



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO 357 OF 2012**

**RUMBA KINUTHIA.....APPELLANT**

**VERSUS**

**NAIROBI WATER & SEWERAGE CO. LTD....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Appellant's Notice of Motion application dated and filed on 9<sup>th</sup> April 2018 was brought pursuant to the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. Prayer Nos (1) and part of Prayer No (2) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT upon hearing of this Application *ex parte* this Honourable court be pleased to and hereby issue a temporary interim order mandating the Respondent herein to reconnect the water supply at the Appellant's/ Applicant's premises, Plot No 1489/1490 KIAMUMBI FARM, and thereafter the reconnection restrain the Respondent herein, either by itself, its servants, agents, employees or any other person claiming through it or on its behalf from invading, interfering, demolishing, removing or in any manner whatsoever disconnecting or threatening to disconnect the water supply to the Appellant's/Applicant's premises, Plot No 1489/1490 KIAMUMBI FARM pending the *inter partes* hearing and final determination of the present application, the Appellant's Application dated 25<sup>th</sup> April 2016 and the entire appeal.**

**3. THAT the costs of this application be in the cause.**

2. The Appellant's Written Submissions were dated 11<sup>th</sup> October 2018 and filed on 12<sup>th</sup> October 2018 while those of the Respondent's were dated 13<sup>th</sup> November 2018 and filed on 19<sup>th</sup> November 2018. The Appellant's Supplementary Written Submissions were dated 2<sup>nd</sup> November 2018 and filed on 5<sup>th</sup> November 2018.

**THE APPELLANT'S CASE**

3. The present application was supported by the Appellant's Affidavit that he also swore on 9<sup>th</sup> April

2018. He contended that on 1<sup>st</sup> February 2012 the Respondent sent him a water bill demanding that he pays a sum of Kshs 172,256.49/= for the period between 2<sup>nd</sup> December 2012 and 5<sup>th</sup> January 2013. The same was payable on or before 13<sup>th</sup> January 2012.

4. He stated that he disputed the said Bill and demanded its withdrawal pending an independent reading and physical examination of the metre but the Respondent did not oblige. He therefore filed suit against the Respondent in the lower court and was granted a temporary injunction restraining it from disconnecting the metre in his premises namely, Plot No 1489/1490 Kiamumbi Farm (hereinafter referred to as “suit premises”).

5. The Respondent filed a Preliminary Objection challenging the jurisdiction of the lower court and the same was upheld. It was that decision that led to the filing of the Appeal herein.

6. He said that in the spirit of resolving the matter out of court, in October 2015, he commenced to pay a sum of Kshs 10,000/= every month which he continued to do until 25<sup>th</sup> February 2016 when the Respondent demanded a sum of Kshs 900,000/=.

7. He averred that he disputed the said figure and on or about 17<sup>th</sup> January 2017, the Respondent reconnected water supply to his suit premises and also replaced the metre. At the time, he was paying a sum of Kshs 30,000/= per month as part payment of the outstanding impugned bill pending the computation of the true figure.

8. It was his averment that he continued to remit a sum of Kshs 30,000/= every month but on 2<sup>nd</sup> April 2018, the Respondent disconnected the water supply.

9. He therefore urged this court to allow his application as prayed.

### **THE RESPONDENT’S CASE**

10. In response to the said application the Respondents Regional Finance Coordinator or (Northern Region) swore the Replying Affidavit on 14<sup>th</sup> May 2018. It was filed on even date.

11. The Respondent stated that the issuance of a bill in the sum of Kshs 122,151.60/= was because it had not raised a bill for over six (6) months due to the Appellant’s resistance to inspection of his water reticulation to ascertain the water flow.

12. It said that it sent him the water bills to his email address and phone number every month but that he continued defaulting in paying the same making his hands dirty.

13. It denied that he made monthly payments of Kshs 10,000/= but pointed out that he in fact only made one (1) payment and that the last payment he made was in February 2018 despite the court having directed him to pay monthly instalments of Kshs 30,000/=.

14. It was its contention that as at 7<sup>th</sup> March 2018, the Appellant was in arrears of Kshs 1,645,986.97/=.

15. It therefore asked this court to dismiss his application as he had not met the threshold of being granted an injunction.

### **LEGAL ANALYSIS**

16. The Appellant relied on the case of **Giella vs Cassman Brown Co Ltd [1973] EA 358** and argued that it was not mandatory to demonstrate that damages would not be adequate compensation if an interlocutory injunction was not granted but rather, that each case would have to be decided upon its peculiar facts.

17. He submitted that the disconnection of the water supply would not only affect him but that it would also affect tenants and other stake holders in the suit premises as their diverse activities would be affected. It was his submission that the validity or otherwise of the impugned decision could only be resolved in evidence.

18. He was emphatic that he had demonstrated a *prima facie* case with probability of success which was described in the case of **Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** as:-

**“A *prima facie* case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 as to call for an explanation or rebuttal from the latter.”**

19. It was his contention that the water bill that he was issued by the Respondent was arbitrary and without legal basis which showed that he had demonstrated a *prima facie* case with probability of success.

20. He asked this court to decide this case on a balance of convenience if it was in doubt.

21. On its part, the Respondent was emphatic that the Appellant had not reached the threshold of being granted an injunction because the disconnection of water supply was not based on the disputed amount but rather, that the same was done because the Plaintiff failed to pay for water consumption.

22. It was, however, willing to concede to an injunction on condition that the Appellant continued paying the monthly bills it would issue to it and that in default of any single monthly instalment, it be at liberty to disconnect the water supply forthwith.

23. It also undertook not to disconnect water based on the disputed bill pending the hearing and determination of the Appeal. It further proposed that the payments for the Appellant’s account be reconciled from 1<sup>st</sup> January 2010 to 31<sup>st</sup> October 2018 within a period of thirty (30) days and a reconciliation report filed where after the sum that would be in dispute should be adjudicated.

24. It was evident from the Appellant’s submissions that an injunction could only be granted on a balance of convenience as contemplated in the case of **Giella vs Cassman Brown Co Ltd** (Supra) in which Spry VP rendered himself as follows:-

**“The conditions for the grant of an interlocutory injunction are now. I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E A Industries v Trufoods, [1972] E A 420.”**

25. This court did not find the Appellant’s submissions that he had demonstrated a *prima facie* case to have been relevant herein for the reason that this matter was not pending hearing and determination of facts but rather the matter was lodged as an appeal.

26. For the same reason, this court could not find that damages would not be an adequate remedy if the injunction as not granted.

27. The court could, however, grant a temporary injunction pending the hearing and determination of the Appeal herein if it found that there was merit to grant the same.

28. Order 42 Rule (1) and (2) of the Civil Procedure Rules provides that:-

**1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**

**2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

29. Section 79G of the Civil Procedure Act stipulates as follows:-

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

30. In determining whether or not the court could grant the Appellant the orders he had sought, the court took into consideration that:-

**1. The Respondent was acceding to a conditional injunction being granted; and**

**2. The High Court was empowered under Order 42 Rule 6(6) of the Civil Procedure Rules “in exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

31. Notably, the decision the Appellant was appealing against was delivered on 15<sup>th</sup> June 2012 and he filed his Memorandum of Appeal on 13<sup>th</sup> July 2012. For all purposes and intent, he had complied with the procedure of instituting an appeal as provided for in Section 79G of the Civil Procedure Act and Order 42 of Civil Procedure Rules and the court could consider if he had laid basis to be granted a temporary injunction pending the hearing and determination of the Appeal herein.

32. In his Supplementary Written Submissions, the Appellant conceded that some of the prayers in his application had been spent owing to the fact that the Respondent had already disconnected the water supply to the suit premises, that the impugned metres had been changed twice and that he had been settling his current monthly bills pursuant to this court’s orders of 14<sup>th</sup> May 2018.

33. He was therefore still apprehensive that the Respondent could still disconnect water supply to the suit premises due to non-payment of the water bill that was over Kshs 1,000,000/= which was the subject of the Appeal herein.

34. He proposed that with the consent of the Respondent, this court grants the following orders:-

**1. THAT this honourable court do issue a temporary interim order restraining the Respondent herein, either by itself, its servants, agents, employees, or any other person claiming through it or on its behalf from invading, interfering, demolishing, removing or in any other manner whatsoever disconnecting or threatening to disconnect the water supply to the Appellant’s/Applicant’s premises, Plot No. 1489/1490 KIAMUMBI FARM pending the hearing and determination of the entire appeal.**

**2. THAT this honourable court do issue a temporary interim order restraining the Respondent herein either by itself, its servants, agents, employees, or any other person claiming through it or on its behalf from billing the Appellant/Applicant with bills stemming from or any way related to the bloated bill of over Kshs 1,000,000/= the subject of the main appeal.**

**3. THAT this honourable court do issue a temporary interim order restraining the Respondent herein either by itself, its servants, agents, employees, or any other person**

claiming through it or on its behalf from invading, interfering, demolishing, removing or in any other manner whatsoever disconnecting or threatening to disconnect the water supply to the Appellant's/Applicant's premises, Plot No. 1489/1490 KIAMUMBI FARM pending the hearing and determination of the entire appeal citing the non-payment of the bloated bill of over Kshs 1,000,000/= the subject of the main appeal.

4. THAT from the day of the order, the Respondent undertake to make prompt monthly readings of the current water readings recorded by the new meters installed in the presence of the Appellant/Applicant and/or his duly appointed representative present at the suit premises and to bill the Appellant/Applicant promptly with the current water bills recorded for such month and who in turn will undertake to make good such bill within 5 working days of receiving the bill and/or to raise a complaint in writing with the relevant authority of the Respondent should he be billed contrary to what has been mutually read as the correct current consumption for such month in presence of both parties and/or their representatives.

5. THAT for the avoidance of doubt, in the event that the Appellant/Applicant defaults in the payment of any current monthly water bill pending the hearing and determination of the Appeal, the Respondent be at liberty to disconnect his water supply forthwith.

6. THAT both the Respondent and the Appellant/Applicant do reconcile their billing and/or payment accounts in respect of account No. 1764007 from the period beginning 1<sup>st</sup> January 2010 until 31<sup>st</sup> October 2018 within the next sixty (60) days.

7. THAT reconciliation report be filed within court at the expiry of the sixty (60) days.

8. THAT any sum not catered for and/or still in dispute at the conclusion of the reconciliation be subjected to adjudication by his honourable court at the Appeal.

9. THAT the Respondent be stopped from requiring the Appellant/Applicant herein from making good his payment of the impugned bill the subject of the main appeal pending the reconciliation of the accounts pertaining to it provided for herein above and the determination of the entire appeal.

10. THAT the costs be in cause.

35. As the Respondent was not opposed to the Appellant being granted an injunction, this court did not find it necessary to expound on why it ought to grant an injunction on a balance of convenience. Suffice it to state that it would only be fair that the same be granted to enable the court determine the matter on merit without the Appeal being rendered nugatory.

36. Having said so, this court faced a challenge in ascertaining the exact amount of the water bill that was in dispute. The Appellant had only annexed a copy of a letter dated 25<sup>th</sup> February 2016 to the Respondent marked Exh "RNR"5" contending that its employees disconnected water supply alleging that there was a bill of Kshs 900,000/=.

37. He also annexed a statement that was not legible that highlighted three (3) payments of Kshs 20,000/=, Kshs 30,000/= and Kshs 30,000/= respectively. On the water bill for the period 1<sup>st</sup> November 2016 to 6<sup>th</sup> December 2016 for a sum of Kshs 1,430,255.97/=, several payments were inscribed thereon.

38. As at 24<sup>th</sup> May 2018, the outstanding water bill shown in a statement that had been annexed to the Respondent's Replying Affidavit was Kshs 1,660,860.17/=.

39. Save for contending in his Supplementary Affidavit sworn and filed on 18<sup>th</sup> June 2018 that he had made several payments in respect of the water bill, he did not annex any proof thereof.

## **DISPOSITION**

40. For the foregoing reasons, the upshot of this court's Ruling was that the Appellant's Notice of Motion application dated and filed on 9<sup>th</sup> April 2018 was allowed in the following terms:-

**1. The Respondent be and is hereby restrained from disconnecting the water supply to the Appellant's suit premises, namely Plot No 1489/1490 Kiamumbi Farm pending the hearing and determination of the Appeal herein on condition that he shall deposit in a joint interest earning account in the name of his advocates and the Respondent's advocates the sum of Kshs 500,000/= within the next sixty (60) days from today.**

**2. The Appellant shall continue paying the current monthly water bills pending the hearing and determination of the Appeal.**

**3. In default of any one (1) instalment, the Respondent will be at liberty to disconnect the water supply to the aforesaid suit premises.**

41. Notwithstanding the aforesaid orders, as both parties are keen on seeking an amicable out of court settlement, they are at liberty to proceed accordingly.

42. It is so ordered.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> day of April 2019**

**J. KAMAU**

**JUDGE**