



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 4 OF 2011

PARADISE SAFARI PARK LIMITED.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL1ST DEFENDANT

SINOHYDRO CORPORATION LIMITED.....2ND DEFENDANT

RULING

1. By a notice of motion dated 13th January, 2015 the plaintiff Safari Park Limited seeks from this court orders for full discovery of documents under Section 22 of the Civil Procedure Act against the 1st defendant Attorney General and the 2nd defendant SinoHydro Corporation Ltd. The documents subject matter of the application are as described in paragraphs a, b and c of the application which are alleged to be in the possession or custody of the defendants and which are:
 - a. All design documents for the construction of the Thika Super Highway relevant to the construction of the carriage way in the vicinity of the plaintiff's property;
 - b. The hydraulic and hydrological design basis and computations for sizing of the diversion culvert as constructed and the final culvert for the carriage way as constructed –comprising the catchment delineation , the measure catchment characteristics, the flood run off computation methodology, calculations and computed results; all for the different flood recurrence intervals adopted; and the consequent hydraulic computation methodology and computed design hydraulic discharge capacity for the diversion culvert and the final culvert, including data on the culvert inlet and outfall hydraulic characteristics, and whether the structures were designed on an inlet control basis, or an outlet control basis; Specifically documents relating to tasks 157,163 and 164 on page 387 and task 224 on page 388 of the 1st defendant's bundle of documents, and all reports referred to in paragraph 5.2.1 A (c) and (d) on page 362 of the 1st defendant's bundle of documents .
 - c. The complete contractor's computation basis for sizing of the diversion culverts, clearly annotated, as specified in the letter from Hamilton Harrison and Mathews to the first defendant and Waweru Gatonye & Company advocates dated 10th March, 2014.
2. Costs of the application.
2. The application is predicated on the grounds that the documents stipulated had been identified

- from the documents already filed by the 1st and 2nd defendants and these further documents are necessary for the proper preparation of the case for hearing.
3. The application was further based on the supporting affidavit sworn by Esther Gathoni Kariuki.
 4. In her supporting affidavit, the deponent deposes that the suit herein arose out of the flooding of the Safari Park Hotel on Thika Road, which is owned and operated by the plaintiff, on the night of 9th January 2010. The plaintiff claims that the flooding was caused by the diversion of the River Kigwa during the construction of the Thika Super Highway by the Ministry of Roads and Public Works of the Government of Kenya and the 2nd defendant. Further that the plaintiff has in light of the defenses filed by the defendants, sought advice of Dr. Sean Avery, a Registered Consultant Engineer specializing in hydrology and Water Resources; which has necessitated for the plaintiff to ask the defendants for disclosure of additional documentation but the had defendants declined to respond. That Dr. Avery has advised that those documents are necessary and are relevant to the matters in issue and for the proper preparation of this case for hearing.
 5. The various correspondences exchanged between the parties advocates were all annexed to the affidavit.
 6. From the description of the documents of the parties that the plaintiff seeks full discovery from the defendants to facilitate proper hearing of this case, and the detailed pleadings filed by the plaintiff and the defendants as well as their respective lists and bundles of documents filed by all the parties on record. I have no doubt in my mind that the claim herein by the plaintiff against the defendants and hence, the dispute, relates to environment and use of land.
 7. The matter of construction of a road and excavating through diversions from the river thereby causing floods into the plaintiff's premises causing extensive damage and destruction to buildings and or nuisance is a matter affecting the environment, occupation and the use of land.
 8. Therefore, before the court determines whether or not the plaintiff is entitled to damages in the sum of shs 89,548,932 claimed, it must first determine issues relating to environment, occupation and the use of land. It is for that reason that documentation detailed in the Notice of Motion are sought to facilitate proper preparation of the hearing of this suit. It will also require expert witnesses to testify and more specifically, experts in hydrology and hydraulics.
 9. That being the case, this court finds that it lacks the necessary jurisdiction to make any orders that will affect the rights and interests of the parties to this dispute. Jurisdiction of this court is conferred by the law and moreso, the Constitution- Article 165 of the Constitution of Kenya, 2010, and neither can the court arrogate itself jurisdiction which it is expressly dispossessed of by the Constitution. In **RE MATTER OF IIEC [2011] e KLR**, it was held the motor vessel '**Lilian S' v Caltex Oil (K) Ltd [1989] KLR 1** case establishes that jurisdiction flows from the law and the recipient –court is to apply the same, with any limitations embodied therein. Such that a court may not arrogate itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret intentions of parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdiction is donated by the Constitution.
 10. And in the Locus Classicus case of Motor Vessel '**Lilian S' v Caltex Oil (K) Ltd**, Justice Nyarangi of the Court of Appeal held:

“ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court sized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it, a court has no power to make one more 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.

11. The Environment and Land Court is a Superior Court with the same status as the High Court. It is established under Section 4 of the Environment and Land Court Act, 2011 in accordance with the dictates of the provisions of Article 162(2) (b) and 3 of the Constitution. That is the court that is conferred with the powers, functions and jurisdiction to hear and determine disputes

- relating to Environment and Land (see Section 13(1) of the Act). In addition, the court has the power under Section 13(1) of the Act to make orders including damages, declaratory orders, specific performance, judicial review, compensation among others.
12. Furthermore, the provisions of Article 165(5) (b) of the Constitution expressly ousts the jurisdiction of the High Court from hearing and determining disputes that fall within the jurisdiction of the Environment and Land Court.
 13. It therefore follows that having opined that this court lacks jurisdiction to hear and determine this dispute, to hold otherwise or to make one more step would be anathemic to the Constitution and would abridge the rights of parties to access to justice. It would also run counter to the principles espoused in Article 159(2) of the Constitution.
 14. I however note that this suit was instituted in this court during the transitional period in the new constitutional dispensation and order. As at January 2011, the Constitution was barely 5 months into its promulgation, and no legislation including the Environment and Land Court Act to implement the said provisions of Article 162(2)(b) of the Constitution had been enacted pursuant to sub Article 3 thereof.
 15. It is for that reason that, in order to avoid any lacuna in the law, which would have bred chaos, the transitional and consequential provisions of the Constitution Part 5 Section 22 on administration of justice provides that all proceedings pending before court or tribunal on the effective date would continue to be heard and determined by the court /tribunal pending the Establishment of the corresponding court/tribunal or as may be directed by the Chief Justice on the Registrar of the High Court.
 16. The Environment and Land Court Act was enacted in 2011, anchoring at Section 4, the Environment and Land Court and judges to that court were appointed later in that year and the court became fully operational in 2012. That being the case, the filing of this suit in this court was not by mistake and neither is the existence of this suit in the High Court fatal.
 17. This court has the power to 'transfer' or place this suit into the right locale and that is the Environment and Land Court now that court is fully operationalised thereby ousting not only the transitional provisions of the Constitution, but also the jurisdiction of this court (Article 165(5) (b) of the Constitution.
 18. It is for those reasons that I decline to make a determination on the application herein and direct that this matter be and is hereby and forthwith placed before the presiding judge of the Environment and Land Court for further directions as to its hearing and disposal as appropriate.

Dated, signed and delivered at Nairobi this 3rd day of November 2015

R.E. ABURILI

JUDGE