



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 401 OF 2013**

**ST NICHOLAS SCHOOL LIMITED.....PLAINTIFF**

**VERSUS**

**NAIROBI CITY WATER AND SEWERAGE**

**COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In its Complaint dated and filed on 19<sup>th</sup> September 2013, the Plaintiff sought the following reliefs against the Defendant herein:-

- 1. A mandatory injunction ordering the Defendant to return and reconnect the Plaintiff's water meter number 1119540.**
- 2. General damages.**
- 3. Costs of this suit.**

2. It had filed the said Complaint along with a Notice of Motion application dated and filed on 19<sup>th</sup> September 2013. In his order of 1<sup>st</sup> October 2013, Hatari Waweru J directed that the Defendant restore its water immediately and that it continue paying the water bills as and when they became due. The Learned Judge was clear that this was an interim relief pending the hearing and determination of the Notice of Preliminary Objection dated 25<sup>th</sup> September 2013 and filed on 26<sup>th</sup> September 2013 in which the Defendant had raised an objection to the court's jurisdiction to entertain the matter herein.

3. Oguo J heard the said Preliminary Objection and on 11<sup>th</sup> December 2013, she dismissed it after finding that the High Court had jurisdiction to hear and determine the dispute between the Plaintiff and the Defendant herein by virtue of Article 165(5) of the Constitution of Kenya, 2010 and further, that the jurisdiction of the Water Appeals Board was limited to matters that had been stipulated under Section 85 of the Water Act Cap 372 (Laws of Kenya).

4. The Defendant entered appearance on 13<sup>th</sup> March 2014 and filed its Defence, List of Witnesses and Witness Statements and List and Bundle of Documents on 27<sup>th</sup> March 2014. The Plaintiff filed its Reply to Defence dated 31<sup>st</sup> March 2014 on 1<sup>st</sup> April 2014. The Defendant subsequently filed a Supplementary List and Bundle of Documents on 2<sup>nd</sup> September 2015.

5. On 24<sup>th</sup> September 2015, the Defendant filed a Notice of Motion application of even date seeking to amend its Defence. The said application was allowed by Seron J on 10<sup>th</sup> March 2016 and on 16<sup>th</sup> March 2016, it filed an Amended Defence dated 24<sup>th</sup> March 2015. On 24<sup>th</sup> May 2019, it filed a Supplementary List of Witnesses and Witness Statement.

6. Anne Otieno (hereinafter referred to as 'PW 1') and Bridget Njoki Ngare (hereinafter referred to as 'DW 1') who adduced evidence on behalf of the Plaintiff and the Defendant herein respectively, adopted their respective Witness Statements as their evidence-in-chief.

**LEGAL ANALYSIS**

7. In her evidence, PW 1 told the court that she was the Plaintiff's administrator. Her testimony was that despite the Plaintiff having paid all its bills in full as and when they fell due, the Defendant disconnected its water connection. She added that as at the time of filing suit, the

Plaintiff had a credit balance with the Defendant herein. She also told the court that the Defendant only reconnected the water on 2<sup>nd</sup> November 2013 after their advocate threatened it with committal to civil jail for contempt of court orders.

8. On being cross-examined, she stated that the Plaintiff had two (2) accounts, one for borehole water and the other for fresh water and that it was the metre for the fresh water that was disconnected on 17<sup>th</sup> September 2013. She admitted that the meter was reconnected on 2<sup>nd</sup> November 2013 which was a period of forty five (45) days. She further said that during the time the fresh water had been disconnected, the Plaintiff had to purchase water because the borehole water was not sufficient for the one hundred and sixty (160) students. She conceded that the meter for the borehole water had never been disconnected and that the Plaintiff never filed a resolution authorising the filing of the suit herein and for her to represent the company.

9. During her re-examination, she averred that the metre for the fresh water was brought back on 2<sup>nd</sup> November 2013 but that the Plaintiff did not get water until 27<sup>th</sup> August 2019 when the Defendant installed a new water metre. She said that they had been relying on bore hole water for the last six (6) years and that they spent a sum of Kshs 12,000/= per day to supplement the said borehole water which used to dry up several times. She denied that the Plaintiff had ever been fraudulent as had been contended by the Defendant herein.

10. On her part, DW 1 confirmed that the Plaintiff herein had been connected to the two (2) water metres as aforesaid but that it had not paid the bills for the fresh water since 2014. She pointed out that it was established that the Plaintiff had tampered with the metre for the fresh water and hence, it was not showing actual water consumption. She said that the Defendant replaced the tampered metre with a new water metre but that since 2014, they had not been able to access the same due to resistance by the Plaintiff herein.

11. She was categorical that the Defendant had found that the Plaintiff had committed various acts of fraud and hence levied the Plaintiff a sum of Kshs 30,000/= as a penalty for metre reversal due to interconnections between the Plaintiff's fresh water and borehole account numbers.

12. In her cross-examination, she reiterated that the Plaintiff had tampered with the water metre for the fresh water as it was moving backwards and then stopped moving, remaining at a constant figure. She pointed out that the Plaintiff had never paid the penalty. When she was re-examined, she said that the Plaintiff never complained that it was not receiving any bills for the fresh water account since 2014.

13. As a preliminary issue, this court found it prudent to address the question of the competency or otherwise of the suit herein. Notably, only the Defendant addressed itself to this issue. Despite the said issue having come up during the cross-examination of PW 1, the Plaintiff did not address the court on the same in its Written Submissions.

14. The Plaintiff is a limited liability company duly incorporated under the laws of Kenya as it stated in Paragraph (1) of its Plaint. At the time of filing suit, it was required to comply with the provisions of Order 4 Rule 4 of the Civil Procedure Rules, 2010. The same provides as follows:-

**“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”**

15. A perusal of the Plaint showed that the Verifying Affidavit was sworn by Nellie Njuguna MRS on 17<sup>th</sup> September 2013. There was no board resolution authorising her to institute the suit herein and/or any authority authorising PW 1 to testify on behalf of the Plaintiff herein.

16. This court therefore fully associated itself with the holdings in the cases of **Thome Farmers Company No 4 Ltd vs Farm of Faith Investors Ltd [2019] eKLR** and **Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina [2015] eKLR** that were relied upon by the Defendant herein where the common holding was that authority for proceedings by a limited liability company must first be preceded by a resolution of the company given under its seal.

17. In the case of **Harleys Limited v Ripples Pharmaceuticals Limited & another [2015] eKLR**, this very court recognised the importance of authority before suit could be filed on behalf of a limited liability company. It rendered itself as follows:-

**“...it could not bring proceedings on behalf of another corporate without a board resolution from the Company authorising it to commence proceedings on behalf of the Company, if at all. It was therefore evident that the Plaintiff therefore had no *locus standi* to institute the proceedings herein.**

18. Consequently, in the absence of any resolution by the board as aforesaid, Nellie Njuguna MRS had no *locus standi* to institute the present suit lending to the suit to being struck out for being defective and incompetent *ab initio*.

19. Indeed, Order 4 Rule 6 of the Civil Procedure Rules states that:-

**“The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”**

20. Turning to the merits or otherwise of the case herein, it was clear that the prayer for mandatory injunction had already been overtaken by events. This was irrespective of whether the metre for fresh water was connected in 2014 as had been contended by the Defendant herein or in 2019 as had been asserted by the Plaintiff herein. For the reason that the Plaint was not amended to reflect the position as at the time of hearing the case, the prayer for mandatory injunction could not therefore have been granted even if there had been authority as envisaged in Order 4 Rule 4 of the Civil Procedure Rules.

21. Going further, the Plaintiff did not adduce in evidence any documents to show that it incurred a sum of Kshs 12,000/= every day to supplement the borehole water which it purported had dried several times while the metre for the fresh water had been disconnected. The burden of proof lay on it to prove firstly, that it incurred the said amount of Kshs 12,000/= every day and secondly, that the borehole dried several times necessitating it to purchase water.

22. Section 107 of the Evidence Act Cap 80 (Laws of Kenya) stipulates that:-

**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.**

23. Further, Section 109 of the Evidence Act provides that:-

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

24. In the absence of proof of the facts that it asserted as aforesaid, the Plaintiff failed to discharge its burden that it was entitled to aggravated damages of Kshs 5,000,000/=. In this regard, it failed to show how its fundamental right to clean water as provided in Article 43(1)(d) of the Constitution of Kenya, 2010 as there was no evidence that at any given time, it remained without any flowing water. On this issue, this court also came to the firm conclusion that even if the authority envisaged in Order 4 Rule 4 of the Civil Procedure Rules had been filed together with the suit herein, the Plaintiff's suit would not have been successful as it had not proved its case in this regard.

25. Accordingly, after carefully considering the evidence that was adduced herein, this court found and held that not only was the Plaintiff's suit incompetent for want of the requisite authority as aforesaid but that its case was not merited as it had failed to prove its case on a balance of probability which is the standard required in civil cases.

#### **DISPOSITION**

26. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was filed on 19<sup>th</sup> September 2013 was not merited and the same is hereby dismissed with costs to the Defendant herein.

27. It is so ordered

**DATED and DELIVERED at NAIROBI this 12<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**