



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. PETITION NO. 4 OF 2017

**IN THE MATTER OF ARTICLES 22, 23 AND ARTICLES 163,
165, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 10, 21, 40, 42, 69, 70 OF
THE CONSTITUTION OF KENYA, 2010**

BETWEEN

SAFARICOM STAFF PENSION SCHEME REGISTERED TRUSTEES.....PETITIONER

AND

ERDEMANN PROPERTY LIMITED.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

MAVOKO WATER & SEWERAGE CO. LTD.....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

AND

EVEREST LIMITED.....1ST INTERESTED PARTY

SUNSET HOUSING LIMITED.....2ND INTERESTED PARTY

RULING

1. In the Notice of Motion dated 21st June, 2018, the 1st Interested Party, Everest Limited, is seeking for the following orders:

- a. The Directors of the 1st Respondent and a Mr. Mang'eli Michael, the Managing Director of 3rd Respondent be committed to civil jail for a period of not more than six months for contempt of court orders.*
- b. That the properties of the 1st Respondent and of Mr. Mang'eli be attached and sold if found in contempt of court orders.*
- c. That the 1st Respondent be compelled to disconnect its sewer line illegally connected to the Applicant's sewer line on 14th June, 2018 during the subsistence and in disobedience of court orders.*

d. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

e. Costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 1st Interested Party's Managing Director who has deponed that Judgment in this matter was delivered on 12th May, 2017; that the 1st Respondent filed an Appeal against the said decision vide Appeal No. 185 of 2017 and that no stay of execution of the Judgment was granted.

3. According to the Applicant, on 14th June, 2018, the 1st Respondent, through its servants, supervised by its Managing Director, a Mr. Yang, commenced re-construction of the impugned sewer line in disobedience of the Judgment of the court and that the 1st Respondent is acting under the authority of the 3rd Defendant.

4. In his Replying Affidavit, the 3rd Respondent's Managing Director deponed that the sewer line in dispute is not the one that the 1st Respondent was constructing; that the court never dealt with or issued an order relating to the existing sewer line that serves the Interested Parties and that the sewer line that serves the Interested Parties has been in operation since the year 2015.

5. According to the 3rd Respondent, the Applicant is attempting to use the court to stop the 1st Respondent from utilizing a sewer line before paying them; that 1st Respondent is using the existing sewer line during emergencies, and specifically when they are unable to utilize the waste water treatment plant within their property and that the Application is bad in law, frivolous and vexatious and ought to be dismissed with costs.

6. The 1st Respondent's Chairman and Managing Director deponed that the Application raises a new cause of action which was not pleaded in the Petition or determined by the court in its Judgment; that the subject matter and claims in support of the contempt Application are different from the subject matter in the Petition and that the Application is incompetent.

7. According to the 1st Respondent, after the Judgment of this court, it abandoned the construction of the trunk sewer line that was the subject of the Petition and Judgment; that it sought and obtained the 3rd Respondent's approvals to connect to an already existing underground sewer line constructed by the Applicant but managed by the 3rd Respondent and that its Application to use the Applicant's sewer line was approved by the 3rd Respondent.

8. The 1st Respondent's Director finally deponed that the subject sewer line being claimed by the Applicant is public property having been constructed underneath a public road; that the sewer line is managed, controlled and owned by the 3rd Respondent and that prior to filing the instant Application, the Applicant had demanded as compensation Kshs. 21,300,000 from the 1st Respondent.

9. In their submissions, the Applicant's advocates submitted that the 1st Respondent is working on a sewer line which had been stopped by the court by connecting the same to the already existing sewer line used by the Applicant; that the 3rd Respondent is encouraging the 1st Respondent to carry on with works on the impugned sewer line and that both Respondents are in contempt of the orders of the court.

10. The 1st Respondent's advocate submitted that the 1st Respondent is not in disobedience of the orders of the court; that the instant Application raises a new cause of action which was not pleaded in the Petition that gave rise to the Judgment of the court and that the Application is a waste of judicial time. The 3rd Respondent's advocate's submissions are similar to the submissions by the 1st Respondent. All the parties relied on numerous authorities which I have considered.

11. This matter was commenced by the Petitioner on 17th February, 2017, with the Applicant being enjoined in the Petition as the 1st Interested Party.

12. In the Petition, the Petitioner averred that the sewer line construction works by the 1st Respondent conflicts with some aspects of its project and design in the following respects: the embankment of the sewer line along Quarry Road is over one (1) meter above the existing road; the sewer line cuts across the main access to the Petitioner's Project thus blocking the Petitioner's access to its property and that the sewer embankment works would cause a major challenge to the drainage of the road.

13. While supporting the Petition, the 1st Interested Party's Director deponed that it is the registered proprietor of land known as L.R. No. 337/861; that its land is serviced at the back by Quarry Road; that the ongoing construction by the 1st Respondent of a sewer line which is 2.8 meters above the ground is obstructing access to its land and that the said construction will cause flooding to its property.

14. The 1st Interested Party's Director further deponed that it owns a sewer line which runs below the ground and that its manholes which are designed for a maximum height of 1.5 meters cannot withstand the extra pressure of a unit raising to 2.8 meters.

15. After hearing the Petition, this court, in its Judgment dated 12th May, 2017, held as follows:

a. A permanent injunction is hereby issued restraining the 1st Respondent from proceeding with the construction of the sewer line along Quarry Road and Old Mombasa Road on the basis and/or on the authority of the approvals granted by the 2nd to 4th Respondents.

b. An order by way of Judicial Review being an order for mandamus directed at the 2nd, 3rd and 4th Respondents be and is hereby issued directing them to reconsider the submitted designs for construction of a sewer line by the 1st Respondent along Quarry Road and Old Mombasa for its Great Wall Gardens Project and make a decision thereon in line with the applicable law and after full public participation by the Petitioner and all other affected stakeholders as provided for in the law.

c. The 1st Respondent to pay to the Petitioner the costs of the Petition.

16. From the pleadings that were filed in this matter, the Petitioner, the Respondents and the Interested Parties agreed that the sewer line that the 1st Respondent was constructing was along Quarry Road and the old Mombasa Road, and was one (1) meter above the road. Both the Petitioner and the Interested Parties were aggrieved by the design of the said sewer and more so, by the fact that the sewer line was being constructed on top of the road, and not, as is traditionally the case, underground.

17. The Applicant has accused the 1st and 3rd Respondent of disobeying the orders of the court. According to the Applicant, *“the 1st Respondent has started to put up the sewer line and has illegally connected its line to that of the Applicants without their consent.”* The Respondents have denied these allegations.

18. It is trite that where a party alleges that a person is in contempt of an order of the court, he must state clearly and exactly what the alleged contemnor has done or omitted to do which constitutes contempt. As was held in the case of ***Gachoni Enterprises Limited vs. D.N. Nyaga t/a Njeru, Nyaga & Co. Advocates & Another (2012) eKLR***, the slightest ambiguity to the order can invalidate an Application for committal, as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence.

19. The standard of proof in contempt proceedings must be higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt (***See Mutitika vs. Baharini Farm Ltd (1985) eKLR***).

20. As I have already stated above, the Petition, as well as the Judgment of this court, shows that the complaint in the Petition was that the 1st Respondent was constructing a sub-trunk sewer line running from the 1st Respondent’s development to the main Export Processing Zone Trunk sewer line whose proposed height was 1 meter above the access road level. That is the sewer line that this court stopped the 1st Respondent from developing or completing.

21. In the current Application, the 1st Interested Party/Applicant has alleged that the 3rd Respondent has allowed the 1st Respondent to connect its sewer line onto its sewer line without consulting it or without compensation. The 1st Interested Party’s complaint is captured in its letter dated 13th June, 2018 addressed to the 1st Respondent and copied to the 3rd Respondent which reads as follows:

“... As you are well aware the said sewer line was constructed by our clients at an enormous cost... Mavwasco only operates the sewer and ownership of the sewer line has not yet been transferred to Mavwasco... We challenge you to point to us in the draft Agreement the powers you seem to claim to authorize connections to our clients’ sewer line without their consent...”

22. The above letter by the 1st Interested Party/Applicant was a culmination of the correspondences between the 1st Respondent and the 3rd Respondent. In its letter dated 2nd May, 2018, the 1st Respondent had written to the 3rd Respondent as follows:

“...As we indicated, we have built a functional sewer treatment plant to serve the proposed Great Wall Gardens and the immediate neighbours of Hillcrest and Mavuno Church. We would like to do a connection to your line that we can use in the instances of a breakdown of our treatment plant. This is only temporary and once the repair is done, we will continue with our treatment plant.”

23. The above request by the 1st Respondent to be allowed to discharge its waste to the *“1st Interested Party’s line”* in instances of a breakdown of its treatment plant was allowed by the 3rd Respondent in its letter of 11th May, 2018. This concession by the 3rd Respondent was objected by the Applicant vide its advocate’s letter dated 17th May, 2018 in which they stated as follows:

“...our clients are very concerned that you are issuing authority to third parties to connect to the said sewer line without consultation or permission to the owners of the sewer line, contrary to the Agreement reached between our clients and our company. Your actions in granting authority to third parties to use our clients’ sewer line without compensation is not only unlawful, but assumes that your company has already taken over the management of the sewer line without executing the sewer management agreement to our clients’ detriment....”

24. Indeed, the subsequent communication between the Applicant and the 1st Respondent shows that the Applicant was interested in being compensated before the 1st Respondent could be allowed to discharge its waste in its sewer line. In an email dated 28th May, 2018, the Applicant informed the 1st Respondent as follows:

“As discussed see attached the draft Agreement. As you can see the cost of the sewer was Kshs. 63,800,000 and the sewer is owned jointly by Everest Park and Sunset Boulevard. In case you want to join and become a partner then you can pay 63,800,000/3 = 21,300,000...”

25. The evidence before me therefore shows that the cause of action in the current Application is different from the cause of action in the

Petition. The Applicant has not offered any evidence to show that the 1st Respondent, with the permission of the 3rd Respondent, is constructing the sewer line that the court stopped.

26. Indeed, while the sewer line that the court stopped was along Quarry Road and was over 1 meter above the existing road, the Applicant's sewer line is underground, meaning that the 1st Respondent can only join the Applicant's sewer line by constructing an underground sewer line.

27. In the absence of evidence to show that the 1st Respondent is constructing or developing the same sewer line that the court stopped, and in view of the Applicant's contestation that it is entitled to compensation before it can allow the 1st Respondent's sewer line to join its sewer line, I find that the Applicant's cause of action is distinct from the cause of action that was raised by the Petitioner herein.

28. For those reasons, I dismiss the Application dated 21st June, 2018 with costs to the 1st and 3rd Respondents

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

O.A. ANGOTE

JUDGE