



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. SUIT NO. 1127 OF 2016

MUTHITHI INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY LTD.....DEFENDANT

RULING

This is a Notice of Motion expressed to be brought under Section 1A, 1B, 3A & 63 of the Civil Procedure Act and Order 40 Rule 1, 2, 3, 4, 5 & 8 of the Civil Procedure Rules, for orders to restrain the defendant, its agents, servants or employees from supplying or further connecting any water and sewerage services to **land parcel No. 23917, Nairobi** (“the Suit Property”) pending hearing and determination of the suit. In addition, the Plaintiff seeks to have the Court order the defendant, its agents or employees to remove all its water and sewer pipelines and apparatus from the Suit Property. When the matter came up in court on 24th November 2016, the Court declined to grant these orders in the interim period.

The gist of the plaintiff’s claim is that the defendant has unlawfully laid water and sewer pipelines on the Plaintiff’s land and further, that the defendant has unlawfully connected water and sewerage services to persons who are unlawfully occupying the Plaintiff’s land despite an eviction order having been issued against these persons in another suit.

Counsel for the plaintiff urged that the plaintiff is the owner of the Suit Property and that its consent to lay water pipes and sewer lines on the Suit Property was never sought by the defendant. According to the plaintiff, the unlawful activities of the defendant have encroached on its property and denied the plaintiff use of its property. The plaintiff further urged that there is a judgment and decree in **ELC 457 of 2013** in which orders of eviction were granted on 13th May 2014 against Andrew S. Kyendo and 22 other defendants in that matter enjoining them to vacate the Suit Property within 90 days of the date of judgment.

The defendant in this matter, Nairobi City Water & Sewerage Company, is a wholly owned subsidiary of the Nairobi City County mandated to provide clean water and sewerage services to the residents of Nairobi County.

Counsel for the defendant submitted that the defendant was not a party in **ELC 457 of 2013** in which the plaintiff sought the eviction of squatters from the Suit Property and obtained a judgment which was not directed at the defendant. And that that judgment is therefore not enforceable against the defendant. The defendant’s counsel further submitted that the defendant had entered into legally binding contracts with other members of the public for the supply of water & sewer services through pipelines passing through the Suit Property and that if the orders sought were issued and the water supply and sewerage services disconnected, the defendant will be in breach of its contractual obligations and would be exposed to pay penalties to people who are not parties in this suit.

The Defendant further urged that it is a public utility company and was carrying out its duty to the general public and it should not be punished for carrying out its duty of providing water & sewerage services in the city.

In reply, the plaintiff's advocate urged the court not to consider the arguments put forth by the defendant's advocate as these were not points of law. The defendant did not file an affidavit in response to the application despite being given ample time on 18th November, 2016 and 15th December, 2016 when the matter came up for mention.

Mike Maina who swore the affidavit in support of the application states at paragraphs 8 and 9 of his affidavit sworn on 15/9/2016 as follows:-

8. "THAT the defendant had however proceeded and connected the said *Squatters* on the Suit Property to its water and sewerage supply and continued to supply water and sewerage services to the Suit Property without the authority and approval or application by the Applicant.

9. THAT the defendant/ Respondent has persistently continued to unlawfully lay water pipes and sewerage line on the Suit Property without the authority, application and/or approval of the Plaintiff/ Applicant thereby aiding the said illegal *Squatters* on the Suit Property in their continued unlawful occupation of the Suit Property."

A copy of the judgment in ***ELC No. 498 of 2004 Muthithi Investments Limited v Andrew S. Kyendo and 22 others*** vide which the Defendants were ordered to vacate and deliver vacant possession of **L. R. No. 23917** to the Plaintiff within ninety days of the date of judgment was annexed to the supporting Affidavit of Mike Maina. Also annexed was a copy of the decree in ***ELC No. 457 of 2013*** (indicated to be formerly HCCC No. 498 of 2004) bearing the same parties as ELC No. 498 of 2004. There is no evidence to show whether the eviction order against the squatters who are on the Plaintiff's land was ever executed or not. It would appear that through this suit, the Plaintiff wishes to have the water supply to the Suit Property cut off so that the squatters who are occupying its land are compelled to vacate the Suit Property.

The question to be determined is whether this court ought to issue orders of injunction restraining the defendant from connecting any water and sewerage services to the Suit Property and whether the defendant should be compelled to remove all its water and sewer pipelines and apparatus from the Suit Property.

In considering which way the scales of justice should tilt, the court has to consider among other things the public importance of the defendant herein in that it has the mandate to supply water and sewerage services to the residents of Nairobi and how other persons who are not parties to this suit may be affected by the order given.

In essence, the plaintiff seeks a mandatory injunction to restrain the defendant, its agents, servants or employees from supplying or further connecting any water and sewerage services to the Suit Property pending hearing and determination of the suit, and a further order directing the defendant, its agents or employees to remove all its water and sewer pipelines and apparatus from the Suit Property.

A mandatory injunction would not normally be granted in the absence of special circumstances. It is granted if the case is clear and one in which the court thinks it ought to be decided at once or where the injunction is directed at simple and summary acts which could easily be remedied or where the defendant has attempted to steal a march on the plaintiff. The courts have been reluctant to grant mandatory injunctions at the interlocutory stage.

The court has considered the rival arguments and is of the opinion that it would not be fair and just to grant the orders sought on the basis that other persons who are not parties in this suit will be adversely affected by the grant of such an order yet it is admitted by the plaintiff that the defendant connected the water and sewerage pipelines through the Suit Property before the eviction orders in ELC 498 of 2004 were made in respect of the Suit Property. There is no evidence to confirm that no other consumers of the

Defendant's vital services will be affected other than the said squatters if the orders sought were granted.

In the result, the court declines to grant the orders sought in the motion dated 15th September, 2015 and orders that this suit do proceed for full hearing after the parties comply with Order 11 of the Civil Procedure Rules. Each party shall bear its own costs.

Dated at Nairobi this 24TH day of FEBRUARY, 2017.

K. BOR

JUDGE

24.02.17