



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E346 OF 2021**

**SALFORD INVESTMENT LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NAIROBI CITY WATER AND SEWERAGE CO. LTD.....DEFENDANT/RESPONDENT**

**RULING**

1. This is the ruling in respect to the Plaintiff's/Applicant's application dated 29<sup>th</sup> September 2021. The application seeks for the following orders: -

i) Spent...

ii) Spent...

iii) *THAT pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the respondents either by itself, their agents, servants and or personal representatives from interfering with the connection of the borehole water meter in order to cut off the Applicant's water supply.*

iv) *THAT pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the respondents either by itself, their agents, servants and/or personal representative from interfering with the sewerage and sewer line for the Applicant.*

v) *THAT costs of this Application be provided for.*

2. The Application is based on the grounds on its face and supported by an affidavit sworn by **Patel Harilal Dhanji** a director of the Applicant's company. The said application is opposed vide a replying Affidavit sworn on 2<sup>nd</sup> November 2021 by **Peter Adigora** the Security Officer in charge of the Eastern Region of the Respondent's company.

3. It was the Applicant's Case that he has a borehole for the provision of water on the premises located at L.R No. 9042/570 along Kabasoro Road next to Aviation School on the Airport North Road Embakasi, Nairobi.

4. The Applicant averred that on or about 1<sup>st</sup> September 2021, the Respondent's Agents accessed the premises and disconnected the water meter without notice or documented proof of tampering of the meter which they alleged has been committed by the Plaintiff.

5. It was the Applicant's contention that they were not furnished with any documented proof of tampering and any notice to confiscate the water meter.

6. The Applicant added that on the 3<sup>rd</sup> of September 2021, upon enquiry at the Respondent's offices on the disconnection of the said meter owing to the lack of water supply, they were condemned to pay a fine of Ksh 100,000/- and pay an additional amount of Ksh 25,800/- as payment for procurement of new borehole water meter.

7. The Applicant also averred that owing to the Respondent's action they are forced to purchase their own borehole meter at the cost of ksh 25,800/- The new borehole water meter was connected and it subsequently started recording the water supply.

8. The Applicant further stated that they were served with a pending water bill of ksh 511,995.31 which they disputed.

9. It was the Applicant's further contention that owing to the disruption of the water supply, the long standing tenants currently at the premise have threatened to issue notice to vacate and in view of this, they stand to suffer irreparable loss.

10. The Respondent strongly opposed to the application. They contended that the Applicant had tampered with the water meter since the water was being consumed yet the readings were going downwards.

11. The Respondent averred that from the three billing cycles, the meter in July 2021 had a previous reading of 2396 units and a current reading of 663 units showing negative consumption of -1733 units, whereas the month of August the 14<sup>th</sup> previous reading is 2396 units and the current reading is 662 units hence a negative consumption of - 1734 units yet the Applicant was consuming water. The Respondent annexed copies of the print outs showing the said meter reading as annexures marked 'PA-01'

12. The Respondent further stated that the Applicant had concealed material information of the court. The Respondent added that on 3<sup>rd</sup> September 2021, the Applicant through its Advocate one Austin Otieno Odoyo from Kipkenda & Co Advocates had signed a liability form acknowledging the tampering and the reversing of the meter and committed to paying a fraud charge of ksh 100,000/- and a further amount of Ksh 25,800/ for a new meter.

13. When the matter came up for directions on 6<sup>th</sup> October 2021, the Court directed the parties to canvass the application by way of written submissions. Both parties filed their respective submissions. The Applicant's submissions were filed on 18<sup>th</sup> October 2021 through the law firm of **E.K Kinyanjui & Co. Advocates** while the Respondent filed their submission through the firm **Mckay and Company Advocates on 3<sup>rd</sup> November 2021.**

14. I have considered the Application, Affidavits by parties, authorities relied upon and the issue for determination in my opinion is whether or not the Applicant has met the threshold for the grant of the prayers of injunction sought.

15. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court restated the law as follows:

*"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*(a) establish his case only at a prima facie level,*

*(b) demonstrate 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.*

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima*

*facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.*

*It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”*

16. While reiterating the said principles, **Ringera, J** (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002* stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

17. It was therefore held by **Ringera, J** (as he then was) in *Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001*:

*“The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity.”*

18. It was therefore held in *Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991* by the Court of Appeal stated as follows:

*“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”*

19. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure Act* or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

20. What then constitutes prima facie case" In the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, the Court of Appeal held as follows:

*"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."*

21. While adopting the same position the Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR added that:

*"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."*

22. In the instant case, the Applicant submitted that they were not given any particulars on the alleged tampering by the Respondent. However, upon perusal of the Respondent's Replying Affidavit, it was submitted that the negative meter reading could either have been from tampering or erroneous reading from the water meter. At this stage, it the issue as to what exactly led to the negative readings cannot be conclusively determined at this stage. As was stated by **Ringera J** (as he then was) in the *Airland Tours case* (*supra*) where facts are disputed at the interlocutory stage, the Court may consider to adopt a prima facie view.

23. The Respondent had also submitted that the Plaintiff had not disclosed to the Court that they had been fined and subsequently paid Ksh 100,000/- as a liability for fraud. However, the Court notes that the Applicant had indeed revealed that fact and further indicated that the said penalty was paid out of coercion and even produced annexures 'PDH – I' to confirm the same. As such it is not true as submitted by the Respondent that the Applicant had concealed this material fact. The Court finds that this fact had been disclosed at paragraph 3 of the supporting Affidavit and paragraph 11 of the plaint. As such, the court finds that indeed a prima facie case has been established by the Plaintiff.

24. On the issue of irreparable loss, the Applicant submitted that due to the actions of the Respondent, the tenants who have had long standing tenancies have threatened to issue vacation notices and as such he stands to lose out. The Respondent countered this position by submitted that no evidence has been laid before this Court showing that the tenants have vacated and or threatened to vacate and further that the value of water connection and supply can easily be ascertained. However, the Court is of a different view. While the pricing of water can be quantified through the water bill, the cumulative effect and significance of lack of water in human life cannot be quantified to warrant compensation of its loss, this is synonymous with the saying that, '*water is life*'. The normative content of the right to water is set out in UN General Comment 15; that the substantive contents of the right to water

include availability, accessibility and quality. The Comment stipulates that; *“the right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”* Lack of water may lead to applicant’s tenants to suffer any health concerns, the same may not be compensated by costs. As such the Court finds that the Applicant stands to suffer irreparable loss.

25. The balance of convenience also lies in favour of the Applicant. Water is an important commodity to human beings which should be accessed by all. It is also no doubt that save for the Applicant, we also have tenants in the premises who will stand to suffer should they not access the water.

26. Accordingly, the application is allowed in the following terms:

*i) The Applicant to continue paying the current water bill as and when it falls due.*

*ii) The issue of the undisputed water bill of Ksh 451,400/- to be resolved during the trial of the suit.*

*iii) A temporary injunction is hereby issued restraining the Respondent either by itself, agents or servants from interfering with the connection of the borehole water meter in order to cut off the Applicant’s water supply pending the hearing and determination of this suit or until further orders.*

*iv) A temporary injunction is hereby issued restraining the Respondent either by itself, agents or servants from interfering with the sewerage and sewer line of the Applicant unless otherwise lawfully provided under any other written statute pending the hearing and determination of this suit or until further orders.*

*v) Each party to bear its own costs of the application.*

21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF NOVEMBER 2021**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Ngunjiri Gichere h/b for Mr. Michuki for the Plaintiff/Applicant**

**Ms. Muriranja h/b for Mr. Nyaosi for the Defendant/Respondent.**

**Court Assistant; Caroline Nafuna.**



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