REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 35 OF 2010

KAPA OIL REFINERIES LIMITED.....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

VERSUS

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

MAVOKO WATER AND SEWERAGE

COMPANY LIMITED.....2ND DEFENDANT

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

RULING

1. There are three Applications before me. The first two Applications by the Plaintiffs and the 2nd Defendant are related. In the Application dated 30th October, 2019, the Plaintiffs are seeking for the following orders:

> a. ***That there be a stay of execution of the Judgment of this Honourable Court delivered on 4th October, 2019 and the resultant decree therefrom pending the hearing and determination of the Plaintiffs' Appeal to the Court of Appeal.***
>
> b. ***That costs be provided for.***

2. The Application is supported by the Affidavit of the 1st Plaintiff's Legal Adviser who has deponed that the Plaintiffs, being dissatisfied with the Judgment of this court, have preferred an Appeal in the Court of Appeal.

3. The 1st Plaintiff's Legal Adviser deponed that the subject matter of this suit involves the operations of the KAPA Sewer line which is managed by the 2nd and 3rd Defendants; that the *status quo* should be maintained pending the hearing of the Appeal because the dispute is essentially between the Defendants *inter se* and that if the sewer line is disconnected by either of the Defendants, the Plaintiffs stand to suffer irreparable harm that cannot be compensated by way of damages.

4. The 1st Plaintiff's Legal Adviser finally deponed that the Plaintiffs employ thousands of workers; that the environment will not sustain the closure of the sewer line; that the premises of the Plaintiffs may be closed indefinitely and that the Plaintiffs are willing to offer any security

as may be determined by the court.

5. According to the Plaintiffs, they are willing to provide a bank guarantee and/or Insurance Bond for the repayment of the decretal monetary sum within thirty (30) days of being ordered by this court.

6. In the Notice of Motion dated 28th October, 2019, the 2nd Defendant is also seeking for a stay of the Judgment of the court pending the hearing of the Appeal.

7. The Application is supported by the Affidavit of the 2nd Defendant's Managing Director who has deponed that the 2nd Defendant wishes to Appeal against the decision of this court; that the 2nd Defendant's mandate is to undertake water and sewerage services provisions within Mlolongo, Kitengela, Athi River and Mavoko area and that by virtue of the Judgment of the court, the residents of those areas stand to suffer.

8. The 2nd Defendant's Managing Director deponed that the Judgment of this court will subject the 2nd Defendant into serious financial losses; that the applicable law for the provision of water services is the Water Act, 2016 and that the 1st Defendant has illegally blocked sewer lines thus affecting the public at large.

9. The 2nd Defendant's Director deponed that the 1st Defendant has commenced vandalism and destruction of the 2nd and 3rd Defendants' infrastructure and that there is a threat to the environment due to the exposure of raw sewerage and other hazardous substances as a result of the 1st Defendant's actions.

10. In response to the two Applications, the 1st Defendant filed Grounds of Opposition in which it averred that the court cannot grant an injunction/restraining order after Judgment and that the 2nd Defendant does not have rights over the 1st Defendant's Trunk Sewer Line and Sewerage Treatment Plant.

11. In his Replying Affidavit, the 1st Defendant's Acting Chief Executive Officer *(the acting Chief Executive Officer)* deponed that in the Judgment dated 4th October, 2019, this court made a finding that the 1st Defendant's EPZA Trunk Sewer Line and Waste Water Treatment Plant belong to the 1st Defendant; that on 5th November, 2019, the 1st Defendant lawfully secured its Trunk Sewer Line from interference by the Plaintiffs and that the 1st Defendant disconnected the Plaintiffs to restrain them from further unlawful discharge of waste in its Trunk Sewer Line.

12. The 1st Defendant's acting Chief Executive Officer finally deponed that the 1st Defendant has never had any claim over the Plaintiffs' KAPA Sewer line; that the Plaintiffs existed and operated their businesses long before 2009 when the sewer connection agreements were signed between the 1st, 7th and 8th Plaintiffs and the 1st Defendant and that the Application should be dismissed with costs.

13. The 1st Defendant filed a Notice of Motion dated 13th December, 2019 in which it sought for a stay of interim orders of stay that were made on 20th November, 2019, and for the striking out of the Applications dated 30th October, 2019 and 28th October, 2019.

14. In his Affidavit in support of the Application, the 1st Defendant's acting Chief Executive Officer deponed that the 1st Defendant was appointed by the Minister of Water as a Water Undertaker vide Legal Notice No. 57 of 3rd June, 1997.

15. It is the 1st Defendant's case that following the high rate of environmental pollution in the area due to illegal connections in its sewer line, the 1st Defendant, formed a task force which established that several entities had been illegally connected on its sewer line and were not complying with environmental standards.

16. The 1st Defendant's acting Chief Executive Officer deponed that despite the 1st Defendant disconnecting the persons who were illegally connected to its sewer line, the 2nd Defendant, in collusion with the County Government of Machakos, forcefully reconnected the said entities; that the decision of this court has not been overturned and that the order of 20th November, 2019 is absurd as it unlawfully grants the 2nd Defendant rights to accepts benefits derived from the Plaintiffs' use of the 1st Defendant's sewer line.

17. The 1st Defendant's acting Chief Executive Officer finally deponed that the order of 20th November, 2019 has caused undue hardship to the 1st Defendant as it cannot carry out its statutory obligation of regulating the connection and use of its sewer line; that the County Government of Machakos has since issued a public notice informing the public that it is the County Government that has mandated the 2nd Defendant to provide water and sanitation services in Mavoko Sub-County and that there is an error apparent to the face of the order of 20th November, 2019.

18. The 2nd Defendant filed Grounds of Opposition in opposition to the Notice of Motion dated 13th December, 2019 in which it averred that the Applicant's counsel is not properly on record; that this court cannot sit on its own Appeal and that the Application seeks to bar the 2nd Defendant from performing its statutory duties

19. The Plaintiffs' advocate submitted that the law is now settled that the power to grant or refuse an Application for a stay of execution is a discretionary power. Counsel relied on the case of ***Masisi Mwita vs. Damaris Wanjiru Njeri (2016) eKLR*** where the court adopted the decision in ***Butt vs. Rent Restriction Tribunal (Civil Application No. 6 of 1979)*** where Madan, Miller and Porter JJA, while considering an Application of this nature, had this to say:

"i. The power of the court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an Appeal.

ii. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should that Appeal Court reverse the Judge's discretion.

iii. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.

iv. The court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements."

20. The Plaintiffs' counsel submitted that the actions of the 1st Defendant/Respondent of blocking the sewer connection between the Kapa sewer line and the EPZ trunk sewer line causing a spillage will cause substantial loss to the Plaintiffs and that it is not possible to reverse the adverse impact to the environment.

21. Counsel submitted that the Plaintiffs are likely to be affected if the *status quo* is changed; that their operations will be affected as they are likely to be hindered in their operations; and that the closure of the sewer line due to supremacy battles between the Defendants will be catastrophic and will spell doom to the Plaintiffs' operations and affect the employment of thousands of workers who rely on the sewer line.

22. Counsel submitted that the 1st Defendant can pursue his claim against the Plaintiffs through non-destructive means as the claim is quantifiable and that the Plaintiffs have demonstrated the substantial loss that they are likely to suffer in the event the stay of execution of the Judgement is not granted.

23. Counsel submitted that the Plaintiffs moved with speed and filed the Application within twenty six (26) days which was expeditious in the circumstances.

24. According to the Plaintiffs' advocate, the Plaintiffs are ready and willing to provide a bank guarantee, and or an Insurance Bond for the repayment of the decretal monetary sum within thirty (30) days of being ordered by this Honourable Court and that this is a clear indication that the Applicants are ready to furnish security for the due performance of the decree.

25. According to the Plaintiff's counsel, the Plaintiffs are caught between the wars of the Defendants; that the Judgment of the court has exposed the Plaintiffs and that the court should protect the Plaintiffs.

26. The 2nd Defendant's advocate submitted that the 2nd Defendant is not only seeking for a prayer of stay of execution of the Judgment issued by this Honourable Court on the 4th October, 2019, but also a conservatory order preserving the suit property pending the hearing and determination of the Appeal.

27. Guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, counsel submitted that before the grant of stay of execution orders are issued, the Applicant must meet the following mandatory prerequisites:

a. ***That the Applicants have an arguable Appeal.***

b. ***That if the orders sought are not granted and his Appeal succeeds it shall be rendered nugatory.***

c. ***That substantial loss would ensue from a refusal of grant of stay.***

d. ***He must offer security for the due performance of the orders appealed against.***

28. Counsel submitted that the grounds raised in the Memorandum of Appearance are not minor, thoughtless or frivolous but are sufficient enough to raise an arguable Appeal.

29. The 2nd Defendant's counsel submitted that if denied the orders sought herein, the 1st Defendant will take over the 2nd Defendant's role as a water and sewerage services provider; that the 1st Defendant will terminate all contracts that the 2nd Defendant has entered into for the provision of sewerage services and that it is probable that the 1st Defendant will disconnect all persons along Mombasa road, Mlolongo, Mavoko and Athi River who are connected to the Trunk Sewer Line pursuant to agreements entered into between themselves and the 1st Defendant.

30. Counsel submitted that the 1st Defendant has started destroying metres, feeder pipelines and all other expansions and or additions made to the infrastructure and that the 2nd Defendant's activities will be permanently paralyzed and might never recover from the effects of the foregoing, even if its Appeal is successful.

31. The 2nd Defendant's advocate submitted that the 2nd Defendant commercially offers water and sewerage services in parts of Mombasa road, Syokimau, Mlolongo, Mavoko, Athi River and Kitengela town; that the monies collected from these services run the activities of the 2nd Defendant, maintains the infrastructure it has installed in various locations within its aforesaid jurisdiction, pay its staff members and that the remainder is submitted to the Treasury. Counsel submitted that the Applicant stands to suffer losses, although the exact amounts it stands

to suffer cannot be assessed, if denied the orders of stay sought herein.

32. According to the 2nd Defendant's advocate, the suit property is the only sewerage infrastructure built in the Applicants' jurisdiction; that if the 2nd Defendant is stopped from using the said trunk sewer line, it will have lost its only source of income and that the effect of the foregoing is that it will not have any recourses to maintain and or repair its infrastructure, pay its bills, pay its staff members or even run its water and sewerage business.

33.It was submitted on behalf of the 2nd Defendant that public interest should be considered as an important precondition in deciding Applications for stay of execution and that public interest as a precondition for stay of execution is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that runs through the Constitution.

34. It is a fact, it was submitted, that if the Applicant is denied the stay orders sought herein, the 1st Defendant will officially terminate all contracts for water and sewerage services that the Applicant has entered into with members of the public; that the 1st Defendant will destroy or vandalize any feeder pipelines that the Applicant has connected to the main trunk pipeline; that the effect of the foregoing is that hundreds of thousands of innocent inhabitants of Mombasa road, Mavoko, Mlolongo and Kitengela will be left without water and or sewerage services as the 1st Defendant is only mandated to offer water and sewerage services within the EPZA Zone and that this will result to acute water shortages and pollution because of the unlawful and careless disposal of sewerage and even an outbreak of diseases.

35. The Constitution of Kenya under Articles 43(1) (b), it was submitted, provides that every person is entitled to reasonable standards of sanitation; that Article 43(1) (d) states that every person has a right to clean and safe water in adequate quantities and that under Article 42 and 70 of the Constitution, every person has a right to a clean and healthy environment. Counsel submitted that all of the aforesaid rights are at risk if the 2nd Defendant is denied the orders sought herein.

36. The 2nd Defendant's counsel submitted that it is only fair, just and in line with the principles of public interest and the Constitution that the Applicant is not only granted an order of stay of execution, but also a conservatory order to preserve the feeder pipelines and other structures attached to the trunk pipeline and protect the interests of the parties served by the said pipeline outside the EPZA Zones.

37. The 2nd Defendant's advocate finally submitted that the National Government will be reluctant to build another trunk sewer pipeline which will cost the country resources to the tune of tens of billions of shillings while there is an existing sewer line which is under-utilized; that it is a constitutional principle enshrined under Article 201 (d) of the Constitution of Kenya that public resources should be used in a prudent and responsible manner and that it is not only proper, but in line with public interest and the constitutional financial principles that the 2nd Defendant continues to run the trunk sewer line outside the EPZA Zones, where the 1st Defendant is by law not allowed to operate, pending the hearing and determination of the Appeal herein.

38. On his part, the 1st Defendant's advocate submitted that for a stay of execution to be granted by the court, the Applicant has to demonstrate the loss and damage it will suffer. Counsel submitted that a successful party in litigation ought to enjoy the fruits of his Judgment; that the court is empowered to see if there exists special circumstances and that a successful party always spends a fortune to successfully prosecute his claim.

39. Counsel submitted that this court held that the 1st Defendant is the legal owner of the sewer line; that it is important that the 1st Defendant is allowed to collect charges from the eight (8) Plaintiffs whose sewer line has been connected on the 1st Defendant's sewer line and that the 1st Defendant should also be allowed to monitor the quality of the effluent discharged by the Plaintiffs in its sewer line and the environment.

40. The 1st Defendant's counsel submitted that the 1st Defendant has been unable to monitor the effluent discharged by the Plaintiffs in its sewer line even after the Judgment of this court and that in the event the Appeal by the Plaintiffs and the 2nd Defendant succeeds, then the money paid will be refunded. However, it was submitted, the Applications by the Applicants should be dismissed with a view of having the environment protected.

Analysis and findings:

41. The eight (8) Plaintiffs are all limited liability companies. In their Plaint dated 16th February, 2010, the Plaintiffs averred that in a private sector initiative under the umbrella of the Kenya Association of Manufacturers *(KAM),* Athi River Branch, they constructed and commissioned a 15 kilometer sewer pipeline *(herein known as the KAPA sewer line);* that the said sewer line was to serve the business community along Mombasa Road from Kapa Oil Refineries Limited Premises to Mlolongo within the then Mavoko Municipality and that they obtained permission and connected the *"KAPA"* sewer line to the main sewer line then operated by the 1st Defendant for valuable consideration.

42. The Plaintiffs averred in their Plaint that upon completion and commissioning of the KAPA sewer line, the 3rd Defendant entered into an Agreement with them and took over the operations, management and maintenance of the sewer line; that the 3rd Defendant agreed to give to the Plaintiffs a 75% discounted fees for using the KAPA sewer line for a period of ten (10) years and that even after the 3rd Defendant took over the said KAPA sewer line, the 1st Defendant has been demanding fees for the usage of the said sewer line.

43. The Plaintiffs finally averred that it is the 2nd and 3rd Defendants who are statutorily mandated to operate the sewerage systems within the Mavoko Municipality; that the dispute between the Defendants is likely to jeopardize their operations and that a declaration should issue as to who between the Defendants is entitled to receive charges, fees or otherwise for the usage of the sewer line.

44. The 1st Defendant filed an Amended Defence and Counter-claim. In its Defence, the 1st Defendant averred that its Athi River Export Processing Zone Water and Sewerage Project was set up in the 1990's as a pivotal support infrastructure for the Athi River Export Processing Zone; that the 1st Defendant constructed a new and separate sewerage facility to the tune of Kshs. 700,000,000 and that the said facility forms the 1st Defendant's asset base.

45. The 1st Defendant averred that its sewer treatment facilities are on its land being L.R. No. 23961 measuring 301.1 Ha; that the sewerage and sewerage treatment plant is basically meant to cater for industries within the 1st Defendant's Athi River Export Processing Zone Complex and that the 1st Defendant has extended the services of sewer conveyance and sewerage treatment to persons and entities outside Athi-River Export Processing Zone on specific individual agreements with terms and conditions.

46. The main issue for determination in the suit that was filed by the Plaintiffs was who between the 1st Defendant, on the one hand, and the 2nd and 3rd Defendants, on the other hand, should manage the Main Trunk Sewer Line that runs from EPZ area in Athi River all the way to Kinanie area, and the Treatment Plant in Kinanie area. Indeed, there was no dispute as to whether the Plaintiffs should pay for discharging their effluent, through the KAPA sewer line, to the main sewer line.

47. After hearing the parties and their witness, this court held as follows:

> ***"120. The 1st Defendant produced in evidence the architectural***
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> ***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.***
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> ***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 L.R. 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.***
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> ***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 L.R. No. 23961 which is registered in the name of the 1st Defendant. Indeed, evidence was produced showing that the Treatment Plant situated on L.R. No. 23961 was constructed by the Government for the 1st Defendant.***
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> ***123. In the letter dated 20th March, 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".***
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> ***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.***
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> ***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***
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> ***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.***
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> ***134. As at the time this suit was filed, the issue of the 1st Defendant transferring its functions of water provision to the 2nd and 3rd Defendants or transferring its assets to the 2nd and 3rd Defendants had not happened. The purported connection of other sewer lines by the 2nd and 3rd Defendants on the 1st Defendant's Trunk-sewer line has neither been authorized by the law nor the 1st Defendant. Any connection of the sewer lines by the 2nd and 3rd Defendants on the 1st Defendant's main sewer line is therefore illegal."***

48. After the analysis of the evidence, this court found that the 1st Defendant had proved on the required standards that the Plaintiffs have been discharging waste water into the 1st Defendant's sewer line and sewer treatment plant without paying the contractual monthly charges. The court proceeded to direct the 1st, 7th and 8th Plaintiffs to pay the 1st Defendant Kshs. 11,664,000 and for the 2nd, 3rd, 4th, 5th, and 6th Plaintiffs to enter into negotiations and agreements with the 1st Defendant on the discharge of their effluent in the "EPZA Main Sewer Line and Treatment Plant".

49. The Plaintiffs, the 2nd and 3rd Defendants are seeking for a stay of execution of the Judgment pending the hearing and determination of the Appeal. The law relating to stay of execution is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

> ***"(2) No order for stay of execution shall be made under subrule (1) unless-***
>
> *a.* ***the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

b. ***such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***

50. In determining whether the court should exercise its discretionary powers in granting a stay of execution pending Appeal, the Court of Appeal in ***Kenya Shell Limited vs. Benjamin Karuga Kibiru & Another (1986) eKLR*** held as follows:

> ***"What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay."***

51. In the case of ***Samvir Trustee Limited vs. Guardian Bank Limited (2007) eKLR,*** Warsame J. *(as he then was)* stated as follows:

> ***"I appreciate and understand that the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.***
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> ***It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss."***

52. As was held by the Court of Appeal in the case of ***Butt vs. Rent Restriction Tribunal, Civil Appeal No. 6 of 1979***, a Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings. In exercising its discretion whether to grant or refuse an Application for stay, the court ought to consider the special circumstances of the case and its unique requirements.

53. The Plaintiffs have argued that they are companies dealing with the manufacture of goods; that they employ thousands of workers who use the sewerage facilities and that the disconnection of their sewerage activities will lead to the closure of the companies and loss of jobs.

54. Throughout these proceedings, the Plaintiffs were of the view that they were willing to pay the requisite charges for the effluent discharged to the main sewer line to an entity that this court will find to be the owner of the main sewer line. Indeed, before handing over their private sewer line, which connects to the 1st Defendant's main sewer line, the 1st, 7th and 8th Plaintiffs had already entered into agreements with the 1st Defendant with respect to the payable charges for the discharge of the effluent, and the quality and quantity of the effluent to be discharged in the main sewer line. The Plaintiffs' complaint later on was that the 1st Defendant was demanding for payments and yet it is the 2nd and 3rd Defendants who are mandated by law to collect sewerage charges.

55. This court has found in its Judgment that the main sewer line belongs to the 1st Defendant. The court further found that all the effluent being discharged in the main sewer line ends up in the 1st Defendant's Treatment Plant at Kinanie, where it is treated, not by the 2nd and 3rd Defendants, but by the 1st Defendant, before being released to the environment.

56. Indeed, in its Judgment, the court found that the National Environment and Management Authority (NEMA) gave to the 1st Defendant an *"effluent discharge licence to discharge effluent from EPZA's Kinanie Sewerage Treatment Plant into Athi River".*

57. The 2nd and 3rd Defendants did not exhibit any evidence to show that they have a licence from NEMA to discharge effluent to the environment. In fact, the evidence that was produced during trial showed that it is the 1st Defendant that has been spending a lot of resources, both financially and in terms of human resources, to desludge and rehabilitate the Treatment Plant.

58. The Plaintiffs have therefore not shown the substantial loss that they will suffer if they continue abiding by the terms of the Agreements they entered into with the 1st Defendant in respect to, not only the payable charges, but the quality and quantity of effluent that they discharge in the main sewer line.

59. In any event, the main sewer line, being a public good, cannot be operated at the whims and wishes of the Defendants. In its Judgment, this court held as follows:

> ***"149. It is with the above literature in mind that the right of the Plaintiffs to be accorded affordable sewerage services by the Defendants, and without the threat of being barred from using the Main trunk-sewer line on flimsy grounds, will be protected by this court. However, the Plaintiffs have an obligation to abide by the Agreements they entered into with the 1st Defendant."***

60. In the event the 1st Defendant disconnects the Plaintiffs from its sewer line without any valid reason, the Plaintiffs are at liberty to move the court appropriately. Having found that the Plaintiffs will not suffer any substantial loss if they abide by the agreements they entered into

with the 1st Defendant in respect of the discharge of their effluent in the main sewer line, I find the Plaintiffs' Application dated 30th October, 2019 to be unmeritorious.

61. On their part, the 2nd and 3rd Defendants argued that if the orders being sought herein are denied, the 1st Defendant will take over the 2nd Defendant's role to provide water and sewerage services to the public; that it will terminate all contracts the 2nd Defendant has entered into with third parties for the provision of sewerage services and that the 2nd Defendant's activities will be paralyzed, thus suffering substantial loss.

62. As I stated in my Judgment of 4th October, 2019, the 1st Defendant was appointed a Water Undertaker vide Legal Notice No. 57 of 1997 dated 3rd June, 1997. By this time, the 1st Defendant owned the sewerage trunk-line running from the Export Processing Zone in Athi River all the way to its Treatment Plant in Kinanie. These facilities have never passed to the 2nd and 3rd Defendants as contemplated by the law.

63. Indeed, by the year 2008 when the 3rd Defendant was created, the 1st Defendant was already providing sewerage services to the members of the public at a fee. That being the case, the 1st Defendant should continue providing such services until there is a formal takeover of the 1st Defendant's infrastructure as contemplated by the law.

64. Considering that the main sewer line and the treatment plant belongs to the 1st Defendant, and in view of the fact that it is the 1st Defendant that has been licensed by National Environment Management Authority (NEMA) to treat the effluent at its treatment plant, the bigger picture and the substantial loss, in this matter, is not the amount of money the parties are likely to lose, but the harm that is likely to be caused, if not already caused, to the environment, due to the supremacy wars between the Defendants in respect to the management of the sewer line and the Treatment Plant.

65. Indeed, the 2nd and 3rd Defendants have not provided any evidence to show that they have been ascertaining the quality of effluent discharged in the main sewer line and the Treatment Plant. To the contrary, it is the 1st Defendant that has been treating the effluent discharged at its Treatment Plant. Consequently, it is the 1st Defendant that ought to ascertain the quality of the effluent that is discharged by the public into is facility so as to safeguard the environment as a whole, and to be accountable to National Environment Management Authority (NEMA).

66. That being the case, the public interest dictates that the body mandated by National Environment Management Authority (NEMA) to discharge effluent to the environment should be the one that should be allowed to test the effluent released to its sewer line and treatment plant so as not to harm the environment, and to collect the sewerage charges. Just the way the 1st Defendant used to provide sewerage services to the public before the establishment of the 2nd and 3rd Defendants, it should continue doing so until the Court of Appeal says otherwise.

67. For those reasons, I dismiss the 2nd Defendant's and the Plaintiffs' Applications dated 28th October, 2019 and 30th October, 2019 with costs. The 1st Defendant's Application dated 13th December, 2019 is allowed in terms of prayer number 2.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF MARCH, 2020.

O.A. ANGOTE

JUDGE