



REPUBLIC OF KENYA



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**Export Processing Zones Authority v Mavoko Water and Sewerage Company Limited
& 3 others; Water Services Regulatory Board (Interested Party) (Environment &
Land Petition 11 of 2019) [2023] KEELC 17625 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17625 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION 11 OF 2019

A NYUKURI, J

MAY 17, 2023

**IN THE MATTER OF: ARTICLES 2, 10, 22, 23, 40, 42, 47
AND 258 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER THE ABOVE ARTICLES OF THE CONSTITUTION**

AND

**IN THE MATTER OF: EXPORT PROCESSING
ZONES ACT, CAP 517 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF: WATER ACT, 2016

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT

AND

**IN THE MATTER OF: LEGAL NOTICE NO. 74 OF 1997 ISSUED UNDER
KENYA GAZETTE SUPPLEMENT NO. 42 PUBLISHED ON 6TH JUNE 1997**

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY PETITIONER

AND

MAVOKO WATER AND SEWERAGE COMPANY LIMITED . 1ST RESPONDENT

NAIROBI WATER AND SEWERAGE COMPANY LIMITED 2ND RESPONDENT

MINISTRY OF WATER AND SANITATION 3RD RESPONDENT



THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

WATER SERVICES REGULATORY BOARD INTERESTED PARTY

RULING

Introduction

1. Before court are three applications. The Notice of Motion dated 5th July 2019 was filed by the Petitioners seeking conservatory orders; the Notice of Motion dated 19th July 2019 was filed by the Interested Party seeking joinder and the Notice of Motion dated 20th July 2019 was filed by the 1st Respondent seeking for review, setting aside, or varying the *ex parte* interim orders of 8th July 2019 and to stay the Motion dated 5th July 2019 on account of the *sub judice* rule.

Application dated 5th July 2019 filed by the Petitioner

2. In the Notice of Motion dated 5th July 2019, the Petitioner sought the following orders;
 - a. Spent
 - b. Spent.
 - c. Spent.
 - d. Spent.
 - e. Pending the hearing and determination of the Petition, a conservatory order by way of an injunction do issue stopping the Respondents whether by themselves, their officers, employees and/or agents, from trespassing onto, damaging, controlling, accessing, installing meters, off-takes and/or any other devices, and/or interfering and/or continuing to interfere in any manner whatsoever, with the Petitioner's water infrastructure including the 19 km trunk main from Firestone, 8,500m³, ground level reinforced tank at Beacon Ranch Mlolongo, 18m³ elevated steel tank and distribution mains at Kitengela, water mains to the 50m³ stone tank at Pump House, Pump House and ancillary works, 12.9 km of 250mm diameter rising falling to 2000m³, reinforced concrete 7.5 km from Kitengela and 5 km distribution mains (herein all referred to as the Petitioners water infrastructure). In particular and for the avoidance of doubt;
 - a. The Respondents be compelled to take away, pull down or otherwise remove all, metres, installations, fixtures, fittings, effects and/or any assets whatsoever, installed on the Petitioner's water infrastructure or any part thereof, pending the hearing and determination of this application.
 - b. Upon such removal, the Respondents do make good to the reasonable satisfaction of the Petitioner all damage caused by such removal.
 - c. In default of compliance with this order, the Petitioner be at liberty to remove all metres, installations, fixtures, fittings, effects and/or any assets whatsoever installed on the Petitioner's water infrastructure and to recover the costs of such removal from the Respondents.



- f. Pending the hearing and determination of the Petition, a conservatory by way of an injunction be issued restraining the Respondents whether by themselves, their officers, employees and/or agents, from trespassing onto, damaging, controlling, accessing, installing meters, off-takes and/or any other devices, and/or interfering and/or continuing to interfere in any manner whatsoever, with the Petitioner's water infrastructure including the 19 km trunk main from Firestone, 8,500m³, ground level reinforced tank at Beacon Ranch Mlolongo, 18m³ elevated steel tank and distribution mains at Kitengela, water mains to the 50m³ stone tank at Pump House, Pump House and ancillary works, 12.9 km of 250mm diameter rising falling to 2000m³, reinforced concrete 7.5 km from Kitengela and 5 km distribution mains (herein all referred to as the Petitioners water infrastructure).
 - g. Pending the hearing of the Petition, a conservatory order do issue restraining the Respondents whether by themselves, their officers, employees and/or agents, from interfering in any manner whatsoever, with the Petitioner's statutory roles and responsibilities for the provision and/or supply of water within the boundaries of the Export Processing Zones area and certain properties outside them but along the pipeline route from the Nairobi City Council Water Supply off-take near Firestone Factory.
 - h. The Honourable Court do grant any order it deems just to grant in the circumstances.
 - i. The costs of this application be provided for.
3. The application was predicated on the grounds on its face and the supporting affidavit sworn by George Makateto, the Acting Chief Executive Officer of the Export Processing Zones Authority (hereinafter referred to as the Petitioner or EPZA). The Applicant's case was that the Petitioner, a state corporation is mandated under the [Export Processing Zones Authority Act](#) (hereinafter referred to as the Act) to spur economic growth by promoting export-oriented manufacturing, creating jobs, attracting investment and creating linkages within the domestic economy. He deponed that EPZA has power under Sections 9 (2), (d) and (k) of the Act, to plan development and maintenance and finance basic infrastructure upto the perimeter of the Export Processing Zones as well as perform such other administrative functions in relation to designated export processing zones as would normally be performed by local authorities thereby having control of water supply to EPZs; which is to assure investors of a conducive operating environment.
 4. It was the Petitioner's case that the Petitioner's programme is highly dependent on a dedicated water supply and waste management system, as it had about 22,000 employees as at 2018 with an investment of Kshs. 40 Billion. That therefore between 1992 and 1994, with the support of World Bank, the Petitioner developed a water project as part of the support infrastructure for the Athi River Zone. That this project comprises 19 Kms from Firestone of treated water trunk main, 8,500m³ ground level reinforced concrete tank at Beacon Rank, 18m³ elevated steel tank and distribution mains at Kitengela, water mains to the 50m³ store tank at the Pump House, Pump House and ancillary works, 12.9 km of 250 mm diameter rising/falling to 2000m³ reinforced concrete tank, 7.5km from Kitengela and 5km distribution mains.
 5. He further deponed that pursuant to the Petitioner's mandate under Section 9 (2) (k) of the [Act](#), the Petitioner was duly appointed in 1997 under the [Water Act](#) (Cap 372) as a water undertaker to provide water within the EPZ zone and outside the zone along its water pipeline from Nairobi. That this was done by Legal Notice Number 74 of 1997 issued under Kenya Gazette Supplement No. 42 published on 6th June 1997. He stated that the aforesaid licence was maintained under the [Water Act](#) of 2002 in



- Sections 114 and 115 thereof and subsequently in the [Water Act](#), 2016 under Sections 156 and 157 thereof.
6. He averred that although regulation 11A (8) of the [Water Act \(Plan of Transfer of Water Services\) Rules](#) 2005 provided that the Ministry of Water and Irrigation acting on behalf of the Water Services Boards, shall negotiate with other Government Ministries, Departments and Parastatals for the transfer of ownership to Water Service Boards of systems facilities and sewerage services as per Section 113 (2) (b) of the [Water Act](#), there has been no such transfer of EPZA water infrastructure to any entity and the same remains the assets of EPZA. According to the Petitioner, the said infrastructure is currently valued at Kshs. 1,325,000,000/- and is maintained in the Petitioner's books of accounts as part of their property, plant and equipment.
 7. The Petitioner complained that Nairobi Water and Sewerage Company Ltd, the 2nd Respondent in this matter, on 21st February 2019, purported to move the water take off point from the designated point at Firestone, to along the water line at Kapa by installing a bulk meter. That the bulk meter interfered with the statutory mandate of the Petitioner as it affected the water flow. He stated that this led to converting the Petitioner's main pipeline trunk into a distribution line affecting the flow of water to the Petitioner's installations.
 8. He further deponed that Mavoko Water and Sewerage Company Limited, the 1st Respondent herein whose registration was recent, does not have its own water infrastructure. That the 1st Respondent applied for and was granted connection for various off take points along the Petitioner's main pipeline and is required to pay for the water supplied to it. He stated that although the 1st Respondent has never supplied the Petitioner with any water, they broke into the Petitioner's pump house on 21st February 2019 and installed water meters. The Petitioner's position was that this action was done without any basis and that the same interfered with the Petitioner's statutory mandate.
 9. He stated that there was sustained interference with the water infrastructure of the Petitioner by the Respondents which included acts by the OCPD Athi River stopping the Petitioner's officers from carrying out civil works on its pump, assisting staff of the 1st Respondent break into the Petitioner's pump house among other acts. He maintained that the unlawful interference with the Petitioner's water infrastructure by the Respondents has led to great prejudice, loss and damage including acute water shortage in Athi River EPZ, which has led to investor complaints and threats of withdrawal of investment. That this included letters from Kenya Association of Manufacturers, Central Organization of Trade Unions and Tailors and Textiles Workers Union. He also deponed that the actions by the Respondents have resulted in health hazards due to sewer effluent contamination of the Petitioner's water supply.
 10. It was further asserted that due to the Respondents' unlawful acts, the Petitioner filed Machakos Petition No. 15 of 2019 leading to grant of a conservatory order by Machakos High Court on 7th May 2019 but that the said orders were discharged on 4th July 2019 vide a ruling on the 2nd Respondent's Preliminary Objection, where the court held that the High Court had no jurisdiction to determine that suit and the same was struck out.
 11. He maintained that this suit is in regard to the Respondents' interference with the Petitioner's property by wanton destructions and unlawful installations in the undisputed zones of the Petitioner and that although there are other matters including ELC No. 35 of 2010, ELC No. 150 of 2015 and High Court Civil Suit No. 315 of 2009, the matters raised therein are different as the matters in issue, and the parties are different. He also stated that the matters complained about were done recently and are not the same as in other cases.



12. According to the Petitioner, the issues raised in the Petition herein were proposed to be handled at an inter-ministerial level between the Ministry of Trade and Cooperatives and that of Water and Sanitation as demonstrated by the letter from the then Cabinet Secretary Ministry of Industry, Trade and Cooperatives and his counterpart for Water and Sanitation, proposing maintenance of status quo until the matter is resolved. He stated that if conservatory orders are not granted to preserve the substratum of the suit, the Petitioner's water supply will continue to be interfered with which will affect numerous investors and the over 22,000 people working there.
13. The application was opposed. Michael Mangeli the Managing Director of Mavoko Water & Sewerage Company Ltd, the 1st Respondent, swore a replying affidavit dated 20th July 2019. He stated that the 1st Respondent is a water service provider established under Section 77 of the Water Act and licenced by the Water Services Regulatory Board to undertake water service provision in Kitengela, Athi River and Mavoko areas. He stated that the Petitioner's allegations that they constructed the water mains trunk are false as the project was undertaken by the Government of Kenya through funding from World Bank to serve the people of Kenya by transmitting water and effluent outside EPZA area and channel it to the treatment works in Kinanie, which is outside EPZA mapped out area. That the same serves the EPZA and the general public as the land for the sewerage treatment in Kinanie was acquired by the Government.
14. He further deponed that by the operationalization of the Water Act 2002, the mandate of all the water undertakers including the Petitioner, was automatically revoked as the management of water and sewerage infrastructure is now to be undertaken by licences of Water Service Board (hereinafter referred to as WSB) also referred to as water service providers. The deponent stated that the Water Service Boards were mandated to use, obtain and own the water facilities and infrastructure used in provision of water services, including sewerage management services. He maintained that all the assets for provision of water services were taken over by the Water Services Board and licences given to Water Services Providers (hereinafter referred to as WSP).
15. According to the 1st Respondent, the Petitioner was required to hand over its infrastructure to a Water Service Board which is Tanathi Water Services Board which has jurisdiction within Mavoko and its environs, as per the provisions of the Water Act and the Water (Plan of transfer of water services) Rules 2005. He asserted that the Petitioner has failed to hand over as provided in law, leading to several suits over the matter, including Machakos ELC Civil Suit No. 35 of 2010, Machakos ELC 315 of 2009, Milimani ELC No. 150 of 2015 and Machakos High Court Constitutional Petition No. 15 of 2019.
16. He stated that in 2006, the 1st Respondent a WSP for Tanathi Water Services Board was incorporated to provide water services within Mavoko and its environs. He emphasised that the water mains/trans line in this Petition is a public utility constructed by the Government of Kenya for benefit of all Kenyans. He stated that the water main is outside the demarcated EPZA area as it runs from Firestone Factory on Mombasa Road to the sewerage treatment plant in Kinanie.
17. He also averred that in 2009, Kenya Association of Manufactures and other companies handed over its sewer line to Tanathi Water Services Board, and that therefore the 1st Respondent took over the management. According to the deponent, all water undertakers gazetted prior to the enactment of the Water Act 2002 needed to seek licence from WSB to continue in the provision of water services, if not, then they were to stop provision of water services. His position was that the Petitioner having not obtained a licence under the Water Act of 2016, should not be allowed to act as a water services provider. Therefore that the Petitioner has no authority, legal or otherwise to stop, or impede the use of the water mains and the sewerage facility in issue by the 1st Respondent. That the Petitioner cannot



- purport to charge for use of the said facility and that there is pending ELC No. 35 of 2010 to ascertain the owner of the facility.
18. He denied any vandalism or interference by the 1st Respondent of the water infrastructure in issue and stated that the Petitioner was guilty of non disclosure of material facts.
 19. He took the view that since the orders sought in the application are the same as the orders sought in the main Petition, granting the orders would amount to granting the orders in the Petition before it is heard.
 20. The application was also opposed by the Interested Party. Engineer Robert Gakubia the Chief Executive Officer of the Water Regulatory Board (Interested Party) swore a replying affidavit sworn on 13th August 2019. It was the Interested Party's case that the Interested Party is the National Regulation of Water and Sanitation Services having been established in March 2003 for the principal object of protecting the interests and rights of consumers in the provision of water and sewerage services by licensing and regulatory WSPS across the Republic.
 21. According to the Interested Party, all water service providers including the Petitioner are required in law to be licenced by the Interested Party to among other reasons; ensure uniformity of standards in water service provision, to ensure all citizens get safe water and to ensure accountability and affordability in the realization of the right to water. He stated that the 1st and 2nd Respondents were duly licensed by the Interested Party to provide water services within the area of the Petitioner and that therefore the 2nd Respondent is required to supply water to 1st Respondent and that that water is transmitted through the suit infrastructure. He stated that the tariff structure applied by the 2nd Respondent for water supplied to the Petitioner and the 1st Respondent was evaluated and issued by the Interested Party and that the 1st Respondent supplies water to thousands of domestic and commercial consumers including Government institutions and schools.
 22. He also asserted that the Petitioner had withheld from this court material facts in regard to the suit infrastructure. According to the Interested party, the Petitioner does not hold a licence for water service provision and therefore their continued engagement in the water services is in violation of the legal and regulatory framework set out in the *Water Act*. He stated that the Petitioner continues levying consumers exorbitant and unregulated water bills with a regulatory levy of 1% which they never remit to the Regulator hence misleading the public.
 23. He took the position that the Petitioners mandate set out in their Act is not water service provision and that the Petitioners encroachment of water license service areas designated for the 1st Respondent was unlawful and a violation of the principles of governance under Article 10 of *the Constitution*. Further that the Petitioner had ignored advice of the 3rd Respondent and the Interested Party and had come to court with unclean hands. He stated that the Petitioner had no alternative but to implement their statutory mandate in accordance with *the Constitution* and the *Water Act*.
 24. In a rejoinder, George Makateto, the Acting Chief Executive Officer of the Petitioner, in response to the replying affidavits of the 1st Respondent and the Interested Party, swore a supplementary affidavit dated 13th September 2019. He stated that the suit infrastructure was funded by the World Bank through the Government of Kenya for the benefit of the Petitioner as payments were made through the Petitioner and the forwarding letters for interim certificates for constructions were addressed to the Petitioner as per annexed documents at pages 1 to 27 of the Petitioner's bundle. He maintained that the suit infrastructure belongs to the Petitioner and that is why they were seeking for the transfer of the same. He took the position that the 1st Respondent was confusing issues as the question of tariffs never arose.



25. He stated that while the Petitioner does not dispute the facts that the Interested Party is the Regulator in water service provision and that the 1st and 2nd Respondents are licenced water providers, he argued that, that does not give the 1st and 2nd Respondents any right of access to EPZA's infrastructure within the area prescribed by Legal Notice No. 74 of 1997. He maintained that the Petitioner's licence as a water undertaker in the boundaries of EPZ, and certain properties outside them, but along the pipeline route from Nairobi City Council Water Supply offtake near Firestone Factory, did not lapse by the enactment of the Water Act, but was saved by the saving provisions of Section 114 of the Water Act 2002.
26. He stated that the Water (Plan and Transfer of Water Services) Rules 2005 in regulation 11 (A) (8) thereof, provided that negotiations must precede transfer of ownership of system facilities and that no transfer ever took place in the manner prescribed in the Rules as no purchase or lease of the infrastructure has been done in accordance with Rule 5 (1) (e) of the said Rules. According to him the licence of the Petitioner continued pursuant to the provisions of Sections 156 and 157 of the Water Act 2016.
27. He contended that the Petitioner does not need any other additional licence as the Petitioner is rightfully deemed as licenced under Successive Acts of the Water Act 2016 as read together with Section 9(2)(k) of EPZ Act. He denied the allegation that the Petitioner was guilty of non disclosure of material facts and stated that there was no evidence of conclusion of negotiations contemplated under the Rules stated above. He stated that the Authority has a wide mandate including the mandate ordinarily performed by local authorities (County Governments).
28. The 1st Respondent filed a further replying affidavit sworn by Michael Mangeli on 14th February 2022. He stated that Section 68 of the Water Act 2016 provides that the Water Works Development Agencies shall develop, maintain and manage National Public Water Works within its area of jurisdiction and that the suit infrastructure herein was gazetted as a National Public Water Works vide Gazette Notice No. 4574 of 6th July 2020. That therefore the Petitioners assertion that they own the suit property are misleading.

The Application dated 19th July 2019 filed by the Interested Party

29. In the Notice of Motion dated 19th July 2019, the Proposed Interested Party sought that the Water Services Regulatory Board be granted leave to join in this suit as an Interested Party. The application is anchored on the grounds on its face as well as the affidavit sworn on 19th July 2019 by Engineer Rober Kakubia, the Chief Executive Officer of the Proposed Interested Party.
30. The Proposed Interested Party's Case is that upon filing this suit, the Petitioner obtained ex parte conservatory orders. According to the Proposed Interested Party, the suit infrastructure has over the years served thousands of domestic and commercial consumers including Government institutions and schools and that therefore the interim orders herein have disrupted water service provision for many consumers who rely on the water transmitted by the suit infrastructure.
31. He deposed that this suit directly affects the Proposed Interested Party as they are the National Regulator of water services and whose object is to protect interests and rights of consumers in the provision of water services in Kenya, as per the Water Act. He stated that while the Petitioner had alleged interference with their statutory role, they had curiously excluded the Proposed Interested Party in the suit. The Proposed Interested Party therefore maintained that they had an identifiable stake in the subject water and that in the interest of justice the application ought to be allowed.
32. The application was not opposed.



The Application dated 20th July 2019 filed by the 1st Respondent

33. The Notice of Motion dated 20th July 2019 filed by the 1st Respondent sought the following orders;
- a. Spent.
 - b. That this Honourable Court be pleased to review, vary and or set aside the exparte interim orders issued on the 8th July 2019.
 - c. That the Petition dated 5th July 2019 be struck out with costs.
 - d. That in the alternative the hearing of the Notice of Motion application and the Petition dated 5th July 2019 be stayed pending;
 - i. The determination of Machakos ELC Civil Suit No. 35 of 2010 Kapa Oil Refineries Limited & 7 Others v. Mavoko Water & Sewerage Co. Ltd and Others which is scheduled for judgment before this court on the 27th September 2019.
 - ii. The hearing and determination of Machakos ELC No. 315 of 2009 Tanathi Water Services Board v. Export processing Zone Authority. Which has been stayed to pending determination of Machakos ELC No. 35 of 2010.
 - iii. The hearing and determination of Milimani ELC Suit No. 150 of 2015 Export Processing Zones Authority v. Nairobi City Water and Sewerage Company Limited which is scheduled for pretrial directions on the 15th October 2015.
 - iv. The hearing and determination of the intended appeal of Machakos High Court Constitutional Petition No. 15 of 2019 Export Processing Zones Authority v. Mavoko Water and Sewerage Company Limited, Nairobi Water & Sewerage Company Limited, Ministry of Water and Sanitation and the Attorney General.
 - e. That costs of the application be provided for.
34. The application is supported by the affidavit sworn on 20th July 2019 by Michael Mangeli, the Managing Director of Mavoko Water and Sewerage Company Limited, the 1st Respondent. The Applicant's case is that the Petitioner obtained interim orders on 8th July 2019. That according to the 1st Defendant, the suit infrastructure's development and construction was undertaken by the Government of Kenya through funding from World Bank to aid in the supply of water from Nairobi Water and Sewerage Company Limited to supply to mains of Mlolongo, Kitengela, Athi River and Mavoko areas and to collect and channel waste from the said areas to the treatment works in Kinanie which is outside EPZA mapped out area for the purpose of serving the people of Kenya.
35. According to the 1st Respondent/Applicant pursuant to the repealed Water Act 2002 and the Water (Plan of Transfer of Water Services) Rules 2005, the suit infrastructure was by operation of law handed over from the National Government to Tanathi Water Services Board which delegated the management of the same to the 1st Respondent as its agent in the areas aforementioned. He asserted that the orders of 8th July 2019 had stopped the 1st Respondent from discharging its statutorily granted duties of water services when it is a WSP established under Section 77 of the Water Act 2016.
36. He stated that the 1st Respondent had spent millions of shillings in installing meters, fixtures and other installations in the course of its business and allowing the Petitioner to remove them will amount to condemning the 1st Respondent unheard contrary to Article 50 of the Constitution. He also asserted that the effect of the orders of 8th July 2019 had the effect of denying the inhabitants of Mlolongo,



Kitengela, Athi River and Mavoko the basic and Constitutionally guaranteed right to clean water and sewerage services.

37. He took the position that this Petition is *sub judice* in view of pendency of Machakos ELC No. 35 of 2010, Machakos ELC No. 315 of 2009, Milimani ELC No. 150 of 2015 and the intended appeal in Machakos High Court Constitutional Petition No. 15 of 2019. He maintained that those suits were pending before this court and that at the centre of the dispute is the determination of ownership rights of the suit infrastructure. He stated that by filing multiple suits the Petitioner was guilty of abuse of the court process and it amounted to a waste of judicial time.
38. No response to the application was filed.
39. The applications were canvassed by written submissions. On record are the submissions filed by Petitioner dated 24th October 2022, the 1st Respondent's submissions dated 24th November 2022 and the 2nd Respondent's submissions dated 24th January 2023.

Submissions

40. Counsel for the Applicant regurgitated the averments in the supporting affidavit and submitted that vide the Legal Notice No. 74 of 1997, the Petitioner was appointed as a water undertaker. Counsel contended that the appointment continued to have effect even after the repeal of the { Water Act of 1952 and the Enactment of the Water Act 2002 by dint of the provisions of Sections 114 of the Water Act of 2002 which provided that the repeal or amendment of the Act did not stop any water undertaker who operated as such prior to the repeal, until the coming into force of any rule contrary to Section 113 of that Act.
41. It was further contended that when the Water Act 2016 was enacted, the status quo was maintained by the saving and transitional provisions of Sections 156 and 157 of the said Act which provided that a right to the use of water that existed before the Act shall be deemed to be a right conferred by a permit under the Act.
42. Counsel submitted that the Water Act and the Water (Plan of Transfer of Water Services) Rules 2005, provided for negotiation as a means for transfer of ownership to Water Services Board which did not happen in these circumstances. Counsel argued that the Respondents' interference with the Petitioner's quiet possession of the suit infrastructure amounted to trespass, and usurpation of control of the water flowing into EPZ; thereby disrupting the Petitioner's operations and causing health hazards.
43. It was submitted for the Petitioner that the Petitioner had made a proper case for grant of conservatory orders. Reliance was placed on the cases of Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General [2011] eKLR and Board of Management of Uburu Secondary School v. City County Director of Education & 2 Others [2015] eKLR, for the proposition that for a party to obtain conservatory orders, they must demonstrate a *prima facie* case with a likelihood of success and that they are likely to suffer prejudice if the orders sought are not granted.
44. The court was referred to the cases of Kevin K. Muriti & Others v. Kenya School of Law & Others [2015] eKLR and Mrao v. First American Bank of Kenya Limited & 2 Others [2003] eKLR, on the definition of what constitutes a *prima facie* case. In that regard, counsel argued that the questions raised in the Petition relate to violation of the Petitioner's right to property guaranteed under Article 40 of the Constitution and that there is a threat of further violation of that right which has already been violated through vandalism, installation of a bulk meter and breaking into their premises to install the water meters.



45. Counsel argued that they had produced exhibits at pages 47 to 53 of the Petitioner's bundle to show correspondence with the 2nd Respondent who installed the meter at Kapa to monitor all the water within the boundaries of Nairobi and the correspondence between the Cabinet Secretary Industry, Trade and Cooperatives with the 2nd Respondent highlighting the need for constant water supply to the EPZ. He argued that evidence of the violation were provided by the Petitioner. It was counsel's contention that although the Rules stated hereinabove provided for transfer procedures in regard to water services, yet todate the Minister has never executed a transfer agreement with the Petitioner. Counsel took the position that as the law itself provides for the transfer procedure, the suit infrastructure cannot vest in the Respondents by operation of law. Counsel argued that having raised several valid questions, the Petitioner had established a prima facie case with a likelihood of success.
46. On whether the Petitioner would suffer irreparable harm, counsel submitted that since the Petitioner has always had control over water supply in the EPZ, the usurpation of this control would result in far reaching negative consequences as the vandalism led to unregulated water flow leading to acute water shortage in the Petitioner's waste water treatment plant. That sewer effluents also leaked into the water, contaminating it. Counsel contended that EPZ is a strong pillar to manufacturing and that the crisis arising from this issue poses a severe risk to the entire nation as the crisis resulted in uproar among investors who threatened to withdraw so as to invest elsewhere.
47. Submissions were made for the Petitioner that the substratum of the Petition will be lost if conservatory orders are not granted because the vandalism will continue. The court was referred to the case of [*Isaiah Luyara Odando & Another v. Kenya Revenue Authority & 6 Others; Nairobi Branch Law Society of Kenya \(Interested Party\)*](#) [2022] eKLR.
48. Counsel argued that arguments by the 1st Respondent that this Petition ought to have first been channelled to the Water Tribunal for adjudication were inapplicable in this matter as the Water Tribunal lacks jurisdiction to hear and determine this dispute as the same is not an appeal against a decision under the [*Water Act*](#) but a Petition challenging the Constitutionality of the Acts of the Respondents. Reliance was placed on Section 121 of the [*Water Act*](#), Article 162 (2) (b) of [*the Constitution*](#), Section 13 (3) of the [*Environment and Land Court Act*](#) as well as the case of [*Augustin Michael Mulandi & 2 Others v. Nol Turesh Water and Sanitation Co. Limited*](#) [2020] eKLR, for the proposition that the jurisdiction of this court to hear and determine Constitutional questions and exercise the supervision, interpretative and enforcement powers cannot be ousted by the powers of the Water Tribunal. Counsel contended that the Petition raised among other questions, the violation of the right under Article 43 for the highest attainable standards of health, accessible, reasonable standards of sanitation and safe water in adequate quantities, that hence this court has jurisdiction to hear and determine this Petition.
49. On whether this suit is *sub judice*, counsel relied on the case of [*Kenya National Commission on Human Rights v. Attorney General; Independent Electoral & Boundaries Commission & 16 Others \(Interested Parties\)*](#) and argued that the cases cited by the 1st Respondent had raised different issues and that the parties involved were different. Counsel observed that although in High Court Petition No. 15 of 2019 had similar parties and similar issues the same was struck out for want of jurisdiction. Counsel pointed out that in ELC No. 35 of 2010 the court found that the trunk sewer line and waste water treatment plant belong to EPZA but that none of the Plaintiffs therein is a party in this suit.
50. On the issue of filing a Notice of Appeal, counsel argued that a Notice of Appeal is not an appeal and that the same had been overtaken by time by dint of the provisions of Rule 82 (1), 83 and 84 of the [*Court of Appeal Rules*](#) as no appeal was filed within 60 days as provided for in those Rules. Counsel cited the cases of [*Justus Aloo Ogeka & 6 Others v. Kenya Union of Commercial Food and Allied Works &*](#)



2 Others [2018] eKLR and Mae Properties Limited v. Joseph Kibe & Another [2017] eKLR to buttress their submissions.

51. On their part, counsel for the 1st Respondent submitted that in response to the Petitioner's application dated 5th July 2019, the 1st Respondent filed a replying affidavit dated 5th November 2019, a further replying affidavit dated 14th February 2019, an application seeking to strike out the Petition and set aside interim orders dated 20th July 2019 and a Preliminary Objection dated 5th November 2019 on the basis that this court has no jurisdiction to determine this matter and that this suit was *sub judice*.
52. Counsel argued that during the pendency of this Petition, the suit infrastructure was operationalized as a National Public Water Works pursuant to a Gazette Notice No. 4574 dated 19th June 2020 by dint of Section 8 of the Water Act 2016 and therefore none of the parties in the Petition is mandated with the management and maintenance of the same. Counsel argued that therefore the suit infrastructure is a public facility not owned by the Government and no private rights as to its ownership arise. Counsel held the view that Government agencies do not own the public property but hold it as trustees for the public. Further it was argued that the Gazette Notice having been published after filing the Petition, the Petition is now moot and overtaken by events. Counsel cited the case of Daniel Kaminja & 3 Others (Suing as Westland Environmental Caretaker Group) v. County Government of Nairobi [2019] eKLR. Counsel argued that the Petition failed to address the Gazette Notice above and reliance was placed on the case of Anarita Karimi Njeru v. Republic (No. 1) [1979] KLR 154 which the court has considered.
53. Counsel for the 2nd Respondent submitted that the Petitioner was not entitled to the orders sought as they were not the owner of the suit infrastructure as demonstrated by a copy of the World Bank application for withdrawal form dated 18th September 1992 in the Petitioner's documents.
54. Counsel relied on Section 5 of the Water Act 2016 on ownership of water resources and submitted that water resource is vested and held by the National Government in trust for the people of Kenya and therefore the Petitioner has no power to provide water services under both the EPZ Act or the Water Act or at all. It was further contended that by dint of Section 24 (1) of the Water Act 2016, the authority to supply water services is vested in Athi Water Services Board which is delegated by a licence to the 2nd Respondent.
55. According to counsel for the Respondent, the Petitioner's rights were extinguished by the coming into effect of the Water Act 2002. Counsel observed that had the Petitioner obtained a licence to be water services providers, they would have legal standing to obtain reliefs sought.
56. Counsel argued that the 2nd Respondent owns the subject matter who has leased it to the Petitioner as the bulk meter is located 150 meters from the boundary of KAPA towards Nairobi whose purpose was to cover the entire Nairobi County. Counsel argued that it is within the mandate of the 2nd Respondent to determine location of the meter to best address operational issues and the needs of the customer.
57. It is submitted for the 2nd Respondent that Constitutionalizing everything is an abuse of the due process and needs to be frowned upon. Counsel was of the view that no right had been violated and that a party seeking redress on account of violation of the Constitution must set out with reasonable degree of precision their complaint and the Constitutional provisions infringed. Counsel urged the court to invoke the principle of Constitutional avoidance as this dispute may be properly decided on another basis and relied on the decision in the case of Communications Commission of Kenya & 5 Others v. Royia media Services Ltd & 5 Others [2014] eKLR.
58. While relying on the decision in the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR, counsel contended that conservatory orders should only issue on the merit of the case bearing in mind public interest, Constitutional values and the appropriate magnitudes. It was the



position of the 2nd Respondent that the Petitioner had failed to disclose the nature of irreparable loss that they may suffer that may not be compensated in damages.

59. It was also contended that the Petitioner failed to disclose the pendency of a similar application in Nairobi ELC Civil Suit No. 150 of 2015. Counsel referred the court to the case of *Kenya Electricity Transmission Company Limited v. Kiboth Limited* [2019] eKLR on the obligation of material disclosure for the parties. Counsel also contended that by virtue of the pendency of Nairobi ELC Civil Suit Number 150 of 2015, this Petition was sub judice as provided for in Section 6 of the *Civil Procedure Act*. To buttress their point, counsel cited the case of *Kinatwa Cooperative Savings & Credit Society Limited v. Kinatwa Prestige Ltd* [2021] eKLR.

Analysis and Determination

60. I have carefully considered the three applications, the responses and submissions. I must point out, which I hereby do, that although the parties extensively argued their respective cases, I will proceed circumspectively on factual matters and restrain myself only to the preliminary issues raised, since the conclusive determination of the issues in the suit and the merits thereof shall be made subsequent to the trial of the suit. Therefore having considered the application and their respective responses, it is my considered view that the issues flowing therefrom are as follows;
- a. Whether this Petition should be struck out or stayed on account of want of jurisdiction and the sub judice rule.
 - b. Whether Water Services Regulatory Board is a necessary party to these proceedings deserving to be joined to this suit as an Interested Party.
 - c. Whether the Petitioner has met the threshold for grant of temporary conservatory orders.
61. On whether or not this court has jurisdiction to determine this matter, I must point out that although in their submission the 1st Respondent referred to a Preliminary Objection dated 5th November 2019, challenging jurisdiction of this court, no such objection was found on record as having been filed. However, since the issue of jurisdiction was responded to by the Petitioner, I will proceed to determine the same as jurisdiction is everything. A court that has no jurisdiction should down its tools immediately.
62. The Petitioner raised questions on violation of Articles 10, 40, 43 and 47 of *the Constitution* among others. The Petitioner contends that the acts of vandalism and interference of its water infrastructure by the 1st, 2nd and 3rd Respondents have threatened their rights to adequate and safe water under Article 43 of *the Constitution* and that if the same is not stopped, they are at the risk of having acute water shortage which will lead to investors withdrawal affecting the economy of the country and that the interference has led to a risk exposure due to effluent leakage. They also raised the right to property under Article 40 of *the Constitution*. On the other hand, the Respondents have raised an important question on the place of access to water resource by citizens as a right provided in *the Constitution*. As this dispute has arisen in regard to acts complained of by the Petitioner as having been committed by the Respondents as entities who are interested in wresting control of water resources in the larger EPZA area and its environments, from the Petitioner, and not a dispute arising from decisions emanating from any of the actors in the water institutional framework including the Cabinet Secretary, Water Resources Authority and Water Services Regulatory Board, my view is that this court has jurisdiction to hear and determine this dispute by virtue of the provisions of Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act* which grants this court the power to hear and determine matters touching on the Environment and Land. And water being an environmental matter, with this court having the ultimate supervisory jurisdiction in respect of the decision makers



- in the water section by dint of Section 124 of the Water Act, I find that this court has jurisdiction to determine this petition.
63. The Petitioner argued that this is not a dispute for the Water Tribunal. I note that the jurisdiction of the Water Tribunal under Section 121 of the Water Act 2016 is in regard to appeals from the decisions of the Cabinet Secretary, the Water Resources Authority and the Water Services Regulatory Board or persons acting under their authority. Since this Petition is not a dispute arising from the decision of the above three institutions, therefore this is not a dispute within the jurisdiction of the Water Tribunal.
64. In the premises, I hold and find that this court has jurisdiction to hear and determine this matter.
65. On the question of whether this matter is sub judice, Section 6 of the Civil Procedure Act provides for the rule of *sub judice* to the effect that where a matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding, between the same parties or their privies, and the previous suit is pending in a court with jurisdiction to grant the relief sought, then the court ought to stay the subsequent suit.
66. In the current suit, the 1st Respondent alleged that the pendency of Machakos ELC No. 35 of 2010, Machakos ELC No. 315 of 2009, Milimani ELC No. 150 f 2015 and a Notice of Appeal in Machakos High Court No. 150 of 2019 means that this suit is *sub judice*. Having considered the pleadings, I note that ELC No. 35 of 2010 was filed by Plaintiffs who are not parties in the current suit and the issue in contention in that suit was, who between the Respondents was entitled to receive levies for water tariffs owed by the Plaintiffs. In the premises therefore, as the parties and the issues in controversy were not the same, the question of *sub judice* does not arise in regard to Machakos ELC No. 35 of 2010.
67. As regards ELC No. 315 of 2009, having considered the pleadings provided by the 1st Respondent, I note that that suit was filed by Tanathi Water Service Board against the Petitioner herein. The other parties herein are not parties to that suit and the issue therein was whether the authority had exceeded its mandate by providing water and sewerage services to consumers outside its area of jurisdiction. In my considered view, that issue is different from the issues raised in the Petition herein. Lastly, on the question of whether the Notice of Appeal in regard to the ruling striking out Machakos High Court Constitutional Petition No. 15 of 2009 is a suit or proceeding envisaged under Section 6 of the Civil Procedure Act, my view is that a Notice of Appeal is only alive before the lapse of 60 days within which the appeal ought to be filed, as the same is merely an indicator of an intention to appeal. I agree with the Petitioner that where an Appellant does not file the appeal in 60 days in accordance to Rule 83 of the Court of Appeal Rules, the failure to comply is deemed as a withdrawal of the Notice of Appeal. As it is not disputed that more than 60 days have lapsed since the Notice of Appeal was filed by the Petitioner in Machakos HCC Petition No. 15 of 2019 and no appeal has been filed, it follows that the Notice of Appeal is deemed as withdrawn and therefore there is no appeal. In view of the above, I find and hold that this matter is not *sub judice*.
68. Rule 7 of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, provides the jurisdiction of the court to join an Interested Party to proceedings before it, as follows;
1. A person, with leave of the court, may make an oral or written application to be joined as an Interested Party.
 2. A court may on its own motion join any Interested Party to the proceedings before it.
69. Rule 2 of the aforesaid Rules defines Interested Party to mean;



A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.

70. Essentially therefore, where any person has a recognisable stake or legal interest in any proceedings before court, may be joined by the court on its own motion or on application of such person, to such proceeds.
71. In a long line of decisions, courts have held that a party seeking to be joined as an Interested Party in any proceedings, must show that they have a stake that can be identified in the proceedings and the decision ultimately made between the primary parties in the suit will affect them. In the case of *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others* [2014] eKLR, the Supreme Court of Kenya while describing an Interested Party stated as follows;
- One who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of court when it is made, either way. Such a person feels that this or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.
72. It was the Proposed Interested Party's case that being a Regulator of water and sewerage services, pursuant to the provisions of Sections 70 and 72 of the *Water Act* 2016, with a mandate to ensure uniformity of standards in provision of water services and the actualization of the right to clean and safe water for all citizens under Article 43 of *the Constitution*, among other functions, the Proposed Interested Party has a stake in these proceedings in view of the issues in the Petition.
73. Having considered the Petition and the application for conservatory orders, I note that the issues raised include whether the Petitioner should obtain a licence from the Proposed Interested Party so as to lawfully continue operating as a water service provider. Besides, the dispute between the 1st and 2nd Respondents on one part and the Petitioners on the other part revolves around the licences obtained by the 1st and 2nd Respondents from the Proposed Interested Party to operate as water service providers and whether failure to obtain such licence by the Petitioner would be a reason for them to hand over their operations to the 1st and 2nd Respondents.
74. Therefore, I find and hold that the Proposed Interested party is a necessary party in these proceedings and their presence in these proceedings would assist the court determine all matters in controversy herein. In the premises, I find that the Proposed Interested Party has a recognizable stake in these proceedings and therefore their prayer to join these proceedings is merited.
75. The 1st Respondent's prayer to set aside *exparte* orders issued on the application of 5th July 2019 are now moot as this court is now determining the same application on merit. On whether the Petitioner is entitled to conservatory orders, I take the view that to merit that prayer, they ought to demonstrate a *prima facie* case with a likelihood of success. They must show an arguable case showing an apparent violation of their rights and atleast one arguable ground is sufficient. That ground need not necessarily succeed at the trial, as long as the questions raised call for a rebuttal from the Respondents, that is sufficient. Besides, an Applicant seeking conservatory orders must show that there is a threat that they may suffer irreparably injury that may not be compensated in damages if the substratum of the dispute is not preserved. (See the case of *Gatirau Peter Munya vs. Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR).
76. Having considered the Petition and the application for conservatory orders, I note that the Petitioner alleges that the suit infrastructure belongs to them having been funded by the World Bank for purposes of supplying water to EPZ for purposes of promoting manufacturing. The Petitioner



attached documents to show the interaction between World Bank and EPZA. On the other hand, the Respondents argue that the enactment of the Water Act by operation of law passed over the assets of the Petitioner to the Respondents, and that therefore the demand for a handover framework should not be made. In view of the above, I am convinced at this preliminary level that the Petitioner has demonstrated an apparent legal interest in the suit infrastructure which interest calls for legal protection. In addition, I have considered the engagement through affidavits between the parties herein and several questions arise for determination including whether the Petitioners control of the suit infrastructure was ousted by the coming into effect of the Water Act 2016 and whether water resource being a public good can be held by the Petitioners in the manner they seek to continue holding in view of the fact that it is a scarce resource especially within this ecosystem attracting diverse competing interests including domestic and industrial use, among others.

77. In the premises, I am convinced that the Petitioner has demonstrated an arguable case with chances of success.
78. On the question of whether there is a threat of irreparable harm should the orders sought not be granted, the Petitioner's case is that the alleged interference and vandalism of the suit infrastructure by the Respondents means that they do not have a consistent supply of water, which affects their operations and the right to safe, clean and adequate water and that it leads to effluent leakages which contaminates their water putting the health of their workers at risk. Therefore, I understand the Petitioners to be saying that the Respondents' actions are a threat to the health of their human resource and economic survival. In my view, these are serious threats that may not be adequately compensated in damages.
79. In the premises, I am convinced that it is imperative and in the interest of justice that the substratum of the Petition ought to be preserved pending the determination of the Petition. In the end, I make the following orders;
 - a. This court has jurisdiction to hear and determine this Petition.
 - b. The Water Services Regulatory Board be and is hereby joined to this suit as an Interested Party.
 - c. The Interested Party is granted leave to file and serve their pleadings and any other relevant documents in support of their case, within 14 days of this ruling.
 - d. Conservatory orders are granted in terms of prayers 5, 6 and 7 of the Notice of Motion dated 5th July 2019.
 - e. Costs of the three applications are awarded to the Petitioner.
80. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Muhizi holding brief for Mr. Wamae for 2nd Respondent

Mr. Mulekyo for 1st Respondent

Mr. Tugee for Petitioner appearing with Faith holding brief for Senior Counsel Paul Muite



No appearance for Attorney General

Ms Josephine – Court Assistant

