



REPUBLIC OF KENYA



**Kifaru Place Ltd v Nairobi Water & Sewerage Co Ltd (Civil Suit
E181 of 2022) [2023] KEHC 2750 (KLR) (Civ) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E181 OF 2022**

**CW MEOLI, J
MARCH 23, 2023**

BETWEEN

KIFARU PLACE LTD PLAINTIFF

AND

NAIROBI WATER & SEWERAGE CO LTD DEFENDANT

RULING

1. Kifaru Place Limited (hereafter the Plaintiff) has sued Nairobi Water & Sewerage Co. Ltd (hereafter the Defendant) seeking a declaration that the Defendant's demand for payment by the Plaintiff of a water bill in the sum of Kshs. 472,935.40/- was irregular, illegal, null and void and a mandatory injunction compelling the Defendant by itself, its employees, agents and or servants to forthwith restore the Plaintiff's water supply inter alia.
2. It was averred that at all material times, the Plaintiff was the lessee of the property known as land reference number Nairobi/Block 93/1250 for business since the year 2018 consuming water from the Defendant under water account number 5139419 registered in the name of Kamau Wambugu Weston, the lessor. That on 07.06.2022 the Defendant without any justification and or notice, ambushed the Plaintiff's agents, servants and by use of force and violence proceeded to disconnect the water supply and to excavate a huge portion of the property leaving a big hole.
3. It was further averred that the Plaintiff was later served with a letter dated 27.06.2022 being a demand for payment of a water bill for the months of August 2020 to June 2022 amounting to Kshs. 472,935.40/-. That the Plaintiff disputes the alleged arrears as the bill is an estimation and not a correct reading. That the Defendant's actions, other being illegal, unprocedural and unconstitutional, forced the Plaintiff to source for water supply from alternative sources. The plaint was accompanied by a motion under certificate of urgency seeking interim orders of prohibition against the Defendant.



4. The Defendant filed a notice of preliminary objection to both the Plaintiff's motion and suit. On grounds that the court lacks the jurisdiction to hear and determine the motion and that the entire suit discloses a water dispute that ought to be heard and determined by the Water Services Regulatory Board and the Water Tribunal; that the Plaintiff's motion and the entire suit have been filed contrary to the express provisions of section 82 (1), 121 (1), and 121 (2) of the Water Act; and that the motion and entire suit are an abuse of the court process and it is only fair, just and proper that the same be struck out.
5. The preliminary objection was canvassed by way of written submissions. On the part of the Defendant, counsel relied on sections 3, 82, 121 & 124 of the Water Act and the decisions in Augustin Michael Murandi & 2 Others v Nolturesh Loitoktok Water and Sanitation Co. Ltd (Successor in title of National Water Conservation) [2017] eKLR, Stella Nyawira Njugi & Another v Nyeri Water & Sanitation Company Ltd (NYSEWASCO) [2021] eKLR, Francis Mwangangi & 31 Others v Nairobi Water Sewerage Company & 3 Others [2021] eKLR. To support the argument that the suit pertains to a simple water dispute that is governed by the Water Act 2016. That pursuant to the cited provisions of statute, the jurisdiction and authority to entertain the instant proceedings, is vested in the Water Services Regulatory Board, Water Tribunal and the Environment and Land Court respectively in the first instance.
6. Echoing the dicta in the of-cited decision of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 counsel asserted that lack of jurisdiction renders both the Plaintiff's motion and suit fatal, and the court ought to down its tools to allow parties to exhaust the alternative dispute resolution mechanisms provided for under the Water Act, 2016.
7. In response, the Plaintiff's counsel cited the provisions of Section 85 and 86 of the Water Act Cap 372, and the decisions in Dirie Olow Mohamed v Tavevo Water and Sewerage Co. Ltd [2015] eKLR, Kuldip Singh Jandu v Nairobi Water Company Ltd & Another [2012] eKLR, Isaiah Ngoto Watbeka v Nairobi City Water and Sewerage Co. Ltd [2013] eKLR and Nairobi City Water & Sewerage Company Ltd v St. Nicholas School [2013] eKLR. His argument was that the dispute before the court relates to a licensee and a customer, an alleged illegal disconnection, and hence the court is vested with jurisdiction to entertain the matter. That the jurisdiction of the Water Appeal Board is confined to decisions emanating from the Water Services Board and limited to disputes set out in the Water Act.
8. Counsel further asserted that the word "appeal" in the provisions cited by the Defendant is not synonymous with the word "dispute" and cannot be interpreted to encompass any dispute relating to water as suggested by the Defendant. It was further contended that disputes arising from the disconnection of water do not fall under the jurisdiction of the Water Appeals Board not being a decision emanating from a decision of the Water Services Board.
9. Citing section 121 of the Water Act, and the decisions in Kenya Commercial Bank of Kenya Ltd v Nairobi City Water & Sewerage Company Ltd [2020] eKLR, Muranga County Government v Muranga South Water & Sanitation Company Ltd & Another [2019] eKLR and Augustine Michael Murandi & 2 Others v Nolturesh Loitoktok Water and Sanitation Co. Ltd [2017] eKLR counsel emphasized that the nature of the dispute is not an appeal to be heard and determined by the Water Appeals Board. In conclusion, counsel reiterated that the court has the jurisdiction to hear the instant motion and accompanying suit hence the preliminary objection ought to be dismissed with costs.



10. The court has considered the rival submissions by the parties and the record herein. The Defendant’s preliminary objection (PO) is fundamentally premised on Section 82 (1) and 121 of the Water Act 2016. The former provision states that;-

“A party aggrieved by the decision of a water services provider may appeal against the decision to the Regulatory Board in the prescribed manner within fourteen days from the date the decision was made.”

11. Whereas Section 121 on the other hand provides that;-

(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.

12. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696, Law J. A. stated:”

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

13. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”



See also *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR.

14. In *Mulemi v Angwenye & Another* (Civil Appeal 170 of 2016) [2021] KECA 214 the same court further distilled the definition of a preliminary objection as elucidated in *Mukisa Biscuits (supra)* by stating as follows:-

- “ i) It must be a pure point of law;
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion” .

15. The key objection raised by the Defendant relates to the jurisdiction of this court to entertain the suit. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. As held in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR a court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The High Court draws its original jurisdiction to entertain disputes from Article 165 (3) of the *Constitution* and statute. The events leading to the suit herein appear not to be in dispute. A cursory review of the plaint herein reveals that the Plaintiff’s grievance against the Defendant arises from alleged illegal disconnection of the water supply and demand for payment of some Kes. 400,000/- odd by the Defendant.

17. The reliefs sought against the Defendant are; -

- “ 1. A declaration that the demand for payment for water bill Kshs. 472,935.40 by the Defendant is irregular, illegal, null and void.
2. A mandatory injunction compelling the Defendant by itself, its employees, agent and or servants to forthwith restore the Plaintiff’s water supply by reconnecting the water supply.
3. Permanent injunction restraining the Defendant from disconnecting the water supply” (sic)

18. It is the Plaintiff’s pleaded case that the Defendant’s computation of its water bill was erroneous and the act of disconnection of the water supply to the Plaintiff’s business premises illegal. Undisputedly,



the foundation of the Plaintiff's cause of action can easily be discerned from his pleadings, and thus requires no further examination. Evidently, the Defendant's objection raises a pure point of law.

19. The objective of the Water Act 2016 was inter alia "to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes". Section 70 (1) of the Water Act 2016 establishes the Water Services Regulatory Board whose principal objective is to "protect the interests and rights of consumers in the provision of water services."
20. Section 2 of the Act defines Water Services as "any services of or incidental to the supply or storage of water and includes the provision of sewerage services" and a Water Service Provider as..... "a company, public benefits organization or other person providing water services under and in accordance with a license issued by the Regulatory Board for the service areas defined by the license". Section 72 (1) & (2) of the Water Act 2016 provide for the powers and functions of the Water Services Regulatory Board.
21. While Section 77 and 78 of the Act make provision for the establishment of Water Services Providers and the responsibilities of such providers, Section 82 provides for appeals to the Water Services Regulatory Board from decisions of Water Service Providers. The provision is in the following terms:
 - "(1) A party aggrieved by the decision of a water services provider may appeal against the decision to the Regulatory Board in the prescribed manner within fourteen days from the date the decision was made.
 - (2) The Regulatory Board may on appeal either vary, reverse or confirm the decision of the water service provider, and the Regulatory Board shall communicate its decision to the parties concerned within fourteen days from the time the decision is made".
22. Further, Section 92 of the Act mandates Water Services Providers to establish a complaints mechanism for consumers of water services consistent with the standards set by the Water Services Regulatory Board. Meanwhile, Section 119 of the Act establishes the Water Tribunal. The jurisdiction of the Tribunal is defined in Section 121 of the Act 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."
23. The Plaintiff's grievance is against a Defendant, who for all intents and purposes in relation to the instant suit, is a Water Service Provider. The Plaintiff pleads at paragraph 4, 6, 12, 13, & 20 of the plaint that:-
 - "4. The Plaintiff as been maintaining the Water Account Number 5139419 with the Defendant through which the Plaintiff has been paying monthly bills promptly when issued with the Defendant."



6. On 7th June 2022 the Defendant.....without any justification and or notice at all, secretly and without the knowledge of the Plaintiff ambushed the Plaintiff's agents/servants by use of force and violence & destroyed property. The Defendant proceeded to disconnect the water supply and excavated a huge portion of the property leaving a big hole in which the Plaintiff covered it up after three days.
 12. On or about 13th June 2022 the Defendant agentcame back into the Plaintiff's premises and not only did Defendant employee disconnect the water supply without giving any reason as to the action but proceeded to pour cement in the sewer hole located in the premises which has occasioned the Plaintiff to massive damages.
 13. On 21st September 2022 yet again the Defendant went to the Plaintiff's place served the Plaintiff with a disconnection order and processed to disconnect the Plaintiff's water supply.
 20. The Defendant referring to the readings of water supply between July 2018 to Jan 2019 to compute a recovery of Kshs. 472,935.40 for water supply between August 2020 to June 2022 is irrational as the business was closed for most part 2020 and 2021 due to measures to curb the spread of the Covid-19 virus. Therefore, it is unfair for the Defendant to compute the readings with years when the business was fully operational July 2018 to January 2019 with when the business was closed in the years 2020 and 2021." (sic)
24. The Plaintiff asserts that there was an existing contract for provision of water services between the parties herein from which a dispute has arisen, prompting the suit. Thus, pursuant to Sections 72 (1) (j), 82 and 121 of the Water Act 2016 there is a clear procedure prescribed for processing a dispute of the kind pleaded by the Plaintiff against the Defendant in this case. Pursuant to the Act, the initial jurisdiction for entertaining the Plaintiff's grievance lies with the resolution mechanism set up by the Water Service Provider, before the dispute goes to the Water Services Regulatory Board by way of an appeal. The Plaintiff's next recourse if dissatisfied with the Board's decision, lies in an appeal to the Water Tribunal and eventually to the Land and Environment Court.
 25. It appears that some of the Plaintiff's submissions before the court refer to the repealed Water Act Cap 372. Equally, counsel's argument that the word "appeal" is not synonymous with the word "dispute" does not hold water. An appeal represents a dispute too and ought to be processed in the manner prescribed by the Water Act 2016 before presentation before superior courts.
 26. The rationale behind the principle of exhaustion was spelt out by the Court of Appeal in the case of Mutanga Tea and Coffee Company Ltd v Shikara Limited & Another [2015] eKLR, (*supra*). The Plaintiff therein was aggrieved by decisions made inter alia by a local authority under the Physical Planning Act, in connection with a development it was opposed to. Eschewing the mechanism for redress stipulated in Section 29 of the Physical Planning Act, the aggrieved party filed an action in the High Court. In the High Court, the action was struck out in limine on account of a jurisdictional challenge raised by the defendants by way of a preliminary objection. The Court of Appeal dismissed the appeal brought by the aggrieved party, observing that the Physical Planning Act did not envisage the possibility that some aggrieved parties could sidestep the dispute resolution mechanism under the Act to bring their grievances directly to the High Court.



27. There as here, the *Physical Planning Act* provided an elaborate procedure for processing grievances arising thereunder. I find it useful to quote in extenso the reasoning of the Court of Appeal in that case:

“The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the *PPA* and the *EMCA* and resort to the High Court, not in an appeal as provided, but in the first instance.

This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of disputes. *Speaker Of The National Assembly v Karume*(supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the *Constitution*. In granting the order, the Court made the often-quoted statement that:

“[W]here there is a clear procedure for the redress of any particular grievances prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.”

(See also *Kones v Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others* [2008] 3 KLR (ER) 296].

It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the *Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the *Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159)(2)(c) is not a closed catalogue.

To the extent that the *Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the *Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the *Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In *Rich Productions Ltd v Kenya Pipeline Company & Another*, Petition No. 173 OF 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

“The reason why the *Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in



circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.”

28. Recently, the Supreme Court in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR while addressing a similar question was unequivocal that:-

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

29. Considering the foregoing, the court is of the firm view that the preliminary objection by the Defendant is well founded. The objection is upheld. Consequently, the Plaintiff’s suit against the Defendant is hereby struck out with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Okoth

For the Defendant: Ms. Abobo

C/A: Carol

