



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Misc. Appli. 50 of 2006

REPUBLIC APPLICANT

VERSUS

DISTRICT WATER OFFICER MACHAKOS RESPONDENT

AND

1. THE CHAIRMAN – WILSON N WAKI
2. THE SECRETARY – WILLY P KIMEU
3. THE TREASURER – DAVID M MAKAU
4. WAMUYA WATER USERS ASSOCIATION APPLICANTS

AND

1. DANSON MUTUA MWATU
2. MOSES WAMBUA KISANGI
3. SABETH MULOVE MATELI
4. RICHARD KITEMA NDUTU INTERESTED PARTIES

RULING ON A PRELIMINARY OBJECTION

1. A Preliminary objection is defined as “an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary” – Blacks Law Dictionary 16th edition.
2. Before me is a challenge to the life of the Notice of Motion dated 31/10/2007 seeking orders of review, setting aside and variation of the consent order recorded on 20/7/2006. The Application is under Order XLIV Rules 1, Order L Rule 3 of the Civil Procedure Rules, Section 3(a), and Section 80 of the Civil Procedure Act and all other enabling provisions of the law. The specific prayers sought are crafted as follows:-
 - i. “THAT this application be certified urgent and fit to be heard on priority basis.
 - ii. THAT the consent order recorded on 20th July 2006 be reviewed, varied and/or set aside.
 - iii. THAT the orders of stay issued on 3rd May 2006 be reinstated pending the hearing and determination of

the applicant's application dated 23rd May 2006.

iv. THAT costs of this application be provided for.”

3. It is also clear that the decision being challenged in the main proceeding is a notice dated 27/4/2006 “purporting to suspend and dissolve the management committee of WAMUYA WATER USERS ASSOCIATION and calling for fresh elections as the same is ultra vires and contravenes the Constitution and the Rules of the Association.”

4. In the Notice of Preliminary Objection dated 22/11/2007 the Interested Parties have stated as follows:

“TAKE NOTICE that at the hearing of the application dated 31/10/2007, a preliminary objection on points of law shall be raised thereto on the grounds that:-

(A) The consent orders of 20/07/2006 are of contractual effect and are IN LAW not liable to be reviewed, varied or set aside:-

ii. EXCEPT upon the consent of all the parties, AND

iii. ARE demonstrated to have been obtained by fraud or collusion or by an agreement contrary to the policy of the court or given without sufficient material facts or in misapprehensive or ignorance of material facts or in general for a reason which would enable a court to vary or set aside a contract.

iv. THE requisite legal requirements for reviewing, varying or setting aside consent orders do not exist IN THIS MATTER as a matter of law to warrant this application.

v. THE Legal conditions for REVIEW as per the provisions of the Civil Procedure Rules do not exist in this application, AND

vi. THE application has been brought after a prolonged, inexcusable and undue delay.

vii. Order XLIV of the Civil Procedure Rules is not applicable in these proceedings.

(B) The orders of 3/5/2006, in law ceased to exist on 20/7/2006 and are incapable of reinstatement as the elections of 20/12/2006 were conducted under valid court orders of 20/7/2006 as opposed to the situation obtaining under which the orders of 5/3/2006 were granted and that situation has been irreversibly altered and is incapable of reinstatement.

(C) The applicants have no locus standi to bring the present application for want of due consent, authority and mandate of the members and management committee of the 4th applicant.

(D) The 1st, 2nd and 3rd applicants in law no longer represent, speak or act for the 4th applicant, its members and committee.

(E) The application is incompetent and contrary to the law and court orders.

The application ought to be struck out with costs.

DATED at MACHAKOS this 22nd day of November 2007.”

5. Noting the lengthy submissions made by both advocates, it seems to me that I should start by reproducing the consent order dated 20/7/2006 verbatim. It reads as follows:-

i. “The Director of water service do forthwith appoint a team of public officers not exceeding ten to manage for a period of six months the Wamunyu Water Supply project on an interim basis to the exclusion of the current management committee or members of Wamuya Water Users association or employees thereof pending the election of Zonal and Central Management Committee members of Wamuya Water users Association.

ii. The Wamuya Water Users Association members, by resolution to be passed at a special General Meeting do hold elections of Zonal and Central Committee members at least one month before expiry of the six months period stated above in accordance with the provisions of the Associations Constitution.

iii. The interim management team appointed above do operate the project and collect water revenue on official receipts and bank the same into the Associations Current Account at the Co-operative Bank Machakos.

iv. The current signatories to their account be changed and replaced by the District Account and District Water Officer Machakos.

v. The saving account in the name of the Association be frozen forthwith.

vi. This matter do come for mention on 27/9/2006, for the District Water Officer to make progress report to court.”

6. Looking closely at that consent order, it is predicated on an order of stay dated 3/5/2006 (of the decision alluded to elsewhere above on the conditions therein set out). I should pause there and state that an order of stay is granted pursuant to Order LIII Rule 1 (4) of the Civil Procedure Rules which provides as follows:-

“(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

7. It is always the prerogative of the judge to grant such an order and it is again the judge to determine for how long the order would subsist and make other orders as he thinks just. In this case, although the learned judge granted the initial blanket order of stay of the offending decision, there is no doubt that the consent order recorded before him was lawful and proper in the circumstances. The Application dated 31/10/2007 seeks an order to set aside, review or vary that consent and the argument made against it is that by law, such orders cannot be granted. I agree. The proceedings herein are judicial review proceedings and it has been said time and time again that the Civil Procedure Rules do not apply in judicial review matters because they form part of a special jurisdiction conferred on this court by the Law Reform Act and not the Civil Procedure Act.

8. Having so said therefore, it seems to me that the Application dated 31/10/2007 is wholly misguided and the orders sought in it cannot be granted whatever the merits or practicality of the issues raised in it. It is simply against the law and it must be struck out.

9. Going back to the consent order reproduced above, my mind is clear that even if the order of stay had been lifted, the leave to challenge the decision dated 27/4/2006 subsists and it matters not what else happened subsequent to the consent order. I say this guardedly but as I understand it, that decision is singular in nature and a challenge to its legality can be made notwithstanding other decisions taken thereafter. Those decisions can also be challenged singularly and to the exclusion of decisions prior or subsequent to them. The motion dated 23/5/2006 is alive and well in that regard and I cannot tamper with it.

10. I should say something about this whole matter; I know that the consent order was entered into in good faith with a view to resolving a social problem tied to water. However, critically looking at it in the eyes of the law, it may well have created hurdles and issues that all parties may not easily surmount. But I digress.

11. To my mind the objection can only succeed in as far as the Notice of Motion dated 31/10/2007 is concerned. It is struck out with costs. I shall make no orders as regards the Notice of Motion dated 23/5/2006.

12. Orders accordingly.

Dated and delivered at Machakos this 11th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mbithi for Interested Parties**

Mr O'Mirera for Respondent

Mr Makau Mutua for Mr Mbindyo for Applicant

ISAAC LENAOLA

JUDGE