

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC LC APPEAL CASE NO. E105 OF 2025

ISAAC MAINA
IHOMBA.....APPELLANT

VERSUS

NAIROBI CITY WATER &
SEWERAGE COMPANY
LIMITED.....RESPONDENTS

*(Being an Appeal against the Ruling delivered by the Hon
Pamela Achieng, in the Chief Magistrates Court, Milimani
on the 5th June, 2025 in Civil Suit E994 OF 2025)*

BETWEEN

ISAAC MAINA
IHOMBA.....PLAINTIFF

VERSUS

NAIROBI CITY WATER &
SEWERAGE COMPANY
LIMITED.....RESPONDENT

RULING

1. Before this court for determination is the Appellant’s Notice of Motion dated the 12th June, 2025 brought pursuant to the provisions of **Article 159** of the **Constitution of Kenya**, **Sections 3A, 63(e)** and **79G** of the **Civil Procedure Act**

and **Order 40 Rule 1, 2, and 3 of Civil Procedure Rules, 2010**, seeking the following reliefs:

- i. That this Honourable Tribunal be pleased to grant an order for Temporary Injunction restraining the Respondent, its servants, officers, employees, agents and/or assigns from howsoever accessing, disconnecting, removing, closing, trespassing onto dealing with and/or in any other manner whatsoever interfering with the Applicant's private Borehole and Meter Number 5184546 situated and installed in the property known as L.R No. 209/1674/1, Pangani Area, Nairobi County pending the hearing and determination of this Appeal.***
 - ii. That the costs of this Application be provided for.***
- 2.** The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Isaac Maina Ihomba, the Appellant of an even date, who deponed that he is the registered proprietor of all that property known as L.R No. 209/1674/1, located in Pangani Area, Nairobi County and the owner of the residential property located within the premises.
 - 3.** According to the Applicant, the residential property houses over 70 tenants, with each household comprising at least

two occupants, bringing the total number of residents to more than 200 people and that these residents, including adults, children, families, and business persons wholly depend on the borehole (the suit property) as their primary source of water within the premises.

4. He explained that he moved the Magistrates' Court in Civil Suit No. E994 of 2024, seeking, among other reliefs, injunctive and declaratory orders to the effect that he and his tenants at the premises known as L.R. No. 209/1674/1, Pangani Area, Nairobi County, are entitled at all times to clean water and a clean environment, and that the Respondent has no right whatsoever to interfere with that entitlement.
5. It was deposed that the Respondent, as the Defendant in that suit, filed a Preliminary Objection dated 12th March 2025, contending that the trial court lacked jurisdiction on the basis that he had not exhausted the available dispute resolution mechanisms and that on 5th June 2025, Hon. Pamela Achieng upheld the objection and struck out the suit with costs. It is contended that the Honourable Magistrate erred in both law and fact in reaching that decision.
6. The Appellant/Applicant deposed that, being dissatisfied with the said ruling and orders, he has preferred an appeal on the basis that his cause of action falls outside the ambit of the Water Tribunal. He stated that the said Tribunal has not been operational pursuant to a Judiciary Public Notice

dated 14th January 2025, and that in any event, his claim does not fall within the jurisdiction of the said Tribunal.

7. He averred that he is apprehensive that unless the application is heard urgently and on a priority basis, the intended appeal will be rendered nugatory and that, following the striking out of the suit, the Respondent's agents have issued threats to disconnect the water without any justifiable cause, despite his full compliance with all payment obligations.
8. He maintained that unless an order of injunction is granted restraining the Respondent and its agents, both he and his over 200 tenants risk violation of their right to clean water and a clean environment pending the determination of the appeal.
9. Mr. Ihomba maintained that as advised by counsel, he has an arguable appeal that raises serious triable issues with a high likelihood of success, as demonstrated in the draft Memorandum of Appeal and that the same arose from the conduct of the Respondent's agents, who have persistently subjected him to nuisance in an attempt to extort money.
10. In a retaliatory move following the filing of the suit and while the matter was pending before the Magistrates' Court, it was deposed that the Respondent issued a letter dated 26th May, 2025 alleging loss of revenue and arbitrarily demanding payment of Kshs. 352,854 without justification,

while threatening to disconnect the water meter in default of payment and that the intended disconnection without sufficient notice and on the basis of an unjustified bill is unlawful and infringes upon his rights and those of his tenants.

- 11.** In response to the Motion, the Respondent's legal officer, Patrick Njue Muriithi, swore a Replying Affidavit on 4th July, 2025. He deponed that the Motion is fatally defective and incompetent, as it misdirects its prayers to a Tribunal rather than to this court, and consequently fails to properly invoke the court's jurisdiction, notwithstanding that the court is otherwise competent to hear the matter.
- 12.** Without prejudice to the aforementioned, he explained, the Water Appeals Tribunal has been properly constituted pursuant to the Gazette Notice No. 8504 and as such the present Motion and appeal have been largely overtaken by events.
- 13.** According to the Respondent, pursuant to the provisions of **Section 121(2)** of the **Water Act**, the Water Appeals Tribunal, is duly clothed with jurisdiction to hear and determine the dispute between the parties as it was correctly pointed out in the Lower court's ruling dated 5th June, 2025.
- 14.** It was deposed that **Article 159** of the **Constitution of Kenya** mandates all courts exercising judicial authority to

be guided by the principle of alternative forms of dispute resolution and that the Court of Appeal in **Speaker of National Assembly vs Karume (1992) KLR 21** and **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** held that whenever there is a dispute resolution mechanism that exists outside court, the same be exhausted before the jurisdiction of the courts is invoked.

15. Mr Muriithi explained that advised by counsel, the Appellant herein has constantly failed to seek redress from the appropriate forum thereby occasioning undue delay in the administration of justice and that the Motion merely casts aspersions and should therefore be disregarded in its entirety.
16. It is the Respondent's case that the Appellant continues to enjoy water services rendered by the Respondent without settling the associated costs, thereby prejudicing the Respondent and depriving it of the much-needed capital required for its daily operations and that the interests of justice warrant the dismissal of the Motion.
17. The Appellant filed a further affidavit on 5th November, 2025. He deponed that this court has the requisite jurisdiction to hear and determine this matter noting that the Tribunal was not operational since January, 2025 when the cause of action herein arose and that the Water Tribunal was gazetted on the 24th June, 2025 whereas the matter

before the Trial Court was lodged on 26th February, 2025 and wrongly dismissed on 5th June, 2025.

18. He stated that he has consistently made all monthly water payments to the Respondent without default and does not owe any outstanding amounts in respect of the water supply to the premises. He maintained that it is erroneous and misleading for the Respondent to allege that he is indebted to it, as he has at all times duly settled his water bills.

Submissions

19. The Appellant filed submissions on 10th June 2025. Counsel submitted that the Appellant has established a prima facie case with a probability of success. Reliance was placed on **Halsbury's Laws of England, Vol. 11 (2009) 5th Edition, paragraph 385**, for the proposition that the court must be satisfied that there is a serious question to be tried and that the claim has real prospects of success.
20. Counsel argued that the appeal challenges the trial court's decision in upholding a preliminary objection on jurisdiction, declining jurisdiction in favour of the Water Tribunal and that the Tribunal lacked jurisdiction to grant the reliefs sought, particularly nuisance orders, and further that it was not operational at the time the suit was instituted. On that basis, counsel maintained that the appeal raises serious and arguable issues warranting determination by this court.

21. On the second limb, counsel submitted that the Appellant stands to suffer irreparable harm if the injunction is not granted. Reliance was placed on **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, where the court held that irreparable injury refers to harm that cannot be adequately compensated by an award of damages.
22. It was submitted that the Appellant manages premises occupied by over 70 tenants and more than 200 residents who rely on its water supply, and that the Respondent's threat to disconnect water from the premises would expose them to serious hardship and health risks, consequences that cannot be adequately compensated by damages.
23. On the third limb, counsel submitted that the balance of convenience tilts in favour of the Appellant. In this regard, reliance was placed on **Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 Others [2016] KEHC 7263 (KLR)**, where the court explained that, in determining where the balance lies, the court must weigh the respective prejudice each party is likely to suffer depending on whether the injunction is granted or refused.
24. Counsel argued that the Appellant has consistently settled water bills and would suffer greater prejudice if the injunction is denied, as the Respondent may proceed to disconnect water supply to the premises. Conversely, it was submitted that the Respondent would suffer no comparable prejudice if the orders are granted.

25. The Respondent filed submissions on 8th December 2025. Counsel submitted that the application is fatally defective for having been brought under the wrong legal provisions and for seeking reliefs directed at a tribunal rather than this court. Reliance was placed on **Samson S. Maitai & Another vs African Safari Club Limited & Another [2010] eKLR** for the definition of an incompetent application as one lacking legal basis.
26. As an appellate court, it was submitted that this court's jurisdiction ought to have been invoked under **Order 42** of the **Civil Procedure Rules**, and not the provisions cited by the Appellant. Such defects are not curable under **Article 159(2)(d)** of the **Constitution**, as affirmed in **Toppias & 4 Others vs Bomet County Government & Another [2025] KECA 841 (KLR)**, and **James Musoo vs Ezeetec Ltd [2014] eKLR**, and **Karan vs Ochieng & 2 Others [2018] eKLR**, which emphasize that procedural rules are integral to fair adjudication and cannot be disregarded under the guise of technicalities.
27. Counsel submitted that the dispute falls within the jurisdiction of the Water Tribunal under **Sections 119 and 121** of the **Water Act**, and that the trial court rightly declined jurisdiction. Cited in support was the cases of **Sammy Ndung'u Waity vs IEBC & 3 Others [2019]**

eKLR and Geoffrey Muthinja Kabiru & 2 Others vs Samuel Henry Karanja & 6 Others [2015] eKLR.

28. Counsel submitted that the Appellant failed to meet the threshold for an injunction, arguing that any loss from disconnection was self-inflicted due to non-payment and is compensable by damages, and that the Appellant is undeserving of equitable relief having approached the Court with unclean hands.
29. In conclusion, counsel submitted that the appeal offends the doctrine of exhaustion, fails to properly invoke this court's jurisdiction, and does not meet the threshold for grant of injunctive relief. He urged the court to find that both the appeal and the application are devoid of merit, constitute an abuse of the court process, and ought to be dismissed with costs to the Respondent.

Analysis and Determination

30. Having considered the pleadings and submissions, the sole issue that arises for determination is whether the Appellant has satisfactorily discharged the conditions warranting the grant of temporary injunction pending Appeal
31. The law with respect to the grant of a temporary injunction pending appeal is found in **Order 42 rule 6(6)** of the **Civil Procedure Rules** which provides as follows:

“Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in

the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

32. As regards the principles governing the same, the court in ***Patricia Njeri & 3 others vs National Museum of Kenya [2004] eKLR***, stated as follows:

- a. ***An order of injunction pending appeal is a discretionary order which will be exercised against an applicant whose appeal is not frivolous.***
- b. ***The discretion should be refused where it would inflict great hardship than it would avoid.***
- c. ***The applicant must show that to refuse the injunction would render the appeal nugatory.***
- d. ***The court should also be guided by the principles in *Giella v Cassman Brown [1973] EA 358.****

33. In the case of ***Giella vs Cassman Brown [1973] EA 358***, the court stated the conditions for grant of interlocutory injunctions as follows:

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”

- 34.** By way of brief background, the Appellant herein, who was the Plaintiff before the Magistrates’ Court, instituted Civil Suit No. E994 of 2024 seeking, *inter alia*, injunctive and declaratory orders to restrain the Respondent from interfering with his private borehole and water supply system installed on L.R. No. 209/1674/1, Pangani, Nairobi, and to affirm his and his tenants’ right to access clean water and a clean environment. He also sought general damages arising from the alleged nuisance occasioned by the Respondent’s actions.
- 35.** The suit was, however, met with a preliminary objection by the Respondent on the ground that the trial court lacked jurisdiction, the Respondent contending that the dispute fell within the mandate of the Water Tribunal and that the Appellant had failed to exhaust the available statutory dispute resolution mechanisms. Upon hearing the objection,

the learned Magistrate upheld the same in a ruling delivered on 5th June 2025 and struck out the suit with costs.

- 36.** Aggrieved by that decision, the Appellant lodged the present appeal, maintaining that the trial court erred in law and fact in declining jurisdiction, particularly on the basis that the Water Tribunal was not operational at the time the suit was filed and that, in any event, the nature of the claim touching on nuisance and violation of constitutional rights fell outside the Tribunal's remit.
- 37.** Contemporaneously, the Appellant filed the present application dated 12th June 2025 seeking, pending the hearing and determination of the appeal, an order of temporary injunction to restrain the Respondent from disconnecting or otherwise interfering with the water supply to the suit premises.
- 38.** The application is premised on the apprehension that, unless restrained, the Respondent would proceed to disconnect water supply, thereby rendering the appeal nugatory and exposing the Appellant and over 200 tenants residing on the premises to hardship and health risks
- 39.** At the outset, the Respondent asserts that the motion is incompetent for referring to a "Tribunal" rather than this court. While the court has noted that anomaly, it is evident that the same amounts to a mere misdescription of this court

as a tribunal, which does not go to the substance of the application nor occasion any prejudice to the Respondent.

- 40.** Also referenced is the fact that the motion is premised on wrong provisions. The law is now settled that a failure to cite the correct provision of law, or the citation of an incorrect provision, is not in itself fatal where the court is otherwise seized of jurisdiction and where the substance of the application is clear. As expressed by the Supreme Court in the case of *Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscone [2013]eKLR:*

“The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant’s cause.”

- 41.** Indeed, courts are obligated under **Article 159(2)(d)** of the **Constitution** to administer justice without undue regard to

procedural technicalities. The court finds that these defects are not fatal and do not render the application incompetent.

42. Turning to the merits, the parties have taken diametrically opposed positions on whether the learned Magistrate properly declined jurisdiction and struck out the suit. However, that issue falls squarely within the province of the substantive appeal and this court will refrain from making definitive findings thereon at this interlocutory stage. Suffice it to observe that the appeal is not frivolous, particularly given that it raises a substantive question on jurisdiction, and whether indeed the Tribunal was in existence as at the time the suit was filed in the lower court.
43. Moving to the considerations in the ***Giella Case (Supra)***, beginning with whether a prima facie case has been established, the Appellant has deponed that he is the proprietor of the suit property and that the premises houses over 70 tenants, comprising more than 200 residents, all of whom depend on the borehole as their primary source of water. This position has not been controverted by the Respondent.
44. The Appellant further asserts that, despite meeting his payment obligations, the Respondent has threatened to disconnect the water supply, a position the Respondent does not deny. He has produced receipts evidencing payments made, and while the adequacy of those payments

remains a matter for determination at the substantive stage, the material placed before the court discloses an arguable dispute as to the propriety of the intended disconnection.

- 45.** In the circumstances, the court is satisfied that the Appellant has demonstrated, on the material presented, the existence of a right to continued access to water which is under imminent threat of infringement, thereby establishing a prima facie case.
- 46.** On the question of irreparable harm, it is evident that the disconnection of the water supply would expose the Appellant and the tenants to serious hardship and health risks, consequences that cannot be adequately remedied by an award of damages. Access to water, particularly in a residential setting of this nature, implicates fundamental concerns of public health and human dignity.
- 47.** Being an indispensable and life-sustaining resource, any interruption would significantly disrupt habitation and undermine the basic conditions necessary for decent living. As regards the balance of convenience, the same tilts in favour of granting the reliefs sought, the prejudice to be suffered by the Appellant and the numerous tenants in the event of disconnection far outweighs any inconvenience to the Respondent, particularly where the Respondent retains the ability to pursue recovery of any alleged outstanding dues through lawful means.

48. In the end, the court finds the Motion to be merited and directs as follows:

- a) An order of temporary injunction does hereby issue restraining the Respondent, its servants, officers, employees, agents and/or assigns from howsoever accessing, disconnecting, removing, closing, trespassing onto dealing with and/or in any other manner whatsoever interfering with the Applicant's private Borehole and Meter Number 5184546 situated and installed in the property known as L.R No. 209/1674/1, Pangani Area, Nairobi County pending the hearing and determination of this Appeal.**
- b) The costs shall abide the appeal.**

Dated, signed and delivered virtually in Nairobi this 14th day of May, 2026.

**O. A. Angote
Judge**

In the presence of;

Mr. Mwangi for Respondent

Ms Odongo for Mr. Mwanza for Appellant

Court Assistant: Tracy