



**Kifaru Place Limited v Nairobi City Water & Sewerage Company Limited
(Complaint 3 of 2023) [2024] WAT 1200 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] WAT 1200 (KLR)

**REPUBLIC OF KENYA
IN THE WATER APPEALS TRIBUNAL
COMPLAINT 3 OF 2023
B OCHOI, CHAIR
MARCH 15, 2024**

BETWEEN

KIFARU PLACE LIMITED APPLICANT

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT

RULING

Background

1. This ruling is in respect of a Notice of Motion Application dated 20TH June 2023 filed under certificate of urgency. The application is brought under the provisions of Section 119 and 121(2) of the Water Act 2016, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Section 3 and 3A of the [Civil procedure Act](#) and all enabling provisions of the law.
2. The applicant seeks the following orders;
 1. Spent.
 2. That pending the hearing and determination of the Appeal, the water bills issued by the respondent be declared irregular and be deemed null and void.
 3. That the respondent be barred from taking any action against the applicant including but not limited to disconnecting the applicant's water supply pending this application.
 - 4) That costs of this application be provided for.
3. The application is based on six grounds set out on the face of the application and supported by an affidavit sworn on 21st June 2023 by Joseph Mutuku Mutie the applicant's Director.
4. As stated above the application was filed by way of certificate of urgency and in the first instance the court granted interim orders in terms of prayer (3) of the application. The Application was served



and the respondent filed a replying affidavit sworn on 1st august 2023 sworn by Ruth Chege a Zonal Revenue Coordinator central Region Nairobi.

5. The parties herein initially attempted an out of court settlement but the same did not succeed and parties agreed to proceed with the matter by way of submissions. The Applicant adopted the supporting affidavit in submissions while the respondent filed written submissions dated 5/2/2024.

The Applicant's Contention.

6. The Applicant contends that it has leased property known as LR.NO. NAIROBI/BLOCK 93/1250 as its place of business since the year 2018 and has maintained water account number 5139419 registered in the name of Kamau Wambugu Weston the Lessor and that the said account has been diligently maintained and the applicant has promptly paid monthly bills upon issuance.
7. It contends that on the 13th June 2023, the applicant received a letter from the respondent dated 11th May 2023 demanding arrears of Ksh. 503,114/= and threatening legal action from the date thereof if payment was not made.
8. The applicant contends that the respondent has demanded payment of unpaid bills allegedly from 21st September 2022 which are fictitious and unjustified and seeks the intervention of the tribunal to address the unjustified demands.

Respondent's Response.

9. The respondent contends that it had been supplying water to the claimant in respect to account number 5139419 which was being billed on monthly basis and the claimant was always duly informed before settling the amounts due.
10. That the respondent detected a drop in consumption of the water by the claimant/applicant over a long period of time which necessitated the respondents to carry out an inspection tour of the applicant's premises in an effort to detect the source of the supply.
11. The respondent contends that on 7/6/2022 they discovered an illegal water connection to the premises and they decided to disconnect the illegal connection and later upon re-inspection of the place the respondent confiscated a car wash machine in an effort to have the applicant honor the summons and that on 9th June 2022, the applicant's manager was arrested and detained at industrial area police station vide OB No 48/09/06/2022 prompting the applicant's representative visiting the respondent's offices for a purported out of court settlement of which terms were agreed on and on 14th June 2022 the respondents team and the applicants team held a meeting at the central region office the Agenda being the Kifaru Ltd customer disconnection recovery calculations and the basis and customers explanations and presentation.
12. The respondent contends that the applicant was issued with a fraud charge voucher for the said account indicating the amount payable for fraud which was Ksh.100,000/= and the applicant paid the amount and issued with a receipt. That thereafter the applicant was issued with a demand Notice for the amount lost by the respondent as a result of the illegal connection which amounted to Ksh. 472,935.40/= which was as a result of undercharge and illegally consumed water and therefore the amount demanded was justified in the circumstances.
13. The respondent contends further that the applicant will not suffer any irreparable loss as claimed since the amount claimed is for services already rendered. He also contends that the applicant had filed a similar suit in Milimani HCCC E181 of 2022 which was dismissed by the High court



Issues for Determination

14. The respondent in its submissions identified two issues for determination i.e., whether the plaintiff/applicant's application has met the criteria for grant of orders sought and secondly who should meet the costs of the application. I adopt the above as the issues for determination.

Analysis and Determination.

15. I have read the application, affidavit in support of the application, replying affidavit and their accompanying annexures. I have also considered and weighed the rival submissions in this application and also taken into consideration the judicial decisions cited and attached. In regard to the first issue, the guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR which was cited by the respondent, 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) allay any doubts as to b, by showing that the balance of convenience is in his favour.

16. These are the three pillars on which rest the foundation of any order of injunction interlocutory or 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”.
17. The applicant herein therefore ought to first, establish a prima facie case with a likelihood of success. In this case the applicant states that the respondent has made unlawful demands through bills which are fictitious, it contends that it has been paying bills regularly and has no outstanding bill and that if the water is disconnected he was likely to suffer substantial loss. The applicant attached a copy of the demand note. The respondent on the other hand acknowledges making demands for payment of money to the complainant and explained that the money was money accrued from water consumed by the applicant who had made illegal connections and consumed water illegally. The respondent claimed that the matter was reported to the police and some arrests were made of the applicant's representative and the applicant took responsibility and agreed to settle the matter out of court. Annexure RC-2 “and RC-3 “in the respondents replying affidavit confirm the same. It is noted that when the applicant was served with the replying affidavit it did not seek leave to file a further affidavit and therefore did not dispute that the amounts claimed were due to illegal water connection. It is clear from the above therefore that the amounts demanded by the applicant were as result of an illegal connection by the applicant who had acknowledged and agreed to having illegally connected water to its building. The demands for payment of the money therefore in my view were not irregular and unjustified as claimed but were well known to the applicant and admitted by the applicant. The applicant in the circumstances cannot be said to have made out a prima facie case with a probability of success. One would ask what success can a wrong doer have against the person he has wronged? I think none at all. The tribunal finds that a prima facie case has not been established by the applicant. In the case of *National Bank of Kenya & 2 Others vs Sam-con Ltd* [2003] eKLR, it was held that the court will decide an application for injunction on balance of convenience only if it is in doubt whether a prima facie case has been proved or not. Having found that a prima facie case has not been established I hereby dismiss the application dated 20th June 2023.



18. It was alleged in the replying affidavit of the sworn by Ruth Chege that a similar suit had been filed by the applicant in Milimani HCCC E181 of 2022 and if that is the case then I will urge the parties to address the issue of Res Judicata before this matter is fixed for hearing.

Who Shall Bear the Costs of the Application?

19. On the issue on costs, section 27 of the [Civil Procedure Act](#) provides that costs shall follow the event. The court having declined to grant the injunction it is ordered that the claimant applicant will pay the respondents costs of the application.

SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024

HON B.M OCHOI

CHAIRMAN

WATER TRIBUNAL

SIGNED BY: HON.BERNARD OCHOI

