



**China Home-In (Kenya) Company Limited v Nairobi City Water  
& Company Limited & another (Environment & Land Case  
376 of 2019) [2024] KEELC 7263 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7263 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 376 OF 2019**

**AA OMOLLO, J  
OCTOBER 17, 2024**

**BETWEEN**

**CHINA HOME-IN (KENYA) COMPANY LIMITED ..... PLAINTIFF**

**AND**

**NAIROBI CITY WATER & COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CHARITY KEMAMA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff's case against the 1<sup>st</sup> Defendant is for breach of contract. In its Plaintiff's case dated 25<sup>th</sup> November, 2019 and amended on the 20<sup>th</sup> of April, 2023, the Plaintiff contends that it has constructed a development known as Casa Mia on Land Reference Number 209/22201 (Original Number 209/396/4) and on the 4<sup>th</sup> of August, 2019, it made an application to the 1<sup>st</sup> Defendant for the connection of a sewer line to the development. That the 1<sup>st</sup> Defendant approved their application on the 5<sup>th</sup> of August, 2019 and proceeded to make the sewer line connection.
2. That despite having already connected the sewer line, the 1<sup>st</sup> Defendant, vide a letter dated 15<sup>th</sup> November, 2019 informed the Plaintiff that the 2<sup>nd</sup> Defendant claimed that the sewer line had been connected to her single (house) dwelling and that the same was done without her consent.
3. The Plaintiff blames the 1<sup>st</sup> Defendant for failing to involve him in the process that led to the disconnection of its sewer, particularly failing to inform them of the 2<sup>nd</sup> Defendant's complaint or inviting them to a site visit before the decision to disconnect the sewer was arrived at. That the 1<sup>st</sup> Defendant randomly decided to reconsider its previous position making it impossible for them to obtain a certificate of occupation to allow purchasers to occupy the development. That all the thirty-three apartments in the Development have been sold and the completion date in the agreements for sale was 31<sup>st</sup> October, 2019.



4. The Plaintiff pleaded further that it sought to cooperate with the 1<sup>st</sup> Defendant to resolve the issue of capacity of the sewer complained of but the request was declined. That it is safe to say the notice to move the sewer line was not made in good faith. The Plaintiff accuses the 1<sup>st</sup> Defendant of neglecting to respond to its efforts to find a suitable solution.
5. It is averred by the Plaintiff that to avoid further delay that may have caused disputes with the purchasers, it was constrained to build another sewerline. Through a letter dated 26<sup>th</sup> May 2020, the 1<sup>st</sup> Defendant approved the proposed sewer line under PDS No. 4434. That they paid K.Shs. 3,500,000 to Blewilab Plumbing Consultancy for the development of the new sewer line. They particularized these costs as special damages to be refunded by the Defendants for their unwarranted actions.
6. The Plaintiff prayed for judgement against the Defendants jointly and severally for:
  - a. A permanent injunction preventing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, employees or workers from removing or disconnecting or in any other manner interfering with the Plaintiff's sewerline connection for property L.R No. 209/22201 (original 209/396/4).
  - b. A declaration that the approval dated 5<sup>th</sup> August, 2019 was valid;
  - c. K.Shs. 3,500,000 as special damages for the construction of a new sewer line;
  - d. Interests;
  - e. Costs of the suit;
  - f. Interest on c and e at court rates until payment is made.
  - g. Any other relief that this Honourable Court may deem just and convenient.
7. The 1<sup>st</sup> Defendant's Statement of Defence is dated 15<sup>th</sup> July, 2020. The Defendant admitted that that the Plaintiff applied for a sewer connection and got all the necessary approvals from them. However, upon completion of the sewer connection, the 1<sup>st</sup> Defendant states that it received a formal complaint from the 2<sup>nd</sup> Defendant alleging that the sewer connection in the Plaintiff's property was done to a sewer line that passed through the 2<sup>nd</sup> Defendant's parcel of land without her consent. The 1<sup>st</sup> Defendant stated that it organised a site visit meeting immediately after they received the complaint, to establish the facts.
8. The 1<sup>st</sup> Defendant continued to state further that it was after the site visit meeting that they wrote to the Plaintiff on the 15<sup>th</sup> of November, 2019 advising him to get an alternative route for the sewer line because the site of the 2<sup>nd</sup> Defendant's sewer was meant for domestic use and could not handle the expected high-volume sewer effluent from the Plaintiff's development.
9. The 1<sup>st</sup> Defendant explained that the scope of the agreement between itself and the Plaintiff with regards to the approvals did not extend to the exact location of the intended sewer, but rather gave a general description of the route along Kibera Lane. That the decision to connect the sewer line on a point located on the 2<sup>nd</sup> Defendant's property was made unilaterally by the Plaintiff and was not endorsed by the 2<sup>nd</sup> Defendant.
10. The 1<sup>st</sup> Defendant stated that one of its mandates as a public body is to balance the interest of the Plaintiff, the 2<sup>nd</sup> Defendant and the general public and therefore the allegations of a vendetta against the Plaintiff should not arise. The 1<sup>st</sup> Defendant urged this Court to dismiss the Plaintiff's suit with costs.



11. I have not sighted both on the physical file or the CTS the 2<sup>nd</sup> Defendant defense to the Plaintiff's suit. What I found is a replying affidavit sworn on 10<sup>th</sup> December 2019 in opposition to an interlocutory application and another reply in opposition to the application for the re-instatement of the suit.
12. The hearing of the suit proceeded ex parte on the 19<sup>th</sup> of June, 2024. Neither the defendants nor their counsels were present in Court on this day despite being served with the hearing notice and even being informed that the hearing was proceeding by the Court Assistant.
13. CAI QINGZHU testified as PW1 and the sole witness for the Plaintiff. He testified in Chinese which was translated to English. He adopted his witness statement dated 6<sup>th</sup> June, 2023 as his evidence in chief and produced the documents on the Plaintiff's List of Documents dated 25<sup>th</sup> November, 2019 and the Supplementary List of Documents dated 20<sup>th</sup> April, 2023 as the Plaintiff's exhibits in support of their case.
14. Pw1 stated that he was in the real estate development business and he had developed Casa Mia apartments. That in the year 2019, he applied for a 200mm sewer line connection and an approval for a 225mm sewer connection was given by the Nairobi City County Water and Sewerage Company Limited. He averred that although they made the connection after the approval was given, they received a complaint from the 2<sup>nd</sup> Defendant that the sewer line had passed through someone's private property. According to him, the sewer line did not pass through any private property and in support of this aversion, he referred to the map stamped 5<sup>th</sup> August, 2019. He confirmed that the sketch map had been provided by the consult they had hired.
15. PW1 continued to state that after they received a letter from 1<sup>st</sup> Defendant that the sewer line will be disconnected they had to construct a new sewer line at a cost K.Shs. 3.5 million which according to the Plaintiff was not necessary. He produced the letter dated 26<sup>th</sup> May, 2020 being the approval for the new sewer line and which line still ended up being connected to the old line but through a different route. He produced the receipt for the construction of the new sewer line and sought to be compensated for those unnecessary costs they incurred for the re-construction of the new sewer line being KShs. 3.5million, legal costs and interest for both.
16. This Court sought an explanation on the existing road on both maps, to which PW1 stated his plot on the survey map is 209/396/4 neighbouring plot 209/1396/1 which was subdivided to create parcel 209/396/4. That the road exists between plot 1996/1 and 396/4. He explained further that the sketch map in the original bundle was prepared by the Plaintiff and was approved by a staff from the Nairobi Water and Sewerage Company Limited.
17. This marked the close of both the Plaintiff's and the Defendants' cases.

### **Submissions**

18. The Plaintiff's submissions are dated 5<sup>th</sup> July, 2024 and reiterated the cases of the respective parties as pleaded as well as the facts adduced during trial. It submitted on the following four issues for determination:
  - a. Whether the approval dated 5<sup>th</sup> August, 2019 granted by the 1<sup>st</sup> Defendant to the Plaintiff was valid;
  - b. Whether the initial sewer line was connected to a private property belonging to the 2<sup>nd</sup> Defendant;



- c. Whether the Plaintiff are entitled to compensation for the costs incurred following the Defendants' actions;
- d. Who bears costs of the suit.
19. On the first issue, the Plaintiff submitted that they made an application dated 1<sup>st</sup> August, 2019 to the 1<sup>st</sup> Defendant for the connection of a sewer line with a 200mm capacity which application the said Defendant allowed on the 5<sup>th</sup> of August, 2019 being satisfied that the Plaintiff had complied with all the requirements including payment of the requisite fees, providing drawings showing plan, ground levels and invert levels of the proposed drain. That the approval was granted based on the fact that the connection was to be made to a public drainage. That no evidence has been led to prove that the approval was irregularly acquired. They urged this Court to find that the approval dated 5<sup>th</sup> August, 2019.
20. While submitting on the second issue, the Plaintiff stated that a perusal of the survey map from Survey of Kenya indicates that there exists a way leave between the properties of the Plaintiff and the 2<sup>nd</sup> Defendant despite the latter's averments that the sewer was connected to her single house dwelling line on her freehold property. The Plaintiff contends that the 2<sup>nd</sup> Defendant has tendered no evidence to prove that the line was made to her private property. That in fact the new sewer line is still connected on the same line as the old one was despite the 2<sup>nd</sup> Defendant complaint. That it is clear that the decision to compel the Plaintiff to seek an alternative sewer route was not out of good faith but fueled by vendetta since the decision was made on the fictitious grounds.
21. The Plaintiff reiterated that no site visit was ever conducted as alleged by the 1<sup>st</sup> Defendant and that if one was done, the Plaintiff was never invited to one. That the fact that the 2<sup>nd</sup> Defendant did not file a statement of defence does not help to demonstrate the legitimacy of their claim.
22. On whether it is entitled to compensation, the Plaintiff submitted that the 1<sup>st</sup> Defendant's decision based on the unwarranted complaint occasioned it to incur further costs of K.Shs. 3,500,000 in developing a new sewer line which line was completely unnecessary. He relied on the Court of Appeal case of Jogoo Kimaika Bus Services Ltd vs. Electrocom International Limited (1992) KLR 177 where the Court held that:
- “Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
23. He relied further on the case of Swalleh C. Kariuki & Another Vs. Violet Owiso Okuyu (2021) EKLR where the Court held:
- “In regard to special damages the law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court.”
24. Lastly, on the issue of costs the Plaintiff while relying on the House of Lords decision in Reid, Hewitt and Co. Vs. Joseph Air 1978 Cal 1717 and Myers Vs. Defries (1880) 5 EX D 180 and urged this Court to award them costs.
25. The 2<sup>nd</sup> Defendant filed her submissions dated 13<sup>th</sup> July, 2024 despite not filing any response to the suit. She submitted that whereas the Plaintiff was given a permit to construct 84 units on their land parcel, it proceeded to construct 94 units illegally. She submitted that the sewer line originating from



the said development is located across an access road adjacent and extremely close to the 2<sup>nd</sup> Defendant's private registered property which was the reason of her complaint to the 1<sup>st</sup> Defendant. She submitted further that the Plaintiff was in direct violation of the EIA licence that he had been given by failing to indicate the massive scale of its development project to the relevant authorities while applying for the sewer line approval.

26. With regards to the payment of special damages, the 2<sup>nd</sup> Defendant submits that the said damages were not payable because the Plaintiff failed and/or ignored the conditions tied to the approval granted. That the damages were as a result of the Plaintiff's own breach of the law and as such must carry the burden of the relocation for non-adherence to the express and mandatory legal provisions outlined therein.
27. The 2<sup>nd</sup> Defendant disputed that Plaintiff had proved its case to the relevant standards and relied on the case of Ng'ang'a Vs. National Water Harvesting & Storage Authority (2022)EKLR where the Court quoted with approval the Supreme Court case of Raila Amolo Odinga & Another Vs. Independent Electoral And Boundaries Commission & 2 Others (2017) EKLR where the Court held thus:
- “...Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burdens keep shifting” and its position at any time is determined by answering the question as to who would lose if no further evidence was introduced.”
28. That the Plaintiff has not led evidence to specifically prove compliance with the laws and regulations and various conditions contained in the approvals of the project. She submitted further that the prayers sought had been overtaken by events since the sewer line had since been relocated from her land.

#### **Analysis and Determination:**

29. Having reviewed the pleadings, the evidence and the submissions tendered, the issues I frame that arise for determination are:
- a. Whether there existed a contract between the Plaintiff and the 1<sup>st</sup> Defendant and if so whether the 1<sup>st</sup> Defendant breached the said contract;
  - b. Whether the approval by the 1<sup>st</sup> Defendant dated 5<sup>th</sup> August 2019 was valid;
  - c. Whether the Plaintiff is entitled to the special damages of K.Shs. 3,500,000 sought;
  - d. Who should pay the costs of the suit.
30. The Plaintiff has a development on its land which required a sewer connection and so it applied for connection from the 1<sup>st</sup> Defendant on the 1<sup>st</sup> of August, 2019 as shown in PEx-1. The application was approved by the 1<sup>st</sup> Defendant on the 5<sup>th</sup> of August, 2019. The application was for an immediate connection of a 200mm capacity sewerage system. It was based on the urgency indicated on the application and the subsequent approval, the Plaintiff began construction of the sewer line.
31. Vide a letter dated 15<sup>th</sup> November, 2019, months after the Plaintiff's sewer line approval, the 1<sup>st</sup> Defendant rescinded its approval of the sewer line on account of a complaint by the 2<sup>nd</sup> Defendant. The contents of the said letter are:

Re: Sewer Connection on L.R No. 209/1396/4 off Ngong Road

Reference is made to a letter written to us by your neighbour Mrs. Charity Kemama of L.R No. 209/1396/4 complaining of your sewer connection done on 11<sup>th</sup> August, 2019 connecting



to her single (house) dwelling sewer line which is of low capacity to accommodate huge flow expected from your newly constructed apartments.

According to the complainant, the connection was undertaken without her prior knowledge/ consent as required by law yet (the existing sewer line is located within her free hold registered land).

In this regard, following our joint site and meeting held on 1<sup>st</sup> November, 2019, you are hereby advised to seek and construct alternative sewer extension through Ngong Road to serve your property. The new route should be designed and relevant approvals obtained for the same subject to our (NCWSC) supervision.

Note that this letter serves as a notice for you to relocate the mentioned sewer line within 14 days failure to which we shall remove/disconnect the same without further notice to you.

32. The Plaintiff stated that it was never given an opportunity to respond to the 2<sup>nd</sup> Defendant's allegations before the cancellation and particularly denied the 1<sup>st</sup> Defendant's averments that there had been a joint site visit meeting where the Plaintiff was invited. The Plaintiff argues that sewer line is a public property and so the complaint was without a basis. A sewer line is an easement anticipated under section 28 of the *Land Registration Act*. However, because the rights of the 2<sup>nd</sup> Defendant was likely to be affected, the plaintiff and the 1<sup>st</sup> Defendant ought to have sought her views under the doctrine of public participation provided for in article 10 of *the Constitution*.
33. The Plaintiff did not lead evidence to deny the defence raised by the 1<sup>st</sup> defendant and contained in the letter of 15<sup>th</sup> November, 2019 that the 2<sup>nd</sup> Defendant's development was a single dwelling. The Plaintiff has spoken of constructing the new sewer-line to join the old (what I can call as the main) line. If its argument that the line claimed by the 2<sup>nd</sup> Defendant was a public utility, but does not elaborate whether the said sewerline had capacity to serve the 94 houses comprised in the Plaintiff's development. Before undertaking its development, the Plaintiff was required under the applicable laws (Environmental Management and coordination Act and the Physical Land Use and Planning Act) to carry out environmental impact assessment.
34. One of the purposes of conducting the EIA process is to ascertain the infrastructure availability and adequacy. The Plaintiff has not adduced evidence to show that it presented such evidence to the approving authority of the adequacy of the sewerline serving the 2<sup>nd</sup> Defendant to accommodate the added housing units. Both defendants were not the approving authority for the Plaintiff's development as it turns out it reached out later to the 1<sup>st</sup> Defendant for such approval. I find no basis to hold them liable as there is no evidence of misrepresentation on the part of the 1<sup>st</sup> Defendant.
35. It is the mandate of the 1<sup>st</sup> Defendant to design capacity of sewer lines and the explanation was given to the Plaintiff vide the letter of 15<sup>th</sup> November, 2019 why the earlier approval was cancelled. First, that the 2<sup>nd</sup> Defendant was never informed/involved in the approval process and second that the existing sewer was for a single dwelling. For the Plaintiff to prove entitlement to the cost of re-constructing the sewer, it had obligation to demonstrate that the 2<sup>nd</sup> Defendant had been informed of the application dated 1<sup>st</sup> August, 2019. Or that the existing line that the 2<sup>nd</sup> Defendant claimed was for single dwelling could indeed serve multi-dwellings. No evidence was led in this regard hence the burden of proof was not discharged.
36. The 1<sup>st</sup> Defendant company carries out its operations on behalf of the County Government of Nairobi who has the powers to issue development permission under the Physical Planning and Land Use *Act no 13 of 2019* which provides for a dispute resolution mechanism. Instead of challenging the decision which cancelled the approval of 5<sup>th</sup> August 2019, the Plaintiff applied to construct the sewer line on an



alternative route. Once the request for the alternative route was granted, the Plaintiff is now estopped from seeking a declaration that the cancellation was unwarranted. As stated herein above, the Plaintiff did not adduce evidence to contradict the reasons offered by the 1<sup>st</sup> Defendant for the cancellation.

37. The upshot of the foregoing is my finding that the Plaintiff has not proved its case as require in law. Consequently, I dismiss the suit for want of merit with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> OF OCTOBER, 2024**

**A. OMOLLO**

**JUDGE**

