



IN THE MATTER OF AN APPLICATION

BY MAVOKO WATER AND SEWERAGE COMPANY LIMITED

FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER

ORDER 53 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF

THE WATER ACT, 2002

BETWEEN

MAVOKO WATER AND SEWERAGE COMPANY LIMITED APPLICANT

VERSUS

TANATHI WATER SERVICES BOARD RESPONDENT

AND

MUNICIPAL COUNCIL OF MAVOKO INTERESTED PARTY

RULING

1. Mavoko Water and Sewerage Company Limited (hereinafter referred to as “**the Company**”) seeks orders under Order LIII Rules 1 (2), (3) and (4) of the Civil Procedure Rules that:

- a. **“THAT this matter be certified as urgent and the same be heard ex parte in the first instance.**
- b. **THAT this Honourable Court do extend and or excuse the filing and service of the Notice to the Registrar.**
- c. **THAT leave be granted to the Applicant to apply for an order of certiorari to quash the decision of the Respondent contained in the letter dated 12th October 2009.**
- d. **THAT leave be granted to the Applicant to apply for an order of prohibition directed to the Respondent, its officers or agents prohibiting them from acting, issuing orders, directions or acting in any manner whatsoever on the decision contained in the Respondent’s letter dated 12th October 2009.**
- e. **THAT leave so granted do operate as a stay of actions, orders, directions by the Respondent, its officers or agents requiring the Applicant, its officers, employees, agents or any other person from**

acting in any manner whatsoever on the decision or in accordance with the decision contained in the respondent's letter dated 12th October 2009.”

2. The grounds in support of the Chamber Summons dated 19/10/2009 are that:

- a. **“THAT the Respondent by a letter dated 12th October 2009 purported to dissolve the Board of Directors of the Applicant.**
- b. **THAT the Applicant is a Limited Liability Company which is subject to the provisions of the Companies Act and the Respondent has no power to dissolve the Board of Directors either under the said Act or under the Water Act.**
- c. **THAT the decision of the Respondent was made in breach of the rules of natural justice and is unreasonable in the circumstances of the case.**
- d. **THAT the purported dissolution of the Board of Directors of the Applicant will cause instability in the Company and will cause substantial and immeasurable loss and damage to the company and o the people of Athi River Area where it is the exclusive water and sewerage service provider.”**

3. In the Statement of Facts and Verifying Affidavit filed pursuant to the Rules, it is the Applicant's case that by letter dated 12/10/2009, Joseph Nzesya, Chief Executive Officer of the Tanathi water Services Board (hereinafter referred to as “**the Board**” states as follows:-

“...the Board has decided to dissolve the Board of Directors of Mavoko Water and Sewerage Co. Ltd effective Thursday, the 15th day of October 2009 in order to pave way for clustering”.

4. The above decision is now being challenged and the grounds thereof have been set out elsewhere above.

5. At this stage, all that this court is required to do is to see whether the Applicant has established a *prima facie* case for grant of leave and I note that the Applicant is a private limited liability company incorporated on 14/5/2009. The shareholders are;

- i. Municipal Council of Mavoko.
- ii. The Mayor, Municipal Council of Mavoko.
- iii. The Town Clerk, Municipal Council of Mavoko.

6. Of the 5000 shares taken in the company, the council holds 4996 shares while the Mayor and Town Clerk hold 2 shares each. In its Articles of Association at article 58, the Directors of the Company are said to be;

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| i. “Commerce | 1 Director |
| ii. Youth | 1 Director |
| iii. Residential Association Athi-River | 1 Director |
| iv. Residential Association Syokimau | 1 Director |
| v. Women Representative | 1 Director |

- vi. Kenya Association of Manufacturers – Athi River Chapter 1 Director
- vii. Mavoko Municipal Council 3 Directors
- viii. Informal Settlements 1 Director
- ix. Daystar University 1 Director”

7. Article 59 then provides as follows;-

i. “At the third annual general meeting of the company from the date of incorporation a third of all the directors shall retire from office and subsequently at the annual general meeting of ever subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three then the number nearest one-third, shall retire from office.

ii. The directors to retire in every year shall be those who have been longest in office since their last election, they have served as directors in the company for no less than three years but as between persons who became directors on the same day those to retire shall unless they otherwise agree among themselves be determined by lot.”

8. From a casual reading of the above articles, there is no provision for “**dissolution of the Board of Directors**” by a third party and in any event, all activities of the company must be governed by the Companies Act, Cap 496 and the Articles and Memorandum of Association. But what is the interest of the Tanathi Water Services Board in the activities of the Applicant Company?

9. I have seen a Service Provision Agreement between the Board and the Company dated 17/4/2009. In that Agreement, the Board granted a license to the Company for the Company to provide water services within the company’s defined area subject to the conditions, covenants and terms stipulated therein. The Board is itself a creature of the Water Act, 2002 and Section 55 of that Act grants it the mandate to enter into agreements with water service providers, such as the Applicant in this case, and Section 55 (4) thereof creates general provisions that must be germane to water service provision agreements.

10. My opinion of the Agreement dated 17/4/2009 will be limited to the following;

Firstly, it does not supersede the Companies Act or the Company’s Articles and Memorandum of Association.

Secondly, it does not *prima facie* give the Board powers to determine the life of the Company’s Board of Directors and specifically gives it no powers to order the dissolution of the Company’s Board of Directors.

11. Having so said, I note that the reason why the Board took the action it took was because the Permanent Secretary, Ministry of Water and Sanitation by a letter dated 10/9/2009 and addressed *inter-alia* to the Chief Executive Officer of Tanathi Water Services Board instructed him to cluster the water providers in the Tanathi region into three clusters to ensure viability in water service provision. No doubt that is a noble, reasonable and probably merited decision. However, the conduct of the Board in executing that decision *vis-à-vis* the company is *prima facie* unlawful.

12. Judicial review never looks to the merit of a decision but to the process leading to the decision. P.P Craig in his book, Administrative Law, 5th ed. 2003 had this to say at page 367;

“Consultation and legislative scrutiny are general methods of control and the focus will be upon the merits of the rule as well as its technical legality. Judicial supervision by way of contrast is ex post facto, particular and focuses on the legality of the measure and not its merits.”

13. I wholly agree and whereas I may see merit in the clustering of water service providers across the country for viability and for reduction of expenses, the process leading to it must be lawful and not one that may cause injustice to an affected party. That seems to be the problem the Board must confront and I have said why.

14. Lastly, it is interesting that whereas the company was incorporated on 14/5/2009, the Water Service Provision Agreement is dated 17/4/2009 and is unsigned by the company. *Prima facie* therefore, the Board may in fact have no lawful connection with the company and its actions merely that of a busybody unless its position is properly entrenched through Section 55 of the Water Act.

15. In the end, I see merit in the Application before me and I shall grant prayers (b), (c) and (d). For obvious reasons, prayer (e) is also granted to secure the survival of the company.

16. Costs shall be in the cause.

17. Orders accordingly.

Dated and delivered at Machakos this 23rd day of **October** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Majanja for Applicant**

ISAAC LENAOLA

JUDGE