



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**PETITION NO. 8 OF 2017**

**AUGUSTIN MICHAEL MURANDI.....1<sup>ST</sup> PETITIONER/APPLICANT**

**MATHIAS MWINZI.....2<sup>ND</sup> PETITIONER/APPLICANT**

**JOHN MUKELELYA.....3<sup>RD</sup> PETITIONER/APPLICANT**

**VERSUS**

**NOLTURESH LOITOKTOK WATER AND SANITATION CO. LTD**

***(Successor in title of NATIONAL WATER***

***CONSERVATION AND PIPELINE CONSERVATION).....RESPONDENT***

**RULING**

**Introduction:**

1. The Applicants through a Notice of Motion application dated 4<sup>th</sup> September 2017 and filed on 5<sup>th</sup> September 2017 moved the court for orders:

**a. Spent**

**b. That this Honourable court be pleased to issue conservatory or interim orders directed at the respondent to re-connect and allow the Petitioners to continue to sell water from the water account No. 060070026 within Sultan Hamud pending the hearing and determination of this application inter-partes.**

**c. That upon hearing the application inter-partes, this Honourable court be pleased to make a declaration that the applicants/petitioners' rights to equality before the law and the right to equal protection and equal benefit of the law as provided for under Article 27(1) of the Constitution have been denied, violated, infringed, breached and threatened.**

**d. That upon hearing the application inter-partes this Honourable Court be pleased to make a declaration that the applicants'/Petitioners' rights as to legitimate expectation is gravely violated.**

**e. That costs of this Application be in the cause.**

2. The application was grounded upon the grounds espoused therein and by the sworn affidavit of

Augustin Michael Murandi dated 1<sup>st</sup> September 2017.

3. The Respondent response was by way of an affidavit dated 21<sup>st</sup> September 2017.

4. On 3<sup>rd</sup> November 2017, the Petitioners filed a further affidavit sworn by Augustin Michael Murandi in reply to the affidavit by the Respondent.

#### **The Petitioners' Case:**

5. It was averred that the **water account number 060070026** within Sultan Hamud belongs to the Petitioners and is their only source of livelihood but it was arbitrarily and unreasonably, without notice, reason or justifiable cause disconnected by the Respondent on 21<sup>st</sup> August 2017.

6. Further, the disconnection had not only affected the Petitioners but had also affected the schools they supply with water, among them Kilia Primary School situated at Sultan Hamud which now lacks water for both domestic and general use within the school.

7. The Petitioners averred that until the disconnection on 21<sup>st</sup> August 2017, they had religiously prayed the charges levied by the Respondent in respect of **water account number 060070026**.

8. it was the Applicants contention that their right to equality before the law and the right to equal protection and equal benefit of the law as provided under the constitution have been denied, violated, infringed, breached and threatened.

9. The Applicants posited that they had been condemned unheard contrary to the rules of Natural justice and unless conservatory or interim orders are granted, they would suffer economic losses and serious prejudice and shall have been denied their source of livelihood.

10. In his affidavit, Mr Murandi stated that he and his co petitioners are the owners and officials of Kilia Water Project Self Help Group. Through an application dated and confirmed on 24<sup>th</sup> May, 2011, they paid the application fees and were subsequently given for purposes of sale of water through water account no. 060070026 within Sultan Hamud. Further, he stated that they had been utilizing the water and paying the bills as soon as they were due and as such they were entitled to clean water and sewerage services provided by the respondent. he reiterated that the disconnection of the water supply on 21<sup>st</sup> August 2017 was unreasonable as they had committed no wrong and there was no pending water bill.

11. The Petitioners contended that their right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since water is one of the most fundamental conditions for survival yet the same was being denied by the respondent. **Article 43(1) (d)** of the Constitution provides that **"Every person has the right of clean and safe water in adequate quantities"**.

12. The petitioners claim this right has been violated by the Respondent by disconnecting water supply when the Petitioners have legitimate expectation that the water supply would be consistent and flowing as per the duty owed to the petitioners by the respondent.

13. According to the Petitioners, they had the legitimate expectation that as long as they paid their bills, the Respondent would equally ensure that the water supply would not be disconnected in an arbitrary manner as was the case on 21<sup>st</sup> August 2017.

14. The Petitioners stated that their right to equality and freedom from discrimination has been violated contrary to **Article 27(1), (2)** of the Constitution owing to the fact that they do not owe any water bill to the Respondent yet the Respondent disconnected the water supply. This proves that the Respondent is discriminating against the Petitioners and are using their monopoly in the water supply to mistreat and discriminate the Petitioners.

15. The Petitioners aver that the Respondent has exposed to cruel, inhuman or degrading treatment and punishment contrary to **Article 25(a)** of the Constitution by arbitrarily disconnecting the water supply without any valid reason.

### **The Respondent's Case:**

16. The Respondent's rejoinder came by way of an affidavit sworn on 21<sup>st</sup> September 2017 by Jeremy Mutende, its managing director. He asserted that the Respondent is a water service provider established by the Water Act (Act No. 8 of 2002) (*now repealed*) and is licensed by the Water Services Regulatory Board under Section 55 of the said Act. Further, it was asserted that the Respondent is the only Licensed Water Service Provider within its area of operation.

17. The Respondent conceded that the Petitioners entered into a contract with the Respondent for the supply of water services on Account No. 060070026 in Sultan Hamud and that one of the pre-conditions of the contract was that:

***“No consumer shall convey, or permit to be conveyed by any means whatever for use outside his plot or for sale any water supplied to him by water undertakers unless during fire fighting emergency.”***

18. To the Respondent, it is a term of the contract with the Petitioners that the water supplied is only for domestic use and not commercial use as they are not licensed to undertake commercial water services within the Respondent's delineated area of operation.

19. The Respondent went on to aver that it had come to their attention that the Petitioners were engaged in selling and supplying water to schools and other third parties contrary to the terms of the Water Act, 2016. Further, the Petitioners had formed a water supply cartel contrary to the law and by doing so they were violating the Right to Water of the consumers whom they were charging exorbitant prices in contravention of the gazetted water tariffs.

20. As per the Respondent, the Petitioners have been engaging in an illegal source of livelihood and therefore unjustifiably enriching themselves by exploiting unwary third parties.

21. The Respondent contended that the Petitioners were in contravention of the conditions for supply of water as stipulated in the agreement entered into between the Petitioners and the Respondent's predecessor. In addition, by engaging in water sale within the area of the Respondent's operation, the Petitioners were in violation of the Water Act 2016 as they did not possess a license for that purpose and were usurping the powers of the Respondent.

22. In the Respondent's view, it had the power and authority to disconnect supply of water services if the consumer engages in acts expressly prohibited by the country. The Respondent denied violating any constitutional provision contending that it acted within its statutory duties under Section 78 of the Water Act.

23. The Respondent's position was that this court lacks jurisdiction to listen to this matter as the same ought to have been brought before the Water Tribunal or the Environment and Land Court. As such, the Respondent stated that it shall file a Preliminary Objection seeking to strike out the Petition.

24. Finally, the Respondent stated that the Petition is bad in law, a total abuse of the court process and should be dismissed.

### **DETERMINATION:**

25. The issue in contention in this application is whether the Applicant has established a prima facie case that warrants the grant of conservatory orders. The law on the granting of conservatory orders is well settled. Odunga J in **Kevin K. Mwiti Others v Kenya School of Law & Others stated:**

***“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”***

26. The court in ***Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others [2017] eKLR*** had this to say about the grant of conservatory orders:

***“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”***

27. The Supreme Court of Kenya in ***Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others eKLR*** stated as follows:

***“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”***

28. I agree with the position advanced by the Supreme Court in the aforementioned case that conservatory orders are not linked to private party issues as the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicant’s case. To my mind, the Applicants seek the protection of this constitutional court to shield them from meeting their contractual obligations with the Respondent.

29. As such, I find that the Applicants have not demonstrated a prima facie case with high chances of success and neither will they suffer any irreparable damaged that cannot be compensated by way of damages The balance of convenience lies with them being denied the orders sought.

30. This leads me to the second main point why the petition is a non-starter, as it hinges on the jurisdiction and power of this court to entertain the dispute. It is trite law that the concept of jurisdiction lies at the heart of any discourse before a superior, inferior court, tribunal or body involved in dispute resolution.

31. Following the promulgation of the constitution 2010 the hierarchy of courts and other tribunals with their sphere of operation are well spelt out. The following statement taken from the case of ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] 1KLR*** represents the doctrine as it’s generally applied in our courts.

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters that are presented in a formal way for its decision. The limits of this authority are imposed by statute charter, or commission under which the court is constituted, and may be extended or instituted in the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be whether as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”**

32. The decision in the *Owners of the Motor Vessel “Lillian” case* is very unanimous that court does not have the power to entertain a dispute by judicial fiat or extend its authority over issues which are beyond its scope as granted by the constitution.

33. I have reviewed the arguments by both counsels and also perused the authorities cited in the submissions. The cause of action is predicated on the right to water under the constitution.

34. The complaint on the petition is on the action taken by respondent to disconnect water supply to the petitioner. The reliefs sought in the main petition are premised under Article 46 (1) (a) (3), 43 (1) (d), 47 (1), 25 (a), 42 and 70 of the Constitution.

35. The principle relief sought by the petitioner in her petition is an order to reconnect and restore what supply at stipulated in the contract.

36. While weighing the oral submissions and reliefs in respect of infringement of rights to me is purely meant to raise the bar on the seriousness of the real dispute in this case to a constitutional level.

37. What is at stake from the evidence and briefs facts of the case is the interpretation and enforcement of the water supply contract. The petitioners further contend that the water resource supplied by the respondent has wide coverage and consumers under their care and management. The abrupt disconnection of the water supply has therefore denied the legitimate consumers a right to water as stipulated in the constitution.

38. The question for determination between the two parties would be the terms and conditions in respect of Water Account No. 060070026. The relationship between the petitioners and the respondent is regulated within legal framework of the provisions under the Water Act 2016 whereby it is important to state the relevant sections applicable.

39. According to section 11, the mandate to regulate and manage use of water resources on behalf of the National Government is vested in the Water Resources Authority. The requirements and formulation of Water Resources Management Policy throughout the Republic of Kenya is under the jurisdiction of this Authority.

40. It is therefore right to state that in consultation with county governments various water management companies do regulate water resource and use on behalf of the Authority.

41. Under section 70 (1) of the Act the Water Services Regulatory Board was established with the sole principal object to protect the interests and rights of consumers in the provision of water services.

42. On the issue touching on Dispute Resolution section 119 provides and creates a Water Tribunal. The jurisdiction of the tribunal is provided under section 121 which states:

**“The tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determined appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person along under the Authority of the Cabinet Secretary, the Authority and Regulatory Board.”**

43. In addition to the powers set out in subsection (1) ***“the tribunal shall have power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”***

44. In this case both counsels for the petitioners and the respondent took the view that section 119 and 121 was not applicable and sought a constitutional interpretation of the disconnection of water.

45. The claim as pleaded in the petition and the affidavit evidence in support is of a nature as to call in the question, validity and recognizable terms of the service contract between the parties.

46. I therefore hold that section 119 and 121 is applicable in determining the dispute raised in the petition dated 1/9/2017. The constitutional provisions on right to water and access in this dispute did not oust the jurisdiction of the water tribunal. The better forum in regard to the parties’ dispute is the jurisdiction of the tribunal created under the said provisions on dispute resolution. I am of the conceded view that the dispute squarely falls within the jurisdiction of water tribunal and not a constitutional court.

47. I am being asked to render a judgement on this petition while the jurisdiction and authority is at the first instance vested in the tribunal to adjudicate the type of controversy in the claim.

48. In my view i would be failing in my duty if i elevate matters of this nature arising out of a simple contract to a constitutional infringement or violation under the bill of rights and fundamental freedoms.

49. The circumstances as canvassed by the petitioners are not befitting the ambit prescribed under Article 22 and 23 of the Constitution.

50. Both this court and the water tribunal are creatures of the constitution and the statute. This means therefore that on hierarchy of courts, the impugned decision ought to have been filed and considered by the tribunal pursuant to section 119 and 121 of the Water Act 2016.

51. On the issue of the above and by the restatement of the law in the case of **Owners of Motor Vessel Lillian’s**, this court has no jurisdiction on the subject matter of the petitioner. That absence of jurisdiction renders the petition fatal at this forum.

52. In the result I decline to grant the orders sought by the Applicants in the application dated 4<sup>th</sup> September 2017.

53. The Notice of Motion dated 4<sup>th</sup> September 2017 is hereby dismissed.

It is so ordered.

**Dated, signed and delivered at Kajiado on this 20<sup>th</sup> day of December 2017**

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**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Obare for Jaoko for the petitioners - present

Mr. Mulekyo for the respondent - absent

Mr. Mateli Court Assistant - present