REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 35 OF 2010

1. **KAPA OIL REFINARIES LTD**
2. **NATION MEDIA GROUP LTD**
3. **SANPAC AFRICA LTD**
4. **ALLPACK INDUSTRIES LTD**
5. **ORBIT CHEMICALS LIMITED**
6. **MABATI ROLLING MILLS LTD**
7. **DOSHI ENTERPRISES LTD**
8. **DECENT DEVELOPERS LTD ……..… PLAINTIFFS/RESPONDENTS**

VERSUS

1. **EXPORT PROCESSING ZONE AUTHORITY ……..… APPLICANT**
2. **MAVOKO WATER & SEWERAGE CO. LTD ……..….. DEFENDANT**
3. **TANATHI WATER SERVICES BOARD ……..…… DEFENDANT**

RULING

1. The applicant (1st defendant) filed an application dated 20th May 2014 seeking;-

   i. ***Issuance of a temporary injunction restraining the plaintiffs, their agents, servants, contractors and all and each of them whether by themselves or otherwise howsoever from discharging industrial effluents and other trunk sewer line/sewerage Treatment plant in Athi River/Mavoko area.***

   ii. ***The orders of injunction given by the court on 12/7/2011 and which have automatically lapsed by operation of the law, be vacated.***

   iii. ***The plaintiff's suit be dismissed and or/struck out with costs for being incompetent and improperly before the court.***

   iv. ***In the alternative, to prayers (ii) and (iii) herein above, the order dated 12/7/2011 be discharged and or varied to exclude discharge of industrial effluents and other environmental pollutants by the plaintiffs into the 1st defendant's trunk sewer line/sewerage infrastructure and sewerage treatment plant in Athi-River/Mavoko area pending hearing and determination of the suit herein.***

   v. ***Such other and/or further orders as justice of the case herein may demand and as the court would deem just.***

2.The application is premised on grounds that the 1st defendant, a state corporation established under the **Export Processing Zones Act (Chapter 517 of the Laws of Kenya**) owns and manages a separate water and sewerage infrastructure in Mavoko /Athi River area serving industries /enterprises within its Athi-River Export Processing zone complex. This programme was developed by the government using its money and funding from World Bank to promote key economic programmes designed to promote exports, create jobs, attract investment and create linkages with domestic economy; The zone water and sewerage project was initiated as part of the support infrastructure for the Athi- River Export Processing Zone.

3. To succeed the 1st defendant depends on the effective and efficient management of its water supply and sewerage services which includes a sewerage treatment plant that is situated some approximately 17 Kilometres away from Mombasa Road. To be released into the environment (River Athi) the waste water conveyed must undergo expansive treatment. Therefore, industrial waste /effluents are not discharged into the treatment plant. The first defendant has extended sewerage conveyancing and sewerage treatment services to persons and entities outside the Athi river Export Processing Zone on specific contractual terms and conditions.

4. Between 2008 and 2009 the 1st, 7th and 8th respondents and the applicant entered into a contract whereby they were to discharge domestic effluent into the sewerage treatment plant. The applicant gave them a notice terminating the contract following breach of the same. As a result the respondent filed a suit in court and obtained an interlocutory injunction on the 12/7/2011. The appeal preferred by the applicant was dismissed.

5. Two years having elapsed since the order was granted the same has lapsed by operation of the law. The discharge of industrial effluent in the applicant's sewerage facilities continues unabated; putting the dependants of Athi River into real health danger through environmental pollution. And the suit ought to have been filed in the Water Appeals Board under the provisions of the Water Act, 2002. Consequently, the suit should be dismissed and/or struck out with costs.

6. In an affidavit in support of the application **Cyrille Nabutola,** the Chief Executive officer of the applicant reiterated what was stated in the grounds upon which the application is founded.

7. The respondents filed grounds of opposition in response stating that the application was an abuse of the court process as the matter has been adjudicated upon by the Court of Appeal and orders issued against the defendant can only be resolved at the trial. Issues raised in the application are *resjudicata* and can only be ventilated at the trial of the main action. The application is not sustainable in view of the provisions of the **Land and Environment Court Act** and the **Constitution of Kenya.** The application seeks to mislead the court to review the orders of the Court of Appeal without regard to due process and if the applicant was aggrieved it should have moved to the Supreme Court.

8. The respondents also filed a replying affidavit deposing that they have made attempts to fix the matters for hearing even when the matter was pending before the Court of Appeal. On the 25th September 2013 when the matter came up for hearing the defendants sought an adjournment which was granted to enable them file an application to file a defence out of time. While the defendants application was pending the 1st defendant (applicant) filed an application to amend its defence on 28th February 2014. Both applications are still pending which has made it impossible for the respondents to take a hearing date. The delay has therefore been occasioned by the defendants.

9. Further, they averred that the issue before court as stated in the judgement of the Court of Appeal, deal and concern matters of mixed Water Management and use of Environment. Issues raised by the 1st defendant may result into prosecution by the National Environment Management Authority. They denied the allegation that they were discharging industrial waste/effluent into the sewer line now owned and managed by the 2nd and 3rd defendants. Any legal or financial

difficulty that may be faced by the applicant will be compensated on determination of the suit.

10. In response to the 1st defendant's application, the 3rd defendant in a reply thereto dated 6th June 2014 by its legal manager, **Brenda Kiberenge** deponed that the 3rd defendant is constituted under **Section 51** of the **Water Act** and has the sole jurisdiction and power to control the provision of Water Sewerage Services within Mavoko Municipality. That the 1st defendant is not a licensed water provider and has no claim over ownership of any sewerage line, system or sewage treatment facilities as the same is vested by law on the 3rd defendant.

11.The 2nd defendant on the other hand filed a Notice of Preliminary Objection on a point of law against the 1st defendant's application on the grounds that it is *resjudicata* on the issue of prayers for an injunction under **Order 40** of the Civil Procedure Rules.

12. Its managing director, **Michael Y. Meng'eli** also deponed an affidavit in reply to the application stating that the question of ownership of the trunk sewer line sewerage infrastructure is subject to the court's determination, therefore, the applicant (1st defendant) cannot summarily purport to want to terminate the suit without parties being heard. The delay in the matter has been occasioned by the 1st defendant / applicant and the injunction that was granted subsists till hearing and determination of the suit.

13. It was agreed by parties herein that both the preliminary objection raised and Notice of Motion be canvassed simultaneously and by way of written submissions. The submissions were later highlighted orally.

14. The application by the 1st defendant has been brought pursuant to the provisions of **Order 40 Rule 1(a), 6 & 7** of the Civil Procedure Rules that provide thus:-

> ***"1. Where in any suit it is proved by affidavit***
>
> ***or otherwise—***
>
> a. ***that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***
>
> ***6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.***
>
> ***7. Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."***

15. The applicant was duty bound to establish that the plaintiffs/respondents herein are carrying on activities that amount to the discharge of industrial effluents and other non-domestic waste into its sewer line/ sewerage infrastructure and sewerage treatment plant in Athi River and Mavoko Area. It has been argued but subject to determination that indeed the 1st defendant cannot have any claim over the sewerage system. It has been argued but subject to determination that indeed the 1st defendant cannot have any claim over the sewerage system or sewage treatment facilities as the entity seized with the jurisdiction is the 3rd defendant.

16. Looking at the case in its entirety, it is not in dispute that the plaintiffs (respondents) sought a temporary injunction to

restrain the 1st defendant from stopping, suspending or restricting in any way the use of and discharge into the sewer by the plaintiff into the defendants sewer line system. The application

was heard by Kihara Kariuki J. (As he then was). He ruled on the matter on the 12th July 2011 and issued injunctive orders sought on temporary basis pending hearing and determination of the suit. The 1st defendant who was aggrieved by the decision of the court appealed the decision. The appeal was heard by the Court of Appeal and in its decision dated 24th day of January 2014 it upheld the learned judge's decision to injunct the 1st respondent.

17.According to Order 40 Rule 6, an interlocutory injunction lapses after one year although the court has the discretion to prolong it if there are sufficient reasons advanced by the applicant. A period of one year has lapsed since the Court of Appeal upheld the injunction granted. It has been stated that an order be granted to the effect that the injunction order granted has lapsed automatically by operation of law hence should be vacated. But, in the alternative, it be discharged and or varied to exclude discharge of Industrial effluents and the other industrial effluents into the sewerage treatment plant.

18. I am persuaded by the case of **David Wambua Ngii vs Abed Sila Alembi & 6 others (2014) eKLR** where Gikonyo J. considered the purpose of **Order 40 Rule 6** of the Civil Procedure Rules and he had this to state;-

> ***"It is important to first deal with the scope and purpose of Order 40 rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 Rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The Rule is intended to prevent a situation where on unscrupulous applicant goes to slumber on the suit after obtaining injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporarize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it intended to cure ..."***

19. In the instant case it is not denied that after the injunction order was granted by the High Court, the plaintiff made an effort to have the case fixed for hearing on diverse dates between the 12th March 2012 and 5th March 2013. On 3rd March 2014, after the Court of Appeal delivered its ruling the 1st defendants sought to amend its defence. The same was to be heard on the 6th June 2014. Before it could be heard, the 1st defendant decided to file the current application. The matter was later slated for hearing on 20th September 2013. The inactivity on the file during this period can therefore be explained by the fact that the 1st defendant in its own volition had filed an appeal against the decision of the judge which generally stalled the suit. The plaintiffs may therefore not be blamed solely for failure to prosecute the matter.

20. With regard to the prayer for varying the order of injunction granted, I am also persuaded by the case of **Filista Chamaiyo Sosten vs Somton Mutai (2012) eKLR** where Munyao J. considered the application of Order 40 Rule 6 and 7 and he stated thus:

> ***"I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction the court must have been satisfied that it was necessary to grant the same. If it were not satisfied the court would not have issued the injunction in the first place."***

21. This is a case where the injunction order issued by the superior court was upheld by the Court of Appeal therefore it was not issued as a matter of course. The court was satisfied that it was necessary, a prima facie case necessitating it having been established. Varying or even reviewing it would be wrong. I therefore decline to do so.

22. It is argued that this court has no jurisdiction to hear the matter as the plaintiff's suit ought to have been filed in the Water Appeal Board under the provisions of the Water Act, 2002. That this therefore calls for the suit to be struck out.

23. It has been stated severally that where jurisdiction is lacking on the part of the court, it would be a serious omission for it to hear the matter. In the case of **the Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd (1989) KLR** Nyarangi JA stated that:

> ***"Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

24. This therefore behooves this court to interrogate its jurisdiction as provided by the law. As a superior court, the High Court has unlimited original jurisdiction in civil matters (criminal inclusive). The matters it cannot touch are those reserved for the exclusive jurisdiction of the supreme court under the constitution or what is contemplated by **Article 162(2)** (vide section 165 of the Constitution). Looking at the relief sought by the plaintiffs herein the order being sought is injunctive in nature which is to be issued against the defendants, restricting them to discharge some effluent into their sewer. There is a dispute as to who amongst the defendants is entitled to receive payment for the usage of the sewer line. Also claimed is general damages.

25.The Water Appeal Board is established by section 84 of the Water Act, 2002. The jurisdiction of the Board is provided for by section 85 which states thus:

> ***"An appeal shall lie to the Water Appeal Board at the suit of any person having a right or proprietary interest which is directly affected by a decision or order of the authority, the Minister or Regulatory Board concerning a permit or licence under this Act, and the Board shall hear and determine any such appeal.***
>
> ***(2) In addition the Board shall have such jurisdiction to hear and determine disputes, and shall have such other powers and functions, as may be conferred or imposed on it by and under this or any other Act."***

26. As correctly submitted, the jurisdiction conferred upon the Board by the statute is limited. It is not very wide. It can only deal with a disagreement between parties where the aggrieved person is wronged by the decision of the Authority, Minister or Regulatory Board in respect of a licence or permit under the Act or where the dispute to be adjudicated upon is stipulated by statute.

27.Section 76(4) of the Water Act has been invoked by the 1st defendant as being applicable. The alluded section provides thus:

> ***"76(i) No person shall discharge any trade effluent from any trade premises into the sewer of licence without the consent of the licensee.***
>
> ***(4) Any person who is dissatisfied with the decision of the licensee on an application under this section May within thirty days of the decision appeal to the Water Appeal Board."***

28. The alluded to section envisages a situation where a dispute arises between a person who has made an application to the person licenced to operate a sewer and the person (licensee) declines to grant him the request to allow him/her to discharge trade effluent therein or probably imposes conditions that are not favourable to his situation. The issue in the instant case did not arise as a result of an application having been made. It is stated that the plaintiffs are already discharging effluents into a sewer following a contract entered into. The contract seems to have been breached by a party to be established during trial so that it is known who actually owns or is entitled to the management of the sewer line.

29. From the foregoing it is apparent that the section of the law relied upon by the 1st defendant does not divest the High Court of jurisdiction to hear this matter.

30.Consequently the application dated 20th May 2014 fails. The same is dismissed with costs to the plaintiffs, 2nd and 3rd defendants.

31. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JULY, 2015.**

L.N. MUTENDE

JUDGE