



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 162 'B' OF 2012

1. DAVID MUNGAI
2. SAUMU REHANI
3. KENEDY OUMA JALANGO (both suing in their capacity as elected representative of the tenants of the Defendant occupying the Defendant's flats in Bombolulu Estate,

Mombasa)PLAINTIFFS

VERSUS

REGISTERED TRUSTEES OF TELEPOSTA PENSION

SCHEME DEFENDANT

RULING

This Notice of Motion Application dated the 8th day of May, 2013 and which is expressed to be brought under Section 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act seeks in the main an interim order directing the Defendant to immediately reconnect the Control box/Water Pump removed from the pump room at Bombolulu Teleposta Pension Scheme flats and restore the water supply to the Plaintiffs residences at Bombolulu Teleposta Pension Scheme flats pending the hearing and determination of this application and the suit.

The grounds are that:-

(a) The Defendant has disconnected the water supply to the plaintiffs residence at Bombolulu Teleposta Pension Scheme flats and removed the control box to the water pump and as a result the Plaintiffs have no water.

(b) That the Defendant has directed security guards at the gate not to allow water vendors to sell water to the Plaintiffs in a bid to frustrate the Plaintiffs into signing a new lease before the matter can proceed for hearing thus rendering the hearing nugatory.

(c) That the plaintiffs pays for the water supply themselves, cater for the electricity bill and repairs of the pump.

(d) That water is life, and none has the right to deprive another person of its usage in such a callous manner, without taking to consideration the numerous risks posed to the plaintiffs in their health due to unavailability of water.

This application is opposed on the grounds:-

1. **That the substantive prayer sought in the Notice of Motion cannot be granted as the same is not pleaded in the plaint.**
2. **That the plaintiffs have not sought and obtained leave to amend the plaint to include any permanent relief with regard to all prayers sought in the Notice of Motion.**
3. **That even if the plaintiffs application was properly before the Court, the same is *res-judicata* as the plaintiffs application seeking interlocutory orders pending hearing and determination of the suit was duly heard and determined and dismissed by Hon. Justice Mwera on 13th November, 2013.**

By their plaint filed on the 10th day of September, 2012 the Plaintiffs sought the following orders:-

(a) A declaration that the purported enforcement of the terms contained in the letter of offer dated 28th May, 2012 by the Defendant's agent M/s Llyod Masika Ltd is null and void, unlawful and illegal.

(b) An order barring the Defendant by itself its agents, M/s Llyod Masika Ltd. and or any person claiming authority and or right under it from enforcing and or implementing the terms contained in the letter of offer dated 28th May, 2012, or in any manner whatsoever, interfering with the Plaintiffs peaceful occupation of the Defendants flats at Bombolulu Estate Mombasa as long as the Plaintiffs diligently continue paying the undisputed rent pending the hearing and determination of this suit.

The Plaintiffs filed an application dated the 7th day of September, 2012 which sought the following orders:-

1. **Spent**
2. **Spent**
3. **That pending the hearing and determination of the application the Court be pleased to issue an order by way of a temporary injunction to restrain the Defendant by itself, its agents, to wit Llyod Masika Ltd. And or any other person claiming authority and or right under it from enforcing and or implementing the terms contained in the letter of offer dated 28th May, 2012 or in any manner whatsoever interfering with the plaintiffs peaceful occupation of the Defendant's flats at Bombolulu Estate Mombasa as long as the Plaintiffs diligently continue paying undisputed rent.**
4. **That pending hearing and determination of this suit, the Court be pleased to issue an order by way of interlocutory injunction restraining the Defendant by itself, its agents to wit M/s Llyod Masika Ltd. and or any person claiming authority and or right under it from enforcing and or implementing the terms contained in the letter of offer dated 28th May, 2012 and or even any manner whatsoever interfering with the Plaintiffs peaceful occupation of the Defendants flats at Bombolulu Estate Mombasa as long as the Plaintiffs diligently continue paying undisputed rent.**

The application dated 7th September, 2012 was heard by Justice Mwera who in his ruling dated 13th November, 2012 dismissed it with costs.

In the replying affidavit of the Defendants representative, it is deponed that the borehole and equipment are the Defendant's property which was installed in November, 2012 and that prior to November, 2012 the Plaintiffs and other tenants were purchasing water from private vendors.

Further that the Borehole and equipment were to be used in accordance with the Defendants terms and conditions as set out in the tenancy agreement executed and/or to be executed by each tenant.

It is admitted that the Defendant had instructed its managing agents not to permit hawking of water within the Defendants premises.

Further that the plaintiffs are not bonafide tenants of the Defendants as they have declined to sign tenancy agreements with the Defendant.

That the plaintiffs have no legal relationship with the Defendant which is enforceable in a Court of Law and accordingly the Court has no jurisdiction to entertain the Plaintiffs application and or grant the orders sought.

A perusal of the prayers contained in the paint do Indicate that they are not amongst those that the applicant is seeking this Court to grant in its present application. This fact is not seriously contested by the applicant.

It is the Defendants view that the Plaintiffs should seek to amend the plaint first so as to include the prayer now sought.

The Plaintiffs response to that anomaly is that the removal of the pump control box was on the 3rd May, 2013 which was long after the suit had been filed. But that answer is not conclusive because there is still room to amend the plaint.

It is trite law that a party has to confine itself to its pleadings.

It is not in dispute that the borehole and equipment are that Defendants property and that they were installed in November, 2012 whereas the suit was filed on 10th September, 2012 meaning that the installation was after the suit was filed.

The contention by the Defendants that the bore hole and the equipment were to be used in accordance with the Defendants terms and conditions as set out in the tenancy agreement executed or to be executed has not also been seriously contested.

It is a fact that the plaintiffs declined to sign the tenancy agreements with the Defendants. It therefore follows that they cannot be seen to benefit from an agreement which they never signed.

It is not in dispute that an application dated 7th September, 2012 was heard and dismissed by Justice Mwera. The prayer sought therein were in the nature of temporary injunctions seeking to bar the Defendants from interfering with the Plaintiffs peaceful occupation of the Defendants flats at Bombolulu Estate.

The Court refused to grant interim orders sought. I find the present application to be *res judicata* and the prayers sought cannot be granted at this interlocutory stage. The upshot is that the application is found to be without merit and its dismissed with costs.

However, I am perturbed by the Defendants admission that they had instructed their managing agents not to permit hawking of water within the defendants premises and that the tenants are at liberty to go and purchase water at any place of their choice and bring the same to the premises they occupy. It is a fact of common notoriety that water is life and is essential to everyday life of all living things.

It would be extremely callous if not outrightly inhumane to deny this essential commodity to a fellow human being.

Whereas the Defendant can rightfully deny the Plaintiffs the water from their borehole it cannot deny them water from other sources.

Its untenable to issue instructions to the Plaintiffs to buy water from far off places when they can buy it from hawkers nearby and save transport costs.

In the interests of Justice and in compliance with Section 63(e) of the Civil Procedure Act the Plaintiffs are allowed reasonable access to water from other sources in the event of further disagreement

with the Defendants over the borehole water.

Ruling delivered dated and signed this **7th** day of **May, 2014**.

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M. MUYA

JUDGE

7TH MAY, 2014

In the presence of:-

Mwagunu holding brief Njeru for Plaintiffs

Kale Maina & Bundotich for the Defendants

M. MUYA

JUDGE

7TH MAY, 2014

Court: Furnish copies of the Ruling to the parties of the Suit.

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M. MUYA

JUDGE

7TH MAY, 2014