Krystalline Salt Ltd v Water Resources Management Authority (Civil Appeal 252 of 2018) [2024] KECA 191 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 191 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 252 OF 2018

DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA

FEBRUARY 23, 2024

BETWEEN

KRYSTALLINE SALT LTD ..... APPELLANT

AND

WATER RESOURCES MANAGEMENT AUTHORITY ..... RESPONDENT

(An appeal from the entire Judgment and Decree of the Environment and Land Court of Kenya (K. Bor, J.) dated 5th April 2018 in ELC Case No. 47 of 2013)

Water used for commercial salt production was part of Kenya's territorial waters (sea) and its usage was subject to control by the country's laws

Reported by Robai Nasike Sivikhe

Law of the sea *– territorial sea – res nullius viz a viz res publicae – claim that sea water used for salt production was res nullius – whether the territorial sea water used for production of salt was res publicae and therefore subject to control by the country's laws – whether territorial sea water used for salt production was a water resource and therefore subject to regulation under the Water Act, 2002 – Water Act, 2002, sections 2, 3 and 4; Geneva Convention on the Territorial Sea and the Contiguous Zone, (1958 Geneva Convention), articles 1 & 5; United Nations Convention on the Law of the Sea, 1982, articles 2 (1) and 3.*

Land Law *– territorial sea water – control of territorial sea water – use of territorial sea water – imposition of charges on a private entity using sea water as a water resource during production of salt – assessment of water use arrears using information from a company website – whether assessment and computation of water use arrears using information from a company's website resulted in a faulty assessment.*

Definitions *– definition of – internal waters – any natural or artificial body or stream of water within the territorial limits of a country, such as a bay, gulf, river mouth, creek, harbour, port, lake or canal - Black's Law Dictionary (9th Edition).*

Definition *– definition of – water course – a body of water; usually of natural origin, flowing in a reasonably definite channel with bed and banks. The term includes not just rivers and creeks, but also springs, lakes, and marshes in which such flowing streams originate or flow – Black's Law Dictionary (9th Edition).*

Brief facts

The dispute that gave rise to the appeal concerned charges levied by Water Resource Management Authority (the respondent) for Krystalline Salt Limited's (the appellant) use of sea water for commercial salt production at Gongoni and Marereni areas near Malindi .

At the trial court, it was held that the respondent was legally mandated to charge the appellant for the use of sea water that it abstracts for salt extraction with effect from October 1, 2007 when water use charges were gazetted. The gazette required water users to pay to the respondent 50cent/m^3 for the raw water it abstracts for its use in its salt production until April 19, 2017 when the Water Act of 2016 was amended expressly to remove the obligation to obtain a permit or pay water use charges with regard to abstraction and/or use of sea water to extract salt; and that the appellant was also enjoined to pay compound interest on the sum due at the rate of 2%, and was also obligated to pay a fixed permit fee of Kshs 135,000 per year to the respondent during that period. The judgment was entered in favour of the respondent as prayed in its amended plaint. The appellant's appeal faulted the trial court's judgment and sought to have it set aside.

Issues

i. Whether the territorial sea water used for production of salt was res publicae and therefore subject to control by the country's laws.

ii. Whether territorial sea water used for salt production was a water resource and therefore subject to regulation under the Water Act.

iii. Whether assessment and computation of water use arrears using information from a company's website resulted in a faulty assessment.

Held

1. The facts in *Kenya Ports Authority v East African Power & Lighting Company Ltd* (KLR) (E & L) 1 82 (Civil Appeal No. 41 of 1981) were distinguishable from the facts in the case that gave rise to the instant appeal. In addition, it appeared that in the above cited authority, the court's attention was not drawn to the provisions of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, (1958 Geneva Convention), particularly articles 1 and 5.
2. Under the 1958 Geneva Convention, only waters of the high seas could be referred to as *res nullius.* The term 'high seas' was defined as all parts of the sea that were not included in the territorial sea or in the internal waters of a State under article 1 of 1958 Geneva Convention on the High Seas. Before the passage of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), only waters beyond three miles of the coast line could be regarded as *res nullius*. However, under Article 3 of the UNCLOS, the limits of a country's territorial sea were up to 12 nautical miles from its coastline. Article 2(1) of UNCLOS granted jurisdictional control over territorial sea to the coastal State, in the instant case, Kenya.
3. The water that the appellant used for its salt production was part of Kenya's territorial waters (sea), and was not *res nullius*. It was res publicae, and thus its usage was subject to control by the country's laws. The respondent was therefore entitled, under the repealed Water Act, 2002 and the Water Act, 2016, to develop principles, guidelines and procedures to govern, inter alia, usage of the said water.
4. Section 3 of the Water Act, 2002(repealed) stated that every water resource was vested in the State, subject to any rights of the user granted by or under the Act or other written law. Section 4 empowered the Minister to exercise control over every water resource in accordance with the Act. Section 2 defined water resource to mean any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or water body flowing or standing water, whether above or below the ground.

5. The appellant was using territorial sea water, which was a water resource that was subject to regulations under the Water Act, 2002. The trial court's visit to the two private properties revealed that the sea water was not naturally flowing into the two parcels of land, the water was actually being pumped into dams that the appellant had dug on its private lands.
6. The appellant pumped sea water from the creek to dams, then to its private parcels of land for salt extraction. Hence, the respondent had power and authority to regulate the use of the sea water that the appellant used for salt extraction since the water was a water resource under the Act.
7. The respondent used information from the appellant's website to compute its claim of Kshs 2,079,590,000 . The appellant did not adduce any contrary evidence with regard to its water usage for salt production. Its witness simply alleged that the information that it had posted on its website about its salt production was erroneous. No evidence was adduced by the appellant in substantiation of the alleged error. The actual water used by the appellant was within its special knowledge, but it failed to adduce the same to controvert the respondent's estimate as pleaded in the amended plaint.
8. In view of the fact there was no self-assessment that was made by the appellant, and there was no agreement on the assessment of the quantity of water used by the appellant, the respondent's assessment prevailed. The trial court could not be faulted for accepting the respondent's assessment.
9. Rule 107 of the Water Resources Management Rules, 2007, set a time limitation regarding a claim for arrears of use of water by a permit holder or a person who was required to have a water permit or who was obliged to pay water use charges but had failed to do so. The respondent was entitled to charge arrears that were limited to a period of twelve months. The respondent's claim ought to have been limited to a period of twelve months from the October 1, 2013 to September 30, 2014 plus simple interest on the arrears at two percent (2%) per month until full payment in terms of rule 114. The rule did not stipulate payment of compound interest on the arrears as was awarded by the trial court.
10. With regard to computation of the arrears payable, the annual salt production capacity of 350,000 Tonnes that was stated by the appellant in its official website was adopted. At the rate of Kshs 530 per Tonne that amounted to Kshs 185,500,000. The trial court's findings of the water use arrears by the appellant which were from October 1, 2007 to April 19, 2017 was set aside
11. Legal Notice 171 of September 2007 obligated the appellant to obtain a permit at Kshs 135,000 per year for a fixed permit fees for water usage, but the appellant had not done so. The amount was therefore rightly claimed and awarded by the trial court.

Appeal dismissed.

Orders

The appellant was obligated to pay to the respondent Kshs 135,000 for fixed permit fees, and arrears for its use of sea water up to a maximum of Kshs 185,500,000 plus simple interest on the arrears at the rate of 2% per month from October 1, 2013 until the amount was paid in full. One half of the costs of the appeal was awarded to the respondent.

Citations

Cases

Kenya

Kenya Ports Authority v East African Power & Lighting Company Ltd Civil Appeal 41 of 1981; [1982] KECA 3 (KLR); [1982] KLR 410; KLR (E & L) 1 82 - (Mentioned)

United Kingdom

Rylands v Fletcher [1868] LR 3 HL 330 - (Applied)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Constitution of Kenya article 62(1)(j) - (Interpreted)
2. Constitution of Kenya (Repealed) section 75 - (Interpreted)
3. Maritime Zones Act (cap 371) sections 2, 5- (Interpreted)
4. Registration of Titles Act, (Repealed) (cap 281) section 23(1) - (Interpreted)
5. Water Act (cap 372) sections 11, 12 - (Interpreted)
6. Water Act, 2002 (Repealed) (Act No 8 of 2002) sections 2, 3, 4, 7- (Interpreted)
7. Water Resources Management Rules, 2007 (Act No 8 of 2002 Sub Leg) rules 104(2); 106; 107; 114 - (Interpreted)

Instruments

1. Convention on the Law of the Sea, 1958 articles 2(1); 3; 56
2. Convention on the Territorial Sea and Contiguous Zone, 1958 articles 1, 5

Advocates

Mr. Oraro, Senior Counsel*, Dr Arwa* and *Mr Rabut* for the appellant

Prof Mumma and Mr Agwara for the respondent

JUDGMENT

Introduction

1. For centuries, mankind has exploited the enormous resources that are found in the sea. The resources include fish, minerals, oil and gas, just to name but a few. But who owns the sea or is it a global common? Are there international conventions and domestic laws and regulations that regulate or govern the use for sea water by individuals in Kenya? These are some of the germane issues that K Bor, J was called upon to determine in Environment and Land Court (ELC) Case No 47 of 2013.

2. The dispute that gave rise to this appeal regards charges levied by the respondent for the appellant's use of sea water for commercial salt production at Gongoni and Marereni areas near Malindi.

3. The respondent is a corporate body that was established under section 7 of the *Water Act, 2002* (now repealed), and re- established *vide* section 11 of the *Water Act, 2016*. Under the *Water Act, 2002* the respondent was statutorily mandated to develop principles, guidelines and procedures for allocation of water resources; to monitor, and from time to time re-assess the national water resources management strategy; to receive and determine applications for permits for water use in accordance with guidelines in the national water resources management strategy; to regulate and protect water resources quality from adverse impacts, and to determine charges to be imposed for the use of water from any water resources. The said section is re- enacted as section 12 of the *Water Act, 2016*. The respondent is also mandated to collect water permit fees and water use charges from water users.

Proceedings before the trial court

4. In November 2013 the respondent filed the aforesaid suit, initially as Civil Suit No 26 of 2013 in the High Court of Kenya at Malindi, seeking to recover from the appellant a sum of Kshs 3,847,935,000 being outstanding water use charges for 12 months' period between 2012 and 2013 together with interest as per the *Water Resources Management Rules, 2007*. The respondent also sought a declaration that the appellant is obligated by law to pay for water use charges for its commercial salt production with effect from October 1, 2007 together with interest thereto as per the *Water Resources Management Rules, 2007*. However, *vide* an amended plaint dated April 12, 2017, the amount claimed was varied to Kshs 2,079,455,000 being the outstanding water use charges for 9 and ½ years period between October 2007 and March 2017.

5. By Legal Notice No 171 of September 28, 2007, water use charges were gazetted, requiring water users to pay to the respondent 50 cents/m^3 for raw water abstracted for their use with effect from October 1, 2007. Under the Rules, water users were required to submit a self-assessment form to the respondent, indicating their actual water use to enable the respondent calculate the water use charges owing and due to it.

6. The respondent contended that the appellant abstracts large volumes of sea water for purposes of commercial production of salt and other related products. This is through the method of solar evaporation by trapping salty sea water into shallow ponds where the sun evaporates most of the water, the concentrated brine precipitates the salt, which is then gathered by mechanical harvesting machines.

7. Due to the appellant's refusal and neglect to comply, the respondent was compelled to estimate the amount of water used by the appellant in order to calculate the charges due. The respondent estimated that the appellant produced a minimum of 350,000 tonnes of salt per year, and the appellant's water use charges from October 2007 to March 2017 together with statutory interest amounted to Kshs 2,079,455,000. In addition, the appellant was obligated to pay a fixed permit fee of Kshs 135,000 per year, thus totaling to Kshs 2,079,590,000. The respondent stated that the gazetted water use charges for water abstraction per day for commercial salt production stood at Kshs 50 per 1,060m^3 of water, which produces a tonne of salt at a cost of Kshs 530.

8. The respondent's computed estimates of the appellant's water usage for the 9 and ½ years' period aforesaid was based on information obtained from the appellant's records available online.

9. The appellant entered appearance and filed its statement of defence dated December 18, 2013. The appellant denied liability as alleged by the respondent, but conceded that it is in the business of manufacturing salt and it uses sea water for that purpose. However, it argued that the respondent has no power to develop principles, guidelines or procedures for the use of sea water; or to monitor and/or assess the use of sea water; or to receive or determine any application for use of sea water; or to regulate the use of sea water as alleged in the plaint. Further, the appellant argued that neither the *Water Act, 2002* nor the *2007 Rules*, or even the *Legal Notice No 171* of September 28, 2007 govern the abstraction and/or use of sea water, and therefore it was not under any legal obligation to either apply for a permit or even make any payment to the respondent for the use of sea water as alleged by the respondent.

10. The appellant further argued that even if it was liable to pay to the respondent for use of sea water as alleged, the respondent's estimate of the water usage ought to be based on concrete empirical and provable data, and cannot be done whimsically, capriciously and maliciously, without regard to either logic or common sense, and against the weight of verifiable facts. The appellant stated that it is not possible for only one cubic meter of sea water to produce one tonne of salt as alleged by the respondent, and that the factual position was that one litre of sea water can only produce approximately 27.3gms of salt, and that it only manufactured 109,977 metric tonnes of salt over the period between 2012 and 2013.

11. At the hearing of the suit, the respondent called one witness, Mr Canute Mwakamba, a Hydro-geologist, its Regional Manager, Athi Catchment Area, while the appellant also called one witness, Ms Hasmita Patel, its Chief Sustainability Officer.

12. After the two witnesses testified, the trial judge in the company of the parties' representatives and their respective advocates made site visits to Gongoni and Marereni, the two places where the appellant's salt extraction plants are located. The learned judge prepared a report regarding the site visit, which forms part of the record of appeal. We shall make reference to the report later on.

13. In its judgment, the trial court held that the respondent was legally mandated to charge the appellant for the use of sea water that it abstracts for salt extraction with effect from October 1, 2007when water use charges were gazetted, requiring water users to pay to the respondent 50cent/m^3 for the raw water it abstracts for its use in its salt production until April 19, 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 sea water to extract salt; and that the appellant was also enjoined to pay compound interest on the sum due at the rate of 2%, and was also obligated to pay a fixed permit fee of Kshs 135,000 per year to the respondent during that period. She therefore entered judgment in favour of the respondent as prayed in its amended plaint.

Appeal to this Court

14. The appellant was aggrieved by the said judgment and preferred this appeal. The appellant faults the learned judge for: holding that the appellant should pay the sum of Kshs 2,079,590,000 as the cost of water used without any proof that the appellant had used the water; holding that the appellant had used 3,524,500,000m^3 of sea water between October 2007 and April 2017 in the absence of any evidence in proof of the same; holding that 1060m^3 of sea water produces 1 tonne of salt, which is contrary to basic scientific fact and evidence to the effect that 32m^3 of sea water produces 1 tonne of salt; holding that the respondent was entitled to Kshs 2,079,455,000 as alleged water use charges even after she had found in paragraph 42 of the judgment that the respondent had failed to prove the actual amount of water allegedly used; holding that water which collects in salt ponds on private land falls within the regulatory powers of the respondent; holding that the respondent was entitled to recover water use charges through an ordinary suit commenced by way of plaint as against a person who has never been issued with a water permit as contemplated under the *Water Act, 2002*; basing her decision on wrong facts that were never raised by any party to the case; holding that the appellant and not the respondent bore the burden of proving the foundational elements of the respondent's case; holding that the respondent had power and authority in law to regulate the use of sea water; awarding compound interest in spite of the fact the same was never sought in the plaint; failing to dismiss the respondent's suit with costs to the appellant; and entering judgment without evidence and without legal soundness, thereby causing a total failure of justice.

15. The appellant prayed that the impugned judgment and the decree together with all the consequential orders thereto be set aside, the appeal be allowed, and the costs of the appeal together with costs of the suit in the trial court be awarded to the appellant.

Submissions

16. The appeal was argued by Mr Oraro, Senior Counsel,appearing alongside Dr Arwa and Mr Rabut for the appellant, and Prof Mumma appearing alongside Mr Agwara for the respondent.

17. Both parties filed their respective submissions, which counsel highlighted. From the grounds of appeal and the parties' submissions, the main issues that fall for our determination are as follows:

    1. Whether the respondent was entitled to recover from the appellant any amount at all for use of sea water or whether sea water is *res nullius*.

    2. Whether under section 2 of the repealed *Water Act, 2002*, territorial sea water was included as "water resources".

    3. Whether the appellant used sea water to produce salt.

4. Whether the parcels of land on which the appellant produces salt are private and thus excluded by section 3 of the *Water Act, 2002* (Repealed) from the provisions of the said *Act*.

5. Whether the respondent's estimation of the volume of sea water used by the appellant and the amount claimed was lawful, fair and final.

6. Whether the respondent was entitled to compound interest of the amount claimed.

18. Turning to the first issue, the appellant's contention was that before August 2010, the *Repealed Constitution* did not contain any provision touching on ownership or regulatory authority over sea water in the territorial sea or the exclusive economic zone; that irrespective of the judicial nature of the sovereign rights enjoyed by the State with regard to the living and non- living resources within the territorial sea or the exclusive economic zone, sea water therein is *res nullius* (a thing with no owner) and therefore incapable of ownership by anyone. The appellant cited this court's decision in *Kenya Ports Authority v East Africa Power & Lighting Company Ltd*, KLR (E & L) 1 82 (Civil Appeal No 41 of 1981).

19. The appellant further submitted that article 56 of the *United Nations Convention on the Law of the Sea* (UNCLOS), which was ratified by Kenya on March 2, 1989, entrenched the *res nullius* doctrine by giving coastal states sovereign rights over the natural resources within the waters superjacent to the sea bed and the sea bed and its subsoil and over exploitation and other economic activities carried out on or in the waters, but not over the waters themselves. This same provision is to be found in section 5 of our *Maritime Zones Act* (Act No 6 of 1989), it was submitted.

20. On its part, the respondent submitted that article 2(1) of *UNCLOS* states that jurisdictional control over the territorial sea is vested in the Coastal State, and it specifically provides that

> " The sovereignty of a coastal State extends, beyond its land territory and internal waters ...".
> The respondent equally cited the provisions of section 5 of the *Maritime Zones Act*.

21. The respondent pointed out that there is a distinction between *res nullius* (a thing with no owner) and *res publicae* (a public thing); and that territorial sea, like national parks and gazetted forests, is res publicae as it is vested in the State and held in trust for the citizenry. It was further submitted that territorial sea water that collects and forms on the territorial mainland of the State invariably forms part of the internal waters of the State, more so if the sea water is impounded and impeded from flowing freely, as the appellant was alleged to be doing. The water is therefore subject to the National Water Resources Management under the *Water Act, 2002* (Repealed). Further, article 62(1)(j) of the *Constitution of Kenya, 2010* stipulates that such waters form part of public land/territorial waters of Kenya, subject exclusively to the national laws of Kenya.

22. The respondent further cited the provisions of article1 as read with article5 of the *Geneva Convention on the Territorial Sea and Contiguous Zone*, 1958 which provide that:

Article 1: The sovereignty of a State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as territorial sea.

Article 5: Waters on the landward side of the baseline of the territorial sea form part of the internal waters of a State.

23. Regarding the appellant's submission that article 56 of the *UNCLOS* limits the sovereign rights of Kenya to natural resources and not water, the respondent argued that article 56 is only applicable to the exclusive economic zone, which is not the case in this matter, since the water in issue here flows through the creeks, and are abstracted and used for commercial salt production by the appellant.

Analysis and Determination

24. On the first issue, the substantive question for our determination is whether sea water is *res nullius* as was argued by the appellant, or, in the context of its usage by the appellant, is a regulated resource as contended by the respondent and therefore, capable of attracting water use charges.

25. The appellant's position was based on this court's decision in *Kenya Ports Authority v East African Power & Lighting Company Ltd* (*supra*), which Prof Mumma sought to distinguish, arguing that the claim in that matter was based on pollution of sea water by the respondent in that matter.

26. The brief facts of the cited case were that the respondent had been licensed by the appellant to operate a power station inside the port of Mombasa on the appellant's land. Following a leakage of the respondent's oil pipes, the waters at the port were contaminated, and the appellant sued the respondent for damages incurred in cleaning up the harbour.

27. The High Court held that the appellant did not own the water that had been polluted, and that since no damage had been done to its property, its claims both under negligence and under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330 must fail. The respondent therein had argued that:

> "sea water, or naturally-flowing fresh water, are '*res nullius*', incapable of ownership at common law, and whatever rights may be vested in governments to the sea-bed in territorial waters, no government or person has any proprietary rights in the water above the sea-bed."

28. Law, JA, in his opinion rendered on March 9, 1982 agreed with the respondent's above submission. The learned judge stated:

> "The plaintiff suffered no actual damage to any of its property; to the extent that the water in the port was damaged by pollution, that water was not the property of the plaintiff; pecuniary loss arising out of purely precautionary measures taken to clean up pollution which might cause damage to property is not recoverable at common law."

29. Madan, JA, was in agreement with that finding, and delivered himself as follows:

> "The sea water that was damaged was a moving, shifting, evaporating, vanishing element which had no fixed abode, nor a fixed area containing it. It was unidentifiable as a fixed property unless put in a bucket or bowser. It was incapable of ownership by anyone. In Shimanzi creek today, away tomorrow, may be many miles away, in another creek, or lapping against different shores, or even rising in waves in the open sea. No ownership, no injury; hence no cause of action."

30. On our part, we agree with the respondent in this appeal that the facts in *Kenya Ports Authority v East African Power & Lighting Company Ltd* (*supra*) are distinguishable from the facts in the case that gave rise to this appeal. Secondly, it would appear that in the above cited authority, the court's attention was not drawn to the provisions of the 1958 *Geneva Convention on the Territorial Sea and the Contiguous Zone*, (1958 Geneva Convention), particularly articles 1 and 5 thereof.

31. In our view, under the 1958 *Geneva Convention*, only waters of the high seas may be referred to as *res nullius*. The term 'high seas' is defined as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State". (See article 1 of 1958 Geneva Convention on the High Seas). Before the passage of the 1982 *UNCLOS*, only waters beyond three miles of the coast line could be

regarded as *res nullius*. But under article 3 of the *UNCLOS*, the limits of a country's territorial sea are up to 12 nautical miles from its coastline.

32. We entertain no doubt that the water that the appellant uses for its salt production is part of Kenya's territorial waters (sea), and is not *res nullius*. It is res publicae, and thus its usage is subject to control by the country's laws. The respondent was therefore entitled, under the repealed *Water Act, 2002* and the *Water Act, 2016*, to develop principles, guidelines and procedures to govern, *inter alia*, usage of the said water.

33. The next and related issue is whether under section 2 of the repealed *Water Act, 2002* the territorial sea water that the appellant uses for salt production is a water resource. The appellant's contention is that section 2 of the *Maritime Zones Act* expressly excludes sea water as a natural resource within the exclusive economic zone; that section 2 of the repealed *Water Act,2002* defined "water resource" to mean "any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other water body flowing or standing water, whether above or below the ground; that the *Water Rules of 2007* that empower the Minister for Water to levy water use charges do not apply to it; that the appellant uses water that naturally collects on its private property; and that the respondent was not entitled to recover the alleged water use arrears for the period between October 1, 2007 and March 2017.

34. The respondent submitted that the phrase "water resource" as used in the repealed *Water Act, 2002* could only be understood alongside terms as "watercourse", "territorial waters" and inland waters; that the *Maritime Zones Act, 1989* was inapplicable; and that although the appellant was producing salt on its private property, it was using territorial water without paying the requisite water charges.

35. The starting point in the determination of the second issue is to consider the provisions of sections 3 and 4 of the repealed *Water Act, 2002*. Section 3 states that: "Every water resource is hereby vested in the State, subject to any rights of the user granted by or under this *Act* or other written law". Section 4 empowers the Minister to exercise control over every water resource in accordance with the Act. Section 2 defines water resource to mean any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or water body flowing or standing water, whether above or below the ground.

36. The appellant's argument that sea water is not a water resource was premised on its earlier contention that sea water is *res nullius*, which we have established is not correct. We have already stated that article 2(1) of *UNCLOS* grants jurisdictional control over territorial sea to the coastal State, in this case Kenya.

37. *Black's Law Dictionary (9th Edition)* defines "internal waters" as:

> "Any natural or artificial body or stream of water within the territorial limits of a country, such as a bay, gulf, river mouth, creek, harbour, port, lake or canal".
>
> Watercourse is defined as: "A body of water; usually of natural origin, flowing in a reasonably definite channel with bed and banks. The term includes not just rivers and creeks, but also springs, lakes, and marshes in which such flowing streams originate or flow".

38. It was established that the appellant pumps sea water from the creek to dams, then to its private parcels of land for salt extraction. We must therefore uphold the learned judge's finding that the respondent had power and authority to regulate the use of the sea water that the appellant uses for salt extraction since the water is a water resource under the Act.

39. Turning to the third issue, that is, whether the appellant used sea water to extract salt, the trial judge and the parties' representatives made a site visit on November 17, 2017. A report of the site visit forms

part of the record of appeal, pages 194 to 197. There is no dispute that the appellant was using sea water to produce salt. We can do no better than reproduce a portion of the report as follows:

> "The court was able to see the lagoon from which water coming from the sea gets onto the defendant's land for the salt extraction. The Defendant's agent told us that the total area of the land covered by the lagoons in Gongoni is about 7500 ha while the Marereni site measures approximately 9500 ha. The lagoons or ponds measure about 2 hectares each with some being much bigger. The defendant has made a small dam and put pumps near the point where the water gets onto the land, which pump water onto the land during the high tide. The dam helps collect the water so that it can be pumped onto the lagoons. The pumps are also used to move water through the many lagoons on the land used in the different stages of the salt extraction."

40. Moving on to the fourth issue, there is no dispute that the parcels of land on which the appellant produces salt are private property. The appellant's contention was that section 75 of the *Repealed Constitution* protected the appellant's rights thereto, that under section 23(1) of the *Registration of Titles Act* the issuance of certificates of title to the appellant's parcels of land was conclusive proof that the appellant was the absolute and indefeasible owner thereof; that everything that occurred naturally thereon belonged to the appellant, and therefore section 3 of the repealed *Water Act, 2002* excluded the water bodies on the private properties.

41. The appellant's arguments are totally misplaced. First, we have established that the appellant was using territorial sea water, which is a water resource that was subject to regulations under the *Water Act, 2002*. Secondly, the trial court's visit to the two private properties revealed that the sea water was not naturally flowing into the two parcels of land, the water was actually being pumped into dams that the appellant had dug on its private lands. This ground of appeal must be rejected.

42. We now turn to consider whether the respondent's estimation of the quantity of water used by the appellant was lawful, fair and final. We shall also consider the issue of interest on the claimed sum. The appellant argued that the learned judge erred in law and in fact in holding that the appellant had used 3,524,500m^3 of sea water between October 2007 and April 2017, in the absence of any evidence in proof of the same. The appellant stated that the respondent relied on a statement that was erroneously posted on its website on May 18, 2016 that indicated that the appellant's annual salt production was 350,000 tones.

43. In response, the respondent contended that its estimation of the appellant's water use was legal, fair and final under the law. The respondent pointed out that the *Water Act* and the *Water Resources Management Rules, 2007* required that where a water user declined to submit its self-assessment on the amount of water used, the respondent was at liberty to carry out a fair estimation of the same, and under rule 106 that estimation is final.

44. In its amended plaint, the respondent stated:

> " 5. By *Legal Notice 171* of September 28, 2007 water use charges were gazetted requiring the water users to pay to the Authority 50 cents/m^3 for the raw water abstracted for their use with effect from October 1, 2007.
>
> 6. Pursuant to rule 104(2) of the Rules, the accounting period for water use charges is quarterly with effect from October 1, 2007 and payments ought to be made by the 15th day of the next month after every quarter. Rule 114

provides that late payments attract a simple interest of 2% per month until the outstanding amount is fully settled.

8. The plaintiff Authority further avers that following the gazettement aforementioned, the defendant was and is obligated to pay to the plaintiff for the raw water used for the commercial salt production at the rate of Kshs.50 cents/1M^3 with effect from October 1, 2007.

9. The defendant is required under the Rules to submit a self-assessment from to the Plaintiff Authority indicating the actual water used to enable the Authority calculate the water use charges owing and due to it.

10. The plaintiff Authority avers that the defendant has willfully and deliberately neglected and/or refused to submit the self-assessment forms indicating the actual water used for its commercial salt production.

11. Due to the defendant's failure and/or refusal to submit the aforementioned self-assessment forms indicating actual water used, the plaintiff authority has been compelled to estimate the amount of water used by the defendant in order to calculate the amount of water use charges owing and due to the plaintiff authority from the defendant.

12. The plaintiff Authority avers that the gazette water use charges for water abstraction per day for commercial salt production currently stands at Kshs 50/1,060M^3 of water which in turn produces a tone of salt at a cost of Kshs 530.00.

13. The plaintiff Authority avers that the defendantat a minimum produces 1,815,000 350,000 tonnes of salt per month in 4 consecutive months per year and that the defendant's water use charges from October 2007 to March 2017 together with the statutory interest, therefore adds up to Kshs 2,079,455,000 Kshs 3,847,935,000 per year. In addition, the Authority avers that the defendant ought to pay a fixed permit fee of Kshs 135,000 per year thus making the amount owed to the plaintiff to be Kshs 2,079,590,000 Kshs 3,847,935,000 which amount has remained unpaid to date."

45. How did the respondent compute its claim of Kshs 2,079,590,000? How did the respondent arrive at volume of the sea water used or quantity of salt produced by the appellant? On May 18, 2016 the appellant posted on its official website a document headed: "Our History", where it stated as follows:

> "Krystalline Salt Limited started out as our Chairmans' dream to become a leading salt producer in East and Central Africa.
>
> Krystalline Salt Limited was established on February 20, 1984, primarily as a salt manufacturer, with sales and distribution as a support function. It took almost a decade of hope, struggle, adventure with wildlife, dedicated staff and mostly patience to harvest our 1st batch of salt.
>
> In 2007, we achieved a milestone. We acquired Mombasa Salt Works (formerly called Fundisha salt, the oldest Salt works in Kenya, started by Germans in early 1920). This allowed us to have a very strong presence within East and Central Africa.

Our desire to embrace and adapt to new state of the art technology has kept us well ahead. In 2011 we invested in a new Refinery which increased our production capacity of 350,000 Tonnes annually."

46. The respondent used this information as the basis of its claim, which it calculated as follows:

> " From 1/10/2007 to March 2017 – 9½ 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 ½ 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.

47. The respondent's witness, Canute Mwakamba, produced before the trial court several documents in proof of the claim, among them being Draft Water Resources Management Rules, Legal Notice No 171 of September 28, 2007, a demand letter for payment of water use charges, assessment of the appellant's water usage and an extract of the appellant's website that showed its annual salt production capacity as 350,000 Tonnes from the year 2011.

48. The appellant did not adduce any contrary evidence with regard to its water usage for salt production. Its witness simply alleged that the information that it had posted on its website about its salt production was erroneous. No evidence was adduced by the appellant in substantiation of the alleged error.

49. We agree with the respondent's submission that the actual water use by the appellant was within its special knowledge, but it failed to adduce the same to controvert the respondent's estimate as pleaded in the amended plaint.

50. Rule 106 of the *Water Resources Management Rules, 2007* states as follows:

> " 106 (1) The permit holder or any person who is required to have a valid permit shall make a fair assessment of the quantity of water used with respect to each permit.
>
> (2) The permit holder shall submit the assessment of water used together with supporting records and calculations to the Authority on WRMA Form 015 as set out in the Twelfth Schedule.
>
> (3) Where the permit holder does not submit a fair assessment of the quantity of water used by the Authority shall make a fair estimate of the quantity of water used.
>
> (4) The Authority shall be guided by the allocation in the permit and by observations and evidence of water use activities when making the assessment in sub- rule (3).
>
> (5) Where the assessed quantity of water used determined by the water user or by the Authority is 25% more or less than the permitted allocation taking into account seasonal variations, the Authority may re-evaluate and vary the permitted allocation.

(6) Where the permit holder and the Authority cannot agree on the assessment of the quantity of water used then the opinion of the Authority shall prevail and any payment due shall be made.

(7) Where after payment the permit holder is dissatisfied with the Authority's assessment the permit holder may lodge a complaint in accordance with Rule 5 of these Rules."

51. In view of the fact there was no self-assessment that was made by the appellant, and there was no agreement on the assessment of the quantity of water used by the appellant, the respondent's assessment prevailed, and the learned trial judge cannot be faulted for accepting the respondent's assessment.

52. However, the appellant argued that the respondent was not entitled to recover the water use arrears for a period exceeding twelve months by virtue of the provisions of rule 107 of the *Water Resources Management Rules, 2007* which sets time limitation on recovery of arrears. The rule states as follows:

" 107 (1) Where the Authority discovers that a permit holder or a person who is required to have a water permit or who is obliged to pay water use charges from the entry into force of these Rules has not done so the Authority shall be entitled to charge arrears for a period not exceeding twelve months.

(2) Where the Authority discovers that a permit holder has under-declared the water quantity used from the commencement of these Rules the Authority shall be entitled to charge for the under declared water quantity used in arrears for a period not exceeding twelve months."

53. The respondent countered that averment by arguing that the appellant failed to raise the issue of recovery of the arrears for a period not exceeding twelve months in its defence and therefore the issue cannot be raised for the first time on appeal. The respondent further submitted that even if the issue were to be considered by this court, the rule only bars the respondent from retrospectively claiming water use arrears for a period exceeding twelve months from the date of discovery of the default; that its claim was from the date of the enactment of the Rules and did not include any retrospective claim, which would otherwise be limited to twelve months prior to the enactment of the Rules.

54. The respondent further submitted that rule 107 only applies to persons who are just discovered to have failed in making water use payments, but not persons who had always known that they should pay water use charges from the inception of the Rules and had adamantly refused to pay.

55. Our appreciation of rule 107 is that it sets a time limitation regarding a claim for arrears of use of water by a permit holder or a person who is required to have a water permit or who is obliged to pay water use charges but has failed to do so. The respondent is entitled to charge arrears that are limited to a period of twelve months.

56. Although the appellant did not expressly raise the issue of application of rule 107 in its defence, it denied the respondent's claim in its entirety. It is instructive to note that the respondent's first demand letter to the appellant was dated September 24, 2013. In the initial plaint filed on November 21, 2013, the respondent claimed "Kshs 3,847,935,000 being outstanding water use charges for the 12-month period between 2012 and 2013 together with interest as per the Water Resources Management Rules, 2007." However, in its amended plaint dated 12th April 2017 the respondent claimed Kshs 2,079,590,000 as the outstanding water use charges for nine and half years' period between October 2007 and March 2017. By Legal Notice No 171 of September 28, 2007, the water use charges were

gazetted and took effect on October 1, 2007. It is this same Gazette Notice that set the time limitation for claiming arrears of water use charges as per rule 107.

57. This was therefore an issue of law that the trial court ought to have considered but failed to. In our view, the respondent's claim ought to have been limited to a period of twelve months from the October 1, 2013 to September 30, 2014 plus simple interest on the arrears at two percent (2%) per month until full payment in terms of rule 114. The said rule does not stipulate payment of compound interest on the arrears as was awarded by the learned judge.

58. With regard to computation of the arrears payable, we must adopt the annual salt production capacity of 350,000 Tonnes that was stated by the appellant in its official website. At the rate of Kshs 530 per Tonne that amounts to Kshs 185,500,000. We must therefore set aside the trial court's findings of the water use arrears by the appellant which she stated at paragraph 79 of the judgment were from October 1, 2007 to April 19, 2017.

59. Regarding the claim for Kshs135,000 per year for a fixed permit fees for water usage, we are satisfied that Legal Notice 171 of September 2007 obligated the appellant to obtain such permit, but the appellant did not do so. The amount was therefore rightly claimed and awarded by the trial court.

60. In conclusion, save for the adjustments that we have made here above regarding the amounts payable by the appellant, we dismiss this appeal and award one half of the costs of the appeal to the respondent.

61. For avoidance of doubt, we hold and find that the appellant is obligated to pay to the respondent Kshs 135,000 for fixed permit fees, and arrears for its use of sea water up to a maximum of Kshs 185,500,000 plus simple interest on the arrears at the rate of 2% per month from October 1, 2013 until the amount is paid in full.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

D. K. MUSINGA, (P).

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

.....

G. W. MACHARIA-NGENYE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.