



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 432 OF 2012

REPUBLICAPPLICANT

VERSUS

WATER RESOURCE MANAGEMENT AUTHORITY.....RESPONDENT

EX-PARTE

ISILO WATER RESOURCES USERS ASSOCIATION &

MAITMA SEVERINO M'MKINDIA

JUDGEMENT

Through the notice of motion application dated 21st December, 2012, Isiolo water Resources Users Association and Maitima Severino M'Mkindia seek orders that:

“1. An Order of CERTIORARI to bring to this court for the purpose of quashing the respondents authorization to WRMA ISL/50/5DA/10143/S and WRMA/50/ISL/5DA/10165/S that allowed the 1st Interested Party to dam, divert, store or abstract the Rugusu and Kithima tributaries of Isiolo river dated 20th Nov 2012.

2. An Order to prohibit the respondents and the interested parties from implementing the authorization No. WRMA/50/ISL/5DA/10165/S authorizing the interested parties to dam, obstruct or divert the Rugusu and Kithima tributaries of the Isiolo river dated 20th of Nov 2012.”

The application is supported by the chamber summons application for leave filed on 4th December, 2012 together with the statutory statement, the verifying affidavits of Felix Murimi Karimba and Maithima Severino M'Mkindia and annexures thereto. It is also supported by the further affidavits of Felix Murimi Karimba and Maitima Severino M'Mkindia sworn on 11th April, 2013.

The Water Resources Management Authority is named as the 1st Respondent. Northern Water Services Board, Ewaso Ngiro North Catchment Area Advisory Board and Isiolo Water and Sewerage Company are the 1st, 2nd and 3rd interested parties respectively.

On 20th November, 2012 the Respondent issued the 1st Interested Party permits to carry out construction

work with a view to extracting water from Kithima and Rugusu which are tributaries of Isiolo river. The applicants fault the process leading to the issuance of the permits and that is why they have filed these judicial review proceedings.

The applicants seek relief on the following grounds:-

- “1. The water resources management authority issued the Northern water services Board with authorization to construct work references WRMA/50/ISL/5DA/10143/S on Kithima Tributary of Isiolo river and WRMA/50/ISL/5DA/10165/S on Rugusu tributary of Isiolo river on the 20th of Nov 2012.**
- 2. The water resources management authority in giving the authorization ignored the objections by the applicant and issued the same without giving the applicants and residents of the area who are the direct users of the water a hearing contrary to the rules of natural justice and the requirement under the water act and water resources management Rules 2007.**
- 3. The Authorization (WRMA/50/ISL/5DA/10165/S) by the respondents was on the 20th November 2012 before the expiry of the 30 days laid down time for objections as advertised on the 23rd of October 2012 which was irregular and illegal.**
- 4. The authorization issued was different in reference from the application which was advertised which in fact is misleading secretive and prejudicial to the objectors, applicants and the public.**
- 5. The authorization ignored the hydrologist and technical survey which showed that the disruption of the flow of the two rivers will completely deplete the water resource and catchment.**
- 6. The Implementation of the Authorization will dry the two tributaries and affect the ecology of Isiolo River.**
- 7. The decision of the water resource management authority to issue the authorization has caused tension between the residents who own the Land and depends on the two tributaries for farming, drinking water and their animals need and the water bodies and the tension may lead to bloodshed.**
- 8. The residents and water users were never consulted.**
- 9. The respondents have advanced plans to construct a dam to be built in the Kianjuri area of Mt Kenya which can serve the entire area with water without affecting the streams.**
- 10. That bodies authorized have already started working on the ground and the interference in various farms is a cause of serious concern.**
- 11. There are over fifty projects which draw and rely on the tributaries for water and are stakeholders who need to be consulted before any works are done.**
- 12. That unless the works are stopped and stayed pending the hearing of the main motions the applicants and residents will suffer irreparably and or there will be serious miscarriage of Justice.**
- 13. That the residents objections are yet to get a response.**
- 14. That the water resources management authority decisions in Ultra vires and against the Law and unless the orders sought are granted there will be serious miscarriage of justice .**

15. That the applicants have been denied a right to appeal as the board acted illegally and made an ultra-vires decision and have infringed on to the citizens rights.”

The grounds relied upon in support of the relief sought essentially captures the applicants' case.

The application is opposed through an affidavit sworn on 11th February, 2013 by Engineer Philip J Olum the Respondent's Chief Executive Officer. At the outset, the Respondent brands the applicants as illegal abstractors of large volumes of water from Isiolo River for commercial irrigation purposes at the expense of the residents of Isiolo town who legitimately need the water for domestic use.

The Respondent's case is that it is a body corporate established under Section 7 of the Water Act, 2002 (the Act) and its mandate includes developing principles, guidelines and procedures for allocation for water resources; receiving and determining applications for permits for water use; monitoring and enforcing conditions attached to permits for water use; determining charges for use of water from any water source; regulating and protecting water resources quality from adverse impacts; and managing and protecting water catchments.

Engineer Olum avers that the 1st Interested Party is also a corporate body established under Section 50 of the Act and its key mandate is to supply water to various areas within the Ewaso Ngiro North Catchment Area which includes, but is not limited to, Isiolo and Meru.

He avers that Isiolo town is one of the Kenyan towns with the worst case of water shortages. This is due to the fact that although the water available in the river is sufficient to meet the town's water needs, the point of abstraction is downstream of the main commercial irrigators who abstract so much of the available water that the remaining water does not meet even half of the water requirements of the town. Further, that the commercial irrigators pollute the waters of the river through run off from chemical fertilizers thus adversely affecting the quality of water downstream which is meant for domestic use.

Engineer Olum averred that following an application for a domestic water abstraction permit, the Respondent upon carrying out the necessary studies and assessment issued the 1st Interested Party with a water abstraction permit to abstract 5000 m³ per day of water from Isiolo river for domestic use by residents of Isiolo town. The permit was issued after the Respondent established that the water flow in the river was sufficient to allow such abstraction. Further, that the decision was undertaken after various consultative meetings with all the stakeholders.

Engineer Olum deposed that the water shortage in Isiolo town is caused by illegal water abstraction carried out at night by use of portable water pumps and mainly for irrigation purposes. Attempts to stop the illegal abstraction have been unsuccessful.

It is the Respondent's case that led by the Ministry of Water and Irrigation it held consultations with various stakeholders and it was agreed that the solution lay in adjusting the water abstraction permits held by the 1st Interested Party to allow it abstract part of its allocated water upstream from Rugusu and Kithima springs which are tributaries of Isiolo river. The decision was backed by various studies which had established that the two tributaries had sufficient water to allow such abstraction and keep the water levels at the lawful reserves set by the Respondent. It is the Respondent's case that the decision was also in accordance with Section 32 (2) of the Act which stipulates that the use of water for domestic purposes takes priority over its use for any other purpose.

The Respondent asserts that the 1st Interested Party's application was processed in accordance with the Act. The Respondent's CEO avers that on 16th October, 2012 the Respondent issued public notices in respect to the two applications for water use permits in accordance with Rule 29(1) of the Water Resources Management Rules 2007 (the Rules) inviting members of the public to submit written comments and/or objections within 30 days from the date of the notice. In compliance with Rule 29(2), the notices were on 16th October, 2012 displayed at the Respondent's regional, sub-regional and agency offices.

Further, that the notices were also displayed at the District Commissioner's, District Officer's and the Chief's offices. It is the Respondent's case that the applicants and others did indeed file objections on the date of the notices. No other objections were received. The CEO of the Respondent avers that the application, the objections thereto, the water use studies and the input of the stakeholders were all considered prior to the issuance of the permit.

It is the Respondent's case that the applicants' case has no basis as the permits were issued on 20th November, 2012 after the expiry of 30 days provided for raising objections. Further, that the Respondent also advertised the applications in the newspapers as per Rule 29(1) which required it to cause to be published in a national newspaper of wide circulation a list of all permit applications falling within categories C and D. It is the Respondent's case therefore that it fully complied with the rules.

It is the Respondent's case that the applicants were indeed consulted but they are only interested in continuing their illegal abstraction of water. Further, that it is mandated under Section 8 of the Act to ensure equitable distribution of water resources and to regulate and protect the use of water considering that water is a scarce resource. It is the Respondent's case that these proceedings are against public interest.

In response to the Respondent's reply, Felix Muirimi Karimba and the 2nd Applicant swore further affidavits on 11th April, 2013. Through his affidavit, Felix Murimi Karimba accused the Respondent's CEO of swearing an affidavit full of falsehoods and contradictions. He averred that they are not extracting water illegally as they have permits issued by the Respondent allowing them to extract water for subsistence farming and not commercial irrigation. He averred that the residents of the areas where the river pass were not consulted and neither were the objections by professionals considered. He deposed that the Respondent's CEO had indeed admitted in writing that the permit was issued under pressure and without consideration of the stakeholders' opinions.

He averred that in as much as Isiolo town requires water, the same cannot be tapped to the detriment of residents living downstream as this would amount to violation of human rights and degradation of the ecosystem. He avers that the study relied on was conducted one year prior to the issuance of the permit and such a report could not be correct as many changes had occurred to the climate and ecosystem. He asserts that the study was misleading in that the amount of water in the river and the mandatory reserve required were not correctly shown.

Felix Murimi Karimba averred that there was an environment assessment report which had proposed that the only solution was the construction of a dam. He averred that no notices were issued as required by Section 29(1) of the Rules and that the only notice issued appeared in the Standard newspaper on 23rd October, 2012 and that is what led to their filing objections. He averred that the law required that any objection raised should be addressed in writing but the Respondent proceeded to issue the permits before addressing their objections.

It is his averment that Section 32 of the Act requires the factors to be considered before the issuance of a permit are existing lawful users, efficient beneficial use, catchment management and water resource, likely effect on other users, existing investments and importance of domestic users. He asserts that if these factors had been taken into consideration then the Respondent would not have issued the permits.

In his further affidavit, the 2nd Applicant averred that he had prepared a report in which he concluded that if the water is abstracted as per the Respondent's permits then the water would never be enough for the users downstream. He averred that although he submitted the hydrological report in support of his objection to the issuance of the permits, he never received any response.

Considering the material placed before the Court, it is clear that the applicants fault the Respondent for issuing the permits before the expiry of the 30 days allowed for filing objections. They also accuse the Respondent for failing to consider their objections and also failing to give a response to their objections.

The applicants have also gone ahead to argue that the permits ought not to have been issued in the first place. I must state without further ado that this particular argument is not sustainable. Whether there was enough water in Isiolo river for extraction is a matter that fell squarely into the jurisdiction of the Respondent. This Court has no jurisdiction to compare the hydrological reports relied on by the Respondent and those presented by the applicants so as to determine whether the Respondent's decision was right or wrong. Judicial review considers whether the correct process was used in arriving at a decision. It does not go into the merits of the decision although sometimes a decision may be found to be so unreasonable such that a normal person applying his mind to the facts of the given case could not have reached such a decision.

I will therefore confine myself to considering the process used in arriving at the decision. The relevant law is found in Section 29 of the Act which provides:

“29. Procedure for obtaining permit

(1) An application for a permit shall be made to the Authority.

(2) If the Authority prescribes a form for use in making such an application, the application shall be made by completing and lodging the prescribed form together with—

(a) such information in support of the application as the form may require; and

(b) the prescribed fee (if any).

(3) The Authority shall determine an application for a permit by granting the permit or rejecting the application.

(4) Except as provided by section 33, an application for a permit shall be the subject of public consultation and, where applicable, of environmental impact assessment in accordance with the requirements of the Environmental Management and Co-ordination Act, No. 8 of 1999.

(5) Any person opposed to the grant of a permit may object in writing to the Authority.

(6) The applicant and any person who may have objected to the grant of the application shall be notified of the decision of the Authority and, in the event of the rejection of an application or objection, as the case may be, of the reasons therefor.

(7) It is the duty of the Authority to determine an application for a permit as soon as practicable after its lodgment.

(8) Where an application duly made in accordance with this section is not determined by the Authority within six months after lodgment, any fee paid by the applicant under subsection (2)(b) shall be refunded to the applicant.”

In deciding to grant or reject an application for a permit the Respondent is guided by Section 32 which states:

“32. Considerations for the issue of permits

(1) In issuing a permit, and in fixing any conditions to be imposed on a permit, the Authority shall take into account such factors as it considers relevant, including —

(a) existing lawful uses of the water;

(b) efficient and beneficial use of water in the public interest;

- (c) any catchment management strategy applicable to the relevant water resource;
 - (d) the likely effect of the proposed water use on the water resource and on other water users;
 - (e) the class and the resource quality objectives of the water resource;
 - (f) the investments already made and to be made by the water user in respect of the water use in question;
 - (g) the strategic importance of the proposed water use;
 - (h) the quality of water in the water resource which may be required for the reserve; and
 - (i) the probable duration of the activity or undertaking for which a water use is to be authorised.
- (2) The use of water for domestic purposes shall take precedence over the use of water for any other purpose, and the Authority may, in granting any permit, reserve such part of the quantity of water in a water resource as in its opinion is required for domestic purposes.
- (3) The nature and degree of water use authorised by a permit shall be reasonable and beneficial in relation to others who use same sources of supply or bodies of water.
- (4) A permit shall, subject to this Act, remain in force for the period specified in it, and may, to the extent that the permit so provides, be renewed from time to time.”

Other relevant provisions are as found in Rules 24-32 of the water Resources Management Rules, 2007. Rules 24 to 28 provide the procedure for the application of water permits. Rule 29 provides the requirement for the publication of permit applications. It states:

“29. Public notification of permit applications

1. The Authority will cause to be published monthly in a national newspaper of wide circulation a list of all the permit applications that fall into Permit Category C and D.
2. The Authority shall display a notice of all applications received, within the region, at the District commissioner’s District Officer’s, Chief’s, Authority’s regional, sub-regional, and district agency offices at the end of each month.
3. The Authority shall display at the Sub Regional Office a notice of all applications received by the Authority, within each sub-region, at the end of each week.
4. The public notification will state the name of the applicant, the water resource for which the application has been made, the quantity and purpose for which the application has been made, the land registration number, the name of the nearest market centre and any additional details that the Authority may consider relevant to the public with respect to the permit application.”

Rule 30 provides for objection to an application for a permit. It states

Objection to permit application

The evidence placed before the Court shows that the public notices issued by the Respondent, in regard to the applications for the permits, were effective in that several objections were received from many people before the deadline which was given as 16th November, 2012. The Respondent has demonstrated that notices were displayed in all the administrative offices within the areas that were to be affected by the proposed water abstraction. The permits were then issued on 20th November, 2012.

I am satisfied that the requirement for a lapse of 30 days before a permit is issued was complied with. The applications were also published in a newspaper with wide national circulation. Although 30 days had not lapsed between the time of the publication in the Standard newspaper and the time of the issuance of the permits, I find that no prejudice was suffered by those who wanted to object to the issuance of the permits. Nobody has come forward to allege that objections were not filed because they relied on the advertisement in the Standard newspaper.

The next question is whether the objectors were given reasons for the rejection of their objections. The applicants assert that they were not given responses as required by the Rules. The Respondent did not directly respond to this issue. It is therefore assumed that there was no response to the objection. This was a breach of Rule 30 (4) which requires the Respondent to notify an objector of the outcome of an objection to an application for a permit within thirty days of its decision.

The question is whether failure to comply with the said rule adversely affected the applicants. The applicants filed these proceedings on 5th December, 2012. That was about 15 days after the decision had been made. It means that the applicants had received news of the issuance of the permits. The Respondent still had 15 days to comply with Rule 30(4). The applicants jumped the gun by filing these proceedings and it cannot be said that the Respondent did not comply with the Rules.

The applicants rushed to this Court for judicial review orders while their core grievance was against the merits of the decision of the Respondent. Section 84 of the Act creates the Water Appeal Board (the Board) and clothes it with jurisdiction under Section 85 of the same Act as follows:-

“85. Jurisdiction of the Board

(1) An appeal shall lie to the Water Appeal Board at the suit of any person having a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or licence under this Act, and the Board shall hear and determine any such appeal.

(2) In addition, the Board shall have such jurisdiction to hear and determine disputes, and shall have such other powers and functions, as may be conferred or imposed on it by or under this or any other Act.”

It is clear that the Board was the best body to make a decision on the applicants’ complaints. According to Paragraph 3 of the Fifth Schedule, members of the Board are expected to have experience in the water sector. They are the people who can peer over the hydrological reports and make conclusion as to which of the reports is correct.

It must also be remembered that the proposed water abstraction is meant to quench the thirst of the residents of Isiolo town. The water is for domestic use. Although I do not profess any expertise in the water sector, I note that the expert reports relied on by the Respondent clearly indicates that the abstraction of the water upstream by the 1st Interested Party will not result in the drying of the river. The report has also recommended measures to be taken to alleviate the water scarcity.

Considering the evidence placed before this Court, I conclude that this application should fail. The application is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 27th day of November, 2014

W. KORIR,

JUDGE OF THE HIGH COURT