



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC MISC NO. EE005 OF 2020**

**IN THE MATTER OF APPEAL NO. 7 (WS) OF 2012 BETWEEN MUEMA KITULU AND NOL TURESH PIPELINE BULK WATER CO. LTD**

**AND**

**IN THE MATTER OF RULE 34(1) AND (2) OF THE WATER APPEALS BOARD RULES 2007**

**AND**

**IN THE MATTER OF THE WATER ACT NO. 43 OF 2016**

**AND**

**IN THE MATTER OF ADOPTION OF AN AWARD OF THE WATER APPEAL BOARD MADE ON 15<sup>TH</sup> APRIL, 2015**

**BETWEEN**

**MUEMA KITULU.....APPLICANT**

**VERSUS**

**NOL TURESH PIPELINE BULK WATER CO. LIMITED.....RESPONDENT**

**RULING**

What is before Court for determination is the Applicant's Notice of Motion application dated the 21<sup>st</sup> October, 2020 brought pursuant to Sections 1B, 3, 3A, 63 (c) of Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules; Section 125 and 156(2) (b) of the Water Act No. 43 of 2017 and Water Appeals Boards Rules. The Applicant seeks for the following orders:

1. Spent.
2. That the consent judgment of the Water Appeals Board in Appeal No. 7 (W/S) of 2012: Muema Kitulu Vs Nol Turesh Pipeline Bulk Water Company issued on 15<sup>th</sup> April, 2015 be adopted as judgement of this Honourable Court.
3. That further and without prejudice to the foregoing, an order of injunction do issue against the Respondents, its agents or servants, restraining them from disconnecting and/or compelling them to reconnect water supply if already disconnected to the Applicant's premises pending the hearing and determination of this application.
4. That an order of injunction to issue against the Respondent compelling the Respondent to supply within reasonable time or within such time as the court may direct, the audited accounts for the consumption of water in respect of the Applicant's account No. **060020376** for purposes of compliance with orders of the Water Appeals Board issued on 15<sup>th</sup> April, 2015.
5. That party and party costs in the Water Appeals Board proceedings be taxed by this Honourable Court and a Decree issued forthwith.
6. That this Honourable Court do make such further or orders as it may deem appropriate in the circumstances and in the interest of

justice.

7. That the costs of this application be borne by the Respondents.

The application is premised on the grounds on the face of it and the supporting affidavit of MUEMA KITULU Advocate where he deposes that there was a dispute at the Water Appeals Board which was lodged in the year 2012 vide Water Appeal No. 7 (WS) of 2012, Muema Kitulu Vs Nol Turesh Pipeline Bulk Water Company Ltd which was resolved when parties recorded a consent on 15<sup>th</sup> April, 2015 in the following terms: the disputed bill was to be shared between the parties and a credit of half the amount effected to the Claimant's account (i.e Kshs. 40, 120.00); The Respondent was to allow for the fitting of a parallel water meter by the Claimant and each party to translocate his/its meter to a location within the Claimant's main gate and a pressure relieve valve fitted to both meters at the Claimant's costs to regulate flow of water; the Respondent was condemned to pay costs to be agreed upon.

He explains that the term of the Water Appeals Board came to an end shortly after it issued the aforementioned order and to date no other board has ever been constituted nor a Tribunal set up under the new Water Act No. 43 of 2016. He confirms the Water Act 2002 was repealed on 21<sup>st</sup> April, 2017 after the promulgation of the Water Act No. 43 of 2016 which set up a Water Tribunal to replace the Water Appeals Board vide section 119 of the said Act. He contends that his intended Bill of Costs is yet to be filed and taxed. He avers that the High Court has supervisory powers over the Water Appeals Board or any successor Tribunal pursuant to the provisions of Article 165 (6) of the Constitution. He reiterates that since the consent decision of the Water Appeals Board of 15<sup>th</sup> April, 2015, the Respondent has failed to credit his water account as directed nor has it conceded to the costs he claimed or even provided statement of accounts as expected hence necessitating the intervention of the court. Further, that the Respondent has on several occasions disconnected water from his home thus causing him embarrassment. He insists the Respondent has never fitted the pressure valve to the designated water meters nor has it translocated the meter to the area mentioned in the Water Appeals Board order and continues to charge exorbitant including unwarranted amounts.

The firm of messrs Fatah & Company Advocates filed a Notice of Appointment of Advocates dated the 19<sup>th</sup> November, 2020 on 25<sup>th</sup> February, 2021 but failed to file any replying affidavit to controvert the Applicant's averments.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the materials presented in respect to the Applicant's Notice of Motion application dated the 21<sup>st</sup> October, 2020, the only issue for determination is whether the consent judgment of the Water Appeals Board in Appeal No. 7 (W/S) of 2012: Muema Kitulu Vs Nol Turesh Pipeline Bulk Water Company issued on 15<sup>th</sup> April, 2015 should be adopted as judgement of this Honourable Court.

The Applicant in his submissions has reiterated his claim and stated that this Court has jurisdiction to recall the dispute file before the defunct Water Appeals Board and issue orders thereon. To buttress his arguments, he relied on Articles 165(6) & (7) of the Constitution as well as the decision of **Kalala P. Musankishay and Another Vs Republic (2020) eKLR**.

I note the Respondent has not controverted the Applicant's averments in respect to the entry of the consent dated the 15<sup>th</sup> April, 2015 in Water Appeal Board vide Appeal No. 7 (W/S) of 2012: Muema Kitulu Vs Nol Turesh Pipeline Bulk Water Company. On perusal of annexure 'MK3', I note the said consent was entered by the then Chairman of Water Appeal Board John Musyoka Annan, in the presence of Applicant and Respondent. There is no indication that the said consent was set aside. I note the Water Appeal Board is no longer in existence as the Water Act 2002 that established it, was repealed after the enactment of the Water Act 2016. Further, the Water Tribunal envisaged in section 119 of the Water Act 2016 is yet to be established. Since the said Tribunal is yet to be established and Rules not in place, I wish to refer to the Water Act 2002 (No.8 of 2002) Water Appeal Board Rules 2007 which were in place during the entry of the consent dated the 15<sup>th</sup> April, 2015 that stipulates thus: ' **34.(1) The decision of the Board and a draft decree shall be filed in the High Court by the parties for execution and enforcement as if it were an order of that Court. (2) An order or decree shall agree with the decision and specify clearly in paragraphs the relief granted or other determination and costs, if any.**'

Article 165 (6) & (7) of the Constitution provides that: ' **(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**'

In the case of **Kalala P. Musankishay and Another Vs Republic (2020) eKLR**, it was held that: ' **11. As regards the circumstances under which this court can exercise its constitutional supervisory jurisdiction, I find useful guidance in the case of Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR, where Mwongo J. posited as follows: "...I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations: a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay; b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law; c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation. d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice;**

**This list showing rationale for intervention is of course not exhaustive."**

**12. The learned judge went on to state that:**

**“Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed: i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings; ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question; iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable; iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate; [emphasis mine] v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;”**

Based on the facts as presented while relying on the above cited legal provisions and associating myself with the quoted decision, I find that this Court indeed has jurisdiction to recall the impugned decision of the Water Appeal Board dated the 15<sup>th</sup> April, 2015 and adopt it as the judgement of the Court.

It is against the foregoing that I find the instant application merited and allow it. I will proceed to make the following final orders:

i. The consent judgment of the **Water Appeals Board in Appeal No. 7 (W/S) of 2012: Muema Kitulu Vs Nol Turesh Pipeline Bulk Water Company issued on 15<sup>th</sup> April, 2015** in the following terms:

1. That the disputed billing of Kshs. 80, 240/= be shared equally between the parties and a credit of Kshs. 40, 120.00 (Forty One Hundred and Twenty) be made into the Appellant’s account.
2. That both parties water meters be relocated to a suitable point just inside the Appellants’ main gate and a pressure release valve, be fitted before both meters, at the Appellants’ own costs.
3. That the Respondent shall bear half costs of the Appeal, herein such costs to be agreed between the parties within FOURTEEN (14) DAYS and in default to be assessed by the Water Board Tribunal. Further, the value of the costs due from the Respondent to be credited into the Appellants’ water account.

be and is hereby adopted as a judgement of this Honourable Court.

ii. The costs of this application is awarded to the Applicant who is directed to proceed to tax his party and party costs in the aforementioned Water Appeals Board proceedings.

**Dated Signed and Delivered Virtually at Kajiado this 29<sup>th</sup> Day of April, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**