IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 40 OF 2018

BETWEEN

AUGUSTIN MICHAEL MULANDI.....1ST APPELLANT

MATHIAS MWINZI.....2ND APPELLANT

JOHN MUKELELYA.....3RD APPELLANT

AND

NOL TURESH WATER AND SANITATION CO. LIMITED

(Successor of NATIONAL CONSERVATION AND PIPELINE CONSERVATION.....RESPONDENT

(Appeal from Ruling and Order of the of the High Court of Kenya at Kajiado

(Nyakundi, J.) delivered on 20th December 2017 in Kajiado Constitutional

Petition No. 8 of 2017 (formally Machakos Petition No. 9 of 2017)

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JUDGMENT OF THE COURT

In this appeal, ***the appellants, Augustin Michael Mulandi, Mathias Mwinzi and John Mukelelya*** are dissatisfied with the decision of the High Court which declined to grant them interim orders for the reconnection and supply of water within Sultan Hamud by ***the respondent, Nol Turesh Water And Sanitation Co. Limited (Successor of National Conservation and Pipeline Conservation)*** which they contend was in breach of their constitutional rights to equal protection before the law and their right to fair trial.

By a Notice of Motion dated 1st September 2017, the appellants sought conservatory or interim orders to direct the respondent to reconnect their Water Account No. 060070026 *(the water account)* and allow them to continue selling water within the Sultan Hamud area pending the hearing and determination of the appeal. They also sought a declaratory that their rights to fair trial and equal treatment and protection under the law were violated contrary to ***Articles 27 (1)*** and ***47 (1)*** respectively of ***the Constitution***.

The application was brought on grounds that the respondent had on 21st August 2017, unreasonably and without notice disconnected the water account, with the result that several schools they supplied no longer had access to water for their domestic use; that the appellants regularly paid for the water supplied until, in breach of their constitutional rights, the respondent disconnected the water.

The application was supported by the affidavit of the 1st appellant who emphasized the grounds set out in the motion, but went further to depone that, as the owners and officials of the Kilia Water Project Self Help Group, they promptly paid their water bills and it was their legitimate expectation to continue to be supplied with water. They also particularized the violations as unreasonable, unfair and inhuman; that the disconnection of their water supply was done without valid reason, thereby depriving them of income and a source of livelihood, and it also denied the schools that benefitted from the water they supplied.

In a replying affidavit sworn on 1st November 2017, ***Jeremy Mutende***, the respondent's Managing Director, deponed that the respondent is a water service provider licenced by the Water Services Regulatory Board for the area; that the contract between the appellants and the

respondent was for the supply of water for domestic use and not commercial use, since it was a term of the contract that the consumer would not convey water for use outside their plot or sell any of the water supplied to them; that it had come to their attention that the appellants were engaged in selling and supplying water to schools and to other third parties and charging them exorbitantly for the water, which was contrary to the Water Act and infringed on the third parties' rights to affordable water; that furthermore, the appellants had usurped the respondent's position as the only licenced water supplier in the area, and consequently the respondent rightfully disconnected the water.

Finally, it was deponed that the High Court lacked jurisdiction to hear the dispute which ought to have been instituted before the Water Tribunal or the Environment and Land Court.

In declining to grant the conservatory orders sought, the learned judge determined that a prima facie case was not established; that the supply contract between the parties was governed by ***sections 119*** and ***121*** of the ***Water Act*** which provisions established a Water Tribunal to hear and determine appeals from decisions or orders of any entity authorized by the Cabinet Secretary, the Authority or Regulatory Board, which meant that, the Water tribunal and not the Constitutional court was the properly empowered forum to determine the parties' dispute. In so finding, the court concluded that it did not have jurisdiction, to hear and determine the petition.

The appellants were aggrieved by the decision of the High Court and filed this appeal on grounds that, the learned judge erred in holding that the appellants ought to have filed a case in the Environment and Land Court or the Water tribunal, and not in the Constitutional court; that the learned judge wrongly concluded that the appellants did not establish a *prima facie* case despite the evidence that showed that they had paid all the respondent's water bills; that the learned judge failed to appreciate that since the respondent was a public body wholly managed by the Athi Water Services Board and regulated by the Water Services Regulatory Board, it ought to have accorded the appellants a hearing, and in failing to do so, it had violated their right to fair administrative action under ***Article 47 (1)*** of ***the Constitution***; that the learned judge failed to appreciate that the disconnection of the water supply was inhuman, undignified and in breach of the appellants' economic and social right to have clean and safe water in adequate quantities, and the disconnection was tantamount to unreasonably monopolizing the water supply; that by conferring the dispute to the Water tribunal, the learned judge took into account irrelevant matters since the tribunal was not in existence in 2014.

Learned counsel for the appellants, ***Mr. Jaoko,*** filed written submissions which were highlighted on a virtual internet platform owing to the relenting spread of Covid- 19 pandemic. Counsel reiterated that the appellants' petition sought redress under ***Articles 43 (1) (d)*** and ***47 (1)*** of the Constitution for the violation of their right to fair administrative action; that the proceedings were properly filed in the Kajiado High Court. It was further argued that the respondent approved their application for the supply of water, and therefore it was the appellants' legitimate expectation to have the water supply continued uninterrupted.

There was no appearance for the respondent despite their having been served, and neither did they file written submissions.

This notwithstanding, we have considered the record of appeal and the appellants' submissions and are of the view that the main issues for determination are whether the trial court had jurisdiction to hear the dispute, and whether the learned judge was right to decline to exercise his discretion to grant the conservatory orders of reconnection and restoration of the water supply sought.

We begin with the complaint that the learned judge misdirected himself when he reached a finding that the High Court lacked jurisdiction to hear the dispute since ***sections 119*** and ***121*** of the ***Water Act*** established the Water tribunal to hear and determine appeals from decisions of the concerned authorities. We have considered the petition, and are of the view that by virtue of the nature of the complaint, the High Court had jurisdiction to hear the dispute. We say this because, it is clear that the appellants have complained of a breach of their rights under the Constitution. They have asserted that in disconnecting the supply of water, the respondent not only violated their right to water, but did so, without giving them an opportunity to be heard.

Under **Article 165 (3)** of **the Constitution** the High Court's jurisdiction is prescribed as follows;

> **"Subject to Clause (5) the High Court shall have;**
>
> **a. Unlimited original jurisdiction in Criminal and Civil matters.**
>
> **b. Jurisdiction to determine the question whether a right or fundamental freedom in Bill of Rights has been denied, violated, infringed or threatened.**
>
> **c. …"**

In addition, ***Article 23 (1)*** specifies that the High Court can hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

On the other hand, ***section 119*** of the Water Act specifies that;

> **"1.The tribunal shall exercise the powers and functions set out in this Act, and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision of the Cabinet Secretary, the Authority and Regulatory Board or any person acting under the Authority of the Cabinet Secretary, the Authority and Regulatory Board.**
>
> **2. In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism."**

The above makes it clear that the Water Act also provides for a dispute resolution mechanism to which appeals from decisions of prescribed authorities can be referred for determination.

And in the case of ***Albert Chaurembo Mumbo & 7 others vs Maurice M.* Munyao & 148 others** *[2016] eKLR* this Court observed;

> **"…under Article 3 of the Constitution, every person has an obligation to respect, uphold and defend the Constitution while Article 10 (1) provides that national values and principles of governance bind all public officers whenever they interpret the Constitution or make public policy decisions. The CEO of RBA and the Appeals Tribunal are public officers and or state organs and are bound to implement the Constitution. We are of the considered view that the jurisdiction of the High Court and or the Employment and Labour Relations Court to hear and determine the present dispute between the parties cannot be premised on the contention that the respondents' claim raises issues of violation of the constitutional right to property and consequently the CEO and Appeals Tribunal have no jurisdiction to consider constitutional violation of rights. It is our view that violation of constitutional rights can be raised in any forum that is competent to hear and determine a dispute between parties and such forum is bound by the Constitution in its interpretation and application of constitutional provisions and individual rights."** (emphasis ours)

Such that, even though the appeal's tribunal was specified as one of the dispute resolution forums that had the capability to hear and determine the matters in contention including constitutional questions, it nevertheless goes without saying that the Constitution as the supreme law has donated the High Court with a superior jurisdiction to determine constitutional questions, as well as civil and criminal disputes, together with supervisory, interpretive and enforcement powers, and therefore, its jurisdiction to hear and determine such questions cannot be ousted. The appellants having raised complaints of alleged constitutional violations have brought themselves within the remit of the High Court. And it was well within the court's jurisdiction to determine those matters, particularly in a case such as this that also involved matters pertaining to an extant contractual relationship between the parties.

As such, we find that the trial Court was wrong to conclude that it had no jurisdiction to hear the petition. The respondents were entitled to, and had the freedom to select the High Court as the forum in which to file their petition and pursue appropriate reliefs, and we so find.

On whether the learned judge rightly declined to grant the conservatory orders sought, the law is settled on the principles that this Court should take into account before interfering with the exercise of discretion of a trial court. In the case of ***Mbogo & Another vs Shah** **[1968] EA, p.15,*** it was emphasised that;

> **"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.**

In determining whether to grant the injunction sought, the learned judge rightly relied on the principles of injunctions set out in the case of ***Giella vs Cassman Brown Co. Ltd*** **1973 E.A. 358** where it was held that in order to grant conservatory orders or injunctions, as prayed, the court must be satisfied that;

> **The applicant had established a prima facie case with probability of success;**
>
> **b. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and**
>
> **c. where the court was in doubt that the application would be established on a balance of convenience.**

In this case, whether a *prima facie* case was made out turned on whether the appellants' demonstrated that there existed a valid water supply contract; whether there was any breach of the contract; whether the appellants were entitled to an uninterrupted supply of water by the respondent, and whether by disconnecting the water, the respondent violated their rights.

It is not disputed that the appellants entered into a water supply agreement with the respondent, on terms to which the appellants were agreeable. Up to the time of disconnection on 21st August 2017, the respondent complied with its obligation to supply the water, but it later asserted that the appellants had failed to adhere to the contractual terms, which are what led to the disconnection. The appellants' response was that the respondent's action of disconnecting the water was undertaken without affording them a hearing, thereby denying them the right to fair administrative action, which violated their rights. They further complained that they were not issued with a notice of disconnection.

In this regard, the veracity of the assertions and counter assertions, and whether the appellants' rights were violated or not are matters that have yet to be determined by the trial court. We cannot therefore make any determination at this stage. Suffice it to say that, contrary to the learned judge's conclusion, that a prima facie case was not made out, our view is that, the reasons advanced or the process adopted notwithstanding, given that it is not disputed that the appellants' water supply was disconnected by the respondent, we are satisfied that a prima facie case with a probability of success has been made out.

As to whether the appellants stand to suffer irreparable loss, it was their contention that following the water disconnection, many schools they were supplying were denied water. But in addition to failing to provide any particulars of alleged loss to the schools, the appellants have also failed to provide details of irreparable loss. As such, we agree with the learned judge that the appellants failed to demonstrate the loss to be suffered during the pendency of the suit, unless the orders sought are granted.

In view of the finding of a prima facie case, albeit that the appellants have not demonstrated what irreparable loss they will suffer during the pendency of the hearing, it behoves us to also consider where the balance of convenience lies.

As seen above, the appellants' complaint is that they have been deprived of water, and they therefore seek to obtain conservatory orders for reconnection of the water supply.

In effect, the water has already been disconnected, and the dispute that led to the disconnection is yet to be determined. Considering that a decision could go either way, we do not find it expedient to order a reconnection at this stage of the proceedings, as a contrary determination by the trial court at a later date could result in disconnection once again. Prudence would demand that a decision on reconnection await the outcome of the substantive hearing which would mean that the balance of convenience tilts in favour of maintaining the prevailing status quo, pending the hearing and determination of the petition.

As such, we have come to the same conclusion as the trial court, in finding that the learned judge rightly declined to grant the conservatory orders of reconnection sought, and we so find.

In sum, the appeal is dismissed, and in view of the nature of the suit, we make no orders as to costs.

It is so ordered.

Dated and delivered at Nairobi this 18*th* day of December, 2020.

M. K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR