



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW NO. 253 OF 2011

BETWEEN

REPUBLICAPPLICANT

AND

THE WATER APPEALS BOARD..... RESPONDENT

EX PARTE

NATIONAL WATER CONSERVATION

AND PIPELINE CORPORATION

AND

DANIEL MWANGI NG'ANG'A 1ST INTERESTED PARTY

ATHI WATER SERVICES BOARD 2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The *ex-parte* applicant (“NWCPC”) moved court by a Notice of Motion dated 3rd November 2011 in which it seeks the following order;

(i) THAT this Honourable court do remove to this court and quash the Respondent’s decision dated 18th May 2011 in its application number 2(ws) of 2008.

2. The respondent is the Water Appeals Board (“the Board”) established under **section 84** of the **Water Act (No. 8 of 2002)**(“*the Act*”).
3. The subject of the application is a decision by the Board arising from a case filed by Daniel

Mwangi Ng'ang'a against the Athi Water Services Board ("AWSB") and NWCP. In that case Daniel Ng'ang'a, as owner of land parcel **Loc 16/Kimandi-Wanyaga/589** situated in Thika, claimed that a water tank under the management of both AWSB and NWCP was negligently maintained. As a result, it led to leakage which caused substantial damage to his land. He therefore sought compensation and an order that tank be maintained in good condition and that the respondents take measures to avoid overflow or leakage.

4. Both AWSB and NWCP denied liability as alleged. NWCP also averred that it could not be sued by reason of **Water (Plan of Transfer of Water Services) Rules, 2005 (Legal Notice No. 101 of 2005)** which transferred its liabilities to the Water Services Board.
5. In the judgment dated 18th May 2011, which is subject of these proceedings, the Board found the both AWSB and NWCP liable for the overflows and leakage and accordingly awarded damages.

The issue for determination

6. The applicant's argument and the issue for consideration in this case is whether the Water Appeals Board had jurisdiction to hear and determine the 1st interested party's claim.

The Arguments

7. Counsel for the NWCP, Mr Musyoki submitted that jurisdiction of the Board is set out in **section 85(1)** of *the Act* which gives it jurisdiction to hear appeals from a decision made by the Authority, Minister or Regulatory Board concerning a permit or licence under the Act. In the circumstances, counsel stated that the jurisdiction is appellate and there having been no decisions made by the bodies referred to in **section 85(1)** of *the Act*, the Board lacked such jurisdiction as it is clear that the case which it handled was founded on allegations of negligence by AWSB and NWCP.
8. The second point raised by the NWCP is that the decision contravened **Legal Notice No. 101 of 2005** which was published in accordance with **sections 110** and **113** of the **Water Act, 2002**. Under the said Notice, the applicant's assets and liabilities in respect of provision of water services were transferred to the respective Water Service Boards hence it was the AWSB which was liable in the circumstances.
9. No written submissions were filed on the respondent's behalf and counsel appearing for the respondent at the hearing, Mr. Bitta, called upon the court to decide the matter on the basis of the material before it.
10. The 1st interested party has filed a replying affidavit sworn on 26th June 2012 and written submissions dated 10th April 2012. On the issue of jurisdiction, the 1st interested party argued that under **section 85(2)** of *the Act*, the Board has wide and unfettered jurisdiction to hear and determine disputes. Further that under **section 87**, the Board has both appellate and original jurisdiction and that **section 87** empowers the court to hear disputes including the subject matter of this case.
11. The 1st interested party relied on a circular issued by the Chief Justice in February 2007 in which he directed that all matters pending in the High Court or subordinate pertaining to water disputes be transferred to the Board for hearing and disposal. In the circumstance the interested party contended that the case before the Board which was commenced as **HCCC No. 976 of 2011** was transferred to the Board to accordance with the directive and was properly heard by it.
12. As regards the application of **LN. No. 101 of 2005**, the interested party submitted that the original suit was filed way back in 2001 before **LN. No. 101 of 2005** came into force and that under **section 22(4)** of *the Act*, NWCP still bears responsibility for works and management of assets

relating to water distribution. He urged that irrespective of **LN No. 101 of 2005**, the applicant is jointly and severally liable for the claim and that the Legal Notice cannot override the provisions of *the Act* as it is subordinate legislation.

13. Counsel for the AWSB did not file any response to the application and submissions and was content to leave the matter to the court.

Determination

14. The issue for consideration is that of jurisdiction of the Water Appeals Board under the **Water Act, 2002** and in order to deal with the matter, it is important to set out **section 85** of *the Act*.

15. The jurisdiction of the Board is defined at **section 85** which reads as follows;

Jurisdiction of the Board

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

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

16. A plain reading of **section 85(1)** shows that the jurisdiction outlined is appellate in nature and I agree with the applicant, this jurisdiction relates to appeals from a decision or order of the Authority, Minister or Regulatory Board concerning a permit or licence.

17. The second part of jurisdiction under **section 85(2)** is jurisdiction to hear and determine disputes “*as may be conferred by this or any other Act.*” Hence the jurisdiction other than appellate jurisdiction must be conferred by *the Act* or any other Act. In **Kuldip Singh Jandu v Nairobi Water Company Limited & Another, Nairobi Petition No 522 of 2012[2012]eKLR**, Nyamweya J., held that, “*It is clear from section 85(2) of the Water Act that the additional jurisdiction granted to the Water Appeals Board is in fact limited, and it does not have jurisdiction to determine all disputes under the Act, but only those disputes where jurisdiction is conferred on the said Appeals Board by the Water Act, 2002 or any other Act.*”

18. The above finding is consistent with the classic statement on jurisdiction in **Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1**; “*By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.*” This statement was approved by the Supreme Court in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others, SCK Application 2 of 2011 [2012] eKLR**.

19. The question then is whether the facts before the Board establish jurisdiction to hear a case

grounded on the tort of negligence. I have perused **the Act** and I find no such jurisdiction conferred by it. No other statute been invoked to establish jurisdiction and non has been cited by the respondent or 1st interested party. The reference to **section 87(3)** of **the Act** called in aid by the 1st interested party states that; “*In determining a dispute, or exercising any other judicial function, the Board shall decide the matter on the merits of the case and may make such order as, in its judgment, will do justice between the parties.*” The section is part of **section 87** titled, “*Determination of appeals and disputes.*” This section deals with and affirms the power of that the Board has in determining matters within its jurisdiction. This provision does not confer jurisdiction. Thus the “*appeals*” and “*disputes*” in **section 87** only refers to appeals and disputes which the Board is empowered to hear under **section 85** of **the Act**.

20. The reference to **Circular No. 69 of February 2007** issued by the Chief Justice to the effect that all cases dealing with water matters be transferred to the Board cannot underpin the impugned decision. The Chief Justice, cannot by a circular confer jurisdiction to the Board under **the Act**. Jurisdiction as I have stated, can only be donated by the Constitution or statute, in this case **section 85** of **the Act**. There is no authority under **the Act** for the Chief Justice, by way of a circular, to imbue the Board with jurisdiction it does not possess.

21. The 1st interested party in his replying affidavit raised several objections regarding the competence of the application including manner in which the application was drawn, the failure to cite legal provisions, the competence of the affidavit and manner of marking annexures to the affidavit. In my view, the objections being technical did not go to the substance of the case and in light of the legal imperative in **Article 159 (2)(d)** of the Constitution which exhorts the court to eschew legal technicalities, I decided to ignore them. In any case the case was argued on the substance and no party was prejudiced by these proceedings.

Disposition

22. The net result of my finding is that the decision of the Water Appeals Board in Appeal No. 2 (ws) of 2008 is *ultra vires* the **Water Act, 2002** and it is hereby quashed.

23. As the decision has been set aside, it is unnecessary to express an opinion on the application of **Legal Notice No. 101 of 2005** as this will be the subject of the dispute between the parties to be determined by the High Court.

24. These then, are the final orders of the Court;

- a. **The judgment of the Water Appeals Board dated 18th May 2011 in Appeal No. 2(ws) of 2008 be and is hereby quashed.**
- b. **The respondent shall bear the costs of the ex parte applicant and the 1st interested party.**

DATED and DELIVERED at NAIROBI this 23rd day of August 2013.

D.S. MAJANJA

JUDGE

Mr. Musyoki instructed by B.M Musyoki & Co. Advocates for the applicant

Mr Bitta, Senior Litigation Counsel, instructed by the State Law Office for the respondent.

Ms. Akong'a instructed by Kinyanjui, Njuguna and Company Advocates for 1st interested party.

Mr Odoyo instructed by Kipkenda, Lilian & Koech Advocates for 2nd interested party.