disconnected water supply on allegations of tampered meter and illegal water connection.
26. That he immediately reported the incident of water disconnection to the Plaintiff's Head of Facilities department, Mr. Joshua Bosire who directly communicated to the relevant officers of Defendant Company and water was reconnected the next day i.e. on 24th October, 2019.
27. That again on 31st October, 2019, the same team from the Nairobi Water Company Limited went back and disconnected water supply on the same allegations that there was an illegal connection.
28. That the following day 1st November, 2019, he and the premises' care taker Ms. Njoki Kariuki were summoned to visit the Defendant's Eastleigh offices which summons they duly honoured.
29. That On reaching the said offices, a charge sheet was prepared and he was arraigned before the City Court under Criminal Case No. M 16277/2019 to answer to charges of alleged illegal water connection.
30. That he denied the charges before Court and he was later released on a cash bail of Kshs.100,000/=.
31. That the Criminal case at the City Court is now scheduled for hearing on 2nd March, 2020.



32. That later on 11th November, 2019 a tripartite meeting was held between the Plaintiff's Facilities Department team, and themselves as the Plaintiff's property managers and the Nairobi Water team as well, where it was agreed that excavation will be done so as to expose the alleged illegal water connection.
33. That despite reaching an agreement to conduct excavation on the 14th November, 2019, the same was not done and the bank wrote letters dated 12th November, 2019 and 18th November, 2019 respectively insisting that the agreed excavation exercise be done so as to resolve the issue amicably.
34. That he wishes to state that they started to manage the Plaintiff's subject premises in May, 2012 and at no point has such an issue relating to illegal water connection and meter tampering, ever been raised by the Defendant Company, yet they have been sending their representative to take the meter readings on a monthly basis for purposes of billing the Plaintiff for water and sewerage services utilized.
35. That from the onset they maintained their ground that there was no illegal connection and were up to date with payment of water and sewerage services to the Defendant/Respondent.
36. He further stated that all along since the issue arose, they have been desirous and ready for the excavation exercise to be conducted so as to expose the alleged illegal connection of water to its premises if any and resolve the issue once and for all, but there has been no cooperation or at all from the Defendant/Respondent and or its officers and agents.
37. That despite the written requests and reminders to conduct the excavation exercise, the Defendant/Respondent has issued a demand note dated 22nd November, 2019 claiming an unsubstantiated amount of Kshs.36,831,441.80 being pro-rated recovery based on an approximated average consumption derived from the period September, 2010 to April, 2011 together with fraud charges for illegal connection of Kshs.100,000/=.
38. That he wishes to state that no explanation whatsoever has been given to the plaintiff by the defendant Company to justify the exorbitant amount of Kshs.36, 831,441.80 as claimed in the demand note or at all.
39. That he wishes to further state that the Plaintiff as the property owners continues to suffer heavy prejudice as the water supply to its business premises remains disconnected and currently it is forced to incur expenses in buying water from other suppliers.
40. That he is aware that ever since the Plaintiff has been in occupation of the subject premises, the Defendant Company has never raised an issue regarding illegal water connection and or a case of meter tampering yet its agents and or servants have been coming to the premises on a monthly basis to read the meter for purposes of billing the Applicant.
41. That he wishes to clearly point out that the Defendant's representative tasked with meter readings have been frequently visiting the premises for purposes of taking the meter readings and the Defendant has been sending monthly bills to the Plaintiff without raising any issue of illegal water connection and or meter tampering.
42. That he verily believes that the Defendant/Respondent and its agents and or servants' action of disconnecting water is illegal and uncalled for noting that there has been no case for illegal water connection against the Plaintiff/Applicant who has been diligent in making the monthly payments.
43. That he wishes to state that the Plaintiff is a reputable Corporate Organization which would not in any way be involved in illegal water connection and or meter tampering as it diligently pays for water and sewerage services as offered by the Respondent Company.



44. The defendant called three witnesses DW 1, Edwin Ngesa Otieno, DW 2 – Cecilia Ndinda Muliand DW 3 – Caroline Mutindawho also adopted their witness statements all dated 23/2/2023 as their evidence in chief.
45. DW 1, Edwin Ngesa Otieno stated that he is an employee of the defendant, working as a Commercial Supervisor and conversant with the facts and issues in this matter, therefore competent to testify on the factual issues known to him.
46. That Sometime in October 2019, while working and analysing water billing accounts and records, he realized there was an anomaly in the figures of the plaintiff's billing accounts on the rate of water consumption for its premises along Jogoo Road.
47. That together with his colleagues Collins Onyango, a Zonal Revenue Officer and Cecilia Ndinda, a Commercial Supervisor, they conducted an audit of these accounts and discovered that in 2011, the rate of consumption of water at the said premises along Jogoo Road was at an average of 5,000 units/ cubic meters being the lowest yet in 2019 the average consumption was only 1,000 units.
48. That Having identified this discrepancy, they realized it would be prudent to visit the said premises to investigate the anomaly and find out more about the reason and cause of the sharp decline in the rate of water consumption.
49. That On 31st October 2019, he and colleagues visited the plaintiff's premises on Jogoo Road where they were received by a lady who identified herself as Njoki Kariuki and who requested them to sign a visitors' book.
50. That they identified themselves as employees of the defendant and then asked her to direct them to the location of the water meter and that of the underground tank to which the water meter was connected. She agreed and accompanied us to both these locations.
51. That they first headed for the underground water tank where they confirmed that water was pouring into the tank and at very high pressure before then heading to the location of the water meter.
52. That at the water meter and in the presence of Njoki, he closed the valve tightly by turning the knob clockwise until it was shut and the meter reading had stopped running.
53. That upon heading back to the location of the underground water tank, he could still hear water gushing into the tank and at very high pressure. This came as an astonishment for he had just closed the valve shut.
54. That it was at this point that they decided to call the defendant's security team to the premises to proceed with investigations into their concerns and possibly identify and prosecute the culprits. Njoki, who was still present appeared equally shocked of this discovery.
55. That their colleague Collins Ondieki from security arrived after about 20 minutes and equally witnessed the water gushing into the tank despite the water meter being shut.
56. That at all material times while they were undertaking these investigations he was taking a video recording using his phone to preserve the evidence and for possible use in court or such further action that might be taken by the defendant.
57. That upon heading back to the office, he requested the ICT department to assist him in sending the video to a computer and to have the same copied to a compact disk (CD) so that he could share the same with security.



58. That sometime in early November 2019, he attended a meeting between the plaintiff and defendant together with his colleagues Cecilia Ndinda and Collins Ondiek where the issues of meter tampering and illegal meter bypass were discussed. It was agreed there would be an excavation of the pipes at the plaintiff's premises in order to expose the pipe and ascertain the location of the bypass.
59. That in early January of 2020, the defendant received a Court Order compelling it to reconnect the water supply to the plaintiff's premises. Collins Ondieki attended to the same in order to ensure the defendant's compliance.
60. That since the reopening of the water meter, he can confirm the defendant has recorded a steady increase in the rate of consumption of water at the plaintiff's premises.
61. That between the period of December 2020 to December 2021, the rate of consumption increased from an average of 1,000 units/cubic meters to almost 4,000 units/cubic meters. Subsequently, this also resulted in the increase in the revenue amounts expected and due from the plaintiff.
62. That this can only be explained by the possible removal of the meter bypass that was initially placed by the plaintiff.
63. That also, having worked for the defendant for a considerable period of time and interacted with the plaintiff's water bill accounts, the rate of consumption of water currently exhibited by the revenue amounts and meter reading is within the average rate expected of the defendant's clients of the plaintiff's nature.
64. That he verily believes that the plaintiff is truly indebted to the defendant and this court should therefore disallow their reliefs as sought in the plaint and allow the reliefs sought in the counterclaim.
65. DW 2, Cecilih Ndindastated that she is employed by the defendant as a Commercial Supervisor and conversant with the facts and issues in this matter and therefore competent to testify on the factual issues known to her.
66. That on or about 28th October 2019, she received information from her colleague Edwin Ngesa Otieno, the defendant's Commercial Supervisor, that he had noted an anomaly in the plaintiff's water bill and wished to proceed to the plaintiff's premises to seek further information on the same.
67. That on 31st October 2019 and in the company of her colleagues Edwin Ngesa Otieno and Collins Onyango their Zonal Commercial Officer, they headed to the plaintiff's offices located along Jogoo Road where they were welcomed by a lady who identified herself as Njoki Kariuki and that she was the caretaker of the premises.
68. That She then asked them to sign a visitor's book which they did.
69. That having identified themselves and explained the purpose of their visit, she accompanied them to the location of the plaintiff's water meter as well as the underground water tank to which the water meter was connected.
70. That at the water tank, they confirmed that the water was flowing and at a very high pressure. They then proceeded to the water meter where her colleague Edwin closed the knob by turning it clockwise until it was tightly shut and the meter reading had stopped running.
71. That upon heading back to the plaintiff's water tank, they were surprised to find that water was still flowing into the tank at high pressure as before despite the water meter being shut. They stood at the water tank for almost thirty minutes waiting for the defendant's security team to take over the investigation.



72. That in 2022, the plaintiff filed an application alleging that the water meter at its premises was leaking and that the leakage was causing flooding at the metering chamber and the increase in the rate of consumption evidenced in the water bills.
73. However, after the defendant responded and confirmed that the leakage was not from the water meter, the plaintiff withdrew the application and proceeded to prosecute the main suit.
74. She stated that in around 2011, the average water consumption at the plaintiff's-premises was 5,000 cubic meters and in 2019 when they realised the anomaly, the average water consumption was 1,000 cubic meters. In 2022, the average water consumption is around 6,000 cubic meters.
75. That she therefore, wishes to confirm to this court the claim in the counterclaim is factual and the plaintiff is truly indebted to the defendant.
76. DW 3, Caroline Mutinda stated that she is a Credit Control Officer of the defendant, employed as such, and conversant with the facts and issues in this matter, therefore competent to testify on all factual aspects known to her.
77. That they calculated the costs for disconnection ordinarily charged by the defendant as well as the fines for the offences of meter tampering and illegal meter bypass into the total amount that was discerned as possible revenue lost for the period between 2013 to 2019 as follows:



Recovery from October 2013 to 2019		
Base reading on consistent high readings between reading of 421790 of period September 2010 to reading 455439 of April 2011		
Reading for April 2011	455,439	
Reading for September 2010	421,790	
Units Consumed between April 2011 and September 2010 in M3 (7 months)	33,649	
monthly average in M3 (33649/7)	4807	
2. Apply this consumption of 4807 M3 from 01, October 2013 to 01, October 2019		
No. of months	72	
Average consumption per month	4,807	Kes.510,158.91
Total M3(4807x72)	346,104	Kes.36,731,441.80
3. Fraud charge (as per gazette tariff 2015)		Kes.100,000
Total recovery		36,831,441.80

78. That Following the above calculations, and including the penalty charged by the defendant based on its tariffs, the company arrived at the figure of KES.36,731,441.80.
79. That she also wishes to state that in auditing the plaintiff's water billing accounts, she discovered from the defendant's CMS that in the month of November 2014, the plaintiff had been charged a fine of KES 30,000.
80. The parties filed written submissions as follows;
81. Plaintiff's Written Submissions
1. The Plaintiff submitted that the defendant had disconnected their water supply on the 23rd of October, 2019 alleging that the plaintiff had tampered with the meter and illegally connected water to its premises.
 2. The plaintiff stated further that it did not illegally connect water to its premises at Jogoo Road and wrote to the defendant agreeing to an excavation which would establish whether there was indeed any illegal connection of water in its premises.



3. The plaintiff further stated that the planned excavation never occurred. The plaintiff avers that it was willing to allow the defendant to conduct any investigation it wished, in order to establish any illegal connection.
4. The plaintiff relied on the case of Serah Njeri Mwobi V John Kimani Njoroge; the doctrine of Estoppel.
5. The Plaintiff further relied on the Constitutional Suit No. 128 of 2006, Lt. Col. Peter Ngari Kagame & Others vs Attorney General, and stated that the burden to prove the allegation is upon he who alleges and the defendant had failed to discharge this burden as it was unable to prove the alleged illegal connection since there was no proper inspection of the premises to establish the same despite the fact that the plaintiff had allowed the defendant to do any inspections they needed.
6. The Plaintiff further submitted that the defendant had failed to discharge its evidentiary burden of proof to support the Counterclaim and as such it ought to fail. The defendant had claimed against the plaintiff a sum of Kshs. 36,831,441.80/=and failed to adduce evidence to support the claim.
7. The plaintiff further relied on the provision of the Evidence Act CAP 80 Revised Edition 2023(1963) on the burden of proof: Section 107(1)
8. The plaintiff further relied on M’Bita Ntiro v Mbae Mwirichia (2018) eKLR; Njoka v Embu Water & Sanitation Co. LTD (Supra), and Halsbury’s Laws of England , 4th Edition , Volume 17 at Paragraph 13 & 14
9. The Plaintiff stated that the court is empowered under section 27 of the Civil Procedure Act to in exercise of its judicial discretion to award costs to a successful party. The plaintiff prays that the Court dismisses the Counterclaim and that its prayers be upheld with costs.

82. Defendant’s Written Submissions

1. The defendant submitted that the suspicion of illegally metered water arose from the decline in the revenue collected from the Plaintiff. Its water consumption plummeted from an average 5000cubic meters in 2011 to 1000 cubic meters between 2013 and 2019 which called for further interrogation upon which Ms. Njoki Karanja an agent of the defendant visited the premises and found foreign pipes (see page 33 of the defendant’s bundle of documents) and (page 32 of the Plaintiff’s bundle of documents)
2. The defendant argued that the standard of proof should not be akin to that in criminal matters to avoid introducing a dangerous precedent not grounded in law.
3. The defendant relied on the case of William Kabogo Gitau v George Thuo & 2 others (2010) 1 KLR 526 and Palace Investment LTD v Geoffrey Kariuki Mwenda & Another (2015) eKLR.
4. On the Counterclaim, the defendant stated that DW-3 made a very elaborate explanation as to how it arrived at the quoted figure and claimed that it was guided by the Water Act and Gazette Notice No. 7335(evidence attached on page 36 of the defendant’s bundle) which provided that for an illegal connection-Commercial industry, construction(fraud) the recommended charge is KES 100,000 plus the estimated consumption during the period.
5. The defendant further relied on Nyeri water Sewerage Co. Ltd v Joseph Waitiki Ndegwa (2008) eKLR Supra.



6. The defendant asked for costs and the amount claimed for in the counter claim.
83. It is the duty of the plaintiff to prove its case to the required standard in civil cases which is on a balance of probabilities.
84. The issues for determination in this case are as follows;
- i. Whether the plaintiff has proved its case to the required standard.
 - ii. Whether the defendant has proved its counter claim to the required standard.
 - iii. Who pays the costs of this suit?
85. The plaintiff filed this suit seeking a declaration that an amount of kshs.36,831,441.80 claimed by the defendant was unsubstantiated and illegal.
86. The defendant filed a counter claim for the said amount.
87. I find that there is no evidence tabled by the defendants that shows that the plaintiff had an illegal connection. Without the requested excavation to expose the water connection to the underground tank, the conclusion by the defendant that there was an illegal connection is mere conjecture.
88. The law requires that he who alleges a fact is duty bound to prove the same.
89. Sections 107 and 108 of the [Evidence Act](#) provide as follows;
- “107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
90. The plaintiff maintained that they did not connect the water illegally.
91. The defendant’s argument was that between the period of December 2020 to December 2021, the rate of consumption increased from an average of 1,000 units/cubic meters to almost 4,000 units/cubic meters.
92. Subsequently, this also resulted in the increase in the revenue amounts expected and due from the plaintiff.
93. I find that this supposition is not supported by evidence.
94. The defendant said that the only explanation was the possible removal of the meter bypass that was initially placed by the plaintiff.
95. I find that the drop in consumption is not proof of illegal connection. To the contrary, there are many other variables, including drop in tenants & undetected underground leakage after the meter, and not necessarily illegal connection.
96. The defendant was indolent between 2013 to 2019 when they purported to discover through comparative evaluation the drop in consumption, yet their officers routinely read the meter throughout this period. The defendant can thus not expect to benefit from its indolence.



97. The defendants have tabulated how they arrived at the sum claimed. I however find that the defendant was indolent between 2013 and 2019 when they purported to discover the drop in consumption by the plaintiff.
98. The defendant's employees continued to read the meter based on which the plaintiff made payments. Why comparative analysis that the defendant relies on was not done earlier is not excusable, and reflects utter internal inefficiency by the defendant.
99. No evidence was tabled to show that the plaintiff tampered with the meter.
100. I find that there is no dispute that the plaintiff consumed water and made payments as billed by the defendants.
101. In the absence of evidence to the contrary it would not be fair for the plaintiff to pay the figure claimed since it is not based on actual readings.
102. The plaintiff is entitled to an order of mandatory injunction to compel the defendant either by itself, its agents and or servants for forthwith to reconnect water supply to the plaintiff's meter number 910410 on the sit premises situated along Jogoo Road in Nairobi.
103. Further, I declare that the purported demand note dated 22nd November, 2019 claiming kshs.36,831,441.80 under Water Account Number 121XXXX is unsubstantiated null and void ab initio.
104. The plaintiff's case succeeds and the defendant's counterclaim is dismissed for want of evidence.
105. Each party to bear its own costs of this suit.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
15TH OCTOBER 2024.**

.....

**A. N. ONGERI
JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant

