



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. JUDICIAL REVIEW CASE NO. 31 OF 2018**

**IN THE MATTER OF: AN APPLICATION BY SUSAN NYAWIRA MATHENGE FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF THE WATER ACT, 2016**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF THE PRINCIPLES OF NATURAL JUSTICE**

**AND**

**IN THE MATTER OF THE DOCTRINE OF REASONABLENESS IN THE EXERCISE OF POWER, PROCEDURAL FAIRNESS, LEGITIMATE EXPECTATION AND RATIONALITY**

**SUSAN NYAWIRA MATHENGE.....APPLICANT**

**VERSUS**

**WATER RESOURCES AUTHORITY (PREVIOUSLY WATER**

**RESOURCES MANAGEMENT AUTHORITY)....RESPONDENT**

**JUDGEMENT**

1. Through the application dated 4/6/2018, the Applicant seeks an order of certiorari to remove to this court and quash the decision of the Water Resources Authority issued on 13/2/2018 directing the Applicant to stop selling water from her borehole. She also seeks an order of prohibition to restrain the Respondent from disconnecting her borehole and from forcibly closing her business pursuant to the Respondent's order dated 13/2/2018.

2. The Applicant claims that she applied for a ground water permit on 11/5/2017 to abstract water from her borehole for domestic and commercial use and that she has been selling water commercially and earning a minimum of Kshs. 450,000/= every month from the water business, which enabled her to support her family and employ more than 10 members of staff.

3. On 13/2/2018 the Applicant received a stop order from the Water Resources Management Authority (WARMA) directing her to stop

selling water on the ground that she applied to abstract water for commercial irrigation and not for public use. The applicant contended that the stop order was illegal for it was issued by WARMA, a body which was abolished when the Water Act of 2016 came into force. The Applicant contended that WARMA does not have the mandate to issue orders in law because it became defunct when the Water Resources Authority was created under the new Act. The Applicant maintained that she never applied for a permit to abstract water for commercial irrigation.

4. The Applicant averred that the stop order contravened Section 48 of the Water Act of 2016 and Article 47 of the Constitution which stipulate that one should be given notice before the Respondent undertakes administrative action. The Applicant claimed that she had suffered loss of monthly earnings of Kshs. 450,000/= while contending that the Respondent decision breached the rules of national justice.

5. The application was supported by the Applicant's replying affidavit filed in on 29/5/2018. She deponed that she decided to drill a borehole for domestic use in her compound in 2015 due to the intermittent supply of water in the area. She attached a copy of the expert's report conducted before the drilling of the borehole. She applied to WARMA who inspected the borehole and tested the water sample provided. WARMA issued a ground water permit to her on 19/8/2015 allowing her to abstract 20m<sup>3</sup> (20,000 litres) of water from the borehole. She applied to the Nairobi City Water and Sewerage Company Limited for approval and this company wrote to her 4/3/2015 indicating that it had no objection to her drilling the borehole.

6. In 2017 she saw an opportunity to supply water to her neighbours and consulted WARMA on the permit required for purposes of selling water commercially. She claimed that she was advised that she needed to have storage capacity and pumps in order to be granted a permit. She constructed an elevated steel tank and incurred costs running into several millions. She went to WARMA and was advised to make an application for variation of water permit, because the earlier permit granted to her was limited to domestic use. She filled the application form applying for variation of the use of water from domestic to both commercial and domestic. She produced a copy of the application form which she submitted to WARMA. She claims that WARMA sent its officers to inspect the borehole following which it issued the letter dated 11/5/2017 informing her that her application was successful. The Applicant started selling water to water bowlers. She claimed that occasionally WARMA would send its agents to read the water meter and that she duly paid the sums ought to WARMA for water consumption.

7. She claimed that the Respondent issued the stop order on 13/2/2018 citing the reason that the water permit given to her was for domestic and commercial irrigation and not for public use and supply. She contended that WARMA ceased to exist when the Water Resources Authority was established and that having so ceased to exist, WARMA had no mandate to issue the stop order. She denied ever applying for a commercial irrigation permit while explaining that she lives in a small residential compound in Garden Estate, Nairobi and that it is not possible to do commercial irrigation at her residential plot.

8. She faulted WARMA for failing to summon her to advise her that the permit which she applied for did not allow her to sell water and for failing to let notify her that she had the wrong permit. She urged that under Section 48 (2) of the Water Act, a permit holder must be given notice and afforded a reasonable opportunity to show cause why the permit should not be cancelled or varied. She contended that the stop order which has the same effect as cancellation of a permit was improperly issued. Further she contended that there was bias exhibited by the Respondent because she is aware of other businesses operating within her estate using a permit similar to the one she has yet their businesses are still operational.

9. Mohammed Moulid Shurie, the Chief Executive Officer of the Water Resources Authority swore the replying affidavit in response to the judicial review application. He confirmed that the Applicant sought authorisation to drill the borehole on L.R. No. 13330/130 and that authority was given by WARMA on 27/4/2015 for the abstraction of 20m<sup>3</sup> of water daily. The Applicant applied for variation of the water permit for additional use on 13/4/2017. It was approved by WARMA on 11/5/2017. The Applicant was allowed to abstract 90m<sup>3</sup> water per day for domestic use and commercial irrigation purposes. He contended that the Applicant informed the Authority that the variation was intended for her domestic use and commercial irrigation.

10. He denied that the officers of the Authority advised the Plaintiff on the permit to apply for prior to her application for variation of the water permit. He urged that the Applicant purported to sell water to members of the public in violation of the water permit issued to the Applicant on 5/1/2017. The Respondent stated that several verbal warnings were given to the Applicant but that she persisted with the violation of the water permit. The authority issued the stop order on 13/2/2018 directing the Applicant to stop selling water to members of the public. The Respondent maintained that it had not cancelled the Applicant's permit but only issued a stop order which serves as a notice to the Applicant to seek authority from the relevant water service provider or alternatively file a formal complaint with the Authority.

11. The Respondent urged that it is mandated under Section 12 (c) of the Water Act to enforce Rule 8 of the Water Resource Management Rules and obviate any breach of the law. He maintained that the Applicant was not licensed to sell water by the Water Services Regulatory Board and that the stop order was properly issued. The Respondent further contended that not having applied for a license, the Applicant cannot sell water. It urged that the stop order was issued under Rule 8 of the Water Rules which are applicable by dint of Section 24 of the Interpretation and General Provisions Act. The Respondent urged the court to dismiss the application for judicial review.

12. Parties filed submissions which the court has considered. The Applicant submitted that the stop order flouted the principles of natural justice enshrined in Article 47 of the Constitution, Sections 48 (2) of the Water Act) and Section 4 (3) of the Fair Administrative Actions Act. She contended that the stop order has no force in law since WARMA was abolished when the Water Act came into force. The Applicant maintained that she is challenging the process through which the stop order was issued and not the merits of that order. She relied on several authorities setting out the tests of legality, rationality and procedural propriety of the decisions under review. The Applicant maintained that the effect of a stop order and that of a cancellation of a permit were the same to the extent that the Applicant has been restrained from using the borehole.

13. The Applicant relied on Section 4 of the Fair Administrative Act which gives every person a right to be given notice and reasons for proposed administrative action as well as an opportunity to be heard. The Applicant relied on the case of **Geothermal Development Company Limited v the Attorney General and 3 other [2013] eKLR** in which the court held that as a component of due process, a party

must have a reasonable opportunity to know the basis of the allegations against it and a reasonable opportunity to present a response. The Applicant urged that the Respondent's decision was irrational, illegal and improperly issued. This decision does not assist the Applicant in light of the facts of this case which are different.

14. The Respondent submitted that the permit issued to the Applicant could not be used for purposes of selling water commercially and that the stop order was issued to the Applicant on 13/7/2018 requiring her to stop selling water. The Respondent further submitted that the dispute as to the use of a water permit fell within the ambit of the Water Tribunal pursuant to section 121 of the Water Act 2016. The Respondent argued that the court lacked jurisdiction under this section. Further that Rule 8 (5) of the Water Resources Management Rules, 2007 gave the Applicant the opportunity to object to the stop order they responding in writing to the Authority within 14 days giving the particulars of the objection. The Respondent relied on the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** in which the court stated that where there is a clear procedure for the redress of a particular grievance prescribed by law, that procedure should be strictly followed.

15. The Applicant also challenged the form in which the application is titled with the Applicant indicated as Susan Nyawira Mathenge instead of the Republic. The Respondent relied on Section 12 (d) of the Water Act 2016 in urging that it rightfully issued the permit allowing the Applicant to abstract 90m<sup>3</sup> daily for domestic and commercial irrigation purposes. It faulted the Applicant for not raising any complaints regarding the variations of the water permit issued to her urging that the Applicant blatantly violated the conditions set out in the varied water permit when she proceeded to use the varied water permit to sell water. The Respondent maintained that the Rules made under the repealed Water Act remained in force and it cannot therefore be deemed that the stop order was issued by a non-existent body as the Applicant contended. The Respondent maintained that its decision was rational and was issued legally.

16. The Respondent relied on Section 75 (10) of the Water Act of 2016 which states that a person shall not be licensed as a water service provider unless he makes an application to the Water Service Regulatory Board and sends a copy to the County Government. Section 85 prohibits a person from providing water services except with a license issued by the regulatory board upon submission of an application and supporting documents which the Board may require. Further, the Respondent submitted that Section 12 (c) (d) and (e) of the Water Act clothes it with the mandate of enforcing the regulations made under the Water Act and enforcing the conditions on the water permits. It was emphatic that it had not cancelled the Applicant's permit.

17. The Applicant filed supplementary submissions on 16/11/2018 urging that the matter before court deals with the Applicant's constitutional rights and relied on Articles 22, 23 and 47 of the Constitution. She urged that under Article 23 the court has jurisdiction to hear any matter regarding infringement of rights and goes further to state that a party can obtain judicial review orders when seeking to enforce their fundamental rights. On the issue of the wrong titling of the judicial review application, the Applicant urged the court not to allow prescriptions of procedure and form to bar her from exercising her rights, urging that this was the essence of Article 159 (2) (d) of the Constitution.

18. The Applicant urged that under Section 55 of the Water Act the Water Tribunal has powers to vary, reverse or confirm the Respondent's decision after hearing the appeal and that unlike other tribunals filing an appeal at the Water Tribunal does not grant an appellant automatic stay of the Respondent's decision. According to the Applicant, this meant that it was only the court which could issue conservatory orders before a determination of the legality of the Respondent's decision could be made.

19. Section 156 of the Water Act, 2016, repealed the Water Act of 2002. The 2016 Water Act which came into force on 4/4/2017, establishes the Water Resources Authority (the Authority) at Section 11 as a body corporate. Section 12 (d) and (e) of the Water Act mandates the Water Resources Authority to receive applications for permits for abstraction of water and to issue or vary permits; and to collect water permit fees and water use charges. Section 48 of the Act empowers the Authority to cancel or vary a permit in respect of an inter basin water transfer where this is necessary to accommodate additional users of a water source. The section sets out the procedure to be followed.

20. Section 49 empowers the authority to cancel or vary a permit in instances where the permit holder contravenes the conditions of the permit. The Authority is required to give notice to the permit holder and afford him a reasonable opportunity to show cause why his permit should not be cancelled. The Water Tribunal has jurisdiction to hear and determine appeals by any person directly affected by the decision or order of the Cabinet Secretary, the Authority or the Water Regulatory Board.

21. The Applicant applied for variation of her water permit on 13/4/2017 using a form bearing the Water Resources Management Authority logo and details. She indicated in the application that the variation was for domestic and commercial purposes and the need for variation was caused by additional purpose or use and increase of demand. She paid the fees and was issued an official receipt by WARMA. WARMA wrote to the Applicant on 11/5/2017 forwarding the water permit authorising the Applicant to abstract 90m<sup>3</sup> of water per day and drew her attention to the special conditions which were attached. The permit issued by WARMA allowed the Applicant to abstract 15m<sup>3</sup> for domestic use and 75m<sup>3</sup> for commercial irrigation.

22. The Respondent issued an order on WARMA's letterhead directing the Applicant to stop selling water from her borehole without permission from the service water provider which stated that the permit issued to her was for abstraction of water for domestic use and commercial irrigation and not for public use and supply.

23. The Applicant applied for variation of her water permit using the WARMA form on 13/4/2017 and got the permit issued by WARMA on 11/5/2017. She should have taken up the issue of the permit allowing her to abstract water for domestic and commercial irrigation purposes as soon as she got that permit. She cannot rely on the fact that other permit holders in her estate are also using permits issued for domestic and commercial irrigation purposes to sell water.

24. Legal Notice number 60 which the Applicant relied on to argue that WARMA became defunct is dated 4/4/2017. The court is of the view that the Applicant cannot seek to rely on the application she made for variation of her permit using a WARMA form and the permit issued on a WARMA form, both of which bear dates after 4/4/2017, then turn around and claim that WARMA was nonexistent when it issued the stop

order on 13/2/2018. For to argue otherwise would mean that her application for variation of the permit and the permit issued for abstraction of 90m<sup>3</sup> of water daily issued on WARMA's letterhead are also invalid since they were issued by a defunct body.

25. Rule 8(1) of the Water Resources Management Rules, 2007 empowered WARMA to issue an order in the prescribed form, WRMA 016 directing any person to desist from any activity or to carry out corrective measures to improve compliance with the Rules for better water resource quality or catchment conditions. The court has looked at the stop order issued by WARMA which the Applicant is challenging and noted that it is Form WRMA 016. Rule 8 (5) granted an opportunity to a person who wishes to challenge the order to object within 14 days to the Authority, which in the court's view, is the avenue that the Applicant ought to have pursued when WARMA served the stop order on her. The Water Resources Management Rules, 2007 are still in force pursuant to Section 24 of the Interpretation and General Provisions Act even though the Water Act of 2002 was repealed. Form WRMA 016 which the Respondent used in issuing the stop order forms part of the subsidiary legislation that is still in force until the 2007 Rules are repealed by subsidiary legislation made under the Water Act of 2016.

26. The court declines to grant the orders sought in the application dated 4/6/2018. Each party will bear its own costs.

Dated and delivered at Nairobi this 11<sup>th</sup> day of July 2019.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. D. Wambua holding brief for Ms. S. Muraguri for the Applicant

Mr. B. Chenge for the Respondent

Mr. V. Owuor- Court Assistant