



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 191 OF 2018

HENRY KIPKOSGEI SEREM.....PLAINTIFF

VERSUS

ERDEMANN PROPERTIES LTD.....1ST DEFENDANT

MAVOKO WATER & SEWERAGE COMPANY LIMITED....2ND DEFENDANT

RULING

1. This Ruling is in respect to two Applications raising the same issues. In the Application dated 4th October, 2018, the Plaintiff has prayed for the following orders:

a. That a temporary injunction do issue against the Defendants/Respondents, their employees, agents, servants and/or any other individuals or third parties whatsoever acting under their instructions restraining them from disconnecting or threatening to disconnect the sewer that connects the Plaintiff and residents of Greatwall Apartments Phase 1 to the Waste Water Treatment Plant pending the hearing and determination of this suit.

b. That the Plaintiff and residents of Greatwall Apartments Phase shall continue to pay their share of the operational costs of the Waste Water Treatment Plant to the 1st Defendant until the dispute regarding ownership of the Waste Water Treatment Plant is resolved in Nairobi HCCC No. 55 of 2016 – John Kieti Makila vs. Erdemann Property Limited and Another.

c. That the costs of this Application be borne by the Defendants/Respondents

2. The 2nd Defendant approached the court vide a Notice of Motion dated 11th October, 2019. In that Application, the 2nd Defendant has prayed for the following orders:

a. Spent.

b. Spent.

c. The Court be pleased to grant temporary injunction compelling the Plaintiff/Respondent whether by himself, his agents and/or servants to pay to the Applicant the outstanding sewer bill pending the hearing and determination of this Suit.

d. The Court be pleased to grant temporary injunction compelling the Respondent whether by himself, his agents and/or servants to pay to the Applicant the sewer bill as and when it accrued, pending the hearing and determination of this Suit.

e. That costs of this Application be provided for.

3. The 2nd Defendant's Application was supported by the Affidavit of the Managing Director of the 2nd Defendant who deponed that the 2nd Defendant/Applicant is the only entity legally mandated to provide water services within the region where the suit premises is situated pursuant to a license issued to it by the Water Services Regulatory Board.

4. It was deponed that the Plaintiff and all the residents of Greatwall Apartment Phase 1 stopped paying sewerage fees upon obtaining interim reliefs that were granted to them in the instant suit and that the non-payment of the outstanding bills has hampered the 2nd Defendant in execution of its functions because it relies on the revenue generated to run its functions.

5. The Application was opposed by the Plaintiff, who deponed that the 1st Defendant developed Greatwall estate which comprises of Greatwall Apartments Phase 1, 2 and 3 respectively and that when the Apartments were constructed, the 1st Defendant advertised them for sale in both the print and electronic media.
6. The Plaintiff deponed that in one of the advertisements for sale of Greatwall Apartments Phase 3, the 1st Defendant informed the public that some of the key amenities which would be available to the homeowners would be a spacious lounge, open kitchen with granite tops, master ensuite, elegant finishes, borehole, Waste Water Treatment Plant and ample parking.
7. It was deponed by the Plaintiff that at the material time when Greatwall Phase 3 Apartments were being advertised for sale, the Waste Water Treatment Plant, which is situated on the parcel of land where Phase 3 Apartments have been constructed, was already operational and was in fact serving the residents of Greatwall Phase 1 and Phase 2 which had been sold earlier.
8. The Plaintiff deponed that the advertisement provided that after all the Apartments in Phase 1, Phase 2 and Phase 3 were sold, the homeowners would pay their proportionate share of the Waste Water Treatment Plant operational costs to the 1st Defendant and that sometime in the year 2015 the 1st Defendant started demanding that the residents of Phase 3 pay Kshs. 200,000 towards the purchase of the Waste Water Treatment Plant.
9. It was deponed by the Plaintiff that the homeowners of Greatwall Apartments Phase 3 objected to the demand by the 1st Defendant through their residents' association; that the objection by the residents caused the 1st Defendant to disconnect the homeowners from accessing the treatment plant and that the homeowners of Phase 3 filed *Nairobi HCCC No. 55 of 2016 - John Kieti vs. Erdemann Property Limited*.
10. In the above suit, it was deponed, the Court (*Grace Nzioka J.*) issued interim orders *inter alia* restraining the 1st Defendant from interfering with the operations and ownership of the Waste Water Treatment Plant and that in disregard of the Court order issued on 20th June, 2016, the 1st Defendant proceeded to sell the Waste Water Treatment Plant to the 2nd Defendant vide a Sale Agreement dated 1st November, 2016.
11. It was deponed that the 1st Defendant started demanding that the Plaintiff and Phase 1 homeowners pay the service charge for operation of the Waste Water Treatment Plant to the 2nd Defendant by virtue of the Sale Agreement dated 1st November 2016.
12. It is the Plaintiff's case that Phase 1 owners have continuously paid the service charge for operating the Waste Water Treatment Plant to the 1st Defendant until sometime in 2019 when the 1st Defendant stopped accepting the payments and that it was not true that the Plaintiff stopped paying the sewerage charges for use of the Waste Water Treatment Plant.
13. The deponent pointed out that pursuant to the court order issued in HCCC No. 55 of 2016, Greatwall Apartments Phase 3 homeowners have been paying their share of the sewerage charges to the 1st Defendant and not the 2nd Defendant and that the 1st Defendant has been accepting payment.
14. It was averred that while there is only one Waste Water Treatment Plant available to the residents of the entire Greatwall Apartments community, the rate applied by the 1st Defendant to calculate the amount of service charge payable by the residents of Phase 3 is different from that which is applied to calculate the payments made by Phase 1 homeowners without any lawful or justifiable rationale for the different rates and that the rate used to calculate the service charge currently being paid by Phase 3 homeowners was arrived at pursuant to a report prepared by the water experts.
15. According to the Plaintiff, the homeowners in Greatwall Apartments Phase 1 are not averse to paying service charge for use of the Waste Water Treatment Plant; that until the question of ownership of the Plant is resolved in the suit pending between Greatwall Phase 3 owners and the Defendants herein, the Plaintiff and Greatwall Apartments Phase 1 homeowners opted to continue making payments to the 1st Defendant.
16. In the Supplementary Affidavit, the 2nd Defendant's Managing Director deponed that due to the interim order of injunction in place, the Plaintiffs have been enjoying free services and that the 1st Defendant is not opposed to the 2nd Defendant receiving the sewerage charges.
17. The 2nd Defendant deponed that the Order issued by Nzioka J. in Milimani Commercial Case No. 55 of 2016, which suit is now before the ELC, Machakos, did not exonerate the Plaintiffs from paying for sewerage services; that at the time the order was issued, the 2nd Defendant was not a party to the suit and that the Plaintiffs have a duty to pay for services rendered. The 1st Defendant did not file a response to the two Applications.

Submissions:

18. The Application was canvassed vide written submissions. According to counsel for the 2nd Defendant, the 2nd Defendant's case is twofold: Firstly, that the 2nd Defendant is a *bona fide* water and sewerage service undertaker under the provisions of the Water Act No. 43 of 2016, and secondly, that the Plaintiff is obliged to pay for sewerage services received as and when due.
19. Counsel cited the provisions of Section 77 (3) of the Water Act, 2016 and submitted that the Applicant is duly licensed by Water Services Regulatory Board to exclusively undertake water and sewerage service provision within the areas of Athi River, Mavoko and areas within Machakos County.

20. Section 77 (3) of the Water Act, it was submitted, provides as follows:

“77. Establishment of water service provider;

(3) A water services provider established under this section may be a public limited liability company established under the Companies Act, 2015 (No. 17 of 2015) or other body providing water services as may be approved by the Regulatory Board.

It was 2nd Defendant’s counsel’s submission that the 2nd Defendant’s mandate to undertake the provision of waste water management and sewerage services emanate from Section 78 (1) of the Water Act, 2016 which provides that;

78. Responsibilities of the water services provider

(1) A water services provider shall be responsible for—

(a) the provision of water services within the area specified in the licence; and

(b) the development of county assets for water service provision.”

21. According to the 2nd Defendant’s counsel, under the provisions of the Water Act 2016, the 2nd Defendant herein is the only legal body authorized to carry out the supply of water and sewerage services within the region where the Plaintiff lives and that the 2nd Defendant has been undertaking its statutory mandate in the management and provision of efficient water and sewerage services to the Plaintiff and the other tenants of Greatwall Apartments Phase 1.

22. Learned counsel submitted that in discharging its mandate, the 2nd Defendant herein incurs costs such as electricity bills, wage bills and facility maintenance costs; that the 2nd Defendant herein relies on the revenue generated from the payment of its services to ensure uninterrupted supply of water and sewerage services to the Plaintiff and other residents of Mavoko area and that the Plaintiff herein and other residents of Greatwall Apartments Phase 1 are in arrears of more than Kshs 3,401,000.00, which amount continues to accrue on a monthly basis which has made the Applicant to suffer financial losses.

23. In response, counsel for the Plaintiff submitted that the 2nd Defendant’s Application has not met the criteria set out under Order 40 of the Civil Procedure Rules or those laid down in *Giella vs. Cassman Brown (1973) EA 358* to warrant the granting of the orders sought.

24. Counsel submitted that the property in question, being the Waste Water Treatment Plant, is not at risk of being wasted, damaged or alienated by any party to this suit and most specifically not by the Plaintiff.

25. It was submitted that the alleged injury to be suffered by the 2nd Defendant (*if at all*), can be adequately compensated by way of damages and that the damages would take the form of the service charge costs for use of the waste water treatment by the Plaintiff after it is determined that the sale of the Waste Water Treatment Plant to the 2nd Defendant was lawful.

26. The court was invited to consider the case of *R. J. R. Macdonald vs. Canada (Attorney General)*, which was cited with approval by the court in *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR* where the court recaptured the principles in *Giella vs. Cassman Brown (1973) EA 358* as follows:

“i) Is there a serious issue to be tried?

ii) Will the Applicant suffer irreparable harm if the injunction is not granted?

iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called “balance of convenience”).”

27. Counsel also relied on the case of *American Cynamid vs. Ethicon (1975) 1 ALL ER 504, (1975) AC 396 at PP 406 and 408* which was quoted with approval by the Court of Appeal in *Mureithi vs. City Council of Nairobi [1979] eKLR* where it was stated that:

“The object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.... If damages in the measure recoverable at common law could be adequate remedy and the Defendant would be in a financial position to pay them, interlocutory injunction should normally not be granted, however strong the Plaintiff’s claim appeared to be at that stage.”

28. It was counsel’s submission that the 2nd Defendant has not shown that it has a *prima facie* case because ownership of the Waste Water Treatment Plant is the subject of an ongoing dispute in a different case which is pending hearing and determination before this court and that the impugned sale of the Waste Water Treatment Plant by the 1st Defendant to the 2nd Defendant was done in violation of a Court order.

29. The Plaintiff’s counsel submitted that despite not being a party in Nairobi HCCC No. 55 of 2016, the Plaintiff is entitled to seek enforcement of the orders granted in HCCC No. 55 of 2016 given that the said orders directly affect the Plaintiff/Respondent and other third parties who are not parties to this suit. Reliance was placed on the case of *Kenya Tea Growers Association vs. Francis Atwoli & 5 Others*

[2012] eKLR in which the Court cited *Clarke and Others vs. Chadburn & Others [1985] 1 All E.R. (PC) 211*, where it was held as follows:

“An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others...I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done...but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them ... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

30. Counsel submitted that there are *status quo* orders issued in this matter requiring the Plaintiff and the tenants of Greatwall Phase 1 to continue paying the water and sewerage services fees and other operations costs to the 1st Defendant, which orders have not been discharged or set aside; that the Plaintiff made all reasonable attempts to make the payments to the 1st Defendant and that the 1st Defendant has declined to receive the payments.

Analysis and findings:

31. Both the Plaintiff and the 2nd Defendant are seeking for injunctive orders. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction are now settled.

32. The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*See Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and Fellowes and Son vs. Fisher [1976] 1 QB 122*).

33. What amounts to a *prima facie* case, was explained by the Court of Appeal in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

“...in Civil cases, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

34. It is trite that interlocutory orders are granted without full investigation of the merits of either side's case. To be granted interlocutory relief of injunction, the Plaintiff must show a more than an arguable case. (*See Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435*). In *Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR*, the Court of Appeal held as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

35. In *Francome vs. Mirror Group Newspapers Ltd.*, [1984] 1 WLR 892, Sir John Donaldson MR, while criticizing the expression ‘*balance of convenience*’, an expression posited in the House of Lords decision in *American Cyanamid vs. Ethicon*, [1975] AC 396, said this about the purpose of interim injunctions:

“Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience.”

36. The filing of this suit by the Plaintiff, who has described himself in the Plaintiff as the Chairman of the Greatwall Apartments Phase 1 Residents Association, was precipitated by the letter dated 21st September, 2018 authored by the 2nd Defendant.

37. In the said letter, the 2nd Defendant notified the homeowners of Greatwall Apartments Phase 1 that unless they remitted to the 2nd Defendant a sum of Kshs. 931,500, being the sewer bills for March, 2018 – August, 2018, the 2nd Defendant will disconnect them from the sewer line.

38. According to the Plaintiff, when the homeowners bought their two bedroomed houses from the 1st Defendant, it was a term of the Lease that a Management Company would be incorporated to hold the reversionary interest in the suit property in which all the 528 homeowners

would be shareholders and that the 1st Defendant incorporated the said Management Company.

39. The Plaintiff's case is that there is a common Waste Water Treatment Plant serving the homeowners of Greatwall Phase 1, 2 and 3 and that as a result of the constant wrangling between the 1st Defendant and the residents on the operation of the Waste Water Treatment Plant, the residents of Phase 3 filed Nairobi HCCC No. 55 of 2016 seeking a permanent injunction restraining the 1st Defendant from interfering with the operations and ownership of the Waste Water Treatment Plant.

40. The evidence on record shows that on 20th June, 2016, Nzioka J. issued interim orders, *inter alia*, restraining the 1st Defendant from interfering with the operations and ownership of the Waste Water Treatment Plant pending the hearing and determination of the suit.

41. After the delivery of the Ruling by Nzioka J., the 1st Defendant proceeded to sell the Waste Water Treatment Plant to the 2nd Defendant vide a Sale Agreement dated 1st November 2016 for Kshs. 50,000,000. The Agreement shows that the same was entered into between the 1st Defendant and the 2nd Defendant. It would appear that the Management Company, in which the Plaintiff and the other homeowners of the Greatwall Phases 1, 2 and 3 are shareholders, was never involved in the transaction.

42. It was deponed that after the purchase of the Treatment Plant, the 1st Defendant started demanding that the Plaintiff and Phase 1 homeowners pay the service charge for operation of the Waste Water Treatment Plant to the 2nd Defendant by virtue of the Sale Agreement dated 1st November 2016.

43. It is the Plaintiff's case that Phase 1 owners have continuously paid the service charge for operating the Waste Water Treatment Plant to the 1st Defendant until sometime in 2019 when the 1st Defendant stopped accepting the payments and that it was not true that the Plaintiff stopped paying the sewerage charges for use of the Waste Water Treatment Plant.

44. The 1st Defendant has not denied the allegation by the Plaintiff that by virtue of the Sale Agreements it entered into with the homeowners, including the Plaintiff, the Waste Water Treatment Plant was to be managed by the Management Company in which the Plaintiff and the other homeowners are shareholders.

45. Indeed, the 1st Defendant did not file a response to explain the circumstances under which it sold the Waste Water Treatment Plant to the 2nd Defendant without involving the homeowners, and more so after Nzioka J. restrained it from interfering with the operations and ownership of the Waste Water Treatment Plant located on L.R. No. 12715/6322 pending the hearing and determination of the suit.

46. Having been directed by the court not to interfere with the operations and ownership of the Waste Water Treatment Plant, the 1st Defendant should not have transferred the ownership of the Waste Water Treatment Plant to the 2nd Defendant or at all.

47. Indeed, in view of the order of the court in Nairobi HCCC No. 55 of 2016, and considering that the impugned Waste Water Treatment Plant was not put up by the 2nd Defendant, the 2nd Defendant cannot demand for payment of the use of the same until the issue of ownership of the Waste Water Treatment Plant as between the Plaintiff and the 1st Defendant is heard and determined.

48. That being the case, the Plaintiff and all the homeowners of Greatwall Phase 1 should continue making the requisite payments for the use of the Waste Water Treatment Plant to the 1st Defendant as directed by the court in Nairobi HCCC No. 55 of 2016.

49. For those reasons, I dismiss the 2nd Defendant's Application dated 11th October, 2019 with costs and allow the Plaintiff's Application dated 4th October, 2018 as follows:

d. That a temporary injunction do issue against the Defendants/Respondents, their employees, agents, servants and/or any other individuals or third parties whatsoever acting under their instructions restraining them from disconnecting or threatening to disconnect the sewer that connects the Plaintiff and residents of Greatwall Apartments Phase 1 to the Waste Water Treatment Plant pending the hearing and determination of this suit.

e. That the Plaintiff and residents of Greatwall Apartments Phase shall continue to pay their share of the operational costs of the Waste Water Treatment Plant to the 1st Defendant until the dispute regarding ownership of the Waste Water Treatment Plant is resolved in Nairobi HCCC No. 55 of 2016 – John Kieti Makila vs. Erdemann Property Limited and Another, or in this suit.

f. The Defendants to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE