THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCC NO.35 OF 2010

1. **KAPA OIL REFINERIES LTD.**
2. **Nation Media Group Ltd.**
3. **Sanpac Africa Ltd.**
4. **All pack Industries Ltd.**
5. **Orbit Chemicals Ltd..PLAINTIFFS**
6. **Mabati Rolling Mills Ltd.**
7. **Doshi Enterprises Ltd.**
8. **Decent Developers Ltd.**

VERSUS

1. **EXPORT PROCESSING ZONE**
2. **MAVOKO WATER AND SEWERAGE CO. LTD......................DEFENDANTS**
3. **TANATHI WATER SERVICES LTD.**

RULING

(1) In the Plaint dated the 16th February, 2010 and filed on the 19th February, 2011, (1)Kapa Oil Refineries Ltd (2) Nation Media Group Ltd., (3)Sanpac Africa Ltd., (4) All pack Industries Ltd, (5) Orbit Chemicals Ltd. (6) Mabati Rolling Mills Ltd., (7) Doshi Enterprises Ltd., (8) Decent Developers Ltd (the Plaintiffs), the plaintiffs seek an injunction restraining (1) Export Processing Zones Authority, (2) Mavoko Water and Sewerage Co. Ltd. and (3) Tanathi Water Services Board, (the Defendants) from stepping, suspending or restricting the use and discharge of sewer by the Plaintiffs into the Defendants sewer line system located within the Municipal Council of Mavoko area. The Plaintiffs also seek a declaration as to who between the Defendants is entitled to receive charges or fees from the Plaintiffs for usage of the sewer line.

(2) The Plaintiffs aver that in a private sector initiative under the umbrella of the Kenya Association of Manufacturers (Athi River Branch) they constructed and commissioned a fifteen (15) kilometer sewerage pipeline to serve the business community along Mombasa Road from Kapa Oil Refineries premises to Mlolongo within Mavoko Municipality. It is the Plaintiff's case that they applied for and obtained various permissions and way leaves from the relevant government agencies Mavoko Municipal Council, the National Environmental Management Authority and the Ministry of Roads and Public Works, amongst others. That upon completion and with the permission of the first Defendant, the Plaintiff's sewer pipe was connected to a pipe then operated by the first Defendant on valuable consideration; that upon commissioning of the sewer pipe, the third Defendant entered into an agreement with the Plaintiffs and took over the operations, management and maintenance of the sewer pipe and agreed to give the Plaintiffs a 75% discounted fee for using the sewer pipes for a period of ten (10) years. The Plaintiffs say that after the takeover, the first Defendant has been demanding fees for usage of their pipes or sewer system from the Plaintiffs and have threatened to stop the Plaintiffs from discharging their sewer into its pipes unless the payment demanded is made. The Plaintiffs contend that they are not liable to the first Defendant as the second and third Defendants who are statutorily mandated to operate the sewerage within the Movoko Municipality and to whom the Plaintiffs are paying monthly charges should shoulder any responsibility. As the Defendants are unable to agree as to who is entitled to manage, operate and maintain the sewer systems the dispute is likely to jeopardize the operations of the Plaintiffs thereby causing them irreparable damage.

(3) With the filing of their Plaint, the Plaintiffs also took out an application by way of Chamber Summons under order 39

rules 1, 2 and 3 of the Civil Procedure Rules seeking a temporary injunction in terms of the prayer in the Plaint pending the hearing and determination of the suit. The application is supported by the affidavit of Mitul Shah, the Environment Manager of the first Plaintiff, made on the 16th February, 2010 on behalf of all the Plaintiffs. He reiterates all the averments made in the Plaint and produces the relevant documents to show that the various approvals were sought and obtained. In paragraphs 15, 16, 17, 19,20 and 21 he states as follows:

"15. **That despite that the 2nd and 3rd Defendants are now operating the Kapa/Mlolongo sewer line, with the Plaintiffs and other stakeholders paying to them the requisite fees, the 1st Defendant has continued to demand fees and other charges from the Plaintiffs for using the sewer and has made threats of blocking the Plaintiffs from discharging sewer into the Mavoko Municipality sewer system. Copies of the letter by the 1st Defendant dated 29th January, 2010 threatening to block the Plaintiffs from discharging the sewer system are now shown to me marked "MS5"**

16. **That the Plaintiffs have about 2,600 employees who use the sewer facility on a daily basis and any disruption will cause the Plaintiffs to shut down operations resulting in loss which cannot be compensated by way of damages.**

17. **That the Defendants have been involved in negotiations to resolve their dispute over the operation of the sewer but while the negotiations are ongoing, the Plaintiffs are constantly under threat of closure and disconnections. Copies of correspondence dated 09.02.1010 and 12.02.2010 between the Defendants are now shown to me marked "MS6"**

19. **That if the Plaintiffs state that before the takeover of the project by the 2nd and 3rd Defendants, the Plaintiffs had entered into direct agreement with the 1st Defendant for usage of the 1st Defendants facilities. However, upon takeover of the Kapa/Mlolongo sewer line by the 2nd and 3rd Defendants, the responsibility of dealing with the 1st Defendant fell upon the 2nd and 3rd Defendants who were now owning, managing, operating and maintaining the Kapa/Mlolongo sewer line.**

20. **That since the 3rd Defendant has purported to appoint the 2nd Defendant as the sole agent charged with the responsibility of providing water and sewerage facilities within the Mavoko Municipality, the 1st Defendant intended action is without justification and only intended to cow the Plaintiffs into paying it illegal charges, an action which is contrary to the law.**

21. **That the Plaintiffs are caught in the struggle for control between the Defendants and therefore seek the Court's intervention and protection that pending the said struggle and negotiations orders of injunction do issue to protect the disruption of their operations.**

(4) The first Defendant filed a replying affidavit in opposition to the application sworn by N. kosure, its acting Chief Executive Officer, on the 5th March, 2010. He says that the Plaintiffs have concealed crucial and material facts in as much as the subject sewer line in this suit is the first Defendant's EPZ Trans Sewer Line which is part of the first Defendant's Athi-River Water and Sewerage Project facilities initiated and developed by the Government of Kenya using Government money and World Bank funding as part of the support infrastructure for the Athi-River Export Processing Zone. He says that this Export Processing Zone is highly dependent on the effective and efficient provision and management of water and sewerage services. Mr. Kosure then goes on to state as follows in paragraph 21, 22, 24 and 25 of his affidavit:

"21.**That on 3.3.2009, the Plaintiffs umbrella body, The Kenya Association of Manufacturers (Athi-River chapter), wrote to the first defendant introducing all the Plaintiffs to the first Defendant for connection to the first Defendant's aforesaid Trunk-Sewer – line via Kapa – Athi River Sewer line. (Hereto annexed and marked "EPZ8" is a copy of the said letter).**

22. **That on 31.3.2009, the first defendant wrote to the Association of Kenya Manufacturers (Athi-River chapter) agreeing to connect the condition that the Plaintiffs adhered to the terms and conditions of such connection and paid the appropriate cost. (Hereto annexed and marked "EPZ9" is a copy of the said letter).**

24. **That out of the eight (8) defendant/applicants herein, only three (3) have so far signed sewer connection agreements with the first defendant and have been connected to the EPZA Trunk Sewer-line. These are:**

(a) Kapa Oil Refineries Limited

(b) Doshi Enterprises Limited and

(c) Decent Developers Limited.

25. **That the second, third, fourth, fifth and sixth Plaintiff/Applicants are yet to sign Sewerage Connection agreements with the first defendant, and are yet to be connected.**

(5) The first Defendant admits that by letter dated the 19th March, 2009, it was informed that the Plaintiffs have transferred their private Kapa-Athi River Sewer line to the third Defendant in line with the Water Act, 2002 but contends that such transfer did not affect the first Defendant's Trunk Sewer-line and sewerage treated works. The first Defendant avers that it has no problem with the transfer of the Plaintiffs' privately-owned Kapa-Athi River Sewerage line to the second or the third Defendants as long as the waste water/effluent quality is maintained by each individual Plaintiff connected to the Export Processing Zone Authority's Trunk Sewer-line and provided that the Plaintiffs comply with the terms and conditions of the sewer connection agreement with the first Defendant and pay the appropriate/agreed conveying and treatment charges. The deponent concludes his affidavit in the following terms in paragraphs 33, 34, 35 and 36:-

"33. **That payment of sewer charges to the second or the third Defendants should be <u>limited</u> to sewer conveyance through the Plaintiffs' said privately-owned Kapa-Athi River-Sewer line.**

34. **That the first defendant (EPZA) <u>cannot</u> be denied management, use, and supervision of its sewerage facilities, neither can the Plaintiffs use this Honourable court to escape from their contractual responsibilities or to access and use the first Defendant's Trunk Sewer-line and sewerage treatment facilities without the first Defendant's approval, and for free.**

35. **That the Plaintiffs and the second and the third Defendants appear to be jointly engaged in an irregular attempt to unlawfully take over the first Defendant's Trunk Sewer-line and Sewerage treatment facilities."**

(6) The first Defendant also filed a Defence on the 19th March, 2011 denying the averments in the Plaint and reiterating the statements made in its replying affidavit.

(7) The second and third Defendants also filed a replying affidavit dated the 22nd March, 2010 and made by Christopher Kilongo Muindi, the Chief Legal and Corporate Affairs Manager of the third Defendant. He says that under and by nature of Section 51 of the Water Act, 2002 vide Legal Notice No.69 of the 4th June, 2008, the third Defendant was constituted for the efficient economical provision of water and sewerage services in various areas including Mavoko Municipality. According to Legal Notice No. 101 of 2001 and with effect from the 1st July, 2005, all lights. Process, duties and liability relating to the provision of Water service were vested in the third Defendant. Pursuant thereto and in accordance with sections 55 and 56 of the Water Act, the third Defendant appointed and assigned the second Defendant the exclusive rights to manage, operate, control and supply water and sewerage services within Mavoko Municipality.

(8). Mr. Muindi goes on to state as follows in paragraphs 11, 12, 13, 14 and 15 of his affidavit:

"11. **That I further aver that the fact that the 1st Defendant may have initiated and carried out the construction of the sewerage lines does not mean it owns the same. It is a Local Authority infrastructure build on a public way leave and on the express understanding with the 2nd and 3rd Defendant and the Local Authority that the 1st Defendant does not and will not own the infrastructure but will only enjoy the discounted rates for a number of years otherwise the operation and management of the entire sewer system is by law vested in the 2nd and 3rd Defendants.**

12. **That the 1st Defendant/Respondent has no claim over ownership of any sewerage line, system or sewerage treatment facilities in Mavoko Municipality as ownership of the same is vested by law on the 3rd Defendant/Respondent.**

13. **That from the foregoing it is clear that the 1st Defendant/Respondent had no capacity to enter into an agreement with any of the Plaintiffs pertaining to the provision of water sewerage services in Mavoko Municipality and to that effect the said agreements are null and void.**

14. **That the 1st Defendant/Respondent cannot purport to be excluded from the application of statutory law by virtue of letters drawn by the Kenyan Association of Manufacturers (Athi River Chapter) and by virtue of illegal contracts between the 1st Defendant/Respondent and the Plaintiffs.**

15. **That the 1st Defendant/Respondent has no right to collect revenue from consumers with regard to the provision of the water and sewerage services at Mavoko Municipality and the 2nd and 3rd Defendants/Respondents are seeking to have the said party restrained from imposing illegal tariffs on consumers in this area.”**

(9) Finally, there is M. J. N. Kosure’s affidavit dated the 21st May, 2010 in reply to the second and third Defendant’s said affidavit. He contends that there is a conspiracy between the Plaintiffs and the second and third Defendants to take over the first Defendant’s water and sewerage facilities unlawfully. He refers to the proceedings brought by the third Defendant against the first Defendant in Machakos HCCC No.315 of 2009 (in which the third Defendant seeks a permanent order to restrain the first Defendant from providing water and sewerage services outside the Export Processing Zone area) and to the first Defendant’s counter-claim therein seeking an order of permanent injunction to restrain the third Defendant from taking over the first Defendant’s water supply and sewerage treatment facilities or the operations thereof. He further contends that the first Defendants water supply and sewerage infrastructure is not transferable under the Water Act, 2002 and the Rules made thereunder and was not transferred either to the Athi Water Services Board or to any other Water Services Board or at all.

(10) I have considered all this evidence in conjunction with the respective submissions filed by the learned counsel on behalf of the second and third Defendants, the Plaintiffs and the first Defendants respectively on the 17th September 2010 the 3rd December, 2010 and the 9th February, 2011 respectively. The Plaintiff say that they have about 2,600 employees who use the sewer facility on a daily basis and any disruption will cause the Plaintiff to shut down operations resulting in loss which cannot be compensated by an award of damages. They assert that they are caught in the cross-fire in the dispute between the three Defendants. The Plaintiffs contend that the second and third Defendants are now lawfully operating the Kapa-Mlolongo sewer line by statutory authority and that the first defendant is not entitled to demand fees to block the Plaintiffs from discharging sewer into the Mavoko Municipality sewer system. This is supported by the second and third Defendants who state as follows in paragraph 11 of Muindi’s replying affidavit:

“That I further aver that the fact that the 1st Defendant may have initiated and carried out the construction of the sewerage lines does not mean it owns the same. It is a Local Authority infrastructure build on a public way leave and on the express understanding with the 2nd and 3rd Defendants and the Local Authority that the 1st Defendant does not and will not own the infrastructure but will only enjoy discounted rates for a number of years otherwise the operation and management of the entire sewer system is by law vested in the 2nd and 3rd Defendants.

The first Defendant has conceded that it has no problem with the transfer of the Plaintiffs’ privately owned Kapa-Athi River Sewer line to the second or third Defendants so long as it is not deprived of its revenue and provided that the waste water/effluent quality is maintained by each of the Plaintiffs. It alleges that the Plaintiffs have been in breach of their obligation to enter into sewer connection agreements with the first Defendant and/or pay fees/charges thereunder since 2009 but does not appear to have sought any legal redress. Indeed, the first Defendant has not raised a counterclaim against the Plaintiffs in its statement of Defence filed on the 19th March, 2010. Further, if the first Defendant believes that its water supply and sewerage infrastructure is not transferrable under the Water Act, 2002 and the Rules made thereunder and questions the legality of the third Defendant, the first Defendant has not demonstrated that it has taken any steps to assert its rights since the 4th June, 2008 when Legal Notice No.69 of 2008 came into force.

(11) For these reasons, I am persuaded that the Plaintiffs have made out a prima facie case with a probability of success and given that their respective operations would shut down in the event of any disruption in use of the sewer facility, the balance of convenience lies with the Plaintiff. In the result, the application in the Chamber Summons dated the 18th February, 2010 and filed on the 19th February, 2010 succeeds and is allowed in terms of prayer (e) therein be and are hereby granted with costs.

Orders accordingly.

Dated and delivered at Machakos this **12th** day of **July**, 2011.

P. Kihara Kariuki
Judge