



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**  
**PETITION NO 143 OF 2014**  
**(CONSOLIDATED WITH PETITION NO 142 OF 2014 &**  
**JUDICIAL REVIEW APPL. NO 140 OF 2014)**

**OKIYA OMTATAH OKOITI .....1<sup>ST</sup> PETITIONER**  
**BALKRISHNA RAMJI DEVAN .....2<sup>ND</sup> PETITIONER**  
**PELICAN SIGNS LIMITED .....3<sup>RD</sup> PETITIONER**  
**PETER N KUGURU .....4<sup>TH</sup> PETITIONER**

**VERSUS**

**NAIROBI CITY COUNTY .....1<sup>ST</sup> RESPONDENT**  
**MINISTRY OF ENVIRONMENT, WATER &**  
**NATURAL RESOURCES .....2<sup>ND</sup> RESPONDENT**  
**WATER SERVICES REGULATORY BOARD .....3<sup>RD</sup> RESPONDENT**  
**ATHI WATER SERVICES BOARD .....4<sup>TH</sup> RESPONDENT**  
**THE NAIROBI CITY WATER & SEWERAGE COMPANY.....5<sup>TH</sup> RESPONDENT**  
**GEORGE ALADWA .....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This judgment pertains to **High Court Petition Nos. 142 and 143 of 2014**, which were consolidated with **Judicial Review Application No. 140 of 2014**. In their respective suits, the petitioners challenge the appointments of new members of the Board of Directors and the

- Chairperson of the **Nairobi City Water and Sewerage Company Ltd** by the 1<sup>st</sup> respondent.
2. **Petition No. 142 of 2014** was filed on 28<sup>th</sup> March 2014 under a Certificate of Urgency to challenge the appointment of one **George Aladwa** as the Chairman of **Nairobi City Water and Sewerage Company**. The petitioner alleged that the appointment had been done without any consideration of constitutional requirements with regard to such appointments.
  3. **Petition No 143 of 2014** was also filed under Certificate of Urgency on 31<sup>st</sup> March 2014 on the grounds that the respondent had dismissed over two-thirds of the members of the Board of Directors of the Nairobi City Water and Sewerage Company and appointed new members without any regard to constitutional requirements.
  4. The third matter, **Judicial Review Application No. 140 of 2014** was filed under Certificate of Urgency on 8<sup>th</sup> April 2014 challenging the removal of the applicant, Mr. Peter Kuguru, from his position as Chairman and appointing the said **George Aladwa** as Chairman. By an order made on 5<sup>th</sup> May 2014, these three matters were consolidated in view of the fact that they all deal with the appointment of the Board of Directors responsible for the management of the **Nairobi City Water and Sewerage Company Ltd**.
  5. Upon consolidation, the parties to the petition were to be **Okiya Omtatah Okoiti** as the 1<sup>st</sup> Petitioner, **Balkrishna Ramji Devani** as the 2<sup>nd</sup> petitioner, **Pelican Signs Limited** as the 3<sup>rd</sup> petitioner, and **Mr. Peter Kiguru** as the 4<sup>th</sup> petitioner. The respondents in the consolidated petition are the Nairobi County (**1<sup>st</sup> respondent**), the Ministry of Environment, Water and natural Resources (**2<sup>nd</sup> respondent**), the Water Services Regulatory Board (**3<sup>rd</sup> respondent**), the Athi Water Services Board (**4<sup>th</sup> respondent**) the Nairobi Water and Sewerage Company Limited (**5<sup>th</sup> respondent**) and Mr. George Aladwa (**6<sup>th</sup> respondent**).
  6. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners did not participate in the proceedings subsequent to the consolidation. Their interest in the matter appears to have been specifically directed at the appointment of Mr. George Aladwa who was later dropped from appointment as the Chairman of the 5<sup>th</sup> respondent. The said George Aladwa did not participate in the hearing of the petitions, either.

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

7. The 1<sup>st</sup> petitioner appeared in person. His case is contained in his Petition dated 31<sup>st</sup> March 2014 which is supported by his affidavit sworn on 31<sup>st</sup> March 2014 and two further affidavits sworn on 2<sup>nd</sup> and 19<sup>th</sup> May 2014. He also filed submissions dated 29<sup>th</sup> May 2014 and supplementary submissions dated 28<sup>th</sup> July 2014.
8. The 1<sup>st</sup> petitioner submits that water is a strategic national resource and cannot be owned or managed by individuals or institutions, and that the governance of water is a national strategic function vested in the 3<sup>rd</sup> respondent but delegated to the 4<sup>th</sup> respondent, who in turn delegates part of it downwards to the 5<sup>th</sup> respondent in a delegated structure-function framework.
9. He submits that the residents of Nairobi City County have a constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, including to a water service provider (the 5<sup>th</sup> respondent) led and managed according to the law, so as to ensure the efficient supply of good quality, affordable, reliable, and sustainable water and sewerage services.
10. The petitioner submits that the Notice for the 5<sup>th</sup> respondent's Annual General Meeting (AGM) of 26<sup>th</sup> March, 2014, listed the institutions of the purportedly retiring directors represented but the 1<sup>st</sup> and its Governor who had been sued as the 2<sup>nd</sup> respondent by the 1<sup>st</sup> petitioner replaced them with names of handpicked individuals whose curriculum vitae have not been disclosed, and whose

representation of stakeholders was not revealed, and for whom no vetting process was undertaken by the 1<sup>st</sup> respondent. It is his contention that if allowed to stand, the irregular appointment of strangers will eliminate the representation of known and approved institutional stakeholders on the Board of Directors of the 5<sup>th</sup> respondent, yet the 5<sup>th</sup> respondent is expected to actualize the all-important right to water of the residents of Nairobi City County; and that it will also reverse and erode the major governance gains so far realized since the Water Act, 2002 came into operation in 2003.

11. The petitioner contends that from precedents, the 5<sup>th</sup> respondent always publishes a notice in at least two newspapers of national circulation asking defined key stakeholders to express interest to serve on its Board of Directors in a competitive process. The shortlisted candidates would then be subjected to the predecessor of the current Nairobi City County Assembly before being appointed at the Annual General Meeting of the 5<sup>th</sup> respondent specifically convened for that purpose.
12. The petitioner avers that the 1<sup>st</sup> respondent's recruitment process for the directors of the 5<sup>th</sup> respondent was fatally flawed, irresponsible and an affront to the Bill of Rights, the principle of public participation, and is contrary to the other provisions of the Constitution and the Water Act, 2002 as the respondent is under a legal duty to recruit directors of the 5<sup>th</sup> respondent in a competitive, transparent, fair and open manner that conforms to all other required procedures; and that the 1<sup>st</sup> respondent has a constitutional duty to uphold the rule of law, the provisions and the spirit of the Constitution. He submits that anything done or omitted to be done contrary to the Constitution is null and void, and that therefore the decision of the 1<sup>st</sup> respondent with regard to the appointment of directors and Chairman of the 5<sup>th</sup> respondent is, among other things, unlawful, unjustified, capricious, and against core values, tantamount to discrimination, and is therefore amenable to judicial intervention.
13. The petitioner further contends that other than the questionable technical credentials and competence of the handpicked directors of the 5<sup>th</sup> respondent, they are likely to be compromised, subservient acolytes of the 1<sup>st</sup> respondent and unable to assert their desired operational autonomy.
14. The petitioner submits further that the recruitment violated the national values and principles of governance including rule of law, democracy and participation of the people set out in **Article 10**, and it is also, in contravention of **Article 27**, discriminatory against those who are not in the good books of the 1<sup>st</sup> respondent or are unknown to it.
15. It is also the 1<sup>st</sup> petitioner's contention that the recruitment process contravenes **Article 35** of the **Constitution** on the right of people to access important information affecting the nation; **Article 47** on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; and **Article 73** on the authority assigned to a State officer and the guiding principles of leadership and integrity.
16. The petitioner further contends that the appointments violate **Articles 6(2), 186(2), 189**, the **Fourth Schedule** and other constitutional provisions and principles on devolution in locking out one level of government from a shared function like water and **Article 232** on the values and principles of public service.
17. The petitioner has made extensive submissions with regard to the relationship between a general and specific law. He has relied on a number of decisions, among them **City of Manila v. Teotico, G.R. No. L-23052 January 29, 1968**, **Bagatsing v. Ramirez, G.R. No. L-41631 December 17, 1976** to support his case for the supremacy of specific laws over general laws. However, as this petition does not, in my view, turn on this point or on whether or not there has been an implied repeal of the Water Act, I need not go into an analysis of his submissions on these two points.
18. He asks the court to grant the following orders:

- a. *A Declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' decision to unilaterally appoint strangers to the Board of Directors of 6<sup>th</sup> respondent was irregular and fatally flawed for not following the procedures laid down in both the Constitution and the Water Act, 2002.*
- b. *A Declaration be and is hereby issued that to ensure that there is no disruption of the services provided by the 6<sup>th</sup> respondent, all the directors currently in office continue serving until they are replaced through the process provided in law.*
- c. *A Declaration be and is hereby issued that the law requires and empowers the 4<sup>th</sup> and 5<sup>th</sup> Respondents to play a critical role in the appointment of the directors of the 6<sup>th</sup> Respondent.*
- d. *A Declaration be and is hereby issued that the directors of the 6<sup>th</sup> Respondent representing known stakeholders approved by the 4<sup>th</sup> and 5<sup>th</sup> respondents cannot be replaced by strangers to those institutions.*
- e. *A Declaration be and is hereby issued that the 1<sup>st</sup> and/or the 2<sup>nd</sup> respondent cannot appoint the Chairperson of the Board of Directors of the 6<sup>th</sup> respondent.*
- f. *A Declaration be and is hereby issued that the Articles and Memorandum of Association of the 6<sup>th</sup> respondent envisages a seamless transition from one Board to another.*
- g. *A Declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents can manage water and sanitation services exclusively without involving the 4<sup>th</sup> and 5<sup>th</sup> respondents.*
- h. *A Declaration be and is hereby issued that the Water Act 2002 is still in force in Kenya and must be obeyed.*
- i. *THAT the Honourable Court do issue hereby issues an order quashing the decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondents' decision to appoint strangers to the Board of the 6<sup>th</sup> respondent.*
- j. *THAT the Honourable Court be pleased to issue hereby issues a permanent order of Prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever, to the unconstitutional and illegal appointment of strangers, by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, to the Board of the 6<sup>th</sup> respondent.*
- k. *THAT the Honourable Court be pleased to issue hereby issues an order ordering the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents to allow the existing directors to continue serving until they are replaced through the procedures set out in the Constitution and in the Water Act, 2000.*
- *THAT the Honourable Court be pleased to issue hereby issues an order compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to forthwith start the process of recruiting new directors and do so competitively, transparently, fairly, through a process anchored in law.*
- m. *THAT the Honourable Court be pleased to issue hereby issues an order ordering that the Board of the 6<sup>th</sup> respondent be maintained as it were on or before 26<sup>th</sup> March, 2014, until a properly constituted Board is instituted within the provisions of the 2010 Constitution and the Water Act, 2002*
- n. *THAT the Honourable Court be pleased to issue hereby issues an order ordering that the Memorandum of Articles of Association of the 6<sup>th</sup> Respondent must be followed strictly, and that no more than two-thirds of directors are not retired at the same time and that the election of the Chairperson shall not be changed from an elective to an appointive position without amending the same Articles.*

○ ***THAT the Honourable Court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.***

p. ***An Order that the Respondents do pay the costs of this Petition.***

#### **The 4<sup>th</sup> Petitioner's case**

19. The 4<sup>th</sup> petitioner approached the court by his application brought by way of a Notice of Motion dated 8 April 2014 in **Judicial Review Application No. 140 of 2014**. The application is supported by his affidavit of the same date. His case was presented by his Learned Counsel, Ms. Munyaka.
20. The 4<sup>th</sup> petitioner was the Chairman of the 5<sup>th</sup> respondent until he was removed by the 1<sup>st</sup> respondent in March 2014. It is his case that the 1<sup>st</sup> respondent acted *ultra vires* by replacing him as Chairman of the Board of Directors without giving him notice of the intention to remove him. He terms the acts of the 1<sup>st</sup> respondent unfair, unjust and unprocedural, and contends that the respondent has acted unreasonably and irrationally by ostracizing him from the affairs of the 5<sup>th</sup> respondent and consequently throwing the affairs of the 5<sup>th</sup> respondent into disarray; that the decision to suspend him was made without due regard to the law and/or policies governing the respondents and in particular the salient grounds upon which such a measure can be taken; that it was made in flagrant disregard of the rules of natural justice as he was neither given an opportunity to be heard nor reasons for the said decision. He contends further that the 1<sup>st</sup> respondent acted arbitrarily, *ultra vires* and unlawfully in suspending him as the Memorandum and Articles of Association of the 5<sup>th</sup> respondent specifically provide for arbitration in cases of disputes within the Board.
21. It is his case further that the 1<sup>st</sup> respondent considered irrelevant considerations in arriving at the decision to suspend him; that it disregarded relevant considerations; that its conduct in its entirety and in particular the impugned decision of 3<sup>rd</sup> April 2014 smacks of impropriety, is absurd, capricious, unlawful, unjust, Wednesbury unreasonable and irrational and further *ultra vires* both the Memo and Articles and **Sections 6(6) of the County Governments Act and Section 47(1) of the Water Act**.
22. It is his contention that **Clause 83 of the Articles of Association** of the 5<sup>th</sup> respondent provides for the stay in office of the Chairman for a period of 3 years and as such it is obnoxious for the respondents to purport to circumvent this provision; and that in any event, **Clause 131 of the Articles of Association** is clear that in the event of a dispute between Directors, it should be referred to arbitration for expeditious resolution. It was his case therefore that the Board erred fundamentally by arbitrarily ousting him from office.
23. The 4<sup>th</sup> petitioner agrees with the submission by the 1<sup>st</sup> petitioner that the stake holders of the 5<sup>th</sup> respondent were not involved in the decision. He contends that he has never been given a chance to be heard, and the reasons for his ouster have never been communicated to him.
24. The 4<sup>th</sup> petitioner submits that the Water Act provides the measures for the appointment of directors; that such measures include competitive bidding for directors and inclusions of stakeholders under Gazette Notice No. 7045 of 18/6/2006, and the actions of the 1<sup>st</sup> respondent were in breach of the law, the Constitution and the powers of the Governor.
25. The 4<sup>th</sup> petitioner submits that there is no conflict of laws; that the Water Act has not been repealed, and that the Constitution provides for a transition period so that services shall not be disrupted by giving legislative roles to the County when it has no effective mechanism to enforce the same. It is however, his submission that even if the Water Act was not applicable, the Memorandum and Articles of the 5<sup>th</sup> respondent provide for voting and natural justice at general meetings. It is his case further that the Memorandum and Articles do conform to the Constitution

but were not followed.

26. The 4<sup>th</sup> petitioner further submits that the 1<sup>st</sup> respondent acted in excess of its jurisdiction and therefore, there is need for orders prohibiting its actions. He relies on the decision in **Applicant vs The Resident Magistrate Kaloleni Misc Application No 117 of 2004** and **R vs City Council of Nairobi and Others, Judicial Review Appl. No 323 of 2010** in support of his case.
27. The 4<sup>th</sup> petitioner asks the court to grant an order of certiorari to quash the decision of the 1<sup>st</sup> respondent removing him from his position as the Chairman of the Board of Directors of the 5<sup>th</sup> respondent; an order of mandamus to compel the 1<sup>st</sup>, and 5<sup>th</sup> respondents to reinstate him as the Chairman of the Board of Directors of the 5<sup>th</sup> respondent; and an order prohibiting the respondents or any person acting in their behest from removing or purporting to remove him from office as the Chairman of the Board of Directors of the 5<sup>th</sup> respondent. He also prays for the costs of the application.

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

28. The 1<sup>st</sup> respondent's case is contained in the Replying Affidavit of one Lilian W. Ndegwa sworn on 8<sup>th</sup> May 2014 and its written submissions dated 23<sup>rd</sup> May 2014. Learned Council, Prof. Ojienda, presented its case.
29. It is useful to point out that the 1<sup>st</sup> petitioner had initially sued both the Nairobi City County and the Governor of the County, and that the acts under attack had been acts of the Governor.
30. According to the 1<sup>st</sup> respondent, the mandate of the 5<sup>th</sup> respondent is set out at sections 51, 53 and 55 of the **Water Act**. It is, under the said Act, an agent of the 4<sup>th</sup> respondent and exercises the mandate of the 4<sup>th</sup> respondent. Its mandate includes the provision of water services or any service of or incidental to the supply of water or sewerage.
31. The 1<sup>st</sup> respondent further submits that the legal framework under which the 5<sup>th</sup> respondent supplies water and provides sewerage services fundamentally changed with the enactment of the Constitution of Kenya 2010/ It contends that the function of the National Government in relation to water is that set out in **Section 22 (c) of Part 1 of the Fourth Schedule** to the Constitution. Consequently, the mandate of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, as agencies of the National Government, is limited to water protection, securing sufficient residual water, hydraulic engineering and safety of dams nationally and not supply of water and the provision of sewerage in Nairobi County.
32. It is also the 1<sup>st</sup> respondent's case that in accordance with the Constitution, the supply of water and the provision of sewerage, collectively known as "water and sanitation services" is an exclusive function of County Governments. It is therefore its contention that in the present case, the provision of water and sanitation is, within its area of jurisdiction, its exclusive mandate, and that the said services are undertaken by the 5<sup>th</sup> respondent on its behalf.
33. The 1<sup>st</sup> respondent contends that by dint of **Article 185 (2) of the Constitution**, regulation of water and sanitation services, including water service providers, is the mandate of the County Government done through laws passed by its County Assembly; that the Water Act must be read in accordance with **Section 7 of the Transitional and Consequential Provision** in the Constitution; and that the Constitution does not support the continued exercise of the regulatory mandate of water and sanitation services by the 3<sup>rd</sup> respondent.
34. The 1<sup>st</sup> respondent further argues that the regulation of water and sanitation services, being a County Government function, is not through national legislation such as the Water Act,

Corporate Governance Principles published by either the 2<sup>nd</sup> and 3<sup>rd</sup> respondent, or licensing terms set by the 3<sup>rd</sup> respondent; and it is misconceived for the petitioners to contend that the 3<sup>rd</sup> respondent, the Water Act and the Corporate Governance Guidelines are the relevant institution and legislation to regulate the provision of water and sanitation services in Nairobi County or any other County.

35. The 1<sup>st</sup> respondent relies on the decision in **Nairobi Metropolitan PSV SACCOS Union Ltd and 25 Others vs County of Nairobi and 3 Others** in support of its contention that County legislation is the relevant legislation regulating the function of the County Government; that state organs must exercise only such power as the Constitution sanctions, relying in this regard on the decision in **Speaker of the National Assembly and Others vs De Lille MP and Another (297/98) [1999] ZASCA 50** and **Speaker of the Senate and Another vs Hon. Attorney General, Nairobi SC Advisory Opinion Reference No. 2 of 2013 eKLR**.
36. The 1<sup>st</sup> respondent agrees with the 1<sup>st</sup> and 4<sup>th</sup> petitioners that there is no conflict of laws as contemplated under **Article 191** of the **Constitution** regarding the management of water and sanitation providers such as the 5<sup>th</sup> respondent; that the provisions of the Water Act do not prevail over those of the Companies Act and those of the 5<sup>th</sup> respondent's Articles of Association pertaining to the appointment and/or selection of directors; and that the Guidelines on Corporate Governance do not prevail over the provisions of the Companies Act or the 5<sup>th</sup> respondent's Articles of Association with regard to appointments. It was its case that only legislation enacted by the County Government under **Article 185 (2)** of the **Constitution** would prevail over the Companies Act and the 5<sup>th</sup> respondent's Articles of Association.
37. The 1<sup>st</sup> respondent further submits that it exercises its constitutional function to provide water and sanitation services indirectly through the 5<sup>th</sup> respondent; that it is empowered in that regard by **Section 6 (5)** of the **County Governments Act No. 17 of 2012**; that the 5<sup>th</sup> respondent, being wholly owned by the 1<sup>st</sup> respondent, is a public corporation pursuant to **Section 2 (1)** of the **Public Finance Management Act**; that once incorporated as a limited liability company, the 5<sup>th</sup> respondent became a separate legal entity distinct from its members. It is its case that it cannot therefore be held responsible or accountable for actions of the 5<sup>th</sup> respondent.
38. The 1<sup>st</sup> respondent further contends that the **Public Finance Management Act** has put in place a robust legal framework to ensure transparency and accountability of County corporations such as the 5<sup>th</sup> respondent. It cites in particular the provisions of **sections 149 (2) (j), 164 (5), 166 (5), 184** and **185**. It is also its case that the manner of appointment of the 5<sup>th</sup> respondent's directors is regulated by **Section 184** of the **Companies Act** and **Article 66** of the **Articles of Association**. It contends that the relevant requirements are that the appointment should be done at a general meeting of the company; there must be a resolution for the appointment of directors; and that shareholders should vote to elect the directors. It is its case that the acts of a director or manager shall, by virtue of **section 181** of the **Companies Act**, be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.
39. The 1<sup>st</sup> respondent submits therefore that the 5<sup>th</sup> respondent duly convened an Annual General Meeting held on 26<sup>th</sup> March 2014, chaired by the 4<sup>th</sup> petitioner and appointed directors to the Board of Directors.
40. The 1<sup>st</sup> respondent concedes that it is the sole shareholder of the 5<sup>th</sup> respondent; that on 25<sup>th</sup> February 2014, the Governor of Nairobi County, nominated persons who would be elected at the Annual General Meeting of the 5<sup>th</sup> respondent and notified the Chief Executive Officer of the 5<sup>th</sup> respondent; but maintains that it was undertaking its mandate in the nomination of persons into the Board of Directors, not as a County Government, but as a shareholder in the 5<sup>th</sup> respondent.
41. It is its case that there has been no appointment of the Chairman of the Board of Directors of the

5<sup>th</sup> respondent to replace the outgoing Chairman, the 4<sup>th</sup> petitioner, whose three year tenure had already expired; that the purported representation of certain institutions in the Board of Directors, including the Kenya National Chamber of Commerce and Industry and Jomo Kenyatta University as a representative of the Institute of Higher Learning, both of which are government institutions, negates the independence of County Government from National Government as envisaged in **Article 6 (2) of the Constitution.**

42. With regard to the 4<sup>th</sup> petitioner, it is the 1<sup>st</sup> respondent's case that as he does not dispute that his tenure as Chairman of the Board had expired, he cannot seek to chair the Board of which he is no longer a member. It is its submission that there is therefore nothing untoward, unlawful or unconstitutional in the procedure for appointing directors to the Board of the 5<sup>th</sup> respondent; and that therefore the provisions of the Companies Act and the Articles of Association of the 5<sup>th</sup> respondent conform to the requirements of the Constitution. It therefore prays that the petition be dismissed with costs.

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

43. On behalf of the Ministry of Environment Water and Natural Resources, the 2<sup>nd</sup> respondent, the Attorney General relied on submission dated 2<sup>nd</sup> May 2014 presented to the court by Learned Counsel, Ms Mwangi. The case of the 2<sup>nd</sup> respondent is that the water function is shared between the National and County Government as provided under **section 22 (c) of Part 1, and Section 11 of Part 2 of the Fourth Schedule of the Constitution;** and that the **Fourth Schedule** envisages cooperation between the two levels of government in line with **Articles 6 (2), 186 (2) and 189 of the Constitution.**

44. Ms. Mwangi submitted that the Water Act 2002 specifies the roles of the different entities in terms of ownership and operations and puts the entire water sector under the regulation of the Water Services Regulatory Board. She submitted that the court should give directions that will enable the water sector run with minimal or no conflict.

### **The 3<sup>rd</sup> respondent's Case**

45. The Water Services Regulatory Board, 3<sup>rd</sup> respondent sets out its case in a replying affidavit sworn by one Eng. Robert Gakubia on 2<sup>nd</sup> May 2013 and its submissions dated 15<sup>th</sup> July 2014. Learned Counsel, Mr Muruka, submitted that in determining the issue whether the provision and management of water services is a shared function or exclusive to county governments, **Articles 185(2), 186(1) and 187(2)** should be read with **Articles 259(1), 21, and 191 of the Constitution.** He submitted that whereas **Section 11(b) of Part 2 of the Fourth Schedule of the Constitution** provides that it is a function of County Governments to undertake "*water and sanitation services*" **Section 22 (c) of Part 1 of the Fourth Schedule to the Constitution** provides the function of the National government to be inter alia: water protection, securing sufficient residual water, hydraulic engineering and safety of dams. He submitted therefore that the water services function is shared between the national and county governments in terms of regulation and management respectively.

46. Counsel further argued that Kenya is also a signatory to the International Covenant on Economic Social and Cultural Rights and by dint of **Article 2(6) of the Constitution,** the state is under an obligation to enact legislation to fulfill international obligations; that it is also under an obligation to pursue a human rights based framework at both national and county level for progressive realization of the right to water and sanitation services and consequently, it is the obligation of the national government to establish a legal framework and uniform regulatory standards on minimum core obligations for both the national and county governments.

47. It is the 3<sup>rd</sup> respondent's case further that under the Water Act 2002, it has generated appropriate

national norms, standards and rules to ensure efficient and effective service provision in line with the human right to water and sanitation; and that the said standards are in conformity with the recommendations in the Report of the UN Special Rapporteur on human rights to safe drinking water and sanitation which underscores sustainability and non-retrogression in the realization of the human right to water and sanitation.

48. It submits therefore that whereas the 1<sup>st</sup> respondent has the constitutional mandate to manage water and sanitation services, the exercise of this constitutional obligation has to be in consonance with the national policy and legislative framework governing the water sector as contemplated by **Article 21** of the **Constitution**; and that a number of county governments have made positive progress in synchrony with this framework, citing the example of Kiambu County government vide Gazette Notice No. 3686.
49. It is its case therefore that national regulation in both the water resources and services sector is inevitable in light of **Article 21** of the **Constitution**. It contends that such regulation is imperative as a tool to set national uniform standards in resource management and service provision standards; that it is necessary for national monitoring of obligations of both levels of government and to protect, put value and articulate on the economics, pricing and sustainability of water for present and future generations; to collate information from all the different players to have a coherent feedback mechanism on the state of water services; and in order to have uniform technical standards regulation.
50. It is the 3<sup>rd</sup> respondent's submission that national regulation does not in any way usurp the 1<sup>st</sup> respondent's constitutional mandate on water and sanitation services and particularly the mandate of the County Assembly contemplated by **Article 185(2)** of the **Constitution** and it is of the view that regulations by the County government are feasible but ought to mainly focus on strong rules on conditions of service at county level that will prescribe the water services providers' (WSPs) rights and responsibilities vis-à-vis consumers; robust surveillance on the WSPs from the owner to ensure performance is as per expectations of the county; link planning to resources at county level; strong rules on rights and responsibilities of citizens vis-à-vis the water resources and services against pollution and vandalism and illegal connection; and robust policing framework anchored in county statutes; as well as enhanced penalties for water related offences. It is also its contention that a framework of shared regulation between the national government and the county government on water services as described above is contemplated by the Water Bill 2014 which has undergone its second reading in Parliament.
51. The 3<sup>rd</sup> respondent further submits that the Water Act 2002 prevails over the Companies Act and those of the respondent's Articles of Association as pertains to the appointment and or selection of directors. It contends that whereas the 5<sup>th</sup> respondent's shareholders have the preserve of nominating directors, that right must be exercised subject to the criteria established under the Water Act. It is its case therefore that the 1<sup>st</sup> respondent is in breach of **Articles 1.1e, 1.1h, 1.1i** of the Service Provision Agreement and **Legal Notice 137 of 2012**, The Water (Services Regulatory) Rules, 2012, and **rule 18(8)** which sets out criteria for competitive appointment of directors.
52. The 3<sup>rd</sup> respondent submits that there is no conflict of laws as contemplated by **Article 191** of the **Constitution** with regard to management of water services providers; but that in any event, the role of the national government with regard to setting of standards is clear in view of **Article 21** of the **Constitution**; and further, that the 1<sup>st</sup> respondent has the constitutional mandate to provide water services in line with the national standard provided for in a national legislation which is currently the water Act 2002.
53. It is also the 3<sup>rd</sup> respondent's contention that the 5<sup>th</sup> respondent was and is still a licensed water services provider and the provisions for appointment of directors set out in its Articles of Association must be read together with the water sector regulations; and further, that the Constitution at **Articles 10(2), 73(2)** and **232** has codified the corporate governance principles envisaged under the guidelines published by the 3<sup>rd</sup> respondent vide Legal Notice No. 7045 of

18<sup>th</sup> June 2010.

54. It submits that the appointment of the 5<sup>th</sup> respondent's directors did not follow a competitive process as envisaged by the Constitution and the sectoral laws; that there was no advertisement of the vacancies and the legal framework governing the process was overtly violated in that the appointment of the board of directors by the 1<sup>st</sup> respondent was not done in accordance with the Constitution of Kenya and the Water Act 2002 and it blatantly violated **Articles 10(2), 73(2) and 232** of the **Constitution** and the Corporate Governance Guidelines published under **Section 47** of the **Water Act 2002**. The 3<sup>rd</sup> respondent relies on the decision in **Petition Number 19 of 2014; Benson Riitho Mureithi 9 –vs- J.W. Wakhungu, Cabinet Secretary Ministry of Environment and 2 Others** for the proposition that appointments such as is in contestation in this case must follow the principles of good governance.

#### **The Case for the 4<sup>th</sup> Respondent**

55. Athi Water Services Board, the 4<sup>th</sup> respondent, filed an affidavit in reply sworn by its Legal Manager, one **Clement Mugambi**, on 29<sup>th</sup> May, 2014 and submissions dated 18<sup>th</sup> July 2014. In submissions on its behalf, Learned Counsel, Mr. Sifuna, agreed with the submissions made on behalf of the other parties except the 1<sup>st</sup> respondent that provision of water services is the obligation of both the National and County Government under **Article 43(d)** of the **Constitution**. It was his submission that water is an inalienable right and its provision must be made in a manner that promotes the progressive realization of the right. The 4<sup>th</sup> respondent takes the position that the Water Act was saved by virtue of **Section 7(1) of Part 2** of the **Sixth Schedule** of the Constitution of Kenya, 2010, which saves all law in force immediately before the effective date, such law to be construed with such alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

56. The 4<sup>th</sup> respondent contends further that by **Legal Notice No. 177** of 9<sup>th</sup> August, 2013 made pursuant to the Transition to Devolved Governments Act, 2012, the Transition Authority approved the transfer of the functions specified in the Schedule to that Notice to the County Government of Nairobi City with effect from 9<sup>th</sup> August, 2013, but that the Legal Notice does not provide for any transitional rules and modalities on how this transfer of especially '*urban water and sanitation services with formal service provision including water, sanitation and sewerage companies*' is to be effected; nor does it state the mode of transfer of the responsibilities bestowed upon the 4<sup>th</sup> Respondent under the Service Provision Agreement. It contends therefore that it is in recognition of this lacunae in the law that the Cabinet Secretary for Environment, Water and Natural Resources, in consultation with the Governor of the Nairobi City County, constituted a Task Force to advise on the re-organisation of water services in the County; that in her letter dated 8<sup>th</sup> July, 2013 to the Governor, the Cabinet Secretary advised on the general policy in the water sector under the devolved system of Government.

57. With regard to the other issues raised in this petition, the 4<sup>th</sup> respondent takes the position that regard should be had to the Service Provision Agreement aforesaid, as well as the Corporate Governance Guidelines for the Water Service Sector issued by the 3<sup>rd</sup> Respondent under the Water Act, 2002. It is its case that the provisions of the Service Provision Agreement, relevant to the present petition are **Article 2.3(a)** which stipulates that the guidelines and standards (the Corporate Governance Guidelines for the Water Service Sector) of the 3<sup>rd</sup> respondent are based on the provisions of the Water Act, 2002 and are binding on the 4<sup>th</sup> and 5<sup>th</sup> respondents; and that therefore the Service Provision Agreement is to be interpreted in such a way as to be consistent with such guidelines.

58. The 4<sup>th</sup> respondent refers also to Paragraph 3 of the Special Conditions to the said Agreement which adds several articles to the Service Provision Agreement. These include Article **1.1(e)** under which the 5<sup>th</sup> respondent warranted to at all times adhere to the Corporate Governance Guidelines

issued by the 3<sup>rd</sup> respondent in constituting the 5<sup>th</sup> respondent's Board of Directors; **Article 1.1(h)** in which the 5<sup>th</sup> respondent warranted not to alter, amend, interpret, or implement its Memorandum and Articles of Association in a manner which would cause it to be in breach of its obligations under the Service Provision Agreement, the Water Act, 2002, or any applicable regulations, procedure or guidelines that may or may be perceived to affect the interests of the 4<sup>th</sup> respondent as licensee or frustrate the terms of that Agreement; **Article 1.1(i)** in which the 5<sup>th</sup> respondent warranted to invite the 4<sup>th</sup> respondent in all the 5<sup>th</sup> respondent's Annual General Meetings, as well as Special General Meetings as an observer.

59. It is its further contention that in recognition that the 5<sup>th</sup> respondent's Memorandum and Articles of Association did not comply with the 3<sup>rd</sup> respondent's Water Sector regulations, Paragraph 4 of the Special Conditions included an undertaking to **Article 2.3(b)** of the Agreement to the effect that the 5<sup>th</sup> respondent would amend its Memorandum and Articles of Association within one year after execution of the Agreement so as to comply with the 3<sup>rd</sup> respondent's water sector guidelines. Such amendment was to be to the effect that the directors of the 5<sup>th</sup> Respondent shall retire on a rotation basis; appointment of the directors of the 5<sup>th</sup> Respondent shall be through a transparent and competitive process; and the representation of various stakeholders in the Board of the 5<sup>th</sup> respondent shall comply with sector guidelines so that no single stakeholder is able to dominate the said Board.

60. The 4<sup>th</sup> respondent contended further that paragraph 16 of the Special Conditions added a provision to Article 20 of the Agreement to the effect that the 5<sup>th</sup> Respondent is, by virtue of being incorporated by a public entity to provide functions that would otherwise be provided by a public entity, considered a public entity and shall at all times abide by the applicable guidelines and regulations governing public entities.

61. The 5<sup>th</sup> respondent submits therefore that a careful reading of the foregoing provisions of the Service Provision Agreement between the 4<sup>th</sup> and 5<sup>th</sup> respondents, the Special Conditions thereto, the Corporate Governance Guidelines for the Water Services Sector, the Water Act, 2002, as well as the 3<sup>rd</sup> respondent's Conditions for Approval, points at promotion of **public participation, good governance, transparency and accountability**. It is its contention that the 1<sup>st</sup> respondent, which is a State organ, and the 5<sup>th</sup> respondent, a public entity, are bound by the provisions of **Article 10** of the **Constitution** which require that the principles of public participation, good governance, transparency and accountability are adhered to.

62. It is its contention further that the Articles of Association of the 5<sup>th</sup> respondent must be interpreted as being subject to the Service Provision Agreement between the 4<sup>th</sup> and 5<sup>th</sup> respondents, which Agreement was further subject to and largely informed by the 3<sup>rd</sup> respondent's Corporate Governance Guidelines for the Water Service Sector. The said Guidelines are, in turn, a creature of the Water Act, 2002. It is that Service Provision Agreement that informed the objects of the 5<sup>th</sup> respondent. Without the said Agreement, the 5<sup>th</sup> respondent would be an empty shell with no business to transact; and therefore any deliberation on the question of appointment of members of the 5<sup>th</sup> respondent's Board of Directors must be approached with this special relationship between the 4<sup>th</sup> and the 5<sup>th</sup> respondents.

63. Consequently, it is its view that in view of this special relationship, the provisions of the Water Act, 2002 are superior over the provisions of the Companies Act and the 5<sup>th</sup> respondent's Memorandum and Articles of Association with regard to the appointment of the members of the 5<sup>th</sup> respondent's Board of Directors.

### **The 5<sup>th</sup> Respondent's case**

64. The 5<sup>th</sup> respondent's case is that it is a public body wholly owned by the 1<sup>nd</sup> respondent and did not actively participate in the election of its directors, for that is within the mandate of the shareholders. It is its case that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have the constitutional mandate to appoint its directors as provided under **Article 235** of the **Constitution**; and that **Article 191** of the **Constitution** provides for the mechanism of dealing with a situation where county legislation conflicts with national legislation. Its case is contained in the replying affidavit sworn on 5<sup>th</sup> May 2014 by **Ms. Ivy Nyarango**, the Company Secretary to the 5<sup>th</sup> respondent, and submissions dated 30<sup>th</sup> June 2014.

65. In the said affidavit, Ms. Nyarango avers that the Chairman of the 6<sup>th</sup> respondent's Board of Directors must be appointed pursuant to the provisions of **Article 83** of the 1<sup>st</sup> respondent's Article of Association and that it is the Board that meets and elects its Chairman. According to Ms. Nyarango, the Board of Directors of the 5<sup>th</sup> respondent had not met, and she had not conducted any elections for its Chair. She averred further that the term of the Board had expired on or about 24<sup>th</sup> March 2014; that Article 66(b) of the 5<sup>th</sup> respondent's memorandum and articles provided that the directors shall serve for a term of 3 years after which the shareholders would have the option of re-electing the directors for a further term of three years or electing new directors; and that an AGM was held on 26<sup>th</sup> March 2014 at which the shareholders nominated a new Board of Directors.

66. The 5<sup>th</sup> respondent concedes that by its letter date 28<sup>th</sup> March 2014, the 4<sup>th</sup> respondent questioned the manner in which the 2<sup>nd</sup> respondent had nominated the 5<sup>th</sup> respondent's Board of Directors; that the 5<sup>th</sup> respondent's management did not have any role in appointing directors and that the matter should be taken up with the 2<sup>nd</sup> respondent. It is its submission that **Article 186 (1)** of the **Constitution** provides for the respective functions and powers of the National and County Governments; and that **Part 2 of Clause 11 (b)** of the **Fourth Schedule** gives the County Government jurisdiction to provide public works and services which includes water and sanitation services.

67. The 5<sup>th</sup> respondent has relied on the decision in **Southend on Sea Corporation vs Hodson (Wickford) Ltd (1961) 2 ALL ER** for the proposition that a public authority cannot by contract fetter the exercise of its discretion and that an estoppel cannot be raised to prevent or hinder the exercise of discretion. It is also its contention that the exercise of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' authority and statutory discretion to appoint the directors of the 5<sup>th</sup> respondent is an expression of the will of the people and this court should not allow the National Government through various bodies to depart from the constitutionally set principles. It prayed that the petition be dismissed with costs.

### **The Case for the 6<sup>th</sup> Respondent**

68. As noted above, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, who had challenged the appointment of the 6<sup>th</sup> respondent, Mr. George Aladwa, as the Chairman of the 5<sup>th</sup> respondent, did not participate in the proceedings. However, submissions dated 15<sup>th</sup> July 2014 seeking dismissal of the petition were filed on behalf of the 6<sup>th</sup> respondent, the gist of which was to question the competence of the petitions given that they were based on newspaper reports regarding the appointment of the 6<sup>th</sup> respondent.

### **Analysis and Determination**

69. Having set out the respective submissions of the parties above, I now turn to consider the issues which arise for determination in the matter. At the outset, following the consolidation of the matters and with the agreement of all the parties, the following six issues were identified, and have

been addressed in the submissions of the parties, as arising for determination in the matter:

- a. ***Whether the regulation and management of Water Sanitation Services and Water Services Providers (WSPS) is a matter exclusively within the jurisdiction of County Governments, in view of the provisions of Articles 185 (2), 186 (1) and 187 (2) of the Constitution or whether it is a shared mandate with the National Government.***
- b. ***Whether the provisions of the Water Act prevail over those of the Companies Act and those of the 5<sup>th</sup> respondent's Articles of Association as pertains to the appointment and/or selection of directors.***
- c. ***Whether the conflict of laws as contemplated by Article 191 of the Constitution arise regarding management of water services providers such as the Athi Water Services Board.***
- d. ***Whether the provisions of appointment of directors in the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association conform to the requirements of the Constitution.***
- e. ***Whether the Board of Directors appointed on 26<sup>th</sup> March 2014 appointed in accordance with the Constitution, the Water Act, the Companies Act and the Nairobi City Water and Sewerage Services Limited's Articles of Association and;***
- f. ***Whether the petitioners are entitled to the Orders sought.***

70. These issues arise in consequences of the allegations by the petitioners that in appointing directors of the 5<sup>th</sup> respondent, the 1<sup>st</sup> and 2<sup>nd</sup> respondent have violated various articles of the Constitution, to wit Articles 2, 70, 73, 75, 235 and 236 of the Constitution. In addressing my mind to these issues, I bear in mind the provisions of the Constitution, particularly Article 10 which contains the national values and principles of governance, and Article 259 on the construction of the Constitution.

***Whether the regulation and management of Water Sanitation Services and Water Services Providers (WSPS) is exclusively within the jurisdiction of County Governments, or is a shared mandate with the National Government.***

71. With the exception of the 1<sup>st</sup> respondent, the parties agree that the regulation and management of Water Sanitation Services and Water Services Providers is a shared mandate between the county and national governments in view of the provisions of Articles 185(2), 186(1) and 187(2) of the constitution.

72. In considering this issue, it is important to do so while bearing in mind the important place of water and sanitation in the lives of citizens. It is, I believe, indisputable that the provision of adequate water and sanitation is critical to the health and wellbeing, indeed to the life, of citizens. This is doubtless why the right to water and sanitation is expressly recognized in the Constitution. Article 43 (1)(b) and (d) provide that:

***(b) "Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation.***

***(d) Every person has the right to clean and safe water in adequate quantities.***

73. Further, international conventions to which Kenya is a party also underscore the importance of the right to water and sanitation, and its critical role in the enjoyment of other rights such as health. These conventions, by dint of **Article 2 (6) of the Constitution**, impose a constitutional obligation on the Government of Kenya to ensure the progressive realization of these rights.

74. Article 14.2 (h) of the **1979 Convention on the Elimination of All Forms of Discrimination Against Women** guarantees the right to water. It provides that:

*“States Parties shall undertake all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ... (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply...”* (Emphasis added)

75. The provisions of Article 11 of the **International Covenant on Economic, Social and Cultural Rights 1996** and Article 28 of the **2006 UN Convention on the Rights of Persons with Disabilities** to the effect that state parties recognize the right of everyone to an *“adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”* have been interpreted to include the provision of adequate water and sanitation, with **General Comment No. 15 of the Committee on Economic, Social and Cultural Rights** noting that *“The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”*

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

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

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

a. *Storm water management systems in built-up areas; and*

b. *Water and sanitation services.”*

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

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

b. *Arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and*

c. *Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.”*

79. It is also worth observing that under **Article 204 (2)** of the **Constitution**, the National Government is under an obligation to use the Equalization Fund to provide **basic services**

*including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.* (Emphasis added)

80. Prior to the promulgation of the Constitution, there were already in force statutory provisions governing the water sector. These are contained in **the Water Act, 2002**. Section 3 of the Act provides that: *“Every water resource is hereby vested in the State, subject to any right of user granted by or under this Act or any other written law.”* At section 49, the Act provides that:

1. *Following public consultation, the National Water Minister shall formulate, and publish in the Gazette, a national water services strategy*
2. ...
3. *The national water services strategy shall have the following objects:*
  - a. *To institute arrangements to ensure that at all times there is in every area of Kenya a person capable of providing water supply and*
  - b. *To design a programme to bring about the progressive extension of sewerage to every centre of population in Kenya.*

81. **Section 7 (1)** of the **Sixth Schedule** of the **Constitution** is to the effect that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. In considering the legislative framework in the new constitutional dispensation, one must construe the Water Act therefore in accordance with the provisions of section 7 of the Transitional Provisions.

82. From the analysis above, it is evident that water provision is essential to the health and wellbeing of citizens, and to the realization of other rights such as the right to health. The importance of its provision and management cannot be underestimated, and the Constitution and international covenants impose positive obligations on the state to ensure that it is available to all, and have included an additional obligation on the state to ensure that it is available to vulnerable groups, such as women and communities in marginalized areas of the country.

83. Further, under the provisions of **Article 21 (2)** of the Constitution, the state has an obligation to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under **Article 43**, under which the right to water is guaranteed. The achievement of this right is dependent on the proper regulation and management of water and sanitation services, and of the entities that have the duty of service provision.

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

**Whether the provisions of the Water Act prevail over those of the Companies Act and the 5<sup>th</sup> respondent’s Articles of Association with regard to the appointment of directors of the 5<sup>th</sup> Respondent.**

85. This issue calls for a consideration of the respective provisions of the Companies and Water Acts, and the Articles of Association of the 5<sup>th</sup> respondent, the Nairobi Water and Sewerage Company Limited. In considering this issue, it is worth bearing in mind the composition of the 5<sup>th</sup>

respondent and its function within the water sector in the 2<sup>nd</sup> respondent.

86. The 5<sup>th</sup> respondent was incorporated in December 2003 as a company limited by shares. The subscribers to the Memorandum and Articles of Association were the predecessor to the 1<sup>st</sup> respondent, the City Council of Nairobi, with four thousand, nine hundred and ninety eight shares, the then Mayor of Nairobi and the Town Clerk with one share each respectively, which they held in trust for the City Council of Nairobi. For all intents and purposes therefore, the 5<sup>th</sup> respondent is owned wholly by the 1<sup>st</sup> respondent, the successor to the City Council of Nairobi.

### **The Water Act No 8 of 2002**

87. For the past decade or so, the water sector in Kenya has been regulated under the provisions of the Water Act, 2002. As it is now a shared function between the national and county governments, it is expected that legislation at the national and county level will be enacted to provide for its regulation. The Water Act was enacted to, among other things, provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water, and to provide for the regulation and management of water supply and sewerage services. The Act, which came into force in 2002, established the Water Services Regulatory Board.

88. It is the Water Act that sets up the mechanism for the regulation of water services, including the formation of water services providers such as the 5<sup>th</sup> respondent which are, under the Act, under an obligation to adhere to guidelines issued by the regulator, the 3<sup>rd</sup> respondent.

89. The **Companies Act, Cap 486** of the Laws of Kenya, provides for the incorporation, regulation and winding up of companies and other associations. The 5<sup>th</sup> respondent has, as is required under the Act, Articles of Association which are intended to govern its internal management. What is the place of a company's Articles of Association? The Articles of Association of a company constitute the constitution of any company and play a vital role in defining and distributing powers and functions, and regulate the functioning of the company. It may thus be argued that the articles of association of the 5<sup>th</sup> respondent prevail over the provisions of the Water Act in relation to the appointment of directors of the 5<sup>th</sup> respondent. This is borne out by various authoritative texts and decisions. **Alan Dignam, Hicks and Goo's Cases and Materials on Company Law, 7<sup>th</sup> Edition (Oxford University Press, Clarendon Street, 2011) [pg 179]** states that *"The Articles of Association are the key internal rules that govern the allocation of power between the members and the company. They are a default set of articles that apply in the absence of those forming the company providing their own set of articles."*

90. In **Paul L Davies, Gower and Davies' Principles of Modern Company Law, 7<sup>th</sup> Edition (London Sweet and Maxwell, London, 2003)**, it is observed that:

*"A remarkable feature of the British Company law is the extent to which it leaves regulation of the internal affairs of a company to the company itself through rules laid down in its Constitution and, in particular, in its Articles of association. [pg 54] However, the crucial point is not the formal relationship between the Articles and the other sources of company law, especially the Act, but the extent to which substantive matters, central to the company's operation, are left to be regulated by the Articles."*

91. In the case of **Wood v Odessa Waterworks Co. (1889) 42 Ch D 636** Stirling J pointed out that: *"... [642] the Articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other."*

92. However, the 5<sup>th</sup> respondent is an agent of the 4<sup>th</sup> respondent (Athi Water Services Board). This is in accordance with the provisions of **Section 51 (1)** of the **Water Act** which empowered the Minister to establish Water Services Boards, and pursuant to which the Athi Water Service Board

was established. Subsequently, in exercise of its powers under **Section 55 (1)** of the **Water Act**, the Athi Water Service Board appointed the 5<sup>th</sup> respondent herein as its agent.

93. The 1<sup>st</sup> respondent submits that the provisions of the Water Act 2002 do not prevail over those of the Companies Act or the 5<sup>th</sup> respondent's Articles of Association with regard to the appointment or selection of directors. It argues, in particular, that the Corporate Governance Guidelines published as Legal Notice No. 7045 of 2010 do not prevail over the Companies Act and the 5<sup>th</sup> respondent's Articles with respect to appointment of directors. It does however, make a significant concession when it submits as follows at paragraph 25 of its written submissions:

***“The relevant legislation that would prevail over the Companies Act and those (sic) of the 5<sup>th</sup> respondent's Articles of Association as pertains to the appointment and/or selection of directors would be the legislation enacted by the 1<sup>st</sup> Respondent's County Assembly under Article 185(2) of the Constitution of Kenya 2010 to regulate provision of “Water and Sanitation” services in Nairobi City County...”***

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

95. I take this view for two reasons. First, the 5<sup>th</sup> respondent was incorporated by the Nairobi City Council, the predecessor of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent has retained the 5<sup>th</sup> respondent pursuant to **Section 6 (5)** of the **County Governments Act No 17 of 2012** which states that:

***“To ensure efficiency in the delivery of service or carrying out of a function for which the county government is responsible, the county government may—***

- a. ***establish a company, firm or other body for the delivery of a particular service or carrying on of a particular function; or***
- (b) contract any person, company, firm or other body for the delivery of a particular service or carrying on a particular function.”***

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

97. Secondly, having been retained as a county corporation by the 1<sup>st</sup> respondent, it cannot exist in a vacuum. It is, in the absence of county legislation, in accordance with the provisions of **Section 55** of the **Water Act**, an agent of the 4<sup>th</sup> respondent. With regard to the relationship between the 4<sup>th</sup> and 5<sup>th</sup> respondent, **Section 55** provides that:

1. ***“For the purposes of Section 53, a water services board may, in accordance with this section, arrange for the exercise and performance of all or any of its powers and functions under the licence by one or more agents, to be known as water service providers.***
2. ***Such an arrangement shall be reduced to an agreement in writing between the water services board and the water service provider, the terms of which (and of any amendment of which) shall be of no force or effect unless approved by the Regulatory Board.***
3. ***The agreement shall specify the powers and functions under the licence which shall be exercised and performed by the water service provider during the currency of the agreement.***
4. ...
5. ***The water services board may enter into agreements with more than one water service provider***

*in respect of its area of supply.*

***(6) A power or function conferred by a licence or otherwise conferred by or under this Act which, pursuant to an agreement approved under this section, may be exercised or performed by a water service provider, to have been exercised or performed under the authority of the licence.”***

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

**Whether there is a conflict of laws as contemplated by Article 191 of the Constitution with regard to the management of water services providers such as the Athi Water Services Board.**

99. **Article 191** of the Constitution provides thus:

1. ***This Article applies to conflicts between national and county legislation in respect of matters falling within the concurrent jurisdiction of both levels of government***
2. ***National legislation prevails over county legislation if-***
  - a. ***The national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or***
  - b. ***The national legislation is aimed at preventing unreasonable action by a county that –***
    - i. ***Is prejudicial to the economic, health or security interests of Kenya or another county; or***
    - ii. ***Impedes the implementation of national economic policy***
3. ...

100. It is common ground that there is currently no legislation enacted by the 1<sup>st</sup> respondent, the County Government of Nairobi, for the regulation of water services provision. Further, all the parties concede that there is no conflict of laws as contemplated under Article 191 of the Constitution with regard to the management of water services providers such as the 5<sup>th</sup> respondent. There is therefore no need for the court to address itself to the issue.

**Whether the Provisions of Appointment of Directors in the Companies Act and the Nairobi City Water and Sewerage Services Limited’s Articles of Association conform to the requirements of the Constitution.**

101. In considering this issue, it is perhaps best to start by considering the constitutional provisions with regard to appointments or elections to public office. These provisions are contained in Article 232, which sets out the principles of public service, as read with Article 10 on the national values and principles of governance. Further, Article 73 provides a further threshold to be met by those serving or seeking to serve in public office.

102. **Article 10** contains the national values and principles of governance. It provides that the principles and values **“bind all State organs, State officers, public officers and all persons”** whenever any of them:

- a. *Applies or interprets this Constitution*
- b. *Enacts, applies or interprets any law; or*
- c. *Makes or implements public policy decisions.”*

103. The national values and principles are set out at Article 10(2) as including:

- a. *Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people*
- b. *Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;*
- c. *Good governance, integrity, transparency and accountability; and*
- d. *Sustainable development.*

104. Article 73 sets out the constitutional principles on leadership and integrity. It provides at Article 73 (2), which is relevant for present purposes, that:

*“The guiding principles of leadership and integrity include—*

- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*
- (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*
- (c) selfless service based solely on the public interest, demonstrated by—*
  - (i) honesty in the execution of public duties; and*
  - (ii) the declaration of any personal interest that may conflict with public duties;*
- (d) accountability to the public for decisions and actions; and*
- (e) discipline and commitment in service to the people.”*

105. Article 232 provides that:

1. *The values and principles of public service include-*
  - a. *high standards of professional ethics;*
  - b. *efficient, effective and economic use of resources;*
  - c. *respective, prompt, effective, impartial and equitable provision of services;*
  - d. *involvement of the people in the process of policy making;*
  - e. *accountability for administrative acts;*
  - f. *Transparency and provision to the public of timely, accurate information;*
  - g. *subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*

- h. *representation of Kenya’s diverse communities; and*
  - i. *affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-*
    - i. *men and women*
    - ii. *the members of all ethnic groups; and*
    - iii. *Persons with disabilities*
2. *The values and principles of public service apply to public service in –*
- a. *All state organs in both levels of government*
  - b. *All state corporations.”*

106. This constitutional standard is what would be required to be met in the statutory provisions regulating the appointment of directors of the 5<sup>th</sup> respondent, which is indisputably a county corporation or state organ at the county level.

107. The appointment of directors is provided for in **section 184** of the Companies Act in the following terms:

1. *At a general meeting of a company other than a private company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be made, unless a resolution that it shall be so made has first been agreed to by the meeting without any vote being given against it.*

*(2) A resolution moved in contravention of this section shall be void, whether or not its being so moved was objected to at the time: provided that –*

- i. *This subsection shall not be taken as excluding the operation of Section 181, and;*
  - ii. *Where a resolution so moved is passed, no provision for the automatic reappointment of retiring directors in default of another appointment shall apply.*
2. *For the purposes of this section, a motion for approving a person’s appointment or for nominating a person for appointment shall be treated as a motion for his appointment.*

108. At **section 186**, the Act provides that:

1. *Subject to the provisions of this section, no person shall be capable of being appointed a director of a company which is subject to this section if at the time of his appointment he has not attained the age of twenty-one, or he has attained the age of seventy*
2. ...
3. ...
4. ...
5. *Nothing in the foregoing provisions of this section shall prevent the appointment of a director at any age, or require a director to retire at any time, if his appointment is or was made or approved by the company in a general meeting, but special notice shall be required of any resolution appointing or approving the appointment of a director for it to have effect for the purposes of this subsection and the notice thereof given to the company and by the company to its members must state or must have stated the age of the person to whom it relates.*

109. **Article 66** of the Articles of Association of the 5<sup>th</sup> respondent provides as follows:

*“The number of Directors shall be 11. The names of the first Directors shall be determined in writing by the subscribers of the Memorandum of association or by a majority of them from an approved list by the Council.”*

110. With regard to the Chairman of the Board, the **Article 83** provides that:

***“The Directors shall in their first meeting elect a chairman and vice-chairman to preside over their meetings for a period of 3 years, provided that directors representing the Council and the Government shall not be eligible for election as Chairman or Vice-Chairman. If at any meeting neither the chairman nor the vice-chairman is present within fifteen minutes after the time appointed for holding the same, the Directors present may choose one of their number to chair the meeting. The initial elections of the Chairman of the Board shall be presided over by the Company Secretary.”***

111. The provisions of the Act and the Articles thus require that the appointment of directors of the 5<sup>th</sup> respondent must be done at a general meeting; that it must be preceded by a resolution for such appointment; that the shareholders should elect directors by way of voting; and the person elected must have garnered a majority of the votes. These provisions, in my view, do provide for participation and transparency in the appointment of the directors of the company. They do not therefore violate the provisions of the Constitution.

**Whether the Board of Directors appointed on 26<sup>th</sup> March 2014 was appointed in accordance with the Constitution, the Water Act, the Companies Act and the Nairobi City Water and Sewerage Services Limited’s Articles of Association.**

112. I will begin with a consideration of whether there was compliance with the requirements of the Companies Act and the 5<sup>th</sup> respondent’s Articles of Association, some of which I have already set out above. With regard to the procedure for calling of meetings of the Board, **Article 43** of the 5<sup>th</sup> respondent’s **Articles of association** states as follows:

***“An Annual General Meeting and a meeting called for the passing of a special resolution shall be called by twenty-one days’ notice in writing at the least, and a meeting for the passing of a special resolution shall be called by seven days’ notice in writing at the least. The notice shall be exclusive of the day on which it is given, and shall specify the place, the day and the hour of meeting and, in case of special business, the general nature of that business, and shall be given, in manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the Articles of the company, entitled to receive such notices from the company; Provided that a meeting of the company shall, notwithstanding that it is called by shorter notice than that specified in this Article, be deemed to have been duly called if it is so agreed:***

- a. ***in the case of a meeting called at the Annual general meeting, by all the members entitled to attend and vote thereat; and***
- b. ***in the case of any other meeting, by a majority in number of the members having a right to attend and vote at the meeting, being a majority together holding not less than 95% in nominal value of the shares giving that right.***

113. The meeting at which the directors of the 5<sup>th</sup> respondent were appointed was called by way of a notice dated 5<sup>th</sup> March 2014 scheduling the 8<sup>th</sup> Annual General Meeting for the 26<sup>th</sup> March 2014 at 10.00. The agenda of the meeting included the election of Directors, and it also included notification of the right of members, in accordance with the provisions of section 136 (2) of the Companies Act, to attend and vote at the meeting or appoint a proxy to attend and vote on his or her behalf. In so far, therefore, as pertains to the summoning of the 5<sup>th</sup> respondent’s Annual General Meeting, there was compliance with the requirements of the Companies Act and the 5<sup>th</sup> respondent’s Articles of Association.

114. With regard to the requirements of the Water Act, **section 2** of the **First Schedule** thereto provides that:

***“In making an appointment to a board or committee, the person making the appointment shall have regard to –***

- a. ***The educational qualifications, expertise, character, and integrity of potential candidates for membership.***
- b. ***The degree to which water users, or water users of particular kinds, are represented on the board or Committee at the time the appointment is made under this Act or any other written law.***

115. **Article 1.1** of the **Service Provision Agreement between Athi Water and Nairobi City Water and Sewerage Company for Nairobi City Cluster** provides as follows:

***(e) the Provider warrants that it shall at all times adhere to the Corporate Governance Guidelines issued by WASREB in constituting its Board of Directors and in particular, comply with the condition subsequent in paragraph 4 of the Special Conditions.***

***(f) The Provider warrants that it shall adhere to good corporate governance in its management and operations. In this regard the Provider undertakes to develop specific Terms of Reference for all its organs as provided in the Corporate Governance Guidelines and warrants that it will strictly adhere to the responsibilities and duties contained in them.***

***(i) The Provider warrants that it shall invite the Licensee in all its Annual General Meetings and Special General Meetings as an observer.***

116. Further, **Section 4.2.1** of the **Corporate Governance Guidelines** provides as follows with regard to the composition of the Boards of water service providers such as the 5<sup>th</sup> respondent:

***“The Boards of the Water Service Providers shall have a minimum of seven (7) and a maximum of eleven members with a professional mix of directors appointed from the local authority and directors appointed from the stakeholders through a competitive stakeholder participation procedure such that no individual or group of individuals or interests can dominate its decision making. No more than one director shall be appointed from each of the local authorities covered by the WSP (in a cluster system). A director representing a Local Authority shall be a professional member of staff of the respective local authority. The respective WSB shall oversee the nomination/appointment process for the stakeholder representatives in the startup phases of the WSP.***

117. I have considered the minutes of the Annual General Meeting of the 5<sup>th</sup> respondent held on 26<sup>th</sup> March 2014 at the Laico Regency Hotel. They are annexed to the 1<sup>st</sup> respondent’s Replying Affidavit sworn by the County Secretary, Ms. Lilian Ndegwa, together with the notice of the meeting, as annexure **L. W. N. 12**. The minutes indicate that one Gregory S. Mwakanongo, present in the meeting as the proxy for the Nairobi City County, proposed a list of persons to be elected directors of the company. His proposal was seconded by the Deputy Governor, Jonathan Mueke, who was representing the Governor of Nairobi.

118. What, however, remains unclear is how the selection/nomination of the said names was done, who were involved in the selection/nomination, the criteria used in the shortlisting of the names and whether there was a procedure or advertisement calling for persons to apply for selection/nomination. I have noted from the documents contained in the parties’ pleadings various correspondence indicating that a decision that the persons said to have been elected at the annual general meeting had already been pre-determined.

119. Of particular note is the letter from the Governor of Nairobi dated **25<sup>th</sup> February 2014** addressed to Eng. Philip Gichuki, the Chief Executive Officer of the 5<sup>th</sup> respondent, and copied to the Registrar of Companies. In the said letter, which pre-dated the Annual General Meeting by a month, the Governor states as follows:

***Dear Gichuki***

**CHANGE OF PARTICULARS OF THE NAIROBI WATER DIRECTORS**

***The Nairobi City County as sole shareholder of Nairobi Water and Sewerage Company has nominated the following directors to serve on the Board of Nairobi Water and Sewerage Company Limited and the same should be elected by the Annual General Meeting to be held on the 26<sup>th</sup> March 2014.***

120. The Governor then set out the names of the persons nominated, who are the same persons who were proposed and seconded at the Annual General Meeting held on 26<sup>th</sup> March 2014.

121. It is evident from the contents of this letter, and from subsequent correspondence contained in the pleadings, particularly the supplementary affidavit of the 1<sup>st</sup> petitioner, that there was no involvement or participation of various stakeholders in the selection or nomination of the candidates for directors of the 5<sup>th</sup> respondent; that the process undertaken for the selection/nomination and subsequent appointment of the directors was not reached through a transparent and competitive process as required by among others, the Corporate Governance Guidelines to which the 5<sup>th</sup> respondent vowed to adhere to in its Service Provision Agreement; that the 1<sup>st</sup> and 2<sup>nd</sup> respondent took the position that as the 5<sup>th</sup> respondent was the sole shareholder in the 5<sup>th</sup> respondent, its word was law, and it was not answerable to any person with regard to the 'selection' of directors for the 5<sup>th</sup> respondent, for the purported 'elections' were just a matter of form.

122. More importantly, in my view, the 1<sup>st</sup> respondent overlooked the standards for public appointments imposed on it by the Constitution. Even had the Water Act and Corporate Governance Guidelines not imposed on it the requirement for stakeholder engagement and an open, transparent process, the Constitution does. I need not repeat the provisions of Article 10, 73 and 232 which I have already set out above.

123. In the case of **Benson Riitho Mureithi -vs- J.W Wakhungu and 2 Others Pet No. 19 of 2014**, this court, after setting out the constitutional provisions at Article 73, observed as follows:

***[84] "It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution."***

124. It is my view that this position applies with equal force in the circumstances of the present case. The 1<sup>st</sup> respondent cannot purport to select the directors of the 5<sup>th</sup> respondent, a company which, though wholly owned by the 1<sup>st</sup> respondent, exists for the purpose of providing water services to the residents of the County. Its directors cannot be pre-selected and imposed on the residents. They must be appointed in a manner that takes into account stakeholder interests, that is open and transparent, and that gives an opportunity to anyone interested to seek appointment.

125. Further, even the Articles of Association of the 5<sup>th</sup> respondent, properly applied, cannot be said to countenance a situation where one person pre-determines the persons to be 'elected' as

directors. It would be to abuse the provisions of the Articles of Association and the Companies Act, and a travesty of the concept of elections.

126. For the above reasons, I find and hold that the appointments made to the 5<sup>th</sup> respondent's Board of Directors on 26<sup>th</sup> March 2014 were not made in accordance with the Constitution, the Water Act, the Companies Act or the 5<sup>th</sup> respondent's Articles of Association.

### **Whether the Petitioners are entitled to the Orders Sought**

127. I have already set out above the respective cases of the parties, and the responses to the core issues that this petition raises. The final issue to consider is whether the 1<sup>st</sup> and 4<sup>th</sup> petitioners are entitled to the reliefs they seek, the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners not having participated in the proceedings.

128. The gist of the 4<sup>th</sup> petitioner's case is that he was removed from the position of Chairman without being given notice of the meeting or resolution for his removal. He concedes, however, that his term in office had come to an end. In the circumstances, I can find no unconstitutionality, unfairness, or any gross breach of natural justice with regard to his removal. He is entitled, in my view, to offer himself in an open process for appointment as a director, and should he be appointed and elected thereafter as Chairman, serve in that capacity.

129. With respect to the orders sought by the 1<sup>st</sup> petitioner, I believe that they have been addressed in the analysis above, with the upshot being that they are merited, but with some variations.

### **Disposition**

130. The Court has jurisdiction to grant appropriate relief in matters brought before it regarding violation of the Constitution or the Bill of Rights. In the present case, taking into account the findings in the above analysis, the orders that commend themselves to me, and which I hereby grant, are as follows:

- 1. I declare that the purported appointment of directors of the Nairobi Water and Sewerage Company pursuant to the purported elections at the Annual General Meeting of the Company held on 26<sup>th</sup> March 2014 is unlawful, unconstitutional and null and void for being carried out in violation of the provisions of the Constitution, the Water Act, the Companies Act and the 5<sup>th</sup> respondent's Articles of Association;***
- 2. I hereby issue an order quashing the appointment of the directors of the Nairobi Water and Sewerage Company in contravention of the Constitution, the Water Act, the Companies Act and the 5<sup>th</sup> respondent's Articles of Association.***
- 3. I direct that the appointment of the directors of the Nairobi Water and Sewerage Company be carried out afresh in accordance with the law.***

131. This matter dealt with important issues relating to the governance of the water sector in Kenya. I therefore direct that each party bears its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 26<sup>th</sup> day of November 2014.**

**MUMBI NGUGI**

**JUDGE**

**Okiya Omtatah Okoiti the 1<sup>st</sup> Petitioner, in person**

**Mr Ojienda instructed by the firm of Tom Ojienda & Associates Advocates for the 1<sup>st</sup> Respondent**

**Ms Mwangi instructed by the State Law Office for the 2<sup>nd</sup> Respondents**

**Mr Muruka instructed by the firm of John H. Muruka & Co. Advocates for 3<sup>rd</sup> Respondent**

**Ms Omotto instructed by the firm of Nyachae & Ashitiva & Co. Advocates for the 5<sup>th</sup> Respondent**