



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 192 OF 2016

SAMEER AFRICA LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY.....DEFENDANT

J U D G M E N T

1. The Plaintiff **Sameer Africa Limited** is a limited Liability Company incorporated under the companies Act. The Plaintiff has been in existence since 1969 when it was then called Firestone. The Plaintiff is the registered owner of the property L.R. NO. 120819 Nairobi. On that property, commonly known as Sameer Africa, there are premises erected thereon which house businesses such as tyre manufacturing factory, stock storage, sales go-downs, management offices, catering unit and other related facilities.

2. The Defendant, **Nairobi City Water & Sewerage Company** is incorporated under the companies Act and is a licenced Water and Services provider, as an agent of Athi Water Services Board, in accordance with the Water Act of 2002.

3. The Plaintiff and the Defendant were in a water supply and related services agreement. In that regard the Plaintiff was connected by the Defendant for the supply of water.

4. The Plaintiff's claim is that at all the material time it maintained its water account No. 1339972, with the Defendant, through which it paid its monthly bills promptly when issued by the Defendant.

5. The Plaintiff contends that on diverse dates in December 2015 it received, from the Defendant, water bills which indicated that it owed the Defendant large sums of money in respect to water bills dating back to the year 2007. That Defendant justified those bills on allegation that the Plaintiff consumed water through unmetered 6 inch pipe and also alleged the Plaintiff only paid for water metered under the 4 inch pipe. The Defendant issued a demand of payment of Kshs. 22,255,046.60 and a further Kshs. 100,000.00 for what it alleged was fraudulent water connection.

6. The Plaintiff, by its plaint, pleaded that the Defendant's demand for those payments were unreasonable, irregular and actuated by malice and bad faith. It disputed the alleged arrears.

7. By its final prayers the Plaintiff prayed for declaration that the demand for payment by the Defendant is irregular, illegal, null and void, and an order for permanent injunction restraining the Defendant from disconnecting or interfering with the Plaintiff's enjoyment of water supply.

8. The Defendants filed a defence and counter-claim in response to the Plaintiff's claim.

9. The Defendant pleaded that it had previously billed the Plaintiff for water it consumed through the 4 inch pipe whereas the Plaintiff had unlawfully and without authorization, from the Defendant, consumed water from a separate 6 inch pipe that was not metered and was installed without the Defendant's authority. It was as consequence thereof that the Defendant demanded from the Plaintiff payment of the amount of the computed value of the unaccounted consumption of water.

10. The Defendant alleged the Plaintiff was fraudulent in its actions. The Plaintiff counter-claimed for the total amount of Kshs.22,255,046.60.

UNDISPUTED FACTS

11. It is not disputed that the Defendant supplied water on the Plaintiff's property being L.R.No. 1208/9 Nairobi. The Plaintiff had a water

meter No.1339972, on that property.

12. It is admitted that the Defendant in December 2015 went on the Plaintiff's property to monitor the meter, which the Defendant maintained was having irregular reading. While the Defendants were monitoring the said meter, and because they noticed a pipe not going through the meter they decided to excavate around the meter area.

13. On carrying out the excavation it was found that the water meter and which the Plaintiff was billed on was on a 4 inch pipe. It was also found that there was on the Plaintiff's said property, a 6 inch water pipe, from the Defendant's main supply, which by-passed the meter and was later, after the metered area of 4 inch pipe, was connected to that 4 inch pipe.

WHAT IS NOT AGREED

14. What however is denied by the Plaintiff is that the said 6 inch water pipe was in fact supplying water to the Plaintiff. The Plaintiff alleged no water was flowing from the 6 inch pipe.

15. The Defendant's witness Jackson Munuve, stated that the sluice valve on the 6 inch water pipe was opened when the investigations or excavation were undertaken. The sluice valve is the one that stops water following backward.

ANALYSIS AND DETERMINATION

16. Although the learned advocates, have set out a number of issues for consideration I am of the view all the issues raised by the pleadings can be determined by the three issues I have identified. They are:

a) *Whether the Plaintiff was unlawfully and/or fraudulently consuming water from the un-metered 6 inch water pipe.*

b) *If (a) is yes is the Defendant entitled to levy charges for such consumption and if so how much?*

c) *Who bears the costs of the suit?*

ISSUE (a)

17. On this issue the Plaintiff's case, in a nutshell, is that it consumed water from the 4 inch pipe and faithfully paid for its consumption when billed by the Defendant. According to the Plaintiff the 6 inch water pipe did not take water on its property and that it is therefore, unlawful for the Defendant to seek payment from it. The Plaintiff's witness Patrick Kamene, stated that when the Defendant undertook its examination of the water supply on the Plaintiff property the 6 inch water pipe was closed and was not releasing any water.

18. The Plaintiff relied on form, on page 1 of its documents, which indicates that on 21st October 2003 the predecessor of the Defendant, City Council of Nairobi (NCC) undertook a change of the Plaintiff's meter. The Plaintiff by then had a meter No.107913 which on that day was changed to meter No.25049607.

19. The Plaintiff also relied on a document on page 2 of its document, which I must say is of very poor quality because it is a photocopy and it bears no title. Faintly one is however able to see the stamp of the Defendant's predecessor (NCC). It is also dated 21st October 2003, the same date as the one on page 1. Of interest is it seems to be a sketch of the Plaintiff's meter chamber. The Plaintiff's meter chamber is made of concrete. That meter chamber reflects a 4 inch water pipe coming from the Defendant's main supply of water and going through the meter chamber. There is also reflected a meter on that 4 inch water pipe. On the same concrete meter chamber is a 6 inch water pipe which also comes from the Defendant's main water supply pipe and goes through the meter chamber and out again into the Plaintiff's property. That 6 inch pipe has a sluice valve which is at the point where that 6 inch pipe is inside the concrete meter chamber. The 6 inch pipe is not connected to the meter.

20. The Plaintiff relies on those two documents, at pages 1 and 2, to argue that the Defendant was aware, at least from the year 2003 of the existence of the 6 inch pipe. The Plaintiff seeks for the Defendant to be stopped from denying the existence of that pipe because it acquiescence to the same.

21. The Plaintiff relied on **Halsbury's Laws of England paragraph 924** where the learned author wrote:

"The term acquiescence is, however properly used where a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise abstained from it, to believe that he assents to it being committed; a person so standing cannot afterwards be heard to complain of the act..."

22. On the doctrine of equitable estoppel the Plaintiff relied on the case **DOGE – V- KENYA CANNERS LIMITED (1989) KLR** where the Court stated:

"... It is a principle of justice and equity that when a man by his words conduct has let another to believe that he may safely act on the faith of them and the other does not act on them, he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so."

23. It is therefore, the Plaintiff's case that it did not consume water through the 6 inch pipe and that in any case since the Defendant was aware of the pipe since 2003 it is estopped from denying its existence and because it had acquiescence to it.

24. The Defendant denied knowledge of the 6 inch pipe until the day it undertook in-depth investigation of the Plaintiff's meter.

25. The Defendant's evidence was adduced through two witnesses.

26. Jackson Munuve, the Defendant's employee gave evidence to the effect that the Defendant noted, the month of October 2015, the Plaintiff's water meter recording was erratic January to September 2015. That variation led the Defendant to suspect the Plaintiff's meter was malfunctioning. The Defendant decided to inspect and verify whether the water pipes connection to the water meter, within the Plaintiff's property, were in order.

27. Because that inspection led them to discover there was a 6 inch water pipe, not connected to the meter, which was on the Plaintiff's property, they decided to excavate to find out where the pipe, which was drawing water from the Defendant's main water line, was going. This is what the witness stated in evidence:

i. That a 6 inch water pipe drew water from the Defendant's main water line to the Plaintiff's premises through a water chamber;

ii. That there was a diversion of a four inch water pipe from the 6 inch water pipe just before the water chamber. The said 4 inch water pipe subsequently connected back to the parent 6 inch water pipe at a point after the water chamber.

iii. That the only billable water meter at the Plaintiff's premises was connected to the four inch water pipe diversion only;

iv. That at about one meter from the chamber, the 6 inch water pipe enlarged to 8 inch pipe and eventually 10 inch pipe at the final terminal point;

v. That the enlargement of the subject water pipe to 8 inch and 10 inch presupposes deliberate attempt to accommodate supply of water from the 6 and 4 inch water pipes within the knowledge of the Plaintiff; The installation design within the Plaintiff's premises allowed the Plaintiff to consume water in excess of what was actually billed without the authority, consent and knowledge of the Defendant.

vi. That at all material time before the December 2015, both the parent 6 inch water pipe and the 4 inch subsidiary pipe were open with free flow of water to the Plaintiff's premises;

vii. Of concern to the Defendant was that the 6 inch water pipe was not metered and hence water drawn from the same not being billed.

viii. Of importance to note is that water from the 4 inch pipe, after passing through the meter, met up with the 6 inch water pipe, which had no meter and became one. Thereafter the piping widen from 8 inch eventually to 10 inch.

28. It is on the basis of that discovery the Defendant demanded payment from the Plaintiff.

29. Mr. Munuve, Defendant's employee, stated that the Defendant was only responsible for the water connection from its main water line up to the meter. Thereafter it was the consumers' responsibility. This is what the witness stated:

"... It is the responsibility of a customer after the meter connection, whatever happens after the meter connection it becomes purely a responsibility of a customer; and therefore it was the responsibility of Sameer (the Plaintiff) whatever transpired after this connection because in normal circumstances what is sketched here and that they have as approval from City Council it is only supposed to have been drawing water from only one line. The big question to us is why then join the two lines if you are not drawing the water from the other line."

30. That witness on being cross examined whether water was flowing through the 6 inch pipe, state:

" When we went to the premises on the day of conflict, and actually what made us to do excavation it was this, when we went there we found the two valves were opened and they were flowing water to the premises."

31. It is important to state that the Plaintiff denied that the 6 inch pipe had water flowing when the Defendant went to investigate the Plaintiff's meter.

DETERMINATION OF ISSUE(a)

32. I have considered the evidence adduced by the parties and their submissions in writing.

33. It is not denied that the Plaintiff had two water pipes on its property. One pipe was 4 inch, which had a meter and the other a 6 inch meter without a meter. Although the Plaintiff denied, through its witness, that water was flowing through the un-metered 6 inch pipe I do not believe the Plaintiff. I had the opportunity to observe the witnesses as they testified. I did not believe the evidence of the Plaintiff's witness, Patrick Kamene, in regard to the existence of the 6 inch pipe and whether water was following through that un-metered 6 inch pipe. The

attempt of the Plaintiff's witness to rely on the diagram at pages 12 and 13 of the Plaintiff's documents is rejected by this Court. The Plaintiff is the author of those two diagrams which were drawn without the Defendant's input. It was therefore self-serving for the Plaintiff to draw the diagram at page 12 showing the valve on the 6 inch pipe being closed.

34. Although the Plaintiff sought to invoke doctrine of estoppel it failed to show when, before October 2015, the Defendant knew of the existence of the 6 inch pipe. The diagrams the Plaintiff relied on pages 1 and 2, not only are they poor photo copies, but they were diagrams of NCC, the predecessors of the Defendant. So when did the Defendant know of the 6 inch pipe so that the doctrine of estoppel can apply.

35. The Defendant proved through its witness, which was not rebutted by the Plaintiff that the Plaintiff's 4 inch pipe after going through the meter, connected with the 6 inch, un-metered pipe, and thereafter the pipe widened to 8 inches and eventually 10 inches as it took water into the Plaintiff's premises. Just as the Defendant's witness asked in evidence; why would the Plaintiff start with the legally provided 4 inch pipe, which connected to 6 inch, un-metered pipe, and the two then led to 8 inch and finally to 10 inch pipe. The only explanation would be that the Plaintiff was creating capacity to receive more water, by using widened pipe, water which was from the un-metered 6 inch pipe.

36. On my consideration of the evidence before me I find that the Defendant shifted the burden of proof that the Plaintiff unlawfully connected their 4 inch pipe to un-metered 6 inch pipe and were therefore consuming water which was un-metered. I find the Defendant proved that on the day in question the valve of the 6 inch pipe was open and water was flowing through it. The Defendant met the evidential and legal burden of proof on the issue (a). The Plaintiff, as stated, failed to rebut that burden.

37. The Plaintiff failed to prove that the valve of the un-metered 6 inch was closed. Instead the evidence, on a balance of probability shows that the Plaintiff shows that the Plaintiff was party or the sole player in diverting the Defendant's water through the un-metered 6 inch pipe and to facilitate that illegality the Plaintiff widened its pipes from 8 inch to 10 inch as the pipes progressed into its property.

ISSUE (b)

38. Having determined issue (a) in the affirmative this Court is now called upon to determine issue (b): whether Defendant is entitled to levy charges for consumption of water under the un-metered 6 inch pipe, and if so how much.

39. When the Defendant excavated the meter chamber, of the Plaintiff, and found that the 6 inch pipe was un-metered the Defendant connected a meter where the 4 inch and 6 inch pipes met. The Defendant however did not use the reading of that meter to calculate how much should be demanded from the Plaintiff.

40. The Defendant's witness Timothy Waithaka Githuku, the Defendant's credit controller gave evidence as to how the Defendant arrived at the amount demanded from the Plaintiff. He said that he used the ratio approach of 1:1:5 because the Defendant was dealing with 4 inch and 6 inch. He said that he used the reading of the 4 inch which was metered, and translated that reading to the 6 inch pipe. He said he worked out the amount due from the Plaintiff from the 2007, when the Defendant took over the supply of water from its predecessor NCC.

41. The witness also referred to the Water Act Tariff guide Gazette in 2015 to calculate the penalty applicable against the Plaintiff for illegal connection of water.

42. I need to correct the Plaintiff's learned advocate because he erred to submit that the Defendant calculated the amount for charge of water consumed, by the Plaintiff, using the Water Act Tariff guide: That was not the evidence adduced.

43. The Plaintiff relied on its own reading that it kept which is at pages 10 and 11 of Plaintiff's documents. It was conceded by the Defendant that when the 6 inch pipe was metered the Plaintiff's consumption fell compared to the previous period, when only the 4 inch pipe was metered.

44. The Defendant's witness gave the following reasons of the probable reason why the consumption seemed to have gone down. He said:

i. The new 6 inch water meter was installed at a level different from that of four inch that was initially in place, the pressure effect is therefore different, which fact influences meter readings;

ii. The non-return valve that was installed at the time of changing the water meter to control back flow of water also affects meter readings;

iii. The Plaintiff may have controlled their water consumption during the trial period thus affecting the meter readings.

45. My view of the matter is that the Plaintiff obviously was aware that it was likely to be monitored on its water consumption, now that the 6 inch pipe was metered. The other reason is that it is obvious from Plaintiff's page II that the Plaintiff, apart from using the Defendant's water, also seem to have bore hole water as its premises. So the question is: Did the Plaintiff rely more on its borehole water in order to camouflage its consumption now that it was under scrutiny?

46. I am of the view that the explanation given by the Defendant's witness on a balance of probability indicated the fair amount the Plaintiff should pay for water consumed without paying. The Defendant used the readings of the 4 inch pipe to calculate the amount payable for the 6 inches consumption.

47. I believe I have here before discussed the inapplicability of the doctrine of estoppel and acquiescence. I do indeed find the Plaintiff liable to pay the Defendant for the water consumed that is Kshs. 22,155,046.60. The Plaintiff is also liable to pay the fine for illegal connection of water of Kshs. 100,000 as provided under the Gazette Notice No. 7335.

48. The Defendant has prevailed on its defence and counter claim and in accordance with Section 27 of the Civil Procedure Act it is entitled to costs.

49. The Plaintiff's case fails and is dismissed for the reasons stated above.

50. It is pertinent to state that although the Defendant's witnesses were in Court when the Plaintiff testified, having considered the case as a whole and the evidence tendered, I will not take an adverse view of the same.

51. In the end I enter judgment as follows:

a) There shall be judgment for the Defendant in the counter-claim for Kshs. 22,255,046.60.

b) The Plaintiff's case is hereby dismissed with costs to the Defendant.

c) The Defendant is also awarded costs of its defence and counter-claim.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT