Obuon & another v Kisumu Water & Sewerage Company Limited (Tribunal Appeal E001 of 2024) [2024] WAT 1198 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] WAT 1198 (KLR)

REPUBLIC OF KENYA

IN THE WATER APPEALS TRIBUNAL

TRIBUNAL APPEAL E001 OF 2024

B OCHOI, CHAIR

JUNE 28, 2024

BETWEEN

CHARLES OMONDI OBUON ..... 1ST APPLICANT

PAULINE ODHIAMBO ..... 2ND APPLICANT

AND

KISUMU WATER & SEWERAGE COMPANY LIMITED ..... RESPONDENT

RULING

1. Before the tribunal is a Notice of Motion Application dated 21st March 2024. The application isbrought under the provisions of section 63 and 82(1) of the *Water Act* 2016, Order 51 Rule1, of the Civil procedure Rules, 2010, Cap 21 Laws of Kenya and Rule 21 of the Water appeal Rules 2007 and and all enabling provisions of the Law.

2. The applicant seeks the following orders;

    1. Spent.

    2. spent

    3. That pending the hearing and determination of this application filed herein, a temporaryInjunction do issue directed to the respondent herein, its servants, its employees and/or agents, restraining them from disconnecting and/or interfering with the water supply to the Appellants premises erected on Land Parcel No. Kisumu/Manyatta "A"/309 known as White Pearl Building.

    4. That the costs of this application be provided for.

    5. This this Honourable court be pleased to make and give any such further orders and directions asmay be just and fair in the interest of these proceedings.

3. The application is supported by an affidavit sworn on 21st March 2024 by Pauline Odhiambo the 2nd applicant and the following grounds set out on the face of the application;

    a. The appellants/Applicants are the owners of a residential property known as Land Parcel No. Kisumu/Manyatta "A"/309

    b. The said residential units are occupied with tenants with their respective water meters.

    c. There is no meter in arrears with respect to bills and /or readings by the respondent.

    d. The meters as well as the booster pumps were installed upon approval by the respondent havingfound the installation compliant with their standards.

    e. The respondent has since disconnected water supply without any sufficient and/or due notice onaccount of booster pump being improperly installed.

    f. The Appellants premises have been cut off supply of water to the prejudice of residents therein.

    g. The Appellants have been constrained to seek water supply of water from 3rd parties so as to fillin the tanks for the use of tenants on interim basis, a move which is not only expensive but does not guarantee supply of clean and water in adequate quantities as statutorily provided for.

    h. That the continued disconnection of the water supply would eventually lead to the tenants seekingto opt out of the tenancy agreements on the account of the premises being inhabitable and unsafe for human occupancy.

    i. Despite prior and post initiatives from the Appellant's side to have the issue amicably resolved, therespondent has been hellbent and /or malicious to discontinue the water supply for ulterior reasons with communication to the respondent eliciting no response.

    j. Unless the Honourable Board intervenes, the respondent shall continue with its arbitrary Act todiscontinue water supply to the appellants premises and thus subject the Appellants to irreparable /and or substantial loss.

    k. The application has been brought without inordinate delay.

    l. The plaintiff stands to suffer irreparable loss as the suit property is on the verge of being wasted

    m. It is in the interest of Justice that the orders sought are granted.

4. This matter came up for hearing Exparte in the first instance and the tribunal did grant interimorders in terms of prayer 1 and 2 of the application.

5. The application was opposed by the respondent vide a replying affidavit sworn on 23rd April 2024 by Thomas Odongo, the managing director of the respondent company.

6. When the application was ready for hearing it was agreed by consent that the same could becanvassed by way of written submissions. On 27/5/2024, the parties confirmed that their submissions had been filed and the application was reserved for ruling. THE APPELLANT/APPLICANT'S CONTENTION.

7. The Applicants contend that they are the owners a building comprising commercial andresidential units on the suit premises Kisumu/Manyatta "A"/309 known as White Pearl Building. That they applied from the defendant provision of water and sewerage services which application was approved and the respondent supplied the applicants with meters for the units in the premises which were installed with booster pumps with the approval of the respondent.

8. The applicants contend that the meters were assigned account numbers which have changed overthe years from 2018 as different tenants occupied the units but the appellants have always caused payment for the meters as billed. They contend that in 2023 the respondent's agents raised a concern as to the installation of booster pumps and arbitrarily proceed to disconnect water supply to the premises and slapped each account with punitive surcharges to the detriment of the of the applicants hence the application.

9. The applicants identified four issues for determination;

    i. Whether the Appellant /Applicants have established a primafacie case with probability of success, ii. Whether on the evidence and material placed before court, the appellant /applicants have satisfied the conditions upon which a temporary injunction can be granted

    iii. Whether the appellants/applicants will suffer irreparable loss /injury that cannot be compensated by an award of damages if the application for temporary injunction is not allowed. iv. In whose favour does the balance of convenience lie.

10. On the first issue the applicants submitted that a primafacie case was one on the material beforethe court, a tribunal properly directing itself will conclude their exists a right which has apparently been infringed by the opposite party .They submitted that they had presented proof of their proprietary interest over the suit land to which water was disconnected by the respondent. They submit that they have demonstrated that as a result of the disconnection it has made the premises uninhabitable in the absence of water and was likely to lead to loss of tenant's elements which cannot be quantified. The Applicants relied in this respect to Mrao vs First American Bank of Kenya and 2 Others [2003] KLR 125, Moses C. Muhia Njoroge & 2 others vs Jane W. Lesaloi and 5 others [2014] eKLR and Winfred Nyawira Maina Vs Peterson Onyiego Gichana [2015] eKLR among others.

11. On the 2nd issue the Applicants submitted that should the respondents not be restrained by anorder of injunction from disconnecting water supply to the suit premises, the respondent will proceed to do so and subject the premises to be inhabitable leading to loss of occupants a loss which shall lead to irreparable depreciation of the premises. They submit that in the event supply of water to the premises cannot be realized the same will be exposed to the danger of being damaged and the applicants will be denied gains from the same which would be complex to quantify.

12. On whether the applicants will suffer irreparable injury/loss which cannot be compensated bydamages, the applicant submitted that the right to have access to water that is clean and safe in adequate quantities is a right under *the constitution* and denial of the same amounts to a loss that cannot be quantified. The applicants relied in this aspect on the case of Shelfer Vs City of London Election Lighting co. [1895] I CH 287 at page 315 as cited with approval in the case of Registered Trustees of Jamie Masjid Ahl-Sunnait-Wal-Jamait Nairobi V Nairobi City County & 2 Others [2015] eKLR.

13. The Applicant final submitted that the balance of convenience tilted in their favours therespondent stands to suffer no prejudice as the bills as raised are settled but on the other hand in the event the Respondent is not barred from discontinuing water supply to the subject premises, the applicants stand to suffer greater loss in terms of having inhabitable premises and loss of their income.

The Respondents Contention

14. The respondent contends that the applicant lacks the locus standi to institute these proceedingssince they do not have accounts with the respondent.

15. The respondent submitted that the proceedings ought to have been instituted by the tenants oron their behalf with their authority as the dispute is between the service provider and its customers who are the tenants and as such the application and proceedings are bad in law.

16. The respondent contends that the Appeal Board lacks jurisdiction to deal with the matter asthere was no privity of contract between the applicants and the respondent

17. The respondent also contends that there was a report received that the meters at the applicants'premises were faulty with 21 out of 25 under registering consumption thereby causing the respondent losses which was caused by direct installation of the booster pump to the meter contrary to the terms and conditions of the water and sewerage services contract.

18. The respondent contends that it is within the rights of to disconnect supply of water andsewerage services for contravention of its terms and conditions contained in the contract of supply and any loss and damage such disconnection may cause to an offending customer is not a fault on its part but a natural and ordinary consequence of the customer's commission or omission for which it remains inculpable

Issues For Derermination

19. Having considered the submissions by all the parties and upon perusal of the pleadings herein i will frame the issues for determination as follows.

    a. Whether the applicants have the locus standi to institute these proceedings

    b. Whether this Honourable court has the jurisdiction to determine this application

    c. Whether the application meets the legal threshold for grant of an order of injunction

    d. Who should pay the costs of the application.

    e. Whether the Water Tribunal has Jurisdiction to deal with this matter

    f. Whether the threshold for grant of an injunction have been met.

Analysis And Determination

Whether the applicants have the locus standi to institute these proceedings

20. The respondent submits that the applicants lack locus standi to institute these proceedings intheir name for reasons that being landlords they only guarantee to ensure that a vacating tenant has cleared his or her bill and also notify the respondent of change in tenancy so as to confirm that there is no outstanding bill owed failure to which they are liable to pay the full water bill in place of the tenant who vacates without paying. They submit that the contract of water service is between the service provider who is the respondent and the tenant and not between the landlord and the service water provider

21. The respondent submits that the respondent has contracts with the tenants and theseproceedings ought to have been brought on their behalf with their authority and in the absence of such authority the applicant lacks locus. In response to this the applicants in their further affidavit stated that the contracts to supply water and sewerage services to the premises was made between the Applicants and prior to the occupation of the premises by the tenants and therefore have the locus to institute the suit.

22. Upon perusal of the statement of Appeal , this Notice of motion ,the supporting affidavit and theresponses it is clear that the cause of action in this matter revolves around the disconnection of water

to the applicants premises known as White Pearl building on the grounds that there were wrong water meter installations in particular that the meters in the building are fitted with in line pumps against the terms and conditions of the contract for the supply of water by the respondent. According to the Appellant /applicant the meters were installed with the approval of the respondent when applying for connection of water.

23. On the issue of who the water supply contract was with, I agree with the applicant /appellantthat the contract was between the respondent and the appellants and not the individual tenants occupying the units. This can be ascertained from the replying affidavit sworn by Thomas Odongo , he avers that before the water was disconnected, a meter reader noted faulty meters and reported to the respondent who sent their Engineer to the premises, the engineer noted the faulty meters and a letter was written to the 2nd respondent who was advised to make certain changes to the pumps before the faulty meters could be replaced(refer to the annexure marked TO4) . If the contract was between the tenants and the respondent then this Notice should have been to the individual tenants. The managing director of the respondent actually refers to the terms and conditions of the water supply contract in the Notice confirming that the same was between the respondent and the appellants. Its common Knowledge that the duty of tenants in a leased premise is to pay for utilities but it is not for them to apply for connection of water to premises, that is normally the duty of the landlord like in this case.

24. The issue in this matter is alleged faulty or illegal installation of in-line pumps to the watermeters in the premises and not nonpayment of bills by any particular tenant, the issue is between the appellant and the respondent and therefore I disagree with the submissions by the respondent that the appellants ought to have filed a representative suit. I therefore find that the appellants have locus standi to institute the suit and the court has jurisdiction to hear and determine the as there is privity of contract between the respondent and the appellants.

Whether the application meets the legal threshold for grant of an order of injunction

25. The guiding principles for the grant of orders of temporary injunction are well settled and are setout in the judicial decision of Giella Versus Cassman Brown (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts notably Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> "in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to,
>
> a) establishes his case only at a prima facie level
>
> b) demonstrates irreparable injury if a temporary injunction is not granted and
>
> c) ally any doubts as to b, by showing that the balance of convenience is in his favour.

26. These are the three pillars on which rest the foundation of any order of injunction interlocutoryor permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially". The applicant herein therefore ought to first, establish a prima facie case. In Mrao Limited v First American Bank of Kenya Ltd and others [2003] KLR 125, , the Court of Appeal stated that a prima facie case is one Which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

27. I this matter the appellant allege that water was disconnected to their premises which isinhabited by many tenants and yet there was no outstanding bill by any of the tenants, the appellants argue that the installations were in place from the time the meters were connected and with the approvals of the respondent and that for over five years they had been in existent the respondent had never questioned or challenged the same. respondents do not allege any unpaid bills but confirm infringement various breaches by the appellants including connecting booster pumps directly to the water service lines and using meters that had been discontinued /suspended or closed contrary to the terms and conditions of the water and sewerage services contract. My take is that since there is no evidence that the meters were recently connected the applicant appears to have a good case which though will be proved by evidence during a full hearing of the matter I am however persuaded that the applicants have demonstrated a primafacie case with a likelihood of success.

28. Secondly, the applicant has to demonstrate that irreparable injury will be occasioned to him if anorder of temporary injunction is not granted. The judicial decision of Pius Kipchirchir Kogo Vs Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

29. The question then is what injury will the applicant suffer if the application is not granted? Theapplicant states that the premises are occupied by tenants and the right to have access to water that is clean and safe in adequate quantities is a right under *the constitution* and the denial of the same amounts to unquantifiable loss. I will agree to this especially considering that the issue in this matter is between the appellants and the respondent while the consumers of the water which is disconnected are 3rd parries who depend on the landlord to have water in the premises probably not aware of the issues between the water provider and the landlord and who may file action against the appellants if they do not provide water.

30. The last requirement for grant of injunction is that the Applicant has to demonstrate that thebalance of convenience tilts in his favour. In the case of Pius Kipchirchir Kogo Vs Frank Kimeli TenaiB(2018) eKLR (supra), the court explained the concept of balance of convenience as follows;

> "The meaning of balance of convenience in favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

31. Applying the above principal to the facts of the case I find that the balance of convenience tiltstowards the appellant considering the circumstances on the ground that there are third parties occupying suit premises who will be inconvenienced with the disconnection while on the other hand if the suit is ultimately dismissed the respondent can always get costs.

32. I therefore find that the application has merit and allow the application in terms of prayer 4. Costs will be in the cause.

33. The matter to be mentioned on 5/72024 for pretrial directions.

SIGNED AND DELIVERED AT NAIROBI THIS 28TH JUNE 2024

HON B.M OCHOI CHAIRMAN

SIGNED BY: HON.BERNARD OCHOI

THE JUDICIARY OF KENYA.

WATER TRIBUNAL

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DATE: 2024-06-28 15:06:00+03

The Judiciary of Kenya