



**Murango v Attorney General & another; Cabinet Secretary Ministry of Water,  
Sanitation and Irrigation (Interested Party) (Constitutional Petition E118 of 2022)  
[2023] KEHC 26468 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26468 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E118 OF 2022**

**AC MRIMA, J**

**DECEMBER 15, 2023**

**BETWEEN**

**JAMES KAMAU MURANGO ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**WATER RESOURCES AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE CABINET SECRETARY MINISTRY OF WATER, SANITATION AND  
IRRIGATION ..... INTERESTED PARTY**

**JUDGMENT**

**Background:**

1. At the time of institution of this suit, James Kamau Murango, the Petitioner herein, was the member of county assembly of Kerugoya Ward and leader of majority party in the county assembly of Kirinyaga.
2. The Petitioner was aggrieved by Legal Notice No 170 of 2021 through which the Attorney General, 1<sup>st</sup> respondent herein, made the *Water Resources Regulations 2021*, (hereinafter referred to as ‘the impugned Regulations’).

**The Petition:**

3. Through the petition dated March 22, 2022, supported by the affidavit and supplementary affidavit of James Kamau Murango deposed on March 22, 2022 and May 23, 2022 respectively, the petitioner sought to challenge the 1<sup>st</sup> respondent’s purported reliance on sections 36(d) and 142 of the *Water Act*



- to introduce water use charges in regulation 84 and Part B of the Second Schedule of the impugned Regulations.
4. The petitioner pleaded that the impugned regulations were *ultra vires* the powers of the 1<sup>st</sup> respondent and in contravention of the Constitution.
  5. The petitioner pleaded that according to article 94(6) of the Constitution, parliament delimited the regulation-making authority of the 1<sup>st</sup> Respondent with respect to the Water Act at section 142 of the Water Act 2016 which does not include the setting or prescribing of water use charges.
  6. The petitioner asserted that the 1<sup>st</sup> respondent regulation-making power is limited to delegation by the authority, the board or a licence of their respective powers, abstraction of ground water and works including licensing of borehole constructors, construction, extension or improvement of dams, the licensing of engineers, requirements in respect to bottled or mineral waters, national public water works, information to the public, transfer of functions, assets, liabilities and staff, rain water harvesting and household water storage and any saving, temporary of transitional provision in consequence of the repeal of the Water Act.
  7. The petitioner posited that the power to set and prescribe water use charges is expressly reserved for and bestowed upon Water Resources Authority, 2<sup>nd</sup> respondent herein under section 42 of the Water Services Act 2016 and, therefore, the 1<sup>st</sup> respondent usurped the statutory mandate of the 2<sup>nd</sup> respondent in violation of article 94(5) of the Constitution.
  8. The petitioner pleaded further that the action of the 1<sup>st</sup> respondent failed to meet the edicts of article 10(2) of the Constitution as read with section 139 of the Water Act 2016 which require public consultation before prescribing water charges.
  9. It was the petitioner's case that under section 42(2) of the Water Services Act 2016, prescription of water use charges ought to be in stand-alone Gazette Notice and consultations be carried out with specificity without the same being bundled together with other regulatory issues.
  10. In the supplementary affidavit, it was his case that section 142 of the Water Act empowers the cabinet secretary to make Regulations only for matters that are required or permitted to be prescribed by the cabinet secretary and as such, the cabinet secretary cannot rely on the said section to prescribe for matters that are required to be prescribed by another state organ.
  11. It was his case further that section 37(3) and 41(1) and 3 of the Water Act do not confer regulation making authority to the Cabinet Secretary, Ministry of Water Sanitation Irrigation, the Interested party herein.
  12. He pleaded that under section 12(a) of the Water Act, the 2<sup>nd</sup> respondent is empowered to formulate regulations standards, procedures and regulations for the management and use of water resources and flood mitigation.
  13. On the foregoing factual and legal basis, the petitioner prayed for the following reliefs;
    - a. A declaration do issue that regulation 84 of the Water Resources Regulations 2021 (Legal Notice No 170 of 2021) is in violation of and inconsistent to article 10, 94(5) and 94(6) of the Constitution.
    - b. A declaration that part B of the second schedule of the Water Resources Regulations, 2021 (Legal Notice 170 of 2021) is in violation of and inconsistent to article 10, 94(5) and 94(6) of the Constitution.



- c. Or that such other order(s) as this honourable court shall deem fit.

### **The Submissions:**

14. The petitioner further urged his case through written submissions dated May 25, 2022. He identified the issues for determination as; whether the interested party acted ultra vires in prescribing water use charges in regulation 84 and part B of the Second Schedule of Water Regulations and whether there was public consultation in terms of section 139 of the Water Act 2016.
15. On the first issue, it was the petitioner's submission that pursuant to article 94(6) of the Constitution, the interested party can only legislate in areas where he is expressly conferred with such powers.
16. Based on the foregoing, it was the petitioner's case that section 12 (a and f) and section 42(1) of the Water Act confer powers to make regulations on water use and water charges to the 2<sup>nd</sup> respondent.
17. It was the petitioner's case that it would be improper to automatically assign the regulation making authority to the interested party when the language of the Act in the foregoing provisions do not expressly say so.
18. To that end, the petitioners relied on Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others [2017] eKLR where it was observed;  

...the starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. The court cannot add words to a statute or read words into it which are not there.
19. Based on the foregoing, the petitioner submitted that in making regulation 84 of the Water Resources Regulations, 2021(Legal Notice 170 2021) as well as part B of the second schedule of the same Regulations, the interested party, stretched its delegated legislative authority and acted *ultra vires*.
20. The Petitioner submitted that the cabinet secretary cannot rely on section 142(1) of the Water Act, 2016 which is a general provision to prescribe for matters that provided for specifically.
21. On the issue regarding public participation, the petitioner submitted that since the interested party had no authority to legislate and set water charges use, then it could not validly conduct public participation.
22. It was submitted that the interested party usurped the statutory mandate of another state organ and that action could not be sanitized through public participation. In that regard, therefore, the petitioner contended that no valid public consultations were carried out as intended in section 42(2) of the Water Act.
23. In the end, the Petitioner urged that the Petition is allowed as prayed.

### **The 1<sup>st</sup> Respondent's and the Interested Party's case:**

24. The attorney general and the cabinet secretary, Ministry of Water, Sanitation and Irrigation responded to the Petition through the replying affidavit of Dr Eng. Joseph Njoroge, the Principal Secretary Ministry of Water Sanitation and Irrigation deposed to on April 4, 2022.
25. He deposed that the Water Act 2016 came into force through Legal Notice No 59 and its enactment was to give effect to the 2010 constitutional provisions including the right to water and reasonable standards of sanitation and the right to a clean and healthy environment.



26. He deposed that sections 8(7), 23(3), 36(d), 37(3), 41(1)(a) and (3) of the [Water Act](#) vests upon the cabinet secretary the power to develop regulations.
27. It was his case further that section 142 of the [Water Act](#) vests on the cabinet secretary the power to make regulation for any matters that are required or permitted to be prescribed or which are necessary or expedient to be prescribed for the carrying out or giving effect to the provision of the Act.
28. He deposed that pursuant to the foregoing, the cabinet secretary consultatively developed [Water Services Regulations, 2021](#) (Legal Notice No 168 of 2021, [Water Harvesting and Storage Regulations 2021](#) (Legal Notice No 169 of 2021 and [Water Resources Regulations 2021](#) (Legal Notice No 170 of 2021) all of which gave effect to the [Water Act](#).
29. Dr Njoroge deposed that in satisfaction of public consultation requirement, the interested party undertook public and stakeholder consultations on November 20, 2018 where it undertook stakeholder exploratory and consultative meeting. He stated that on December 18, 2018, consultations were held with the Council of Governors Secretariat, followed by a second consultation focused on technical requirements for developing of draft regulations on 31<sup>st</sup> January to February 1, 2019.
30. He deposed further that consultation on regulatory impact statement were conducted on March 25, 2019 at Kenyatta International Convention Centre which were followed by Civil society meeting on March 28, 2019 and Private sector consultation on March 29, 2019 where the Regulatory Impact Statement was discussed.
31. It was his case further that stakeholder consultation was held further on 30<sup>th</sup> and May 31, 2019 in Naivasha whereafter regional public consultation forums were held between 18<sup>th</sup> September and December 18, 2019 in Nakuru, Eldoret, Kisumu, Nyeri and Mombasa.
32. The deponent stated that following compliance with the requirements and timeline provided for under [Statutory Instruments Act](#), 2013, the regulations came into operation on February 9, 2022.
33. He deposed that grant of the orders prayed for in the petition would prejudice the respondents, the interested party and the general public since due consultation were extensively conducted, and the impugned regulations were already in operation and its implementation by the 2<sup>nd</sup> Respondent had already commenced.
34. He deposed further that according to sections 41 and 142 of the [Water Act](#), the cabinet secretary had in no way usurped the powers of the 2<sup>nd</sup> Respondent.
35. In reference to section 3 of the [Interpretation and General Provisions Act](#), the term ‘prescribed’ means prescribed by an Act in which the word occurs or by subsidiary legislation made thereunder.
36. It was his deposition, therefore, that the term prescribed as used in section 41(3)(b) of the [Water Act](#) expressly vests regulatory power of prescribing fees on the Cabinet Secretary.
37. In the end, the interested party and the 1<sup>st</sup> respondent urged that it is in public interest that the orders prayed for are not granted.

**The submissions:**

38. In its submissions dated June 27, 2022, the interested party and the 1<sup>st</sup> respondent largely reiterated the depositions of Dr Eng. Kamau.
39. In rebutting the claim of usurpation of power, it was submitted that under article 94(5) and (6) of the [Constitution](#), legislative mandate of the cabinet secretary is a delegated authority. Support to that end



was drawn from the decision in *SDV Transami Kenya Limited & 19 others v Attorney General & 20 others & another* (2016) eKLR where it was observed *inter alia*: -

(174) Clearly although the judiciary is the final arbiter of constitutionality, parliament would have done the initial sweep for mines that render the statutory instruments unconstitutional, *ultra vires* and, therefore, void, and for consideration apart from the question of constitutionality whether the legislation should more properly be dealt with as an Act of Parliament. I would venture to suggest that had this been done, there may be not have been any petition of the kind before the court today.

40. Pursuant to the foregoing, it was submitted that having undergone the extensive scrutiny before the relevant parliamentary committee and passed the requirements under part IV of the *Statutory Instruments Act*, the *Water Resources Regulations* and specifically regulation 84 and part B of the schedule is constitutional, and the court should uphold it as such.

41. In conclusion, it was asserted that the petitioner had neither challenged the constitutionality of the decision by parliament to enact the *Water Resources Regulations* nor demonstrated in any way that parliament in discharging its mandate, acted in contravention with the *Constitution* or any other law.

### **The 2<sup>nd</sup> Respondent's case:**

42. The Water Resources Authority opposed the petition through the replying affidavit of John Kinyanjui, the Manager Water Resources Assessment and Monitoring, deposed to on April 4, 2022.

43. He deposed that pursuant to section 6 of the *Water Act*, the 2<sup>nd</sup> respondent is designated as an agent of the national government responsible for regulating the management and use of water resources in the country and in implementing its mandate, it is guided by functions assigned to it under section 12 of the *Water Act*.

44. It was its case that section 12(e) of the *Water Act* obligated the 2<sup>nd</sup> respondent to collect water permit fees and water use charges and granting the orders sought would have extensive negative repercussions on the statutory mandate of the 2<sup>nd</sup> respondent and the management and use of water resources in the country.

45. He deposed further that contrary to the petitioner's claim, the Regulations to be prescribed by the authority under section 42(1) of the *Water Act* relate to the regulatory mandate of the 2<sup>nd</sup> respondent as contemplated under section 12(a).

46. It was the 2<sup>nd</sup> respondent's case that it undertook public participation with stakeholders and the public and to that end, referred to newspaper advertisement and Gazette Notice marked JNK 2.

47. He reiterated that generation of the water use fees under regulation 84 of the 2021 is vested on the interested party pursuant to the provisions of section 41(3)(b) of the 2021 *Regulations* and were, therefore, developed within the statutory limits.

48. In conclusion, it was its case that in is in the interest of public, justice and fairness that the Petition is dismissed.

### **The submissions:**

49. The 2<sup>nd</sup> respondent filed written submissions dated June 21, 2022 where it identified issues for determination as was identified by the 1<sup>st</sup> respondent and the Interested Party.



50. It generally reiterated their position and made the submission that the petitioner had misinterpreted section 42(1) of the Water Act to mean the same set of regulations to be prescribed by the interested party under section 41(1) and 3 of the Act.
51. It was its case that the Regulations to be prescribed under section 42(1) of the Act relate to the regulatory mandate of the 2<sup>nd</sup> respondent as contemplated under section 12(a) of the Water Act.
52. It was its case that its regulatory powers are variously provided for in other parts of the Act and section 42(1) of the Act should not be read in exclusion.
53. It was submitted further that, one of the functions of the authority under Water Act is to determine and set permit and water use fees and in doing so, pursuant to sections 12(a), (e), (f), (i) and 42(2) of the Act, a review of the water use fees prescribed by the interested party under section 41(3) (b) of the Act is undertaken.
54. Pursuant to the foregoing, it was submitted that regulation 86 of 2021 Regulations allows the authority to at any time, following public consultation, review and gazette new water use charges on the basis of a significant increase in the cost of regulating the water resources, the desire that water use charges facilitate water resources demand management; and any other criterion that the Authority may consider appropriate.
55. To buttress propriety of their actions, and the need for the court to accord the 2<sup>nd</sup> respondent autonomy in performance of its mandate, support was drawn from Republic v Water Services Regulatory Board & 3 others ex-Parte Paul Mwangi Mwaniki & 2 others [2017] eKLR where it was observed;
 

...so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act.
56. In the end, the 2<sup>nd</sup> respondent submitted that petitioner had not contested the fact that pursuant sections 8(7), 23(3), 36(d), 37(3) and 41(1)(a) and (3) and 142 respectively of Water Act, the interested party is designated as the regulation making authority and had not usurped the powers as alleged by the petitioner.
57. It was urged that prayers and grounds in the petition are ill-advised and should be dismissed with costs to the Respondents.

**Analysis:**

58. This court has carefully considered the Petition, the responses, the parties' written submissions and the decisions referred thereto. The following issues arise for determination: -
  - i. Whether the interested party acted ultra vires in prescribing water use charges in regulation 84 and part B of the second schedule of Water Regulations.
  - ii. Whether there was public consultation in terms of article 10 of the Constitution and section 139 of the Water Act.



iii. Reliefs, if any.

The Court will now deal with the issues in seriatim.

**(a) Whether the Interested Party acted ultra vires in prescribing water use charges in Regulation 84 and Part B of the Second Schedule of Water Regulations:**

58. Buttrressing the above issue, the petitioner submitted that under article 94(6) of the Constitution, parliament delimited the regulation-making authority of the interested party with respect to the Water Act in section 142 of the Water Act, 2016 which powers do not include the setting or prescribing of water use charges.

59. The respondents held the contrary position.

60. Perhaps a look at the above provisions will aid in determining this issue. article 94(6) of the Constitution states as follows: -

An Act of Parliament, or legislation of a county, that confers on any state organ, state officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

61. Section 142 of the Water Act, 2016 provides as follows: -

142. Regulations

- (1) The cabinet secretary may make Regulations with respect to any matter which by this Act is required or permitted to be prescribed, or which is necessary or expedient to be prescribed for the carrying out or giving effect to this Act.
- (2) Without prejudice to the generality of subsection (1), such regulations may make provision with respect to —
  - (a) delegation by the authority, the board or a licensee of their respective powers and functions;
  - (b) abstraction of ground water and works therefore, including the licensing of borehole constructors;
  - (c) construction, extension or improvement of dams and the licensing of persons carrying on business as dam contractors;
  - (d) the licensing of engineers offering and other persons offering professional services in respect of water resources or water services;
  - (e) requirements in respect to bottled or mineral waters;
  - (f) national public water works;
  - (g) information to be made available to the public under the Act;
  - (h) requirements for the keeping of records and the furnishing of information to the Authority or the Board;
  - (i) the transfer of functions, assets, liabilities and staff;



- (j) rain water harvesting and household water storage; or
  - (k) any saving, temporary or transitional provision in consequence of the repeal of the *Water Act*, 2002 (No 8 of 2002).
- (3) Regulations made under this section may create offences in respect of any contravention of the regulations and may for any such offence impose penalties not exceeding one million shillings or imprisonment not exceeding two years, or both such fine and imprisonment.
  - (4) Regulations made under this Act shall be published in the Gazette and shall come into effect upon publication.
62. Of particular importance in this discourse is also section 12(f) of the *Water Act* which provides one of the functions of the 2<sup>nd</sup> respondent herein being to determine and set permit and water use fees.
  63. Article 94(6) of the *Constitution* vouches for clarity and certainty in any delegated legislation under any law. In this case, section 12(f) of the *Water Act* vested the duty to determine and set permit and water use fees on the 2<sup>nd</sup> respondent.
  64. However, section 142 of the *Water Act* seems to have accorded the interested party overriding powers over the powers and functions of the 2<sup>nd</sup> respondent. Under section 142(2)(a), the interested party was vested with the power to make any regulations that may make provision with respect ‘...to delegation by the authority [2<sup>nd</sup> respondent], the board or a licensee of their respective powers and functions...’
  65. It, therefore, means that section 124(2)(a) gave the interested party the powers to delegate the 2<sup>nd</sup> respondent’s powers and functions under any regulations it comes up with. As such, a reading of section 12(f) and 142(2)(a) of the *Water Act* permits the interested party to delegate the powers and functions of the 2<sup>nd</sup> respondent by its regulations.
  66. That is exactly what the interested party herein did in this matter. On the basis of section 142 of the *Water Act*, the interested party came up with the impugned *Regulations* that delegated the function of the 2<sup>nd</sup> respondent in respect to determining and setting permit and water use fees to itself.
  67. It is, therefore, the finding of this court that the interested party did not act beyond its powers. Its actions were not *ultra vires* neither did it offend article 94(7) of the *Constitution*.
  68. The first issue is, hence, answered in the negative.

**b. Whether there was public consultation in terms of article 10 of the *Constitution* and section 139 of the *Water Act*:**

69. The contention by the petitioner in respect of this issue was to the effect that any public participation that was undertaken by the interested party in coming up with the impugned *Regulations* did not have any force of law since the interested party did not have powers to come with the impugned Regulations in the first instance.
70. With the finding of this court on issue (a) above, the issue now turns to the adequacy of the public engagement in this matter.
71. A brief look at the constitutional principle of public participation provided under article 10(2)(a) of the *Constitution* will suffice. On that score the decision by the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for*



*the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR comes in handy.

72. In the said case, the apex court developed guiding principles for public participation. The court expressed itself thus: -

(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
  - a. clarity of the subject matter for the public to understand;
  - b. structures and processes (medium of engagement) of participation that are clear and simple;
  - c. opportunity for balanced influence from the public in general;
  - d. commitment to the process;



- e. inclusive and effective representation;
- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

73. With the above legal framework on public participation, this court will now proceed to consider whether the impugned Regulations are unconstitutional for limited or lack of public participation in the process leading to their enactment.
74. Parliament also dealt with the impugned *Regulations* under the *Statutory Instruments Act*. One of the considerations before the house was whether adequate public engagement was undertaken. Parliament was so satisfied.
75. This court has evaluated the processes jointly undertaken by the 2<sup>nd</sup> respondent and the interested party in respect to public engagement. Several meetings were held all over the country which brought together stakeholders, members of public and experts in the sector. The evidence thereof was produced before this Court. No doubt enormous public resources were expended.
76. With such enormous engagements, this court is satisfied that elaborate and adequate public participation was undertaken in coming up with the impugned *Regulations*. The engagements also entailed the procedures in section 139 of the *Water Act*.
77. The second issue is now answered in the affirmative. With such a finding, there is no need of dealing with the aspect of the reliefs since none would issue.

**Disposition:**

54. Deriving from the foregoing, the following final orders do hereby issue: -
- a. The Petition dated March 22, 2022 be and is hereby dismissed.
  - b. Being a public interest litigation, each party shall bear its own costs.
- Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of:

Mr. Rienye, Learned Counsel for the Petitioner.

N/A for the 1<sup>st</sup> Respondent and the Interested Party.

N/A for the 2<sup>nd</sup> Respondent.

