



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 30 OF 2014

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL FREEDOMS UNDER
ARTICLE 10, 20(1), 22, 23(1), 23(3), 47 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CONTRAVENTION OF THE NATIONAL VALUES AND PRINCIPLES
OF GOVERNANCE AND THE RIGHT TO LAWFUL, REASONABLE AND PROCEDURALLY
FAIR ADMINISTRATIVE ACTION**

AND

**IN THE MATTER OF: WATER SERVICE PROVIDERS' CORPORATE GOVERNANCE
GUIDELINES AND MEMORANDUM 7 ARTICLE OF ASSOCIATION**

AND

IN THE MATTER OF: WATER ACT NO. 8 OF 2002

BETWEEN

COAST WATER SERVICES BOARD.....PETITIONER

AND

1. MRS. ALOME ACHAYO

**2. MOMBASA WATER SUPPLY & SANITATION COMPANY LIMITED....
.....RESPONDENTS**

AND

1. WATER SERVICES REGULATORY BOARD

2. MR. KETAN DOSHI

3. FATMA TWAHIR

4. FAIZ BAJABER.....INTERESTED PARTIES

JUDGMENT

THE PARTIES

1. The Petitioner, Coast Water Services Board, is a statutory body constituted under the Water Act, 2002 whose responsibilities include the planning for improvement in provision of water supply and sewerage services, the appointing and contracting of water service providers. It is also the asset holder of the national government facilities previously belonging to the Ministry of Water and its affiliate state corporations and institutions.
2. The Corporate Governance Guidelines were gazetted on 18th June 2010 under the Water Act 2002, and are aimed at streamlining the water sector, and in particular to have water service providers operate in a manner that would maximize efficiency and the provision of water services, taking into account equity and sustainability.
3. The Second Respondent, Mombasa Water Supply and Sanitation Company Limited is a water service provider whose main object is to act as the Petitioner's agent in providing water and sewerage services within Mombasa County and its Sub-Counties namely Kisauni and Changamwe, and its environs. In this regard, it also manages the Petitioner's leased assets therein. Its mandate is set out in Sections 51, 53 and 55 of the Water Act, 2002.

THE CLAIM

4. On or about 13th March 2014, the First and Second Respondents unilaterally purported to appoint the Second, Third and Fourth Interested Parties to the Second Respondent's Board of Directors (BOD). The Petitioner contends that their appointment is irregular and illegal as the manner in which the appointments were made clearly violates the core clauses of the Second Respondent's Memorandum and Articles of Association and the Corporate Governance Guidelines gazetted on 18th June 2010. In particular, the BOD appointments should have been subjected to advertisement and competitive recruitment, as well as a Stakeholder Participation Process as envisaged in Article 57(i) of the Respondent's Memorandum & Articles of Association. Further, the composition of the BOD is clearly set out in the said Article 57(i), a third of whom must be women. The Chairman of the BOD is to be elected at the first meeting of the BOD. Their appointment violates the Corporate Governance Guidelines which dictate that the BOD should have a minimum of 7 and a maximum of 11 members with a professional mix of directors appointed from stakeholders through a competitive stakeholder participation process.
5. Instead, the Second, Third and Fourth Interested Parties were handpicked by the First and Second Respondents and do not represent any known stakeholders and that the Second Respondent did not have power or capacity to appoint any of the members. The purported appointments also violate Article 10 of the Constitution on participation of the people, Article 47 (1) on fair administrative action and Article 175(c) on the two thirds gender representation rule for members of representative bodies. The Petitioner is also apprehensive that the First interested body, the Water Services Regulatory Board may be inclined to revoke the Petitioner's license owing to the said illegal appointments.
6. The Petition therefore seeks a declaration that the appointments are illegal, null and void, and the Respondents be accordingly restrained from conducting any business for or on behalf of the Second Respondent. Filed simultaneously was a Notice of Motion Application seeking a temporary injunction to restrain the 2nd – 4th Interested Parties from taking up the appointments pending the determination of the Petition.
7. The Petition is opposed.

RESPONSE TO THE PETITIONER'S CLAIM

8. The First Respondent, Alome Achayo is the Managing Director of the Second Respondent Company. In a response to the Petition, she denied playing any personal role in the appointments. She called for the application and Petition against her to be dismissed with costs since no prayers had been sought against her in her individual capacity in which she has been sued.

9. The Second Respondent filed grounds of opposition on 21st May, 2015 stating **firstly** that the Petition does not disclose infringement of the Constitution of Kenya, 2010 by the Second Respondent. **Secondly**, it was stated that the dispute primarily concerns itself with the management of the Second Respondent and therefore is commercial in nature. The Petition was said to amount an abuse of court process and failed to disclose a reasonable cause of action as against the Second Respondent.

10. Eng. Robert Gakuba, Chief Executive Officer, Water Services Regulatory Board, swore an affidavit supporting the Petition on behalf of the First Interested Party on 28th May, 2014. He stated that the First Interested Party, the Water Services Regulatory Board (WSRB) is a state corporation established under the Water Act, 2002 to regulate water service boards and water service providers by issuing licenses for the provision of water services and to oversee the implementation of policies and strategies relating to provision of water and sewerage services. It also sets rules, issues tariffs and enforces standards that guide the sector towards ensuring that consumers are protected and have access to efficient, adequate, affordable and sustainable services.

11. It was further deponed by Engineer Gatiba that pursuant to its legal mandate and in keeping with the international best practices, the human rights approach to the right to water and the jurisprudence developed for the International Covenant on Economic Social and Cultural Rights (ICESCR), the First Interested Party has developed guidelines and regulations for the provision of services to be adopted by licensees including the Second Respondent. Among the guidelines and regulations developed by the First Interested Party to ensure sustainable provision of water services across the nation is the Corporate Governance Guidelines whose adoption is mandatory for any water service provider under the Water Act, 2002 as published in the Kenya Gazette No. 7045 of 18th June, 2010. The guidelines are designed to entrench good governance, integrity, transparency and accountability in the leadership and management of all water companies. The Service Provision Agreement between the Petitioner and the Second Respondent was approved by the First Interested Party upon an undertaking by the Second Respondent expressed in its Memorandum & Articles of Association that it shall comply with all water sector regulations on governance. Therefore, the appointments of the 2nd – 4th Interested Parties made without any public participation or competitive recruitment amounts to an overt violation of Articles 259, 10(2) and 232 of the Constitution as well as the Water Act, 2002 and water sector regulations.

12. It was also deponed that the First and Second Respondents have no justification to renege from complying with the water sector regulations. Article 259 envisages that the Constitution will be interpreted in a manner that promotes its purpose, advances the rule of law, permits development of the law and contributes to good governance. Article 10(2) and 232 enjoin both levels of government national and county to promote the purposes, values and principles of the Constitution including the rule of law and participation of the people, inclusiveness and non-discrimination, good governance, integrity, transparency, and accountability. The appointments also violate Clause 2.1(a) and (b) of the Service Provider Agreement and Rule 18(8) of the Water (Service Regulatory) Rules, 2012, (Legal Notice 137 of 2012) which sets out the criteria for competitive appointment of directors. Water services fall within the concurrent jurisdiction of both the national and county governments. The national government is under Constitutional obligation to take legislative, policy and other measures including the setting of standards to achieve the progressive realization of the social and economic rights guaranteed under Article 43. The court was therefore urged to invoke its jurisdiction to determine the issues raised in the Petition in accordance with the provisions of the Constitution and the prevailing water laws.

SUBMISSIONS FOR THE PETITION

13. The First Interested Party filed written submissions dated 9th February 2015. It was submitted that the subject appointments failed to follow a competitive process as envisaged by the Constitution. The

First and Second Respondents overlooked the standards for public appointment imposed on them by the Constitution. There was no advertisement of the vacancies and the legal framework governing the process was overtly violated contrary to the tenets of rule of law. The court is asked to guard the integrity of the Constitution which underscores the principle of good governance. Reliance was placed on the case of **Benson Riitho Mureithi vs. J. W. Wakhungu & Others**, Petition No. 19 of 2014 and **Okiya Omtatah Okoiti & 3 Others vs Nairobi City County & 5 Others**.

14. The Petitioner filed written submissions dated 3rd June, 2015 stating that as a statutory body constituted under the Water Act, it enjoyed legal personality. Under Article 260 of the Constitution it had the requisite personality to seek the protection of the Constitution under Articles 20 and 22 of the Constitution. It was submitted that the Respondent and the 2nd – 4th Interested Parties have a legal and moral obligation to obey the letter and spirit of the Constitution and other laws of the land. Further, per the decision in **Mwangi Stephen Mureithi vs. Daniel Toroitich Arap Moi [2011] eKLR**, there are instances when non-state actors can be and have been held liable for breach of fundamental rights. The appointments are said to have contravened the Constitution in the following ways:

- a. The national values and principles of governance enshrined in Article 10 of the Constitution of Kenya, which include participation of the people, inclusiveness, non-discrimination, transparency and accountability were not adhered to.
- b. Article 47(1) of the Constitution that guarantees to every person the right to administrative action that is lawful, reasonable and procedurally fair was blatantly contravened.
- c. The appointments disregarded Article 175(c) of the Constitution which provides that at maximum, two-thirds of the members of representative bodies in each county government shall be of the same gender.
- d. The purported appointments were otherwise inequitable and against the rules of natural justice.

15. In addition to contravening the Constitution, the appointments contravene the Second Respondent's Memorandum & Articles of Association in that it was not subjected to advertisement and competitive recruitment through a stakeholder participation process. It also contravenes the process of appointment set out in the Corporate Governance Guidelines issued by the WSRB, the First Interested Party. The Guidelines were described to be subsidiary legislation of the Water Act as published in the Kenya Gazette. The Second Respondent is bound by the Guidelines and the Constitution whether as a private corporation or as a person. The appointments amount to administrative action as contemplated under Article 47(1) notwithstanding that the Second Respondent is a private company. The court has therefore the jurisdiction to supervise such administrative action. The court was urged to interpret the intention of the drafters of Article 47(1) to bind all persons including private corporate bodies. The case of **Total Kenya Limited vs. The Permanent Secretary, Ministry of Energy, Nairobi Misc. Civil Appeal No.1638 of 2004 [2006] eKLR** was cited where the Judge in defining the nature of judicial review stated that,

“Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public duties”.

SUBMISSION AGAINST THE PETITION

16. For the Second Respondent, it was submitted on 25th March, 2015 that it was a County Corporation as defined by Section 2 of the Public Finance Management Act, CAP 412C. It was described as a public body wholly owned by the County Government of Mombasa who are its shareholders by succession. The County Government of Mombasa, being the main shareholder, has the constitutional mandate to appoint its Directors as provided under Article 235 of the Constitution. As the County Government of Mombasa was not a Party to this Petition, the court was urged to find that any finding at this stage would amount to condemning the County Government of Mombasa unheard. It was further submitted that the orders sought against the Second Respondent cannot be enforced since it was not the appointing Party, and the court must not issue an order in vain.

17. In a 180° turn from this submissions, the Second Respondent filed subsequent submissions dated 21st May, 2015 urging that the Second Respondent is a private entity and has not violated any laws in making the appointments to its BOD citing the case of **Gabriel Amok & Others vs Mombasa Water Supply and Sanitation Company Limited, Mombasa HC Constitutional Petition No. 70 of 2014 (2015) eKLR.**

18. While still admitting that the County Government had taken over the ownership of the Second Respondent from the original shareholders being the Town Clerk, Mayor and Municipal Council of Mombasa under section 6(5) of the County Governments Act, it was submitted that the Second Respondent cannot be said to be a county corporation since per section 5 of the Public Finance Management Act, CAP 412C, there has been no gazette to that effect. As such, the Second Respondent remains a private entity which cannot be subjected to follow public law. Its shareholder have a right to have a say in the running of its affairs and management hence neither the national government, nor its agents, being the Petitioner and the First Interested Party should be allowed to interfere in its affairs. The forum of the Constitutional Court was questioned, on the basis that the dispute is essentially commercial in nature. It should only be governed by the Memorandum & Articles of Association which is NOT intended to bind the company or its members to an outsider to give effect to the Articles. The case of **Brown vs. La Trinidad (1887) 37 CHD 1** was referenced on this issue as cited in Company Law by Avtar Singh, page 87. It was submitted that a Party should not be allowed to convert a commercial matter into a constitutional issue in order to circumvent the strict requirements that an outsider cannot dictate to the company its manner of appointment of persons to the board of that company.

19. The Petitioner was challenged to seek enforcement of any claim it may have under the Service Provision Agreement in an ordinary suit for contract rather than in this Petition, terming this Petition as an abuse of court process per **Gabriel Amok & Others vs. Mombasa Water Supply & Sanitation Company Limited.** They faulted the finding in **Okiya Omtatah Okoiti & 3 Others vs. Nairobi City County & 5 Others, Nairobi HC Constitutional Petition No. 143 of 2014** saying that the court in that case was mistaken in assuming that the roles of the national and county government with regard to provision and management of water services were concurrent. The two roles were distinguished as water protection, securing sufficient residual water, hydraulic engineering and safety of dams being the role of the national government and the role of the county government is water and sanitation services per the Constitution. It was submitted that water protection is different from water and sanitation services. And the learned Judge erred in relying on the Water Act of 2002 which at section 3 vested every water resource in the State, because this Act preceded the Constitution by 8 years. Section 3 of the Water Act is void to the extent of its inconsistency with the Schedule 4 of the Constitution that describes the different roles in water management. In any event, should the dispute culminate into a matter of determination of Conflict of Laws under Article 191 of the Constitution, then the same ought to be properly addressed in a separate and specific cause, and not under the present Petition which is a claim of infringement of fundamental rights. In conclusion, the Second Respondent asserted that the orders sought by the Petitioner should not be granted.

ANALYSIS AND DETERMINATION

20. The Mombasa Water Supply and Sanitation Company Limited, the Second Respondent, is a limited liability company wholly owned by the Government of the County of Mombasa. It is charged with acting as an agent of the Petitioner within a state-controlled industry under the immediate authority of the First Interested Party. Following the definition of a “**public entity**” per the Leadership and Integrity Act, 2012, the Second Respondent is a public entity because it is wholly owned by the County Government. It was incorporated as a private company limited under the Companies Act Cap 486, Laws of Kenya (now repealed) on 18th March, 2011 with the main object of being an agent of the Coast Water Services Board and to provide the public with water and sewerage services. Its functions are subject to the approval of the Petitioner, the Coast Water Services Board. The Articles of Association of the Second Respondent defines a “Director” as “**a person appointed from the process of stakeholder participation organized under the supervision of the Coast Water Services Board**”. It also defines the term “**stakeholder**” and provides for the stakeholder participation procedure. Article 57(i) provides who shall constitute the BOD in great detail including their qualification and gender balance. In any event, the Articles require

that the appointment of a director be determined after stakeholder participation and in consultation with the Petitioner. These provisions are adopted from the Corporate Governance Guidelines (LN No.7045 of 18th June, 2010). In addition, the Petitioner and the Second Respondent signed a Service Provision Agreement which saw the Second Respondent issued with a Certificate of Operation from the First Interested Party authorizing it to operate as a water services provider for the period of 5 years from 4th May, 2012 – 3rd May, 2017 unless earlier termination by the First Interested Party for breach of conditions.

21. From the annexures “EJWT – 6” to “EJWT – 14” to the affidavit of Engineer James W. Thuku sworn on 2nd May, 2014 in support of the Petition, the First Respondent in a letter dated 19th March, 2014 informed the Petitioner of the appointment of the 2nd – 4th Interested Parties to the BOD of the Second Respondent. The appointments were attributed to H. E. the Governor of Mombasa County following the resignations of 5 previous directors. The Petitioner wrote back on 21st March, 2015 protesting the manner of the appointments, advising that they should be revoked and the proper process of competitive advertisement and stakeholder participation be followed. The national body, the First Interested Party, advised as much, and directed the Petitioner to file court proceedings to stop the directors from taking office and working as directors; to inform the Registrar of Companies that the appointed directors did not follow the law; and to notify all for information that the perpetrators of the illegality would be surcharged. It should not be lost to the court that the services provided by the Second Respondent is a public right. Every person has the right to a clean and healthy environment which includes the right to clean and safe water in adequate quantities as well as reasonable standards of sanitation (Articles 42 and 43 of the Constitution). That being said, it is also noteworthy that while it would be within the powers of the First Interested Party to revoke the services of the Second Respondent for breach, such action is likely to result in a vacuum for which the greatest losers would be the public.

22. Nyamu, J (as he then was) in **Muiruri vs. Credit Bank Ltd. & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** was of the view that **“A constitutional issue ... is that which directly arises from court’s interpretation of the Constitution.”** This court made similar determination in the case of **Maggie Mwauki Mtalaki vs Housing Finance Company of Kenya [2015] eKLR** stating:

“52. The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in Four Farms Limited vs. Agricultural Finance Corporation (2014) eKLR following the decision in Damian Belfonte vs The Attorney General of Trinidad And Tobago where it was stated,

... where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a General rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.” (my emphasis)

23. The Water Act should be interpreted to give effect to the Constitution. It creates the First Interested Party with wide regulatory powers over water service providers in accordance with the National Water Strategy. One of the objects of the National

Water Strategy is to ensure that at all times there is in every area of Kenya a person capable of providing water supply; and a programme to bring about the progressive extension of sewerage to every centre of population in Kenya. The County Government of

Mombasa has the constitutional responsibility to provide water and sanitation services within its jurisdiction (Constitution of Kenya, 4th

Schedule Part II, paragraph 11 (b)). It does so through its corporate arm that is the Second Respondent. The National Government on

the other hand is responsible for protecting the environment and natural resources with a view to establishing a durable and sustainable system of development including among others, water protection. This is accomplished through the Water Services Regulatory Board and by extension the Water Services Boards.

24. Whether or not this Petition is filed in furtherance of this obligation, it is abundantly clear that the Petitioner strongly feel that the Second Respondent's appointments were ultra vires the Constitutional mandate assigned to the County Government of Mombasa. The Government of the County of Mombasa, acting through the Second Respondent is bound to apply the national values and principles of governance set out in Article 10 of the Constitution which include good governance, integrity, transparency and accountability. The appointment not only jeopardizes the Service Provider's Agreement which could result in its license being revoked, but it also disenfranchises the people of the County of Mombasa. The Second Respondent by virtue of being fully owned by the Government of the County of Mombasa is answerable to the people of the County of Mombasa from whom they draw their power and authority. For this reason, any person, including the Petitioner, may launch legal proceedings in defence of the rights of the people owed through the Second Respondent.

25. In **Memphis Publishing Company vs Cherokee Children and Family Services Inc. 87 S. W. 3d 67**, the U.S.A.

State of Tennessee had subcontracted a private company to perform a service previously handled by the State. The Petitioner had sought access to the private company's records but was barred on the basis that the private company was not bound by the public records laws even though it was hired by the State. Finding for the Petitioner, Tennessee Supreme Court Justice Adolpho A. Birch Jr. opined that,

“...the public’s fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor. When a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.”

26. In that case, the court went further to set out a non-exhaustive list of factors for consideration when determining whether a private entity operates as the functional equivalent of a governmental agency and therefore subject to the Act. The list includes **(1) whether and to what extent the entity performs a governmental or public function; (2) the level of government funding of the entity; (3) the extent of government involvement with, regulation of, or control over the entity; and (4) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.**

27. By the same analogy, the Second Respondent in this case would qualify on these conditions to be subject to Constitutional liability even though it is incorporated as a company limited by shares and would ordinarily be regarded as a private entity. However, the test of being a private or public entity is not incorporation. Shares is not the fact of incorporation under the Companies Act, but rather, the ownership or control of the shareholding in such entity. Under the State Corporations Act (Cap 446, Laws of Kenya), any company or corporation in which the state or state agency owns more than fifty percent (50%) of the voting stock or shares or if less than 50%, the controlling stock of such company, qualifies such entity as a public entity.

28. Without serious reflection on alternative fora which may have been available considering the **locus** of the parties and their respective relationships, there are two constitutional issues raised by this Petition, and therefore worth of exploration, **firstly**, whether the Second Respondent was entitled to make the appointments of the 2nd – 4th Interested Parties and **Secondly** whether those appointments were or are in breach of the Constitution. In considering these questions, note is taken of the constitutional position that even private persons, or private entities may breach and are liable for breach of the Constitutional, provisions like, discrimination on the grounds of gender (Article 27(3) and 27(4) and (5) **women and**

men have the right to equal opportunities in political, economic, cultural and social spheres), a person shall not discriminate directly or indirectly against another person on the grounds of gender (sex). That was the basis of the court's decision in **ROSE WANGUI MAMBO & 2 OTHERS VS. LIMURU COUNTRY CLUB & 17 OTHERS (2014) eKLR**.

29. The Respondents' claimed that the relationship between them and the Petitioners was purely contractual and sought to rely upon the decision of this court in the case of **GABRIEL AMOK & OTHERS VS. MOMBASA WATER SUPPLY AND SANITATION COMPANY LIMITED [2015] eKLR**. That case is entirely distinguishable from the case in point because in that case, the contention between the Petitioners and the Mombasa Water Supply and Sanitation Company Limited was found to be based on the contract for the supply and distribution of water to largely unconnected areas. The Petitioner in that case failed to demonstrate the existence of any constitutional issue between them and the Respondents. The court following the analogy of landlord and tenant stated at paragraph 22 –

”22. In contrast to a license, the licensee has only a right to take a product or render a service in terms of the license. Such right is unlike tenancy, does not confer exclusive right to the licensee outside the terms of the license. It is a limited right, it terminates in accordance with its terms. That right is neither human right nor a fundamental freedom. It is merely a contractual right. It determines in accordance with its terms. Any Party, the Petitioners or the Respondent is at liberty to institute civil proceedings claiming a breach by the other and claim the monies owed by the Petitioners, or damages as against the Respondent. What the court cannot do is to allow the Petitioners to use and thereby abuse the provisions of the Constitution on purely private contractual matters in which they can seek remedy by civil actions.”

30. Article 57(1) of the Second Respondent's Articles of Association provide that the number of Directors who shall be appointed in accordance with the Stakeholder Participation Procedure shall be eleven (11) being the maximum number comprising the following:-

- (i) Two officers from the Council being the Town Clerk and any other professional officer;
- (ii) Two representatives of women groups one from the Maendeleo ya Wanawake (Mombasa Branch) and the other from any other women organization;
- (iii) One representative of the Kenya Hotel Keepers & Caterers Association (KHK&CA);
- (iv) One representative of the Kenya Association of Manufacturers;
- (v) One representative from a Residents Association;
- (vi) One representative of a Professional Body;
- (vii) One representative of the Business Community;
- (viii) One representative of the Youth;
- (ix) One representative of the Physically Challenged Persons

Provided that a third of the members shall be women and all Directors shall at a minimum be literate and numerate at least O'Level with a Diploma level and have a minimum of 7 years experience in any business or profession, or trade.

31. Clause 4.2.4 of the Corporate Governance Guidelines issued by the Water Services Regulatory Board (WASREB) and published in Gazette Notice Number 7045 on 18th June, 2010, provides for elaborate stakeholder participation procedures, requiring Water Service Producers (such as the Second Respondent) to -

- (i) have a list of stakeholders in the concerned service area;
- (ii) advertise in the local media positions for the board of directors;
- (iii) hold stakeholder conference;
- (iv) interview candidates for appointment to the Board of Directors through a committee;
- (v) through a committee, select at least five names for appointment to the Board;
- (vi) hold a conference for ratification of appointments;
- (vii) induction of the Board on the corporate governance guidelines;
- (viii) inform the Water Services Regulation Board (WASREB).

32. In this case, there is no doubt the Second Respondent intended to and was bound to follow not merely its own Articles of Association but more importantly the edicts of the Water Act, including the Corporate Governance Guidelines issued under the Water Act, 2002. The Second Respondent has not sought to amend its Memorandum and Articles of Association, which are modeled upon these Guidelines and thus whichever way the court looks at it, the appointments were illegal and **ultra vires** its own statutes, and the governance provisions on public participation under the Constitution.

33. As already discussed above, the Second Respondent is amenable to constitutional supervision. The Board of Directors envisaged under the Water Act is representative in nature to ensure stakeholder involvement, democracy, participation of the people, among other national values and principles of governance enshrined in Article 10 of the Constitution.

34. In addition, Kenya also ratified the main human rights treaties, and these now form part of Kenyan law under Article 2(5) of the Constitution of Kenya, 2010. And under Article 11 of the International Covenant on Economic, Social and Cultural Rights, safe drinking water and sanitation is a human right derived from the right to an adequate standard of living. The Second Respondent being a creature of the County of Mombasa and an agent of the Petitioner must realize that its role in providing water and sanitation services is not without regulation. Its function is one of agency, and its duties must be exercised with due regard to a public duty of care to its functions in a manner that promotes the human right to clean water and sanitation, and are enjoined to do so when implementing public policy decisions to uphold the national values and principles of governance. The appointment of the Board of Directors is one such decision. The appointment of the 2nd – 4th Interested Parties failed to honour the Second Respondent's Memorandum and Articles of Association, the water industry regulatory Guidelines and the Constitutional principles of governance.

35. In conclusion, the justice of this case requires this court to ask one question, and that is whether the Second Respondent, being an agent of the Petitioner and an organ of the Government of the County of Mombasa, can or should be allowed to function in complete and total disregard of either its Memorandum or Articles of Association, not to mention the water sector regulations. The answer to this question must be a resounding no. Why? Because the Memorandum of Association of a company is its Constitution, it sets out its objects from which it can only depart by way of a members' resolution at a duly convened Annual General Meeting or Extraordinary or Special General Meeting. Likewise, the Articles of Association are its rules of governance or management and which again cannot be departed from except upon due amendment.

36. On the equally fundamental question whether the Second Respondent's actions amount to a breach of the national values and principles of governance enshrined in the Constitution the resounding answer is in the affirmative, YES.

37. Having come to these conclusions, the Petitioner herein succeeds, and there shall be orders -

(i) a declaration that the appointment of the Second, Third and Fourth Interested Parties by the Second Respondent to the Second Respondent's Board of Directors violates Articles 10 and 47(1) of the Constitution of Kenya 2010;

(ii) a declaration that the appointments of the Second, Third and Fourth Interested Parties by the Respondent to the Second Respondent's Board of Directors violate the Second Respondent's Memorandum and Articles of Association and the applicable Corporate Governance Guidelines of the Water Act, 2002;

(iii) a declaration that the appointment of the Second, Third and Fourth Interested Parties by the Second Respondent to the Second Respondent's Board of Directors are null and void, and are hereby brought to and quashed by the order of certiorari.

(iv) an order that the Board of the Directors of the Second Respondent be constituted within 90 days of the date hereof in line with the tenets of the Guidelines on Governance and the Memorandum and Articles of Association of the Second Respondent

37. On the question of costs I had indicated throughout the proceedings leading to this Judgment that this was a matter which ought to have been settled amicably among the warring governmental agencies. The Respondents and in particular ought to have heeded this view of the matter but claimed that they were an independent body. This was obviously erroneous. Though there were no specific orders sought against the First Respondent, as the Chief Executive Officer, she was the principal mouth piece of the Second Respondent. No costs would be ordered against her personally, but in all fairness, the legal costs incurred by the Petitioner should be laid at the feet of the Second Respondent.

38. There shall therefore issue an order for legal costs of the Petitioner's counsel against the Second Respondent, which if not agreed upon shall be taxed by the Taxing Officer of this court.

39. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 23rd day of October, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Were holding brief Kibara for Petitioners

Miss Kimori holding brief Mohamed for Respondents

Mr. Kaunda Court Assistant