



London Distillers (K) Limited v Mavoko Water & Sewerage Company & 2 others (Environment & Land Case 104 of 2019) [2022] KEELC 13644 (KLR) (17 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 104 OF 2019
CA OCHIENG, J
OCTOBER 17, 2022**

BETWEEN

LONDON DISTILLERS (K) LIMITED PLAINTIFF

AND

MAVOKO WATER & SEWERAGE COMPANY 1ST DEFENDANT

MACHAKOS COUNTY GOVERNMENT 2ND DEFENDANT

ERDERMANN PROPERTY LIMITED 3RD DEFENDANT

RULING

1. What is before court for determination is the 1st defendant's notice of motion application dated the November 8, 2019 brought pursuant to sections 1A, 1B and 3A of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules*. The 1st defendant seeks the following orders:
 1. Spent
 2. That this honourable court do grant an early mention date for purposes of taking directions on the process and mode of sampling.
 3. That pending the hearing and determination of this application or until further orders of this court, a temporary conservatory order be and is hereby issued prohibiting the respondents jointly and/or severally, whether by themselves and or their officers, agents, servants or anybody acting under them from discharging any effluent into the public sewers and environment.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Michael Mangeli. The 1st defendant contends that there is no clear defined procedure for sampling that was agreed upon between the experts during the initial sampling process ordered to be conducted on the November 4, 2019. Further, this puts the integrity of the results in jeopardy and requires immediate remedial measures. It argues that without the court's guidance on the procedure on a day to day basis,



parties are not able to carry on with sampling process in an objective measurable and secure manner, Further, the Environmental Management and Coordination Act does not provide the measurable standards for collecting industrial samples which has made it difficult for the experts to use a generally endorsed and acceptable standard and impartial process for sampling. In the supporting affidavit, the deponent explained the process they had adhered to, to implement the order of the court issued on October 28, 2019.

3. The plaintiff opposed the instant application by filing a notice of preliminary objection dated the November 19, 2019 and a replying affidavit sworn by Pushpinder Singh Mann, where it avers that pursuant to the judgment of this court dated the October 4, 2019 in *Machakos ELC No 35 of 2010, Kapa Oil Refineries Limited & Another vs EPZA, Mavoko Water and Sewerage Company & Others*, this court lacked jurisdiction to entertain or determine matter touching on the ownership and control of Export Processing Zone Authority (EPZA) Main Trunk Sewer Line. Further, that the 1st defendant had no locus to question the quality of discharge as well as superintend the subsisting contract between the plaintiff and EPZA. It claimed the 1st defendant vandalized the plaintiff's connection to the EPZA main trunk sewer line thereby causing it massive losses and resulting in the closure of the distillery. It explains that the 1st defendant having opposed the plaintiff's application seeking direction on the mode and defining the procedure of carrying out sampling process pursuant to order of this court made on October 18, 2019 is barred by the doctrine of res judicata and its extended form, estoppel. It reiterates that the orders sought herein are directed at EPZA that is not a party to this suit, hence the said orders cannot issue as EPZA is receiving effluent from the Plaintiff's factory pursuant to a subsisting contract. Further, that by this application, the 1st defendant is usurping statutory powers of National Environmental Authority (NEMA) and EPZA. It insists that the 1st defendant should be directed to provide security for costs amounting to Kshs 20 million. It denies having a pre-determined sampling point as all experts had been granted access to collect samples. Further, that the 1st defendant in a joint venture with the 2nd defendant seeks to facilitate the closure of the plaintiff's distillery. It explains that this court cannot set any procedure for how sampling should be carried out but this is an independent work of experts. It reaffirms that on November 18, 2019, both parties in Machakos JR No 48 of 2019: R vs EPZA Ex parte London Distillers (K) Limited recorded a consent withdrawing the entire motion for judicial review after reaching a unanimous understanding that it is the 1st defendant in collusion with the 2nd as well as 3rd defendants herein who actually frustrated the subsisting agreement between the parties thereto. Further, that orders sought herein cannot issue. It further reiterates that the plaintiff discharges effluent to EPZA main trunk sewer line.
4. The 1st defendant filed a supplementary affidavit sworn by Michael Mangeli reiterating its averments where he deposes that on October 18, 2019, the court granted orders in the Machakos JR No 48 of 2019: R vs EPZA Ex parte London Distillers (K) Limited in respect to collection of samples of the effluent from the plaintiff's plant which extends to this matter. He explains that the samples were collected and a senior environment specialist prepared a report. He provides a highlight of the findings in the report and insists the plaintiff's effluent treatment plant does not consistently meet the threshold guidelines for some of the parameters set. Further, that quarterly monitoring should be done and plaintiff should be directed to provide discharge monitoring records for the six (6) months prior to the 1st defendant filing the instant application.
5. The plaintiff further filed a supplementary affidavit sworn by Benjamin Langwen where it reiterates the plaintiff's averments and insists that on September 11, 2019 the court issued interim orders barring the defendants from interfering with the discharge of its pre treated effluent into the EPZA main trunk sewer line and the said orders have never been set aside and remain in force. Further, that the 1st defendant has never filed a counter claim in this matter to entitle it to purport to have locus



in interfering with or supervising the independent contract that the plaintiff has, for purposes of discharge of its pre treated effluent into the EPZA main trunk sewer line. It contends that the import of the instant application is that it seeks to set aside the orders barring it from interfering with the discharge of the plaintiff's effluent into the EPZA main trunk sewer line. Further, that on September 4, 2019 National Environmental Tribunal (NET) in NET Appeal No 21 of 2019 London Distillers (K) Ltd vs NEMA and Erdermann Property Limited, made an order stopping the construction of Great Wall Gardens Estate Phase 3. Further, that the 3rd defendant filed an appeal in JR Case No 41 of 2019 Erdermann Property Limited vs NET & Others. It proceeds to highlight the proceedings in the related matters pending before this court and claims the instant application is an abuse of the process of court. It further challenges the impartiality of the expert Mercy Omolo.

6. The application was canvassed by way of written submissions

Analysis and determination

7. Upon consideration of the instant notice of motion application including the various affidavits, annexures and rivalling submissions, the only issue for determination is whether this court should restrain the plaintiff or its agents from discharging effluent into the public sewer line as well as grant directions on the process and mode of sampling.
8. The 1st defendant sought for orders to restrain the plaintiff from discharging effluent into the public sewers and environment. Further, that the court should grant directions on the mode of taking of samples. The plaintiff opposed the instant application and insisted that the court lacked jurisdiction to handle this matter. The plaintiff further made reference to the aforementioned Kapa Oil case (supra), where the court had made a decision over ownership of the EPZA main trunk sewer line. I have had a chance to peruse the said decision and note the issue of the ownership of the aforementioned sewer line was actually heard and determined. I will proceed to highlight an excerpt from the decision of Kapa Oil Refineries Limited & 7 others v Export Processing Zones Authority & 2 others [2019] eKLR where Angote J. observed as follows:

As I have stated above, the 1st defendant was appointed as a water undertaker vide Legal Notice No 57 of 1997 dated June 3, 1997. By the time the 1st defendant was appointed a water undertaker, it owned the sewerage trunk-line sewer line running from the Export Processing Zone in Athi River all the way to a place known as Kinanie, where it has its treatment plant.

120. The 1st defendant produced in evidence the architectural drawings of the said pipeline and the treatment plant. The drawings clearly show that although the pipeline was wholly funded by the government, it was owned by the 1st defendant.
121. The ownership of the sewer line running from the 1st defendant's land in Athi River all the way to the treatment plant in Kinanie is further confirmed by the title document which shows that LR No 23961 measuring 301.1 Ha is registered in the name of the 1st defendant. It is on this land that all the effluent is treated before being released to Athi River.
122. It is not in dispute that all the effluent that runs through the main trunk- sewer line gets its way to the treatment plant that is located on LR No 23961 which is registered in the name of the 1st defendant. Indeed, evidence was produced



showing that the treatment plant situated on LR No 23961 was constructed by the government for the 1st defendant.

123. In the letter dated March 20, 2009, the National Environment and Management Authority, (NEMA) gave to the 1st defendant an 'effluent discharge licence' to discharge effluent from EPZAs Kinanie Sewerage Treatment Plant into Athi River.
124. It is on the basis of the said licence, and the fact that the sewerage system running all the way from the 1st defendant's zone in Athi River to its treatment plant in Kinanie, that the 1st defendant connected the plaintiffs' KAPA sewer line on its line.
125. Although section 56 of the *Water Act*, 2002, which is the law that was in existence when this suit was filed, required that all water providers who supply water and sewerage services to more than twenty households, or who use more than 100,000 litres per day for any purpose, required a licence from the Water Services Regulatory Board, the evidence before me shows that this provision was not applicable to the 1st defendant.
126. I say so because having been appointed a water undertaker under the repealed law, the *Water Act*, 2002 allowed the 1st defendant to continue undertaking the tasks of a water undertaker until 'the coming into force of any rules to the contrary. (See section 114 (c)).
127. Indeed, when the 2005 rules under the *Water Act*, 2002 were operationalized, the then Athi Water Services Board, through the Ministry of Water, was required to enter into negotiations, and sign legally binding agreements with the 1st defendant or the ministry, transferring to the Athi Water Services Board all its services and infrastructure pertaining to the provision of water and sewerage services. That never happened.
128. The 1st defendant having not entered into any formal agreement with the then Athi Water Services Board, which later on was split to create the 3rd defendant, the 3rd defendant cannot claim that it took over the water services undertaking functions from the 1st defendant. Having not taken over the water and sewerage services or infrastructure from the 1st defendant as contemplated under the law, the 3rd defendant could not have entered into a valid agreement with the 2nd defendant, who is its agent, in relation to the trunk - sewer line and the treatment plant that is owned by the 1st defendant.
129. Although the 3rd defendant has a licence from the Water Services Regulatory Authority as a water service provider, and has entered into an agreement with the 2nd defendant to provide those services on its behalf, the 2nd and 3rd defendants can only use the 1st defendant's trunk -sewer line with its consent or by operation of the law. Indeed, its illogical and immoral for the 2nd and 3rd defendants to purport to continue using a facility that they never invested in, or before entering into a formal agreement with the 1st defendant as contemplated by the *Water Act*, 2002 and the 2005 Rules.



130. In fact, the difficult that the Ministry of Water has had to transfer the 1st defendant's facility to other entities is expected considering that the 1st defendant's water supply and sewerage facilities are meant to cater for export processing enterprises within the 1st defendant's Athi River Export Processing Zone Complex. If another entity was to take-over the facility, it means that the 1st defendant's operations will be at the mercy and magnanimity of the 2nd defendant, who is the 3rd defendant's agent.'
9. From the *Environmental Management and Co-ordination Act* and rules, I note it is only NEMA mandated to collect samples from any sewer line whether public or private. However in this instance and based on the decision of the KAPA Oil case supra which is related to this matter, I opine that it is only EPZA that can seek restraining orders against the plaintiff at this juncture, as it owns the main trunk sewer line. Further, I note EPZA is not a party to this suit and has not indicated if it is aggrieved with the plaintiff's effluent being discharged on its main trunk sewer line, and I will hence not issue any restraining orders to that effect.
10. On the issue of collection of samples, since EPZA and NEMA are not parties to this suit and noting that it is only NEMA that is legally mandated to collect samples while there is no complaint from EPZA which is the owner of the main trunk sewer line, on effluent discharged by the plaintiff, I will decline to make an order for collection of samples as sought.
11. In the circumstances, I find the notice of motion dated the November 8, 2019 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF OCTOBER, 2022.

CHRISTINE OCHIENG

JUDGE

