



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA KIAMBU

PETITION CASE NO. 41 OF 2018

IN THE MATTER OF ARTICLES 19, 20, 21(1), 22(1)(2), 23(1)(3)(A)(B)(C)(D), 43(1)(B)(D),46(1)(A)(B)(C),174(A)(C)(D)(F)(G), 176(2) & 184(C) & 3(1), OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF SECTIONS 77(1) (2) (3), 85(1), 86(1) & (2), 96(1), 97, 103(1) OF THE WATER ACT 2016

IN THE MATTER OF SECTION 41, 42(2) AND 50 OF THE COMPETITION ACT

IN THE MATTER OF SECTION 87 OF THE COUNTY GOVERNMENTS ACT

IN THE MATTER OF SECTION 5(1), 9(4) OF THE CONSUMER PROTECTION ACT

IN THE MATTER OF THE KIAMBU COUNTY WATER AND SANITATION ACT, 2015

IN THE MATTER OF THE KIAMBU COUNTY WATER AND SANITATION (AMENDMENT) ACT, 2018

KINUTHIA WAMWANGI.....1ST PETITIONER

THIKA DISTRICT BUSINESS ASSOCIATION.....2ND PETITIONER

JAMHURI OFAFA STAREHE WELFARE ASSOCIATION.....3RD PETITIONER

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

THE WATER SERVICES REGULATION BOARD.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THIKA WATER AND SEWERAGE

COMPANY LTD.....INTERESTED PARTY

RULING

1. This Notice of Motion filed on 9/7/2018, by the Interested Party is seeking the following orders:

“a) SPENT

b) That this Honourable Court do order the 1st Respondent to appoint the Alternate persons to the Interested Party’s Board to replace the Directors that the 1st Respondent removed from the Board on the 5th February, 2018.

c) That this Honourable Court be pleased in the Alternative to issue an order authorising the board of the Interested Party as currently constituted to transact all the Board business of the interested party pending the hearing and the determination of the petition herein.

2. The Application is premised on the grounds that the 1st Respondent has withdrawn three representatives from the board of the Interested Party thereby hindering its operations as only 3 directors remain.

3. **Eng. J. M. Wakimani** filed a supporting affidavit on his own behalf and on behalf of the other petitioners. He deposed that two directors of the interested party retired and one resigned during their last annual general meeting. That the 1st Respondent had subsequently withdrawn its 3 representatives to the board from February 2018 and has failed to replace the said representatives thereby grounding the operations of the Interested Party. That written requests to the 1st Respondent have not yielded a response. That the actions are a deliberate attempt to hinder the board from carrying out its mandate.

4. The 1st Respondent filed her notice of preliminary objection. Stating firstly, that the application is not supported by any evidence as the supporting affidavit is defective. Further, that the court lacks jurisdiction to interfere with internal management of a legal entity such as company incorporated under, the Companies Act. That the Applicant has not exhausted the internal and statutory mechanisms and in that regard and therefore the issues raised in the motion cannot be determined in the proceedings before the court. And that the motion does not cite any violations of any right or fundamental freedom and is evidently unrelated to the petition.

5. The application and preliminary objection were heard together. The Applicant submitted that the preliminary objection by the 1st respondent is misplaced as a preliminary objection should only raise pure points of law which arise clearly in the pleadings. It was submitted that application was supported by evidence and as such not defective. Counsel also submitted that the court has jurisdiction to deal with the issues raised in the application under Part XXXVIII and in particular Sections 1003 and 1004 of the Companies Act. The Interested Party argued that it had exhausted the internal and statutory process. Lastly, counsel submitted that the application is merited as it is intended to ensure that the operations of the Applicant are not grounded, pointing out that the 1st Respondent had started the process of dissolving the Interested Party through an unlawful process.

6. The 1st Respondent submitted that there is no evidence that recourse provided in the Companies Act has not been exhausted and therefore, the court lacks jurisdiction. Counsel submitted that the application does not plead the violation of any right or fundamental freedom under the Constitution. It was said to be incompetent as the prayers sought are not related to the Petition. Counsel submitted that a private company can be run by one director, thus lack of quorum and the alleged inability to execute functions does not arise. Counsel pointed out that other vacancies in the board and that despite the respective nominating bodies failing to act, the Applicant singled out the 1st Respondent in her application.

7. The court has considered the material canvassed in respect of the application by the Interested Party. The question of the jurisdiction of this court to entertain the application, and Petition as raised by the 1st Respondent is an important one. This question has now been agitated in full during the hearing of the Petition. Judgment is set to be delivered on 10/5/19. In my view, it is inappropriate for the court to determine that limb of the Preliminary Objection as raised against the instant application.

8. Jurisdiction is everything and the court is wary of making determination thereon at a preliminary stage, in the circumstances of this case. Secondly, until the question is determined, the court cannot rule on the merits of the application by the Interested Party. The court therefore deems it prudent to reserve its ruling in relation to the motion so as to render its decision therein within the judgment to be delivered on 10th May, 2019. Costs to abide the outcome of the Petition.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF NOVEMBER 2018

C. MEOLI

JUDGE

In the Presence of:

Miss Sagini for Interested Party

Mr. K. M. Mwangi for 1st Respondent

Court Clerk - Kevin