



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.26 OF 2015**

**BETWEEN**

**OKIYA OMTATAH**

**OKOITI.....**  
**PETITIONER**

**AND**

**NAIROBI CITY COUNTY.....**  
**.....1<sup>ST</sup> RESPONDENT**

**OSANO AND ASSOCIATES.....**  
**.....2<sup>ND</sup> RESPONDENT**

**ATHI WATER SERVICES BOARD.....**  
**.....3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF ENVIRONMENT, WATER AND NATURAL  
RESOURCES.....4<sup>TH</sup> RESPONDENT**

**AND**

**NAIROBI CITY WATER AND SEWERAGE  
LIMITED..... 1<sup>ST</sup> INTERESTED PARTY**

**WATER SERVICES REGULATORY  
BOARD.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner, Okiya Omtatah Okoiti describes himself as an adult Kenyan citizen and a resident of Nairobi City County and has filed the present Petition against the 1<sup>st</sup> Respondent, Nairobi City County, established under the Constitution; the 2<sup>nd</sup> Respondent, M/s Osano and Associates; a consultancy firm which at the material time had been offering services to the Nairobi City County; the 3<sup>rd</sup> Respondent, Athi Water Services Board; and the 4<sup>th</sup> Respondent, the Cabinet Secretary,

Ministry of Environment, Water and Natural Resources.

2. The Nairobi City Water and Sewerage Company Limited (hereafter “NCWSC”) was enjoined to these proceedings as the 1<sup>st</sup> Interested Party while the Water Services Regulatory Board, which describes itself as a non-partisan State Corporation, was enjoined as the 2<sup>nd</sup> Interested Party.
3. On 26<sup>th</sup> November, 2014, in **Petition No. 143 of 2014, Consolidated with Petition No. 142 of 2014 and Judicial Review Application No. 40 of 2014, Okiya Omtatah Okoiti and 3 Others vs Nairobi City County and 5 Others**, the High Court dissolved the Board of the NCWSC for having been irregularly constituted and ordered that a fresh Board be constituted. In that regard, the 1<sup>st</sup> Respondent herein acting jointly with the 2<sup>nd</sup> Respondent, placed an advertisement in the “*Daily Nation*” newspaper of 21<sup>st</sup> January, 2015 inviting applications from the public to fill nine positions in the Board of Directors of the NCWSC.
4. The Petitioner is aggrieved by the on-going recruitment of the said members of the Board of Directors of the NCWSC and alleges that the recruitment is being conducted in an irregular, unlawful and unconstitutional manner and now invites this Court to grant orders stopping the alleged illegal and unconstitutional actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in that regard.

### **The Petitioner’s Case**

5. The Petitioner’s case is contained in his Petition dated 27<sup>th</sup> January, 2015 supported by his Affidavit sworn on the same day, and three sets of Written Submissions dated 10<sup>th</sup> March, 2015, 13<sup>th</sup> March, 2015 and 10<sup>th</sup> October, 2015, respectively.
6. It was the Petitioner’s case that under the law, the 1<sup>st</sup> Respondent has no capacity to contract the 2<sup>nd</sup> Respondent to recruit members of the said Board under the **Corporate Governance Principles** created under the **Water Act** and published in the **Kenya Gazette as Legal Notice No. 7045 of 18<sup>th</sup> June, 2010** because that function is the exclusive mandate of the 3<sup>rd</sup> Respondent herein, working with stakeholders in the water sector within Nairobi County. That the on-going recruitment exercise is also offensive to best practices and contrary to his expectations following the decree issued in the above cited decision by the High Court, the advertisement calling for applications to the positions in the Board of Directors of the NCWSC does not conform to the law to the extent that it does not list the institutions to be represented by the directors and that if allowed to stand as it is, then the advertisement will result in the irregular appointment of strangers to the Board and will eliminate the representation of known and approved institutional stakeholders on the said Board.
7. The Petitioner’s case was further that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are engaged in the recruitment and appointment of members of the Board of the NCWSC in blatant disregard of the values and principles of governance and the Bill of Rights enshrined in the **Constitution, the Water Services Act, and Section 4 of Legal Notice No. 7045 of 18<sup>th</sup> June, 2010** and further that their actions are also in contemptuous disregard of the Judgment and decree of the Court in **Nairobi Constitutional Petition No. 143 of 2014** aforesaid. He contended therefore that the process of recruitment herein is fatally flawed, irresponsible and an affront to the Bill of Rights, the Rule of Law and is contrary to the other provisions of the **Constitution**.
8. He contended further that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are engaged in a mere ritual to defeat the law and the said Judgment; the public interest in the Board of Directors of the NSWSC will be defeated if its members are recruited in violation of the law; that the 2<sup>nd</sup> Respondent was not recruited in a competitive process, and hence it is a tool for defeating the public interest in the appointment of the said Board.

9. According to the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' impugned advertisement in the "Daily Nation" of 21<sup>st</sup> January, 2015 does not list the nine approved stakeholders from whom the 2<sup>nd</sup> Respondent is seeking to recruit directors from, and to sit on the said Board. That the advertisement is also too general, for example, the Residents Associations, business community and the manufacturing community among others are not involved in the recruitment, and that fact appears to offer the 1<sup>st</sup> Respondent the discretion, for instance, to decide which Residents Association within Nairobi City is active under the law and that such representative bodies, he argued, cannot be individual associations or companies, but representative federations or alliances such as the Kenya Association of Residents Association (KARA).
10. The Petitioner's other contention was that the encouragement to former directors to apply for the advertised positions is meant to clear the way for the return of the members of the Board of Directors which the High Court had earlier disbanded.
11. Accordingly, the Petitioner argued that the 1<sup>st</sup> Respondent's decision to contract the 2<sup>nd</sup> Respondent is ultra vires, illegal, unjustified, unlawful, capricious, unreasonable, irrational, malicious, against core values, in bad faith, biased, tantamount to discrimination and amenable to judicial intervention. Further, that the 2<sup>nd</sup> Respondent was not recruited in a competitive process, as it was handpicked by the 1<sup>st</sup> Respondent and as such, the Petitioner expressed his apprehensions that the 1<sup>st</sup> Respondent would use it to defeat the decision by the High Court aforesaid and that, through the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent will abuse public office by using it to reward political cronies and supporters of the appointing authority contrary to **Articles 73 and 75 of the Constitution**. Furthermore, that it would be contrary to **Article 27 of the Constitution** to use public office to reward cronies and such an action would result in direct discrimination against those who do not enjoy the patronage of a power wielder.
12. The Petitioner also argued that the disregard for the Rule of Law by the 2<sup>nd</sup> Respondent makes him suspect that the 2<sup>nd</sup> Respondent is also in violation of **Section 41 of the Human Resource Management Professionals Act, 2012**, which criminalises practicing as a human resource professional if one is not a member of the **Institute of Human Resource Management**.
13. For the above reasons therefore, the Petitioner asserted that there is an overarching requirement of justice for the following orders to be granted in his favour:
- a. *A declaration be and is hereby issued that, under the law, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do not have the capacity to recruit members of the Board of Directors of the Nairobi City Water and Sewerage Company without reference to the 3<sup>rd</sup> Respondent.*
  - b. *A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' on-going recruitment of members of the Board of the Nairobi City Water and Sewerage Company does not meet the threshold set in the Constitution, in the Water Act, 2002, and in the Corporate Governance Principles created under the Water Act, 2002, and published in the Kenya Gazette No. 7045 of 18<sup>th</sup> June, 2010.*
  - c. *A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' on-going recruitment of members of the Board of Directors of the Nairobi City Water and Sewerage Company does not meet the threshold set in the Judgment and decree issued by the Honourable Court in Nairobi Constitutional Petition No. 143 of 2014.*
  - d. *A declaration be and is hereby issued that the law requires and empowers the 3<sup>rd</sup> Respondent to exclusively supervise the recruitment of eligible candidates to be appointed members of the Board of Directors of the Nairobi City Water and Sewerage Company.*

- e. *A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should bear the costs of the Petition since it was filed pursuant to their violations of the law and the Constitution.*
- f. *The Honourable Court do issue and hereby issues a mandatory order quashing the advertisement placed on behalf of the 1<sup>st</sup> by the 2<sup>nd</sup> Respondent, on page 43 of the Daily Nation newspaper published on Wednesday, January, 21, 2015, inviting applications from the public to fill nine positions in the Board of Directors of the Nairobi City Water and Sewerage Company.*
- g. *The Honourable Court be pleased to issue and hereby issues a permanent order of prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever, to their on-going unconstitutional and illegal process of recruiting and appointing members of the Board of Directors of the Nairobi City Water and Sewerage Company.*
- h. *The Honourable Court be pleased to issue and hereby issues an order compelling the 3<sup>rd</sup> Respondent to forthwith commence the process of recruiting members of the Board of Directors of the Nairobi City Water and Sewerage Company through the process anchored in law.*
1. *The Honourable Court be pleased to issue and hereby issues an order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents do pay the costs of this Petition.*
10. *The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant.*

#### The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Case

14. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents are in support of the Petition and their case is contained in a Replying Affidavit sworn on 9<sup>th</sup> February, 2015 by one Clement Mugambi, the Legal Counsel and Board Secretary of the Athi Water Services Board, and Written Submissions dated 26<sup>th</sup> January, 2016.
15. Mr. Mugambi's deposition was that the present Petition does not seek any relief against the 3<sup>rd</sup> Respondent and hence, it is improperly enjoined in the present matter and ought instead to have been enjoined as an interested party. That fact notwithstanding, it was Mr. Mugambi's position that provision of water, sanitation and sewerage services is regulated by the **Water Act**, which further sets up mechanisms for the regulation of water services including the formation of Water Service Providers such as the NCWSC.
16. Additionally, that the recruitment of members to the Board of Directors of Water Service Providers is outlined under the **Corporate Governance Guidelines** for the Water Service Sector, and in that regard, a perusal of the advertisement made by the 1<sup>st</sup> Respondent in the "Daily Nation" newspaper dated 21<sup>st</sup> January, 2015, leads to the inevitable conclusion that the same falls short of the criteria laid down under the said Guidelines and also not in line with the High Court decision cited elsewhere above.
17. Mr. Mugambi asserted that the appointment of the Board of Directors of the NCWSC should be in accordance with the constitutional provisions in regard to appointment to public office, the Articles of Association of the said company, as well as the **Corporate Governance Guidelines** aforesaid. As such, he urged the Court to be guided by the foregoing facts and give such reliefs as will ensure ultimate achievement of the constitutional right to water as guaranteed under the Constitution.

#### The 2<sup>nd</sup> Interested Party's Case

18. In a Replying Affidavit sworn on its behalf by its Chief Executive Officer, Eng. Robert Gakubia,

on 4<sup>th</sup> February, 2016, the **Water Services Regulatory Board** also stated that it was in support of the present Petition.

19. Mr. Gakubia deponed that the advertisement by the 1<sup>st</sup> Respondent amounts to overt violation of the **Constitution**, the **Water Act** and the **Water Sector Regulations**. In that regard, it was his contention that the said advertisement is in contravention of **Articles 10 (2), 232 and 259** of the **Constitution**, **Articles 1.1e, 1.1h, 1.1i** of the **Service Provision Agreement** and **Legal Notice No. 137 of 2012, The Water (Services Regulatory) Rules 2012**, specifically **Rule 18 (8)** thereof.
20. Accordingly, it was the 2<sup>nd</sup> Interested Party's contention that the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Interested Party have no justification whatsoever in law or otherwise to renege from complying with the water sector regulations and urged the Court to invoke its jurisdiction to determine the issues raised in the present Petition in accordance with the provisions of the **Constitution** and the prevailing water laws.

## The Response

### The 1<sup>st</sup> Respondent's Case

21. The 1<sup>st</sup> Respondent's case is contained in its Replying Affidavit sworn on its behalf by its Head of County Public Service, Ms. Lilian W. Ndegwa on 25<sup>th</sup> February, 2015, and two sets of Written Submissions dated 10<sup>th</sup> March, 2015 and 28<sup>th</sup> October, 2015, respectively.
22. Ms. Ndegwa deponed that under the former constitutional order, the provision of water services by the City Council of Nairobi, through the NCWSC was a licensed function of the **Water Services Regulatory Board**, a national Government agency. That the said City Council of Nairobi could therefore only undertake the provision of the said services in terms of the licensing terms set by the **Water Services Regulatory Board**. Further, that the foregoing notwithstanding, the NCWSC provided water services as an agent appointed by the **Athi Water Services Board**, which is a national Government agency.
23. It was Ms. Ndegwa's deposition further that the legal framework under which Nairobi City County now provides water services has fundamentally changed under the **Constitution, 2010**, and that any function transferred from one State organ to another State organ can only be done pursuant to **Section 7 (2)** of the **Sixth Schedule** to the **Constitution**. That the mandate of the Nairobi City County Government to provide water and sanitation services is therefore now pursuant to **Section 11 (b)** of **Part 2** of the **Fourth Schedule** to the **Constitution** and that the mandate of the National Government in relation to water governance is that which is provided under **Section 22 (c)** of **Part 1** of the **Constitution**.
24. According to Ms. Ndegwa, following the decision in **Nairobi HC Petition No. 143 of 2014 (As Consolidated with Petition No. 142 of 2014 and JR Application No. 140 of 2014), Okiya Omtatah Okoiti and 3 Others vs Nairobi City County and Others**, the present Petition is singularly premised on a basic reading of the **Corporate Governance Guidelines, Legal Notice No. 7045 of 2010**, without appreciating the import of **Section 7** of the **Sixth Schedule** to the **Constitution**. That the NCWSC is not a start-up company but a fully established corporation that has existed since the year 2003 and as such, the instant Petition is premised on the singular provision and restricted reading of **Paragraph 4.2.4** of the **Corporate Governance Guidelines** and hence clearly misguided.
25. It was Ms. Ndegwa's other deposition that based on the unequivocal admission by the **Water Services Regulatory Board** and the **Athi Water Services Board** that the mandate to oversee the constitution of the Board of Directors of the NCWSC is exclusively vested in the Nairobi City County and as such, the Nairobi County Government properly engaged the services of M/s Osano and Associates to publicly, competitively and transparently identify suitable persons that would be

considered for appointment by the Nairobi City County Government to the Board of Directors of the NCWSC. That the Nairobi City County Government therefore duly and competitively procured the services of the said firm on that premise.

26. Ms. Ndegwa also stated that the Court in **Wycliffe Gisebe Nyakina and Another vs Institute of Human Resource Management and Another, Petition No. 450 of 2013**, stayed the implementation of the **Human Resource Management Professionals Act** and hence, the contention by the Petitioner that M/s Osano and Associates is not registered by the **Institute of Human Resource Management** is misguided. Additionally, that in the issuing of the impugned advertisement, the Nairobi City County Government complied with the constitutional requirements of participatory, inclusive, competitive, transparent and accountable appointment of persons and that nowhere in the said advertisement did the County Government bar any qualified person from seeking appointment to the Board of Directors.

27. For the above reasons, it was Ms. Ndegwa's position and that of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents that the instant Petition is brought to pursue the agenda of specific persons who are seeking to be appointed to the Board of Directors of the NCWSC, by using the Petitioner as a proxy, and hence the same is an abuse of the Court process for which the Petitioner should be reprimanded and condemned to pay for the costs suffered by the Nairobi City County Government in this litigation.

28. Lastly, they seek that the Petition being grossly incompetent, misconceived and frivolous, ought to be dismissed.

### **The 2<sup>nd</sup> Respondent's Case**

29. While opposing the present Petition, the 2<sup>nd</sup> Respondent filed an Affidavit in reply sworn on its behalf on 13<sup>th</sup> February, 2015 by its Chief Executive Officer, one Denis Osano Kute and Written Submissions dated 12<sup>th</sup> March, 2015.

30. Mr. Osano deponed that, having satisfied all the relevant criteria, the 2<sup>nd</sup> Respondent was procedurally prequalified and registered by the 1<sup>st</sup> Respondent as one of its consultants. That thereafter, the 1<sup>st</sup> Respondent invited bids from the prequalified consultants requesting for proposals to spearhead the selection of the Board of Directors of NCWSC and that in that regard, the 2<sup>nd</sup> Respondent submitted its bid as per the said request and was successful in that bid. It was therefore given the mandate to undertake the recruitments subject of the Petition herein.

31. It was Mr. Osano's further deposition that contrary to the Petitioner's baseless assertions, the 2<sup>nd</sup> Respondent placed the adverts to fill the nine positions to the Board in due compliance with the law and in part fulfilment of its mandate because the advertisements as placed, were derived directly from the **Water Act** and that they enunciate the principles of inclusivity and public and stakeholder participation as demanded by the law. That the advertisements were also placed in three newspapers namely, the "*Daily Nation*", "*The East African Standard*" and "*The East African*" on 21<sup>st</sup> January, 26<sup>th</sup> January, and 24<sup>th</sup>-30<sup>th</sup> January, 2015, respectively.

32. Mr. Osano asserted that a plain reading of the advertisement would reveal that the 2<sup>nd</sup> Respondent did not specifically invite the previous Board Members of the disbanded NCWSC to apply as alleged, but merely encouraged persons with previous experience as board members in any Water Service Provider and female candidates to apply for practical reasons. That, the Petitioner's assertion that the 2<sup>nd</sup> Respondent has the support of alleged cronies and supporters draws an inference that the Petitioner is abusing this Court's process to settle scores with someone he refers to as the "appointing authority", and as such, the Petition has nothing to do with the competence of the 2<sup>nd</sup> Respondent or its appointment to undertake the recruitment of the Board members of NSWSC.

33. On the assertion by the Petitioner pertaining to the **Human Resource Management Act, 2012**, Mr. Osano deponed that the Petitioner seems to be unaware of the decision in **Wycliffe Gisebe Nyakina and Another vs Institute of Human Resource Management and Another, Petition No. 450 of 2013**, wherein the Court stalled the implementation of the said Act including the registration of new members to that effect. In that context therefore, the said Act is not in operation and thus not applicable in the present case. That in any event, the 2<sup>nd</sup> Respondent has been undertaking human resource services prior to the enactment of the said Act and as such, its enactment cannot extinguish the 2<sup>nd</sup> Respondent's experience and expertise gained over the years, in the field of human resource.
34. From the foregoing, Mr. Osano asserted that the 2<sup>nd</sup> Respondent's appointment was procedural and not flawed as alleged and it is therefore incomprehensible how the said appointment could have infringed upon the Petitioner's rights. Further, and in any event, that the Petitioner's objection to the said appointment is a procurement issue that ought to be canvassed in a different forum and this Court does not have jurisdiction to hear and determine procurement disputes.
35. Lastly, the 2<sup>nd</sup> Respondent's case was that the Petitioner's actions are in bad faith, a sham, abusive, contemptuous and geared at embarrassing and/or ridiculing the 2<sup>nd</sup> Respondent and the process of this Court and that the Petitioner has not demonstrated that he is worthy of any of the prayers sought in the Petition and that the Petition ought to be dismissed with costs to it.

### **The 1<sup>st</sup> Interested Party's Case**

36. The Nairobi City Water and Sewerage Company Ltd opposed the Petition and it was its position that the legal framework under which the Nairobi City County Government provides water services changed under the **Constitution, 2010**. It argued in that regard that **Section 7 (1)** of the **Sixth Schedule** to the **Constitution** enjoins the Court to construe all laws that were in force immediately before the 27<sup>th</sup> August, 2010, including the **Corporate Governance Guidelines**, with alterations to bring them into conformity with the **Constitution**.
37. While relying on **Nairobi Metropolitan PSV SACCO Union Limited and Others vs County Government of Nairobi and 3 Others, Petition 486 of 2013**, it was its argument that the power of the Legislature in the County falls squarely on the County Assembly, and as such, the Court cannot decide what an appropriate or wise legislative provision is. In that regard therefore, its argument was that the provision of water and sanitation services remain the exclusive mandate of the Nairobi City County Government.
38. It further reiterated that in issuing the impugned advertisement, the Nairobi City County Government duly complied with the law and that the recruitments as carried out by the firm of M/S Osano and Associates was in fulfilment of the County Government's duty to appoint an independent consultant to carry out an open and competitive recruitment process.
39. For the above reasons, it contended that the Petition is bad in law and an abuse of the due process of this Court and urged the Court to dismiss the same with costs to it.

### **The Parties' Submissions**

#### **For the Petitioner**

40. The Petitioner took the position that there still exists the need for the **Corporate Governance Guidelines** to be fully complied with under the **Constitution, 2010** more so in light of the international provisions in international instruments that acknowledge the right to water and sanitation, given the central place that water and sanitation play in life and the fact that Kenya has an acute water scarcity problem.

41. It was also his submission that the **Service Provision Agreement** between **Athi Water Services Board** and NCWSC was not voided on the effective date of the coming into force of the Constitution, and that **Section 7** of the **Sixth Schedule** to the **Constitution** concerns itself with Statutes and not contracts and hence, by dint of **Sections 6, 31 and 32** of the **Sixth Schedule**, contracts entered into under the **Repealed Constitution** are protected and are not required to be in accord with the **Constitution, 2010**.
42. According to the Petitioner, the transfer to County Governments of facilities which occupy public land vested in the national Government violates **Section 21** of the **National Government Coordination Act, 2013**, which forbids the transfer of all property, assets, rights, liabilities, obligations, agreements and other arrangements of the National Government. In addition, that the NCWSC is in violation of the requirement under the **Service Provision Agreement** by amending its Memorandum of Association and Articles of Association. Further, that by dint of **Clause 4** of the **Service Provision Agreement**, the provisions of the **Water Act** prevail over those of the **Companies Act** and those of the Articles of Association and that even legislation enacted by the County Government under **Article 185 (2)** of the **Constitution** would not prevail over the **Water Act, 2002** during the subsistence of the **Service Provision Agreement**.
43. The Petitioner maintained that **Paragraph 4.2.4** and related Paragraphs of the **Corporate Governance Guidelines** absolutely bar the Nairobi City County Government from solely determining the appointment of the members of the Board of Directors of the NCWSC. Furthermore, that the Nairobi City Water and Sewerage Company is a start-up company operating public assets and is therefore bound by the said **Paragraph 4.2.4** of the **Corporate Guidelines**. In addition, that the advertisement placed in the “*Daily Nation*” newspaper does not meet the requirements of the Corporate Guidelines, does not state which business and manufacturing bodies are to nominate candidates and as such, it is an attempt to eliminate the representation of known and approved institutional stakeholders on the Board of Directors of the NCWSC.
44. The Petitioner’s other submission was that **Paragraph 4.2.4** of the **Corporate Governance Guidelines** which provides for the appointment of members of the Board of Directors of NCWSC is in accord with the requirements of **Article 6 (3)** of the **Constitution**. The said Article provides that:

***“A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.”***

45. He finally argued that the 2<sup>nd</sup> Respondent has admitted that the firm is not compliant under the **Human Resource Management Professionals Act, 2012** and arguments that the said Act is suspended do not hold water as the suspension was for six months which ended in December, 2014.
46. The Petitioner finally reiterated that the Petition is merited and ought to be granted as prayed.

### **For the 3<sup>rd</sup> Respondent**

47. In its submissions, the 3<sup>rd</sup> Respondent argued that the aim of the **Water Act**, in creating a hierarchy of institutions for the management of the water sector in Kenya, was that all the institutions therein would operate in a manner that would maximise efficiency in the provision of water services and provide satisfaction and safety to all water services consumers, taking into account equity and sustainability. That there was also the need for the formulation of the Guidelines in order to govern the leadership and operation of all the entities in the water sector in Kenya.
48. It was its further submission that the appointment procedure spelt out under the Guidelines and that ought to have been applied in the present case is as follows:

- i. The 3<sup>rd</sup> Respondent initially comes up with a list of stakeholders in the concerned service area of whom the 3<sup>rd</sup> Respondent would have impressed upon and convinced on the need to participate in water service provision management;
  - ii. The 3<sup>rd</sup> Respondent then advertises in the local media, positions for the board of directors for the 1<sup>st</sup> Interested Party, setting out the criteria for those eligible to apply in accordance with the guidelines;
  - iii. The 3<sup>rd</sup> Respondent thereafter calls for a stakeholders conference to create a Selection Committee of five members from the stakeholders who will evaluate the applications submitted;
  - iv. The 3<sup>rd</sup> Respondent then fixes a date when the stakeholder Selection Committee interviews the shortlisted applicants and the 3<sup>rd</sup> Respondent does not sit in such an interviewing panel;
  - v. The Selection Committee then selects five or an appropriate number of names of qualified persons and forwards them to the 3<sup>rd</sup> Respondent;
  - vi. The 3<sup>rd</sup> Respondent then takes the selected persons through an induction on corporate governance, where they sign a code of conduct.
  - vii. The 3<sup>rd</sup> Respondent then communicates the list of appointed persons to the 2<sup>nd</sup> Interested Party herein.
49. Based on the foregoing, it was its further submission that the subject advertisement runs contrary to the Guidelines among others and that it clearly states that the 2<sup>nd</sup> Respondent was instructed to put up the advertisement by the 1<sup>st</sup> Respondent as opposed to the 3<sup>rd</sup> Respondent.

#### **For the 1<sup>st</sup> Respondent**

50. The Nairobi City County Government argued that the provisions of the **Corporate Governance Guidelines, Legal Notice No 7045 of 2010** are relevant in the appointment of directors of NCWSC to the extent only that the relevant provisions therein conform to the **Constitution, 2010**.
51. It was its further submission that the present Petition is singularly premised on a basic and slanted reading of the Guidelines without appreciating the import of **Section 7** of the **Sixth Schedule** to the **Constitution, Articles 10 (2), 73 and 232 (1) (g)** of the **Constitution** and further that it grossly misrepresents and misapplies the provisions of **paragraph 4.2.4** of the **Guidelines**.
52. Accordingly, that the said **paragraph 4.2.4** only applies where a Water Service Provider is in a start-up phase and is running assets previously owned by the local authority. As such, the NCWSC is not a start-up company, but a fully established corporation that has existed since the year 2003. That **Paragraph 4.6.4** of the **Guidelines** expressly recognizes the supreme authority of shareholders of the NCWSC in overseeing the entire process of the election and appointment of directors to the board of the 1<sup>st</sup> Respondent. As such, the said shareholder in the present Petition is the 1<sup>st</sup> Respondent.
53. It maintained that pursuant to **Paragraph 4.6.4** of the **Guidelines** and **Articles 10 (2), 73 and 232 (1) (g)** of the **Constitution**, it engaged the services of the 2<sup>nd</sup> Respondent, to publicly, competitively and transparently identify suitable persons that would be considered for appointment by it to the board of NCWSC. That the engagement of the 2<sup>nd</sup> Respondent was public, competitive and transparent as evidenced by the procurement records adduced before this Court.

54. Further, it submitted that the impugned advertisement for vacancies in the board duly complied with the constitutional requirements of participatory, inclusive, competitive, transparent and accountable appointment of persons to public office contrary to the Petitioner's deleterious contentions that only specific persons merit appointment to the said board. That in any event, the said advertisement did not bar any qualified person, including the persons whose brief the Petitioner mischievously advances vide the present Petition, from seeking to be appointed to the Board of Directors of NCWSC.

55. Finally, the 1<sup>st</sup> Respondent submitted that it is evident from the tenor of the present Petition that it is brought to this Court to pursue the agenda of specific persons who are seeking to be appointed to the said board, by using the Petitioner as a proxy and thus a gross abuse of the Court process for which the Petitioner should be reprimanded and condemned to pay for the costs suffered by it in this litigation.

56. For the above reasons, the 1<sup>st</sup> Respondent urged the Court to dismiss the present Petition with costs to it.

### **For the 2<sup>nd</sup> Respondent**

57. The 2<sup>nd</sup> Respondent, while associating itself with the submissions by the 1<sup>st</sup> Respondent, argued that the Petitioner's contention that the 2<sup>nd</sup> Respondent's appointment was flawed is unfounded, for the said appointment was done in a public, competitive and transparent manner.

58. It maintained that the **Human Resource Management Professionals Act** is not applicable in the present case and that in as far as the Petition concerns the 2<sup>nd</sup> Respondent's appointment, the same does not fall within the jurisdiction of this Court. It relied on the decision in **Speaker of the National Assembly vs Karume [2008] 1 KLR (E.P) 425** and submitted that it is trite that where there exists a clear procedure for redress of any particular grievances prescribed by law, that procedure must strictly be followed.

59. According to the 2<sup>nd</sup> Respondent, it is an abuse of the court process for the Petitioner to apply for a judicial review remedy where there was no clear or proven breach of a fundamental right as was held in **Kenraj H. Harrikisson vs Attorney General of Trinidad and Tobago [1980] AC 265**. Further, that it is inconceivable how it could have violated the Petitioner's rights, if any, by its successful participation in the tender for the recruitment of the Board of Directors of the NCWSC. In that regard, it urged the Court to be guided by the decision in **Kwacha Group of Companies and Another vs Tom Mshindi and 2 Others [2011] eKLR** and dismiss the present Petition and vacate the interim orders that had been granted to the Petitioner with a further order for costs in favour of the 2<sup>nd</sup> Respondent.

### **Determination**

60. Having read and considered the pleadings and submissions filed in the present matter, the key issue for determination is whether there has been violation of the **Constitution, 2010** or any law in regard to the intended recruitment of members of the Board of the NCWSC. If the answer to that question is in the affirmative, then I shall proceed to determine the remedies available to the Petitioner, if any.

61. Before I address my mind to that key question, I must firstly answer this question; under whose mandate does the provision of water services and management in Nairobi County fall? In that regard, in **Okiya Okiiti Omtatah vs Attorney General and Others, Petition No. 143 of 2014 (supra)**, the High Court reached the conclusion that the management and provision of water services is a shared responsibility between the National Government and the County Governments. The Court stated thus in that regard:

**“[76] Within the devolved structure of government under the Constitution, Article 186 (1) provides that the distribution of functions between the national and county government is as set out in the Fourth Schedule to the Constitution. With regard to water and sanitation, section 2 of Part 1 of the Fourth Schedule provides that the functions of the national government include “the use of international waters and water resources” and at section 22, “Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular –**

- a. **Water protection, securing sufficient residual water, hydraulic engineering and the safety of dams...”**

**[77] The functions and powers of the County governments on the other hand are listed under section 10 and 11 of Part 2 of the Fourth Schedule. Section 10 provides that such functions include: “Implementation of specific national government policies on natural resources and environmental conservation, including (a) soil and water conservation...” while section 11 provides that they include “County public works and services, including-**

- a. **Storm water management systems in built-up areas; and**
- b. **Water and sanitation services.”**

**[78] Article 185 (2) provides that county assemblies may make any laws necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. At Article 187 (2), the Constitution deals with the transfer of functions between the two levels of government. It provides that:**

**“If a function or power is transferred from a government at one level to a government at the other level –**

- a. **Arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and**
- b. **Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.”**

**[79] It is also worth observing that under Article 204 (2) of the Constitution, the National Government is under an obligation to use the Equalization Fund to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.”**

62. In concluding on the above issue, the Court stated that:

**“[84] It is thus evident that the provision and management of water services is a shared function, distributed between the two levels of government. Article 6 (2) of the Constitution recognizes the fact that the governments at the national and county levels are distinct and inter-dependent. It enjoins them to conduct their mutual relations on the basis of consultation and cooperation. With regard to water provision, they should perform their respective functions in the spirit of consultation and co-operation, and in accordance with the legislation, policies and standards set by the state, bearing in mind the provisions of section 7 of the Transitional Provisions which require such adaptations as will ensure accord with the Constitution.”** (Emphasis added)

63. On the position of the Nairobi City Water and Sewerage Company Limited specifically, the Court opined that:

**“[86] The 5<sup>th</sup> respondent [the N.C.W.S.C] was incorporated in December 2003 as a**

*company limited by shares. The subscribers to the Memorandum and Articles of Association were the predecessor to the 1<sup>st</sup> respondent, the City Council of Nairobi, with four thousand, nine hundred and ninety eight shares, the then Mayor of Nairobi and the Town Clerk with one share each respectively, which they held in trust for the City Council of Nairobi. For all intents and purposes therefore, the 5<sup>th</sup> respondent is owned wholly by the 1<sup>st</sup> respondent, the successor to the City Council of Nairobi.*

**[96] The 5<sup>th</sup> respondent is therefore a County Corporation by dint of Section 2 (1) of the Public Finance Management Act Cap 412C, which defines a “county corporation” as “a public corporation within a county established by an Act of Parliament or county legislation.” (Emphasis added)**

64. I am in agreement with the Learned Judge and applying the foregoing to the present Petition, it is evident and despite the Petitioner’s argument to the contrary, that the NCWSC is a County Corporation wholly owned by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent is of course elected by voters in the City of Nairobi and operates on their behalf. In that regard, what then is the procedure for appointment of its Board of Directors? In the Decision referred to above, the Court rendered the following position on the appointment thereof:

**“[94] As a public corporation providing a service that is, in the absence of county legislation, governed by the Water Act, for it cannot be that such an essential sector can be left in a vacuum with regard to regulation, the appointment of directors of the 5<sup>th</sup> respondent ought, in my view, to be governed both by the provisions of the Companies Act and its Articles of Association, as well as the Corporate Governance Guidelines under the Water Act.**

...

**[98] I have set out elsewhere the provisions of the Service Provision Agreement between the 4<sup>th</sup> and 5<sup>th</sup> respondent. I have also considered the provisions of the Water Act, Corporate Governance Guidelines (Gazette Notice No 7045), which state that the guidelines adhere to the standards set in the Companies Act. The appointment of the directors of the 5<sup>th</sup> respondent must therefore be in accordance with, first, the constitutional provisions with regard to appointments to public office, the Articles of Association of the company, and the corporate governance guidelines.” (Emphasis added)**

65. Again I have no reason to depart from the above findings and I further note that **Clause 4.6.4 of Legal Notice No. 7045 of 2010** stipulates that:

***Shareholders of the company shall jointly and severally protect, preserve and actively exercise the supreme authority of the company in general meetings. They have a duty, jointly and severally, to exercise the supreme authority to:***

- 1. Ensure that through the stakeholder participation procedure only competent and reliable persons who can add value to the company are elected or appointed to the Board of Directors;**
- 2. Ensure that the Board of Directors is constantly held accountable and responsible for the efficient and effective governance of the company.***
- 3. Change the composition of the Board of Directors that does not perform to expectation or in accordance with the mandate of the corporation.*** (Emphasis added)

66. **Clause 4.6.5, sub-clause (5)** then states that:

***All shareholder rights shall be recognized, respected and protected and shall include the***

*right to:*

*appoint their representatives to the Board according to the eligibility criteria.* (Emphasis added)

67. **Sub-clause (13)** further provides that:

*The stakeholders have the right to;*

*Be provided with adequate information on competencies required on the Board and given options to elect directors from amongst a range of qualified, competent, fit and proper persons in accordance with the eligibility criteria.*

68. It is therefore apparent from the foregoing that the role of appointing directors to the Board falls squarely within the mandate of shareholders who as can be seen above are all entities within the City Council of Nairobi and now obviously, whose powers are repositied in the 1<sup>st</sup> Respondent. In the circumstances of the present case, I also note that vide **Legal Notice No. 177 of 9<sup>th</sup> August, 2013**, the **Transition Authority** devolved to County Governments, functions pertaining to water and sanitation. **Clause 10** of the Notice thereof was particularly to the effect that:

*Pursuant to section 15 of the Sixth Schedule to the Constitution as read with sections 23 and 24 of the Transition to Devolved Governments Act, 2012 and further to Legal Notice No. 16 of 2013, the Transition Authority approves the transfer of the functions specified in the Schedule to the county government of Nairobi City, with effect from the 9<sup>th</sup> August, 2013:*

*(10) County public works and services:*

a. ...

b. *Water and sanitation services including rural water and sanitation services, provision of water and sanitation service in small and medium towns without formal service providers, water harvesting (specific to counties), urban water and sanitation services with formal service provision including water, sanitation and sewerage companies, excluding Water Service Boards, Water Services Regulatory Board and Water Resources Management Authority.* (Emphasis added)

69. The above provisions should be read together with **Section 7** of the **Sixth Schedule** to the **Constitution** which stipulates that:

1. *All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*

70. In the above context, certain misunderstandings by the Petitioner must be stated. Firstly, as was confirmed in **Okoti Omtatah vs AG (supra)**, the NCWSC is not at the start-up phase and consequently, the **Corporate Governance Guidelines** and specifically **Clause 4.2.4** relating to start-up Water and Sewerage Companies cannot apply to it.

71. Secondly, the appointment of directors of NWSC cannot be solely on the basis of the **Corporate Governance Guidelines** but also on the basis of the **Constitution** and the Articles of Association of the said Company. The Petitioner, it would seem, has pegged his arguments solely on the Guidelines.

72. Having so said, whether at the start-up phase or post start-up, stakeholder participation is imperative by dint of **Articles 10** and **232** of the **Constitution** on public participation as well as

competitive and open recruitment processes in the Public Service.

73. However, **Paragraph 4.2.4** of the **Corporate Governance Guidelines** which is headed **“Stakeholder Participation Procedure”** starts with the preamble:

***“This process shall apply where the WSP is in start-up phase and is running assets previously owned by the local authority or any other Government scheme.”***

74. The Stakeholder participation procedure therein stated includes the calling of a stakeholder conference and a stakeholder selection committee but it is obvious that once I have found, and following the prior decision of this Court, that NWSC is not at the start-up phase, then those procedures are inapplicable. Instead, the applicable procedure is that in appointment of Directors, a competitive, open, transparent process which ensures that all the stakeholders are represented in the Board is adhered to.

75. In addition, as was stated in **Okiya Okioti Omtatah vs AG (supra)**, since the NWSC is a **“a County Corporation by dint of Section 2(1) of the Public Finance Management Act”** and following the edict in **Section 7** of the **Sixth Schedule** to the **Constitution**, in overseeing appointments to the Board, the 1<sup>st</sup> Respondent must ensure that **Clause 4.2.2** of the **Corporate Governance Guidelines** are adhered to in the appointment of Directors to the Board of the NWSC. I will return to the imperatives in that clause shortly.

76. The next question that I must then determine is whether the County Government of Nairobi acted in accordance with the law in engaging the services of M/s Osano and Associates as a consultant in the recruitment of Board members of NCWSC.

77. In that regard, based on the evidence before this Court, I note that the County Government of Nairobi advertised for a tender requesting for proposals to Spearhead the Selection of a Board of Directors for NCWSC in line with the Directions of the Regulator. Following the advertisement, the firm of M/s Osano and Associates applied and was granted the said tender. The Petitioner has challenged the selection of the said firm and has argued at paragraph 30 of his Petition that: ***“The 2<sup>nd</sup> Respondent was not recruited in a competitive process, as the firm was handpicked by the 1<sup>st</sup> Respondent...”***

78. Whereas the **Public Procurement and Disposal Act** generally is in line with his argument above, **Section 25** of the **said Act** establishes the **Public Procurement Administrative Review Board** to deal with any disputes regarding procurement including for professional services. **Section 93** of the **Act** thereof further provides that:

***“(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.”***

79. My understanding of the foregoing provision is that the section is limited to candidates who participated in the tendering process and not an outsider like the Petitioner.

80. However I note that M/s Osano & Associates were pre-qualified as consultants for the 1<sup>st</sup> Respondent and try as I have, I am unable to find any evidence that the said process was irregular in any way. It is not enough to state that the said firm was favoured and was enjoying the cronyism of the appointing authority without credible evidence in that regard. Which other firm was so entitled and why did it not invoke **Section 93** of the **Public Procurement and Disposal Act** and challenge that appointment? In any event, I have seen no evidence that the said appointment is unlawful and the Petitioner’s objections thereto are based on mere speculation and conjecture.

81. Similarly, whether the said firm was operating in breach of the **Human Resource Management Professionals Act, 2012** is neither here nor there. It is true however that the said Act was suspended by an order of this Court (Mumbi Ngugi J.) in **Wycliffe Gisebe & Anor vs Institute of Human Resource Management & Anor (supra)**. Whether those orders are in place or not would not take away the fact that there is not sufficient evidence that M/S Osano and Associates were appointed other than by a lawful process.

82. The next question that I must then address, which is a corollary to the first, is whether the advertisement calling for applications to fill the vacancy of the Board of Directors to the NCWSC is unconstitutional.

83. The Petitioner in that regard, at paragraph 21 of his Petition, challenges the advertisement and asserts that: ***“The 2<sup>nd</sup> Respondent’s job advertisement does not conform to the law to the extent that it does not list the institutions to be represented by the directors it is listing.”*** He states further at paragraph 22 that: ***“If allowed to stand, the advertisement will result in the irregular appointment of strangers and will eliminate the representation of known and approved institutional stakeholders on the Board of Directors of the NCWSC, who are expected to actualize the all-important right to water of the residents of Nairobi City County. It will also reverse and erode the major governance gains so far realized since the Water Act came into operation in 2003.”***

84. In that context, I have seen the impugned advertisement in the *“Daily Nation”* of 21<sup>st</sup> January, 2015. In the said advertisement, I note that M/s Osano and Associates outlined the Guidelines to be adhered to, stakeholder representation and the criteria to be met by persons applying for appointment. As regard the former, the advertisement states that:

***“Guideline to the Stakeholder Representation:***

- ***Member from the Business Community***
- ***Member from the manufacturing community***
- ***Professional from a professional body which must be active within the Nairobi City County***
- ***A representative from a local resident organization which is active within Nairobi City County or its environs***
- ***Member of a women organization which must be active within the Nairobi City County.”***

85. As can be seen from the advertisement, it calls for applications from various and diverse sectors within Nairobi County. Those sectors form the Stakeholders in terms of the Guidelines aforesaid. I further note in that context that **Clause 4.2.2 of Legal Notice No. 7045** provides the background of persons to be appointed as directors in the following terms:

1. ***Two directors from the local authority where one shall be a professional officer from each of the local councils covered by the Water Service Provider.***
2. ***Two members from the business and manufacturing community nominated by their bodies.***
3. ***One local professional from the professional bodies nominated from the bodies.***
4. ***One representative from resident organizations.***
5. ***One member from a women organization.***
6. ***Where possible at least three of these members shall be women, provided that the eligibility criteria below are not compromised.***

86. Juxtaposing the foregoing with the impugned advertisement, I hold the view that the advertisement has merely called for applicants who possess any of the set qualifications. I am thus

unable to find the advertisement to be in violation of the **Corporate Governance Guidelines** as alleged by the Petitioner. In any event, I reiterate that I do not agree with the Petitioner's argument that the advertisement ought to have included requirements of a stakeholders conference and a stakeholder selection committee. I say so because and again I reiterate that the NCWSC is not at the start-up phase because as was held in the **Okiya Omtatah Case (supra)**, the company is a well-established County Corporation. I am in the circumstances inclined to hold that the advertisement does not in any way violate the **Constitution** or the **Corporate Governance Guidelines** and is in line with the decision in **Okiya Okioti Omtata Case (supra)**.

87. Having said so however, what is the basis for the advertisement to specifically mention former Directors as eligible to apply. There is no such criteria in the **Corporate Guidelines** but if a former Director applies for recruitment on the basis of the above criteria, then he does so out of qualification and not because he is a former Director. That aspect of the advertisement was clearly irregular.

88. However since a fresh advertisement would have to be made after this Judgment, the issue can be taken care of and does not affect the merits or otherwise of the Petition.

#### **Remedies Available to the Petitioner**

89. I have re-looked at the prayers in the Petition and having reached the conclusion that the intended recruitment process of the Board of Directors of the NCWSC is in line with the **Constitution**, the **Water Act** and the **Corporate Governance Principles** created under the **Water Act**, it is obvious that I see no merit in the Petition.

90. Further, having found that the advertisement in the "*Daily Nation*" newspaper of 21<sup>st</sup> January, 2015 is not in any way unconstitutional, this Court cannot quash the same as urged by the Petitioner.

91. In addition the Petitioner, at Prayer (g), the Petitioner has urged this Court to grant an order of prohibition, prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whether by themselves or any of their employees or agents or any person claiming to act under their authority, from proceeding to give effect, in any way whatsoever, to the on-going alleged unconstitutional and illegal process of recruiting and appointing members of the Board of Directors of NCWSC. Having reached the conclusion that the intended recruitment is in line with the law, this Prayer must fail.

92. With the above findings in place, no other prayers in the Petition can be granted and the entire Petition must therefore fail.

#### **Conclusion**

93. This matter is one that should not have been filed after the decision of Mumbi Ngugi J. in **Okiya Okioti Omtatah vs AG & Others (supra)**. That decision gave clear directions to all the Parties to this Petition, including the Petitioner.

94. I have upheld all the findings made in that case and I have also said that I have no reason to fault the cause of action taken by the 1<sup>st</sup> Respondent.

95. It is however sad, that despite all attempts by this Court to have the matter settled amicably, some Parties were intransigent and have thereby wasted precious judicial time in a matter that could have been resolved in open, frank and transparent discussions. I digress.

#### **Disposition**

96. Based on my reasoning above, I hereby dismiss the present Petition.

97.As I see no personal benefit to accrue to the Petitioner had the Petition succeeded, let each Party bear its own costs.

98.Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Petitioner absent

Mr. Masila for 2<sup>nd</sup> Respondent

Mr. Atonga for 2<sup>nd</sup> Respondent

Miss Irari for 4<sup>th</sup> Respondent

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**