



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

JUDICIAL REVIEW CAUSE NO 5 OF 2017

1. KAHUTI WATER & SANITATION CO. LTD.
2. GATAMATHI WATER & SANITATION CO. LTD.
3. GATANGA COMPANY WATER SCHEME
4. MURANG'A WATER & SANITATION CO. LTD.
5. MURANG'A SOUTH WATER & SANITATION CO. LTD.....APPLICANTS

VERSUS

1. THE GOVERNOR, MURANG'A COUNTY.....RESPONDENTS
2. WATER SERVICES BOARD.....INTERESTED PARTY

RULING 'B'

1. The subject-matter of the judicial review proceedings herein is the Gazette Notice No. 9976 of 09/10/2017 that was issued by the 1st Respondent, the **Governor, Murang'a County**.

2. In a ruling dated 7th and delivered on 8th December 2017 concerning an application for stay of that gazette notice pending disposal of the judicial review, this court ruled as follows at paragraphs 18 to 23 -

“18. What appears indisputable *prima facie*, is that the provision of water and sanitation services is a devolved function of the county governments under the Constitution. The county governments are mandated by law to set up entities by which they would execute this function. I am satisfied, *prima facie*, that the Caretaker Committee set up by the 1st Respondent in the impugned Gazette notice is a precursor to the setting up of such entities, and appears to have been lawfully set up.

19. It is also apparent, *prima facie*, that the *Ex Parte* Applicants are engaged, and have been so engaged, in legitimate businesses of providing water and sanitation services to the residents of Murang'a County. But it should be obvious to anyone, again *prima facie*, that after promulgation of the new Constitution, the *Ex Parte* Applicants would have a limited time to continue doing so independently, because the provision of water and sanitation services was now a devolved function of the *County Government of Murang'a*, and that they would probably continue to provide those services only until such time as the County Government was ready to take on that function.

20. Having said that however, and after reading the replying affidavit filed by the 2nd Respondent, it appears that the process of the County Government taking on the devolved function of providing water and sanitation services, and on the other hand, the process of the *Ex Parte* Applicants disengaging therefrom, will not be a simple one, and will probably require dedicated, delicate and possibly long drawn-out negotiations between all the parties concerned as has apparently already been advised by the 2nd Respondent.

21. For now I am satisfied that it is necessary that the *Ex Parte* Applicants should be able to continue with their businesses of providing water and sanitation services pending disposal of the substantive motion, without them feeling threatened by the Gazette notice in issue.

22. I will therefore stay, pending disposal of the substantive motion, only that part of the Gazette notice at the end thereof that reads –

“Effective immediately the Boards of the various water companies within Murang’a County shall cease to exercise any control of water resources, water and sanitation services.”

23. That means that the Caretaker Committee appointed by the 1st Respondent in the Gazette notice should continue to exercise its mandate towards realizing the County Government’s devolved function in respect to water resources, water and sanitation services, pending disposal of the substantive motion.”

3. The 4th Applicant, **Murang’a Water & Sanitation Co. Ltd**, applied by **notice of motion dated 03/01/2018** seeking the following orders

“2. THAT pending the interparte hearing of this application and the substantive Notice of Motion application in this suit, the County Commissioner – Murang’a County be ordered to enforce this Honourable Court’s Order dated 15th December, 2017, in particular by ensuring the peaceful entry, stay and exit into and out of offices and other premises as well as normal business operations of the 4th Applicant’s Managing Director, Board of Directors, Management and staff pursuant to this Honourable Court’s order dated 15th December, 2017.

3. THAT in the alternative, and pending the interparte hearing of this Application and the substantive Notice of Motion Application filed in the suit herein, this Honourable Court be pleased to set out, the mandate of the 4th Applicant’s Board of Directors and Management in relation to that of the Caretaker Committee appointed by the 1st Respondent, in light of its Orders dated 15th December, 2017 and order the County Commissioner Murang’a to enforce compliance.

4. THAT in the alternative, pending the hearing of the substantive Notice of Motion Application in this suit, this Honourable Court be pleased to set out, the mandate of the 4th Applicant’s Board of Directors and Management in relation to that of the Caretaker Committee appointed by the 1st Respondent, in light of its Orders dated 15th December, 2017 and order the County Commissioner Murang’a to enforce compliance.

5. THAT the Honourable court be pleased to grant such further orders as it may deem fair and just to grant to achieve the objectives of its Order dated 15th December 2017.

6. THAT the costs of the application be in the cause”.

4. A joint “replying” affidavit sworn by **Frasiah Wanjiku Kamau, Washington Maina Mwangi, Joseph Gilbert Kibe and Julius Kamende Manyeki**, and filed by the 1st, 2nd, 3rd and 5th Applicants – respectively **Kahuti Water & Sanitation Co. Ltd., Gatamathi Water & Sanitation Co. Ltd., Gatanga Community Water Scheme and Murang’a South Water & Sanitation Co. Ltd.**, - is supportive of the 4th Applicant’s application. The Interested Party, **Tana Water Services Board**, filed a “replying” affidavit on 12/01/2018 which is sworn by one **Eng. Moses M. Naivasha**. The affidavit is also supportive of the application by the 4th Applicant.

5. The 1st Respondent opposed the application by a replying affidavit on 11/01/2018. It is sworn by the Governor, Murang’a County, one **Mwangi Wa Iria**. On 19/01/2018 the 1st Respondent filed a further replying affidavit, also sworn by Mwangi Wa Iria.

6. The parties agreed to dispose of the application by way of written submissions, with liberty to highlight. The 4th Applicant filed its submissions on 23/01/2018, the 1st Respondent on 19/01/2018 and the 2nd Respondent on 22/01/2018. No other party filed written submissions. I have read and considered those submissions.

7. On 24/01/2018 the parties who had filed written submissions highlighted them. Those who had not, made oral submissions. I have considered those written submissions.

8. All the parties are agreed that the notice of motion dated 03/01/2018 concerns the interpretation of the court’s ruling and order dated 7th and delivered on 8th December 2017. The 4th Applicant’s main complaint in the application is that certain actions by the 1st Respondent were contrary to the court’s intentions in issuing the aforesaid order, which actions were ostensibly done pursuant to the court order. The 4th Applicant has also stated in the application that the court’s order was “intended to bring clarity and order into the subject dispute, and not ignite the chaos being perpetuated by the 1st Respondent....”

9. A close reading of the affidavits sworn in support of the application show that the 4th Applicant is in essence complaining that the 1st Respondent is in breach and contempt of the order dated 7th and delivered on 8th December 2017. In that case what the 4th Applicant should have done is to bring contempt proceedings against the 1st Respondent, instead of pleading ambiguity in the order.

10. The first part of the order at paragraph 22 recognized the need for the Applicants (including the 4th Applicant) to continue their businesses of providing water and sanitation services pending disposal of the substantive judicial review motion without feeling threatened by the gazette notice in issue. The court therefore stayed that part of the Gazetted Notice that reads -

“Effective immediately the boards of the various water companies within Murang’a Country shall cease to exercise any control of water resources, water and sanitation services.”

There is not any ambiguity at all in that part of the order.

11. The second part of the order (at paragraph 23) echoed a state of affairs in the Constitution and the law that is not in dispute, and that is, that the provision of water and sanitation services is a devolved function of County Governments. The court therefore directed that -

“...the Caretaker Committee appointed by the 1st Respondent in the Gazette Notice should continue to exercise its mandate towards realizing the County Government’s devolved function in respect to water resources, water and sanitation services, pending disposal of the substantive motion.”

12. Again, there cannot be any ambiguity in this part of the order, taking into account the tenor and purport of the entire ruling. Needless to say, the County Government’s ability to realize its constitutional function of providing water and sanitation services may be gradual and incremental. But, again needless to say, the Applicants must in equal measure give way gradually to the County Government in this regard as they move towards eventually winding up their businesses. That is the logic and purport of the ruling and orders of 8th December 2017, and it should be clear to anyone.

13. I find no ambiguity in the orders, requiring interpretation or further clarity. There is no merit in the application by notice of motion dated 03/01/2018, which is hereby dismissed with costs to the 1st Respondent as against the 4th Applicant. It is so ordered.

DATED AT MURANG’A THIS 30TH DAY OF APRIL 2018

H P G WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 30TH DAY OF APRIL 2018