



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 66 OF 2016

DR. KIRIINYA MWENDA.....PLAINTIFF/APPLICANT

VERSUS

NAIROBI CITY COUNTY.....1ST DEFENDANT/RESPONDENT

RUNDA WATER LIMITED.....2ND DEFENDANT/RESPONDENT

NAIROBI CITY WATER & SEWAGE CO. LTD.....3RD DEFENANT/RESPONDENT

RULING

The plaintiff applicant has sued the defendants jointly and severally for a declaration that the 1st defendant has a constitutional duty and mandate to supply him with clean, safe and affordable water through the 2nd and 3rd defendants. Based on that claim, he has sought a permanent injunction against the 2nd defendant to prevent it from denying him the right to apply and have water supply connected to his property known as LR No. 7785/334.

Against the 3rd defendant he has sought a permanent injunction to compel it to immediately connect water supply to his property aforesaid upon payment of the relevant fees. The defendants, upon service of the plaint, have filed their respective defences which are on record denying the plaintiff's right and or claim.

The plaint was followed by an application by way of Notice of Motion dated 16th and filed on 24th April, 2018 seeking interim injunction orders related to the mandatory orders sought in the plaint. The application is founded on the grounds set out on the face thereof, alongside an affidavit sworn by the plaintiff. I note in passing that this application was filed about two years after the lodging of the plaint. The said application is opposed by the defendants who have filed their respective replying affidavits and or grounds of opposition. The parties have also filed submissions and cited several authorities which I have noted.

The orders sought are discretionary which discretion has to be exercised judicially. The foundation and or principles for granting the orders sought by the plaintiff are now well settled – see **Giella vs. Cassman Brown & Co. Limited [1973] EA 358.**

The plaintiff has the duty to present before the court a prima facie case with a probability of success; and 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; if the court is in doubt it will decide the matter on a balance of convenience.

I mention at the outset that the granting of the orders sought by the plaintiff at this stage would have the impact of determining the main suit in its entirety. This is not withstanding at this stage only affidavit evidence is available before the court without the benefit of being tested under cross examination.

There is evidence that this matter has been subject to previous litigation in **Constitutional Petition No. 501 of 2013** between the plaintiff herein and the 2nd defendant. In fact the decision of that petition is part of the documents filed by the 3rd defendant in the bundle of documents to be relied upon in the main hearing.

The defendants have stated in their respective defences why the plaintiff may not be entitled to the orders sought due to statutory limitations and also the location in which his property is located.

I have some reservations to address the issues raised by the parties at this stage, because these are the same that may be subject to the main hearing when the parties reach the stage of presenting their respective testimonies.

I have already observed that this may have the effect of determining the entire suit at interlocutory stage. To delve into the dispute any further may occasion prejudice to the rights of the parties before the trial court that may be seized of the matter. The balance of convenience therefore comes into play. Having waited for two years to bring this application, the plaintiff may not be adversely affected if the status quo remains in place.

I therefore restrain myself from making any determination of this application and observe that since the pleadings have been closed, parties should comply with Order 11 of the Civil Procedure Rules so that this matter is heard and determined expeditiously. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 6th day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE