REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW CAUSE NO. 01 OF 2020

IN THE MATTER OF APPLICATION BY ALLAN KIPRUTO TUWEI FOR

JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 27 & 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT SECTION 8 AND 9, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 66, 68 AND 69 0F THE WATER ACT NO. 43 OF 2016

ALLAN KIPRUTO TUWEI.....EX PARTE APPLICANT

VERSUS

THE CABINET SECRETARY MINISTRY OF WATER

AND SANITATION AND IRRIGATION.....1ST RESPONDENT

NORTH RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY.....2ND RESPONDENT

ASMAN KAMAMA.....3RD RESPONDENT

JULIUS MURGOR.....4TH RESPONDENT

JOAN MAIYO..... 5TH RESPONDENT

DOUGLAS KIPLIMO TANUI.....6TH RESPONDENT

CHRISTOPHER EPOKOT EKUOM.....7TH RESPONDENT

DAVID CHUMBA CHEMWENO.....8TH RESPONDENT

JUDGMENT

1. **ALLAN KIPRUTO TUWEI** (the ex parte applicant) being dissatisfied with appointments made by **THE CABINET SECRETARY MINISTRY OF WATER AND SANITATION AND IRRIGATION (the 1st respondent)** of the 3rd to 8th respondents to be board members of **NORTH RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY (2nd Respondent),** by a Judicial Review Motion dated 9th April 2020, brought pursuant to **Articles 27 & 47 of the Constitution, the Fair Administrative Action Act No. 4 of 2015,**

Sections 65,66,68 and 69 of the Water Act – No. 43 of 2016, Sections 8 and 9 of the Law Reform Act - Cap 26 Laws of Kenya and Order 53 of the Civil Procedure Rules seeks inter alia-

a) An order of certiorari to remove into this court and quash the decision of the 1st Respondent in causing gazettment of the 3rd to 8th Respondents as Board Members of the 2nd Respondent made on the 10th March 2020 vide the Gazette Notice No. 2360 of 20th March 2020 and any subsequent decisions therefrom.

b) Orders of prohibition; prohibiting the 3rd to 8th Respondents from: assuming office, drawing salaries and/or allowances, expending any monies and/or making any decisions in relation to the 2nd Respondent.

c) The costs of be borne by the respondents.

2. The genesis of this matter is that **NORTH RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY** (2nd Respondent) whose jurisdiction comprises of **TURKANA, WEST POKOT, ELGEYO MARAKWET AND UASIN GISHU COUNTIES**, was established by **THE CABINET SECRETARY MINISTRY OF WATER AND SANITATION AND IRRIGATION** (the 1st Respondent) vide Legal Notice No. 4 (Legislative Supplement No. 4) dated 4th February 2020 in compliance **with section 65 of the Water Act No. 43 of 2016**. Pursuant to the provisions of **section 66 of the Water Act No. 43 of 2016**, the 1st Respondent appointed the 3rd to 8th Respondents as Board Members of the 2nd Respondent on 10th March 2020 vide the Gazette Notice No. 2360 of 20th March 2020.

It is a requirement that members of the board of the 2nd respondent should come from within the counties that form the basin area as outlined in Legal Notice No. 4 (Legislative Supplement No. 4) dated 4th February 2020

3. The applicant's complaint is that the 3rd to 8th Respondents are unlawfully and irregularly in office as board members, as:

a) Their appointment is in breach of the provisions of **Section 66 of The Water Act No 43 of 2016** requiring that the chairperson of the board together with the members to be appointed from counties within the basin area, which comprises Turkana, West Pokot, Elgeyo Marakwet and Uasin Gishu counties

b) The composition s not fair and does not give a representation of Kenya generally, and the counties within the North Rift Valley Water Works Development agencies which covers Turkana, West Pokot, Elgeyo Markwet and Uasin Gishu counties

c) That the chair who is the 3rd respondent, and the 6th respondent, are not residents of the counties within the basin area, thus their appointment does not fall within the requirement of the express provisions of section 66 of the Water Act of 2016.

d) The composition of the board violates the provisions of Article 27 of the Constitution of Kenya, which contemplates that not more than two thirds of the members of appointive bodies shall be of the same gender

Thus in conducting public affairs and expending public resources, including funds and benefits, the 3-8th respondents are violating the Constitution of Kenya and the Water Act.

4. The applicant in his capacity as a citizen of this country, and resident of **UASIN GISHU** county who pays taxes, is aggrieved by the appointments to the board and deposes in the supporting affidavit as well as the statement of facts, that on 10th March 2020, the Cabinet Secretary **MINISTRY OF WATER AND SANITATION AND IRRIGATION** (1st respondent) in exercise of her powers under section 66 of the Water Act No 43 of 2016 appointed the 3rd to 8th respondents as Board members the **North Rift Valley Water Works Development** agencies of vide gazette notice No 2360 of 20th March 2020.

5. It is drawn to this court's attention that out of the 6 board members, only 1 is female, thus rendering the appointments discriminatory and unconstitutional. Further, the chair **(ASMAN KAMAMA)** being the 3rd respondent) and **DOUGLAS KIPLIMO TANUI** (the 6th Respondent) do not even hail from the counties within the basin area as stipulated under section 66 of the Water Act - both are from **BARINGO** county, and the appointments do not reflect the interests of the residents living within the basin area. In any event, the 6th respondent is currently serving as a board member of **LAKE VICTORIA NORTH WATER WORKS AGENCY** having been appointed in 2019 to a 3-year term, as per the gazette notice No. 12 of 7th February 2019. This in effect means he is collecting two salaries/allowances from both government agencies

6. **The Attorney General**, was served with the suit papers on behalf of the 1st and 2nd Respondents but did not enter appearance or put in a response to the Judicial Review Motion. **The Ministry of Water and Sanitation and Irrigation** was served at the **Maji House offices**, on behalf of both the 1st Respondent and the 2nd Respondent (which is an agency under the said Ministry) – the affidavits of service by **Samuel Gitahi**, a duly authorized process server confirm the same.

7. It is pointed out by the applicant's counsel that the 2nd Respondent being a newly incorporated body neither has a physical address nor postal (or internet/web) address to enable easier service of process at this time of the COVID-19 pandemic and pursuant to the **Electronic Case Management Practice Directions,2020 – Gazette Notice No. 2357 of 4th March 2020, and the Practice Directions For The Protection Of Judges, Judicial Officers, Judiciary Staff, Other Court Users And The General Public From Risks Associated With The Global Corona virus Pandemic – Gazette No. 3137 of 20th March 2020.**

8. In response, the 3rd respondent by way of a replying affidavit on his behalf and on behalf of the other respondents, contends that he is a resident of **WEST POKOT, BARINGO AND NAIROBI** counties, and the representation balances the 4 basin areas as he is from **Baringo/West Pokot Counties**, the 4th respondent is from West Pokot, 5th and 6th respondents are from Uasin Gishu county, 7th respondent

is from Turkana County and 8th respondent is from Elgeyo Marakwet county. Further that under **Paragraph 2(1) and 2 (2) of the Water Act, as well as Articles 10 and 232 of the Constitution of Kenya** the Cabinet Secretary is at liberty to consider other qualifications in making the appointments including:

a) Academic

b) Professional experience and expertise

c) Character and integrity

d) Gender, regional and ethnic diversity.

He has enumerated his career exposure to justify his appointment, and insists that the applicant has not demonstrated what prejudice he stands to suffer, and is merely harping more on technicalities, rather than substance

9. With regards the gender composition, the respondents contend that the same is not yet fully constituted as the Cabinet Secretary has powers under the State Corporations Act and the Water Act, to co-opt members. He further deposes that:

a) The 3rd, 4th, 5th and 6th Respondents were seconded from the now defunct **Rift Valley Water Works Development Agency,** and the 1st Respondent did not err or exceed her mandate when making the appointments, since she still has latitude in fulfilling the requirements as she has power to co-opt two extra members of the Board to fulfill **Article 27 of the Constitution** on gender balance.

b) That the existence and functioning of the 2nd Respondent is vital in containing the flooding menace and **COVID-19 pandemic** within counties in the Basin Area as well as providing food, sanitizers and masks to affected communities/persons.

c) The ex parte applicant is seeking personal reliefs at the expense of public interest.

d) The present Judicial Review Motion is incompetent

10. It is argued that the law expressly requires the ex-parte applicant to demonstrate and prove that there was such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision and that the decision complained of is clearly a defiance of logic and acceptable moral standard.

11. Further, that on the contrary, it is clearly evident that there was rigorous observance of the rules of natural justice and procedural fairness in the making of the decision that is the subject of complaint. The Cabinet Secretary in this case acted in accord with the relevant provisions of the State Corporation Act and the Water Act, 2016 and the Constitution of Kenya when appointing the respondents. Under section **65,66,67,68 and 69 of the Water Act, 2016** being the sections affecting the 2 respondent was adhered to together with the first scheduled of the Act

Issues

12. The petitioner has distilled their submissions to four main issues namely -:

a) Whether while exercising her powers as the appointing authority the 1st respondent is required to strictly adhere to Constitutional provisions, specifically **Article 27(3) and (8)** which contemplates that not more than two-thirds of the members of appointive bodies shall be of the same gender.

b) Whether while exercising her powers as the appointing authority the 1st respondent is required to strictly adhere to section 66 of the **Water Act, No. 43 of 2016.**

c) Whether **section 66 of the Water Act, No. 43 of 2016** contemplates co-opting of extra members under the **State Corporations Act,** Cap 446 Laws of Kenya

d) Whether, in lieu of a, b and c above, the Board of the 2nd Respondent is legally and constitutionally constituted and thus whether Gazette Notice No. 2360 of 20th March 2020 is proper.

e) The petitioner also raises the issue as to whether the Replying Affidavit of **Julius Turgor (the 4th Respondent**) and **Christopher Epokot Tekuom e) (the 7th Respondent)** are proper for want of compliance with **section 4 of the Oaths and Statutory Declarations Act** or should be struck out and/or not relied on by the court.

I will incorporate these issues under the various sub-headings that follow in this judgment, not necessarily bearing the same sub-titles

The Appointments and the Gender Rule Requirement

13. The applicant focuses on **GENDER BALANCE** and strict compliance with **Article 27 of the Constitution** in appointing of persons to State Corporations. The exparte applicant laments that it would be a travesty and an unflinching defilement of the Constitution for a

Public/State officer to be in flagrant breach of **Articles 27 (3) and (8)**, and urges the court to adopt a substantive interpretative approach to Article 27. It is argued that when enacting the present Constitution, the people of Kenya committed themselves to the realization of the gender equity and thus expressed their desire to be free from discriminatory conduct, specifically against the female gender which has long suffered discrimination. In support of this position the applicant refers to the Supreme Court of Kenya in **Advisory Opinion No. 2 of 2012 In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR** where the Court noted –

> ***"this Court is fully cognizant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81 (b) of the Constitution, that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices or gender – indifferent laws, policies, and regulations. These sentiments equally reflect the position of persons with disabilities, the youth, minorities and marginalized communities."***

14. The applicant further relies on the cases of **Federation of Women Lawyers (FIDA-K) & 5 Others vs. Attorney General and Another [2011] eKLR** as well as **Centre for Rights Education and Awareness vs. Attorney General and Another [2015] eKLR.**

> ***The respondents acknowledge that indeed, the 5th Respondent is the only female director of the 2n respondent. IT is their argument however, that in practice, the Minister under the State Corporation Act, Cap 446 Laws of Kenya specifically the State Corporations Advisory Committee shall nominate two (2) other members as independent directors, in this case two (2) female members in fulfillment of the third gender rule. Therefore the Board shall be duly and competently constituted. The respondents also draw from the Mwongozo, the code of Governance for State Corporations, 2015 which gives discretion to the Cabinet Secretary to appoint two (2) more independent directors, to argue that the issue of non - fulfillment of one third gender rule does not arise***

15. It is not in dispute that a total of six persons – being the 3rd to 8th Respondents, were appointed through the impugned Gazette Notice, out of which five, including the Chairman, are male and only one (the 5th Respondent) is female. On this limb, I concur with the applicant's submissions that the number of males is thus clearly more than two-thirds, two-thirds of six, being four.

16. Indeed, the Court in **Marilyn Muthoni Kamuru & 2 Others vs. Attorney General & Another [2016] eKLR** emphasized that appointive positions do not require legislation to be in compliance with Article 27 of the Constitution. The appointment may not have mathematical precision, but at least needs to be balanced enough to create a semblance of rational fairness – which is sorely lacking in this instance

17. Can this imbalance be remedied through co-option? In my view even the mere idea that the women are not deserving of appointment on merit, and should only benefit from being co-opted is rather belittling of the women, and advances the historical concept of tokenism which women have had to contend with in this country. It does not in ***strictu sensu*** comply with the express provisions of **Articles 27 (3) and (8) of the Constitution** which provide as follows:

> **27. Equality and freedom from discrimination**
>
> **(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**
>
> **(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.**

18. It is argued that from the wording of the **Act and Clause 2(2) of the First Schedule** thereto, the Chairperson and members ought to be identified for appointment through an open competitive process, yet this was not done. Further, that it has clearly been admitted by the respondents in their various affidavits particularly the 3rd Respondent **(Asman Kamama)**, that he and **Julius Murgor (the 4th Respondent)** were appointed by virtue of being having been members of the now defunct **Rift Valley Water Works Development Agency** and not through any competitive recruitment process. That **Joan Jepkemboi Maiyo (the 5th Respondent and Douglas Kiplimo Tanui (the 6th respondent)** have deposed that they were appointed by virtue of having served at the **Lake Victoria Water Works Development Agency** and not through competitive recruitment.

19. The respondent's attempt to assuage the situation by arguing that the Cabinet Secretary can remedy this by appointing 2 other members to the Board so as to comply with the 'not more than two-thirds of either gender rule' is faulted as being deflated by **Section 6(1) of the State Corporations Act** which provides for composition of boards of State Corporations with a caveat that it only applies to bodies where there constituting/parent Act is silent on the said composition. I am alive to the provisions of section 6(1) of the same Act which provides that:

> **Unless the written law under which a state corporation is established or the articles of association of a state corporation otherwise require, the Minister may, in consultation with the Committee, appoint one or more duly qualified persons, not being members of the Board, to be alternate members, and any one alternate member may attend a meeting of a Board in place of a substantive member who is unable to attend; and every alternate member shall, when attending a meeting, be deemed for all purposes to be a member of the Board. [Act No. 11 of 1992, Sch.]**

However, this provision cannot be read in isolation, but must be considered alongside **section 66 (1) of the Water Act [2016]** which states that:

> **66. (l) Each water works development agency shall consist of-**

(a) a chairperson, who shall be appointed by the Cabinet Secretary from a county within the basin areal

(b) four other members who shall be appointed by the Cabinet Secretary from counties within the basin area; and

(c) the Chief Executive Officer

The First Schedule Clause 2 (1) provides as follows:

2. (1) In making an appointment to a board, the Tribunal or a committee, the person making the appointment shall have regard to-(a) Article l0 of the Constitution of Kenya on national values and principles of governance;(b) Article 232 of the Constitution of Kenya on values and principles of public service;

(c) the academic qualifications, professional experience, expertise, character and integrity of the potential candidates for appointment;

(d) gender, regional and ethnic diversity; and

(e) the degree to which water users, or water users of particular kinds, are represented on the board or committee at the time the appointment is made.

Qualification of members.

(2) The Chairperson and members shall be identified for appointment <u>through an open competitive process.</u> (underlined for emphasis)

20. Certainly a legislation cannot supercede the Constitution, which is the ***Grund Norm***, and I agree with the applicant that **Water Development Agencies under the Water Act, No. 43 of 2016** has an elaborate mechanism on appointments provided for under the First Schedule. The key element for the appointment is a **<u>competitive process</u>**, not a conveyor belt approach consisting of ushering former members of one agency into the other agency not through sympathetic tokenism under the guise of co-opting. No evidence has been presented to demonstrate that the process was competitive, or that any of the qualities alluded to in the **First Schedule** of the **Water Act** were taken into consideration. The appointees themselves do not allude to any competitive process, being content to draw from the history of their past involvements with other such similar agencies, as a justification for their appointment.

21. I hold and find that there was non-compliance with statutory provisions, specifically the Water Act No. 43 of 2016, and in this regard I am guided by the decision in **Republic v Secretary of the Firearms Licensing Board & 2 others Ex-parte: Senator Johnson Muthama [2018] eKLR** where the court relied on the case of **Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876** and stated that;

"Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

<u>Origins of appointees</u>:

22. The applicant pokes holes at the appointment of the 3rd respondent as chairperson of the board as he is not a resident of any of the basin counties and invites this court to take judicial notice of his being a resident of **Baringo County** having served in Parliament where he represented **Tiaty Constituency**, which is situate in **Baringo County** and under the 1963 Constitution under which he also served as Member of Parliament, residency in a constituency generally determined election to Parliament. As regards the contents of a letter (annexure AK (1b), written by a chief of **Sekeriot Location in Pokot County**, the applicant urges this court to take it with a pinch of salt as the same was prepared well after this matter was filed in court.

23. That in any event, the 6th Respondent has not controverted the exparte applicant's claim that he is a resident of Baringo County and currently serving as a board member of **Lake Victoria North Water Works Development Agency** having been appointed for a period of 3 years with effect from 7th February 2019 vide Gazette Notice no. 12 dated 08.02.2019. He is therefore not eligible for appointment under section 66(1) (b) of the Water Act. The 3rd applicant says he is a resident of many counties, at the same time. He insists that the 6th Respondent hails from Uasin Gishu County

24. What was the purpose of the Water Act 2016? What is the rational for requiring that membership of the boards be drawn from the basin areas? The purpose of the 2016Water Act is to align the water sector with the Constitution's primary objective of devolution, and it also recognizes that water related functions are a shared responsibility between the national government and the county government. The 2016 Water Act provides for handing over of national public works upon commissioning from Water Works Development Agencies (WWDA)to the county government, joint committee or authority of the county governments if the water works' assets exclusively rest geographically within their jurisdiction.

25. WWDAs are responsible for

- the development, maintenance and management of national public works;
- operation of the national public waterworks and provision of water services as a water service provider, until the responsibility for the operation and management of the waterworks is handed over to the county government, joint committee or CCA;
- provision of technical services and capacity building to county governments and water service providers WITHIN ITS REGION
- From this I can glean that the reason for requiring membership to come from the basin area is to have a local participation element fused with local lived realities and challenges, in a bid to achieve devolution. Would an individual who has divided attention spanning three counties be able to effectively represent such interest? I do not know, as the argument was not pursued beyond the initial fault-finding of being from Baringo county,

25. What about the fact that the 3rd respondent is already in another almost similar government agency in another basin area, and would be drawing two salaries? I notice there was a very loud silence on this limb, and the only inference I can logically draw is that there is truth in this statement, although it is not one of the criteria set out in the Water Act, in my view, it is information the appointing authority should keenly consider. I say so because in a Judicial Review matter, the court's concern is strictly with the decision making process, not with the merits of the decision itself and I would be delving into merits of the decision were I to make a pronouncement on that aspect within this application.

27. As to whether the 6th respondent hails from Baringo county or from Uasin Gishu remains moot, as neither party presented tangible evidence to support their assertions

FORM OVER SUBSTANCE

28. The applicant submits that the effect of want of compliance with section 4 of the Oaths and Statutory Declarations Act is fatal to the response in the Replying Affidavits by **Julius Murgor (the 4th Respondent) and Christopher Epokot Tekuom (the 7th Respondent)** which should be struck out and/or not relied on for want of compliance with **section 4 of the Oaths and Statutory Declarations Act.**

Section 4 provides that:

> **…a Commissioner of Oaths shall not exercise any of the powers given by the Act in any proceedings or matter in which he is the Advocate for ant of the parties to proceedings or concerned in the matter**.

29. It is submitted that **Christopher Mite – Advocate** has both drawn and commissioned the two impugned affidavits, and is also acting for both the 4th and 7th respondents contrary to express provisions of the Act. In support of this submission, the applicant refers to the case of ***R.E BAGLEY (1911) 1 KBD 317*** **where the court stated that;**

> ***"Now one of those affidavits was sworn before Mr. Goddard, who was the solicitor for the trustee of the deed, and they also have been interested in it. It is sufficient to say that he was solicitor for the trustee of the deed, as appears from the endorsement of the deed itself. That is the really important point in this case. Is an affidavit, or what purport to be an affidavit, sworn before the solicitor of the trustee of the deed a nullity and is its effect to render the deed void?"***

Having regard to the above the court held that;

> ***"Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding in which he is solicitor to any of the parties to the proceeding, or clerk to any such solicitor, or in which he is interested."***
>
> > ***"That is to say, although under the first part of the section he is generally empowered to administer an oath whether the oath be in the form of an affidavit or of a statutory declaration, yet there is a proviso that this general power may not be exercised by any person who is solicitor to any of the parties in any proceeding."***
> >
> > ***"If am right in the view that Goddard had no authority to administer this particular oath, it seems to me that there was no affidavit at all, and, that being so, the deed to the validity of which the filing of the debtor's affidavit is essential is no deed at all and is gone."***

30. *From the fore-going judicial precedents, I agree that Mr.* Mitei, being an advocate on record for the respondents, has breached the express provisions of section **4 of the Oaths and Statutory Declarations Act**. Does **Article 159 (2) (d)** offer any refuge? The article provides that:

> **In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**
>
> **(d) justice shall be administered without undue regard to procedural technicalities;**

I think the answer is readily available in the sentiments expressed by Onyango-Otieno (J) in ***Caltex Oil (Kenya) Limited Vs New Stadium Services Station Limited & Another [2002] eKLR*** that:

> ***"I do think that the courts have a duty to rightly interpret the laws and to ensure that they do not condone any breaches of the same laws under any pretenses whatsoever. I still stand by what I did say in the case of James Francis Kariuki &***

Another Vs. United Insurance Co. Ltd HCCC No. 1450 of 2000 that such an affidavit sworn in violation of section 4 (1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title."

31. Although from the fore-going, the fate of the 4th and 7th respondents' affidavits are sealed, as that procedural error is significant and cannot be cured by Article 159 (2) (d), I think the affidavit by the 3rd respondent, more than gives them a lifeline, so that their case is still considered on merit.

32. The Respondents on the other hand, argue that the applicant has no locus to bring the present Judicial Review Motion. The respondents submit that the Judicial Review Application is an abuse of Court Process, and the Applicant herein did not demonstrate candidly as to what prejudice, damage or loss he has suffered on account of the 3rd – 8th respondents' appointment to the Board of the 2nd respondent. Moreover, that the applicant cited only technicalities rather than the substantive aspect thus making his argument and his case hollow and untenable especially considering that the 1st respondent acted in good faith and within the laws of Kenya when she appointed 3rd - 8th respondents to the Board of the 2nd respondent.

33. The application is faulted as serving no useful or practical significance, considering that the concerned Cabinet Secretary did all that could be expected of her to fulfill public duty and that any such remedy is not necessary as it would cause administrative chaos and public inconvenience. That the application is muddled in form and fatally defective, and there is no mention of any prejudice suffered by the applicant. Actually what the applicant has referred to as technicalities are procedural administrative steps which are subject to judicial review.

34. The respondents also fault the format of the pleadings, arguing that the commencing pleading and statutory statement is fatally defective as there is no mention of any reliefs sought, rendering the Judicial Review proceedings improper and void, a reason for dismissing the application and avert administrative chaos and great detriment to the public.

35. On this limb, let me reproduce the prayers sought in the application:

> 1. An order of certiorari to remove into this court and quash the decision of the 1st Respondent in causing gazettment of the 3rd to 8th Respondents as Board Members of the 2nd Respondent made on the 10th March 2020 vide the Gazette Notice No. 2360 of 20th March 2020 and any subsequent decisions therefrom.
>
> 2. Orders of prohibition; prohibiting the 3rd to 8th Respondents from: assuming office, drawing salaries and/or allowances, expending any monies and/or making any decisions in relation to the 2nd Respondent.
>
> 3. The costs of be borne by the respondents.

I think that settles the matter and I need not delve beyond this.

36. The respondent argues that applications for Judicial Review ought to be made in- the name of the Republic rather than the name of the ex-parte applicant as was underscored in **Farmers Bus Service & others Vs Transport Licencing Appeal Tribunal [1959] EA 779,** which held that prerogative orders are issued in the name of the Crown and applications for such orders MUST be correctly instituted. Also cited is the case of **Jotham Mulati Welamodi Vs the Chairman Electoral Commission of Kenya [2002] 1 KLR 486,** where the application was struck out with costs to the respondent for failure to institute the matter properly by making the Judicial Review application in the name of the Republic. In that particular case, Ringera, J, as he then was, ruled thus:

> ***"Last, but not least, the objection that the application is made in the name of the wrong person is well merited. In* Farmers Bus Service and Others Vs Transport Licencing Appeal Tribunal [1959) E.A. 779, the East African Court of Appeal *held that prerogative orders are issued in the name of the Crown and applications for such orders must be correctly instituted. On Kenya's assumption of the Republican status on 12t December 1964, the place of the Crown in all legal proceedings was taken by the Republic. Accordingly, the orders of certiorari, mandamus or prohibition now issue in the name of the Republic, and application are made in the name of the Republic at the instance of the person affected by the action or omission in issue…. I find the Motion to be completely muddled in form and thus incompetent and also misconceived in substance."***

37. The respondent also cites the decision in **The Chairperson of the National Governing Council of the African Peer Review Mechanism Vs Hon. Prof Anyang Nyong & others, Misc. Application No. 1124/05**, the Court held that failure to bring a Judicial Review application in the name of the Republic was fatal to the Application. Further, that in the case of **James Kega Kangau & others Vs Electoral Commission of Kenya & another [2006] eKLR,** leave was granted to the applicants therein to file an application in the nature of Judicial Review for orders of certiorari and prohibition. That the applicants therein subsequently filed the substantive Notice of Motion, but a Preliminary Objection was raised on the ground that the substantive application therein was, just as is in the present case, defective. The respondents maintain that the orders therein sought, as in the present instance, being prerogative orders, ought to have been brought in the name of the Republic, but as it were, it had not been so instituted and therefore fell short of this critical legal requirement.

38. I have deliberately set out a number of decided cases referred to by the respondents on this issue whose net effect is that failure to bring a Judicial Review application in the name of the Republic was fatal to the Application. I acknowledge that that in the past the Courts ultimately reiterated that the practice which has acquired the force of law through judicial precedent is that prerogative orders are issued in the name of the Republic, and ruled that the application therein was fatally defective for failure to adhere to the said requirement and held that the Court had no option but to strike it out with costs to the respondent and interested parties. The common thread in all these matters is that they were decided before the 2010 Constitution of Kenya which now gives deference to substance over unnecessary procedural form as

was entertained by courts pre-2010

39. Article 22 and Article 159 (2) (d), literally accommodates any manner in which an aggrieved party may move the court in pursuit of enforcement of Bill of Rights

> **Article 22 (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—**
>
> **(a)……;**
>
> **(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.**

40. The applicant urges the Court to disregard that line of argument in light of the broadness of the issue of *locus* under the Constitution of Kenya, 2010. The applicant contends that he has locus to file this application drawing from **Article 22 of the Constitution of Kenya** on the Enforcement of Bill of Rights

> **(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**
>
> **(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—**
>
> > **(a) a person acting on behalf of another person who cannot act in their own name;**
> >
> > **(b) a person acting as a member of, or in the interest of, a group or class of persons;**
> >
> > **(c) a person acting in the public interest; or**
> >
> > **(d) an association acting in the interest of one or more of its members.**

41. I think I have already rendered myself on this aspect, but for clarity, I find that the applicant does have the locus as a resident of Uasin Gishu, which falls within the basin area, to pursue the matter in the interest of the public within that geographical setting

Conclusion

42. The actions of the Cabinet Secretary are described as ultra vires the powers conferred to her by the Water Act and are thus ripe for judicial review remedies. The respondents argue that the appointments are proper at law and in Accord with the Tenets of Natural Justice insisting that the Cabinet Secretary acted within the laws, and did not exceed her mandate nor breach any provisions of the law or the tenets of natural justice. In any case, the ex-parte applicant has not shown or demonstrated how the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

43. It is the respondent's contention that the law expressly requires the ex-parte applicant to demonstrate and prove that there was such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision and that the decision complained of is clearly a defiance of logic and acceptable moral standard. The same has not been demonstrated or shown at all in the present case, which makes one wonder why the ex-parte applicant expects this Court to grant any judicial review relief. That there was rigorous observance of the rules of natural justice and procedural fairness in the making of the decision that is the subject of complaint. It is contended that the Cabinet Secretary in this case acted in accord with the relevant provisions of the State Corporation Act and the Water Act, 2016 and the Constitution of Kenya when appointing the respondents. The concerned Cabinet Secretary, the 1s respondent herein acted within the Law. Section 65,66,67,68 and 69 of the Water Act, 2016 being the sections affecting the 2 respondent was adhered to together with the first scheduled of the Act.

44. I recognize that the doctrine of ultra vires has been well articulated in various legal precedents including by Mattive J in **Republic vs. Public Procurement Administrative Board & 2 Others [2019] eKLR** at paragraph 52: -

> **"…an administrative decision is flawed if it is illegal. A decision is illegal if it (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement public duty."**

45. Indeed, the task for the Courts in evaluating whether an administrative decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision maker. Section 66 of the Water Act and the express clauses in the First Schedule are the instruments that grant the Cabinet Secretary the power to appoint members to various Water Development Agencies. My finding is that the ex parte applicant has been able to demonstrate the illegality of the actions of the Cabinet Secretary and the decision complained of as clearly a defiance of logic and acceptable standards set out in the Constitution and statute, in that the appointments were not subjected to a competitive process, and defied the constitutional threshold on gender balance. I therefore grant the following orders:

An order of certiorari to remove into this court and quash the decision of the 1st Respondent in causing gazettement of the 3rd to 8th Respondents as Board Members of the 2nd Respondent made on the 10th March 2020 vide the Gazette Notice No. 2360 of 20th March 2020 and any subsequent decisions therefrom.

1. Orders of prohibition; prohibiting the 3rd to 8th Respondents from: assuming office, drawing salaries and/or allowances, expending any monies and/or making any decisions in relation to the 2nd Respondent.

2. The costs of the application shall be borne by the respondents.

Virtually Delivered and dated this 29th Day of June 2020

H.A. OMONDI

JUDGE