



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Judicial Review 97 of 2010**

**CHEMOSIT WATER AND SANITATION CO. LTD.....1<sup>ST</sup> APPLICANT**

**ONESMUS K. ARAP MARITIM.....2<sup>ND</sup> APPLICANT**

**WELDON K. KIRUI.....3<sup>RD</sup> APPLICANT**

**WILLIAM KITUR.....4<sup>TH</sup> APPLICANT**

**JOYCE C. MABWAI.....5<sup>TH</sup> APPLICANT**

**COUNCILLOR PATRICK NGERECH.....6<sup>TH</sup> APPLICANT**

**VERSUS**

**LAKE VICTORIA SOUTH WATER  
SERVICES BOARD.....RESPONDENT**

**JUDGMENT**

The notice of motion dated 15/10/2010 was brought by the six (6) ex-parte applicants (referred to as subjects) i.e. Chemosit Water and Sanitation Co. Ltd, Onesmus K. Arap Maritim, Weldon K. Kirui, William Kitur, Joyce C. Mabwai and Councillor Patrick Ngerch against the Lake Victoria South Water Services Board, the respondent. The applicants seek the following orders:-

- 1. An order of certiorari to bring into the High Court for purposes of being quashed the Public Notice by the respondent on 25/6/2010 in the Daily Nation and any subsequent decisions in relation to the said Notice;**
- 2. An order of certiorari to bring into the High Court for purposes of being quashed the respondent's letters dated 26/8/2010 addressed to the directors of the 1<sup>st</sup> applicant;**
- 3. Costs of this application.**

The application is predicated on grounds found in the statement of facts and the verifying affidavit sworn by Onesmus Kipkirui Maritim, who described himself as one of the directors of the 1<sup>st</sup> applicant. It is deponed that the 1<sup>st</sup> applicant is a registered company and the 1<sup>st</sup> applicant and respondent entered into an

agreement for the applicant to be one of the water services providers and a deed of surrender was signed on 16/3/2007; that the 1<sup>st</sup> applicant is governed by the provisions of the Companies Act and the Corporate Governance Guidelines – Water Act 2002; the respondent published a notice in the Daily Nation on 25/6/2006 to the effect that the terms of the current directors of the Water Companies which include the 1<sup>st</sup> applicant; it advertised for posts of directors of the respective water companies and went ahead to direct that all applications be made to the Chief Executive Officer (CEO) of the respondent. The applicant contend that they had only been appointed in March 2010 and it was misleading for the respondent to allege that the terms had expired. The applicants contend that the respondent acted *ultra vires* its powers and in breach of the rules of natural justice because it did not consult them. The applicants held an Annual General Meeting on 26/2/2010 (OKAM5) to which they invited the respondent but it was not represented. The applicants also wrote to the CEO of the respondent on 28/6/2010 addressing their grievances (KAM6) but he replied insisting that their terms of service had expired (OKAM7). They raised the issue with the Water Services Governing Body, the Water Services Regulatory Board (WASREB), it intervened and rescinded the decision of the respondent vide the letter dated 1/9/2010 but the respondent disregarded it and called for a meeting of 18/10/2010 (OKAM9). One of the agenda was to nominate a committee to oversee appointment of directors. The applicants contend that in accordance with its **Memorandum and Articles of Association**, the **Companies Act** and the **Corporate Governance Guidelines**, the respondent cannot decide how the 1<sup>st</sup> applicant should be run. The applicants are also contend that the respondent cannot single handedly appoint directors for the 1<sup>st</sup> applicant because it amounts to intermeddling with the functioning of the companies and taking over the affairs of the 1<sup>st</sup> applicant contrary to the rules of natural justice.

The notice of motion was opposed and a replying affidavit was sworn by Michael Owino Ochieng the CEO of the respondent. He admitted that an agreement dated 16/3/07 was entered into with the 1<sup>st</sup> applicant to act as an agent of the respondent for provisions of clean water. He further deponed that although the 1<sup>st</sup> applicant held an AGM on 26/3/2010 in which it amended its articles or directed by Water Services Regulatory Board, it had no mandate to elect its directors except as provided under the Guidelines. In the letter dated 12/10/2010 (MOO1) to the CEO WASREB, the deponent set out what the 1<sup>st</sup> applicant had not complied with in the Guidelines. It is the respondent's contention that the AGM was not done procedurally and as an agent, the 1<sup>st</sup> applicant is bound to carry out the directives of the principal as the principal (respondent) has to ensure efficient provision of water to the public at large and the licences have to adhere to the requirements of good governance. The respondent also urged that this matter is not properly before this court because the contract between the parties (ASP) provides a dispute resolution mechanism under clause 17 which the applicant by-passed and came to this court and the application is therefore incompetent and an abuse of the court process. Ms Asuna, counsel for the respondent added that the orders sought are not capable of being granted because the court is being asked to enlarge a contract period of the directors and a claim for breach of a contract lies in private law not public law. Counsel also submitted that by inviting the respondent to their meeting under the letter of 26/2/2010 (OKAM4) and that they were therefore bound by the guidelines; that they admitted the oversight role of the respondent over law junctions. Ms Asuna also submitted that the notice of motion as filed is incompetent in that though there are five other applicants apart from the 1<sup>st</sup> applicant, only the 2<sup>nd</sup> applicant swore an affidavit in support hereof and the other applicants did not give him authority to represent them contrary to **Order 1 Rule 13** of the **Civil Procedure Rules**.

After hearing the rival arguments on the application, the issues that seem to lend themselves for determination are as follows:-

1. **whether the application is defective/incompetent;**
2. **what is the effect of clause 17 of the SPA;**
3. **whether the applicants complied with procedure for appointment of directors under the Corporate Governance Guidelines;**

#### 4. what is the nature and scope of an order of certiorari and whether it can issue.

This is a Judicial Review application brought pursuant to **Sections 8 and 9** of the **Law Reform Act** being the substantive law and **Order 53** of the **Civil Procedure Rules**. The judicial review jurisdiction has been described as being '*sui generis*' a special jurisdiction that is governed by **Order 53** of the **Civil Procedure Rules** and that the rest of the **Civil Procedure Rules** do not apply. This was stated by the Court of Appeal in **Hotel Kunste v Commissioner of Lands CA 145/1995** and a host of other decisions. It is true that the affidavit in support of the application was only sworn by the 2<sup>nd</sup> applicant and there was no authority filed by the other applicants. In this regard, **Order 1 Rule 13** of the **Civil Procedure Rules** does not really apply but it would be expected that the other applicants would swear affidavits or at least demonstrate that they had authorized the 2<sup>nd</sup> respondent to swear the affidavit on their behalf. However, even if no authority was filed, I take cognisance of the fact that the 1<sup>st</sup> applicant is a statutory body and one of the applicants had to swear an affidavit on its behalf. Even if the other applicants have not sworn affidavits the application is still sustainable by the 1<sup>st</sup> and 2<sup>nd</sup> applicant. Even if the names of the 3<sup>rd</sup> to 6<sup>th</sup> applicants were removed, that omission does not render the application incompetent.

Both the applicants and the respondent do admit that they entered into a Service Provision Agreement (hereinafter referred to as SPA) on the 16/3/2007. The duty of the applicant under the contract was generally the provision of clean water to the area covered by the respondent. The 1<sup>st</sup> applicant was therefore an agent of the principal, the respondent. Their relationship was therefore based on principles that govern an agent and principal. Both the applicants and respondents are creations of the **Water Act. Section 46** of the **Water Act** establishes a Water Services Regulatory Board whose powers are specified under **Section 47** of the **Act** which are inter alia:-

- (a) **“to issue licences for the provision of water services;**
- (b) **to determine standards for the provision of water services;**
- (c) **to monitor compliance with established standards for the design, construction, operations and maintenance of facilities for water services;**
- (d) ....
- (e) ....
- (f) ....
- (g) ....
- (h) **To develop guidelines for and provide advice on the cost effective and efficient management and operations of water services –**
- (i) **to develop model/performance agreements for use between license and water service providers;**
- (ii)...”

A water service provider is defined under **Section 2** of the **Act**:-  
**“Water service provider” means a company, non-governmental organization or other person or body providing water services under and in accordance with an agreement with the licensee within whose limits of supply the services are provided.”**

The 1<sup>st</sup> applicant is a water service provider. The guidelines created pursuant to **Section 47(h)** were gazetted in gazette notice 7045 on 15/6/2010.

**Clause 4.2.4** of the **Guidelines** gives the respondent stake holders participation procedure which includes advertising for positions of director of the Board of Directors of existing companies. The clause states:-

**“4.2.4 Stakeholder participation procedure. This process shall apply where the WSP is in start up phase and is running assets previously owned by the local authority or any other government scheme. After a board of directors of a company is already in existence, the WSPs will advertise for the position following the criteria above.**

**1. ...**

**2. The Water Service Board shall advertise in the local media positions for the board of directors for an existing water company and shall set the criteria for those eligible to apply in accordance with the guidelines;**

**3. The Water Service Board shall call a stakeholder conference in the service area to create a selection committee of five members from the stakeholders who will evaluate the application submitted;**

**4. A date shall be set by the water service board for the applicants to be interviewed by the stakeholder selection committee. The Water Service Board shall not participate during the selection process; 5 – 8.”**

The above procedure clearly demonstrates the fact that the respondent has an oversight role to play in the appointment of directors of a service provider like the 1<sup>st</sup> applicant. The respondent has the duty to advertise for the positions of directors set the criteria for selection and thereafter a committee is set up for interviewing the applicants. The applicant did appreciate the fact the oversight role of the respondent which is captured at paragraph 11 and 12 of the 2<sup>nd</sup> applicant’s affidavit where the applicants claimed to have invited the respondent to its AGM on 26/3/2010. Such acknowledgment was made in the letter dated 28/6/2010 from the applicant to the respondent, when the applicant agreed to comply with the guidelines for better organizational governance.

Having established that the respondent had oversight authority over the 1<sup>st</sup> applicant, the question is whether the respondent acted outside its powers in publishing the impugned notice in the Daily Nation of 25/6/2010 (OKAM3) and the letters of 26/8/2010. The impugned notice reads as follows:-

**“PUBLIC NOTICE**

**APPLICATION FOR APPOINTMENT OF DIRECTORS FOR URBAN WATER SERVICE PROVIDERS IN LVSWSB**

**Lake Victoria South Water Services Board was established on 12/3/04 vide Gazette Notice No.1714 under the Water Act as a state corporation. It is responsible for ensuring provision of effective, efficient and economical water and sanitation services in its area of jurisdiction. It covers the whole of Nyanza Province and Chepalungu, Tinderet, Nandi East and Nandi South Districts. Our statutory responsibility is to:-**

**§ Plan, develop and rehabilitate water facilities in our jurisdiction;**

**§ Own, on behalf of the public and the Government of Kenya, all water and sewerage facilities within our jurisdiction;**

**§ Appoint water service providers as our ‘agents’ to manage water facilities and directly provide water and sewerage services directly to customers;**

**§ Build capacity of community based organization to access funding from Water Service Trust fund;**

**§ Monitor and supervise the performance of appointed water service providers as per the guidelines of the service Provision Agreement (SPA).**

**The terms of the current directors of the water companies have expired. These companies are:-**

- a. ...
- b. ...
- c. **Chemosit Water and Sanitation Co. (Head office Kapkatet;**
- d. – h...

**Lake Victoria South Water Services Board therefore calls for applications from persons from the above named institutions excluding item (i) wishing to be considered to serve as Directors of respective Water Companies. To be eligible for consideration the applicant must be:-**

**(i) – (viii)...**

**The institution which nominates a person for consideration as Director should provide the name(s) of the nominee and a letter of intent of not more than two standard A4 pages indicating the stake the institutions have in the management of water services in respective water company and the experience/skills the nominee will bring to the Company Board. ”**

The notice goes on to state the procedure that was to be followed. The applicants have given the excuse that by the time this notice was sent out, they had already appointed their directors at an AGM held on 26/3/2010 after they invited the respondent to attend but the respondent failed to do so. Even as of 26/3/2010, the applicants recognised the oversight authority of the respondent over the 1<sup>st</sup> applicant and that is why they were inviting the respondent to take part in their AGM. During the AGM the 1<sup>st</sup> applicant amended its **Articles of Association** as had been directed by the respondent. That fact is captured in the applicant’s letter to the respondent dated 28/6/2010 at paragraph 5 thereof. Having amended the **Articles** to be in compliance with the guidelines, it follows that the applicants had to be guided by the said guidelines in the appointment of the new directors in accordance with **Article 4.2.4** of the **Guidelines** (supra).

**This process fell short of the following procedure:-**

- (i) The current directors did not apply for re-election as per WASREB regulations;**
- (ii) The current directors did not give an opportunity to the other interested persons to apply for directorship of the WSP;**
- (iii) The stakeholder process was ignored by the Company;**
- (iv) The AGM’s agenda did not include audited accounts for the respective financial year;.....”**

The above letter was written to the Regulatory Board after the applicant complained to it that the respondent was acting ultra vires its powers. The powers and functions of the Regulatory Board as conferred by **Section 47** of the **Water Act** are inter alia, to monitor the operations of agreements (S.47(I) (J) between **Water Services Board** and **Water Services Providers** and to take appropriate action to improve their effectiveness with the consent of the Attorney General to prosecute any offences arising under the Act and is subject to the directions of the Minister. The Regulatory Board oversees all the functions of the Authority. Nowhere has the 1<sup>st</sup> applicant demonstrated that it complied with the guidelines and regulations as shown in the above letter. The applicants have not disputed the fact that they had been made aware of the guidelines before they held their AGM. Having failed to do so, I will agree with the respondent that the 1<sup>st</sup> applicant had acted contrary to the guidelines that govern their contract and therefore the respondent acted within its powers when it published the notice advertising the positions of the directors. In the same breadth, the respondent had the mandate to write letters to the individual directors that their terms had expired in line with the guidelines and specifically **Clause 4.2.4, 4, 5 and 6.**

At **Clause 17** of the ASP, the applicant and respondent agreed on a dispute resolution mechanism in the event of a dispute between them.

**“1. If any dispute arises out of or in connection with this SPA, either party shall give a written notice of fourteen (14) days to the other party. The parties shall meet promptly and in good faith attempt to reach an amicable settlement through mutual consultation and negotiation.**

**2. In the event that the parties do not resolve a dispute within thirty (30) days of notice of the dispute being given, either party may refer the dispute to an agreed mediator before submitting the dispute to the Water Appeals Board for determination. The party which has established the dispute will give written notice to the other party at least fourteen (14) days before referring the dispute to the Water Appeals Board.**

**3. The decision of the Water Appeals Board over the dispute shall be final but in the event that the Water Appeals Board shall be considered to have erred in law, an appeal on its decision may be made to the High Court Appeal of Kenya.”**

It is clear from that clause that the parties could only come to this court if the dispute resolution mechanism was exhausted. However, in total breach of the above clause, the applicant rushed to this court. Parties who enter into contracts must abide by them and not rush to the already overladen courts. The matter may have been amicably resolved without wasting a lot of the court’s precious time and avoided the escalating costs of litigation. In my view, coming to this court was premature, an abuse of the due process and the applicants should comply with **clause 17** of the SPA. Judicial review is a public law remedy. In the instant case existed a contractual relationship between the 1<sup>st</sup> applicant and the respondent. If the parties failed to resolve the dispute under **Clause 17** of their contract, they should have tried to resolve their dispute in the civil courts because they were trying to enforce private rights. The Court of Appeal in **Commissioner of Lands v Hotel Kunste Ltd )1995-1998) EA 1** held in inter alia: that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected. Clearly the dispute between the applicants and respondent arises from enforcement of their contractual relationship not performance of a public duty by the respondent.

In the end, I find that the applicants have not demonstrated that the respondent acted outside its powers or in breach of the rules of natural justice to avail that any public right had been breached of the orders sought. Besides, the application is premature and an abuse of the due process. It is hereby dismissed with the applicants bearing the costs.

**DATED and DELIVERED this day 28<sup>th</sup> of March, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Ndeda holding brief for Mr. Kurgat for the applicants

N/A for the respondent  
Kenney – Court Clerk