



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Suit 571 of 2011**

**EVERLYNE A. BONYO.....PLAINTIFF**

**VERSUS**

**MOMBASA WATER SUPPLY & SANITATION**

**COMPANY LIMITED .....DEFENDANT**

**Coram:**

Mwera, J.

Odongo for Plaintiff

Otieno for Defendant

Court Clerk Furaha

## **RULING**

In the notice of motion that the plaintiff brought under Order 40 rule 2 of Civil Procedure Rules and sections 1A, 1B, 3, 3A, 63(e) of Civil Procedure Act, she sought one main order:

(i) that a mandatory injunction be issued directing the defendant company to reconnect water supply to her premises.

It was contended in the grounds that the defendant disconnected the water supply on 1<sup>st</sup> October, 2011 without notice and despite the fact that the applicant had paid reconnection charges and also made an additional deposit. The action caused the plaintiff loss and damage. She had no arrears of payments on her account No. K3-001-06700. The plaintiff could only surmise that the defendant's action was meant to ultimately withdraw her permit to operate a water kiosk and thus cause her economic prejudice. She proposed to make a deposit of Shs. 40,090/= in court as per the defendant's letter dated 7<sup>th</sup> October, 2011.

In the supporting affidavit the plaintiff averred that she paid Shs. 4,000/= reconnection fee together with additional deposit (annexture "B") even as she doubted the basis for the demand for additional deposit. To demonstrate to the defendant that she had paid all the past bills, the plaintiff deponed that she availed some receipts for May, June and July, 2011 but the defendant demanded that all past receipts be furnished alleging that there had been a fraud (annexture "C"). That the explanation by the plaintiff was not accepted and at some point she filed a judicial review application HC Miscellaneous Application 83/2011. The actions of the defendant were viewed to be in bad faith and intended to prejudice the plaintiff who claimed that she had invested over Shs. 1.6 million in the water kiosk. That the defendant should not have disconnected the water supply but instead moved to discuss the plaintiff account, if it had any problem, with view to resolve the same. The plaintiff appears to have annexed more exhibits (D to F) without explanation why in the affidavit.

By the replying affidavit by Moses Kinya, the defendant's managing director, the court was told that the reason for the disconnection conveyed to the plaintiff was that the purported payment of bills was through manipulation of the defendant's accounting system. Her account had been irregularly and fraudulently maintained to the defendant's loss and detriment. The applicant furnished to the defendant paid bills for May, June and July, 2011 and by them the alleged fraud was unearthed. The defendant had also noted huge disparities in payments made previously yet the plaintiff had failed to avail originals of previously paid bills. It was added that the plaintiff's annexture "F" (not explained, see above) showing that as at 4<sup>th</sup> July, 2011 she paid Shs. 9,305/= so as to appear to owe no arrears, was part of the fraud. The plaintiff was obliged to make available all the original paid bills to sort out the issue; the defendant had no ill-will towards the plaintiff. The alleged fraud had been reported to the police. The plaintiff did not deserve the orders sought. There is on record an amended defence in which the defendant pleaded fraud against the plaintiff.

On 14<sup>th</sup> February, 2012 the court granted orders to reconnect the plaintiff's water supply and to maintain the same as long as the plaintiff paid her bills on time.

When the matter came up for *inter partes* hearing, both sides filed submissions.

The plaintiff's side maintained its story as per the affidavit and similarly the defendant did likewise but with many authorities cited.

In determining this application it is not in doubt that the subject water supply was disconnected and

the plaintiff felt aggrieved. The defendant's position was that that action followed a suspected fraud or manipulation in the plaintiff's payment of bills particularly covering the month of May, June and July, 2011. The defendant demanded that originals of receipts be furnished but apparently the plaintiff did not comply. The defendant suspected a loss to it of about Shs. 40,000/= through the suspected fraud. The plaintiff has offered to deposit that sum adding that the dispute would rather have been discussed and probably resolved and not answered by water disconnection. The plaintiff has not demonstrated any incident to the effect that the defendant had an ill-motive here.

In this court's view, the order to restore/maintain water supply to the plaintiff's kiosk remains. She should pay the bills as they fall due. She should deposit Shs. 40,000/= in court within the next twenty one (21) days as she offered until the determination of the suit or further court order. In the same twenty one (21) days the plaintiff should avail the originals said to have been issued to her in May, June and July, 2011 (Nos. 219589, 220983, 222048) as demanded by the defendant in its letter of 7<sup>th</sup> October, 2011. These will definitely form the basis to discuss the dispute as the plaintiff would wish. The plaintiff will also do well to cooperate and avail such material as will be required for the two sides to resolve their dispute. In default of the foregoing, the defendant will be at liberty to take any course open to it in such cases.

Those are the orders of the court.

Costs to the defendant.

Delivered on 20<sup>th</sup> September, 2012.

**J. W. MWERA**

**JUDGE**



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