



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL COURTS

Civil Case 699 of 2008

**WATER RESOURCES MANAGEMENT AUTHORITY
(LUMUMBA MAMMA & KALUMA).....PLAINTIFF**

VERSUS

KENYA ELECTRICITY GENERATING COMPANY.....DEFENDANT

RULING

Application dated 6/2/09 seeking the striking out of the defence filed herein by the Defendant/Respondent on the grounds that specified on the application and thereafter the judgment be entered as prayed for the Plaintiff in the Plaint. The supporting affidavit discloses that on 26/11/2008 the Plaintiff filed a Plaint claiming Shs. 141,868,339/= against the Defendant. That the Plaintiff is vested with powers under the Water Act 2002.

By legal Notice No. 171 of 28th September 2007, it was required generating electricity using hydropower. They have admitted using hydropower under paragraph 9 of its Defence.

Paragraph 4 of that defence is frivolous, denied to pay 5cts/kwh. The Respondent is now obliged to pay the gazette amount from 1/10/2007. Paragraph 5 of defence is frivolous. The Respondent has not facilitated calculations by authority the water use charges. Paragraph 7 is calculated to frustrate the Applicant. The claim of 1,932,315,000 kwh or for the period of 1st October 2007 to 30th June 2008 kwh at the rate of 5cts/kwh amounts to Shs. 97,615,830. The defence paragraph 7, 6, of Respondent should be struck out.

The interest on water charges mounting to Shs.976,158.30/= as at September 2008 at simple interest of 2% per month is Shs. 11,713,899/= as provided in the Rules. The amount of water use charges payable by the Defendant for the period commencing 1st July 2008 to 30th September 2008 is Shs. 32,538,610. This amount has not been controverted by Defendant in its defence. The total due and owing is Shs.141,868,339. The Defendant is bound by law to pay such amount. This matter falls under Water Act 2002 and the rules thereunder.

That the Defendant admits in paragraph 19 of defence to owe Plaintiff Shs. 96,615,750/=. It is clear then that the arrangement and obligation by Defendant to pay to the Plaintiff is not denied by the Defendant. The Defendant has caused an affidavit to be sworn by Company Secretary Rebecca Miano who states the Plaintiff has sent invoices amounting to Shs.141,868,399.00. Defendant does not deny it was in business of use of water primarily for hydroelectric power generation during this period and while Defendant has not denied that the Plaintiff is mandated by Water Resource and Management Rules 2007, it says Approval of Energy Regulatory Commission is required before any such charges can be implemented. The affidavit has annexures attached.

On 22/4/2009 the Plaintiff filed Chamber Summons of that date 27/4/2009 seeking to strike out the 3rd Party Defence and in the alternative the third Party Notice together with the third party proceedings be set aside. The costs be borne by third party on the grounds that third party is in breach of the law applicable and the defence lacks factual and legal basis is self contradictory, inconsistent, a sham a mere denial and raises no reasonable defence. It is contrary to public policy that the purported 3rd party mischievously elect to shackle justice and due progress through its untenable irregular and unmeritorious defence.

I have perused and considered the arguments of Plaintiff. The Defendant does not deny water use but objects to paying for its use. I have noted that the defence is a sham and an abuse of court process. I therefore strike that defence out and enter judgment as prayed in the Plaint together with interest and costs.

Regarding the Chamber Summons dated 22/4/09 there is no cause of third party Notice. The Defendant is not entitled to any indemnity or contribution by third party to the Plaintiff's claim. The third party is a regulatory body and has no obligation to indemnify the Defendant. I therefore strike the Defendant's defence as being a sham, frivolous and an abuse of court process.

I have perused the authorities listed by the Respondent:

(1) DT Dobie Co. (K) Ltd vs Joseph Mbaria Muchung

where it was said **"It has been said more than once the rule is only to be acted upon in plain and obvious cases and jurisdiction should be exercised with extreme caution."**

(2) Bakari Ali Ogado & Others vs Uniliver Kenya Ltd.
Appeal against High Court judgment, the court said:

"We are of the view that as far as possible the courts should encourage the resolution of disputes by hearing both sides on merit without undue regard to technicalities. Nitin Properties Ltd vs Kalsi & Another Court of Appeal said striking out is a drastic remedy and it has been held time and again that striking out procedure can only be invoked in plain and obvious cause court of justice should aim at sustaining suit."

Gachago V. Attorney General 1980 LLR 1279.
where it was on the right of a third party.

Other authorities Muiruri vs Muiruri & Another Company Winding Up Petition summary remedy of striking off is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of court process or is unarguable.

Kenidia Assurance Co. Ltd vs Alpha Knits Ltd & Another was statement of Defence raising any valid of defences.

I have considered all the above authorities. Firstly the Plaintiff is empowered by statute and Rules thereunder to raise charges concerning Electrohydro Water user for generation of electricity the Defendant was obliged to pay for the water use and the charges were Gazetted.

The third party is a Regulatory body established by law. It should not participate in these proceedings. It is not to indemnify the water users. The obligation to pay plaintiff is not denied and they do not deny water user. Therefore to bring arguments to delay or avoid payment before the court is an abuse of court process.

The defence has no merit. The proceedings between third party and Defendant do not concern the Plaintiff and it is proper that they be set aside as they are not valid.

In the circumstances Third Party proceedings are set aside. The defence of the Defendant is truck out and judgment is entered for Plaintiff as prayed in the Plaint. Costs of this application is to Applicant payable by Defendant and Third Party.

Dated and delivered at Nairobi this 15th day of October 2010.

J. N. KHAMINWA
JUDGE