



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 20 OF 2014**

**BETWEEN**

**KISUMU WATER & SEWERAGE COMPANY LTD .....APPELLANT**

**AND**

**ABDINASIR ALI HASSAN .....RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. H. Adika, RM dated 17<sup>th</sup> February 2014 at Chief Magistrates Court in Kisumu in Civil Case No. 574 of 2012)***

**JUDGMENT**

1. The appellant is a limited liability company licenced to supply water and sewerage services within Kisumu and its environs in accordance with the **Water Act, 2002**. It has filed this appeal contesting an order issued by the subordinate court granting;

*[A]n order of injunction compelling the Respondent/Defendant either by itself, its agents, servants or any other persons to continue with the reinstatement of the supply of water to the plots or parcels of land KISUMU/MUNICIPALITY BLOCK 8/182, 183 and 347 pending the hearing and determination of the suit on condition that suit be listed for hearing within 90 days.*

2. The respondent commenced the proceedings by way of a plaint seeking a mandatory injunction ordering the appellant to reconnect the supply of water to its parcels of land and general damages. Together with the plaint, the respondent filed an application for injunction dated 18<sup>th</sup> December 2012 under the provisions of **Order 40** of the **Civil Procedure Rules**, which was supported by the deposition of Ali Zakariah Mohammed who stated that he was the administrator of *Mahad Ummusalaama*, a Madrassa teaching Islamic religious studies for girls. He deponed that after the water meter was damaged in January 2012 he made a report to the appellant in the appropriate form. The appellant neglected to attend to the complaint until August 2012 when it accused the respondent of tampering with the meter and disconnecting its water supply. As a result, the appellant demanded a fine of Kshs. 10,000.00 for tampering with the meter and a surcharge of Kshs. 335,064.00. The respondent complained that the 120 students attending Madrassa would suffer irreparable damage as the water supply to the school would be cut.
3. The application was initially granted *ex-parte* and the orders affirmed when the matter came up for inter-parties hearing. The appellant moved the court to stay, discharge and or vary the injunction issued. The application was dismissed but upon a further application for review, the respondent's application dated 18<sup>th</sup> December 2012 was reinstated for hearing.

4. The appellant opposed the application through the replying affidavit of Kenneth Kasyoki, its Human Resources Manager. The appellant's position was that while it had a contractual relation with the appellant, the contract was for supply of water for domestic use and not for the Madrassa as alleged. It also asserted that after it installed a new meter, the respondent tampered with it and as a result the respondent was charged with the offence of tampering with a meter contrary to **section 95** of the **Water Act, 2002**. The appellant averred that one of the respondent's agents admitted that he had tampered with the meter and undertook to pay the fine and surcharge authorised by Gazette Notice No. 245 of 9<sup>th</sup> January 2009. It urged that no basis had been laid for the grant of the injunction.
5. After considering the application, depositions and the written submissions the learned magistrate held as follows;

*I find that there are serious triable issues that can only be resolved if this matter is heard to its conclusion. I therefore grant the application dated 18<sup>th</sup> December 2012 with the condition that this suit be listed for hearing within 90 days to allow for all the issue to be aired before court and a final decision made.*

6. It is this order that has precipitated this appeal. In the memorandum of appeal dated 15<sup>th</sup> March 2014, the appellant contended that the learned magistrate failed to critically analyse the evidence issues before making the order. It submitted that the learned trial magistrate failed to take into account the parties submissions and in particular failed to apply the principles for the grant of injunction established in the case of **Giella v Cassman Brown [1973]EA 358**. Mr Njoga, learned counsel for the appellant, submitted that the trial court did not take into account the nature of the contract between the parties, the allegations of tampering with the meter and the admitted breach by the respondent. Counsel further submitted that the respondent did not make out a prima facie case warranting the grant of the orders sought.
7. The respondent's position is that the trial court exercised its discretion properly by taking into account the facts of the case. Mr Mushindi, learned counsel for the respondent, contended that the provision of water is a right and if the same was disconnected from the school, the students would suffer irreparable damage. The respondent denied that there was an admission of liability for tampering with the meter. Counsel submitted that although the respondent was charged, the charges against him had not been proved. He contended that the appellant had not demonstrated any breach.
8. This is an appeal against the grant of an injunction and the circumstances under which this court will interfere with the decision of the subordinate court where its discretion is called into question were clearly set out in the case of **Mbogo v Shah[1968]EA 93,94** in which De Lestang JA., observed that;

*I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.*

9. The conditions for the grant of an interlocutory injunction are beyond doubt (see **Giella v Cassman Brown (supra)**). The applicant must demonstrate a prima facie case with a probability of success, that damages are an adequate remedy and if the court is in doubt, it will decide the matter on a balance of convenience. Although the injunction sought by the respondent was couched in negative terms, it was in reality a mandatory injunction which once granted had the effect of concluding the suit leaving only the issue of general damages for trial. It is well established that the courts have jurisdiction to grant a mandatory injunction at an interlocutory stage. In **Kenya Breweries Ltd & Another vs Washington O. Okeyo NRB CA Civil Appeal No. 332 of 2000[2002] eKLR**, the Court of Appeal accepted that;

The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4<sup>th</sup> Edition paragraph 948 which reads:-

*'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.'*

10. The Court of Appeal restated the position in ***Nation Media Group & 2 others v John Harun Mwau NRB CA Civil Appeal No. 298 of 2005 [2014] eKLR*** as follows;

*It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.*

11. The learned magistrate failed to consider whether the applicant had established a prima facie with probability of success and whether there were exceptional circumstances that would entitle the respondent to the orders sought. He also failed to outline the serious triable issues or weigh the conflicting claims by the parties. In addition, the learned magistrate held that the issue between the parties was one for accounts and whether the respondents had paid their bills without considering the fact that the respondent had been accused of meter tampering which was admitted. I therefore find and hold that this is a proper case for appellate intervention within the confines set out in ***Mbogo v Shah (supra)***.

12. It is common ground that the relationship between the appellant and respondent was governed by a contract. A fact not controverted by the respondent was that the agreement between them was for supply for domestic consumption and not industrial, commercial or like consumption thus the respondent's use for non-domestic consumption constituted a breach of contract. Had the learned magistrate considered the facts in light of the principles I have outlined, he would have taken a different view.

13. I am not convinced that the respondent made out a prima facie entitling him to the injunction sought. Moreover, there are no special circumstances that would warrant the grant of a mandatory injunction. As the appellant had demonstrated, the supply to the respondent's plots was for domestic consumption. To grant a mandatory injunction would be to vary the tenor of contractual obligations. I also hold that any money paid by the respondent for reconnection of the water would be refunded by the appellant in the event the respondent succeeds in the suit.

14. For the reasons I have set out, the appeal is allowed with the result that the respondent's Notice of Motion dated 18<sup>th</sup> December 2012 filed in the subordinate court is dismissed with costs to the appellant. The appellant shall have costs of this appeal.

**DATED and DELIVERED at KISUMU this 1<sup>st</sup> day of September 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Njoga instructed by Ouma Njoga and Company Advocates for the appellant.

Mr Mushindi instructed by L. G. Menezes and Company Advocates for the respondent.