



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Suit 64 of 1998

THE BOARD OF GOVERNORS, HILL SCHOOL ELDORET,

PRIMARY & SECONDARY.....PLAINTIFF

=VERSUS=

THE BOARD OF GOVERNORS, ELGON VIEW ACADEMY.....DEFENDANT

RULING

The Plaintiff is the Board of Governors of Hill School Eldoret while the Defendant is the board of Governors, Elgon View Academy.

Their respective premises are located proximate to each other.

In Plaintiff dated 2nd April, 1998, the Plaintiff states:-

- That on or about 1994, the Eldoret Municipal Council instituted proceedings against the Plaintiff where the Plaintiff was required to construct a sewer line stretching from the Plaintiff's premises to the nearest public sewer.
- That in or about 1995, the Plaintiff commenced and completed construction of a sewer line measuring one and a quarter kilometer (1.4 km) in compliance with the direction referred to above with the strict capacity to remove the wastes collected upon the Plaintiff's premises from time to time.
- That prior to the construction of the sewer lines, the Plaintiff sought for and obtained permission to expend its own money, resources and labour in the construction of the sewer lines, to excavate any land or road with a view to laying the line, to exclusively use the sewer line to solely maintain or finance the sewer line from the Eldoret Municipal Council which was not in a financial position to undertake the same.
- That prior to the construction of the sewer line, the Plaintiff and/or the Eldoret Municipal Council invited the Defendant to participate, render financial contribution and to provide man power towards construction of a more enhanced sewer line with a large capacity if it desired to use the same but the Defendant refused, neglected, and/or otherwise failed to tender any such assistance.
- That at completion of the sewer line, the Plaintiff had expended the sum of Kshs 750,000/= by way of purchase of materials, professional advise, labour and machinery.
- At all times after completion of the sewer line and at all times prior to December, 1996, the Plaintiff

enjoyed quite possession, use and exercise maintenance of its sewer line without interference from other person or body of person whatsoever.

- That on or about December 1996 and so soon after the Plaintiff's pupils and students had proceeded for vacation, the Defendant unlawfully without consent and without any legal and economic justification whatsoever, trespassed upon the Plaintiff's sewer line by connecting its waste collection system to the Plaintiff's system thereby increasing the value of wastes entering upon the Plaintiff's sewer line.
- That Consequently upon the Defendant's act of trespass aforesaid, the Plaintiff's sewer line whose capacity was still limited to disposing of waste from the plaintiff's premises could not withstand the additional volumes of waste and the pressure accompanying the addition whereupon the same burst.

The Plaintiff claims that the said connection amounted to trespass and unlawful entry leading to blockage and disconnection of the Plaintiff from its sewer line. In claiming proprietary rights over the sewer line the Plaintiff seeks the following orders:-

1. A declaration that the Plaintiff is entitled to the sole possession, use, enjoyment and maintenance of its sewer line.
2. An order of mandatory injunction directing the Defendant to immediately disconnect and remove all the materials connecting the Defendant's waste collection system to the Plaintiff's sewer line and further directing the Defendant to restore the Plaintiff's access to its sewer line at the Defendant's own cost.
3. An order of permanent injunction restraining the Defendant inter alia from connecting its waste collection system to the said sewer.

In the alternative the Plaintiff seeks orders permitting the Defendant the use of the Plaintiff's sewer line upon fulfilling various conditions.

In its Defence dated 17th April, 1998, the Defendant states inter alia:-

- o It has no obligations to seek permission from the Plaintiff for the use of the sewer line as it is a public utility owned by the Municipal Council of Eldoret.
- o The Defendant further avers that the Plaintiff has no cause of action against the Defendant as the sewer line is a public utility owned by the Municipal Council of Eldoret and land on public land.

The Defendant filed the application before me on 12th June, 2006. It seeks an order that the suit be struck out under the provisions of Order VI, Rule 13 (1) (a) (b) and (d) of the Civil Procedure Rules. The Defendant lists the following grounds in support of the application; that:-

- (a) That the Plaintiff does not disclose a cause of action.
- (b) The suit is vexatious and an abuse of the Court process.
- (c) The Plaintiff was compensated by the Municipal Council of Eldoret.
- (d) The sewer line, subject matter of this suit vested in the Municipal Council of Eldoret in 1995 by virtue of section 170 of the Local Government Act (now repealed).
- (e) The subject matter of the suit is the property of the Municipal Council of Eldoret and the Plaintiff has no locus standi to proceed with the suit.

On the issue of procedure which was first taken up by the Plaintiff's Counsel, I do agree with him that under the provisions of order 6 Rule 13 1 (a), no evidence shall be admissible. However, I think that if an application is also made under Rules (b), (c) and (d), the evidence is admissible by way of an affidavit.

The evidence shall relate to the said rules and not Rule 1 (a). There is no prejudice in bringing one application in respect of all the rules.

I will first deal with the first ground that the Plaintiff does not disclose a cause of action. The Plaintiff relies on Section 170 of the Local Government Act (now repealed) which vests sewerage and drainage in local authorities.

The Plaintiff claims that it commenced and completed construction of the sewer line in 1995. By the said year when it claims that it acquired proprietary rights over the sewer, the section 170 (1) (I) of the Local Government Act, Chapter 268 was still in force. The said section provided as follows:-

“ 170 (1) All, drains, pipes, ventilating shafts or other inconveniences for the disposal of sewerage or drainage, constructed by or which are under the control of a municipal council, town council, or urban council, shall be vested in such local authority and such local authority, its offices and servants, shall at all times have a right of access to private property for the purpose of inspection, maintenance, alteration, or repairs of such sewers, drains, pipes, ventilating shafts or other conveniences vested in it, and may do all things necessary to uncover and expose such sewers, drains, pipes, shafts or other inconveniences for the purpose of inspection, alteration or repair.”

In Blacks law Dictionary **“Vests”** is defined inter alia as:-

“1. To confer ownership of (property) upon a person

2. To invest (a person) with the full title to property

..... .”

It is my view therefore that reading the provisions of S. 170 (1) of the Act and the meaning of **“vested in”** that all sewers, drains, pipes, ventilating shafts or other conveniences for the disposal of sewerage or drainage belong to the relevant local authority. Such sewers, drains etc may have been constructed by the local authority or under its **“control”** under section 2 of the Act.

“Control” is defined to include regulated, inspect, supervise and license.”

This means that ultimate ownership in law under the Act of any sewers or sewer lines constructed by an individual or company still vests in the local authority whether the sewer line is on private property, runs through public property or both.

I therefore do hold that by constructing the sewer line in 1995, the Plaintiff did not become the owner of the sewer line. At the material time when its cause of action arose, section 170 (1) of the Act was still in force and the sewer line was owned by the Eldoret Municipal Council for the purpose of the Act. The sewer line is for public utility and while the Plaintiff may have certain rights, it is not its property for which it can institute this suit to control or enforce the use therefore in any way. It is only the Eldoret Municipal Council which could institute present suit.

Section 170 (1) of the Local Government Act was repealed by Section 111 (2) of the Water Act 2002, No. 8/2002. The said new provision has transferred the jurisdiction and powers of Water Service including sewerage services of many local authorities to new Water Boards established throughout the country. Where no board or other body has been set up; section 111 (3) provides for transition provisions enabling the local authority to continue carrying out the said services. In such event the said local authority is enabled to exercise any powers vested in it in connection with the performance of such functions.

As a result of the foregoing, the relief of a Declaration that the Plaintiff is entitled to the sole possession, use, enjoyment and maintenance of the sewer line herein is not available to the Plaintiff.

By virtue of Sections 170 (1) (b) of the Local Government Act (now repealed) and Section 111 (1) (2)

and (3), of the Water Act, the ownership of the sewer line was vested previously in Eldoret

Municipal Council and may still be so vested unless it has been transferred to the Eldoret Water & Sewerage Co. Ltd.

The alternative relief of this Court setting conditions for the use of the sewer line by the Defendant, is also not available as the Court has no jurisdiction to grant such orders. Such decision can only be made by the body or authority in which ownership of the sewer line is vested in by law. In this case it is not and has never been the Plaintiff.

The result is that I do hereby hold that the plaint does not disclose a cause of action against the Defendant. I have reached this decision without referring to the affidavits and confined myself to the pleadings and the law. I therefore do hereby strike out the plaint under order VI, Rule 13 (a). It follows that I must therefore dismiss the suit which I hereby do with costs to the Defendant.

Having decided on the first ground, I think it would be unnecessary and superfluous to deal with grounds (b) and (c).

In reaching this decision, I had considered that the parties had prepared for the trial of the suit and each party had filed their issues and documents. Despite this and the delay in making the application, I think that there is no prejudice as I was able to reach the decision on the pleadings and the law.

DATED AND DELIVERED AT ELDORET ON THIS 4TH DAY OF DECEMBER, 2007.

M.K. IBRAHIM,

JUDGE.