



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 OKOITI1ST PETITIONER
BALKRISHNA RAMJI DEVAN2ND PETITIONER
PELICAN SIGNS LIMITED3RD PETITIONER
PETER N KUGURU4TH PETITIONER

VERSUS

NAIROBI CITY COUNTY1ST RESPONDENT
MINISTRY OF ENVIRONMENT, WATER & NATURAL RESOURCES2ND RESPONDENT
WATER SERVICES REGULATORY BOARD3RD RESPONDENT
ATHI WATER SERVICES BOARD4TH RESPONDENT
THE NAIROBI CITY WATER & SEWERAGE COMPANY5TH RESPONDENT
GEORGE ALADWA6TH RESPONDENT

RULING

Introduction

1. In my judgment in this matter dated 26th November 2014, I declared that the purported

appointment of directors of the Nairobi Water and Sewerage Company pursuant to the elections alleged to have been held at the Annual General Meeting of the Company held on 26th March 2014 was 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 5th respondent's Articles of Association. I also issued an order quashing the appointment of the directors of the Nairobi Water and Sewerage Company, and directed that the appointment of the said directors be carried out afresh in accordance with the law.

The Applications

2. The 1st and 5th respondents have now approached the court by way of Chamber Summons applications dated 5th and 8th December 2014 respectively in which they seek similar orders, the substantive order of which is that the court be pleased to issue an order staying the execution of the judgment /decree of 26th November 2014 and any other order or proceedings pursuant thereto, for a period of 90 days. The applications are supported by affidavits sworn by Ms. **Lilian W. Ndegwa**, the County Secretary and Head of County Public Service of the Nairobi City County, and Ms. **Assumpta Mbesa**, the acting Legal Coordinator of the 5th respondent.
3. The grounds for the applications are couched in similar terms. On the part of the 1st respondent, it states that it is aggrieved by the decision of the court and seeks a stay to enable partial compliance and pending appeal against the finding of the court that the distribution and management of water services is a shared resource between county and national government. It argues further that the matter is novel and the applicant has an arguable appeal with a high probability of success. It also contends that the 4th respondent (**Athi Water Services Board**) is licensed to provide water services in the county of Nairobi City and its board has applied to the 3rd respondent (**The Water Services Regulatory Board**) for a regular tariff adjustment for its agent, the 5th respondent (**Nairobi City Water and Sewerage Company Limited**) for the period 2014/15 to 2017/18, so as to enable it attain full cost recovery, to undertake investment and meet conditions for improving service delivery.
4. The 1st respondent states that the 5th respondent is tasked with the duty to provide reliable quality water and sewerage services to the entire Nairobi City County which has an estimated population of 3.8 million and the 5th respondent also serves environs outside Nairobi. It contends that the intended tariff review invariably affects the delivery of water services to the millions of consumers within and without Nairobi City County and that if the process is disrupted at this point in time, it is the millions of consumers who shall stand to suffer as water services may be interrupted.
5. The 1st respondent further states that in pursuance of the tariff review process, the 4th respondent published in newspapers on 19th November 2014, a notice of public consultation in line with section 107 of the Water Act 2002 where all members of the public and key stakeholders have been invited to attend. The said public consultative meeting was scheduled for 10th December 2014 at Nyayo Stadium, Basket Ball Court starting at 9.00 a.m. and it contends that the directors of the 5th respondent are necessary parties.
6. The second ground for seeking an order of stay advanced by the 1st respondent is that the term of the current Managing Director of the 5th respondent is set to expire on 16th February 2015; that the renewal of his term and the appointment of a new chairman is extremely urgent so as to avoid a situation in which the operations of the Nairobi City Water and Sewerage Company are thrown into disarray; and that it is not possible to carry out that task before the expiry of that period without there being a Board of Directors.
7. It is contended further that the current Managing Director of the 5th respondent has expressed his intention to renew his contract with the 5th respondent and the 5th respondent had commenced his

- appraisal on 16th September 2014. The appraisal was being conducted by a team composed of three of the directors elected at the Annual General Meeting of the Company held on 26th March 2014; that the appraisal committee has already submitted its final report to the Board's chairman but the report could not be considered for approval or amendment in view of the judgment of the court.
8. In its application dated 8th December 2014, the 5th respondent seeks an order similar to that sought by the 1st respondent, namely that an order do issue staying the judgment made on 26th November 2014 for a period of 3 months to permit the 5th respondent to comply with order 3 of the said judgment.
 9. In her affidavit sworn in support of the application, **Ms. Assumpta Mbesa**, the acting Legal Coordinator of the 5th respondent states, on the advice of her Advocates on record, that the judgment has created a vacuum which risks impairing the operations of the 5th respondent, and that unless the orders are granted, the operations of the 5th respondent shall be seriously impeded to the detriment of the public interest. She echoes the averments of **Ms. Lillian W, Ndegwa** for the 1st respondent that the Athi Water and Services Board had applied to the Water Services Regulatory Board for a regular tariff adjustment for the 5th respondent for the period 2014/15 to 2017/18, and that a public consultation meeting was scheduled for 10th December 2014.
 10. She states further that the 5th respondent is in the process of making capital investments that require the Board's input and approval; that such capital investments include the project on financing for the sewerage services in low income communities; and that the Board must approve the borrowing of Kshs 634,000,000.00/- in order for the project to be implemented.
 11. It is also her contention that the appraisal of the Managing Director was also underway, and that a report was to be submitted to the Board Chair and the appraisal committee thereafter dissolved by the Board.
 12. It is her deposition that the process and timelines within which the selection or nomination and subsequent appointment of the directors is to be done shall be prolonged, and a vacuum in the management of the 5th respondent's affairs shall subsist.

The Applicant's Submissions

13. In his submissions on behalf of the 1st respondent, Learned Counsel, Prof. Tom Ojienda, stated that the applicant was seeking a stay of the orders made for a limited period of 90 days or any other period pending partial compliance; that according to the Guidelines issued by the 3rd respondent, such compliance would not take shorter than 60 days; and that further, the 1st respondent required the time to appeal on the point whether water and sanitation is a shared function between the national and county governments.
14. Counsel referred the court to the decision of the Supreme Court in **Petition No 5 of 2014-Gatirau Peter Munya –vs- Dickson Kithinji** and submitted that the Supreme Court had in that matter granted stay on the ground of public interest as the Governor needed to give services to Meru County. He urged the court to grant the orders sought so that the tariff review can go on with the Board of the 5th respondent in place, and so that the appraisal of the Managing Director, whose term expires on 16th February 2015, can go on. It was Counsel's submission that the 5th respondent would be rudderless if the stay is not granted; that the process put in place by the 1st respondent would take no less than 60 days, and that the public interest tilts in favour of granting the orders sought.
15. Mr. Macharia, Learned Counsel for the 5th respondent, submitted that the 5th respondent was not

appealing the judgment. Its concern was with the time between the judgment and the appointment of a compliant Board, within which period he submitted a vacuum is created in the 5th respondent, and that what the 5th respondent was trying to avoid is a disproportionate counter mischief pending appointment of a new Board. He relied for this proposition on the Court of Appeal decision in **East African Cables Limited –vs- The Public Procurement Complaints Review and Appeals Board Court of Appeal Civil Appeal No. 109 of 2007 (Unreported)** in which the Court, while finding that the grant of the tender impugned in the case was irregular, nonetheless ruled that it was in the public interest to allow Kenya Power & Lighting Co. Limited to proceed with the tender so that it can continue supply of power to the public. Counsel further relied on the decision in **National Union of Water and Sewerage Employees & Others -vs- Nairobi Water and Sewerage Company Civil Application NO. 85 of 2013** in which the court relied on the principle in the **East African Cables** decision.

16. Counsel further argued that section 177 of the Companies Act contains an absolute prohibition on a company operating with less than the statutory number of directors, and makes it a criminal offence for a company to do so.
17. Mr. Macharia further argued that section 181 of the Companies Act, which are mirrored at section 52 and 53 of the **Interpretation and General Provisions Act**, contemplates situations such as is presently before the court as it envisages that there cannot be a vacuum. It was his submission that the section allows the appointment of temporary directors, and that the actions of a director later found to have been improperly in office are still valid.
18. Counsel submitted that a process has commenced, though the 5th respondent is not sure how long it will take, and that the court could prescribe a time limit within which to comply. It was also his submission that the Board that preceded the present Board was also irregularly appointed, and so the contention by the petitioners that the previous Board could take over was not tenable.

Submissions in Reply

19. The 1st and 4th petitioners and the 3rd and 4th respondent opposed the application and made oral submissions in response in view of the timeline between the filing of the applications under certificate of urgency and the hearing as they did not have time to file responses.
20. In his submissions on behalf of the 3rd respondent, Learned Counsel, Mr. Muruka, argued that the principle to guide the court in considering this matter is the hardship to be suffered by the parties, in this case the public, if the orders sought are not granted. Counsel asked the court to be guided by the view of the court in the case of **Christopher Ndarathi Murungaru –vs- Kenya Anti-Corruption Commission** in which it stated that there are cases where to grant a stay would cause greater hardship.
21. According to Mr. Muruka, the reason advanced for seeking stay orders, that it is to enable compliance with the orders of the court, has not been stated in any affidavit. Rather, the reason advanced was that there is an ongoing tariff process. Counsel submitted that tariff approval is a technical process undertaken by the management of the 5th respondent and the 4th respondent, with the 4th respondent taking the lead; that the public consultation guidelines established by the 3rd respondent merely require the 4th respondent to make presentations at the public forum and the Board of the 5th respondent is not required; that the guidelines also set the criteria for tariff approval for a water company, and a Board of directors of a utility need not be present or in place.
22. With regard to the second reason advanced, that the extension of the term of the Managing Director was ongoing, Counsel submitted that the Managing Director is appraised based on performance contracts signed prior to assumption of duty, and that such appraisal can be done by another, duly constituted Board. It was his case further that the 5th respondent is a corporate entity with systems, operating within a regulated environment, with Athi Water Services Board as the

- licencee, and the management of the company is under an obligation to give quarterly reports to the regulator. He therefore discounted the submission by the 1st and 5th respondent that the absence of a Managing Director will occasion harm to the public.
23. Counsel submitted further that the irregular Board had been in place since 26th March, 2014; that the contract of the Managing Director states that the approval of his office should have taken place 6 months before its expiry; and the court should therefore address itself to the risk likely to emerge should the stay be granted as the governance issue at the 5th respondent has been of concern to stakeholders, including development partners, who would like to see due process in the 5th respondent. It was his submission that the two applications are unmerited and brought in bad faith.
24. For the 4th respondent, Mr. Sifuma associated himself with the submissions of the 3rd respondent. He submitted that the exercise of tariff review is simply price control that affects consumers, and the Board of Directors is not involved; and further, that the tariff review can be undertaken without the Board of the 5th respondent.
25. Counsel submitted further that the current Board members cannot guarantee to act as stewards for county resources, and they can take decisions that would have a negative impact on citizens.
26. Mr. Kago for the 4th petitioner also opposed the application. He posed the question whether the orders sought to be stayed are capable of being stayed. He also asked the court to consider the principles for stay, whether there is an arguable appeal, whether such an appeal will be rendered nugatory, and the question of security for costs. It was his submission that the issue identified by the 1st respondent as the subject of its appeal, whether water is a shared mandate of the county and national government, is an arguable issue, but it will not be rendered nugatory if the stay is not granted.
27. Counsel submitted further that none of the parties is contesting that the Board as constituted was illegal and unconstitutional, and therefore null and void. It was his submission therefore that granting the orders for stay would not serve any useful purpose. It was also his case that the orders were issued in the public interest and it would be wrong to issue orders of stay, and the greater good would not be served by sanctioning an illegality.
28. While conceding that a company cannot be without a Board of Directors, it was his submission that once a particular cause of action has been declared null and void, the *status quo ante* is reverted to, which would mean resort to the previous Board.
29. The 1st petitioner, Mr. Okiya Omtatah Okoiti, also opposed the application. He asked the court to focus on why he had filed his petition, drawing attention to prayer (K) thereof which was to allow the previous Board to continue in office. He asked the court to give the old Board an extension to midwife the transition, and that it would be a lesser evil to allow the old Board to continue within the interim period until a new Board is appointed than to allow the impugned Board to continue in office. It was also his submission that people should not be allowed to benefit from violations of the law.
30. Mr. Omtatah submitted further that the grounds relied on by the applicants are peripheral. He contended that the public consultations on tariffs involve the 3rd and 4th respondent while the 5th respondent is simply an implementing agent.
31. With regard to the decision of **Gatirau Peter Munya** relied on by the 1st respondent, it was his submission that it buttresses the view that the application should be made in the Court of Appeal to avoid the court embarrassing itself by sanctioning an illegality.
32. It was his further contention that the re-appointment of the Managing Director did not involve the Board only as it requires applications and a competitive process. He asked that the application be

dismissed with costs and the implementation of the orders issued allowed.

Rejoinder

33. In his response to the submissions in opposition to the application, Mr. Macharia submitted that those opposed to the application appeared to be of the view that the 5th respondent does not require a Board and can operate without one for a period of several months. He reiterated that the Board is engaged in negotiating for a loan of Kshs 600 million; that the previous Board is hobbled by the fact that it was also not appointed procedurally; that four of the members of the Board have been in place since 2011; and that the actions of the Board can be validated by section 181 of the Companies Act and sections 52 and 53 of the Interpretations and General Provisions Act.

Determination

34. In making a determination of the two applications before me, I will do so by considering the grounds on which the applications are premised. Four reasons have been advanced for the grant of stay of the orders of this court made in the judgment of 26th November 2014. The first is that the 1st respondent wishes to appeal against the decision of the court with regard to whether or not the provision of water services is a shared mandate between the county and national governments. I believe that this ground can be dispensed with at the outset. As submitted by Counsel for the 4th petitioner, though this is an arguable issue, it will not be rendered nugatory if the orders issued by the court are not stayed. Indeed, it has no bearing on the finding of unconstitutionality in the appointment of the Board of Directors and the direction for fresh appointments in compliance with the law.

35. The second reason relates to the contemplated tariff review. It is apparent, from the averments and submissions of the applicants, as well as the submissions in opposition by the 3rd and 4th respondents and the petitioners, that the responsibility for the tariff review lies on the 4th respondent, which has requested the 3rd respondent for a review on behalf of its agent, the 5th respondent. I am not satisfied that there is any prejudice that will occur with regard to the tariff review should the orders of the court not be stayed.

36. The third ground is that the 5th respondent is engaged in capital projects, including a project involving the World Bank for water and sanitation in low income areas of the City. I note from the document, which is headed “**Primer For Commercial Lenders**” and is dated November 2014 that the project appears to be at the conception stage. The document states in the Executive Summary that “*The objective of the document will be to facilitate commercial lending to Nairobi City Water and Sewerage Company and to allow future funding to be addressed using the arrangements agreed for in the transaction discussed here.*”

37. That being the case, does a stay of 90 days, assuming it can be granted, allow for the negotiations for the facilities contemplated by the 5th respondent and lenders to be completed? Would it not then require the Board found to have been unconstitutionally appointed to remain in office for an indeterminate period?

38. Further, the document contemplates a Board that meets the Water Services Regulatory Board Guidelines, as indicated at section 3 of the document titled “**Overview of the potential borrower**”. For the court to grant orders to allow the current Board to remain in office would, effectively, be to scuttle the intended project as the Board is not compliant with the 3rd respondent’s Guidelines.

39. Mr. Macharia argues that the actions of a Board subsequently found to have been improperly appointed are validated by the provisions of section 181 of the **Companies Act** which provides that:

181. Validity of acts of directors

“The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”

40. He also relies on section 52 and 53 of the Interpretation and General Provisions Act. These provisions are as follows:

52. Power to appoint alternate or temporary members

“Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, a person who is by that written law empowered to appoint any or all of the members thereof may—

- a. ***appoint one or more duly qualified persons to be alternate members, and any one alternate member may attend a meeting when a substantive member is temporarily unable to attend;***
- b. ***appoint a duly qualified person to be a temporary member in the place of a substantive member who is precluded by illness, absence from Kenya or other cause from exercising his functions, and, when attending a meeting of the board, commission, committee or similar body, the alternate or temporary member shall be deemed for all purposes to be a member thereof.***

53. Power of board, etc., not affected by vacancy, etc.

“Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—

(a) a vacancy in the membership thereof; or

(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.”

41. I am not certain that the above provisions of the Interpretation and General Provisions Act apply to the present situation, though it can be argued that section 181 of the Companies Act is relevant. However, the question is whether section 181 can give validity to actions undertaken by a Board **after** it has been found to have been unlawfully and unconstitutionally appointed. Can the Board found to have been unlawfully and unconstitutionally appointed in the judgment of 26th November 2014 be allowed to go on and negotiate contracts and oversee the appointment of a Managing Director for the 5th respondent?

42. In my view, any action or decision taken by the Board prior to the decision of this court on 26th November 2014 is valid in accordance with the provisions of section 181 of the Companies Act. However, I am unable to agree with Counsel for the 5th respondent that the section can sanitise acts not already performed, and that the court should therefore grant a stay to enable the Board finish the pending projects, including the appointment of the Managing Director, which Mr. Macharia informed the court from the Bar may not take the sixty days referred to by Prof. Ojienda for the 1st respondent.

43. Which brings me to the final question that arose from the submissions of Mr. Kago, Counsel for the 4th respondent. Can this court stay the decision it gave on the 26th of November 2014? Should it allow the Board that it found to have been appointed unlawfully and unconstitutionally to remain in office, and delay the appointment of a Board in accordance with the law? Mr. Macharia referred to the case of **East African Cables Limited –vs- Public Procurement Complaints**,

Review and Appeals Board & Another Civil Appeal No. 109 of 2007 in which the Court stated as follows:

“We think that in the particular circumstances of this case, if we allow the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that the advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action, and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.”

44. Mr. Macharia also referred the court to the case of **National Union of Water and Sewerage Employees & Others -vs- Nairobi Water and Sewerage Company (supra)** which followed the reasoning in the East African Cables case in declining to give the orders that the appellants were seeking.
45. Applying the utilitarian principle that the 5th respondent invites the court to follow, it is my view that the ethical choice for this court to follow is to allow its orders to stand. First, to allow the application is to allow a Board appointed irregularly and unconstitutionally to remain in office and continue taking actions and decisions for an important public entity such as the 5th respondent. That would send the message that it is okay to take unconstitutional action, for consideration of utilitarianism would ensure that the unconstitutional state of affairs remains.
46. However, in this case, that principle, in my view, has no application. As observed above, the water tariff review is being dealt with by the 3rd and 4th respondent, and there is nothing to indicate that tariffs must be raised within the next 60 days referred to by the 1st respondent, or that the operations of the 5th respondent will collapse if the cost of water for the residents of Nairobi is not raised. Secondly, the project for which a facility of Kshs 600 million is required is in the formative stages, and there is nothing to indicate that it must be entered into in the next sixty days.
47. The only act that may be required soon is the appointment of a new Managing Director. However, there is nothing to show that a new Board cannot be constituted and a new Managing Director appointed prior to the expiry of the term of the current Managing Director on 16th February 2015. In the worst case scenario, the current Managing Director, whose appointment and performance has not been put in question, can remain in office until a new, validly appointed Board is in office and can then undertake the appointment of a new Managing Director.
48. Indeed, I note from the contract annexed to the affidavit of Ms. Lilian W. Ndegwa as annexure **“LWN6”** that the Managing Director may well be properly in office. Clause 12 of the Employment Agreement dated 16th February 2012 entered into between the 5th respondent and the Managing Director, **Philip Githii Gichuki**, provides as follows:

“Not less than six (6) months prior to the expiry of this contract, the Employee shall give the Board written notice of his intention to renew or otherwise his intention to separate from the company. The Board shall on its part respond either way within three(3) months of receipt failure to which the contract will be automatically renewed for a further period of three (3) years with all the attendant rights, privileges and obligations thereto. Communication in this regard shall be by personal and acknowledged hand delivery of such notice/communication to each party and the dates under reference presumed to have commenced seven (7) working days after the date of the said notice/communication.”

49. I note from annexure “LWN7” that Mr. Gichuki indicated his interest in a renewal of his term on **30th June 2014**. According to Clause 12, the Board should have responded by the 7th October, 2014. It did not do so until 13th October 2014. On the face of it, therefore, the Managing Director’s contract was automatically renewed in terms of clause 12. This, however, is a matter for the parties to consider, but at any rate, again on the face of it, there is no urgency with regard to the renewal of the contract of the Managing Director.

50. In closing, let me comment on the arguments with regard to the previous Board. The 1st and 4th petitioner submitted that the Board whose term ended in March 2014 is the proper Board to oversee the operations of the 5th respondent pending the appointment of a new Board, and that upon the declaration of unconstitutionality in the appointment of the Board appointed on 26th March 2014, the *status quo ante* meant the previous Board should take over. However, aside from the submission of Counsel for the 5th respondent that the previous Board had also not been appointed procedurally, I take the view that the interests of the 5th respondent, and those of the residents of Nairobi County, are best served by an expedited process of appointment of a Board of Directors, undertaken strictly in accordance with the law and the Constitution.

51. For the above reasons, I decline to grant the orders sought by the applicants. The two applications are therefore dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 18th day of December 2014

MUMBI NGUGI

JUDGE

Okiya Omtatah Okoiti the 1st Petitioner, in person

Pro. Ojienda instructed by the firm of Tom Ojienda & Associates Advocates for the 1st Respondent

Mr Njoroge instructed by the State Law Office for the 2nd Respondents

Mr Muruka instructed by the firm of John H. Muruka & Co. Advocates for 3rd Respondent

Mr Sifuma- instructed by the firm of Nyachae & Ashitiva & Co. Advocates for the 4th respondent

Mr Macharia instructed by the firm of Mbugua, Atudo & Macharia Co. Advocates for the 5th Respondent