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Judge:	Paul Kihara Kariuki
Citation:	KAPA OIL REFINERIES LTD & 7 others v EXPORT PROCESSING ZONE & 2 others [2011] eKLR
Advocates:	-
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Sum Awarded:	-

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THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURUS

SCCC 80/2011 OF 2011

1. KAPA OIL REFINERIES LTD.

2. Nation Media Group Ltd.

3. Sanyac Africa Ltd.

4. All pack Industries Ltd.

5. Oishi Chemicals Ltd.....PLAINTIFFS

6. Masaiti Rolling Mills Ltd.

7. Dushki Enterprises Ltd.

8. Decent Developers Ltd.

VERSUS

1. EXPORT PROCESSING ZONE

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

3. TANATHI WATER SERVICES LTD.

SUMMARY

# KAPA OIL REFINERIES LTD & 7 others v EXPORT PROCESSING ZONE & 2 others [2011] eKLR

[1] In the Plaint filed the 16<sup>th</sup> February, 2010 and filed on the 15<sup>th</sup> February, 2011, (1)Kapa Oil Refineries Ltd (2) Nation Media Group Ltd, (3)Empor Africa Ltd, (4) All pack Industries Ltd, (5) Citra Chemicals Ltd, (6) Nation Rolling Mills Ltd, (7) Dash Dimpress Ltd, (8) Decont Developers Ltd (the Plaintiffs), the plaintiffs seek an injunction restraining (1) Export Processing Zones Authority, (2) Muvuko Water and Sewerage Co. Ltd and (3) Tazara Water Services Board, (the Defendants) from stopping, suspending or restricting the use and discharge of sewer by the Plaintiffs into the Defendants sewer system located within the Municipal Council of Muvuko 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.

[2] The Plaintiffs aver that in a public sector initiative under the umbrella of the Kenya Association of Manufacturers (KAM-River Branch) they constructed and commissioned a three (3) kilometer sewerage pipeline to serve the business community along Muvuko Road from Kapa Oil Refineries premises to Muvuko Municipality. It is the Plaintiffs' case that they applied for and obtained various permits and approvals from the relevant government agencies: Muvuko Municipal Council, the National Environmental Management Authority and the Ministry of Public 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 valuable consideration that upon commissioning of the sewer pipe, the first Defendant entered into an agreement with the Plaintiffs and took over the operation, management and maintenance of the sewer pipe and agreed to give the Plaintiffs a 75% discounted fee for using the sewer pipe for a period of ten (10) years. The Plaintiffs say that after the takeover, the first Defendant has been demanding their full usage of sewer system from the Plaintiffs and have threatened to stop the Plaintiffs from discharging their sewer into its pipe unless the payment demanded is made. The Plaintiffs contend that they are not liable to the first Defendant as the second and third Defendants are lawfully entitled to operate the sewerage within the Muvuko 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 system the dispute is likely to jeopardize the operations of the Plaintiffs thereby causing them irreparable damage.

[3] With the filing of their Plaint, the Plaintiffs also took 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 Plaint pending the hearing and determination of the suit. The application is supported by the affidavit of Mridul Shah, the Counselor 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 Plaint 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 avers as follows:

12. That despite that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are now operating the Kapa/Muvuko 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 Muvuko Municipality sewer system. Copies of the letter by the 1<sup>st</sup> Defendant dated 23<sup>rd</sup> January, 2010 threatening to block the Plaintiffs from discharging the sewer system are now shown to me marked "1652".

14. 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 "1656".

18. That 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> Defendant's facilities. However, upon takeover of the Kapa/Muvuko 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/Muvuko sewer line.

20. 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 Muvuko Municipality, the 1<sup>st</sup> Defendant intended action without justification and only intended to cost the Plaintiffs too paying a legal charges, an action which is contrary to the law.

21. 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 said struggle and negotiations orders of injunction do issue to protect the disruption of their operations.

[4] The first Defendant filed a replying affidavit in opposition to the application sworn by N. Isaura, its acting Chief Executive Officer, on the 2<sup>nd</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 Ahiu 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 Ahiu 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 further says as to date as follows in paragraphs 10, 22, 24 and 25 of his affidavit:

<sup>11</sup> That on 23.2008, the Plaintiffs umbrella body, The Kenya Association of Manufacturers (KAM-River chapter), wrote to the first defendant introducing all the Plaintiffs to the first Defendant for connection to the first Defendant's proposed Trunk-Sewer - the Ahiu Kapa - Ahiu River Sewer line. (Items annexed and marked "EPZ" in a copy of the said letter).

22. That on 31.2008, the first defendant wrote to the Association of Kenya Manufacturers (Ahiu-River chapter) agreeing to connect the condition that the Plaintiffs adhered to the terms and conditions of each connection and paid the appropriate cost. (Items annexed and marked "EPZ" in 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) Decent Developers Limited.

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

(5) The first Defendant admits that by letter dated the 1<sup>st</sup> March, 2008, it was informed that the Plaintiff's have transferred their private Kapa-Abi River Sewer line to the third 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 treatment works. The first Defendant avers that it has no problem with the transfer of the Plaintiff's privately-owned Kapa-Abi River Sewerage line to the second or the third Defendants so long as the waste water/effluent quality is maintained by each individual Plaintiff connected to the Export Processing Zone Authority's Trunk Sewer-line and provided the Plaintiff's comply with the terms and conditions of the sewer connection agreement with the first Defendant and pay the appropriate sewerage and treatment charges. The above is considered to be affected in the following terms to paragraphs 20, 24, 25 and 26.

(3) That payment of sewer charges to the second or the third Defendants should be made to sewer conveyance through the Plaintiff's said privately-owned Kapa-Abi River Sewer line.

14. That the first defendant (EPZA) cannot be denied management, use, and supervision of its sewerage facilities, neither can the Plaintiff's 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 this.

25. That the Plaintiff's 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.\*

(6) The first Defendant also filed a Defence on the 1<sup>st</sup> March, 2011 denying the averments in the Plaintiff's and reiterating the statements made in its replying affidavit.

(7) The second and third Defendants also filed a replying affidavit dated the 27<sup>th</sup> March, 2010 and made by Christopher Kiragu Mutitu, the Chief Legal and Corporate Affairs Manager of the first Defendant. He says that under and by virtue of Section 11 of the Water Act, 2002 vide Legal Notice No. 65 of the 4<sup>th</sup> June, 2008, the first Defendant was constituted for the efficient economical provision of water and sewerage services in various areas including Mwakisi Municipality. According to Legal Notice No. 101 of 2007 and with effect from the 1<sup>st</sup> July, 2008, all rights, powers, duties and liability relating to the provision of water services were vested in the first Defendant. Pursuant thereto and in accordance with sections 55 and 56 of the Water Act, the first Defendant appointed and assigned the second Defendant the exclusive rights to manage, operate, control and supply water and sewerage services within Mwakisi Municipality.

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

11. That I 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 built on a public way here 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 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 Mwasika 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 Mwasika 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 (KAMU 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 Mwasika Municipality and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents are seeking to have the said party restrained from imposing illegal tariffs on consumers in this area."

(9) Finally, I refer to Mr. Mutai's affidavit dated the 2<sup>nd</sup> May, 2010 in reply to the second and third Defendants' said affidavits. He contends that there is a conspiracy between the Plaintiffs and the second and third Defendants to take over the 1<sup>st</sup> Defendant's water and sewerage facilities unlawfully. He refers to the proceedings brought by the first Defendant against the first Defendant in Machakos HCCC No. 212 of 2008 in which the first Defendant seeks a permanent order to restrain the first Defendant from providing water and sewerage service outside the Export Processing Zone and to the first Defendant's counter-claim therein seeking an order of permanent injunction to restrain the first 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 Aky 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 2<sup>nd</sup> December, 2010 and the 1<sup>st</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 first Defendants. The Plaintiffs contend that the second and third Defendants are now lawfully operating the Kapa-Mwasika sewer line by statutory authority and that the first defendants is not entitled to demand fees to block the Plaintiffs from discharging sewer into the Mwasika Municipality sewer system. This is supported by the second and third Defendants who say as follows in paragraph 11 of their respective affidavits:

"I 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 built on a public way here 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 contended that it has no problem with the transfer of the Plaintiff's privately owned Kapa-Aky River Sewer line to the second or third Defendants so long as it is not deprived of its revenue and provided that the waste water 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 fees/charges thereunder since 2003 but does not appear to have sought any legal redress. Indeed, the first Defendant has not issued a court action against the Plaintiffs in its statement of Defence filed on the 1<sup>st</sup> March, 2010. Further, if the first Defendant believes 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, 2008 when Legal Notice No.69 of 2008 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 1<sup>st</sup> February, 2010 and filed on the 1<sup>st</sup> February, 2010 succeeds and is allowed in terms of prayer (h) therein be and are hereby granted with costs.

Orders accordingly.

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P. Kibara Karuri

Judge



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