



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**E.L.C. CASE NO. 47 OF 2015**

**(FORMERLY NAIROBI HCCC NO. 549 OF 2014 & MALINDI HCCC NO. 26 OF 2013)**

**WATER RESOURCES MANAGEMENT AUTHORITY.....PLAINTIFF**

**VERSUS**

**KRYSTALLINE SALT LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff was established under the Water Act, 2002 as a body corporate mandated to develop principles, guidelines and procedures for the allocation of water resources and to monitor the national water resources management strategy. It receives applications for permits for water use and monitors and enforces conditions attached to the permits for water use. It also regulates and protects water resources quality from adverse impacts. The Water Act and the Water Management Resources Rules of 2007 vests the Plaintiff with the power to issue water permits and charge water users for water use.

2. Through Legal Notice No. 171 of 28/9/2007, water use charges were gazetted requiring water users to pay to the Plaintiff 50 cents/m<sup>3</sup> for the raw water they abstracted for their use with effect from 1/10/2007. Under Rule 104(2) the accounting period for the charges is quarterly and payments ought to be made by the 15<sup>th</sup> day of the next month after every quarter.

3. The Defendant is a limited liability company carrying on the business of commercial production and sale of salt. The Plaintiff avers that the Defendant abstracts large volumes of water for purposes of commercial production of salt. It does this through solar evaporation which entails capturing and trapping of seawater into shallow ponds which then evaporates leaving concentrated brine that is then gathered by mechanical harvesting machines. The shallow ponds are dug and maintained in the mainland approximately 2kms from the sea within the Kenyan Coastline.

4. The Plaintiff argues that following the gazette, the Defendant was under an obligation to pay it for the raw water it used for the commercial production of salt at the rate of 50 cents/m<sup>3</sup> from 1/10/2007. Further, that the Defendant is required to submit to the Plaintiff a self-assessment form indicating the actual water used to enable the Plaintiff calculate the water use charges due. The Plaintiff claims that the Defendant has wilfully and deliberately refused to submit the self-assessment forms indicating the water it used for its commercial salt production. This forced the Plaintiff to estimate the amount of water used by the Defendant in order to calculate the amount of water use charges due from the Defendant.

5. The Plaintiff states that the gazetted water use charges for water abstraction per day for commercial salt production stands at Kshs. 50/1,060m<sup>3</sup> of water which in turn produces a tonne of salt at a cost of Kshs. 530/=. The Plaintiff avers that the Defendant produces a minimum of 350,000 tonnes of salt per year and that the Defendant water use charges for the period from October 2007 to March 2017 together with the statutory interest adds up to Kshs. 2,079,455,000/=.

6. In addition, the Plaintiff claims that the Defendant ought to pay a fixed permit fee of Kshs. 135,000/= per year to the Plaintiff. In total, the Plaintiff claims the sum of Kshs. 2,079,590,000/= against the Defendant.

7. The Plaintiff states that it computed the estimates for the Defendant's water use for the period running from October 2007 to March 2017 from the Defendant's records available online and estimated the amount due from the Defendant on account of water use charges for that period together with interest as provided under Rule 114 of the Water Resources Management Rules. The Plaintiff states that in assessing and arriving at the estimates of the Defendant's water use and the amount due, it complied with Rule 106 (3) and (4) and arrived at a fair estimate of the quantities of water used by the Defendant based strictly on the observations by the Plaintiff of the Defendant's water use activities.

8. In the Amended Plaint filed in court on 19/4/2017, the Plaintiff seeks judgement in the sum of Kshs. 2,079,590,000/= being the outstanding water use charges for the period October 2007 to March 2017. In addition, the Plaintiff seeks a declaration that the Defendant is obligated by law to pay for water charges for its commercial salt production with effect from 1/10/2007 together with interest in accordance

with the Water Resources Management Rules, 2007.

9. On its part, the Defendant contends that the Plaintiff has no power under the Water Act and the Water Resources Management Rules, 2007 to develop principles guidelines or procedures for the use of seawater, nor to receive nor determine applications for use of seawater and that it does not regulate the use of seawater. It denies that it is under any legal obligation to apply for a permit from the Plaintiff so as to abstract or use seawater; nor to make any payment as alleged by the Plaintiff. The Defendant argues that Rule 104 (2) and 114 of the Water Resources Management Rules do not apply to the abstraction of seawater and that these rules are irrelevant to this suit.

10. The Defendant maintains that even if the Plaintiff were entitled in an appropriate case to estimate the amount of water used by any user, such estimation must be based on concrete empirical and provable data and cannot be done whimsically, capriciously or maliciously without regard to logic or common sense. The Defendant argues that it is not possible for 1 cubic meter of seawater to produce 1 tonne of salt as alleged by the Plaintiff and avers that the correct factual position from its analysis is that 1 litre of seawater can only produce approximately 27.3g of salt. The Defendant avers that it only manufactured 109,977 metric tonnes of salt in the period between 2012 and 2013.

11. Mr. Canute Mwakamba, who is the Plaintiff's Regional Manager for Athi Catchment Area gave evidence for the Plaintiff. He adopted his witness statement which was filed in court on 21/11/2013. According to him, the Defendant produces a minimum of 1,815,000 tonnes of salt per month in four consecutive months per year. Based on the gazetted water use charges for water abstraction per day for commercial salt production, the Defendant water use charges add up to Kshs. 3,847,800.000/= per year. He also stated that the Defendant ought to pay the annual fixed permit fee of Kshs. 135,000/=. It was his evidence that the Ministry of Finance/Treasury had factored into the Plaintiff's budget for 2013/2014 the expected revenue from the water use charges as appropriation in aid. The Plaintiff averred that it stood to suffer and its operations would be paralysed if the Defendant does not pay the outstanding water use charges.

12. The witness who is a Hydro-geologist and an expert in water resource, took the court through the process of manufacturing salt from seawater. He stated that most of the salt manufacturing plants are to be found within Gongoni Area of Kilifi County. When manufacturing salt, seawater is pumped onto the main land into ponds or lagoons which are connected to allow for slow movement of the seawater from one point to another while moving inland until the water crystallises from evaporation. The evaporation is aided by the sun and the concentration of the salt increases as the seawater is allowed to flow slowly until it crystallises before it is harvested as raw salt.

13. Gongoni area is ideal for salt extraction because of its unique nature which allows the salt water to crystallise without sipping into the ground. He explained that there are no salt works in Watamu and other places because they are sandy hence unsuitable for salt extraction. There are aquifers underneath the clay layers in Gongoni area and the Plaintiff needs to monitor the salt water being pumped onto the land to ensure that it does not affect the aquifers which contain fresh water.

14. After the seawater is pumped and salt extracted, the Plaintiff charges the entity for water use irrespective of where the water came from. He explained that the Defendant had given its production of salt in its website as 350,000/= tonnes annually. This is the amount the Plaintiff used to arrive at Kshs. 2,079,455,000/= that it claims for the 9 and 1/2 years from 1/10/2007. The computation is made up as follows: -

From 1/10/2007 to March 2017 – 9 ½ years

350,000 tonnes x 530 per tonne = 185,500,000/=

185,500,000 x 9 years = 1,669,500,000/=

185,500,000 x 1/2 years = 92,750,000/=

Total Claim 1,762,250,000 (a)

Add compound interest at 2% = 317,205,000 (b)

Total claim = a + b

**= 2,079,455,000/ Kshs.**

15. The Plaintiff produced several documents including the public notice on the stakeholders meeting on the Draft Water Resources Management Rules; Legal Notice 171 of 28/9/2007; the demand letter and the assessment of the Defendants' water use and charges together with the extract of the Defendants' website. He stated that the Water Act of 2002 was repealed and the new Water Act of 2016 came into force on 21/4/2017. The Plaintiff's functions remained unchanged, only the name changed to Water Resources Authority.

16. On cross examination, he stated that he had not been involved in salt extraction but that he had visited the Defendants' factory in 2007. He explained that the term 'water use' refers to utilisation for a particular purpose/benefit while the term 'abstracting' refers to plucking or removing to another destination for a particular use. Rivers, lakes and rains are considered to be surface water while ground water includes water that percolates into the water table and the mass water underground. The Water Act of 2002 defined 'water resources' by separating ground water and surface water. He recalled seeing a pump or two at the Defendant's salt works which only pumped water to the first lagoon.

17. He clarified that to produce 1 tonne of salt you require 1060 m3 of water. Seawater concentration can vary. The average concentration which is presumed to be the same all through is used in the calculations. He agreed that the concentration of seawater depends on temperature which varies in Gongoni throughout the year. He maintained that the Defendant abstracts water by pumping it from the sea into the ponds or lagoons which are on the mainland for purposes of crystallisation for salt extraction and that the salt extracted from seawater has

an economic benefit. The Plaintiff is claiming the charges in respect of the water that was used for salt extraction and not for the imported salt. He clarified that in computing the Defendant's water use, the Plaintiff had not taken imported salt into consideration. He stated that if the Defendants were to give the Plaintiff its own assessment of water used, the Plaintiff would go by it since the Water Act makes provision for self-assessment forms.

18. The defence called one witness, Hasmita Khanji Patel who works at Krystalline Salt as Chief Sustainability Officer. She stated that the Defendant operates two salt works in Magarini, Kilifi County. She was emphatic that they do not use seawater but that they use the salt in the seawater. She explained that the seawater flowed into their land naturally during the high tide and then goes back into the sea during low tide. The water that came into their land during high tide goes through evaporation and what is left on the land is salt. During high tide, seawater comes onto their land through creeks. Once the water is on their land it is collected into crystallisation ponds. The water evaporates aided by the sun and leaves behind the salt deposit which is harvested and taken to the refinery for further processing and packaging. The crystallisation ponds are natural and the Defendant put wooden planks to aid in the crystallisation. She confirmed that the Defendant does not own the creeks through which the water gets into their land.

19. She explained that it takes 4 to 6 months for the salt deposits to form after evaporation. Water moves from one point to the other through gravity after the planks are opened. She stated that the pumps on their land are used to pump water to clean the salt and that the water used in cleaning the salt is not released into the ocean. She maintained that the Plaintiff should not deal with private water since the ocean is not owned by anybody and that the Water Act does not talk about seawater. She conceded that without seawater, the Defendant would not evaporate water and get the salt deposits. It was her evidence that the Defendant does not produce consistent quantities of salt throughout the year.

20. She stated that she directed the Defendant's Information Technology Department (IT department) to delete the information which had been uploaded on its website regarding the Defendant's production of 300,000 metric tonnes of salt since it was an error by the Defendant's IT department.

21. She reiterated that water came to their land naturally and that they do not use any mechanism to extract or abstract seawater onto their land.

22. The Plaintiff's advocate applied to have the court visit the Defendant's salt works in Malindi. The court visited the Defendant's salt works in Gongoni and Marereni areas of Malindi on 17/11/2017 in the presence of the advocates and representatives of both parties.

23. The team was taken round the expansive land by the Defendant's agent in Gongoni. The team was able to see the creek from which the seawater gets onto the Defendant's land for the salt extraction. The Defendant's agent stated that the total area covered by the salt extraction ponds in Gongoni is about 7500 hectares while the Marereni site occupies approximately 9500 hectares. The ponds measure about 2 hectares each with some being much bigger.

24. The pumps were not working in the morning when the team visited the site during the low tide. The team was taken through the process of salt extraction and how the evaporation occurs resulting in the formation of a bedrock of salt.

25. The Defendant's agents explained that the pumps are on the same level as the sea and that the creek which brings in water from the sea is the only source of water the Defendant uses for salt extraction. Salt harvesting is best done during the dry season. The Defendant's agent told the court that most of the salt extraction is done between December and March and that there is very little extraction of salt the rest of the year.

26. After the site visit to Gongoni, the court directed that the second site visit to Marereni would be at 3.00 p.m. to coincide with the high tide which was expected at 3.46 p.m. The team visited the second salt works and went to the place with the pumps and found one pump running. This was during the high tide and a large volume of water had accumulated inside the small dam which collects water so that it can be pumped into the ponds for salt extraction.

27. The Defendant has made a small dam and put pumps at the point where the seawater in the creek gets into its land which pump water into the Defendant's land during the high tide. The dam aids in collecting water for it to be pumped into the ponds. The pumps are also used to pump water through the many ponds during the different stages of salt extraction.

28. The Defendant's agent explained that the pump served the dual purpose of pumping water into the ponds from the creek and also stopping water from flowing to the sea. The water pumps are powered by solar panels. In both salt works in Marereni and Gongoni, water gets into the Defendant's land from the sea through creeks during the high tide and it is then pumped into the Defendant's ponds. The Defendant had blocked off the channel using wooden planks to prevent the liqueur produced from the salt extraction from flowing back into the creek and into the sea.

29. From the site visits to the two salt works, it became apparent that the water from the creek that is pumped into the Defendant's ponds does not go back into the sea after the salt extraction process. The water evaporates and the rock formed after crystallization is what is dug up as salt which is then refined in the Defendant's factory and packaged for sale. The liqueur left after the salt is extracted goes through some channel which the Defendant explained is recycled at the factory. The team did not go inside the factory. The ponds are built with short wooden walls which prevent the water from flowing out.

30. The issues for determination are: -

- a. Does the Plaintiff have power under the Water Act 2002 and the Water Resources Management Rules of 2007 to develop principles and guidelines, and to monitor and regulate the use of seawater?

- b. Do Rules 104 (2) and 114 of the Water Resources Management Rules apply to the abstraction of seawater?
- c. Was the Defendant obligated to conduct a self-assessment under the Water Resources Management Rule of 2007?
- d. Is the Defendant required to pay the annual permit fees of Kshs. 135,000/=?
- e. Is the Defendant liable to pay the Plaintiff the sum claimed in the amended plaint as charges for water use?

31. The Defendant denies abstracting or using seawater for commercial production of salt and maintains that seawater flows naturally into its private land during the high tide without any intervention on its part; and that when water is on private land, it belongs to the land owner. It argues that it delays the return of the water back to the sea and in the process part of it evaporates leaving salt which is what the Defendant uses.

32. The Defendant argues that the State does not own the seawater within its territorial sea and that it does not have the right under international law to regulate the use of seawater. It argues that the State merely owns the sea bed, the minerals therein and the flora and fauna inside the seawater whose use it can regulate alongside other commercial activities which may be carried out within its territorial sea including fishing and sailing.

33. The Defendant posits that under Section 260 of the Constitution, land includes any body of water on or under the surface and all marine waters in the territorial sea within Kenya's exclusive economic zone. It argues that the National Land Commission and not the Plaintiff, is the institution charged with the responsibility of regulating land use in Kenya under Article 66 and 67 of the Constitution read with Sections 5 and 6 of the National Land Commission Act. Consequently, it argues that the Water Act is unconstitutional and is therefore null and void pursuant to Article 2(4) of the Constitution.

34. The Defendant also contends that the Maritime Zones Act which is the legislation governing waters and the continental shelf does not confer on the Plaintiff the power to issue water permits or levy any charges for the use of seawater and that if the power to regulate the use of seawater does not fall within the purview of the National Land Commission then it ought to vest upon the Kenya Maritime Authority and not the Plaintiff. Going by the Defendant's argument that the Plaintiff cannot levy charges for use of seawater, and by parity of reasoning, it would then follow that not even the Maritime Authority would not levy charges for seawater use which the Defendant argues falls within the ambit of the National Land Commission.

35. The Defendant's submission on the allegation of abstraction of seawater is that the Plaintiff needed to prove how it physically extracts seawater into its land which would be by means of pumps. The court noted during the visit to the Defendant's salt works that the Defendant has pumps at the point where its land meets the creeks which pump water from the dam into its land during high tide. The court also confirmed that no water flows back into the sea after the salt is extracted.

36. The Water Act defines "use" in relation to water in or forming part of water resource to mean abstraction, obstruction or diversion of the water; or discharge of materials or substances into the water. "Water resource" is defined to mean, lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or any other water flowing or standing whether above or below the ground. The Defendant argues that this excludes seawater. It further argues that water that collects naturally on private land whether through rain, flooding or other means cannot form part of water resource within the meaning of the Water Act 2002 and, that use of any such water cannot be deemed to be water use within the meaning of this Act.

37. The Defendant maintains that since the law vests on the owner not just the land but everything on it, the Defendant does not abstract or divert the water inside the salt extraction ponds on its private land but it simply built embankments which slows down the rate of its return into the sea leaving behind the salt which is what it uses. It was confirmed during the site visits to the Defendant's salt works that no water flows back to the sea from its land.

38. The court finds that the Defendant abstracts seawater from the creeks on its land during the high tide for purposes of extracting salt from it.

39. The Defendant's other argument is that the Plaintiff's case is wholly founded on the provisions of the Water Act 2002 which has since been repealed and that the Water Act of 2016 does not apply to this suit. The Plaintiff's claim is for water use charges for the period October 2007 to March 2017.

40. The Defendant argues that the onus was on the Plaintiff to prove that it was producing 1,850,000 tonnes of salt per month which onus the Plaintiff failed to discharge. The Defendant terms the claim outrageous since the Plaintiff based its calculation on the statement it posted on its website which the Defendant maintains was erroneous. The statement was to the effect that the Defendant undertook investments aimed at building its production capacity to 300,000 tonnes per month. The Plaintiff is accused of taking advantage of the erroneous statement.

41. The Defendant argues that the responsibility of proving the actual quantity of seawater used by the Defendant fell on the Plaintiff under Section 107 of the Evidence Act. The Defendant argues that the Plaintiff failed to discharge this burden and that without proof of the actual quantity of seawater it uses the Plaintiff cannot be given judgement. The Defendant argues that the Plaintiff ought to have produced independent evidence to prove that the allegations on its website were true and factual.

42. The Water Act allows water users to fill self-assessment forms which the Defendant declined to fill. Without filling the self-assessment forms and in the absence of evidence of the amount of seawater the Defendant uses in its manufacture of salt, the court is of the view that the Plaintiff was entitled to calculate the water charges the Defendant ought to pay based on the amount of salt the Defendant indicated on its website that it was producing. No evidence was led by the Defendant to show that the information on its website was erroneously put there by its IT officers. It could have done this by adducing evidence on the actual amounts of salt it extracted from its salt works in Magarini from

2007 to 2017.

43. The Defendant argues that the water on its land constitutes a private water body and not a public water body falling within the regulatory authority of the State. It argues that the water inside the salt extraction ponds may not be classified as seawater simply because it originally emanated from the sea. It argues that seawater refers to water inside the territorial sea pursuant to Article 62 (1) (j) as read together with Article 260 of the Constitution. It pursues an interesting argument that when seawater evaporates into the sky or when it flows downstream and collects into a pond or rather receptacle located on private land it ceases to be seawater and the State cannot exercise any power over it.

44. The Oxford Advanced Learner's Dictionary defines 'seawater' as water from the sea or ocean that is salty. The definition is based on the sea as the source and not where it is to be found as the Defendant urges. Hence the water in the Defendant's ponds is seawater. A 'creek' is defined as a narrow area of water where the sea flows into the land or a small river or stream.

45. The Defendant argues that the State's power to regulate water use is confined solely to public water bodies such as lakes, rivers, streams as well as ponds, swamps or marshlands located on public land which the State holds in trust for the benefit of all citizens; and that the State has a duty to regulate the exploitation of such public water resources for sustainability reasons.

46. The Defendant further argues that on the basis of the doctrine of capture which holds that water which is captured in a reservoir, artificial pond or some other receptacle on private land, constitutes private property outside the regulatory authority of the State. And that captured water is personal property owned by the captor until it is destroyed, abandoned or released. The court is not persuaded by this argument because of the provisions of the Water Act.

47. The Defendant argues that its land falls in the space between high and low tide which is usually referred to as tideland. It argues that tidelands are usually held by the State in trust for all its citizens but that when the State grants a private title to land that falls within the tideland then the public easement is destroyed and the landowner is granted an absolute right of ownership free of public control and use. The Defendant relies on the case of **The People v. California Fish** [166 CAL.576 (1913), 138 P.75] where it was held that the State may sell and dispose of tidelands into private ownership or private users thereby destroying the public easement in such portions of land and giving them over to the grantee free from public control and use. The Defendant argues that this is what happened in its case when the State issued a private title to it.

48. The position in Kenya is different from what obtains in the US. All land between the high and low water marks constitutes public land under Article 62(1)(l) of the Constitution. The Defendant does not therefore own the tideland as it argues.

49. The Defendant argues that even though the State owns the territorial waters measuring 12 nautical miles from the Kenyan Coast under Section 3(1) of the Maritime Zones Act, it does not own the water which may at any time be found therein. It argues that seawater is not capable of ownership by any individual, corporation or State because it is *res nullius* under International Law.

50. The Defendant buttresses this argument using Article 56 of the United Nations Convention on the Law of the Sea which states that the Coastal State has sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources whether living or non-living of the waters superjacent to the sea bed, and of the sea bed, and its subsoil and with regard to other activities for the economic exploitation, and exploration of the zone such as production of energy from the water, currents and winds.

51. It argues that this article does not give any ownership right to the Coastal State with regard to the water and that the right to the natural resources in the water granted is only limited to the water superjacent to the zone. It argues further that if the States do not own the seawater and cannot exercise full ownership rights with regards to it then it follows that none of its agents including statutory corporations can exercise such rights with regard to seawater.

52. The United Nations Convention on the Law of the Sea (UNCLOS), also called the Law of the Sea Convention or the Law of the Sea Treaty defines the rights and responsibilities of nations with respect to their use of the world's oceans and establishes guidelines for businesses, the environment, and the management of marine [natural resources](#).

53. The Preamble to the Convention states that the States Parties to the Convention were prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea and being aware of the historic significance of the Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world.

54. This basically captures the essence of the Law of the Sea Treaty which is binding on the State Parties to the Convention and not private persons. Which is why in August 2014 Somalia instituted proceedings before the International Court of Justice (ICJ) against Kenya with regard to the maritime boundary delimitation dispute in the Indian Ocean.

55. Section 2 of the Convention on the limits of the territorial sea provides at Article 8 that waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State. The Coastal State is free to set laws, regulate use, and use any resource within its internal waters.

56. Article 2 of the Convention states that the sovereignty of a Coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. The sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. The sovereignty over the territorial sea is exercised subject to the Convention and to other rules of international law. Under Article 3, every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention.

57. The Defendant relied on the case of **Kenya Ports Authority v. East African Power and Lighting Company Limited** (Civil Appeal No. 41 of 1982) in which the Court of Appeal clarified that seawater is *res nullius* and incapable of ownership at common law and that

whatever rights may be vested in the government to the seabed in its territorial waters, no government or person had any proprietary rights in the water above the sea bed.

58. It argues that this decision was followed in the case of **Kenya Ports Authority v. Kenya Power and Lighting Limited & Another** (Civil Case No. 500 of 1991) where the court dismissed a case involving the exercise of sovereign rights with respect to seawater on grounds that no State or individual has any proprietary right over the seawater to justify the exercise of such rights. In this case, the applicant wanted the court to recognize an alleged right to clean seawater and claim the costs incurred from the Defendant who was alleged to have poured the oil thereon. The suit was dismissed as not disclosing any cause of action.

59. The Convention on the Law of the Sea came into force in 1994, a year after Guyana became the 60<sup>th</sup> nation to ratify the treaty. **Kenya Ports Authority v. East African Power and Lighting Company Limited** (Civil Appeal No. 41 of 1982) and **Kenya Ports Authority v. Kenya Power and Lighting Limited** (Civil Case No. 500 of 1991) which the Defendant relied on, were decided before this treaty came into force. Kenya ratified this treaty on 2<sup>nd</sup> March 1989.

60. The Defendant argues that Section 8(1) (g) of the Water Act of 2002 which bestows on the Plaintiff the power to determine the charges to be imposed for the use of water from any water resource defines 'water resource' at Section 2 to mean lake, pond, swamp, marsh, stream, estuary, aquifer, artesian basin or other water body flowing or standing whether above or below the ground. The Defendant argues that this excludes seawater and must be interpreted *ejusdem generis* which requires that where specific examples are followed by a general word then the parameters of a general word is to be determined by the common characteristics of the specific words given.

61. It therefore argues that 'water resource' as defined by Section 2 of the Water Act must be confined to public water bodies located on the mainland and must exclude private water bodies located on private land and public water bodies that exist outside the mainland such as marine water resources. They stretch this argument to contend that the Water Resources Management Rules 2007 have no application to private water stored in the salt extraction ponds constructed on private land nor to the seawater and urge that the Plaintiff has no authority to demand water use charges in connection with the Defendant's utilisation of the water stored in the ponds within its land.

62. The Defendant argues that in determining which water bodies constitute 'water resource' within the meaning of Section 2 of the Water Act 2002 the court must examine why the Plaintiff was established and given the responsibility to issue water abstraction permits and to levy water use charges. The Defendant argues that the Plaintiff was established to facilitate sustainable use of the scarce and depletable water resources for the benefit of present and future generations owing to the scarcity of the locally available water resources.

63. It argues that the Plaintiff was never intended to manage or regulate the use of water bodies that are *res nullius* (in respect of which the State has no right to regulate or manage); water bodies that are wholly private or which exist on private land; and water bodies that are not capable of depletion through human activity or usage and which therefore do not need any conservation. The Defendant argues that seawater falls within the first and last of these three categories and must be excluded from the meaning of 'water resource' in Section 2 of the Act.

64. The Defendant argues that Section 5 of the Maritime Zones Act does not grant the State or any of the statutory bodies ownership rights over the seawater in its exclusive economic zone to justify the exercise of the alleged management and regulatory right. But that the provision merely donates the sovereign rights with respect to exploration and exploitation as well as conservation and management of the natural resources of the zone. Natural resources are defined in the Act as the living and non-living resources on the seabed and subsoil and of the waters superjacent to the sea bed. This excludes the seawater from the meaning of natural resources according to the Defendant.

65. Article 62(1) (i) and (j) of the Constitution defines public land to include all rivers, lakes and other water bodies as defined by an Act of Parliament (such as the Water Act) as well as the territorial sea, the exclusive economic zone and the sea bed. Article 260 of the Constitution defines land to include any body of water on or under the surface as well as the marine waters in the territorial sea and exclusive economic zone; while natural resources is defined as the physical non-human factors and components including surface and ground water. From this Constitutional definition, seawater constitutes public land.

66. Article 62(3) of the Constitution stipulates that all rivers, lakes and other water bodies as defined by an Act of Parliament; the territorial sea, the exclusive economic zone and the seabed; and all land between the high and low water marks shall vest in the national government to hold in trust for the people of Kenya and shall be administered by the National Land Commission. Seawater being public land, the State has control over it.

67. Based on the United Nations Convention on the Law of the Sea and Articles 62 and 260 of the Constitution, seawater is not *res nullius*. It vests in the national government and would not be excluded from the meaning of 'natural resources' which are to be utilised for the benefit of the people of Kenya.

68. The Defendant argues that if the government has the mandate to manage or regulate the use of seawater, then such a mandate would belong to the National Land Commission and not the Plaintiff and that the Plaintiff would be acting *ultra vires* if it purported to levy the water use charges.

69. The Defendant argues that with the promulgation of the new Constitution, and the establishment of the National Land Commission; the powers which were previously exercised by the Plaintiff, which was established prior to the promulgation of the new Constitution, were transferred to the National Land Commission and that therefore the provisions of the Water Act of 2002 which conflicts with the Constitution are unconstitutional and therefore null and void. There is nothing to show that the mandate and powers which were being exercised by the Plaintiff were transferred to the National Land Commission. The National Land Commission Act does not mandate the Commission to levy charges for the use of seawater.

70. Article 67 of the Constitution creates the National Land Commission and clothes it with the power to manage public land and regulate the use of land on behalf of the State. This would include regulating the use of seawater as an integral component of land. The Constitution

recognises that the National Land Commission must work with other authorities that is why Article 67(f) tasks the Commission to conduct research related to land and the use of natural resources and make recommendations to appropriate authorities. Such authorities would include Plaintiff.

71. Article 69 (1)(h) of the Constitution enjoins the State to utilise the environment and natural resources for the benefit of the people of Kenya. This is the basis for charges imposed by the State on water use and other natural resources for the benefit of the people of Kenya.

72. The Constitution did not envisage a situation in which the National Land Commission would levy charges or taxes. Articles 209 and 210 of the Constitution makes the imposition of taxes and other charges the preserve of the national government and the county government in specified instances. No tax may be imposed, waived or varied except as provided by legislation.

73. Article 66 of the Constitution provides that the State may regulate the use of any land or any interest in or right over any land. It is the State which regulates use of land including seawater, and not the National Land Commission. To 'regulate' is to control something by means of rules. The Water Act and the Water Management Resources Rules of 2007 empower the Plaintiff to issue water permits and charge water users for water use in line with the State's mandate pursuant to Article 66 of the Constitution. The Plaintiff which is a creature of Statute, had power under the Water Act 2002 and the Water Resources Management Rules of 2007 to regulate the use of seawater on behalf of the State.

74. The Defendant urged the court to arrive at a conclusion similar to the one arrived at in the case of **Water Resources Management Authority v. Kensalt** (Malindi ELC No. 28 of 2013) in which Justice Angote struck out the suit filed by the Plaintiff seeking payment of alleged water use charges from a salt manufacturing company along the Kenyan Coast line in similar circumstances.

75. The court notes that this case went on appeal. In allowing both the appeal and the cross appeal in **Water Resources Management Authority v Kensalt Limited [2016] eKLR**, the Court of Appeal found that the Authority's claim raised issues that ought to have gone to trial and the suit should not have been struck out. The court directed that the action would be tried by a judge in the Environment and Land Court other than Angote, J. The court observed stated as follows: -

“Upon the restrictive nature and summary form of pleadings no trial can be had. The questions whether or not the appellant had the power to control or regulate the use of seawater or levy charges for its use, whether seawater is *res nullius* and who between the appellant and the National Land Commission has the power to regulate the use of water resource, were all questions which could only be determined on merit at the trial at which, perhaps expert evidence would have been called to resolve some of the technical aspects of the dispute and, even involve a visit to the *locus in quo*. The answers to those questions were not plain, obvious or clear. In the same vein we do not think the action was demurrable and that it could be determined by the summary procedure employed. “

76. The Defendant argues that Parliament repealed the Water Act 2002 and replaced it with the Water Act of 2016 which came into force on 31/12/2016. The new Act defines 'water resource' to mean any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body or flowing or standing water whether above or below the ground and includes seawater and transboundary waters within the territorial jurisdiction of Kenya.

77. The Defendant argues that owing to the unconstitutionality of the new Water Act it was amended on 19/4/2017 at Sections 36 and 37 to expressly remove the obligation to obtain a permit or pay water use charges with regard to abstraction and or use of seawater to extract salt. The Defendant argues that the Water Act of 2016 has no relevance to this case because the Plaintiff's case is anchored on the Water Act of 2002, and the acts and omissions complained of took place between 2007 and 2017 and the Water Act expressly removes the use of seawater for manufacture of salt from its regulatory ambit.

78. The court is of the view that prior to the promulgation of the Constitution in 2010, the State through the Plaintiff, was well within its statutory mandate to charge the Defendant for the seawater it abstracted for salt extraction because under Article 193 of the UN Convention on the Law of the Sea, States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

79. The court finds that the Plaintiff was legally mandated to charge the Defendant for the use of seawater it abstracted for the salt extraction with effect from 1/10/2007 when water use charges were gazetted requiring water users to pay to the Plaintiff 50 cents/m<sup>3</sup> for the raw water they abstracted for their use until 19/4/2017 when the Water Act of 2016 was amended to expressly remove the obligation to obtain a permit or pay water use charges with regard to abstraction and or use of seawater to extract salt.

80. The Defendant was also enjoined to pay compound interest on the sum due at the rate of 2%. The Defendant was also obligated to pay a fixed permit fee of Kshs. 135,000/= per year to the Plaintiff during this period.

81. The court enters judgement for the Plaintiff as prayed in the Amended Plaint. The Plaintiff will have the costs of the suit.

**Dated at Nairobi this 5<sup>th</sup> day of April 2018**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Agwara for the Plaintiff

Mr. Omondi holding brief for Mr. Arwa for the Defendant

Mr. V. Owuor- Court Assistant