



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
JUDICIAL REVIEW CAUSE NO 2 OF 2017

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

VERSUS

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

RULING

1. On 17/10/2017 this court allowed prayer (b) of the chamber summons dated 12/10/2017 and granted the *Ex parte* Applicants leave to apply for judicial review to seek orders of **prohibition, certiorari** and **mandamus** in respect to **Gazette Notice No 9976** of 09/10/2017 issued by the 1st Respondent. The *Ex Parte* Applicants filed the substantive notice of motion dated 27/10/2017 on 30/10/2017 and served the same.

2. With regard to the prayer that such leave do operate to stay "...the implementation and/or carrying out of the decision...contained..." in the said Gazette Notice, I directed under the *proviso* to **Order 53, Rule 1(4)** of the **Civil Procedure Rules, 2010** that the same be heard *inter partes*. This ruling concerns only that issue of leave operating as a stay of the impugned Gazette Notice.

3. I have read the grounds upon which the chamber summons dated 12/10/2017 is made, statutory statement, and verifying affidavit (and perused the many documents annexed thereto).

4. The 1st Respondent filed grounds of opposition dated 09/11/2017 specific to the prayer for leave to operate as a stay. I have read those grounds. The 2nd Respondent filed a replying affidavit on 13/11/2017 in regard thereto. It is sworn by its Chief Executive Officer, one Eng. Robert Gakuhi. I have read the same. The 2nd Respondent supports the issuance of stay. The Interested Party also does not oppose the

stay sought. It did not file any papers in respect thereto.

5. I have considered the submissions of the learned counsels appearing. They tended to delve too deeply into the merits of the substantive motion, a proclivity that few learned advocates are able to resist!

6. The Gazette Notice 9976 of 2017 that is impugned in these proceedings is as follows –

GAZETTE NOTICE NO. 9976

THE CONSTITUTION OF KENYA

(NO. 17 OF 2012)

THE COUNTY GOVERNMENTS ACT

APPOINTMENT

It is notified for general information that the Governor, Murang'a County pursuant to Part 2 of the Fourth Schedule of the Constitution of Kenya and section 6(5) as read together with section 30(1) (L) of the County Governments Act, has appointed a Caretaker committee to manage water resources, water and sanitation and all matters incidental thereto within Murang'a County consisting of the following members –

Benson Githinji - Chairman

Members

County Executive Committee Member, Water and Irrigation

County Executive committee Member, Finance and Economic Planning

Chief Officer, supply Chain and Projects Implementation

Joseph Nyutu Ngugi

Maribe wa Mwangi Maribe

Rebecca Wanjiru Mwicigi

Fredrick Kihuna Munyua

Catherine Wairimu Mugo – Secretary

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

WA IRIA MWANGI

Governor, Murang'a County

7. It is the *Ex Parte* Applicants' argument that by that Gazette notice the 1st Respondent purported to remove them from their statutory duties without any legal authority to do so, as they are corporate legal entities not owned by the County Government. It is also their argument that by the Gazette notice the 1st Respondent has purported to disband the boards of the *Ex parte* Applicants.

8. It is further submitted for the *Ex Parte* Applicants that there is now interference from the Caretaker Committee put in place by the 1st Respondent pursuant to the impugned Gazette notice, and that therefore, in the interests of justice and in the interests of the people of Murang'a County to whom the *Ex Parte* Applicants supply water and sanitation services, and on whose behalf they manage the water resources within the county, there ought to be stay of the Gazette notice so that the *Ex Parte* Applicants may continue to provide these services.

9. For the 2nd Respondent (who as already seen supports the granting of the stay sought) it was argued that a reading of **section 30** of the *County Governments Act* will show that the 1st Respondent did not have the legal power to issue the impugned Gazette notice.

10. For the 1st Respondent it was submitted that the Gazette notice should be appreciated in its proper context, that context being that under **Article 186(1)** as read with the **Fourth Schedule, Part 2, Paragraph 11(b)** of the *Constitution of Kenya, 2010* the provision of water and sanitation services is one of the functions devolved to county governments.

11. It was also submitted that under **section 6(5)** of the *County Governments Act*, the county governments are empowered to establish appropriate entities for delivery of any particular function vested by any law in a county government.

12. It was upon that constitutional and legal basis, it was further argued, that the 1st Respondent constituted the Caretaker Committee whose members appear in the Gazette notice.

13. It was further submitted for the 1st Respondent that the Gazette notice in question did not in any way disband the boards of the *Ex Parte* Applicants which are not entities constituted by the *Murang'a County Government* under **section 77** of the *Water Act, 2016* which authorizes county governments to establish water services providers; and that the committee set up by the Gazette notice was only a precursor to such providers. In this context it was pointed out that the *Ex Parte* Applicants are private entities not answerable to the County Government that is constitutionally and legally mandated to provide water and sanitary services. That notwithstanding, it was offered, the 1st Respondent would have no problem, as an interim measure, for the *Ex Parte* Applicants to continue to run their water provision businesses in a transitional period, in exchange for the members of the Caretaker Committee appointed by the 1st Respondent being incorporated into the various boards of directors of the *Ex Parte* Applicants so that the County Government can participate in decisions pertaining to provision of water services.

14. As for **section 30** of the *County Governments Act*, it was submitted for the 1st Respondent that **sub-section (2) (c)** of that section provides for publication in the *Kenya Gazette* of all important decisions of county governments or governors, and that therefore the Gazette notice was not procedurally defective. It was also submitted that county governments should be encouraged, not restrained, to take on their constitutional mandates as devolved governments.

15. With regard to the offer made by the 1st Respondent, it was pointed out for the *Ex Parte* Applicants that the *County Government of Murang'a* has two representatives in the board of each *Ex Parte* Applicant where the average membership of the board is nine with an average quorum of seven. It was also stated that the infrastructures of the *Ex Parte* Applicants are generally owned by the Central Government, but that the same were supposed to be taken over by the County Government.

16. As for the suggestion itself for the 1st Respondents' Caretaker Committee members in the Gazette notice to sit in the various boards of the *Ex Parte* Applicants, the same was rejected by them.

17. Many, if not all, the issues submitted upon by the learned counsels will be the same issues that will be canvassed at the hearing of the substantive motion. Therefore, the less said of them, the better so that the court does not appear to make decisions upon issues that are yet to be better and fully canvassed at a later stage.

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

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

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

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

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

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

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

24. Those will be the orders of the court.

25. Costs shall be in the main cause.

DATED AND SIGNED AT MURANG'A THIS 7TH DAY OF DECEMBER 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 8TH DAY OF DECEMBER 2017