



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
MISCELLANEOUS CIVIL CASE NO 369 OF 2016

REPUBLIC.....APPLICANT

AND

WATER SERVICES REGULATORY BOARD.....1ST RESPONDENT

ATHI WATER SERVICES BOARD.....2ND RESPONDENT

WATER RESOURCES MANAGEMENT AUTHORITY.....3RD RESPONDENT

NAIROBI WATER & SEWERAGE COMPANY LIMITED...4TH RESPONDENT

AND

PAUL MWANGI MWANIKI.....1ST EX-PARTE APPLICANT

JOSEPH KIBURIO CHEGE.....2ND EX-PARTE APPLICANT

JOSEPH GATIBARU.....3RD EX-PARTE APPLICANT

(AS THE OFFICIALS OF PRIVATE EXHAUSTERS SERVICES PROVIDERS)

JUDGEMENT

Introduction

1. In their Motion brought on Notice dated 30th August, 2016, the ex parte applicants herein seek the following orders:

- a. An order of Certiorari to remove and quash the Notice issued by the 4th Respondent's and the gazette notice dated 2nd October 2015 by the 1st respondent increasing the annual Licence from Kshs 60,000/- to Kshs 180,000/- per year (Kshs 5,000/- to Kshs 15,000/- per month).
- b. An order prohibiting the 1st, 2nd and 4th Respondents from enforcing the notice and raising the license levy and/or harassing the applicants' members or denying them access to the waste disposal site at Njiru Discharge point.

c. **An order of mandamus compelling the Respondents to adhere to the provisions of the Water Act 2002 Section 107 (1) 2, (a) (b) (c) 3 (a) (b) (c) (d) (e) 4, 5 (a) (b) 6 and 7 by carrying out proper consultation with the stakeholders and granting the applicants a fair hearing in the matter on raising the levy.**

2. Cost of this application be paid by the Respondent's in any event.

Ex Parte Applicants' Case

2. According to the applicants, on the 2nd day of August 2016, the 4th respondent caused to be issued an undated notice to the effect that the levy charged by the 1st respondent for discharging waste at Njiru Discharge Point was to be increased from Kshs 60,000/- to Kshs 180,000/- a year with effect from 1st day of August, 2016.

3. Alarmed by the said notice, the Chairperson of Private Exhausters Services Providers Sacco (hereinafter referred to as "the Sacco") whose membership comprises the user of the discharge point at Njiru, called for a meeting to find out from the members whether any body knew about the issue but the response was in the negative.

4. Consequently the applicants instructed their Advocates on record to write a protest letter to the 4th respondent who was the author of the letter. Based on a subsequent between the said advocates and a representative of the 4th respondent on the issue, the applicants were informed that the 4th respondent had explained that the matter had been gazetted and also advertised for interested stakeholders meeting to air their views. It was averred that the 4th respondent vides their email dated 4th August 2016 forwarded the gazette notice, the newspaper advertisement and the list of the people who attended.

5. It was the applicants' case that upon perusal of the said documents, it is evidently clear that the advertisement in the newspaper was done on the 27th November 2014, the stakeholders meeting was held on the 10th December 2014 while the gazette notice inviting the stakeholders notifying them of the increment from Kshs 5,000/- to Kshs 15,000/- per month was done on the 2nd October 2015 almost a year after the stakeholders meeting.

6. Based on legal advice the applicants believed that the 1st respondent violated the procedural requirement as set out in section 107 of the **Water Act, 2002** (hereinafter referred to as "the Act") which section provides that the Applicants would be required to firstly gazette the increment, then proceed to announce the increment and call for a stakeholders meeting and also advertise through local radio station and thereafter gazette the increment once it has been passed and any person aggrieved given the right to appeal within thirty (30) days. It was therefore averred that the 1st respondent gravely acted to the prejudice of the applicants' members by failing to follow the laid down procedure.

7. To the applicants, the gazette notice is also contradictory as the stakeholders were required to present their views within thirty (30) days and at the same time the increment was to take effect within thirty (30) days from the date of gazette.

8. It was therefore the applicants' case that they were never granted a hearing by the 1st respondent before the increment of the levy which, to them, were arbitrary and economically burdensome to the Applicants' members.

9. The applicants accused the Respondents of not providing any services in respect of repair and maintenance of the discharge point at Njiru which had to be shouldered by the Applicant's members. To them, the Respondents have only been collecting annual subscription without providing any services hence not entitled to increase the monthly levy.

10. It was submitted on behalf of the applicants that the Respondents did not submit to the provisions of

section 107 of the **Water Act, 2002**. It was contended that the 2nd Respondent alleged that Respondents conducted three (3) public consultation meetings with the first being were conducted on 7th and 14th August 2014 at Laico Regency and Utalli respectively. However these two meetings did not meet the requirements of section 107(2) and the threshold of a public participation as envisaged in the Act since no notice was issued to the public informing them about the meeting. It was submitted that the said consultative meetings were conducted without notice to the Public as required hence did not meet the requirements of section 102(2) of the **Water Act**. The News Paper advertisement dated 19th November, 2014 was published before the Gazette Notice dated 21st November, 2014 calling for a consultative meeting on 10th December, 2014 to be held at Laico Regency. This was contrary to section 107(2) of the **Water Act** requiring a proposal to be gazetted, then published in the Daily News Paper and advertised in a Radio circulating with the area in which the proposal would be carried out.

11. With respect to the alleged advert in the radio, it was submitted that the Local Service Order number 0808304 for advertisement through Royal Media Services exhibited was made on 12th January, 2015. As per the order, the radio broadcast was for advertisement to be done 4 times a day for tariff review for Nairobi Water on 13th, 14th and 15th January, 2015. An invoice is dated 15th January, 2015 and payment voucher on 6th May, 2015. Further, it does not meet the 30 days notice envisaged in section 107(3) of the **Water Act**.

12. The applicants wondered why the public participation that was to be held on 10th December, 2014 was to be conducted after the public participation had been carried out.

13. To the applicants this justifies their position that the Respondents did not follow the requirements of section 107(2). It was the applicants' view that in advertising conflicting information in the gazette and the daily newspaper and proceeded to broadcast the notice for public participation long after the public participation had been conducted, the notices only aimed at confusing the public and stakeholders.

14. It was averred that on 10th December, 2014 a consultative meeting was advertised in the Gazette on 21st November, 2014, in the *Daily Nation* circulation on 19th November 2014 and 2nd December, 2014. According to the Applicants the News Paper advertisement dated 19th November, 2014 was published before the Gazette Notice dated 21st November, 2014. The Newspaper publication and Gazette Notice did indicate that the public consultation meeting would be held on 10th December, 2014 at Laico Regency starting. The 4th Respondent vide a newspaper publication stated the location of the Public Participation meeting would be Nyayo National Stadium at Basket ball Hall instead of Laico Regency as published in the Kenya Gazette. The respondent did not gazette the change of location of the consultative meeting as earlier indicated.

15. The applicants averred that pursuant to section 107(3)(d) of the **Water Act**, comments are to be submitted to the designated person not less than 30 days from the date of publication. The gazette notice for the advertisement is dated 21st November, 2014 whereas the public consultation meeting was conducted on 10th December, 2014, less than the 30 days' notice required.

16. It was further submitted that the 4th Respondent published a Gazette Notice dated 16th January, 2015 calling for comments. In the Notice, the closing dated for comments is 12th February, 2015 and this Notice gave the Public 27 days to submit their comments on the increment in tariffs and decision made. The Gazette Notice dated 2nd October, 2015 called upon the public to submit their comments by 30th December, 2015 which is 29 days hence not complying to section 107(3) (d) of the **Water Act**. It was therefore submitted that the respondents did not comply with provisions of section 107(3) of the **Water Act**.

17. The applicants further relied on section 107(4) of the **Water Act** and averred that the published notices did not state where copies of the proposed tariffs would be obtained. While citing section 107(6) of the **Water Act** it was stated that whereas the Respondents published in the Kenya Gazette the increased tariffs

on 2nd November, 2016, no publication was done in the daily newspaper of national circulation and by a broadcast in the radio within the area affected by the decision as required. It was the applicants' case that the respondents did not carry out conclusive public participation as stated in section 107 of the Water Act; yet public participation is a pre-condition for any increment on the levy charges as envisaged in the **Water Act** and reliance was placed on **Martin Nyaga Wambora vs. County Assembly of Embu and 36 Others (2015) eKLR** where **Okwengu, JA** held that infrastructures should be put in place to facilitate public participation. In the applicants' view, the importance of involving the stakeholders in public participation is to ensure that all their concerns are heard and taken into consideration. In this regard reliance was placed on **Doctors for life International vs. Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)**.

18. The Applicants maintained that the Respondents' increased the tariffs from Kshs. 5,000.00 to Kshs. 15,000.00 which was a 200% increase in tariff charges that has not been based on any economic logic but just an assumption of the respondents without consulting the stakeholders who are the applicants.

19. It was therefore the applicants' case that the Public Consultation process taken by the Respondents did not follow the laid down procedures as provided for in the **Water Act**, section 107. Further, the notices issued were confusing to the general public as they gave contradicting information on where public hearings would be held. In addition, various notices issued did not comply with requirements of section 107(3)(b) of the Act as the public was given lesser time to send their comments on the tariffs. Further, the respondents did not notify the stakeholder/ respondents the decision taken through the same media as required when inviting the public comments on the new tariffs. Lastly, no efforts have been demonstrated to show that the efforts had been taken to inform the public and call for its involvement into the public participation process.

20. It was therefore sought that the application be allowed.

1st Respondent's Case

21. The application was opposed by the 1st Respondent herein, the **Water Regulatory Board** (hereinafter referred to as "the Board").

22. According to the Board, it is mandated under the **Water Act 2002** to issue licenses for the provision of water services, to develop guidelines for the fixing of tariffs for the provision of water services and to determine fees, levies, premiums and other charges to be imposed for water services among other duties. It was averred that the 2nd Respondent, Athi Water Services Board (hereinafter referred to as "Athi Water") is licensed by the Board to provide water services in counties of Nairobi, Kiambu and Gatanga area of Muranga County and the 4th Respondent, Nairobi Water and Sewerage Company Limited (hereinafter referred to as "the Company") is Athi Water's appointed agent in Nairobi County.

23. According to the Board, on 15th October 2014, it, in line with its mandate, concluded a validation process of regular tariff adjustment application made by the Company and notified Athi Water of the requirements to be met when carrying out public consultation, as per section 107 of the Act. On 21st November 2014, Athi Water in compliance with the Board's requirements, issued a Public Consultation Notice vide Gazette Notice Number 8485 to all the stakeholders and the general public notifying them of the following: -

- a) That the Board proposes to review the tariff upwards to enable the Company attain full cost recovery, undertake investment and meet conditions for improving service delivery.
- b) That the proposed rising block tariff was to be adopted for all consumer categories except water kiosks.
- c) That the details of the tariffs could be obtained from Athi Water and the Company's websites or

the Company's offices.

d) That comments on service delivery and/or justified objections to the upward tariff review should be sent to the Athi Water via post or email addresses provided.

e) That the closing date for comments was on 20th December 2014.

f) That a public consultation meeting was to be held on 10th December 2014 at Laico Regency.

24. It was further averred that on 13th January 2015, the Board issued a 2nd Public Consultation Notice by way of advertisements through the *Daily Nation* newspaper inviting comments on water tariff adjustment and gave all the necessary details similar to the ones issued by Athi Water on 21st November 2014. On 13th 14th and 15th January 2015, the 1st Respondent issued a 3rd Public Consultation Notice by way of advertisements through Royal Media Services Limited, a local radio station, inviting comments on water tariff adjustment and with all the necessary details similar to the ones issued by Athi Water on 21st November 2014 which advert was aired 4 times daily for the 3 days the advert was running.

25. According to the Board, on 16th January 2015, the Company issued a 4th Public Consultation Notice vide Gazette Notice Number 252 inviting comments on water tariff adjustment with all the necessary details similar to the ones issued by Athi Water on 21st November 2014.

26. It was averred that after careful consideration of all comments received and review of the proposed tariff adjustments, the Board approved the regular tariff adjustment for water services for the financial year(s) 2015/16 to 2017/18 and on 2nd October 2015, the the Company in compliance with the Act, published the Board's approval notice vide Gazette Notice Number 7335 notify the general public the approved tariffs with a clear indication of the amount increased and/or charged under each category, the reasons for tariff increase and the performance evaluation. It was averred that the Notice dated 2nd October 2015 gave the existing and potential consumers 1 months notice to enable them make the necessary adjustments. It was the Board's case that the Notice issued by the Company was in accordance with the charges approved by the Board in October 2015 and the Ex-parte Applicants had been given sufficient time to make the necessary adjustments.

27. It was disclosed that the process of tariff review began in 2014 when the Ex-parte Applicant's SACCO had not been incorporated as the same was registered on 4th December 2015. However, the Ex-parte Applicants and the general public were still notified as members of the public through various forums and forms of media but they did not submit their comments and/or views.

28. In the Board's view, that delayed notice of increment serves as advantage to the Ex-parte Applicants since it gave them more time to make adjustments and/or necessary arrangements for payment of the new charges.

29. Based on legal counsel, the Board averred that it complied fully with the provisions of section 107 of the **Water Act 2002** and followed the laid down procedure.

30. To the Board, the Ex-parte Applicants were given a period of 3 months to present their views from 21st November to 12th February 2015 which is more than the statutory period required. The applicants having been given an opportunity to give comments which they wasted, the Board contended that they therefore they cannot claim that were never heard.

31. In the Board's view, the increment of the tariffs from Kshs 5,000/- to Kshs 15,000/ per month is economical, achievable, necessary and fair as the same was approved by the Board after the following considerations: -

a) That the average capacity of an exhauster vehicle doing business in Nairobi is 8m³ and each

makes an average of 4 trips per day 6 days in a week.

b) That an 8m³ capacity exhauster making an average of 4 trips in a day and working 6 days in week shall discharged (8x4x6x4) 768m³ volume of waste water into 4th Respondent's sewerage system in a month.

c) That the average bulk water tariff charged by the 4th Respondent is Kshs 53 per m³ and the sewerage tariff is charged at 75% of the water tariff, which translates to Kshs 39.75 per m³.

d) That if the cost of the volume of waste water discharged into the 4th Respondents sewer system by a private exhauster was directly charged to connected consumers, the potential revenue due to 4th Respondent would be (768x39.75) Kshs 30,528/= in a month.

e) That the 4th Respondents approved dumping rates for private exhausters are Kshs 5,000/= per discharge for all customers except for informal settlement which is Kshs 4,000/= and an average of Kshs 4,500/= was used to compute moderate charges for the private exhausters.

f) That a typical exhauster with capacity of 8m³ charging Kshs 4,500/= per trip, to discharge into 4th Respondents system, making an average of 4 trips per day and working 6 days in a week for the 4 weeks has the potential to generate revenue of (4,500x4x6x4) Kshs 432,000/= per month.

g) That based on the foregoing analysis, a typical private exhauster conservatively generates Kshs 432,000/= per month while the 4th Respondent is only authorized to charge a nominal fee of Kshs 15,000 per month irrespective of capacity of exhauster and number of loads of waste discharged to the 4th Respondent's sewer system.

32. It was the Board's case that the Respondents are as per law required to provide the necessary services at Njiru but additional sums are required to enable the Respondents discharge the following financial obligations: -

a) Pay Effluent discharge license fee to NEMA.

b) Transport the discharged sewage at Njiru point to Ruai for treatment before disposal.

c) Treat the waste water to the required effluent discharge standards as per EMCA Regulations 2006.

d) Cater for operation and Maintenance costs of the sewer facilities and the treatment plant.

e) Rehabilitation of the sewer system.

f) Generally improve service delivery.

33. It was the Board's case that the notice was issued in accordance with the law and the same should be upheld as the Respondents will not provide the much needed services to the consumers if the notice is quashed.

34. In their submissions the Board contended that the Ex-parte Applicants have made an application to this Honourable Court in their capacity as official members of Private Exhausters Services Providers Sacco, which was registered on 4th December 2015. However, the process of upward tariff adjustment began sometime in October 2014 and the same was successfully concluded in October 2015, three months before the SACCO was registered. It was further disclosed that the Ex-parte Applicants are seeking orders to quash Gazette Notice dated 2nd October 2015, which was published even before they were incorporated, it is out rightly unfair, unreasonable, unjustifiable and an abuse of the Court process since

the Ex-parte Applicants could not have been consulted as an organization, when they were not even registered.

35. According to the Board, section 107 of the **Water Act 2002** sets the threshold to be met by the Respondents when carrying out public participation. Based on the averment in its replying affidavit, the Board contended that it did more than what it was required to do under the law; it bended over backwards to ensure that the public fully participated in the upward tariff review and adjustment. To the Board, the notices indicated above complied with section 107 (3), (4), (5), (6) and (7) of the **Water Act 2002**.

36. In support of its position the Board cited **British America Tobacco Kenya Limited vs. Cabinet Secretary for the Ministry of Health and 2 Others - Petition Number 143 of 2015**, wherein the Court referred to the case of **Minister of Health vs. New Clicks South Africa (PTY) Ltd (2006) (2) SA 311**.

37. It was the Board's position that since section 107(2) does not limit public participation to attending a public consultation meeting and giving comments, the public consultation meeting held at Laico Regency was to compliment other avenues available to the public for participating, such as giving written comments by post or email. All the notices given for upward tariff review had a specific email address and postal address and that these avenues were used by members of the public.

38. It was submitted that 30 days' period was given for every notice issued and the periods we never limited, as a matter of fact the public which includes the Ex-parte Applicants were given a period of 3 months to present their views, that is from 21st November 2014 to 12th February 2015 which is more than the statutory period required. The numerous notices issued were meant to notify the public of the upward tariff adjustments and not to confuse as alleged by the Ex-parte Applicants. Since the law aids the vigilant, the Ex-parte Applicants were not vigilant and they cannot be aided by the law.

39. It was reiterated that the increment of the tariffs from Kshs 5,000/- to Kshs 15,000/ per month is economical, achievable, necessary and fair.

40. It was therefore the Board's contention that the Ex-parte Applicants Application dated 30th August 2016 lacks merit and it urged this Court to dismiss the same with costs to the 1st Respondent.

2nd Respondent's Case

41. The application was similarly opposed by the 2nd Respondent, Athi Water Services Board (hereinafter referred to as "Athi Water").

42. According to Athi Water, it is a parastatal established under section 51 of the **Water Act, 2002** as one of the eight water boards under the ministry of water and irrigation created to bring about efficiency, economy and sustainability in the provision of water and sewerage services in Kenya. It ensures the provision of quality and affordable water and sewerage services its area of jurisdiction through its appointed water services providers (WSPs) which include **Nairobi Water and Sewerage Company Ltd**.

43. It was averred that Athi Water applied through the Board, which is the sector regulator, for a regular tariff adjustment for its agent the 4th Respondent for the period 2014-2015 to 2017-2018 to enable the Company attain full cost recovery, undertake investment and meet conditions for improving service delivery. Before the said application was made, in compliance with the requirements of section 107 of the **Water Act 2002**, Athi Water advertised for the stakeholders' workshop three times in the *Daily Nation* Newspapers on the 19th and 27th November 2014 and on 2nd December 2014 as well as on its website, the Kenya Gazette and on *Radio Citizen* (this being on 26th November, 2014). Additionally Athi Water made a concerted effort to mobilize the public and, in addition to the print media, it made invitation cards that were hand delivered and emailed to key stake holders and the said notices were also placed in various churches, mosques and strategically placed at public halls.

44. It was disclosed that there was public consultation meeting on the 10th December, 2014 before the

tariff adjustment was implemented and that the public consultation meeting was held on the 10th of December 2014 in addition to an earlier meeting that was held at Laico Regency and Utalii College on the 7th and the 14th August, 2014 at the basketball Hall of Nyayo Stadium Nairobi and which was attended by more than 150 people and which consultation meeting was officially opened by the Company's Managing Director and Athi Water's CEO. Thereafter, the report was forwarded to the Chief Executive Officer of the Board forwarding the deliberations that took place at the said stakeholders workshop, list of participants, copies of advertisement in the newspaper and CD of the radio advert with a view of requesting the Board to facilitate the next step towards the tariff review process.

45. It was averred that after the public consultation report was forwarded, the Board called for a consultative meeting between the County Government of Nairobi, Athi Water and the Company on the implementation of the tariff, which was held on held on 25th August 2015 where the same was discussed. Thereafter the Board in compliance with section 73(5) of the **Water Act 2002** approved the regular tariff increase for water and sewerage tariffs for Nairobi City and Sewerage Company Limited (NCWSC) the 4th Respondent herein and after the said approval the Athi Water in compliance with **Water Act** published a Gazette Notice notifying all existing and potential water and sewerage customers that the current tariffs have been adjusted upwards with effect from 1st November, 2015.

46. It was averred that in particular Athi Water complied with the requirements of the **Water Act 2002** as the public was notified and invited to give their comments on the tariff review, the consultation were then forwarded to the Water Regulatory Board, which then approved the new rates before they were gazetted. According to Athi Water, the Applicant's purported Notice of Motion is ostensibly premised on the magnanimity ground that no public consultations were held prior to the gazettement of the reviewed tariffs the said application is only misconceived and filed out of malice and in bad faith as Athi Water complied with the Water Act 2002.

47. It was therefore Athi Water's position that the Applicants were given a reasonable opportunity to attend and air their views together with other Kenyans who attended the public consultation meetings which they failed to attend and cannot now come and reverse the whole process and the Applicants should also appreciate that it cannot be expected that a personal hearing will be given to every individual who claims to be affected by regulations that are being made.

48. The Court was therefore urged to safeguard its integrity and the due process, by dismissing the Application herein with costs to the Respondents. Athi Water 2nd Respondent that section 107(1) of the **Water Act, 2002** imposes a requirement, on a person making any application or proposing to take any action under the Act to undertake public consultation in relation to that application or action proposed.

49. The 2nd Respondent submitted that Regulation 36 of the **Water (Services Regulatory) Rules, 2012** provides that a licensee shall at least thirty days before applying for any proposed tariffs, give notice in the *Gazette* and in such other manner as it considers necessary specifying the following:-

- a) The name and particulars of the licensee or class of agents providing the service to which the tariffs relate;
- b) The reasons for the proposed review of the tariffs and the proposed new tariffs;
- c) The time within which representation or objections may be made to the proposed new tariffs and the date, time duration and place of the tariff hearing.

50. Similarly, section 107(2) and (4) of the **Water Act, 2002** provides that *that* person shall publish a notice in the *Gazette*, in at least one national newspaper circulating in the locality to which the application or proposed action relates; and in at least one Kenyan radio station broadcasting in that locality and shall make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the application or proposed action which are in the possession of the person.

51. While reiterating the contents of the replying affidavit, the 2nd Respondent however submitted that the statutory requirement of Public Consultation was complied with fully, substantially and procedurally, before the publication of the Nairobi City Water and Sewerage Company Ltd Approved Water Tariff Structure for the Period 2015/16 to 2017/18.

52. According to the 2nd Respondent these notifications to the public of Public Consultations and invitations to the public to submit comments and or objections on the proposed upwards tariff increase did not contain conflicting or confusing information as alleged by the Ex-Parte Applicants. In particular, there is no legal requirement that the comments must be received before the public hearing can be conducted. Instead, the two processes are separate but complimentary.

53. To The 2nd Respondent, section 107(5) of the **Water Act, 2002** is clear with respect to public hearing on the one hand and reception of comments on the other hand.

54. The 2nd Respondent contended that the invitations to the public to submit their comments or objections even after public hearing was not only lawful but perfectly in order. However, it was submitted that the above Public Consultations in fact followed other consultations between the 4th Respondent and other stakeholders held at Laico Hotel and Utalii College on 7th and 14th August 2014 respectively. It was its view that it approved the regular tariff adjustment for water services for the financial years 2015/2016 to 2017/2018 on 23rd July 2015 after careful consideration of all comments received and review of the proposed tariff adjustments. After approval of the tariff increase, the 1st Respondent further consulted with the 2nd and 4th Respondents and the Nairobi City County to ensure that tariff conditions were met before the new tariffs were published in the Gazette.

55. It was submitted that the Nairobi City Water and Sewerage Company Ltd Approved Water Tariff Structure for the Period 2015/16 to 2017/18 was published in Kenya Gazette Notice Number 7335 on 2nd October 2015 giving all existing and potential customers of the 4th Respondent a 30 days notice that the structure of approved tariff for water services for the said financial year shall be as contained on the Gazette notice. In support of its submissions the 2nd Respondent relied on **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR.**

56. The 2nd Respondent asserted that the above holding in support of its submission that a reasonable opportunity was offered to members of the public and the Ex-Parte Applicants and all interested parties to know about the proposed upwards tariff review and to have an adequate say in the approval and gazettment of the Nairobi City Water and Sewerage Company Ltd Approved Water Tariff Structure for the Period 2015/16 to 2017/18. According to the 2nd Respondent, it is not true that the Ex-Parte Applicants were denied a right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair. To the contrary, Far the failure by the Ex-Parte Applicants to attend public hearing or submit their comments or objections to the proposed Water Tariff Structure for the Period 2015/16 to 2017/18, before it publication, was of their own making and should not be the basis of quashing a decision that was arrived at in accordance with the law after extensive public consultation and participation.

57. As regards the contention that the said Approved Water Tariff Structure for the Period 2015/16 to 2017/18 is not based on any commercial, economic or social consideration and is uneconomical, the 2nd Respondent averred that the 4th Respondent undertook a comprehensive socio-economic study whose findings it shared with stakeholders and members of the public gathered on 10th December 2014 at the Nyayo National Stadium Basketball Court. Secondly as was held by this Honourable Court in **Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR** at para 54, judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process itself.

58. It was reiterated that the Gazette Notice which the Ex-Parte Applicants have challenged was

published on **2nd October 2015** while the Private Exhausters Services Providers Sacco came into being on **4th December, 2015**. The 2nd Respondent submitted that neither the Private Exhausters Services Providers Sacco nor their officials as their officials could have therefore participated in public hearing and consultations leading to the approval and gazettelement of the Water Tariff Structure since the Sacco did not exist at the time, legally or otherwise.

59. To the extent therefore this this judicial review application has been filed by the self-described officials of an entity that was non-existent at all times material to the this judicial review application and on whom rights could not have accrued in favour, the same ought to be dismissed with costs.

3rd Respondent's Case

60. The 3rd Respondent, Water Resource Management Authority (hereinafter referred to as "the Authority") also opposed the application based on the following grounds of opposition:

- 1) The suit herein discloses no reasonable cause of action against the 3rd Respondent herein.**
- 2) The Application seeks no orders against the 3rd Respondent.**
- 3) The 3rd Respondent has no statutory mandate over the matters in dispute between the Parties herein.**
- 4) The 3rd Respondent is a stranger to the dispute and played no part in adjusting the tariffs in issue.**
- 5) The 3rd Respondent is not a necessary party to this suit and its inclusion in the suit will only prejudice or delay the fair trial of the suit.**
- 6) The Ex-Parte Applicants will not be prejudiced in any way if the Honourable Court were to remove/strike out the 3rd Respondent from the proceedings as no orders are sought against it.**
- 7) It is in both the public interest and the interest of justice that the 3rd Respondent be struck out/ removed from the proceedings.**

61. According to the Authority's submissions, it is a statutory body established by section 7 of the **Water Act** No. 8 of 2002 and its powers and functions are provided for in section 8 of the **Water Act** and include:-

- a) To develop principles, guidelines and procedures for the allocation of water resources;
- b) To monitor, and from time to time re-assess, the national water resources management strategy;
- c) To receive and determine applications for permits for water use and to monitor and enforce conditions attached to permits for water use;
- d) To regulate and protect water resources quality from adverse impacts and to manage and protect water catchments;
- e) To liaise with other bodies for the better regulation and management of water resources;

62. From the above, it was the 3rd Respondent's that powers and functions are concerned with water resources management. However when it comes to water supply and sewerage services regulation, the statutory body in charge is the 1st Respondent established by Section 46 of the **Water Act** with powers

and functions, among others, of issuing of licences for the provision of water services, developing guidelines for the fixing of tariffs for the provision of water services and developing guidelines on regulations for the provision of water services to be adopted by licensees.

63. The 3rd Respondent therefore submitted that it has no statutory mandate in the development of guidelines for the fixing of tariffs for the provision of water services or in the approval of tariffs for provision of water services. Accordingly, it has not made any decision which the Ex-Parte Applicants have challenged. It was its case that it has not contemplated, and neither have the Ex-Parte Applicants alleged that it is contemplating making a decision in any respect that is in excess of its jurisdiction or that is a departure from the rules of natural justice.

64. The 3rd Respondent's was therefore that judicial review orders of Certiorari and Prohibition cannot issue against it. In so submitting, the 3rd Respondent places reliance on the case of **Republic vs. Chief Magistrate Milimani Commercial Court & 2 Others Ex-Parte Violet Ndanu Mutinda & 5 Others [2014] eKLR** where this Honourable Court held that Prohibition can only prevent the making of a contemplated decision.

65. It was similarly its case that in the absence of a specific obligation which the 3rd Respondent ought to be compelled to perform, an order of mandamus cannot issue against it.

66. Consequently, the 3rd Respondent's position was that this judicial review application discloses no reasonable cause of action against it and relied on **G.B.M Kariuki V Nation Media Group Limited & 3 Others[2012] eKLR** and **Mary Wangai Gachihi & Another vs. Principal Magistrate, Mukuruweini Courts & 2 Others [2016] eKLR** where Mativo, J stated as follows:

"I find it fit at this early stage to seek guidance in the words of Devlin J. in Amon vs Raphael Tuck & Sons Ltd where the learned judge put it succinctly as follows:-

"What makes a person a necessary party" It is not of course, merely he has relevant evidence to give on some of the questions involved; that would only make a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately....the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to make a person a party to an action so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

Nambuye J (as she then was) in Kingori vs Chege & 3 others put it clearly when she held that "necessary parties who ought to be joined in proceedings are the parties necessary to the constitution of the suit without whom no decree at all can be passed...The presence of opposing parties is one of the essential requirements of any civil suit. But all parties are not necessary for the suit to be adjudicated upon. Therefore, distinction should be made between necessary and non-necessary parties. 'Necessary Parties' are those parties from whom relief is claimed. 'Non-necessary Parties' are those parties who may be party to the suit, but from whom no relief has been claimed. The presence of necessary parties is obviously required for the court to adjudicate and pass an effective and complete decree granting relief to the plaintiff. However, the same does not hold good for non-necessary parties. In the absence of necessary parties, the court may dismiss the suit, as it shall not be able to pass an effective decree. But a suit can never be dismissed due to absence of non necessary-party. As Nambuye J (as she then was) held in the above cited case, 'Necessary Parties' are those parties in the absence of whom no effective decree can be passed by the court.

In the Indian case of Benares Bank Ltd. v. Bhagwandas the court laid down the two tests for determining the questions whether a particular party is necessary party to the proceedings.

The said tests were reiterated in the case of Deputy Commissioner of Hardoi v. Rama Krishna. The said tests are:-

- i) There has to be a right of relief against such a party in respect of the matters involved in the suit.
- ii) The court must not be in a position to pass an effective decree in the absence of such a party.

Generally, a party from whom no relief is sought is not a necessary party. Thus, the nature of relief claimed is important in deciding who is a necessary party. Necessary parties are essentially those parties from whom the plaintiff has claimed relief ...”

67. The 3rd Respondent submitted that its participation in these proceedings is not necessary to the constitution of these judicial review proceedings. No relief has been sought against the 3rd Respondent and neither would the Honourable court be handicapped in passing an effective decree in the absence of the 3rd Respondent.

68. For the foregoing reasons, the 3rd Respondent submitted that its name should be struck out of these proceedings with costs.

Determinations

69. I have considered the application, the affidavits, the submissions and authorities cited herein.

70. The first issue for determination is the applicants’ *locus* to institute these proceedings. Article 22(1) and (2) of the Constitution provides that:

(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.

71. One of the rights under the Bill of Rights is the right to fair administrative action decreed in Article 47 of the Constitution which provides as hereunder:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

72. In my view the applicant’s case is hinged on the above constitutional provision. Similarly, Article 258 of the Constitution which provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(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.

73. Therefore if the Respondents were by their actions threatening or violating the Constitution, the applicants were properly entitled and in fact pursuant to Article 3(1) of the Constitution obliged to respect, uphold and defend the Constitution.

74. The issue of *locus* was even prior to the promulgation of the Constitution of Kenya, 2010 dealt with *in extenso* by Nyamu, J (as he then was) in Mureithi & 2 Others (for Mbariya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others...Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law...The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue...Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of *locus standi* is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”...Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the

benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest...In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”

75. Similarly, in Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010, the Court expressed itself as follows:

“over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy... In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched

fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi*. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

76. The Court continued:

“In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

77. In Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the *locus standi* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.”

78. In this case it is contended that the process of tariff review began in 2014 when the Ex-parte Applicant’s SACCO had not been incorporated as the same was registered on 4th December 2015, after the process had been successfully concluded in October 2015, three months before the SACCO was registered. It was therefore contended that since the Ex-parte Applicants are seeking orders to quash Gazette Notice dated 2nd October 2015, which was published even before they were incorporated, it is

outrightly unfair, unreasonable, unjustifiable and an abuse of the Court process since the Ex-parte Applicants could not have been consulted as an organization, when they were not even registered.

79. In my view if the applicants' contention was purely that they were never consulted as a registered entity, the Respondent's contentions would be valid. However, it is not in doubt that the entity is comprised of individual members who no doubt existed even if they were not incorporated. To me the mere fact of incorporation does not bar individuals who claim that their rights had been violated from coming to Court in the name of the incorporated entity even though by the time of the alleged violation, the entity had not been registered as long as, as this case indicates, the applicants are before the Court in their representative capacities. Apart from that, nothing bars a person from coming to Court to complain about the violation or threat thereof of the Constitution even if such violation occurred before he or it was conceived.

80. It therefore my view that the applicants are properly before this Court.

81. In my view the determination of this application revolves around the issue as to whether in arriving at their decision, the Respondents complied with section 107 of the *Water Act, No. 8 of 2002*. The said section provides as hereunder:

(1) A requirement imposed by or under this Act for a person (in this Section called the "designated person") to undertake public consultation in relation to any application made, or action proposed to be taken, under this Act shall be construed as a requirement to ensure that this Section is complied with in relation to that application or action.

(2) The designated person shall publish a notice, in relation to the application or proposed action— (a) in the Gazette; (b) in at least one national newspaper circulating in the locality to which the application or proposed action relates; and (c) in at least one Kenyan radio station broadcasting in that locality.

(3) The notice shall in each case— (a) set out a summary of the application or proposed action; (b) state the premises at which the details of the application or proposed action may be inspected; (c) invite written comments on or objections to the application or proposed action; (d) specify the person or body to which any such comments are to be submitted; and (e) specify a date by which any such comments are required be received, not being a date earlier than 30 days after publication of the notice.

(4) The designated person shall make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the application or proposed action which are in the possession of the designated person.

(5) The designated person shall consider— (a) any written comments received on or before the date specified under subsection (3)(e); and (b) any comments, whether in writing or not, received at any public consultation meeting held in relation to the application or proposed action at which the designated person was represented, or pursuant to any other invitation to comment.

(6) The designated person shall publish, through the same media as were employed pursuant to subsection (2), notice of the fact that a copy of the decision in writing of the designated person in relation to the application or proposed action, and of the reasons therefore, is available for public inspection at the same premises as were notified under subsection (3) (b).

(7) Where rules made under this Act so require, the designated person shall cause a public consultation meeting to be held in relation to the application or proposed action.

82. It was contended that the 2nd Respondent alleged that Respondents conducted three (3) public consultation meetings with the first being were conducted on 7th and 14th August 2014 at Laico Regency and Utalli respectively. However these two meetings did not meet the requirements of section 107(2) and

the threshold of a public participation as envisaged in the Act since no notice was issued to the public informing them about the meeting. It was submitted that the said consultative meetings were conducted without notice to the Public as required hence did not meet the requirements of section 102(2) of the **Water Act**. The News Paper advertisement dated 19th November, 2014 was published before the Gazette Notice dated 21st November, 2014 calling for a consultative meeting on 10th December, 2014 to be held at Laico Regency. This was contrary to section 107(2) of the **Water Act** requiring a proposal to be gazetted, then published in the Daily News Paper and advertised in a Radio circulating with the area in which the proposal would be carried out.

83. With respect to the alleged advert in the radio, it was submitted that the Local Service Order number 0808304 for advertisement through Royal Media Services exhibited was made on 12th January, 2015. As per the order, the radio broadcast was for advertisement to be done 4 times a day for tariff review for Nairobi Water on 13th, 14th and 15th January, 2015. An invoice is dated 15th January, 2015 and payment voucher on 6th May, 2015. Further, it does not meet the 30 days' notice envisaged in section 107(3) of the **Water Act**.

84. From the copy of the Gazette Notice dated 21st November, 2014, the public was given till 20th December, 2014 to submit their written comments. As far as the written comments were concerned it is clear that the Gazette Notice complied with section 102 (2)(a) and (3)(e) of the **Water Act**. With respect to the public consultation meeting, it is clear that the same was to take place on 10th December, 2014 at Laico Regency. Again in my view there was nothing wrong with that since the provisions do not provide for the period within which the public consultation meeting is to be conducted as opposed to submission of written comments. As regards the defect in the subsequent Gazette Notices, it is not contended that the original Gazette Notice had been superseded by those subsequent ones and hence the original Gazette Notice was no longer relevant. In my view, having issued a valid Gazette Notice any further extension of the period did not require Gazette notifications as long as the original Gazette Notice was valid.

85. A similar newspaper advert appeared in the Daily Nation Newspaper of 19th November, 2014 in which comments were invited with the last day for such submission being 20th December, 2014 with public consultation meeting being undertaken on 10th December, 2014. To the applicant, pursuant to section 107(3)(d) of the **Water Act**, comments are to be submitted to the designated person not less than 30 days from the date of publication hence the gazette notice for the advertisement dated 21st November, 2014 for the public consultation meeting to be conducted on 10th December, 2014, was less than the 30 days' notice required. In my view the 30 days period clearly refers to the notices in the Gazette, newspaper circulating in the locality and the Kenyan radio station broadcasting in that locality. What the notices are to contain are a summary of the application or proposed action, the premises at which the details of the application or proposed action may be inspected, invitation of written comments on or objections to the application or proposed action, the person or body to which any such comments are to be submitted; and a date by which any such comments are required be received. There is no requirement that the notices state the place at which the public consultation meeting is to take place in those mandatory documents or notices. Accordingly the 30 days period is inapplicable to the notice of the date and place of public consultation meeting which is dealt with in section 102(7) as opposed to section 102(3) of the Act. I am similarly of the view that this advert complied with the law.

86. It is however contended that it was wrong for the Gazette Notice to have been published after the newspaper advert. In my view a reading of the legal provisions does not expressly state that the Gazette Notice must precede the newspaper advert and I am not prepared to read that interpretation into the law.

87. Apart from the Gazette Notice and the newspaper advert, section 102(2)(c) provides that the notice is to be advertised in at least one Kenyan radio station broadcasting in the locality. To my mind that notice is similarly supposed to be published at least 30 days before the last date when written comments are to be received. It is the Respondents' case that the said advert was aired 4 times daily for three days between 13th and 15th January, 2015. In my view again that was in compliance with the law.

88. In my view the mere fact that several notices were issued by the Respondent cannot be construed as having caused confusion in the minds of the public as there is no averment that the applicants at any one point relied on any of the said notices and was misled thereby. With respect to the change in the venue for consultation it was the applicant's view that the said change ought to have been similarly gazetted. With due respect the applicants are reading into the provision what does not appear therein. What is required to be stated in the notices is the premises at which the details of the application or proposed action may be inspected. The law does not require the specification in the notice of the place where public consultation meeting is to take place. Accordingly there was no need to gazette the change of the place at which the consultation was to take place as long as the public were made aware of the change of venue through the newspaper advert.

89. It was contended that contrary to the requirement that arrangements for the public to obtain copies, at a reasonable cost, of documents relating to the publication or proposed action which are in the possession of the designated person, the published notices did not state where copies of the proposed tariffs would be obtained. I have looked at the newspaper advert of 19th November, 2014 and it is clearly indicated that:

Details of the current tariff and the proposed tariff can be obtained from...or the Nairobi City Water and Sewerage Company Ltd offices, Industrial Area, Kampala Road.

90. The website from where the said documents could be obtained was similarly indicated. It is my finding that the said requirement was complied with.

91. I agree with the position in **Doctors for life International vs. Speaker of the National Assembly and others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006)** that:

“Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation.”

92. However as was rightly held in **British America Tobacco Kenya Limited vs. Cabinet Secretary for the Ministry of Health and 2 Others - Petition Number 143 of 2015**, wherein the Court referred to the case of **Minister of Health vs. New Clicks South Africa (PTY) Ltd (2006) (2) SA 311** that:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

93. A similar view was held by this Court in **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR**, where this Court expressed itself as follows at paragraphs 50 and 51:-

“...it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected [that] a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated [and taken] in formulating the final regulations. Accordingly, the law is that the forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a

reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.

Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by Lenaola, J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013, public participation is not the same as saying that public views must prevail.”

94. Therefore as an opportunity was afforded to the applicants to air their views on the variation of the tariffs, their failure to do so can only be blamed on themselves.

95. It was contended that the Respondents’ increased the tariffs from Kshs. 5,000.00 to Kshs. 15,000.00 which was a 200% increase in tariff charges that has not been based on any economic logic but just an assumption of the respondents without consulting the stakeholders who are the applicants. These are however judicial review proceedings which do not strictly deal with the merits of a case save for the limited extent of making an inquiry as to the reasonableness of the decision in question. I have considered the rivaling contentions. The Respondents contend that considering the amount of money the applicants make from their activities, the increment of the tariffs from Kshs 5,000/- to Kshs 15,000/ per month is economical, achievable, necessary and fair. In this case, the powers of the Respondent to review the tariffs is not being challenged. The law in such matters is as was stated by Githua, J in Jipe Kindergarten Limited vs. City Council of Nairobi [2012] eKLR that:

“The law is that the Court cannot issue orders of prohibition to prevent public bodies like the Respondent or inferior tribunals from performing their statutory duties and functions when the same are executed in accordance with the law. The supervisory jurisdiction of the High Court can only be exercised where it is proved that public entities or inferior tribunals have either abused their powers in the exercise of their statutory duties, have acted without or in excess of their jurisdiction or have breached the rules of natural justice *inter alia* occasioning legal injury to the person complaining of the aforesaid acts.”

96. By this contention the applicants are however challenging the quantum of the increment. The Court of Appeal decision in the case of Municipal Council of Mombasa versus Republic, Ex Parte Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2001, held as follows:

“... in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

97. I would adopt the reasoning of Lenaola J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs. County of Nairobi Government & 3 Others Petition No. 486 of 2013 where he stated that:-

“I must also state that this Court cannot direct the 1st Respondent on how to exercise its duty of levying parking fees. The 1st Respondent has the option of legislating on the calculation of parking fees and in its wisdom it has done that taking into consideration public views, its policies as well as the revenue it ought to raise.”

98. The Learned Judge proceeded to hold that a Court:

“...cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the 1st and 2nd Respondents. This Court will only intervene if the Petitioners had demonstrated that in charging the parking fees, the Respondents have violated the existing law or acted in contravention of the law.”

99. This Court also dealt with the issue in Petition No. 532 of 2013 Consolidated with Petition Nos. 12 of 2014, 35, 36 of 2014, 42 of 2014, & 72 of 2014 and Judicial Review Miscellaneous Application No. 61 of 2014, where it expressed itself as hereunder:

“It is therefore clear that the County Assembly may not impose property rates and entertainment taxes unless otherwise authorised by an Act of Parliament and this position is emphasised by the provisions of Article 210(1) of the Constitution which expressly provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. County Governments are however empowered to impose charges on services they provide. Such service would include parking and market fees...Further the levying of such taxes ought not to be such as to prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Tariffs and pricing of services must however comply with the provisions of section 120 of the *County Government Act*. The Court however is not entitled to interfere with the Tariffs and pricing of services simply on the ground that the Court would have decided otherwise since the Court ought not to substitute its opinion for that of the County Government. As long as the provisions of the Constitution and the relevant legal provisions are complied with and the applicable principles are taken into account, the Court ought not to interfere.”

100. Similarly, this Court cannot in proceedings of this nature direct the respondents on the amount of increase they are to impose since that is a policy decision and as was held in Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374:

“It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.”

101. This position was reflected in Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC in which it was held:

“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. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair.”

102. The rationale for non-interference with policy matters was restated by Justice McLachlin of the Supreme Court of British Columbia in the Canadian case of Just Versus R in Right of B.C. (Vancouver

No. C822279), in which he observed thus:

“In general, policy refers to a decision of a public body at the planning level involving the allocation of scarce resources or balancing such factors as efficiency and thrift. The operational function of government, by contrast, involves the use of governmental powers for the purpose of implementing, giving effect to or enforcing compliance with the general or specific goals of a policy decision...one hallmark of a policy, as opposed to an operational, decision is that it involves planning...A second characteristic of a policy decision as opposed to an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift.”

103. At paragraph 8, the learned Judge rendered himself thus:

“The law distinguishes between conduct of a public authority which falls within the realm of “policy” and conduct which is “operational”. A governmental body cannot be held liable in a court of law for its policy decisions. It is, however, liable for its operational functions if negligence is established...A second characteristic of a policy decision as opposed to an operational function is that a policy decision involves allocating resources and balancing factors such as efficiency or thrift.”

104. Therefore as was stated in U.S vs Butler, 297 U.S. 1[1936]:

“This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

105. In these proceedings, as the Respondents have offered plausible grounds which informed their decision to increase the tariffs, it is not for this Court to substitute its decision for theirs. I cannot therefore interfere with the policy of the Respondents informed by their consideration of factors which they considered relevant unless it is shown to me that the decision taken or act done constituted such gross unreasonableness that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision hence the decision or act is in defiance of logic and acceptable moral standards. See Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2.

106. Since I am not satisfied that this is the case in these proceedings, it follows that the Notice of Motion dated 30th August, 2016 is merited.

Order

107. Consequently the said Motion fails and is dismissed with costs.

108. Orders accordingly.

Dated at Nairobi this 24th day of November, 2017.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Adhiambo for Mrs Kirui for the 1st Respondent

Mr Ochieng for Mr Macharia for the 4th Respondent

