



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 706 OF 1997

**NAIROBI GOLF HOTELS (KENYA) LTD V PELICAN ENGINEERING & CONSTRUCTION
CO LTD**

*Water - requirement of permit for certain purposes – river diversion -
rights of riparian owner – capacity of the plaintiff to bring an action to
restrain the defendant from constructing a dam and diverting river water
- Water Act (cap 372) sections 3, 180 (2)*

The defendant raised preliminary objections against the plaintiff's interlocutory injunction application which sought to restrain the defendant from constructing a dam on Gatharani river and from diverting the river water.

The defendant contended that under section 3 of the Water Act, water is vested in the government and the plaintiff had no *locus standi* to bring the suit. It was further submitted that the plaintiff should have lodged a complaint with the Water Apportionment Board and that since the land had been leased to another party the defendant had been wrongly sued.

Held:

1. The Water Act does not give any member of the public a right to complain over the use of water by anybody in the absence of an application for a permit.
2. The court found no provision in the Water Act which gives any member of the public a right to complain to either the Water Apportionment

Board or to the Water Resources Authority for use of water by any member of the public unless they have first applied for a permit.

3. Payment of a penalty as provided for under section 180(2) of the Water Act does not affect the right of any other person to bring any action or take any proceedings against the defendant for the alleged illegal construction of the dam and alleged diversion of water.

4. The plaintiff by virtue of being a riparian owner could apply for injunction under the common law to restrain the defendant, a non riparian owner, for extra-ordinary use of water.

5. If the defendant had through a lease authorised another party to utilise the land in a manner complained of by the plaintiff and the utilisation of the land in that manner was going to cause permanent damage to the plaintiff's investment, the plaintiff had a cause of action against the defendant as the head lessee at the time this suit was brought without having to wait for the estate to fall into possession of the defendant in the future.

Preliminary objection overruled.

Cases

No cases referred to.

Texts

Hailsham, Lord (1979) *Halsbury's Laws of England* London: Butterworths
4th Edn Vol XXIV p 574 para 1028

Statutes

Water Act (Cap 372) sections 3, 35, 36 (2); 38; 74; 180 (2); 181

Advocates

Mr Kigano for the Plaintiff

Mr Owino for the Defendant

May 8, 1997, **Githinji J** delivered the following Ruling.

This is a preliminary objection raised against the plaintiff's application for an order of injunction dated 24.3.97.

Plaintiff filed a suit on 24.3.97 against the defendant claiming damages and a permanent injunction to restrain the defendant from constructing a dam on or across Gatharaini river and from trespassing on the plaintiff's land. On the same day, plaintiff filed an application for interlocutory injunction to restrain the defendant from constructing a dam on Gatharaini River and from diverting the River water and from trespassing on the plaintiff's land.

On the same day, an *ex parte* interlocutory injunction as prayed was granted by Khamoni J. That *ex parte* injunction is still in existence.

When the application came for hearing *inter partes*, Mr Owino for the defendant raised a preliminary objection to the application.

The basis of the plaintiff's suit and the interlocutory injunction is in summary that:

- (a) Plaintiff owns land reference No.14883 on which it has erected a prestigious and unique five star resort hotel/club, conference facilities and an 18 hole golf club of international repute known as "Windsor Golf and Country Club" unparalleled elsewhere in Kenya.
- (b) With a view to conserving nature, plaintiff has nurtured, maintained and preserved indigenous trees on the golf course.
- (c) The boundary of the land is the centre line of Gatharaini river which flows naturally from west to east and that with the permission, *inter alia*, of Water Apportionment Board, it has erected a dam (Windsor dam) from which it derives water for the maintenance

of the golf course, the trees and grass on the premises.

(d) Further plaintiff is a riparian owner with natural rights *ex jure naturae* to the use of the water from the river.

(e) Defendant is the owner of land reference number 15153 curved from Kiambu Forest Reserve which land does not border the Gatharaini river and is separated from the river by a portion of the forest.

(f) From February 1997, defendant contrary to the Water Act, erected a concrete reinforced wall across the river up stream, erected a temporary water reservoir pending construction of a dam, installing a water pump and diverting large quantities of water from the river via the reservoir to its land for irrigated floricultural and horticultural farming and water storage reservoirs thereby extinguishing the natural flow down stream of Gatharaini river.

(h) Defendants actions are crippling the plaintiff's use of the Windsor dam and water rights causing the grass on the golf course and vegetation to wither.

Those are of course allegations as the application and the suit has not been heard.

Mr Mike Maina the Managing Director of the defendant has sworn a replying affidavit. The defendant has also filed a defence. The defence is a mere denial of all the allegations in the plaint except that defendant admits that it is the owner of the land referred to by the plaintiff. All what Mr Mike Maina states in the replying affidavit is that defendant has leased the land to Valentine Growers and therefore defendant is wrongly sued.

The other thing Mr Mike Maina states is that plaintiff has come to court with unclean hands as it has unlawfully and without permission blocked the flow of waters of the river thereby obstructing and diverting the waters of the river to waste. Defendant has raised four preliminary objections to the application namely

(i) As by section 3 of the Water Act, water is vested in the government, plaintiff has no *locus standi* to bring the suit.

(ii) That it is the Water Apportionment Board which determines the utilisation of water and therefore plaintiff should have lodged a complaint with the Water Apportionment Board.

(iii) That plaintiff can only come to court for judicial review after all the administrative machinery under the Water Act are exhausted.

(iv) That as the defendant has leased the land to Valentine Growers - a firm; plaintiff can only sue Valentine Growers and not the defendant.

Mr Muturi Kigano for the plaintiff has replied to the preliminary objection. He contends *inter alia*, that High Court has original unlimited jurisdiction, that plaintiff has permission from Water Apportionment Board; defendant has not deponed that it has permission from Water Apportionment Board; that defendant has not traversed the various breaches complained of; that the lease was hurriedly registered on 3.4.97 and in any case the lease is invalid in law; that the same Mike Maina MD of defendant is the representative of Valentine Growers; that riparian rights lie against the offending land owner and riparian owner can obtain an injunction to restrain the diversion even without proof of damages.

Dealing with the first, second and third objections together, it is true that every body of water in Kenya is vested in the government but that is as section 3 of the Water Act provides subject to any rights of user to any person granted under the Act or recognized as being vested in any other person. As Mr. Kigano states, the government is a trustee for the general public. As the government is the people, the body of water logically belongs to the people but the government has to preserve it, control it and apportion it for the general good of the people. It is aptly said that water is life and no doubt that water is very valuable natural resource. The government controls the use of water by requiring that permits be obtained for some extra ordinary use of water. Such cases where permits are required are one specified in section 35 of the Water Act and include cases of use of water for irrigation. But by s 38 of the Act, a permit is not required for the abstraction or use of water from any body of water for domestic purposes by any persons having lawful access to the water and if such abstraction is made without employment of works. This natural right to use water for domestic purposes is subject to section 50 and 74 of the Act. By section 50 of the Act a person cannot construct a well within 100 yards of any body of surface water or construct a well within half a mile of another well. By section 74 of the Act, the government can declare any areas a conservation area and refuse the extraction of water. A riparian owner is a person who owns land on a bank of a river, or along a river or bordering a river or contiguous to a river. Under the common law and as permitted by section 38 of the Water Act, he has a right to take a reasonable amount of water from a natural river as it flows past his land for ordinary purposes such as domestic use which includes such things as watering his animals, his garden. He can even construct a dam so long as it is not within 100 yards of surface water. It may be that the wider right of riparian

owner under common law are limited by the Water Act but it is clear that a riparian owner has the natural right to use the water adjacent to his land for normal use.

For cases where a permit is required, it is an offence to use the water without a permit (section 36 of the Act). For the use of water where a permit is required it is the intended user who is required to apply to the Water Apportionment Board for a permit and anybody objecting to the issuing of a licence is required to file an objection. I can find no provision in the Water Act which gives any member of public a right to complain to either the Water Apportionment Board or to Water Resources Authority for use of water by anybody in the absence of an application for a permit. The objection that plaintiff should have exhausted the machinery prescribed in the Water Act would have been valid if the defendant had said that it applied for a permit from the Water Apportionment Board and that plaintiff failed to file an objection or appeal. As the pleadings and affidavits stand, the defendant has not said that it has applied for a permit and that such a permit was duly granted.

If it is true, as plaintiff pleads, that the defendant has not obtained a permit and if it is true that it has committed the acts complained of, then it would have committed an offence under s 36(2) of the Water Act. If such is the case, then the Minister or Water Resources Authority or the Water Apportionment Board has power to prosecute the defendant or take any civil proceedings against the defendant (section 181). But as section 180(2) of the Act provides, the payment of any such penalty does not affect the right of any other person to bring any action or take any proceedings against the defendant for alleged illegal construction of the dam and alleged diversion of water. Plaintiff is such a person and comes to court against the defendants for the alleged illegal works and also as a riparian owner.

He has a right of action under s 180 (2) of the Act. Further, plaintiff by virtue of being a riparian owner who alleges that defendant is not a riparian owner can apply for injunction under the common law to restrain the non-riparian for extra ordinary use of water for irrigation purposes.

Halsburys Laws of England vol 24 page 574 para 1028. As for the objection that the suit and application cannot be maintained against the defendant as defendant has leased the land to Valentine Growers, I note that the defendant has been granted a 99 year lease from April, 1991. If the lease to Valentine Growers is valid, (I am not going to decide on its validity) it is for 10 years from 1.11.96 after which it will revert to the defendant for use for over 80 years. One of the acts complained of by the plaintiff is trespass to his land. The works complained of by plaintiff are of permanent nature. It is my view that if the defendant has by the lease authorised Valentine Growers to utilise the land in the manner complained of by the plaintiff and if the utilization of the land in that manner is going to cause permanent damage to the plaintiff's investment, the plaintiff has a cause of action against the head lessee now without waiting for the estate to fall in possession of the defendant in future.

In any case, it is not clear as to who is dealing with the defendants land as Mr Mike Maina is involved both in the defendant and in Valentine Growers and seems to wear two hats. If Valentine Grower feel that they have an interest to protect it as a firm, it has a right to apply to be joined as a defendant to protect those interests.

For those reasons the preliminary objection has no merit and is overruled with costs to the plaintiff. I order that the application do proceed to hearing on merits.