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

JUDGMENT

Introduction:

1. 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.

2. 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.

3. According to the Plaintiffs, the 1st Defendant threatened to stop them from discharging the sewer from their *"KAPA"* sewer line into its Trunk sewer-line running along Mombasa road unless it is paid and that the Plaintiffs are not liable to pay the 1st Defendant any fees.

4. 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.

5. 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.

6. 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 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.

7. The 1st Defendant's case is that the 1st, 7th and 8th Plaintiffs entered into Agreements with the 1st Defendant in the year 2009 in which they were allowed to discharge their effluent into its Trunk sewer-line and its treatment facilities through the Plaintiffs' privately constructed sewer-line *(the "KAPA" sewer-line);* that in March, 2010, the 1st, 7th and 8th Plaintiffs breached the aforementioned Agreements by refusing to pay the agreed sum and discharging unauthorized industrial effluent and that the 1st Defendant is legally and contractually entitled to disconnect the 1st, 7th and 8th Plaintiffs from the use of its Trunk sewer-line as per the terms and conditions of the Agreements.

8. The 1st Defendant finally averred in its Defence that the suit is a conspiracy between the Plaintiffs and the 2nd and 3rd Defendants to unlawfully take over the 1st Defendant's sewerage and sewerage treatment facilities and that this court does not have the requisite jurisdiction to deal with this dispute.

9. In the Counter-claim, the 1st Defendant averred that it was expressly agreed between the 1st Defendant and the 1st, 7th and 8th Plaintiffs that the said Plaintiffs would pay to the 1st Defendant a monthly charge of Kshs. 60,000, Kshs. 24,000 and Kshs. 24,000 respectively for the sewer conveyance and treatment; that it was also agreed that the said three Plaintiffs will only discharge domestic effluent into the 1st Defendant's Trunk sewer-line and that in March, 2010, the 1st, 7th and 8th Plaintiffs breached the sewer connection Agreements by discharging untreated industrial effluent into the 1st Defendant's Trunk sewer-line and also refused to pay the agreed monthly charges.

10. The 1st Defendant has sought for an order of permanent injunction restraining the Plaintiffs from discharging in its Trunk- sewer line and treatment plant any form of effluent; an order that the 1st, 7th and 8th Plaintiffs do pay to the 1st Defendant all the unpaid contractual sewerage conveyancing and sewerage treatment charges from March, 2010 until payment in full; general damages for breach of contract and general damages for unlawful use of its sewerage and sewerage treatment plant.

11. On its part, the 2nd Defendant denied that the 1st Defendant applied for and obtained various permissions and way leaves from relevant authorities to construct a sewer pipe line; that all powers and rights relating to the provisions of water and sewerage services are vested upon the 3rd Defendant and that the 3rd Defendant appointed and assigned the 2nd Defendant exclusive rights as its agent to operate, manage, and supply sewerage services within the then Mavoko Municipality *(now Machakos County Government)* and its environs.

12. The 2nd Defendant sought for a declaration that the 1st Defendant has no legal mandate or licence to supply water outside the EPZA zone; a declaration that the water infrastructure the subject of this suit is vested in the 3rd Defendant; and for the 1st Defendant to be found liable for any claims by the Plaintiffs. The 3rd Defendant's Defence is similar to the Defence of the 2nd Defendant.

The Plaintiffs' case:

13. The 1st Plaintiff's Legal Manager, PW1, informed the court that the Plaintiffs are companies operating their businesses along Mombasa Road, within the then Mavoko Municipality and that the Plaintiffs are all members of the Kenya Association of Manufacturers *(KAM),* Athi River Chapter.

14. According to PW1, the Plaintiffs, at the initiative of the 1st Plaintiff and with the approval of the 2nd and 3rd Defendants, the National Environment Management Authority, the Ministry of Roads and Public Works and all the concerned authorities, constructed a 15 kilometer sewer pipeline commencing from Kapa Oil Refineries Limited *(the KAPA sewer line).*

15. It was the evidence of PW1 that upon completion and commissioning of the "KAPA sewer line", the 3rd Defendant took over the operation and management of the sewer line from the Plaintiffs under the provisions of the Water Act; that the 3rd Defendant handed over the management, operations and maintenance of the KAPA sewer line to its agent, the 2nd Defendant, and that since the take-over of the said sewer line, the Plaintiffs have been paying to the 2nd Defendant monthly fees.

16. PW1 informed the court that the Plaintiffs obtained permission from the 1st Defendant and connected the KAPA sewer line to the 1st Defendant's Trunk sewer line *(also known as the EPZA Trunk sewer-line)* and that by the time the Plaintiffs connected their private *"KAPA"* sewer line to the 1st Defendant's sewer line, the KAPA sewer line was being maintained by the Plaintiffs under the Private Sector initiative of KAM, Athi River Branch.

17. It was the evidence of PW1 that after the management and operation of the *"KAPA"* sewer line was taken over by the 2nd and 3rd

Defendants by operation of the law, the Plaintiffs started paying to the 2nd Defendant the monthly fees and that since the 3rd Defendant appointed the 2nd Defendant as the sole agent charged with the responsibility of providing water and sewerage facilities within the Mavoko Municipality, the intended action of the 1st Defendant of disconnecting the *"KAPA"* line sewer line from the main Trunk-line is without justification.

18. PW1 admitted that the 1st, 7th and 8th Plaintiffs entered into Agreements with the 1st Defendant, which Agreements had terms of the kind of effluent that would be discharged from the *"KAPA"* sewer line to the *"EPZ"* Trunk sewer line, including the payable charges, the maximum dischargeable effluent and the dates that the payments were to be made to the 1st Defendant.

19. PW1 testified that the Plaintiffs handed over the KAPA sewer line to the 2nd and 3rd Defendants because by law, the Plaintiffs could not run a public sewer line and that the Plaintiffs should be guided as to whom they should be paying the effluent charges.

20. PW1 denied that the effluent by the Plaintiffs has caused damage to the 1st Defendant's Treatment Plant and that they filed this suit due to the 1st Defendant's threats to have their sewer line disconnected from the main Trunk line. It was the evidence of PW1 that the *"KAPA"* sewer line now belongs to the 2nd and 3rd Defendants; that the Plaintiffs are caught in the struggle for control of the sewer line between the Defendants, and that a declaration should be made to indicate upon whom the Plaintiffs should be paying for the effluent that is discharged from the *"KAPA"* sewer line into the main Trunk sewer line.

1st Defendant's case:

21. The 1st Defendant's Corporation Secretary, DW1, informed the court that the 1st Defendant is a State Corporation established under the Export Processing Zones Act *(EPZA)* and that the 1st Defendant is a body corporate capable of acquiring and holding property and entering into contracts.

22. DW1 stated that the main objectives of the 1st Defendant is regulating and administering of approved activities within the Export Processing Zones; maintenance and financing of its basic infrastructure; and performing all such admisntrative functions in relation to the designated export processing zones as would normally be performed by local authorities.

23. It was the evidence of DW1 that due to the shortage of water and sewerage facilities in the early 1990's, the 1st Defendant built a water supply pipeline from Nairobi to its Export Processing Zone in Athi River Complex and also built a separate sewerage facility to serve the Export Processing Industries within the EPZ Complex.

24. DW1 informed the court that the 1st Defendant's sewerage and sewerage treatment facilities include 3.5 km of Trunk sewer; 15.5 km of Box Culvert; three aerial crossings and a 150,000m^3 sewerage stabilization ponds which are situated on parcel of land known as L.R. 23961 measuring 301.1 Ha. It was the evidence of DW1 that the 1st Defendant's water and sewerage infrastructure is currently valued at Kshs. 700,000,000.

25. DW1 stated that the Plaintiffs are located far away from the 1st Defendant's Athi River Processing Zone and own a separate privately constructed sewer line within Athi River *(the KAPA sewer line)* ; that the 1st Defendant has extended the services of sewer conveyance and treatment to persons outside the zones and that on diverse dates between the years 2008 and 2009, the 1st , 7th and 8th Plaintiffs signed Agreements with the 1st Defendant whereby they agreed to discharge specific volume of domestic effluent into the 1st Defendant's Trunk sewer line on specific contractual terms and conditions.

26. It was the evidence of DW1 that the Plaintiffs have been discharging waste water and raw industrial effluent into the 1st Defendant's Trunk sewer line and Sewerage Treatment Plant and that the 1st, 7th and 8th Plaintiffs ought to pay to the 1st Defendant all the outstanding contractual sewerage conveyancing and treatment charges to be computed as from March, 2010 until payment in full.

27. DW1 stated that the 1st Defendant is claiming for Kshs. 4,740,000 from the 1st Plaintiff as at September, 2016; Kshs. 1,896,000 from the Plaintiffs and Kshs. 1,896,000 from the 8th Defendant. DW1 further stated that the 1st, 7th and 8th Plaintiffs should pay general damages for breach of contract and that the 2nd, 3rd, 4th, 5th and 6th Plaintiffs should pay to 1st Defendant general damages for the unlawful use of the 1st Defendant's Trunk sewer line and Sewerage Treatment Plant.

28. In respect to the issue of ownership of the Trunk sewer line, DW1 stated that the 1st Defendant's sewerage and Treatment facilities have never been transferred to any other entity , either under the Water Act, 2002 and the Rules or under any other law; that the 3rd Defendant was established on 4th June, 2008 to cover the area that was under the jurisdiction of Athi Water Services Board and that by the time the 3rd Defendant was established, the period of the transfer of the earmarked water infrastructure had long lapsed.

29. DW1 informed the court that this suit is a conspiracy between the Plaintiffs and the 2nd and 3rd Defendants aimed at unlawfully taking over its multi-million sewerage and Sewerage Treatment Plant.

30. In cross-examination, DW1 stated that the 1st Defendant provides sewer services within the zone; that its sewerage infrastructure is for the benefit of the industries in the zone and that the 1st Defendant has allowed other industries to connect their private sewer lines on its main Trunk sewer line.

31. DW1 informed the court that the EPZA Trunk sewer line is a project of the Kenyan Government and is a public utility; that the said

sewer line was constructed between the years 1991-1993 to serve all the industries within the zone and that she was not sure how many industries outside the EPZ are connected on the main Trunk sewer line.

32. According to DW1, although the mandate of the 1st Defendant is within the areas designated as Export Processing Zones (EPZs), the 1st Defendant was granted approvals to operate outside the zone; that they have connected some industries to the 1st Defendant's Trunk sewer line outside the Athi River EPZA zone and that the said connection is in line with a Legal Notice dated 6th June, 1997.

33. It was the evidence of DW1 that the 1st Defendant has been rehabilitating and desludging the Treatment Plant at a great cost due to the effluent from the Plaintiffs' industries.

34. DW1 informed the court that although all water undertakers were required to get a licence to provide sewerage services from the 3rd Defendant, the Water Act, 2002 exempted the 1st Defendant; that earlier on, a licence had been issued to a company which had been registered by the 1st Defendant known as Mavoko EPZA Water and Sewerage Company but the said company was wound up; that the Mavoko EPZA Water and Sewerage Company was a composition of the 1st Defendant, Mavoko Municipal Council and Kajiado Municipal Council and that due to the differences in terms of ownership of the assets, the shareholders went their separate ways.

35. DW1 stated that although Water Services Boards took over the functions of the provisions of water and sewerage from the then Municipalities, with the Water Services Regulatory Board being the licencing body, the 1st Defendant was exempted from transferring its assets to the 3rd Defendant; that any transfer of the assets from one parastatal to another was to be approved by the Permanent Secretary, Treasury and that the said approval was never given in respect of the assets of the 1st Defendant.

36. DW2 informed the court that since the year 2005, he has been working at the Export Processing Zones Authority (EPZA) as an Assistant Manager, Sewerage and Environment in charge of Environmental Section of the Directorate of Commercial and Technical Service and that he is the head of the EPZA wastewater infrastructure for collection, conveyance and treatment at the wastewater Treatment Plant.

37. DW2 informed the court that the 1st Defendant (EPZA) has a wastewater infrastructure which was developed by the Government of Kenya and World Bank as part of the support infrastructure for the Athi River Export Processing Zone.

38. It was the evidence of DW2 that the infrastructure is elaborate and its main function is to collect, convey and treat wastewater emanating from enterprises and developments within the EPZ, Athi River, and that the infrastructure starts from EPZ Athi River Premises in form of a Trunk sewer at manhole 001 traversing via Athi River Town to Kinanie EPZA wastewater Treatment Plant which was acquired as a wayleave.

39. DW2 stated that although the EPZA wastewater infrastructure is for the enterprises located in the Athi River EPZ, the 1st, 7th and 8th Plaintiffs were connected on the said Trunk-Sewer line in March, 2010 to discharge their domestic wastewater. However, it was the evidence of DW2 that the three Plaintiffs breached the Agreements they entered into with the 1st Defendant for non-payment and the quality of discharged effluent in the EPZA Trunk sewer line vide the "KAPA" sewer line.

40. DW2 informed the court that the 1st Defendant has spent more than Kshs. 500 million in a series of partial and total desludging activities and rehabilitation of the entire Treatment Plant and that the 2nd Defendant is working in cahoots with the Plaintiffs by advising the Plaintiffs not to comply with their obligations. DW2 produced in evidence diagrams showing the designs of the sewer Trunk-line and the Treatment Plant.

41. In cross-examination, DW2 stated that other than the 1st, 7th and 8th Plaintiffs, he was aware that other entities outside the EPZ are connected to the main Trunk sewer line and that the KAPA sewer line is under the management of the 2nd Defendant.

42. It was the evidence of DW2 that although the 2nd Defendant is a water undertaker, it is the 3rd Defendant which issues licences to all water undertakers; that the 1st Defendant does not require a licence to provide water and sewerage services; that the law allows the 1st Defendant to provide water and sewerage services to third parties without a licence and that he was not aware that the 1st Defendant was required to transfer all its water and sewerage services to the 3rd Defendant.

The 2nd Defendant's case:

43. The 2nd Defendant's Managing Director, 2DW1, informed the court that in order to ensure that the EPZA area has a conducive environment for investors, the Government of Kenya created a sewerage system that transmits its effluent into a trans-line outside the zone and channels the effluent to the treatment works in Kinanie.

44. According to 2DW1, the Kenya Association of Manufactures constructed a sewer line joining the main Trans-line outside the EPZA zone; that the KAM sewer line *(also known as KAPA sewer line)* transmits its effluent to the adjoining Trans-line sewer which then heads to the Treatment works and that the said trans-line serves the EPZA and the residents of Mavoko and its environs, including Kitengela town.

45. 2DW1 informed the court that in the year 2002, the Water Act was enacted; that the enactment of the Act provided that the management of water and sewerage infrastructure was to be taken over by licensees of a Water Service Board and that the Act provides for the water service providers.

46. According to 2DW1, all the assets for provision of water services were taken over by the Water Services Boards; that the 1st Defendant (EPZA) was in accordance with the Water Act, 2002 and the Water *(Plan of Water Services) Rules, 2005 (the Rules)* required to hand over its infrastructure to a Water Service Board and that the 1st Defendant failed to do so.

47. 2DW1 testified that in the year 2006, the 2nd Defendant was incorporated as a Water Service Provider for the 3rd Defendant to provide water and sewerage services within Mavoko and its environs; that the sewerage trans-line is a public utility constructed by the Government and that the 1st Defendant has never obtained a license envisaged under the Water Act.

48. According to 2DW1, the main trans-line sewer line originates outside the EPZA area in Athi River and runs all the way to the Treatment Plant in Kinanie; that there are other small lines connecting on the Trans-line, including the Plaintiffs' KAPA sewer line and that it is the 2nd Defendant who has the mandate of collecting the sewerage charges from the connecting sewer lines users.

49. The 2nd Defendant's Director stated that the 1st Defendant does not have authority to stop, restrict or in any way impede the use of the sewerage facility constructed by the Plaintiffs; that the 1st Defendant cannot purport to charge for the use of the said facility and that the 1st Defendant should be restrained from overstepping its mandate.

50. 2DW1 finally testified that Legal Notice No. 57 of 1997 has since been overtaken by events; that the 1st Defendant is holding the title for L.R. No. 23961, where the Treatment Plant is located, as trustee and that the Agreements that the Plaintiffs purported to enter into with the 1st Defendant are null and void.

51. In cross-examination, 2DW1 stated that the 3rd Defendant was created in the year 2008; that Legal Notice No. 101 dated 12th August, 2005 created seven (7) Water Services Boards and that the 3rd Defendant was not one of such Boards.

The 3rd Defendant's case:

52. The Legal Manager of the 3rd Defendant, 3DW1, informed the court that the 3rd Defendant is a Water Service Board established under the Water Act, 2002; that the 3rd Defendant was created on 4th June, 2008 through Legal Notice Number 69 and that the 3rd Defendant was hived from what was then known as Tana and Athi Water Services Board.

53. 3DW1 stated that in line with its mandate, the 3rd Defendant assigned to the 2nd Defendant exclusive rights as its agent to operate, manage and supply efficient and economical water and sewerage services within Mavoko Municipality and its environs vide a Water Service Provision Agreement.

54. Having delegated its functions to the 2nd Defendant, 3DW1 stated that the 3rd Defendant was irregularly sued by the Plaintiffs; that the KAPA sewer line that was constructed by the Plaintiffs was handed over to the 3rd Defendant and that the 3rd Defendant is mandated to operate and maintain the KAPA sewer line on behalf of the Plaintiffs.

The Submissions:

(i) Plaintiffs' submissions:

55. The Plaintiffs' advocate submitted that the suit is in the nature of an inter pleader seeking to determine whether the transfer of the KAPA sewer line to the 3rd Defendant who subsequently licenced the 2nd Defendant as the Water Service Provider was lawful, and as such, whether the Plaintiffs and all the parties connected to the said KAPA sewer line should pay the charges connected thereto to the 2nd Defendant.

56. The Plaintiffs' counsel submitted that the KAPA sewer line runs from Syokimau Railways Station all the way to the Devki Steel Mills turn off in Athi River. Apart from the Plaintiffs, it was submitted that the 2nd Defendant has authorized the connection of various other parties into the said sewer line.

57. The submission by the Plaintiffs' advocate is that the KAPA sewer line is no longer a privately owned sewer line *(though developed using private resources)* but is owned and managed by the 2nd and 3rd Defendants for the benefit of the residents within the locality of the KAPA sewer line; that as a consequence, the control of the KAPA sewer line between Syokimau Railways Station to the Athi River Pump Station owned by the 2nd Defendant is vested in the 2nd and 3rd Defendants and that the 2nd and 3rd Defendants are entitled to collect levies from persons connected thereto.

58. It is the submission of the Plaintiffs' advocate that the court must make a distinction between the infrastructure developed by the Government of Kenya through funds sourced from the World Bank and being controlled by the 1st Defendant and the KAPA sewer line, and that the issue before the court is not who owns the infrastructure operated by the 1st Defendant, *(that is the sewer line running from EPZ near Kitengela to Kinanie)* but the privately constructed KAPA sewer line that is managed by the 3rd Defendant.

59. Counsel submitted that the 1st Defendant legally does not have a mandate to operate as a water service provider under the Water Act, 2002 or the Water Act, 2016 and that its own statute, the EPZ Act, does not give it that functionality.

60. The Plaintiffs' advocate submitted that as between the Plaintiffs and the Defendants, the Plaintiffs are connected to the KAPA sewer line which is managed and controlled by the 2nd and 3rd Defendants who are lawfully entitled to levy and collect charges from the public using

the said facility. According to the Plaintiffs, it is the responsibility of the 1st Defendant to comply with all the legal requirements to be licenced by the 3rd Defendant and thereafter enter into an agreement with the 2nd Defendant, if need be, on the outflow of the effluent from the KAPA sewer line at its pump station near Devki Steel Mill *(managed and operated by the 2nd Defendant*) into the 1st Defendant's publicly owned trunk sewer developed by the Government of Kenya using funds secured from the World Bank.

61. Counsel submitted that the Water Act, 2002 provide a systematic process for the handover, licensing and management of water and sanitation resources; that the court should encourage the Defendants to amicably work within the provisions of the Water Act 2016 to resolve any dispute on the utilization of the trunk sewer line and that any charges, if any, should be paid to the 2nd and 3rd Defendants who have the ownership and control of the KAPA sewer line.

62. The Plaintiffs' advocate submitted that the 1st Defendant's attempt to disconnect the Plaintiffs' KAPA sewer line and any subsequent disconnection will create an environmental disaster contrary to the provisions of Article 43 of the Constitution; that the 1st Defendant's recourse is to lay claim against the 2nd and 3rd Defendants who have the management and control of the KAPA sewer line which has since been handed over by the Plaintiffs as a public sewer line operated by the 2nd Defendant on behalf of the 3rd Defendant.

63. The Plaintiffs' advocate urged that the contract that the 1st, 7th and 8th Plaintiffs entered into with the 1st Defendant was frustrated by the fact that the management and control of the KAPA sewer line is no longer with the Plaintiffs but the 2nd and 3rd Defendants; that the law does not provide for a party who is not a licensed Water Service Provider to undertake provision of sewerage services; that such a party cannot enter into any binding legal relationship with other parties; and that the contracts between the 1st, 7th and 8th Plaintiffs and the 1st Defendant were against public policy and therefore unenforceable.

(ii) The 1st Defendant's submissions:

64. The 1st Defendant's advocate submitted that the 1st, 7th and 8th Plaintiffs entered into individual sewer connection agreements with the 1st Defendant in or about the year 2009 whereby the 1st, 7th and 8th Plaintiffs were allowed to discharge domestic sewerage material/waste water into the 1st Defendant's Trunk sewer line on specific terms and conditions, which the 1st Defendant would then convey into its Sewerage Treatment Plant and undertake appropriate treatment thereof before discharging the same to the environment.

65. The 1st Defendant's advocate urged that the 1st, 7th and 8th Plaintiffs breached the said sewer connection agreements by discharging unauthorized sewer materials (industrial effluents) into the 1st Defendant's trunk sewer line and sewerage Treatment Plant.

66. The 1st Defendant's advocate submitted that it was after the 1st Defendant threatened to exercise its contractual right of disconnecting the 1st, 7th and 8th Defendants from discharging effluent into its trunk sewer line that the 1st, 7th and 8th Plaintiffs, along with the 2nd, 3rd, 4th, 5th and 6th Plaintiffs who had not signed any sewer connection agreement with the 1st Defendant, filed the present suit; that the said Plaintiffs *(2nd, 3rd, 4th, 5th and 6th Plaintiffs)* have admitted that they are currently discharging their effluent into the 1st Defendant's trunk sewer line and sewerage Treatment Plant through their privately owned KAPA sewer line and that the 2nd, 3rd, 4th, 5th and 6th Plaintiffs have never signed any sewer connection agreement with the 1st Defendant (EPZA).

67. The 1st Defendant's counsel submitted that the alleged hand-over by the Plaintiffs of their privately owned KAPA-Athi River sewer line to the 3rd Defendant to which the 1st Defendant was not privy to does not in any way affect the sewer connection agreements between the 1st Defendant and the 1st, 7th and 8th Plaintiffs or the 1st Defendant's ownership and control of its Trunk-sewer line and sewerage treatment facilities and that the said hand over does not confer any form of right to the 2nd, 3rd, 4th, 5th and 6th Plaintiffs to use the 1st Defendant's aforesaid sewer facilities.

68. According to the 1st Defendant's counsel, the 1st Defendant was at all material time a licensee under Section 112 of the Water Act 2002, having been appointed a water undertaker under the previous Water Act *(Cap. 372 Laws of Kenya)*, and held the relevant sewerage treatment licenses and permits from the relevant statutory bodies, including NEMA.

69. The 1st Defendant's counsel argued that the 1st Defendant could not, and cannot be compelled to allow the Plaintiffs or any of them to discharge into its sewer line, unless it agrees to allow such discharge, and on terms and conditions as aforestated; that if the Plaintiffs or any of them was barred from discharging into the 1st Defendant's sewer line, they ought to have appealed *(filed their case)* in the Water Appeal Board, and not in this court and that their case is incompetent and should be dismissed with costs.

70. According to the 3rd Defendant's counsel, the 3rd Defendant's attempt to purport to seek indemnity from the 1st Defendant is misplaced; that the 1st Defendant having been appointed a water undertaker under the Water Act- Cap 372 *(now repealed)* had its rights saved under Section 112 of the Water Act, 2002 as a permit/licence and under the aforesaid Act (which has subsequently been repealed as well), issuance and regulation of licences and permits are roles that were vested in the Water Management Authority and the Water Services Regulatory Board (WASREB).

71. The 1st Defendant's counsel submitted that the 1st Defendant's water and sewerage infrastructure has never been taken over by or transferred to any other entity under the Water Act 2002, either by the 3rd Defendant or by Athi Water Services Board, from which the 3rd Defendant was hived and created on 4th June, 2008 vide Legal Notice No. 69 dated 4th June, 2008.

72. Counsel submitted that it was expressly agreed in the sewer connection agreements that the 1st, 7th and 8th Plaintiffs would pay to the 1st Defendant a monthly charge of Kshs. 60,000, Kshs. 24,000 and Kshs. 24,000 respectively as contractual considerations for the sewer

conveyance and sewer treatment.

73. Counsel submitted that the 1st Defendant has proved its case on a balance of probability, and has demonstrated that:

> *a) For nine (9) years the 1st, 7th and 8th Plaintiffs have been discharging sewerage/waste water into the 1st Defendant's sewer line and sewer treatment plant without paying the agreed contractual monthly charges to the 1st Defendant.*
>
> *b) The 2nd, 3rd, 4th, 5th and 6th Plaintiffs have unlawfully connected themselves to the 1st Defendant's sewer line and sewerage treatment plant, and have since March, 2009 been discharging huge quantities of unauthorized sewerage materials/industrial effluents into the 1st Defendant's sewer line and waste water treatment plant.*
>
> *c) That all the Plaintiffs have been unlawfully discharging huge loads of unauthorized materials into the 1st Defendant's sewer line and waste water treatment plant, greatly damaging the same, leading to repair expenses running into hundreds of millions of shillings; and*
>
> *d) That there is real danger of poisoning of the environment (River Athi) into which the waste water is released upon treatment at the 1st Defendant's waste water treatment plant, which is only supposed to handle domestic effluents and pre-treated industrial effluents.*

74. The 1st Defendant's counsel submitted that the 1st, 7th and 8th Plaintiffs have defaulted in payment of the contractual sums for a total of nine (9) years (108 months), and that the outstanding sums are as follows:

a.1st Plaintiff Kshs. 60,000x12x9 = Kshs. 6,480,000

b. 7th Plaintiff Kshs. 24,000x12x9 = Kshs. 2,592,000

c. 8th Plaintiff Kshs. 24,000x12x9 = Kshs. 2,592,000

Total Kshs. 11,664,000

75. The 1st Defendant's advocate finally submitted that the 2nd, 3rd, 4th, 5th and 6th Plaintiffs have not denied having connected themselves to the 1st Defendant's trunk sewer line and sewerage Treatment Plant; that they have been unlawfully and deliberately discharging sewerage materials into the 1st Defendant's sewerage infrastructure, leading to the mechanical breakdown and malfunctioning of the same, and that the resultant rehabilitation and repair costs of the sewerage infrastructure amounts to Kshs. 175,349,663.

(iii) The 2nd Defendant's submissions:

76. The 2nd Defendant's advocate's submissions is that the 1st Defendant's actions of purporting to sale and supply water and sewerage services outside its mandated zone contravenes the law and the Constitution; that the 1st Defendant has usurped the constitutional and statutory mandate of the 2nd and 3rd Defendants; that the 1st Defendant's actions are as a result of a sense of entitlement, impunity and flawed decision and that each of the Defendants should confine themselves to the doctrine of legality.

77. The 2nd Defendant's counsel submitted that the supply of water in Kenya is governed by the provisions of the Water Act. No. 43 of 2016. Section 85 of the Act provides that;

> ***i. A person shall not provide water services except under a license issued by the Regulatory Board, upon submission of an application and such supporting documents as the Board may require.***
>
> ***ii. A person who provides water services in contravention of this section commits an offence.***

78. Counsel submitted that the 1st Defendant has not exhibited evidence to show that it holds a license for water service provision in accordance with the Act, neither is it claiming that it had rights envisaged and saved under Section 85 of the Water Act, 2016.

79. Counsel submitted that under Section 114 of the Water Act 2002, the 1st Defendant's appointment as a water undertaker was extinguished upon coming into effect of the Water Plan of Transfer of Water Services Rules 2005, and that the said mandate has further been extinguished under the Constitution of Kenya 2010 and the Water Act 2016.

80. The 2nd Defendant's advocate urged that pursuant to the provisions of the Water Act 2002 and the Water *(Plan of Transfer of Water Services)* Rules 2005, 1st Defendant was required to hand-over its infrastructure to a Water Service Board, in this case Athi Water Services Board, which had territorial jurisdiction to manage water service provision within Mavoko area and which was succeeded by the 3rd Defendant.

81. According to the 2nd Defendant's advocate, the said legislation provided for a mandatory transfer of the functions of the management and operation of water services to the Water Service Board.

82. The 2nd Defendant's advocate finally submitted that the 1st Defendant has adamantly refused to comply with the provisions of the Water Act 2002 with regard to the handing over of the assets thereby creating the present conflict.

Analysis and findings:

83. The Plaintiffs are private companies located within the Syokimau- Mlolongo area along Mombasa Road, undertaking various industrial activities. The Plaintiffs, under the auspices of Kenya Association of Manufacturers, Athi River, developed a sewer line, otherwise known as KAPA sewer line, which was connected to the Pump Station owned by the 2nd Defendant and operated by the 3rd Defendant and which discharges its effluent into another trunk sewer line operated by the 1st Defendant.

84. It is the Plaintiffs' case that upon completion and commissioning of their private sewer line *(the KAPA sewer line)*, under the auspices of the Kenya Association of Manufacturers, Athi River, they handed it over to the 3rd Defendant pursuant to the provisions of the Water Act, 2002, and that the 3rd Defendant handed over the same sewer line to its agent, the 2nd Defendant.

85. In their letter of 17th November, 2008, the Plaintiffs' Association informed the 1st Defendant (EPZA) that its 13 km sewer line from Kapa Oil Refineries Limited had been completed, and that they wished to hand over the said line to the Water Services Provider for running and maintenance.

86. The Plaintiffs produced in evidence the *"Transfer and Hand-over of K.A.M sewer line"* agreement between the *"Kenya Association of Manufacturers"* (*Athi River Chapter)* and Tanathi Water Services Board *(the 3rd Defendant)* dated 24th February, 2009. It is this handing over of the KAPA sewer line to the 2nd and 3rd Defendants, and the refusal of the Plaintiffs to pay to the 1st Defendant the demanded charges for using the main sewer line to discharge their effluent that gave rise to this dispute.

87. The 1st Defendant's case is that its Athi River Export Processing Zone Water and Sewerage Project was set up in 1990's as a pivotal support infrastructure for the Athi River Export Processing Zone; that due to the chronic shortage of water and sewerage facilities, it had to extent its water supply from Nairobi to Athi River Export Processing Zone and that there was also a need for the construction of a completely new and separate sewerage facility. These two infrastructural projects were constructed by the Government of Kenya to the tune of approximately Kshs. 700,000,000. It was the evidence of DW1 that the said water and sewerage infrastructure was and still is the 1 st Defendant's asset base.

88. The 1st Defendant's witnesses informed the court that the Plaintiffs industries are located far away from the 1st Defendant's Athi River Processing Zone and own a separate privately constructed sewer line within Athi River *(the KAPA sewer line)* ; that the 1st Defendant has extended the services of sewer conveyance and treatment to persons outside the Export Processing zone and that on diverse dates between the years 2008 and 2009, the 1st, 7th and 8th Plaintiffs signed Agreements with the 1st Defendant whereby the said Plaintiffs agreed to discharge specific volumes of domestic effluent into the 1st Defendant's Trunk sewer line on specific contractual terms and conditions.

89. It was the evidence of DW1 that the Plaintiffs have been discharging waste water and raw industrial effluent into the 1st Defendant's Trunk sewer line and Sewerage Treatment Plant; that the 1st, 7th and 8th Plaintiffs ought to pay to the 1st Defendant all the outstanding contractual sewerage conveyancing and treatment charges to be computed as from March, 2010 until payment in full.

90. DW1 stated that the 1st Defendant is claiming for Kshs. 4,740,000 from the 1st Plaintiff as at September, 2016; Kshs. 1,896,000 from the 7th Plaintiff and Kshs. 1,896,000 from the 8th Defendant. DW1 further stated that the 1st, 7th and 8th Plaintiffs should pay general damages for breach of contract and that the 2nd, 3rd, 4th, 5th and 6th Plaintiffs should pay to the 1st Defendant general damages for the unlawful use of the 1st Defendant's Trunk sewer line and Sewerage Treatment Plant.

91. The 1st Defendant has disputed the assertion by the Plaintiffs, the 2nd Defendant and the 3rd Defendant that its sewerage facility, which runs from its Export Processing Zone area in Athi River to Kinanie, and which is approximately 15.5 km long, including the Treatment Plant in Kinanie, was transferred to the 3rd Defendant or at all.

92. According to DW1, although the mandate of the 1st Defendant is within the areas designated as Export Processing Zones (EPZs), the 1st Defendant was granted approvals to operate outside the zone; that they have lawfully connected some industries to the 1st Defendant's Trunk sewer line outside the Athi River EPZA zone and that the said connection is in line with the Legal Notice dated 6th June, 1997.

93. In line with its purported mandate to provide sewerage services to other people and industries outside the EPZ area, the 1 st Defendant entered into the Agreements dated 13th February, 2009 and 9th April, 2009 with the 1st, 7th, and 8th Plaintiffs respectively.

94. Indeed, before the Agreements between the 1st Defendant and the 1st, 7th and 8th Plaintiffs were signed, each of the three Plaintiffs had applied to the 1st Defendant to allow them to discharge their effluent in the 1st Defendant's sewer line as follows:

> ***"We would like to inform you that we are members of KAM – Athi River Chapter and contributor to Kapa – EPZA trunk sewer line. We would like to apply for sewer connection on the said line. Kindly let us have an application form for the same or letter offering to connect to this line with necessary guidelines and charges."***

95. The Agreements that the 1st, 2nd and 8th Plaintiffs entered into with the 1st Defendant provided as follows:

a. The effluent to be discharged from Kapa Oil Refineries shall be domestic-effluent only (thus wastewater from the premises sanitary facilities e.g. toilets, kitchen, bathrooms and hand washing basins). No effluent from industrial plant shall be discharged into the sewer line.

b. Domestic effluent from Kapa Oil Refineries' premises shall meet National Environmental Management Authority standards for effluent discharge into public sewers (See attached copy).

c. Maximum amount of domestic effluent to be discharged into EPZA trunk sewer from Kapa Oil Refineries Ltd shall be 1000m³ per day.

d. Kapa Oil Refineries Ltd shall ensure non-biodegradable materials (e.g. plastic papers, condoms and sanitary pads among others) do not find their way in its effluent discharged into EPZA trunk sewer.

e. EPZA shall accept responsibility of final treatment and disposal at a cost, so long as the statutory quality requirements for domestic effluent emanating from Kapa Oil Refineries' premises are maintained.

f. EPZA sewer charges are Kenya Shillings Twenty (Kshs. 20/= per m³) of effluent discharged into sewer line. Therefore, Kapa Oil Refineries shall be charged an equivalent to 100m³ effluent discharges on daily basis, thus Kshs. 60,000/= (sixty thousand) per month.

g. EPZA does not approve construction, maintenance or manage private sewer lines, hence EPZA's responsibility is limited to connection authorization and quality of the conveyed waste water into its trunk sewer.

h. All payments are to be paid through bankers' cheque to Export Processing Zones Authority (EPZA). Monthly payments shall be paid by 5th of every month with effect from the month connected.

i. All charges shall be payable on demand, and if any bill shall remain unpaid for more than sixty (60) days this sewer connection agreement shall automatically lapse.

j. If any of the above conditions is not met by Kapa Oil Refineries, the domestic and pre-treated industrial effluent shall be disconnected from EPZA sewer line by the Authority (EPZA) and EPZA shall not be liable to any damages or losses which may be incurred by Kapa Oil Refineries. Ltd.

96. It would appear that the 1st, 7th, and 8th Plaintiffs did not adhere to the conditions of the Agreements that they entered into with the 1st Defendant. I say so because on 29th January, 2010; the 1st Defendant informed the three Plaintiffs as follows:

"…EPZ A therefore instructs entities connected on Kapa line to stop discharging wastewater through this line with effect from 5th February, 2010."

97. The letter dated 29th January, 2010 by the 1st Defendant and addressed to the three Plaintiffs was forwarded to the 3rd Defendant who, in a letter dated 9th February, 2010, informed the 1st Defendant as follows:

"… The statutory duty of collection, conveyance, treatment and discharge of treated wastewater into the environment in Mavoko Municipality rests with Tanathi Water Services Board as envisaged in Section 53(1) of the Water Act, 2002. The Board has licensed Mavoko Water and Sewerage Co. Ltd as Water Services Provider (WSP) under Sections 55 and 56 of the Water Act, 2002…. The sewer line in question is owned by the Board and it is being managed and operated by our duly appointed WSP. In this regard, any question, issue or clarification about the quality of wastewater discharged from Kapa sewer line to EPZA line should be addressed to the Board."

98. Due to the above supremacy wars between the 1st Defendant and the 3rd Defendant as to who is mandated by law to operate the Main Trunk-sewer line, this suit was filed by the Plaintiffs. Indeed, the main issue for determination in this matter is who between the 1st Defendant and the 3rd Defendant should own and 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. To answer the above issue, the law pertaining to the provision of water and sewerage services is critical.

99. Although the 2nd Defendant's advocate invited me to consider the provisions of the Water Act, 2016, I refuse to accept the invitation. The said refusal is guided by the provisions of Section 23(3) (b) and (e) of the Interpretation and General Provisions Act, Cap 2 which provides as follows:

"(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

100. These proceedings were filed in the year 2010. The law governing the parties herein as at that time was the Water Act, 2002. Consequently, the applicable law is the Water Act, 2002 *(repealed)* and not the Water Act, 2016.

101. The Water Act, Cap 372 *(repealed)* came into force on 7th May, 1952. Before the year 1974, the provision of water in the country was managed by the Department of Water Development, which was a department housed in various Ministries. However, the Department was upgraded into a full Ministry of Water in 1974.

102. The Water Act, Cap 372 *(repealed)* created several authorities which were all controlled by the Central Government. The said bodies included the Water Resources Authority; the Catchment Board; the Regional Water Committees; the Water Apportionment Board and the Water Undertakers. Section 124 of the Water Act Cap 372 *(repealed)* provided that *"no person shall construct any works for the supply of water to any premises within the area of supply of a water undertaker without first obtaining permission in writing from the undertaker to construct such works."*

103. However, the requirement for a permit for supply of water *[and sewerage services]* was not required under Section 124 of the Act in respect of the supply of water by any *"local authority"* or *"other persons"* to its employees or in respect of the supply of water on the premises of any hospital, factory, school, hotel, brewery, research station or institution, in cases where the source of supply is under the control of such local authority, person, hospital, factory, school, hotel, brewery, research station or institution by a water undertaker.

104. The implication of the above provisions is that under the repealed Act, the 1st Defendant could supply water and offer sewerage services to the industries within its zone without being appointed a water undertaker.

105. Section 124(6) of the Water Act, Cap 352 *(repealed)* prohibited and criminalized the supply of water by any person or entity to more than two consumers, unless one is appointed a water undertaker. To enable the 1st Defendant to supply water and provide sewerage services outside its zone, the Minister for Water appointed the 1st Defendant to be a water undertaker vide Legal Notice Number 57 of 1997 of 3rd June, 1997 as follows:

> ***"IN EXERCISE of the powers conferred by Section 124 of the Water Act, the Minister for Land Reclamation, Regional and Water Development, after consultation with the Water Resources Authority, appoints-***
>
> ***THE EXPORT PROCESSING ZONES AUTHORITY***
>
> ***To be a water undertaker responsible for provision of an adequate supply of water within the boundaries of the Export Processing Zones area, certain properties outside them but along the pipeline route from the Nairobi City Council Water Supply off-take near Firestone Factory.***
>
> ***This area is delineated in BLUE, on Plan No. EPZA/WU/01 deposited in the office of the Director of Water Development, Maji House, Nairobi and the office of Export Processing Zones Authority, Nairobi."***

106. It is on the basis of that Legal Notice that the 1st Defendant started supplying water and sewerage services to entities outside the zone. The involvement of the Central Government in the direct provision of water and permits was opposed by many stakeholders, including the international community. In 1999, the National Water Policy was adopted by the National Assembly as Sessional Paper No. 1 of 1999. The said policy redefined the role of Government by moving away from the direct service provision to regulatory functions. The policy justified the handing over of water services. The existing infrastructural facilities were to be handed over to those responsible for their operation and maintenance. It is on that basis that the Water Act, 2002 was enacted, thus repealing the Water Act, Cap 372.

107. The Water Act, 2002, separated the responsibility of water resources management from that of the water supply and created new institutions. Section 7 established the Water Resources Management Authority (WARMA), whose main function was to develop guidelines and procedures for the allocation of water resources and issue permits for water use.

108. Section 46 of the Water Act, 2002, established the Water Services Regulatory Board whose main function was to issue licences for the provision of water services. Section 51 of the Act mandated the Minister to name, by way of gazette, Water Services Boards, which would then be licenced by the Water Services Regulatory Board to provide water services *(which includes sewerage services).*

109. The law allowed the established Water Services Boards to appoint agents for the exercise and performance of all or any of its powers and functions under the licence, to be known as Water Service Providers *(See Section 55 of the Water Act, 2002).* The law prohibited the Water Services Boards from engaging in direct service provision. The Water Services Boards had to identify another entity, a water service provider, to provide water services as its agent. Indeed, Section 55 (5) of the Act allowed the Boards to enter into agreements with more than one water service provider in respect of its area of supply.

110. Section 56 of the Act prohibited the supply of water by any person within the limits of supply of a licensee to *"more than twenty households or more than 100,000 litres of water a day for any purpose except under the authority of a licence."* However, the law allowed any person to supply water *(and sewerage services)* of more than 100,000 litres to its employees or factory if the source of water is his or if the water is supplied to him in bulk by a licensee. The law required Water Services Boards to apply for a licence to the Water Services Regulatory Board *(See Section 57(1) of the Act).*

111. Section 113 of the Water Act, 2002 *(repealed)* provides as follows:

> ***"(1) As soon as reasonably practicable after the commencement of Part I of this Act, and following public consultation, the***

Minister shall publish by notice in the Gazette a plan for the transfer of the management and operation of water services to water services boards established under this Act.

(2) The plan shall—

a. provide details of the institutional, contractual and financial arrangements, capacity building, organizational restructuring, transitional and other measures necessary to ensure an efficient, cost-effective and orderly transfer of the management and operation of water services;

b. prescribe appropriate arrangement for transferring to water services boards the ownership of plant, equipment or other assets used by the Government in connection with water services, whether with or without any associated liabilities; and

c. prescribe appropriate arrangements for water services boards to obtain the use of plant, equipment or other assets used by a local authority or other person in connection with water services; and

d. specify measures to give effect to the plan within a specified time.

(3) Rules made under this Act may make such provision as may be necessary to give effect to the plan in respect of any particular water services."

112. Pursuant to the above provision, the Minister promulgated "the Water *(Plan of Transfer of Water Services)* Rules, 2005 which were published in Gazette Notice Number 101 dated 12th August, 2005.

113. The 2005 Rules provided for the names of the established Water Services Boards, which included Athi Water Services Board. The area of jurisdiction of the Athi Waters Services Board was Kajiado, Machakos, Kiambu, Thika, Makueni and Nairobi. Under the sub-heading *"Part II: The process of transfer",* Rules 7 and 8 provided as follows:

"7. Local authorities providing water services under previous water undertaking arrangements shall be required to comply with the provisions of Sections 55(1) and 57 within six (6) months of the coming into force of this transfer plan [by obtaining licences and entering into agreements with the Boards].

8. The Ministry, acting on behalf of Water Services Boards, shall negotiate with other Government Ministries/Departments and Parastatals, for the transfer of ownership to Water Services Boards of system facilities that they own or use for provision of water and sewerage services in compliance with Section 113 (2)(b)."

114. The above two regulations shows that, the local authorities were required to immediately get licences from the established Water Services Boards before they could continue providing water and sewerage services. On the other hand, and in line with Section 113(2) (b) of the Act, the Ministry, on behalf of the Boards, was to negotiate with the Government agencies and Parastatals for the transfer of ownership to the Boards of the facilities that they owned.

115. The Regulations contained in Legal Notice No. 101 further provided for the Schedule of Transfer as follows: *"The following are the critical dates and milestones for the transfer."*

"Table 3: Transfer Road Map"

Activity	**Commencement Date**	**Completion date**
Transfer	1st July, 2005	30th June, 2006
Execution of Transfer Agreements	5th March, 2005	30th June, 2006
Supportive Activities	1st January, 2005	30th June, 2006
Identification and engagement of Successor Water Services Providers	1st July, 2005	30th June, 2006

116. The Regulations provided that the Water Services Boards were the transferees while the Ministry and the National Water Conservation and Pipeline Corporation were the initial transferors, and the other Government Ministries, Departments and Corporations were to be the subsequent transferors.

117. Regulation number 11.D, under the heading *"The Transfer Agreement"* provided as follows:

"The transfer will be affected by means of a legally binding agreement between the Ministry, the National Water Conservation

and Pipeline Corporation and the relevant Water Services Boards."

118. Part IIIA of the Regulations provided as follows:

> ***"Each transfer agreement shall contain a plan for completing the transfer by the 30th June, 2008. The Ministry shall assist each water services board to prepare the plan. The Plan shall, among other considerations, give a broad framework specifying various transitional arrangements in respect to legal continuity, continued provision of services, staffing, finalization of ongoing contracts and incoming of new provisions and arrangements. Central to these transitional arrangements are-***
>
> > ***a. Appointment of all water service providers, including Ministry and National Water Conservation and Pipeline Corporation scheme-level staff on secondment as the water service boards may require;***
> >
> > ***b. Retention, on secondment, of Ministry and National Water Conservation and Pipeline Corporation staff at existing terms of service for the period ending on the 30th June, 2006;***
> >
> > ***c. Continuation of Ministry funding of operation, and maintenance (including staff) costs for the duration of the interim water service provider status;***
> >
> > ***d. Provision of adequate financial resources to meet non-staff operation & maintenance costs while taking into account revenues (billings and collections); and***
> >
> > ***e. Continuation of existing consumer agreements and customer accounts."***

119. As I have stated above, the 1st Defendant was appointed as a water undertaker vide Legal Notice No. 57 of 1997 dated 3rd June, 1997. By the time the 1st Defendant was appointed a water undertaker, it owned the sewerage Trunk-line sewer line running from the Export Processing Zone in Athi River all the way to a place known as Kinanie, where it has its Treatment Plant.

120. The 1st Defendant produced in evidence the architectural 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.

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.

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.

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".*

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.

125. Although Section 56 of the Water Act, 2002, which is the law that was in existence when this suit was filed, required that all water providers who supply water and sewerage services to more than twenty households, or who use more than 100,000 litres per day for any purpose, required a licence from the Water Services Regulatory Board, the evidence before me shows that this provision was not applicable to the 1st Defendant.

126. I say so because having been appointed a water undertaker under the repealed law, the Water Act, 2002 allowed the 1st Defendant to continue undertaking the tasks of a water undertaker until *"the coming into force of any rules to the contrary." (See Section 114 (c)).*

127. Indeed, when the 2005 Rules under the Water Act, 2002 were operationalized, the then Athi Water Services Board, through the Ministry of Water, was required to enter into negotiations, and sign legally binding agreements with the 1st Defendant or the Ministry, transferring to the Athi Water Services Board all its services and infrastructure pertaining to the provision of water and sewerage services. That never happened.

128. The 1st Defendant having not entered into any formal agreement with the then Athi Water Services Board, which later on was split to create the 3rd Defendant, the 3rd Defendant cannot claim that it took over the water services undertaking functions from the 1st Defendant. Having not taken over the water and sewerage services or infrastructure from the 1st Defendant as contemplated under the law, the 3rd Defendant could not have entered into a valid agreement with the 2nd Defendant, who is its agent, in relation to the Trunk - sewer line and the Treatment Plant that is owned by the 1st Defendant.

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 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.

130. In fact, the difficult that the Ministry of Water has had to transfer the 1st Defendant's facility to other entities is expected considering that the 1st Defendant's water supply and sewerage facilities are meant to cater for Export Processing enterprises within the 1st Defendant's Athi River Export Processing Zone Complex. If another entity was to take-over the facility, it means that the 1st Defendant's operations will be at the mercy and magnanimity of the 2nd Defendant, who is the 3rd Defendant's agent.

131. Such a scenario, to say the least, is not what was intended when the Government spent over Kshs. 700,000,000 in the early 1990's to put up the water and sewerage infrastructure for the attainment of its industrial and manufacturing goals. The 2nd and 3rd Defendants cannot therefore convince me that they can take over the operations of such a facility in the name of providing sewerage services to all and sundry. The 2nd and 3rd Defendants should, as contemplated under Section 57 of the Water Act, 2002, put up an infrastructure of their own and offer the sewerage services to the public at their own rates.

132. Better still, the law allows the 3rd Defendant to enter into an agency agreement with any person for the provision of sewerage and water services. The 3rd Defendant can therefore enter into a formal agreement with the 1st Defendant and have those services provided to the public. Any continual discharge of effluent in the 1st Defendant's sewer line without its consent is contrary to the provisions of Section 76 of the Water Act.

133. Unlike the local authorities whose mandate to provide water services was automatically curtailed by the provisions of the 2005 Rules, Section 112 and 114 of the Water Act, 2002 allowed the 1st Defendant to continue offering those services.

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.

135. That being the case, the Plaintiffs' prayer for an order of injunction as against the 1st Defendant fails.

136. The 1st Defendant filed a Counter-claim. In paragraph 21 of the Counter-claim, the 1st Defendant has pleaded that on 13th February, 2009, 14th May, 2009 and 23rd April, 2009 respectively, itentered into written sewer connection agreements with the 1st, 7th and 8th Plaintiffs whereby the 1st, 7th and 8th Plaintiffs were to be connected *(and were connected)* to the 1st Defendant's trunk sewer line on specific *(contractual)* terms and conditions that are specifically set out in the said agreements. Paragraphs 22 and 23 of the Counter-claim sets out some of the terms and conditions of the agreements. The agreements were produced in evidence by the 1st Defendant.

137. In the Agreements that the 1st Defendant entered into with the 1st, 7th and 8th Plaintiffs, it was expressly agreed that the 1st, 7th and 8th Plaintiffs would pay a monthly charge of Kshs. 60,000, Kshs. 24,000 and Kshs. 24,000 respectively to the 1st Defendant as contractual consideration for the sewer conveyance and sewer treatment.

138. The 1st Defendant's witness proved on a balance of probability that for more than nine (9) years, the 1st, 7th and 8th Plaintiffs have been discharging sewerage/waste water into the 1st Defendant's sewer line and sewer treatment plant without paying the agreed contractual monthly charges to the 1st Defendant.

139. The evidence before me shows that the 1st, 7th and 8th Plaintiffs have defaulted in payment of the aforesaid contractual sums for a total of more than nine (9) years *(108 months),* that is, from March, 2010 until March, 2019. The outstanding sum is as follows:

a.1st Plaintiff Kshs. 60,000x12x9 = Kshs. 6,480,000

b. 7th Plaintiff Kshs. 24,000x12x9 = Kshs. 2,592,000

c. 8th Plaintiff Kshs. 24,000x12x9 = Kshs. 2,592,000

Total **Kshs. 11,664,000**

140. That being the case, I award to the 1st Defendant a sum of Kshs. 11,664,000 as at March, 2019, being payment of Kshs. 60,000, 24,000 and 24,000 per month by the 1st, 7th and 8th Plaintiffs respectively from March, 2010 until March, 2019.

141. Although the 1st Defendant called one witness who testified about the alleged discharge of huge volumes by the Plaintiffs of unauthorized waste into the 1st Defendant's sewerage Treatment Plant, there was no evidence to show that the said unauthorized effluent was by the Plaintiffs.

142. Indeed, other than the Plaintiffs and the industries within the EPZ, I was informed that there are so many other industries and homes

whose sewer lines have been connected on the 1st Defendant's sewer line. Indeed, the 1st Defendant acknowledged that other than the many other connected sewer lines on its main sewer line, there are other people who have destroyed the man holes along the sewer line and have been illegally depositing effluent on the sewer line vide the dismantled man holes.

143. That being the case, the 1st Defendant has not shown a direct causation between the unauthorized effluent that finds its way to the Treatment Plant and the Plaintiffs herein. The 1st Defendant ought to take pro-active measures of checking with all the entities connected on its sewer line, with a view of ascertaining the persons or industries discharging unauthorized effluent in its sewer line. Consequently, the claim for general damages as against the Plaintiffs fails

144. In conclusion, I would say that this matter has raised fundamental issues concerning the provision of clean water and sewerage services to the people of Machakos and Kajiado Counties viz-a-viz their right to a clean and healthy environment. The right to a clean and healthy environment has been equated to the right to life, because there can be no life, so to speak, in a toxic and polluted environment.

145. Indeed, in 2010, the United Nations General Assembly *(UNGA)* declared safe and clean drinking water and sanitation a human right under international law. Water and sanitation were recognized as a singular, composite, and independent right obligating States to ensure the provision of water and sanitation to its people. The United Nations General Assembly *(UNGA)* Resolution recognized both water and sanitation as a human right essential for the full enjoyment of life and all human rights. The State is therefore obligated to provide resources, including developing infrastructure, to scale up efforts to provide safe, clean and affordable drinking water and sanitation for all.

146. With the provisions of Article 43 (1) of the Constitution in mind, and the 2010 United Nations General Assembly *(UNGA)* Resolution, water and sanitation should always be treated as a social and cultural good and not primarily an economic good. Commodification of water and sewerage services has and shall continue to lead to conflict. To quote Ismail Serageldin, the former Vice President of the World Bank, if wars of this century were fought over oil, the wars in the next century will be fought over water. As Vandana Shiva in her book, *"Water Wars: Privatization, Pollution and Profits",* has argued, commodification of water is undemocratic and centralizes the control over decision making and resources; destroys natural resources and erodes the democratic base of politics because these are hijacked by the World Bank, IMF and other players that push the privatization agenda.

147. I am in agreeable with that school of thought. Although in the Water Act, 2016, recognizes that water belongs to the State and is to be managed and supplied for the benefit of the people, the negative effects of privatization of the provision of water and sewerage services points to the contrary. Indeed, it is common knowledge that privatization of water and sewerage services does not benefit the marginalized and vulnerable groups at all.

148. As correctly argued by Ms. Nerima Akinyi Were, privatization of water and sewerage services shifts the State obligation for the fulfillment of a human right for its citizen to private actors, and also directly violates some basic principles, particularly those that provide that water must be free for sustenance needs and that water is a common pool resource.

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.

150. For the reasons I have given above, I shall dismiss the Plaintiffs' Plaint. Considering that the Plaintiffs were forced to file this suit by the supremacy wars between the 1st Defendant and the 2nd and 3rd Defendants in respect to the provision of sewerage services, each party will pay its own costs in respect to the Plaintiffs' suit.

151. The 1st Defendant's Amended Counter-claim dated 11th December, 2015 is allowed in the following terms:

a. The 1st, 7th and 8th Plaintiffs to pay to the Defendants a sum of Kshs. 11,664,000 made up as follows:

a.1st Plaintiff Kshs. 60,000x12x9 = Kshs. 6,480,000

b. 7th Plaintiff Kshs. 24,000x12x9 = Kshs. 2,592,000

c. 8th Plaintiff Kshs. 24,000x12x9 = Kshs. 2,592,000

Total Kshs. 11,664,000

b. The 1st, 7th and 8th Plaintiffs to pay to the 1st Defendant Kshs. 60,000, Kshs. 24,000 and Kshs. 24,000 respectively every month with effect from April, 2019 until payment in full.

c. The 1st Defendant to enter into negotiations and agreements with 2nd, 3rd, 4th, 5th and 6th Plaintiffs on the discharge of their effluent in the EPZA Main Sewer line and Treatment Plant.

d. Each party to bear its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE