



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APP. NO. 374 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION

AND MANDAMUS AGAINST THE RESPONDENTS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26

AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE RIGHT TO CLEAN WATER

AND

IN THE MATTER OF DISCRIMINATION AGAINST MACHAKOS PEOPLE WITH RESPECT

TO THE RIGHT TO CLEAN WATER

AND

IN THE MATTER OF REASONABLENESS WITH RESPECT TO THE DISTRIBUTION OF

CLEAN WATER IN UKAMBANI AREA

AND

IN THE MATTER OF WATER ACT NO. 8 OF 2002 LAWS OF KENYA

AND

IN THE MATTER OF *ULTRA VIRES* TO THE WATER ACT, CONSTITUTION AND

INTERNATIONAL INSTRUMENTS TOUCHING ON THE RIGHT TO WATER

AND

IN THE MATTER OF PRINCIPLES OF PROPORTIONALITY AND LEGITIMATE EXPECTATION

AND

IN THE MATTER OF DOCTRINE OR REASONABLENESS IN THE EXERCISE OF POWER AND RATIONALITY

AND

IN THE MATTER OF EQUITY AND FAIRNESS IN DISTRIBUTION OF CLEAN WATER IN THE UKAMBANI AREA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

TANATHI WATER SERVICES BOARD.....1ST RESPONDENT

CABINET SECRETARY FOR WATER AND

NATURAL RESOURCES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

EX-PARTE: SENATOR JOHNSTONE MUTHAMA

JUDGEMENT

Introduction

1. By a Motion dated 11th June, 2013, the applicant herein, **Senator Johnstone Muthama**, seeks the following orders:

(a) That the court be pleased to issue an order of certiorari to quash the decision by the Respondents to take water to Kitui County before the same is supplied to the Respondents of Masinga and Machakos County.

(b) That the court be pleased to issue an order of prohibition to prohibit and restrain the Respondents whether by themselves, agents employees, contractor, representative, assigns or anybody whomsoever from in any way (sic) before the same is supplied to the Residents of Masinga and Machakos County.

(c) That the court be pleased to issue an order of mandamus to compel the Respondents to put up measures to ensure that the waters harvested form Masinga Dam within Machakos County benefits the people of Masinga and Machakos County first before it is disseminated to other neighbouring counties;

(d) That the court orders the leaders from the two counties to hold a consultative meeting to

iron out the differences within seven (7) days under the chair and secretary appointed by the court and report the finding back to the court.

(e) That the costs of this Application be borne by the Respondents.

2. The grounds upon which the application was based according to the Statutory Statement filed were:

1. That it has become so intense and the people of Machakos County have been angered by this greedy decision to deprive them of their own natural recourses in the name of Trans-County and National project;

2. The Applicant avers that this is a discriminative and an extension of the past injustices being meted against the people of the Machakos County;

3. The Applicant and indeed the people of Machakos aver it is deceptive, sham, illegal and discriminatory to take away from Machakos County and allege that the permanent solution to Machakos residents shall be achieved either through extensions from the Pipeline to Masinga Market or after construction of Yatta Dam;

4. The Applicant and the people of Machakos County refuse to be bamboozled and muddled with empty promises by the Respondent in order to be allowed achieve selfish ends of few individuals in the Government who seek selfish recognition and political mileage over their opponents at the expense poor and deserving residents of Machakos County who need the resources from without to enhance and improve their livelihood;

5. The Applicant avers that the actions of the Respondent are unreasonable and discriminative to the people of Machakos County as they need to benefit from the natural resources within their county before the same is transferred to disseminated to other Counties;

6. The Applicant states that the acts of the Respondent goes against the principle of reasonable in the exercise of constitutional and statutory powers;

7. That whereas Article 43 (1)(b) the constitution guarantees every citizen with the right to be free from hunger, and to have adequate food of acceptable quality as a result of which the Tanathi Water Project was founded, the Respondent has designed the project in a manner likely to delineate and discriminate against the people of Machakos County in favour of the people of Kitui County;

8. That whereas Article 27 of the constitution guarantees every citizen with the right of equality before the law and the right to equal protection and equal benefit of the law which includes the full and enjoyment of all rights and fundamental freedoms, the Respondent has curtailed against the people Machakos County against enjoyment of this rights by allowing the Tanathi Water Project to benefit only the people of Kitui County at the expense of the people of Machakos who own the Natural Resource (Water) being directed to the people of Kitui, another court;

9. That whereas the state is prohibited from discrimination of any kind by providing that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth, the Respondent has through its actions demonstrated breach of this provision by direction water from Masinga Dam in Machakos County straight to Kitui County without taking into consideration the concerns and the needs of the people of Machakos county who are also in dire need of that special resource just as the people of Kitui County;

10. That whereas Article 43 of the constitution guarantees the right of the citizens to be free from hunger, and to have adequate food of acceptable quality to clean and safe water in adequate quantities, the Respondent has in its impugned actions trampled upon the Machakos' people right to the benefit of this Article by directing important resources from their county to benefit people of other counties while leaving the owners of the resource desperate and without means of help;

11. The Applicant states that the acts of the Respondent goes against the principle of legitimate expectations as the people of Machakos County have legitimate expectation that they will first benefit from the resources within their own county and will be consulted before such resources are dishd to the people outside the county;

12. The Applicant states that the Respondents decision is irrational, corrupt and tainted with illegalities;

13. The Applicant herein seeks to enforce the fundamental rights of the people of Machakos County by seeing the intervention of this Honourable Court to make the declarations and orders that will ensure fair administrative action by the Respondent and equality in the manner in which resources ought to be shared within the Counties;

14. That it is imperative that the Respondent being a public body is susceptible to the orders of Judicial Review while exercising powers bestowed to it by the law;

15. That the people of Machakos County stand to suffer irreparable loss if the decision by the Respondent to channel away natural resources from the county without substantively benefiting the people who reside therein is not reconsidered;

16. That it is in the best interest of justice and public order that the orders sought herein are granted in favour of the Applicant.

3. The application was supported by an affidavit sworn by the applicant herein on 24th October, 2013.

4. According to the applicant, paramount to this matter is the fact that, Tanathi Water Services Board, was charged with the responsibility to ensure a permanent solution to the perennial problem of water scarcity within Machakos and Kitui Counties and in line with their mandate, the Board initiated Masinga Dam Project with the loan funding by African Development Bank allegedly to the tune of Kshs. 2 Billion which project was meant to tap and harness water from Masinga Dam and supply the same to the people of Machakos and Kitui Counties.

5. The applicant deposed that it was however alleged that the project was meant to include lateral lines which encompassed a line to Masinga Market, the total cost for the project at the point was Kshs 5 Billion against the approved AFDB loan budget of Kshs 2 Billion hence it was this budget deficit that led to downscaling of works resulting in the retention of the intake works, sedimentation tanks and trunk line to Kitui. Further it was alleged that the project is a trans-county and national project to serve Masinga Town and Residents along the Masinga-Kitui pipeline.

6. The applicant however was of the view that this was a clear scheme by well-known persons and politicians in Kitui who wanted to channel all the waters of Masinga Dam to Kitui County at the expense of the people of Machakos who deserve priority to the people of other neighbouring Counties.

7. To the applicant, it had become apparent that some well-placed persons had decided to use their political schemes to ensure that only people from their County receive rewards regardless of the source which state of affairs had ignite discomfort from the people of Machakos when they learnt that resources from their county (water) is to be utilized by other counties due to political manoeuvres of persons of questionable character.

8. The deponent averred that as a leader he believed in equality and equitable distribution of resources within the counties and the country as a whole and to his understanding equitable distribution of resources in this forum would mean that resources with Machakos County are first utilized by the people within the county then the remainder or a portion thereof is shared by the neighbouring counties. He asserted that the people of Machakos are aggrieved by the decision of the Respondent to use their resources for the benefit of residents from other counties and that the decision to channel water from Masinga Dam directly to Kitui County is not only discriminative but unconstitutional and an assault to the integrity of the people of Machakos County.

9. He was of the view that the decision of the Respondent to use resources from Machakos County to substantively benefit residents of Kitui County alone is unfair, illegitimate and disproportional and must be stopped with immediate effect.

1st Respondent's Case

10. In opposition to the application the 1st Respondent filed a replying affidavit sworn by **Jane Sein**, the 1st Respondents Water Services Provider Manager on 16th June, 2014.

11. According to her, Tanathi Water Services Board has 15 Water Service Providers spread across the 4 Counties and comprise of 2 in Kitui, 6 in Machakos, 3 in Makueni, 4 in Kajiado.

12. To her, contrary to the allegation by the Applicant that the people of Machakos have been sidelined in water distribution from Masinga Dam, the current pipe abstracts 9,000m³ of water from Masinga for distribution within the two Counties but only 40% of the water abstracted from Masinga gets to Kitui while the rest is distributed within the Machakos County. It was deposed that within Machakos County there are Six Water Service Providers spread across Machakos County, including; Machakos, Mavoko, Mwala, Matungulu Kangundo, Yatta, Kathiani Water Companies with most parts of Machakos County having their own sources. She further deposed that in Kitui County there are only itui Water Sanitation Company where Masinga Dam is the main water source plus a few boreholes; and Kiambere-Mwingi Water and Sanitation Company the main source being Kiambere Dam with a total production of 9,400m³ per day and hence it is a misrepresentation of facts to allege that the Machakos people have been sidelined. Apart from that there are several projects being undertaken by Tanathi Water and Service Board on the Machakos County side which are being funded by various donors including, Public Private Partnership initiative for Machakos and Mavoko Water and Sewerage Company, Matungulu Water Supply Project for Matungulu Kangundo Water and Sewerage Company, Rehabilitation of the Yatta Canal for Yatta Water Service Company, a public sanitation facility for Mwala Water and Sanitation Company and many more under proposal stage while in Kitui County side it is only the Masinga Kitui Water Supply and sanitation Project for Kitui Water and Sanitation Company and Kiambere-Mwingi Water Supply and Sanitation Project for Kiambere-Mwingi Water and Sanitation Services.

13. It was contended that though comparatively the Kitui County is larger in terms of service area followed by Machakos, the Water Services are more widespread in Machakos than Kitui County.

14. It was therefore the 1st Respondent's position that water supply and sanitation services has been evenly provided by the Tanathi Water Service Board to not only to the two counties under dispute but also to Makueni and Kajiado depending on the availability of funds.

15. Apart from that affidavit there was a replying affidavit sworn by **Francis Kyalo Silva**, a Service Planning Engineer with the 1st Respondent on 16th June, 2014.

16. According to him, the 1st Respondent's main mandate is provision of water and sanitation service to four counties namely Kitui, Machakos, Kajiado and Makueni and currently the project being carried out serves Machakos and Kitui Counties .

17. According to him, the project was initially intended to lay the trunk line pipe from Masinga through to

Kitui with lateral lines serving other areas falling within the project area covering 5500km² including a lateral line to Kaewa-Masinga and also water supply and sewerage treatment works at a cost of Kshs 5 Billion. However the financiers were only able to provide a maximum of Kshs 2 Billion as a result of the project had to be scaled down to fit within the Kshs. 2 billion budget framework though that did not affect the original design or output of the intended supply and distribution. By the scaling down and limiting the project to the laying of the trunk line and treatment works instead of the lateral lines, with the provisions of tees or off takes placed on various points along the trunk line the project will still meet its ultimate intended output and object when the future expansions from the Tees /Off takes are done. According to him, the only lateral line retained is the Kaewa-Masinga lateral line within Machakos County upon extra funding from the Government of Kenya through the ministry of environment, water and irrigation at a cost of Kshs. 110/= Million which project is undergoing and covers the project area and the disputed area.

18. It was deposed that the allegation raised that the project is only supplying water to Kitui residents and completely side-lining the people of Machakos is untrue and is based on inaccurate facts and information. To the contrary, the project as originally designed was meant to supply water to the areas which fall within the project area both on the Machakos County and Kitui County and that the only changes made during the scaling down is the removal of lateral lines and replacing them with tees and off-takes. In any case the Machakos County takes a big share of the water to be harnessed under the project with the retained lateral line to Kaewa-Masinga as compared to Kitui County and that the only emphasis placed on Kitui side is sewerage and treatment works based on the feasibility study. In any case the new trunk line under construction runs alongside the existing line with a difference in capacity as the new line will increase the volumes of water from 9000cm³ and hence the demands by the Applicant are neither genuine nor economically viable.

19. According to the deponent, the project has been completed to about 67% at a cost of Kshs 1.4 Billion which is irreversible and any order to the contrary will cause substantial loss, damage and in essence it will deprive of the people of Machakos and Kitui their constitutional right of access to clean water and sanitation services.

20. It was therefore contended that the people causing disturbances and stalling of the project are being given inaccurate information that the people of Machakos are being side-lined which allegation or information is untrue and based on misunderstanding of the project and that further the stalling and/or redesigning of the project of as demanded by the Applicants will neither be beneficial to the people of Machakos nor Kitui as claimed as the project area is defined not based on preferences but at the dictate of the Geographical features, Economic viability and sustainability of the project and hence part of the areas being agitated to have the design included will not meet the above criteria.

21. It was reiterated that over 67% complete with almost all pipes having been laid, two treatment tanks at Kwamtumba partially completed at a cost of Kshs 29,711,209/= and Katheka tank having been completed at Kshs 4,418,287.43/= and hence the request for redesigning is impossible unless the entire work done is undone with high cost, wastage and damages arising from the contracts and that the supplies will result to substantial loss to the Government as it will service a loan without benefits.

22. It was asserted that the project is a milestone to provide water and sanitary services to the people of Machakos and Kitui counties in line with the National Government's duties and directives by the constitution of Kenya.

23. There was also a replying affidavit sworn by **Nicholas Kathuka Muthui**, the 1st Respondent's Chief Executive Officer on 31st October, 2013.

24. According to him, the 1st Respondent was formed on 4th June 2008 by legal notice No. 69 of 2008 and the limits of supply for the 1st Respondent are contained in legal notice 68 of 4th June 2008 which cover 38 districts covering the 4 counties of Kajiado, Kitui, Makueni and Machakos. According to him, the 1st Respondent's mandate is provision of economical and efficient provision of water services, rehabilitation of infrastructure, capital development of infrastructure, formulation and enforcement of

regulations, contracting and supervising water services projects and development of sewer facilities and that the 1st Respondent has been undertaking various projects in Machakos County for example the Matungulu Water Supply Project that is ongoing, the Yatta Dam and Yatta Water Supply and Sanitation Project currently at completion stage; the JICA founded projects between the months of May 2012 to May 2013 involving 32 boreholes supplying 1,280 cubic millimetres per day, Mavoko PP which is ongoing; Mwala Water through the World Bank; Muuoni Dam de-silting; new World Bank funded borehole at Kalama, Kyua, Ekalakal where surveys are ongoing.

25. It was deposed that the implemented programs in Machakos County include rehabilitation of the Maruba Dam (2009-2010), Kitunduni Water Supply (2009), Mavoko Portland Cement Dam (2009), Lukenya Sewer (2010) and that Projects planned for implementation in Machakos County include Mavoko PPP (2013-2015), Machakos Urban PPP Water Supply (2013-2015), Yatta Water Supply & Sanitation (2013-2015), Rehabilitation of Yatta Canal (2013-2014). According to the deponent, the 1st Respondent provided Machakos County through Mwala Water and Sanitation Company and Machakos Water and Sewerage Company a bowser and a lorry in the month of September 2013 to ensure that rural unserved areas are also catered for and that in recognition and in response to the request by Masinga residents, the 1st Respondent sourced and got funding from the relevant ministry to undertake the Kaewa, Masinga Market Water Supply Project, which project procurement is underway as the advertisement was done on 9th October 2013. In respect to the ongoing Masinga project the current two counties amount to Kshs 2 Billion, delay in the ongoing works attract damages of Kshs 1 million per day per contract which would have adverse effect on the entire project.

26. It was averred that the government of Kenya through Tanathi Water Services Board in the year 2009 commissioned a consultant to carry out a feasibility study and preliminary design for water supply and sanitation for Masinga-Kitui Water Supply and Sanitation Project and that the project study area as per the terms of reference were Matuu, Masinga, Kaewa, and Kithyoko trading centres in Machakos County, Migwani, Katutu, Tulia, KwaVonzia, Itoleka, Matinyani, Mulutu, Wikililye and Kavisuni trading centres in Kitui County. Upon conclusion of the feasibility study and subsequent review by another consultant in January 2012, the cost of the project was estimated at Kshs 5.1 Billion against the available budget of Kshs 2 Billion which necessitated the phasing of the works; phase 1 was to comprise of priority works that could be implemented within budget and also incorporate a full gravity flow and sewerage system thus minimizing on operation costs resulting from pumping for long distances. To him, the priority areas considered were expansion of the intake works to 18,000 cubic metres per day to ensure substantial supply of water to people within the project area, expansion of the treatment works to 18000 cubic metres per day to accommodate treatment of water from the expanded intake works, expansion of the pumping capacity to accommodate the treated water.

27. It was added that other priority areas included a new trunk line from Masinga to Kitui with provisions for lateral (branch) lines to later serve all the areas indicated in the feasibility study with a view of progressively serving the entire area envisaged in the feasibility study and increased storage capacity to accommodate the increased treated water and a sewerage system for Kitui due to the increased Kitui urban population which is part of the 1st Respondent's mandate and which was informed by the feasibility study as well as the review of the final design.

28. In the deponent's view, the existing Masinga-Kitui pipeline supplies water to both Machakos and Kitui Counties; Machakos County receives approximately 3120 cubic metres per day and that the current and only water supply source for the residents along the Masinga-Kitui pipeline and Kitui town is Masinga Dam. To him, the allegations that there is an intention to channel all the waters of Masinga Dam to Kitui County are totally inaccurate.

29. It was contended that Masinga Dam is public land per Section 62 of the Constitution and vests in the national government and the 1st Respondent on behalf of the national government undertook the Masinga-Kitui Water Supply and Sanitation Project for the benefit of the Kitui and Machakos Counties and that as the right to water per Section 21(2) is a progressive realization human right, the 1st Respondent per Section 43(1)(d) as read with Section 21(2) as evidenced by the above has and is progressively working

on achieving the right to safe water in adequate quantities for the Machakos County.

30. It was asserted that the 1st Respondent has and will always be apolitical in the discharge of its mandate.

Determinations

31. I have considered the instant application the rivalling affidavits, the submissions made by **Dr Khaminwa**, learned senior counsel for the applicant and **Mr Odhiambo**, learned counsel for the Respondents.

32. It is important to state at the outset that what is before me is a judicial review application and the purview of judicial review was clearly set by **Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** when he stated that:-

“Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’.....By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to itBy ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at itI have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

33. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

34. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

35. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may

be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

36. Judicial review is concerned with the decision making process and illegality or otherwise of the decision rather than with the merits thereof. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

37. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the ***Civil Procedure Act*** does not apply. It is governed by sections 8 and 9 of the ***Law Reform Act*** being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law. Section 8 of the ***Law Reform Act*** specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. A declaration, for example, does not fall under the purview of judicial review for the simple reason that the court would require *viva voce* evidence to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**

38. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.

39. In this case the Applicant’s case is that the impugned decision is discriminatory of the people of Machakos County since whereas the water in question is drawn from Machakos County, it will be for the benefit of Kitui Country at the expense of the people of Machakos County. The Respondents’ position on the other hand is that to the contrary, the water project is for the benefit of the residents of Machakos more than the residents of Kitui though the latter County is larger.

40. In **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR,** it was held that:

“we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality.”

41. In Nyarangi & 3 Others vs. Attorney General [2008] KLR 688, it was held:

“The *Blacks Law Dictionary* defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”... The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company 1971 401 US 424 91* is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”.

42. It is therefore clear that even if the Court was to find that there is differential treatment between the people of Machakos and the people of Kitui that alone would not necessarily amount to discrimination which is outlawed by the Constitution. In order to determine whether the people of Machakos County are being discriminated against vis-à-vis the people of Kitui County, it would be important to look at the larger social, political and legal context since it is only by examining the larger context that a court can determine whether differential treatment results in equality. Whereas this Court appreciates that in certain instances issues of discrimination may be properly adjudicated by way of affidavit evidence, it is my view that the issues raised herein are not proper candidates for such adjudication.

43. In this case it is clear that the factual situation is far from settled. In order to determine the conflicting positions with respect to the aforesaid larger social, political and legal context, it is my view that affidavit evidence would not suffice and that it would be necessary to take *viva voce* evidence which would have to be subjected to cross examination to verify its veracity and probative value. **Dr Khaminwa**, learned senior counsel must have appreciated this position when he opined that the deponents of the affidavits be cross-examined thereon. That course however is not open to these kinds of proceedings in which the Court deals with the process rather than the merits of the decision in question.

44. Apart from that it is contended that the decision has been influenced by politicians from the said Kitui District. Whereas the particulars of the said politicians were not disclosed in the verifying affidavit, in the submissions the fingers seem to be pointed at inter alia the Cabinet Secretary for Lands, **Hon. Charity Ngilu**. However the said Cabinet Secretary is not a party to these proceedings and to make any adverse findings in respect of her conduct would clearly be a violation of the rules of natural justice and a contravention of her rights to fair hearing.

45. Therefore based on the state of the pleadings and evidence before this court as well as the nature of these proceedings the issues raised before this Court which issues this Court considers to be substantial, I hold that the same cannot be properly ventilated and determined in these proceedings. The applicant ought to have instituted either civil proceedings or constitutional petition in which the issues herein would have been properly and adequately canvassed and determined and appropriate remedies granted under Article 23 of the Constitution.

46. Before concluding this Judgement, I must express my gratitude to learned counsel for in depth research undertaken by them and if I have not referred to them it simply because considering my finding herein, to do so may prejudice any proceedings which might be instituted in which the said authorities would be dealt with substantially.

Order

47. In the result the Notice of Motion dated 11th June, 2013 is incompetent and is struck out but with no order as to costs since in my view this litigation was in the nature of public interests litigation rather than for the personal benefit of the applicant.

Dated at Nairobi this 24th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Dr Khaminwa for the Applicant

Mr Odhambo for the Respondents

Cc Patricia