



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL CASE NO. 193 OF 2010**

**WESTERN WATER SERVICES  
COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**LAKE VICTORIA NORTH WATER  
SERVICES BOARD..... DEFENDANT**

**RULING ON A PRELIMINARY OBJECTION**

1. The preliminary objection dated 16.12.2011 is premised on the following grounds;
  - a) That Habel Wesonga Salasya who swore the supporting affidavit to the application and the verifying affidavit on behalf of Western Water Company Limited is not an authorized officer for the purposes of the law and hence rendering both the suit and the application fatal, incompetent and incurable.
  - b) The Honourable Court is bereft of the necessary jurisdiction to entertain the dispute which falls within the mandate of the Water Appeals Board under the provision of the Water Act No. 8 of 2002.
  - c) The Orders of injunction sought cannot issue against the defendant who is already in possession of the suit premises.
  - d) The orders sought do not accord with the public good and or order.
  - e) The plaintiff is guilty of non disclosure of material particulars respecting the true ownership of the disputed premises and all the circumstances.
  - f) The suit and the application amounts to an abuse of the process of the Honourable court as the plaintiff is without any locus standi in the matter in dispute.

2. I will address the issue of jurisdiction first because it has often been said that jurisdiction is everything and without it, there is nothing. I say so because in the plaint dated 25.11.2010, it is claimed that on 22.10.2010, the Defendant took over the plaintiff's premises unlawfully and inspite of the existence of a Service Provision Agreement (SPA) between them. Further, that the Defendant also took over the plaintiff's revenue collection services and directed the plaintiff's customers to make direct payment to the Defendant's bank account No.1103686909, Kenya Commercial Bank Ltd. – Kakamega Branch.

3. In the same plaint, a declaration is sought that the Defendants acts of trespass and interference with the plaintiff's operations and business are illegal and unlawful *ab initio* and contravenes the Service Provision Agreement. A permanent injunction is also sought to stop the Defendant from continuing the allegedly unlawful actions.

4. In his submissions, Mr. Musiega made the point that the dispute is one that should be determined by mechanisms known to the Water Act No.8 of 2002 and specifically by the Water Appeals Board established under the Act and whose mandate is set out in S.85 of the Act. The High Court is then allowed the appellate mandate from a decision of the Board and since the Board exists, the dispute should be referred to it and the present suit struck off.

5. Mr. Nandwa's answer to the above contention, and on behalf of the Defendant, is that the Board has no mandate because the Service Provision Agreement was never approved by the Water Service Regulatory Board. Further, the issue in contest is not the license per se but the invasion of private property by the Defendant, a matter with constitutional implications and therefore only determinable by the High Court.

6. I have considered the rival submissions and I have perused the Water Act **S.46** and **S.47** provides as follows;

*S.46.(1) There is hereby established a board to be known as the Water Service Regulatory Board.*

*(2) The Regulatory Board shall be a body corporate with perpetual succession and a common seal and shall have power in and by its corporate name, to sue and be sued and, in the exercise and performance of its powers and functions, to do and permit all such things as may lawfully be done or permitted by a body corporate in furtherance of its objects.*

*(3) The Regulatory Board shall consist of;*

- a) A chairman, who shall be appointed by the President; and*
- b) ten other members who shall be appointed by the Minister.*

*(4) The First Schedule has effect with respect to the membership and procedure of the Regulatory Board.*

AND

*S.47(1). The Regulatory Board shall have the following powers and functions*

- a) to issue licences for the provision of water services;*
- b) to determine standards for the provision of water services to consumers;*
- c) to establish procedures for handling complaints made by consumers against licensees;*
- d) to monitor compliance with established standards for the design, construction, operation and maintenance of facilities for water services;*
- e) to monitor and regulate licensees and to enforce licence conditions;*
- f) to advise licensees on procedures for dealing with complaints from consumers and to monitor the operation of these procedures;*
- g) to develop guidelines for the fixing of tariffs for the provision of water services;*

- h) to develop guidelines for the fixing of tariffs for and provide advice on the cost-effective and efficient management and operation of water services;
- i) to develop model performance agreements for use between licensees and water service providers;
- j) to monitor the operation of agreements between water services board and water service providers and to take appropriate action to improve their effectiveness;
- k) to develop guidelines on regulations for the provision of water services to be adopted by licensees;
- l) to disseminate information about water services;
- m) to promote water conservation and demand management measures;
- n) to monitor, and from time to time re-assess, the national water services strategy;
- o) in accordance with the national water services strategy, to determine fee, levies, premiums and other charges to be imposed for water services;
- q) to gather and maintain information on water services and from time to time publish forecasts, projections and information on water management of water services;
- r) to liaise with other bodies for the better regulation and management of water services;
- s) to advise the minister concerning any matter in connection with water services;

(2) The Regulatory Board may, with the consent of the Attorney-General given under the Criminal Procedure Code, undertake prosecution of any offences arising under this act or in connection with the performance of its functions..

(3) The Regulatory Board shall have such other power and functions as may be conferred on the Regulatory Board by or under this or any other Act, or as may be reasonably incidental to the exercise or performance of any power or function so conferred.

(4) Except as to the contents of any report or recommendation made by it, the Regulatory Board shall, in the exercise and performance of its powers and functions, be subject to such directions as may be given from time to time by the Minister.

(5) A summary of any directions given under subsection (3) during a financial year shall be published in Regulatory Board's annual report prepared under section 47.

7. Further SS.84 and 85 of the Act provide as follows;

S.84.(1) There is hereby established a board to be known as the Water Appeal Board.

(2) The Board shall consist of :—

- a) a Chairman, to be appointed by the President on the recommendation of the Chief Justice, who shall be a person qualified to hold or who has held the office of a judge of the High Court of Kenya; and
- b) two other persons, to be appointed by the Minister.

(2) The Fourth Schedule has effect in respect of the membership and procedure of the Board.

S.85.(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.*

**8.** Reading all the above sections together, it is obvious to me that the Water Appeals Board is an appellate body where the original proceedings have been determined by the Regulatory Board. The matters have been enumerated above and Mr. Musiega has not referred me to any part of S.47 that is relevant to the dispute at hand. The dispute at hand is the forceful take over, as alleged, by a service provider of the assets and functions of another. That is not a matter for the Appeals Board because there is no complaint that the Regulatory Board was in any way involved in the take-over or that it took sides against one provider.

**9.** Further in determining the dispute, the Service Provision Agreement will become an important document because it is the document that provides for the relationship between the parties to the present suit. That matter is certainly outside the ambit of the mandate given to the Appeal Board because **S.55 (1)** and **(2)** of the Act provide as follows;

*S.55.(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.*

**10.** The issue before this court is whether there is or there is no Service Provision Agreement and not whether the Regulatory Board has acted in any manner that would require the intervention of the Appeals Board.

**11.** It is also clear to me that the High court has been approached by the plaintiff directly and for good reason and it is being asked to exercise its original civil jurisdiction and determine whether one entity had the right to take over another. It has jurisdiction to determine that question. Grounds (b) and (f) the objection have no merit and is overruled.

**12.** Regarding ground (a), (c), (d), (e), all raise matters of fact which cannot be determined by way of a preliminary objection and should be canvassed when the chamber summons dated 25.11.2010 is being argued – see Mukisa Biscuits vs West End Ltd. [1969] E.A. 696.

**13.** In the end, the objection has no merit and is overruled with cost to the Defendant/Respondent.

Orders accordingly.

***Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of April, 2011***

**ISAAC LENAOLA  
J U D G E**