Kapa Oil Refineries & 7 others v Export Processing Zones Authority & 2 others (Environment & Land Case 35 of 2010) [2022] KEELC 13425 (KLR) (12 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13425 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 35 OF 2010

A NYUKURI, J

OCTOBER 12, 2022

BETWEEN

KAPA OIL REFINERIES ..... 1ST PLAINTIFF

NATION MEDIA GROUP LIMITED ..... 2ND PLAINTIFF

SANPAC AFRICA LIMITED ..... 3RD PLAINTIFF

ALLPACK INDUSTRIES LIMITED ..... 4TH PLAINTIFF

ORBIT CHEMICALS LIMITED ..... 5TH PLAINTIFF

MABATI ROLLING MILLS LIMITED ..... 6TH PLAINTIFF

DOSHI ENTERPRISES LIMITED ..... 7TH PLAINTIFF

DECENT DEVELOPERS LIMITED ..... 8TH PLAINTIFF

AND

EXPORT PROCESSING ZONES AUTHORITY ..... 1ST DEFENDANT

MAVOKO WATER AND SEWERAGE COMPANY LIMITED .. 2ND DEFENDANT

TANATHI WATER SERVICES BOARD ..... 3RD DEFENDANT

RULING

1. *Vide* an application dated September 6, 2021, the plaintiffs/applicants sought for the following orders;

   a) That the 1st, 7th and 8th plaintiffs having paid all sums due under the judgment with respect to the 1st defendant's counterclaim, this matter be marked as settled on the 1st defendant's claim.

   b) That the 1st defendant be asked and directed to obey and comply with the judgment.

c) That the 1st, 7th and 8th plaintiff upon payment of the sums ordered by the court and complying with the contract, the 1st defendant be restrained from interference and usage of the sewer by the said plaintiffs until and unless a new contract is entered into by the parties.

d) That the costs of the application be provided for.

2. The application is supported by the affidavit of Samuel Njoroge, the legal affairs manager of the 1st plaintiff, sworn on September 6, 2021. The applicants' case is that this court entered judgment for the 1st defendant on the counterclaim and ordered the 1st, 7th and 8th plaintiffs to pay charges for the usage of the sewer line as agreed by the parties in the contract between them. The applicants further stated that they have paid all the sums as ordered in the decree and have continued to pay the contractual sum as agreed between the parties.

3. In addition, the applicants averred that although the contract between the parties provided for specific monthly charges, the 1st defendant had unilaterally increased the 1st plaintiff's sewerage charges from Kshs 60,000/= per month to Kshs 157,500/=, which increase had also been done for the other applicants. The applicants complained that by increasing the monthly charges, the 1st defendant was violating the judgment it sought and obtained from court and more specifically paragraph 151 (b) thereof and ought to be compelled to obey the judgment because by increasing the charges, the 1st defendant was clogging the applicants' rights to the benefits of their contracts and enjoyment of the right to a clean environment.

4. The application was opposed by the 1st defendant/respondent. On October 4, 2021, the respondent filed a replying affidavit sworn by Benjamin Chesang, the acting chief executive officer of the 1st defendant. It was the respondent's case that the matters raised in the application raised a new cause of action outside the scope of the judgment entered in this matter and could not be ventilated in execution proceedings.

5. Mr Chesang deponed that the judgment herein confirmed that the respondent was a licenced water undertaker owning the trunk sewer line and the water infrastructure leading to the EPZA Athi River zone, together with the treatment plant in Kenanie.

6. It was further stated for the respondent that this court entered judgment for the respondent as against the 1st, 7th, and 8th plaintiffs and ordered for payment of the charges due to the respondent between March 2010 to March 2019 being the sums of Kshs 6,480,000/=, Kshs 2,592,000/= and Kshs 2,592,000/= respectively and for payment of Kshs 60,000/=, Kshs 24,000/= and Kshs 24,000/= respectively, from April 2019 onwards until payment in full.

7. It was further pointed out by Mr Chesang that in May 2020, after judgment herein, in line with the power conferred on the respondent by dint of section 9 (2) (k) of the *Export Processing Zones Act*, the respondent's board considered and passed a resolution to approve proposed new tariffs for discharge of sewage to EPZA trunk line. That this was done by issuing a public notice of the standard operating procedures with new sewerage rates, hence, it was their position that the review of the tariffs was legal and procedural and not unilateral as alleged by the applicants.

8. He maintained that it was only the 1st plaintiff that had refused to comply with the new rates as the rest of the plaintiffs were in compliance, hence the 1st plaintiff's unpaid sewerage charges as at September 2021 stood at Kshs 1,804,151.61. He was also of the view that acceding to the 1st plaintiff's demand would expose the 1st defendant to claims of discrimination.

9. He further deposed that the judgment herein was only in respect of outstanding contractual sewerage conveyancing and treatment charges from March 2010 until payment in full as the respondent did not ask the court to define its future relationship with entities connected to its trunk sewer line. He emphasized that the judgment did not prohibit future revision of sewerage rates for entities using the respondent's trunk line, neither can that be implied from the judgment as doing so would lead to the payment of monthly charges of Kshs 60,000/=, Kshs 24,000/= and Kshs 24,000/= in eternity, which would be an absurd interpretation of the judgment. He observed that paragraphs 146, 147, 148 and 149 of the judgment which formed the basis of the instant application were obiter dicta and maintained that the review of the tariffs was based on the economy and that the 1st plaintiff has not demonstrated that the new tariffs are unbearable and too expensive.

10. The application was canvassed by way of written submissions. On record are the applicants' submissions dated November 26, 2021 and the respondent's submissions dated March 14, 2022.

The Applicants' Submissions

11. Counsel for the applicant submitted that the 1st defendant wilfully disobeyed the judgment of this court by unilaterally increasing utility charges in a punitive and retaliatory manner despite the applicants' compliance with the judgment. Reliance was placed on the case of *Buchell v Buchell* 684 S.W.2d 296 (1984), for the proposition that enforcement of compliance with court orders is the cornerstone of the rule of law and the basis for the confidence in recourse to law as an instrument for resolution of disputes. It is on this basis that the applicants argued that it is prudent that the respondent is restrained from interference of the applicants' usage of the sewer line, until a new contract is entered into by the parties.

12. Counsel relied on the case of *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443 for the proposition that a contract remains binding on the parties, in the absence of proof of any justification for defeating contractual obligations. According to the applicants, change of tariffs by the respondent cannot be a basis for altering the parties' contractual obligations as the charges are premised on contractual obligation and not statutory obligation; which takes away the respondent's unilateral actions.

13. Citing section 139 of the *Water Act*, the applicants contended that there is no justification for the colossal increment of the tariffs. Counsel contended that increment of the tariffs ought to be done only upon the approval of the Water Services Regulatory Board (WASREB), a body with the statutory mandate under the *Water Act* to determine charges to be imposed for water and sewerage services and to approve alterations to existing utility contracts. The applicants further argued that the respondent failed to comply with the procedures laid down in the guidelines of public consultation for regular tariff review under section 72 (1) (b) of the *Water Act* 2016.

14. It was maintained on behalf of the applicants that by increasing the utility charges, the respondent was clogging the applicants' rights to the benefits of their contracts and enjoyment of the right to a clean environment protected under the *Constitution* and in breach of the applicants' right to goods and services of reasonable quality contrary to article 46 of the *Constitution*.

15. Counsel referred to the case of *National Bank of Kenya of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR, for the proposition that it is not the function of equity to interfere with a contract or relieve a party from a bad bargain.

The Respondent's Submissions

16. Counsel for the respondent submitted that the court cannot fix the rates or interfere with the rates fixed by the respondent as that is the latter's prerogative. Counsel argued that upon delivery of judgment herein, the court became *functus officio* and cannot determine the sewerage rates post judgment. They faulted the applicants' argument that the respondent was clogging its rights and contended that, that view showed that the applicants' claim was based on new issues outside the scope of the pleadings and the judgment herein.

17. It was further argued for the respondent that the respondent's board acted in accordance with section 9 (2) (k) of the *Export Processing Zone Act* cap 517 Laws of Kenya, in revising the sewerage tariffs. Counsel pointed out that the court's finding in paragraphs 146 to 149 of the judgment, to the effect that the right to clean water and sanitation as social and cultural goods which ought to be provided by the state as opposed to commodification of the same, did not mean that the sewerage tariffs could not be reviewed.

18. It was submitted that when charging fees for sewerage services, the respondent carries out a statutory duty conferred by section 9 (2) (k) of the *EPZA Act*. That the obligation on the Respondent in reviewing sewerage rates is to inform the actual and potential users of their sewer trunk line, which was done *vide* their public notice issued in May 2020. According to the respondent, the decision to review the sewerage tariffs was considered by the respondent's lawful structures, hence the same had a lawful basis and could not be said to have been whimsical.

19. Counsel maintained that the revision of sewerage rates which happened after entry of judgment, was not the subject matter of the judgment and that therefore the judgment did not bar the respondent from revising sewerage rates when deemed appropriate. That therefore it was not correct that the 1st defendant had violated the judgment. Reliance was placed on the cases of *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR and *Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited* [2017] eKLR, for the proposition that a court cannot rewrite parties' contract as the court has no power to do so.

20. It was the respondent's view that allowing the application would amount to an unfair preferential treatment of the 1st plaintiff over other entities being served by the respondent's main trunk sewer line as the rest of the plaintiffs, including the 7th and 8th plaintiffs were paying the new tariffs while the 1st plaintiff was adamant and unwilling to pay.

21. On whether the 1st defendant complied with procedures on increment of sewerage fees, counsel contended that the 1st defendant is a water undertaker *vide* legal notice No 57 of 1997. It was their case that the 1st defendant did not need a licence from the Water Services Regulatory Board, which position was captured in paragraphs 125 to 127 and 130 of the judgment herein. It was further argued that section 72 (1) (b) of the *Water Act* did not apply to the 1st defendant.

22. Counsel stated that section 31 of the *EPZA Act* provides that any person aggrieved with the decision of the 1st defendant ought to appeal to the cabinet secretary within 30 days of the decision, and therefore the claim that the 1st defendant was violating the applicants' right to a clean and healthy environment was an abuse of the court process, baseless and ought to be dismissed.

Analysis And Determination.

23. I have carefully considered the application; supporting affidavit; replying affidavit; submissions and authorities relied upon by each party. In my considered view, the issues that arise for determination are as follows;

    a) Whether this court is *functus officio*

    b) Whether the applicants are entitled to the orders sought.

24. The *Black's Law Dictionary* 11th edition defines *functus officio* as follows;

    without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

25. As I understand it, the doctrine of *functus officio* means that once a court has determined a matter, its mandate in so far as that matter is concerned is spent and can do nothing more.

26. The essence of the doctrine of *functus officio* was succinctly captured in the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550, where the court held as follows;

> A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.

27. Similarly, in election petitions Nos 3, 4 and 5 *Raila Odinga & others v IEBC & others* [2013] eKLR, the Supreme Court cited with approval the article by Daniel Malan Pretorius in "The origins of the *functus officio* doctrine with specific reference to its application in administrative law" (2005) 122 SALJ 832 as follows;

> The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.... the [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.

28. In the instant application, the applicants contend that the 1st defendant made a counterclaim for payment of the 1st, 7th and 8th plaintiffs' usage of the sewer facilities as agreed by the parties and that the same was duly paid. Their main complaint is that the 1st defendant has unilaterally, unlawfully and without justification increased the monthly sewerage fees from Kshs 60,000/= to Kshs 157,500/=, which action has clogged the 1st, 7th and 8th plaintiffs' right to a clean and safe environment. Further that the increment in sewerage fees is a violation of this court's judgment which ordered for payment of the sewerage fees as agreed between the parties. Other antecedent complaints are that the sewerage tariff increment was done without the approval of WASREB and not in compliance with procedures provided for under section 72 (1) (b) of the *Water Act*.

29. In rebuttal, the 1st defendant contends that the increment was done in May 2020, after judgment had been delivered in this matter and that the orders sought are outside the purview of the primary pleadings and judgment as the applicants' complaint is about clogging of their right to a healthy environment which has allegedly been caused by the tariff increment.

30. Therefore, the issue that this court must first address is whether the application herein raises matters which may be entertained post judgment or whether the same are new matters that cannot be raised at this stage. In short, has this court's mandate been discharged conclusively and therefore become functus?

31. Although the judgment is clear, for some reason, the parties herein have each chosen to interpret it in two opposing directions. While the applicants content that the judgment spoke to the outstanding and future obligations under the contract between the parties; the respondent is categorical that the judgment only addressed outstanding and or defaulted payments. The 1st defendant contents that if the judgment was to mean that the payment of the monthly charges of Kshs 60, 000/= were to apply in eternity, that would lead to an absurdity not intended in the judgment.

32. I note that in the pleadings, while the plaintiffs sought inter alia for a permanent injunction to restrain the defendants from impeding the discharge of their sewer in to the defendants' sewer line and a declaration as to who between the defendants was legally mandated to operate the main sewer line, the 1st defendant sought from the 1st, 7th and 8th plaintiffs the unpaid sewerage conveyancing and treatment charges from March 2010 until payment in full.

33. Upon trial, this court found that the 1st defendant had proved their claim that the 1st, 7th and 8th plaintiffs had defaulted in the payment of the contractual sums of Kshs 60,000/=, Kshs 24,000/= and Kshs 24,000/= respectively, for more than 9 years (108 months). This position is clearly stated in paragraphs 136 to 140 of the judgment. Having found so, the court ordered the said plaintiffs to pay the 1st defendant sums of Kshs 6,480,000/=, Kshs 2,592,000/= and Kshs 2,592,000/= respectively being monies owed for the period between March 2010 and March 2019. The court also ordered the 1st, 7th and 8th plaintiffs to pay their respective contractual sums every month with effect from April 2019 until payment in full. I do not find anything in the judgment to suggest or indicate that the monthly sewer charges paid by the 1st, 7th and 8th plaintiffs could not be varied.

34. I therefore do not agree with the applicants' argument that the finding that they pay their respective contractual sums with effect from April 2019 until payment in full meant that the 1st defendant was barred from reviewing the sewerage conveyancing and treatment charges from time to time. There is nothing in the judgment to suggest that the findings of the court applied to future payments. As I understand the judgment, it addressed the 1st defendants' counterclaim which was a prayer for unpaid charges. I therefore do not consider the 1st defendant's review of the sewerage tariffs as amounting to disobedience of the judgment herein, as the court did not bar such revision.

35. The 1st, 7th and 8th plaintiff's main complaint in the application before court is that the 1st defendant unilaterally and unlawfully, without justification increased the sewerage conveyancing and treatment charges, which action has violated their constitutional right to a clean and healthy environment. They sought for injunction to restrain the 1st defendant from interfering with their use of the sewer trunk line until a new contract is entered into by the parties. In my considered view this claim and the prayers sought discloses a new cause of action outside the purview of the pleadings and judgment entered herein and therefore cannot be determined post judgment as this court's mandate in so far as the matters and issues in this suit are concerned is exhausted. Although the court stated in the judgment that sanitation is a right that ought to be provided by the state, and not be commodified, the substratum

of this case was not whether or not the charges levied on the plaintiffs' use of the 1st defendant's sewer trunk line amounted to commodification of sanitation. The main issue was who between the defendants was to be paid the sewerage charges. Therefore, the application discloses a fresh cause of action, beyond the mandate of this court at this stage.

36. In addition, the applicants have sought for injunction. I am clear in my mind that an injunction can only issue where there is a *prima facie* case with probability of success. (see *Giella v Cassman Brown* [1973] EA 358). In this matter, the case was determined and therefore there is no case pending upon which an injunction can issue.

37. I therefore find and hold that this court is *functus officio*. Having found so, the court cannot consider the merits of the application, as the same discloses a new cause of action that can neither be determined at this stage nor within these proceedings.

38. In the premises, I find and hold that the application dated September 6, 2021 lacks merit and the same is dismissed with costs to the 1st defendant.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12th DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Ngei holding brief for Mr. Tugee for 1st Defendant

Ms Makori for the Plaintiff

Ms. Josephine Misigo - Court Assistant