



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURURU

DOCS/MS/PL/2011/001

1. KAPA OIL REFINERIES LTD.

2. Nation Media Group Ltd.

3. Sanyo Africa Ltd.

4. All pack Industries Ltd.

5. Orin Chemicals Ltd. .... PLANTIFFS

6. Bahari Rolling Mills Ltd.

7. Doshi Enterprises Ltd.

8. Dancart Developers Ltd.

VERSUS

1. EXPORT PROCESSING ZONE

2. MUYOBI WATER AND SEWERAGE CO. LTD. .... DEFENDANTS

3. TANATHI WATER SERVICES LTD.

SUMMARY

12. In the Plaintiffs dated the 10<sup>th</sup> February, 2010 and filed on the 15<sup>th</sup> February, 2011 (Kapa Oil Refineries Ltd (2), Nelson Media Group Ltd, (3)Segeco Africa Ltd, (6) Al pack Industries Ltd, (5) Onka Chemicals Ltd, (6) Masab Rolling Mills Ltd, (7) Coast Enterprises Ltd, (8) Decent Developers Ltd (the Plaintiffs), the plaintiffs seek an injunction restraining (1) Export Processing Zone Authority, (2) Mombasa Water and Sewerage Co. Ltd and (3) Tawahi Water Services Board, (the Defendants) from stopping, suspending or restricting the use and discharge of sewer by the Plaintiffs into the Defendants sewer the system located within the Municipal Council of Mombasa area. The Plaintiffs also seek a declaration as to who between the Defendants is entitled to receive charges or fees from the Plaintiffs for usage of the sewer line.

13. The Plaintiffs aver that in a private sector initiative under the umbrella of the Kenya Association of Manufacturers (KAM-River Branch) they constructed and commissioned a 1000 Mm diameter sewerage pipeline to serve the business community along Mombasa Road from Kapa Oil Refineries premises to Mtwapa with Mombasa Municipality. It is the Plaintiffs' case that they applied for and obtained various permissions and way leaves from the relevant government agencies: Mombasa Municipal Council, the National Environmental Management Authority and the Ministry of Roads and Public Works, amongst others. That upon completion and with the permission of the first Defendant, the Plaintiffs' sewer pipe was connected to a pipe then operated by the first Defendant on suitable consideration that upon commissioning of the sewer pipe, the first Defendant entered into an agreement with the Plaintiffs and took over the operations, management and maintenance of the sewer pipe and agreed to give the Plaintiffs a 75% discounted fee for using the sewer pipes for a period of ten (10) years. The Plaintiffs say that after the Defendant has been demanding them for usage of the sewer system from the Plaintiffs and have threatened to stop the Plaintiffs from discharging their sewer into its pipes unless the payment demanded is made. The Plaintiffs contended that they are not liable to the first Defendant as the second and third Defendants who are exclusively mandated to operate the sewerage within the Mombasa Municipality and to whom the Plaintiffs are paying monthly charges should shoulder any responsibility. As the Defendants are unable to agree as to who is entitled to manage, operate and maintain the sewer systems the dispute is likely to jeopardize the operations of the Plaintiffs thereby causing them irreparable damage.

14. With the filing of their Pleas, the Plaintiffs also took out an application by way of Chamber Summons under order 30 rules 1, 2 and 3 of the Civil Procedure Rules seeking a temporary injunction in terms of the prayer in the Pleas pending the hearing and determination of the suit. The application is supported by the affidavit of Mwalid Shah, the Environment Manager of the first Plaintiff, made on the 16<sup>th</sup> February, 2010 on behalf of all the Plaintiffs. He releases all the averments made in the Pleas and produces the relevant documents to show that the various averments were sought and obtained. In paragraphs 15, 16, 17, 18, 20 and 21 he states as follows:

15. That despite that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are now operating the Kapa/Mtwapa sewer line, with the Plaintiffs and other stakeholders paying to them the requisite fees, the 1<sup>st</sup> Defendant has continued to demand fees and other charges from the Plaintiffs for using the sewer and has made threats of blocking the Plaintiffs from discharging sewer into the Mombasa Municipality sewer system. Copies of the letter by the 1<sup>st</sup> Defendant dated 20<sup>th</sup> January, 2010 threatening to block the Plaintiffs from discharging the sewer system are now shown to me marked "B52".

16. That the Plaintiffs have about 2,000 employees who use the sewer facility on a daily basis and any disruption will cause the Plaintiffs to shut down operations resulting in loss which cannot be compensated by way of damages.

17. That the Defendants have been involved in negotiations to resolve their dispute over the operation of the sewer but while the negotiations are ongoing, the Plaintiffs are constantly under threat of closure and disconnections. Copies of correspondence dated 09.02.2010 and 12.02.2010 between the Defendants are now shown to me marked "B53".

18. That if the Plaintiffs state that before the takeover of the project by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiffs had entered into direct agreement with the 1<sup>st</sup> Defendant for usage of the 1<sup>st</sup> Defendants facilities. However, upon takeover of the Kapa/Mtwapa sewer line by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the responsibility of dealing with the 1<sup>st</sup> Defendant fell upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were now owning, managing, operating and maintaining the Kapa/Mtwapa sewer line.

19. That since the 2<sup>nd</sup> Defendant has purporting to appoint the 3<sup>rd</sup> Defendant as the sole agent charged with the responsibility of providing water and sewerage facilities within the Mombasa Municipality, the 1<sup>st</sup> Defendant intended action is without justification and only intended to cause the Plaintiffs into paying a illegal charges, an action which is contrary to the law.

20. That the Plaintiffs are caught in the struggle for control between the Defendants and therefore seek the Court's intervention and protection that pending the suit struggle and negotiations orders of injunction do issue to protect the disruption of their operations.

21. The first Defendant filed a reply affidavit in opposition to the application sworn by N. Kozoua, its acting Chief Executive Officer, on the 9<sup>th</sup> March, 2010. He says that the Plaintiffs have concealed crucial and material facts in as much as the subject sewer line in this suit is the first Defendant's EPZ Trans Sewer Line which is part of the first Defendant's Athi-River Water and Sewerage Project facilities initiated and developed by the Government of Kenya using Government money and World Bank funding as part of the support infrastructure for the Athi-River Export Processing Zone. He says that the Export Processing Zone is highly dependent on the efficient and efficient provision and management of water and sewerage services. He accuses their plea on to state as follows in paragraphs 21, 22, 23 and 25 of his affidavit:

21. That on 21.3.2009, the Plaintiffs undertakes both, The Kenya Association of Manufacturers (KAM-River chapter), writes to the first defendant introducing all the Plaintiffs to the first Defendant for connection to the first Defendant's proposed Trans-Sewer - line 10 Kapa - Athi River Sewer line, (Hence annexed and marked "EPZ") is a copy of the said letter.

22. That on 21.3.2009, the first defendant wrote to the Association of Kenya Manufacturers (AKM-River chapter) agreeing to connect the condition that the Plaintiffs adhered to the terms and conditions of such connection and paid the appropriate cost. (Hence annexed and marked "EPZ") is a copy of the said letter.

24. That out of the eight (8) defendants/applicants herein, only three (3) have so far signed sewer connection agreements with the first defendant and have been connected to the EPZA Trunk Sewer-line. These are:

(a) Kapa Oil Refineries Limited

(b) Doshi Enterprises Limited and

(c) Doocew Developers Limited.

25. That the second, third, fourth, fifth and sixth Plaintiffs/Applicants are yet to sign Sewerage Connection agreements with the first defendant, and are yet to be connected.

(d) The first Defendant admits that by letter dated the 10<sup>th</sup> March, 2009, it was informed that the Plaintiffs have transferred their private Kapa-Ahi River Sewer line to the first Defendant in line with the Water Act, 2002 but contends that such transfer did not affect the first Defendant's Trunk Sewer-line and sewerage treated works. The first Defendant avers that it has no problem with the transfer of the Plaintiffs' privately-owned Kapa-Ahi River Sewerage line to the second or the third Defendants as long as the waste water/effluent quality is maintained by such individual Plaintiff connected to the Export Processing Zone Authority's Trunk Sewer-line and provided that the Plaintiffs comply with the terms and conditions of the sewer connection agreement with the first Defendant and pay the appropriate/required conveying and treatment charges. The deponent concludes his affidavit in the following terms in paragraphs 20, 24, 25 and 26:

"23. The payment of sewer charges to the second or the third Defendants should be linked to sewer conveyance through the Plaintiffs' said privately-owned Kapa-Ahi River-Sewer line.

24. That the first defendant (EPZA) cannot be deemed management, use, and supervision of its sewerage facilities, neither can the Plaintiffs use this Honourable court to escape from their contractual responsibilities or to access and use the first Defendant's Trunk Sewer-line and sewerage treatment facilities without the first Defendant's approval, and for free.

25. That the Plaintiffs and the second and the third Defendants appear to be jointly engaged in an irregular attempt to unlawfully take over the first Defendant's Trunk Sewer-line and Sewerage treatment facilities."

(e) The first Defendant also filed a Defence on the 15<sup>th</sup> March, 2011 denying the averments in the Plaintiffs' and restating the statements made in its replying affidavit.

(f) The second and third Defendants also filed a replying affidavit dated the 22<sup>nd</sup> March, 2010 and made by Christopher Kiunga Muriuki, the Chief Legal and Corporate Affairs Manager of the third Defendant. He says that under and by virtue of Section 51 of the Water Act, 2002 vide Legal Notice No.69 of the 4<sup>th</sup> June, 2008, the third Defendant was constituted for the efficient economical provision of water and sewerage services in various areas including Mwakiki Municipality. According to Legal Notice No. 101 of 2001 and with effect from the 1<sup>st</sup> July, 2005, all rights, powers, duties and liability relating to the provision of Water service were vested in the third Defendant. Pursuant thereto and in accordance with sections 55 and 56 of the Water Act, the third Defendant appointed and assigned the second Defendant the exclusive rights to manage, operate, control and supply water and sewerage services within Mwakiki Municipality.

(g) Mr. Muriuki goes on to state as follows in paragraphs 11, 12, 13, 14 and 15 of his affidavit:

[11] That further aver that the fact that the 1<sup>st</sup> Defendant may have initiated and carried out the construction of the sewerage line, does not mean it owns the same, it is a Local Authority infrastructure build on a public way lease and on the express understanding with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant and the Local Authority that the 1<sup>st</sup> Defendant does not and will not own the infrastructure but will only enjoy the discounted rates for a number of years otherwise the operation and management of the entire sewer system is by law vested in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

12. That the 1<sup>st</sup> Defendant/Respondent has no claim over ownership of any sewerage line, system or sewerage treatment facilities in Mwariki Municipality as ownership of the same is vested by law on the 2<sup>nd</sup> Defendant/Respondent.

13. That from the foregoing it is clear that the 1<sup>st</sup> Defendant/Respondent had no capacity to enter into an agreement with any of the Plaintiffs pertaining to the provision of water sewerage services in Mwariki Municipality and to that effect the said agreements are null and void.

14. That the 1<sup>st</sup> Defendant/Respondent cannot purport to be excluded from the application of statutory law by virtue of letters drawn by the Kenyan Association of Manufacturers (KAM) (River Chapter) and by virtue of illegal contracts between the 1<sup>st</sup> Defendant/Respondent and the Plaintiffs.

15. That the 1<sup>st</sup> Defendant/Respondent has no right to collect revenue from consumers with regard to the provision of the water and sewerage services at Mwariki Municipality and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents are seeking to have the said party restrained from imposing illegal tariffs on consumers in this area."

[9] Finally, there is M. J. N. Kwarui's affidavit dated the 31<sup>st</sup> May, 2010 in reply to the second and third Defendant's said affidavit. He contends that there is a conspiracy between the Plaintiffs and the second and third Defendants to take over the first Defendant's water and sewerage facilities unlawfully. He refers to the proceedings brought by the first Defendant against the first Defendant in Mchichaia HCCC No.315 of 2009 in which the first Defendant seeks a permanent order to restrain the first Defendant from providing water and sewerage services outside the Export Processing Zone area, and to the first Defendant's counter-claim wherein seeking an order of permanent injunction to restrain the third Defendant from taking over the first Defendant's water supply and sewerage treatment facilities or the operations thereof. He further contends that the first Defendants water supply and sewerage infrastructure is not transferable under the Water Act, 2002 and the Rules made thereunder and was not transferred either to the AEM Water Services Board or to any other Water Services Board or at all.

[10] I have considered all this evidence in conjunction with the respective submissions filed by the learned counsel on behalf of the second and third Defendants, the Plaintiffs and the first Defendants respectively on the 1<sup>st</sup> September 2010 the 3<sup>rd</sup> December, 2010 and the 9<sup>th</sup> February, 2011 respectively. The Plaintiff say that they have about 2,000 employees who use the sewer facility on a daily basis and any disruption will cause the Plaintiff to shut down operations resulting in loss which cannot be compensated by an award of damages. They assert that they are caught in the crossfire in the dispute between the three Defendants. The Plaintiffs contend that the second and third Defendants are now lawfully operating the Kapa-Mwariki sewer line by statutory authority and that the first defendant is not entitled to demand fees to block the Plaintiffs from discharging sewer into the Mwariki Municipality sewer system. This is supported by the second and third Defendants who state as follows in paragraph 11 of Mwariki's replying affidavit:

"That further aver that the fact that the 1<sup>st</sup> Defendant may have initiated and carried out the construction of the sewerage line, does not mean it owns the same, it is a Local Authority infrastructure build on a public way lease and on the express understanding with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the Local Authority that the 1<sup>st</sup> Defendant does not and will not own the infrastructure but will only enjoy discounted rates for a number of years otherwise the operation and management of the entire sewer system is by law vested in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The first Defendant has conceded that it has no problem with the transfer of the Plaintiff's privately owned Kapa-AEM River Sewer line to the second and third Defendants so long as it is not deprived of its revenue and provided that the same sewer/effluent quality is maintained by each of the Plaintiffs. It alleges that the Plaintiffs have been in breach of their obligation to enter into sewer connection agreements with the first Defendant and/or pay leasecharges thereunder since 2009 but does not appear to have sought any legal redress. Indeed, the first Defendant has not raised a counterclaim against the Plaintiffs in its affidavit of Defence filed on the 10<sup>th</sup> March, 2010. Further, if the first Defendants believe that its water supply and sewerage infrastructure is not transferable under the Water Act, 2002 and the Rules made thereunder and questions the legality of the first Defendant, the first Defendant has not demonstrated that it has taken any steps to assert its rights since the 4<sup>th</sup> June, 2009 when Legal Notice No.8 of 2009 came into force.

[11] For these reasons, I am persuaded that the Plaintiffs have made out a prima facie case with a probability of success and given that their respective operations would shut down in the event of any disruption in use of the sewer facility, the balance of convenience lies with the Plaintiff. In the result, the application in the Chamber Summons dated the 10<sup>th</sup> February, 2010 and filed on the 10<sup>th</sup> February, 2010 succeeds and is allowed in terms of prayer (c) therein to and are hereby granted with costs.

Orders accordingly.

Dated and delivered at Mchichaia this 12<sup>th</sup> day of July 2011.

P. Khari Karuri

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