



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 571 OF 2011

EVERLYNE ACHIENG BONYO.....PLAINTIFF

VERSUS

MOMBASA WATER SUPPLY &

SANITATION COMPANY LTD.....DEFENDANT

R U L I N G

1. On the 5/12/2017 the parties determined this suit by consent to the effect that the plaintiff's water kiosk account No. K300106700 to remain connected and not be disconnected save in the event of subsequent and future breaches by the plaintiff/applicant.
2. It is said in the application by the plaintiff dated 17th December 2018 that the order was extracted and duly served upon the plaintiffs Applicant by the defendants own lawyers on record.
3. It is then contended that in violation of the said decree, the defendant's Managing Director, one Francis Kombe, and its General Manager, Naima Yusuf on the 2/8/2018 invaded the plaintiff's kiosk and not only disconnected the water supply but also demolished the water kiosk and dug out the supply pipes for a continuous period of 3 days and involved the use of a bulldozer which then destroyed everything including concrete water tanks. The Application was supported by the Affidavit sworn by the plaintiff reiterating the facts on the face of the application and exhibited documents including photos of the kiosk dug after demolition as well as a valuation report by a quantity surveyor quantifying the loss at Kshs.988,325.80. The Affidavit adds that after demolition the plaintiff's two workers were arrested and released on cash bail to attend court, which they did on three occasions without any charges being preferred against them and were subsequently set free.
4. In opposition to the Application, the cited 2nd contemnor, swore a Replying Affidavit on the 01/02/2019 in which it is contended that the plaintiff had breached the defendant's water kiosk policy and that she had received an advice to the effect that she was not liable for contempt of the order because the same did not amount to a consent order as defined by Black's Law Dictionary. It was contended that the defendant did advertise the recruitment of water kiosks and stand pipes operators but the plaintiff did not apply hence she was not awarded a license and thus the operation by the applicant thereafter was illegal. Being so illegal the respondent waived the need for a notice to demolish the illegal structures and thus did demolish without serving the plaintiff are was requisite. It was then contended that the suit having been compromised by consent and the litigation was ended with the consequence that the contempt proceedings do not lie just as much as the demolition was in compliance with the court order and that the plaintiff recourse is available under Section 82 of the Act and not in this suit.
5. It was also asserted that the defendants data base reveals that the Applicant operates multiple water kiosk accounts a fact prohibited by the defendant's water policy and therefore she was not in breach of the court order but was entitled to disconnect as she did.
6. There was no response by Mr. Francis Kombe but on the date of hearing, it was reported to court that he had passed on hence no orders were being sought against him. The Respondent filed a further Affidavit called **Reply To Supplementary Affidavit** but, that was struck out at the request of the plaintiffs' counsel when it was demonstrated that the same was filed without leave of the court.
7. Parties then filed written submissions in canvassing the application. The Applicants submission are dated 28/2/2019 and filed on 01/03/2019 while those by the Respondent are dated 25/3/2019 and filed the next day.
8. In the submissions filed, the applicant rehashes it position that the respondent is in violation of the consent order while the respondent takes the view that there was a breach by the Applicant which made it to disconnect and dismantled the Applicant's systems of operating a water kiosk.
9. Parties have equally submitted on when, why and how courts punish for contempt. In all submissions filed, that there exist a consent decree, the fact of disconnection and demolition, are not contested. The only contention upon which the court must make a decision is

whether there was a justification for the demolition and disconnection.

10. As crafted, the only justification the respondent would take advantage of the consent order was a breach committed after the date of the consent. The respondent other than contesting the propriety and clarity of the consent judgment asserts that the applicant was operating contrary to the water kiosk and stand pipe policy (2016) and the water Act.

11. The question is however whether this was a breach existing before the consent or if was a breach after the consent decree. It is not in doubt that by the date of the consent both the water Act and the water kiosk and stand pipe policy were in operation. It is also true that by the date of the consent the Applicant was yet to be registered under the new policy. Obvious, the water Act was all the time in existence. It cannot thus be debatable that when the parties negotiated and came to a settlement they had all the provisions of the law in focus. In coming to that settlement the parties deliberately excluded past breaches as a basis for disconnection. In the entire reply and submission, there is no allegation that there was a new breach after the consent judgment.

12. On the basis of the foregoing analysis, I do find that in disconnecting water and dismantling the Applicant's kiosk there was outright breach of the court order and thus contempt. In any event even if there had been a breach that qualified as a future breach, subsequent to the court order, the law under Fair Administrative Act, Principles Of Natural Justice properly captured under the Water Act and the defendants own water kiosk stand pipe policy mandated that the Applicant be notified. The obligation to issue notice before taking such a drastic action are cardinal for proper execution of administrative action or quasi-judicial duty by a public body like the defendant herein.

13. Here the person cited, Naima Yusuf does not deny participation in the contemptuous conduct but seeks to justify the same. In fact she has not denied the causation by the Applicant at paragraph 14 of the Affidavit in support that she accused the Applicant of fighting the government and that she would go round like one **Miguna Miguna** without anything happening to the contemnor. That to me is the conduct that qualifies to be described as impunity and outright contempt for the law and due process. It is the conduct that any person and institution of goodwill and possessed of love and respect for the rule of law must frown upon and abhor. It must be discouraged and sanction given to pursue deterrence.

14. I do find that the cited person, NAIMA TWALIB YUSUF, while acting as the General Manager, Commercial and Business Development, of the Defendant, when she supervised disconnection and demotion of the Applicants Water Kiosk was in contempt of the consent judgment entered before court in this matter on 5/12/2019. She acted in a manner that was overtly in willful defiance of the court order and thus deliberate challenge or affront to the authority of the court and supremacy of the law. Her willful and deliberate conduct is self-evident in the Replying Affidavit where no remorse is exhibited but outright justification and defiance. I find her guilty of contempt and order that she be forthwith arrested by the **OCS, Urban Police Station**, and brought to court for sentencing.

15. There is another prayer by the Applicant regarding the damage suffered at the time of the disconnection and demolition. That claim to me is in the nature of damage suffered and occasioned after this matter was concluded and does not properly belong to this file for determination here. It may as well be a fresh claim which the Applicant need to take counsel and advice. All I can say is that the same is ill-fitted here.

16. Lastly, the respondent has made submissions to the effect that after the consent finally determining the dispute the court has become *functus officio* and not properly seized of the matter. My position on that question is that it is the making of the consent order which placed rights and obligations upon the parties and the subsequent breach thereof that triggers the regime of contempt of court proceedings.

17. Indeed the court does not automatically become *functus officio* every time it makes a final order. It retains the right, over and above the power to punish for contempt, to handle various consequent applications like those connected to execution, and even review. This point was improperly taken and does not come to the respondent's aid to resist the application against her.

18. I award the costs of the application to the Applicant to be paid personally by the contemnor and not the defendant. The file is now stood over to the 16/10/2019 to confirm compliance by the OCS Urban Police Station in apprehending the contemnor.

Dated and delivered at Mombasa this 4th day of October 2019.

P.J.O. OTIENO

JUDGE