



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CONSTITUTIONAL PETITION NO. 16 OF 2019**

**MURANG'A COUNTY GOVERNMENT.....PETITIONER**

**VERSUS**

**MURANG'A SOUTH WATER & SANITATION CO. LTD.....1<sup>ST</sup> RESPONDENT**

**WATER SERVICES REGULATORY BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner is a county government established under **Article 176** of the **Constitution**.
2. The genesis of the dispute is the publication of *Gazette Notice No. 4805* on 23<sup>rd</sup> May 2019 by the Murang'a South Water & Sanitation Company Limited (hereafter *the 1<sup>st</sup> respondent*). The notice sought to hike *water tariffs* in the Sub-Counties of Murang'a South, Kigumo and Kandara.
3. The 1<sup>st</sup> respondent claimed that it had the "*authority from the county to provide water services*". It stated that it had applied to the Water Services Regulatory Board (hereafter the 2<sup>nd</sup> respondent or *Wasreb*) for the review in the "*interests of consumer protection*".
4. The case for the petitioner is that *water and sanitation services* are distinct functions *devolved fully* to the county government under **Article 186** of the **Constitution** as read with section 11(b) of part 2 of the *Fourth Schedule* to the **Constitution**.
5. To the petitioner, the 1<sup>st</sup> respondent is illegitimate and acting without its authority or consent. It is further accused of colluding with *Wasreb* to usurp the functions of the petitioner.
6. The petitioner prays for the following declarations and orders:
  - i. A declaration that provision of water and sanitation services is a devolved function exclusively within the province of the county government as decreed by Article 186 as read with the Fourth Schedule to the Constitution.
  - ii. A declaration that the 2<sup>nd</sup> respondent being an agent of the national government has no mandate whatsoever to supervise and/or licence anyone to provide water and sanitation services within Murang'a County.
  - iii. A declaration that the 1<sup>st</sup> respondent being a private company has no mandate or power to provide water and sanitation services within Murang'a county without the express authority and written consent of the county government.
  - iv. A declaration that the actions of the 1<sup>st</sup> respondent purporting to provide water and sanitation services to Murang'a residents without the express authority and consent of the county government contravenes the constitution and section 5 of Murang'a County Water and Sanitation Services Act and therefore illegal, null and void.
  - v. A declaration that sections 72, 74, 77, 85 & 86 of the Water Act to the extent that they purport to bestow upon the 2<sup>nd</sup> respondent with powers to supervise and licence water service providers and to approve water tariffs, are inconsistent with Article 186 as read with section 11(b) of part 2 of the Fourth Schedule to the Constitution and hence null and void.
  - vi. A declaration that the proposed tariff review by the respondents as commenced through *Gazette Notice No. 4805* without the authority of the county government is unconstitutional and illegal.
  - vii. An order of certiorari to remove to this court for purposes of quashing the actions of the respondents to commence the impugned

tariffs review process.

viii. An order of certiorari to remove to this court for purposes of quashing Gazette Notice No. 4805.

ix. A permanent injunction restraining the 1<sup>st</sup> respondent from purporting to provide water and sanitation services and/or reviewing water tariffs without the express consent and written authority of the county government or in any other manner whatsoever interfering with the county government's mandate to provide water and sanitation services within Murang'a County.

x. A permanent injunction restraining the 2<sup>nd</sup> respondent from purporting to exercise any power, supervisory or otherwise, over provision of water and sanitation services within Murang'a County.

xi. Costs

7. The grounds are set out at length in the petition dated 19<sup>th</sup> June 2019 and the deposition of even date by the County Secretary, P. K. Mukuria. There is also a further affidavit by the same deponent sworn on 23<sup>rd</sup> July 2019.

8. He averred that water and sanitation services entail sourcing and treatment of drinking water, piping and connection to consumers. Other services include treatment of waste water, setting of tariffs and billing. In his view, the respondents have no role in that cycle because they are neither organs of the county government nor possess its authority or consent.

9. He deposes that the proposed tariff hike is ill-timed because the petitioner has approved a significant reduction in water tariffs; and, proposed a waiver for poor households in line with sections 117 and 120 (3) (c) of the **County Governments Act**.

10. The deponent states that the petitioner issued *Gazette Notice No. 2104* of 2018 after extensive public participation. For instance, it abolished application fees for new consumers, monthly meter rent, separation fees and termination fees and reduced water tariffs for poor households. A copy is annexed marked *PKM 2*. The schedule of the published tariffs was published on the 2<sup>nd</sup> respondent's website (*PKM3*)

11. Learned counsel made reference to *Legal Notice Number 178 of 2013* in which the *Transitional Authority* approved transfer of water services or water companies to the counties. Reliance was also made on ***Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang'a & Others***, Murang'a, Jud. Rev. 5 of 2017 [2018] eKLR where *Waweru J* held that water services were a devolved function; and, that the *ex parte* applicants could only "continue to provide those services only until such time as the County Government was ready to take on that function".

12. He submitted that the proposed tariff hike is unconstitutional. It is also assailed for violating section 12 of the **Murang'a County Water and Sanitation Act 2018** which provides that water and sewerage charges or tariffs shall be prescribed by the county executive.

13. He contended that *Wasreb* is an entity of the national government. He argued that its attempt to regulate and approve water tariffs devolved to county governments is unconstitutional and void. He submitted that section 72 (1) (b) of the **Water Act 2016** which donates such power to the *Wasreb* is inconsistent with the **Constitution** and to that extent null and void.

14. The petition is opposed by the respondents *in toto*.

15. The 1<sup>st</sup> respondent filed a replying affidavit by *Mary Nyagah* filed on 9<sup>th</sup> July 2019. The affidavit was *struck out* for want of a date and a commission. The court however granted leave to the deponent to file a fresh affidavit. The new affidavit was sworn on 23<sup>rd</sup> July 2019.

16. The deponent is the Managing Director of the 1<sup>st</sup> respondent. Two legal objections were raised: Firstly, that the proper forum is the *Water Tribunal* formed under section 121 of the **Water Act**.

17. Secondly, that the dispute is *sub judice* in view of a number of pending suits before the High Court at Nairobi and Murang'a. They include ***C.O.G v Cabinet Secretary Ministry of Water and Sanitation & another*** Nairobi Constitutional Petition 523 of 2016; ***Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang'a & Others***, Murang'a Judicial Review 5 of 2017; ***Stephen Chege & 287 others v County Government of Murang'a & others***, Murang'a Constitutional Petition No 54 of 2018; and, ***Mercy Kimwe & 2 others v Governor Murang'a County & others*** Murang'a Constitutional Petition 55 of 2018.

18. At paragraphs 32 and 34 of the affidavit, the 1<sup>st</sup> respondent states that it has express or implied authority of the petitioner to supply water. It is averred that "although not a necessary requirement, it has the authority of the petitioner to supply water within three sub-counties including Murang'a South, Kigumo and Kandara areas".

19. The 1<sup>st</sup> respondent asserts that it is paradoxical to challenge its authority because the petitioner remains its biggest consumer of water in hospitals, health centres and milk cooling plants. Annexure *MN2* shows that the petitioner owed the 1<sup>st</sup> respondent Kshs 2,595,616 as at 25<sup>th</sup> April 2019 on consumption by dispensaries and Kshs 177,451 on milk plants as at 28<sup>th</sup> May 2019.

20. The deponent avers further that the petitioner has crippled the operations of the 1<sup>st</sup> respondent through "scorched earth strategies" that include: failure to finance the sector; lowering tariffs in a populist but ill-informed campaign; and, hiring plumbers to reconnect supply to debtors.

21. Reliance was further placed on the **Water Act 2016**. Learned counsel submitted that the Act allowed water companies formed under the repealed **Water Act 2002** to continue providing services. He argued that since the new Act stems from the **Constitution**, it is a heresy to claim that it is unconstitutional.
22. It is the 1<sup>st</sup> respondent's case that the assets of the water service providers have not been transferred to the petitioner because sections 153 and 154 of the **Water Act 2016** were stayed by *Legal Notice 59* of 4<sup>th</sup> April 2017. Reference was also made to *Gazette Notice 858 of 2017* issued under the **Intergovernmental Relations Act**. It was submitted further that under the **Water Act 2016**, the transitional period was three years. A letter from the cabinet secretary dated 19<sup>th</sup> October 2018 is annexed marked *MN6*.
23. According to the 1<sup>st</sup> respondent, water is a resource held by the national government in trust for the people. Reference was made to various international treaties and conventions touching on rights to water. For example, Article 24 of the **Convention on the Rights of the Child** and Article 14 (2) (h) of the **Convention on the Elimination of all Forms of Discrimination against Women** which require state parties to ensure supply of water to all segments of society without discrimination.
24. It was submitted that under the framework of the **Constitution**, **Water Act 2016**, *Water Regulations 2012* and *Corporate Governance Guidelines*, water and sanitation services are "a function within the concurrent jurisdiction" of both levels of government. In particular the 1<sup>st</sup> respondent argued that section 120 of the **County Governments Act** provides for tariffs and pricing of public services. The tariffs are set through stakeholder consultation. The 1<sup>st</sup> respondent contended that the impugned gazette notice was meant to achieve exactly that.
25. It submitted that it made a *Regular Tariff Adjustment* application to *Wasreb*. On 21<sup>st</sup> May 2019 the latter advised it to publish a notice and conduct public participation (annexture *MN7*). A public meeting was held on 21<sup>st</sup> June 2019 at a hotel in Kenol, Muranga. The 1<sup>st</sup> respondent avers that the meeting was attended by members of the county assembly and representatives of the Governor.
26. The invitation to the petitioner and the list of participants are attached (exhibits *MN9* and *10*). The resolutions from the meeting were forwarded to the 2<sup>nd</sup> respondent. It is the 1<sup>st</sup> respondent's case that the petition is a dishonest or belated attempt to challenge the tariff process.
27. The 1<sup>st</sup> respondent submitted that the relations between the two levels should be conducted on the basis of consultation and co-operation as decreed by **Article 6 (2) & (3)** of the **Constitution**.
28. It is the 1<sup>st</sup> respondent's case that the **Murang'a County Water and Sanitation Act** cannot override the **Water Act 2016**. Reliance was placed on **Articles 174, 189 and 191** of the **Constitution** as read together with section 30 (2) of the **County Governments Act**.
29. Lastly, the petition is attacked by both respondents for want of precision. Reliance was made on *Anarita Karimi Njeru v Republic* High Court, Nairobi Misc. Crim. Appl. 4 of 1979 [1979] eKLR.
30. The 2<sup>nd</sup> respondent relied on the replying affidavit of *Robert Gakubia*, the CEO of the Board, sworn on 22<sup>nd</sup> July 2019. Like the 1<sup>st</sup> respondent, he avers that the right forum is the *Water Tribunal*.
31. He equally takes the position that the suit is *sub judice* particularly in view of the existence of *Murang'a Misc. Appl. No. 11 of 2019* "which seeks interpretation of the same provisions" of the **Constitution**. On the latter point, counsel submitted that a party should plead their whole case. Reliance was placed on Rule 3 (8) of the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules 2013*.
32. The deponent avers that the 2<sup>nd</sup> respondent has the duty to evaluate and recommend tariffs to the water providers "in line with consumer standards". He avers that under section 22 (c) of the *Fourth Schedule* to the **Constitution**, *Wasreb* as an agent of the national government, is required to protect the use and development of water. The duties are outlined in detail at paragraph 10 of the deposition. A copy of the national water policy, service strategy and tariff guides are attached and marked *RG1*.
33. He avers that sections 72 (1) (b), 158 and 159 of the **Water Act 2016** grant *Wasreb* powers to set or vary water tariffs. In his view, the petitioner is mandated by section 117 of the **County Governments Act** to comply with the policy and standards set by the national government. He argues that the petitioner's attempt to reduce or waive tariffs is unreasonable and commercially unviable. The conduct also threatens sustainability of the resource and runs counter to section 120 of the **County Governments Act**.
34. The 2<sup>nd</sup> respondent has challenged the said tariffs in *Gazette Notice Number MR/4187300* issued by the petitioner in *Murang'a Misc. Appl. No. 11 of 2019*. The 2<sup>nd</sup> respondent's case is that **Murang'a County Water and Sanitation Act** violates the *Fourth Schedule* to the **Constitution** and sections 72, 158 and 159 of the **Water Act 2016**. According to the 2<sup>nd</sup> respondent, the county legislation must give way to the national legislation.
35. The 2<sup>nd</sup> respondent confirms that it received a proposal from the 1<sup>st</sup> respondent on a *Regular Tariff Adjustment* and advised it to carry out public participation. It gave clear guidelines on the exercise which were followed by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent contended that the 1<sup>st</sup> respondent complied fully with **Article 10** of the **Constitution**, the **Water Act 2016** and the **County Governments Act**.
36. In its rejoinder the petitioner disputed that water and sanitation services are a concurrent function between the national and county governments. Reliance was placed on section 22 (c) of the Part I of the *Fourth Schedule* to the **Constitution** which limits the national government's functions to "water protection, securing sufficient residual water, hydraulic engineering and the safety of dams".

37. The petitioner's view is that the present dispute cannot be resolved under **Article 191** of the **Constitution** which addresses conflict of laws in respect of matters falling within the concurrent jurisdiction of both levels of government.

38. The petitioner retorted that the *Water Tribunal* lacks jurisdiction because the present suit is not an appeal against a decision under the **Water Act** but a petition challenging the constitutionality of actions taken by the respondents. It was submitted that the dispute can only be adjudicated by the High Court.

39. The petitioner tried to distinguish the instant action from other pending suits referred to by the respondents. For example, it denied knowledge or being a party to **C.O.G v Cabinet Secretary Ministry of Water and Sanitation & another** [supra] or *Petition No. 14 of 2019*.

40. Regarding *Murang'a Judicial Review Misc. Appl. No. 11 of 2019*, the petitioner submitted that the action was instituted by the 2<sup>nd</sup> respondent challenging the county government's tariffs policy published in *Gazette Notice No. 2104 of 2018*. The petitioner contended that current suit challenges a different or unrelated *Gazette Notice No. 4805 of 2019*.

41. All the parties filed elaborate submissions and lists of authorities. Those by the petitioner were filed on 22<sup>nd</sup> August 2019. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their separate submissions on 30<sup>th</sup> August 2019. On the latter date, I heard further arguments.

42. From the pleadings, depositions and submissions the following broad issues arise for determination:

(i) *Whether the court has jurisdiction.*

(ii) *Whether the petition is sub judice.*

(iii) *Whether the 1<sup>st</sup> respondent is entitled to provide water and sanitation services within Murang'a County.*

(iv) *Whether the application for a Regular Tariff Adjustment by 1<sup>st</sup> respondent made to the 2<sup>nd</sup> respondent was lawful.*

(v) *Whether the 2<sup>nd</sup> respondent can superintend, license and regulate water service providers within Murang'a County.*

(vi) *Whether the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents are unconstitutional*

(vii) *Whether the petitioner is entitled to the reliefs sought.*

(viii) *Who should be condemned to costs?*

43. I will commence with the question of *jurisdiction*. In **Jamal Salim v Yusuf Abdulahi Abdi & another** Civil Appeal No. 103 of 2016 [2018] eKLR the Court of Appeal stated:

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another v Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;*

“1) .....

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

44. The centrality of jurisdiction was succinctly captured by Nyarangi, J.A. in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited** [1989] KLR 1:

*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...*

45. The key question here is whether the correct forum is the *Water Tribunal*. Section 121 (1) and (2) of the **Water Act 2016** clearly spells out the jurisdiction of the Tribunal as follows:

*(1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.*

*(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an*

alternative dispute resolution mechanism. [Underlining added]

46. Clearly the present proceedings are not in the nature of an *appeal* against the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under their authority. Secondly, the dispute does *not* stem from a *business contract*. Thirdly, the petitioner seeks interpretation of the **Constitution** and some reliefs that can only be granted by this Court. I accordingly find that the *Water Tribunal* is not seized of jurisdiction; and, that the dispute is properly before the court.

47. The respondents also contend that the court lacks jurisdiction because the dispute is between the *two levels* of government. True, our Constitution recognizes the national and county governments. However, the present dispute is not between those two: it is between the County Government of Murang'a and a private company (the 1<sup>st</sup> respondent) on the one hand and *Wasreb* on the other.

48. Whereas the *Wasreb* is an *agency* within the national government, it would be a strained construction to equate it with the *national government*. I thus find that the dispute falls outside the purview of **Article 189** of the **Constitution** or the mechanisms envisaged by the **Intergovernmental Relations Act**. It follows that this court is fully seized of jurisdiction.

49. The next issue is whether the petition is *sub-judice*. The doctrine is found in section 6 of the **Civil Procedure Act** which provides:

*No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

50. I agree with the respondents that a substantial number of the issues raised in this suit are *sub judice*. I find that prayers (i), (ii), (iii), (iv), (v) and (ix) which I set out *verbatim* at paragraph 6 of this judgment are largely the subject of at least two *prior* and pending suits: **Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang'a & Others**, Murang'a, Judicial Review 5 of 2017; and, **Mercy Kimwe & 2 others v Governor Murang'a County & others** Murang'a Constitutional Petition 55 of 2018.

51. I observed recently in the **Mercy Kimwe** case [supra] as follows:

*To the petitioners, the question for decision is whether the violent takeover of Murang'a Water and Sanitation Company (hereafter the 2<sup>nd</sup> respondent or Muwasco) by the governor (the 1<sup>st</sup> respondent) is lawful. To the 1<sup>st</sup> respondent, the issue is straightforward: Who between the governor of the county government of Murang'a and Muwasco has the power or right to provide water to the residents?*

52. In a considered ruling in that suit, I found that at paragraph 9 of the replying affidavit by the Water Services Regulatory Board conceded that “upon the onset of devolution in 2013, all water service providers were subsumed [in] to the new county governments as county entities to provide water services on their behalf”.

53. I then held as follows:

*But that is not to say that the governor or county government of Murang'a can wake up one morning and violently take over the management of the water service providers. The **Constitution** in the Fourth Schedule envisioned a negotiated and orderly transition. For example, some assets of Muwasco may belong to the national government. Accrued loans and other debts will need to be re-assigned or transferred. That position must be respected and remains a live issue in the main petition.*

*The existing water service providers on the other hand should let go at some point.*

54. In a separate interlocutory application in **Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang'a & Others**, [supra], Waweru J held that water services were a *devolved function*; and, that the *ex parte* applicants could only “continue to provide those services only until such time as the County Government was ready to take on that function.”

55. The two suits are still pending. I thus decline the invitation to determine prayers (i), (ii), (iii), (iv), (v) and (ix) sought by the petitioner in the present suit. For the same reason, I shall not delve too deep into the elaborate submissions by the parties on those six areas.

56. I am alive of another suit: *Murang'a Judicial Review Miscellaneous Application No. 11 of 2019*. That suit primarily challenges the county government's water tariffs policy contained in *Gazette Notice No. 2104 of 2018*. By its very nature, an action in judicial review would not afford the respondent the opportunity of a cross-petition.

57. **Article 191 (2)** and **(4)** of the Constitution clearly delineates the instances where *national* legislation prevails over *county* legislation; and, the circumstances under which *county* legislation can take precedence over *national* legislation. In light of the pending suit in *Murang'a Judicial Review Miscellaneous Application No. 11 of 2019* it would be prejudicial to make any further comment on the legality of the **Murang'a County Water and Sanitation Services Act 2018** or whether the **Water Act 2016** takes precedence over it.

58. Suffice to say that I find there is a new or distinct issue pleaded in this petition: Whether the respondents acted lawfully in commencing the *Regular Tariff Adjustment* or review vide *Gazette Notice No. 4805 of 23<sup>rd</sup> May 2019*. Intertwined with that question is whether the decision or notice should be *quashed*; or, whether a *permanent injunction* should issue. I find that those issues are fresh and not *sub judice*.

59. It is not contested that the 1<sup>st</sup> respondent is a *distinct* legal entity managed by a board of directors; and, that it performs critical functions

of supplying water and sanitation services in parts of Murang'a. Paragraphs 27 to 30 of the replying affidavit of Mary Nyagah are germane. She avers that the review of tariffs is a pragmatic step "to break even the operation costs and save the 1<sup>st</sup> respondent from...insolvency and further deny consumers their well-deserved right to water and sanitation services".

60. She contends that the petitioner is employing a scorched-earth policy by lowering tariffs; not paying the water bills for its dispensaries and other institutions running into millions of shillings; and, not contributing to the running operations of the company. It seems plain to me that the capacity of the 1<sup>st</sup> respondent to maintain a commercially viable model envisaged by sections 77 and 78 of the **Water Act 2016** is in jeopardy.

61. I am alive that section 120 of the **County Governments Act** provides for *tariffs and pricing* of public services. It is worth noting that the power to provide for tariffs or pricing is vested in a *county government* or any *agency* delivering services in the county. Such tariffs are meant to finance operations; ensure sustainability of the resource; maintain the assets; carry out repairs on aged infrastructure; and, extend services to new areas.

62. The 2<sup>nd</sup> respondent is a body corporate created by section 70 of the **Water Act 2016**. It implements the *national water policy*. Among other roles, it is mandated to protect the interests and champion the rights of water consumers; and, to determine and prescribe national standards for the provision of water services and asset development for water services providers.

63. The 2<sup>nd</sup> respondent admitted that it received a proposal from the 1<sup>st</sup> respondent on a *Regular Tariff Adjustment* and advised it to carry out public participation. It gave clear guidelines on the exercise which were followed by the 1<sup>st</sup> respondent.

64. The problem however is that the 1<sup>st</sup> respondent is a product of the repealed **Water Act 2002** whose framework was carried over to the **Water Act 2016**. Under sections 154 and 156 of the new Act the existing water services providers such as the 1<sup>st</sup> respondent were to continue to operate as the county water services providers or cross county water services providers for a *limited period*. By the respondent's admission, the period was to be specified in "the transfer plan published by the Cabinet Secretary".

65. I have closely studied annexure MN6 to the replying affidavit of Mary Nyagah sworn on 26<sup>th</sup> August 2019. It is a statement dated 19<sup>th</sup> October 2018 by the *Cabinet Secretary for Water and Sanitation* on the disputes between the County Government of Murang'a and the water services providers. At paragraphs 5 and 6, the Cabinet Secretary freely concedes that the transition period under the **Water Act 2016** was for *three years*. The Act received assent on 31<sup>st</sup> August 2016 and entered into force on 4<sup>th</sup> April 2017.

66. But the statute is subordinate to the **Constitution** by dint of **Article 2** of the supreme law. **Article 187 (1)** of the **Constitution** provides as follows-

*A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—*

*(a) the function or power would be more effectively performed or exercised by the receiving government; and*

*(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.*

67. **Article 187 (2)** then states-

*If a function or power is transferred from a government at one level to a government at the other level*

*(a) arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and*

*(b) constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule. [Emphasis added]*

68. I have then looked at the *Fourth Schedule* which deals with *distribution* of functions *between* the national and county governments. Part 2 of the schedule at section 11 grants county governments the following functions-

*County public works and services, including—*

*(a) storm water management systems in built-up areas; and*

*(b) water and sanitation services. [Emphasis added]*

69. In view of the express letter of the **Constitution**, it remains *doubtful* that the 2<sup>nd</sup> respondent can approve water and sewerage tariffs in the county *without* consultation or consent of the county government. Any other interpretation would defeat the objects and principles of *devolution* decreed by **Article 174** and **175** of the **Constitution**.

70. I readily find that the exercise of power by the 1<sup>st</sup> respondent in effecting the *Regular Tariff Adjustment* is on shaky legal and constitutional foundation. In the impugned gazette notice, the 1<sup>st</sup> respondent claimed that it had "the authority from the county government

to provide water services to the three sub-counties of Murang'a South, Kigumo and Kandara". No such authority was displayed. Instead, the 1<sup>st</sup> respondent relied on the participation of County Executive Committee Members or Members of the County Assembly at stakeholder meetings. To the 1<sup>st</sup> respondent, that was sufficient or implied authority.

71. I find that the tariff hike can only be done with the *express* authority or *consent* of the *county government*. I am afraid that the mere attendance of County Executive Committee Members or Members of the County Assembly at the stakeholders meeting of 21<sup>st</sup> June 2019 or the earlier tripartite meeting held on 14<sup>th</sup> December 2016 is *not* synonymous with *consent* of the county government.

72. The upshot is that the petition dated 19<sup>th</sup> June 2019 *partially* succeeds as follows:

a) A *declaration* is hereby issued that the *Regular Tariff Adjustment* by the 1<sup>st</sup> respondent vide *Kenya Gazette Notice No. 4805* of 23<sup>rd</sup> May 2019 without the consent of the petitioner is illegal null and void.

b) An order of *certiorari* is hereby issued to remove to this Court for purposes of quashing the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to commence the tariff review or adjustment.

c) An order of *certiorari* is hereby issued to remove to this Court for purposes of quashing *Kenya Gazette Notice No. 4805* dated 23<sup>rd</sup> May 2019.

d) A *permanent injunction* is granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from reviewing water tariffs without the express consent or authority of the petitioner.

73. Costs ordinarily follow the event and are at the discretion of the court. I am satisfied that the petition raised constitutional issues in the *public interest*. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 29<sup>th</sup> day of October 2019.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Kagwi holding brief for Mr. Ng'ang'a for the petitioner instructed by Mbugua Ngang'a & Company Advocates.

Mr. Ndegwa for the 1<sup>st</sup> respondent instructed by Sunkuli Ndegwa & Company Advocates LL.P.

Ms. Owuor holding brief for Mr. Munyua for the 2<sup>nd</sup> respondent instructed by Rachier & Amollo LL.P Advocates.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.