



Republic v County Government of Nyandarua & another; Rift Valley Water Services Board (Interested Party); Nyakanja Water & Sanitation Company Limited (Formerly Nyakanja Water Services Provider Society) (Exparte Applicant) (Miscellaneous Civil Cause 4 of 2017) [2024] KEHC 1426 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CIVIL CAUSE 4 OF 2017**

RM MWONGO, J

FEBRUARY 14, 2024

IN THE MATTER OF THE REGULATIONS OF THE COUNTY ASSEMBLY OF THE NYANDARUA COUNTY GOVERNMENT DATED 5/4/2016 ORDERING THE DISSOLUTION OF THE NYAKANJA WATER & SANITATION COMPANY LIMITED BETWEEN REPUBLIC..... APPLICANT AND COUNTY GOVERNMENT OF NYANDARUA.....
.....1ST RESPONDENT AND COUNTY GOVERNMENT OF NYANDARUA COUNTY ASSEMBLY.....2ND RESPONDENT AND RIFT VALLEY WATER SERVICES BOARD.....INTERESTED PARTY AND NYAKANJA WATER & SANITATION COMPANY LIMITED (FORMELY NYAKANJA WATER SERVICES PROVIDER SOCIETY)EX-PARTE APPLICANT

BETWEEN

REPUBLIC APPLICANT

AND

**COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT
COUNTY GOVERNMENT OF NYANDARUA COUNTY ASSEMBLY 2ND RESPONDENT**

AND

RIFT VALLEY WATER SERVICES BOARD INTERESTED PARTY

AND

NYAKANJA WATER & SANITATION COMPANY LIMITED (FORMELY NYAKANJA WATER SERVICES PROVIDER SOCIETY) EXPARTE APPLICANT



JUDGMENT

1. This judicial review matter was first filed in Nakuru in 2016, and was subsequently transferred to Naivasha High Court as it involved Nyandarua County, then handled under the jurisdiction of Naivasha High Court.
2. The application was first brought via the leave stage on 21st June 2016. The High Court in Nakuru granted leave to file the Judicial review, simultaneously granting stay of the respondents' actions that would in any way interfere with or obstruct the smooth operations and management of the Ex parte applicant.
3. The substantive application was brought on 30th June 2016. It seeks the following orders:
 1. An order of certiorari to quash the resolution of the 2nd Respondent, made on the 5th April 2016 ordering for the dissolution of the Ex-parte Applicant.
 2. An order of prohibition to restrain the 1st and 2nd Respondent from enforcing the former's resolution and from interfering with the running and management of the Ex parte Applicants water distribution service sand projects within Nyandarua County.
 3. An order of prohibition to restrain the Respondents from appropriating the assets, offices, equipment's and/or machinery applied towards the Ex parte Applicant's projects specifically with respect to the supply of water to the members of Nyakanja community within Nyandarua County.
 4. An order of Mandamus to compel the Respondent's to remit the funds allocated to the Ex parte Applicant water project, by the 1st Respondent under the County budget for the year 2015/2016 which funds have not been made available despite being lawfully allocated and apparently disbursed.
4. The Ex parte Applicant is a Company Limited by Guarantee and without a share capital incorporated under the *Companies Act* on the 27th February 2013. It filed the motion herein supported by an Affidavit of Amos Mwangi. The ex-parte applicant contends that it initially operated as a community-based organization known as Nyakarianga Kanguo Water project when in 2005, it metamorphosed to Nyakanja Water Service Providers Society on the 16th August 2005 with an alleged membership of over 1000 subscribers.
5. The Ex-parte Applicant alleges that it raised monies obtained from its community/membership, which it invested in various projects, in asset water distribution machinery, and also acquired land Title No. Nyandarua/Ol Joro Orok Salient/2555 measuring 17 Hectares. Thereafter, in the year 2012, the ex-parte applicant's members held a meeting and passed a resolution to convert the society into a company limited by guarantee, thus giving birth to Nyakanja Water and Sanitation Company Limited an incorporated company limited by guarantee. The ex-parte applicant further contends that the transfer of the Society's assets to the company did not taken place due to shortage of funds.
6. The ex-parte applicant further contends that, whilst trading as a society, it became a registered agent of the Interested Party herein (Rift Valley Water Services Board) by securing an agency vide a Service Provision Agreement (SPA). Various clauses of the SPA mandated the Ex Parte Applicant to supply potable water of good quality to households, business and other establishments, in Nyakarianga, Kanguo and Kanjata areas of Nyandarua County. All this was done pursuant to the SPA and in accordance with relevant standards and guidelines stipulated by the Water Services Regulatory Board



7. The Ex parte Applicant alleges it was carrying out its mandate diligently, and received various accolades. It asserts that it also informed its principal, the Interested Party, of its conversion from a Society to a guarantee company, which conversion was effected and the engagement continued. The Ex parte Applicant alleges that after operating in the aforesaid manner for over 10 years, the Respondents began making unexplained enquires into the affairs of the Ex-parte Applicant particularly the transition from a Society into a guarantee Company. The ex-parte applicant alleges that it elaborately explained all issues raised by the respondents, giving relevant documentation.
8. The Ex parte Applicant also alleges that the 2nd Respondent unreasonably made the resolution contained in the letter of 5th April 2016, which letter the Ex-parte Applicant seeks to quash.
9. As regards the Interested Party, the Ex-parte applicant alleges that it is a licensee of the Water Services Regulatory Board (WASREB) mandated to undertake the efficient management and distribution of water services; and that it was on the strength of the license that the Interested party appointed the Ex parte Applicant as its agent vide the SPA executed in 2006. The Interested Party alleges in its affidavit that having been recognized under the *Water Act*, 2002 and vested with power to issue licenses, the respondent recognized the Ex parte Applicant's conversion from a Society to a guarantee Company which it recognizes as a private entity and is a duly licensed water service provider.
10. The ex-parte applicant relied on the authority of *Rahab Wanjiru Njuguna v Inspector General of Police & another* [2013] eKLR which referred to the dicta in *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2 and *Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 where it was stated that: “for judicial review to succeed the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint”.
11. Further reliance was put on the authority of *Isaac Lenaola J. in Misc. Application No.348 of 2009 Mavoko Water and Sewerage Company Limited v Tanathi Water Service Board* where water service provisions agreements were recognized under the *Water Act* 2002 and should not be interfered with as was the case where the order by the Chief Executive Officer of Tanathi Water Services Board to cluster water resources was considered illegal.
12. The 1st interested Party mooted that the Ex-parte Applicant Application has merit in that the respondents lack legal authority to order the dissolution of the ex-parte applicant and therefore acted illegally in their action to dissolve the Ex-parte applicant. The interested party relied on the authority of *Justice J. Mativo in Omondi Michael Haya & 4 others v University of Nairobi* [2017] eKLR where the court stated that public bodies may only do what the law empowers them to do and as such no provision constitutionally or otherwise to exercise an authority that is not sourced in the law.
13. The 1st interested Party moots that the Ex-parte applicant was an entity under the Community based organization and later converted to a company limited by guarantee with the involvement of party members and the 1st interested party with annexures to boot in compliance with the law at the time (*Water Act* 2002 and *Water Act* 2012) and that it complied with the former section 47 which allowed for companies to be registered as either by shares, by trusts under trust law, as a society by suocieties Act and as a natural person.
14. The 1st interested party argues that in as much as section 22(c) of part 1 of the Fourth Schedule to *the Constitution* provides the functions of water matters shared between the county and national governments, it must be read with Article 21 of *the Constitution* of Kenya. Reliance was placed on the



- authority of *Omtatah Okoiti & 3 others v Nairobi City Council & 5 others* [2014] eKLR where shared function of water services was determined to lie with both levels of government.
15. The 1st interested party alleges that ex-parte applicant built the water services facilities and infrastructure and should the respondents go unhindered it will amount to expropriation and violation of the right to property and which even motivated the conversion from society to trusteeship and as such has met the grant of relief having met the legal thresholds.
 16. The 1st and 2nd respondents in response to the application of 30th June 2016, opposed the application via 8 grounds, four of which drew from *the Constitution* of Kenya 2010. They state that: *The Constitution* supersedes the provisions of the *Water Act* 2002, specifically at Articles 186 and 187 of *the Constitution*, and the differentiated functions of the two levels of government as per the 4th Schedule at part 1 (sections 1 and 22) and Part 2 (sections 10 and 11). They further argue that at Part 2 section 11 of the said Schedule, provision of water and sanitation services is designated as exclusively a function of the county governments. The 1st and 2nd Respondent further allege that the *Water Act* 2002 must be read in accordance with section 7 of the Transitional and Consequential provisions of *the Constitution*. As such, the 1st and 2nd Respondent argue that *the Constitution* 2010 overhauled the legal framework of water and sanitation and did away with the ex-parte applicant including the Water Services Regulatory Board which created the interested party.
 17. The 1st and 2nd Respondent further allege that after some members of the Nyakanja Water Services Provider Society discovered that its officials had illegally converted the society into a company without prior authorization from the members approached one of the members of the 2nd Respondent, who tabled a motion and the 2nd Respondent determined that the conversion was illegal and ordered the company's dissolution. The 1st Respondent then acted to enforce the resolution of the 2nd Respondent as the executive arm of the government precipitating the filing of Judicial Review proceedings.
 18. The 1st and 2nd Respondent rely on Article 176 of *the Constitution* of Kenya which charges the county government to ensure that it carries out its services to the extent that is efficient and practicable to do so. Further reliance was placed on Section 23 (1) of the *Transition to Devolved Government Act* by the 1st and 2nd Respondents where the Transition Authority is mandated to identify functions which may be transferred to the county governments with time frames by notice predicated on election dates. The 1st and 2nd Respondent's cited that the Transition Authority vide Legal Notice No. 180 dated 9th August, 2013 approved the transfer of functions designated under the Sixth Schedule of *the Constitution* of Kenya, to the 2nd Respondent including the management of county water services.
 19. The 1st and 2nd Respondent state that Article 186(1) of *the Constitution* limits the functions of the county government to those set out in the Fourth Schedule. Part 2 of the Fourth Schedule of *the Constitution* provides for the functions of the 2nd Respondent. Rule 11 of Part 2 of the Fourth Schedule of *the Constitution* places the function of water management upon the 2nd Respondent and therefore through the action of the 1st respondent, it established a sectoral committee with the mandate of "all matters relating to water and sanitation services" whose functions are carried out and the conduct of how water services are managed is within the authority of the Respondents. The 1st and 2nd Respondent argue that the law does not allow any other body to administer water services to the residents of Nyandarua County
 20. The 1st and 2nd Respondent submitted the authority of *Thuku Kirori & 4 Others v. County Government of Muranga* [2014] eKLR where the court expressed its hesitation to intervene and curtail an organ of Government's efforts in executing their statutory and constitutional mandates.



21. The 1st and 2nd Respondent submitted that the orders of Certiorari, Prohibition and Mandamus are not dished on a whim or on doubtful evidence but must be strong in their nature for the court to grant the same. Further, that even when the ground/evidence exists, it is a discretionary power which must only be invoked if the order would be the most efficacious in the circumstances surrounding the claim. The following authorities were relied upon: Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University [2018] eKLR; Jipe House Kindergarten Limited v City Council of Nairobi [2012] eKLR; Kabararwa Clan v Kirawi Clan [2016]eKLR.
22. The 1st and 2nd Respondent submitted that they acted well within the law and in their jurisdiction through the County Executive Committee in protecting the interests of the people of Nyandarua County. Further, that if the 1st and 2nd Respondents allowed the ex-parte Applicant to carry out their work of administering water services to the residents of Nyandarua, then this would amount to double delivery of services and as such the orders prayed for should not be given.
23. On this, the Respondents cite the authority of Kabararwa Clan v Kirawi Clan [2016] eKLR where the court held that an order for mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. It is therefore misplaced as a prayer as they allege they have acted well within the law and therefore the court cannot compel performance of such public duty. The respondents conclude that the Constitution envisages the conduct of water services provision as a mandate of the county government and therefore had to interfere with the alleged illegal activities by the Nyakanja Water Services Society since water is a public resource.

Issues for Determination

24. The issues that arise for determination by the court are as follows
 1. Whether the Ex-parte Applicant before and after conversion (from a society to a Company limited by guarantee) was a function or entity formed under the National Government to warrant the operation of Schedule 4, Schedule 6 section 15, Article 185 of the Constitution 2010 as read with Section 23 and 24 of the Transition to Devolved Government Act and Legal notice 180 of 2013?
 2. Whether the 1st and 2nd respondents acted Ultra Vires?
 3. What reliefs, if any, are available to the applicant?

Whether the Ex-parte Applicant before and after conversion (from a society to a Company limited by guarantee) was a function or entity formed under the National Government to warrant the operation of Schedule 4, Schedule 6 section 15, Article 185 of the Constitution 2010 as read with Section 23 and 24 of the Transition to Devolved Government Act and Legal notice 180 of 2013?

25. I commence with my understanding of the essential background of this matter.
26. The Ex parte applicant was registered as a members' society, namely, Nyakanja Water Services Provider Society, on 16th August 2005 under Certificate No 25290. The records show that at the time of registration of the Society, it was it was operating Nyakarianga Kanguo Water Project within Nyandarua. There are no clear records of the nature of registration of the Nyakarianga Kanguo Water Project. It appears from some of the correspondence that the Project was operating as what was commonly referred to as a local "self-help group", based on the "harambee spirit".



27. At any rate, Nyakarianga Kanguo Water Project, was allocated land by the Ministry of Lands, namely, Nyandarua/ Ol Joro Orok Salient/2555 measuring 17 hectares. Through its members' contributions, it paid 176,250/- for the land. A balance of Kshs 132,000/- remained outstanding as at 24th May 2010 according to a letter from the Ministry of Lands dated 24th May 2010 Ref DSO/NYA/207/2555/4. The land title was registered on 1st September, 2011, in the names of the trustees of the Water Project named therein as Amos Wamithi Mwangi, Daniel Macharia Kimundu and Felicity Wangethe Githinji.
28. On 20th January, 2012, members of the Society at a Special General Meeting (Min 02/19/FR/2012) agreed that in order to safeguard the assets of the Society, they should be registered in the names of a company. Following that meeting, the members of the Society formed themselves into Nyakanja Water & Sanitation Company Limited, a company limited by guarantee. The registration was completed and a certificate of incorporation No CPR/2013/96073 was issued on 27th February 2013.
29. It is not in dispute that the *ex parte* applicant was at all material times conducting the operations of a water services provider in terms of the *Water Act* 2002, and the Water 2010. It is also not in dispute that the *ex parte* applicant was governed by the Society's Act and *Companies Act* at various times whilst registered and providing its services to the people of Nyandarua.
30. The question is whether it whilst performing its operations, it could legally be deemed to have been performing or be a function or entity formed under the National Government to warrant the operation of Schedule 4, Schedule 6 section 15, Article 185 of *the Constitution* 2010 as read with Section 23 and 24 of the *Transition to Devolved Government Act* and Legal notice 180 of 2013.
31. A perusal of the provisions of Section 15 of the 6th Schedule to *the Constitution*. Section 15 of the 6th Schedule provides:
- “(1) Parliament shall, by legislation, make provision for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185. (Emphasis added)
32. This provision envisions the transfer of functions from the national government to the county government. This clearly signifies that functions that were being carried out by the national government are to be transferred in a phased manner to county governments.
33. Article 185(2) of *the Constitution* states that:
- “A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.”
34. In exercise of the powers under *the Constitution* granted to the Transitional Authority under the *Transition To Devolved Government Act*, 2012 (No. 1 of 2012) Transfer Of Functions, the Transition Authority issued Legal Notice No 180 on 9th August, 2013. In the instant case, it concerns the transfer of functions pursuant to section 15 of the Sixth Schedule to *the Constitution* as read with sections 23 and 24 of the Transition to Devolved Governments Act, 2012 and further to the Legal Notice No. 16 of 2013.



35. Under Legal Notice 180, the Transition Authority approved the transfer of the functions specified in the Schedule to the County Government of Nyandarua, with effect from the 9th August, 2013. It makes a proviso as follows:

“Provided that the responsibility for the personnel emoluments related to the discharge of the devolved functions shall be managed by the national government for a period not exceeding six months or as shall be agreed upon between the two levels of government, whichever comes first.” (Emphasis added).

There was no evidence availed to show that the Exparte applicant benefitted from the proviso by the payment of its personnel emoluments by the National Government.

36. In the Schedule to thje Legal Notice the following functions, amongst many others, are transferred:

“Schedule

1.

.....

9. Implementation of specific national government policies on natural resources and environmental conservation:

a) soil and water conservation

(i) implementation of county specific water conservation and forestry policies through water resource users;

(ii) water pollution control;

10. County public works and services:

(a) public works including designing, documentation, post contracting, project management of construction and maintenance of public buildings and other infrastructural services. Construction of footbridges; and

(b) water and sanitation services including rural water and sanitation services, provision of water and sanitation service in small and medium towns without formal service providers, water harvesting (specific to counties), urban water and sanitation services with formal service provision including water, sanitation and sewerage companies, excluding Water Service Boards, Water Services Regulatory Board and Water Resources Management Authority.” (Emphasis added)

37. Indeed, it appears that water and sanitation services that were to be transferred not only had to be under national government auspices, but they had to be those “in small and medium towns without formal service providers”. In the present case, the Exparte applicant has exhibited substantial documentation showing that it was a formal water service provider and had a Service Provision Agreement with the



Rift Valley Water Services Board from 2006. The agreement had a scope of services provided and in Schedule C, it showed the Service Providers Area of coverage contained in a map.

38. As earlier pointed out, the Fourth Schedule of the Constitution anticipates the Distribution of Functions Between the National Government and the County Governments. The respondents while rightly citing that functions such as those of water and sanitation are under their purview, have not shown: that the ex-parte applicant was a body incorporated or formed or under the jurisdiction of the National government; or that or that it was within the purview of bodies which were the subject of Legal Notice No 180. It is not in dispute by any party, even the respondents, that the ex-parte applicant is a company limited by guarantee promoted by local citizens.
39. A company limited by guarantee under the Kenyan Companies Act 2015, (and also in the repealed Companies Act Cap 486) is of the following nature: It must be incorporated without a share capital; The liability of its members must be limited by the company's articles to a specific amount, usually a nominal amount; The members must undertake to contribute to the assets of the company in the event of a liquidation; and that as a corporate body it is a separate and distinct legal entity or juristic body.
40. Further, the certificate of incorporation of a guarantee company must state that it is a company limited by guarantee, as it does in this case. As such, a guarantee company cannot be a private company (Kenyan Companies Act Section 9(1)(b)). Accordingly, the respondent's allegation that the Exparte applicant it is a private entity holds no water. Because a company limited by guarantee cannot have share capital, it also does not meet the definition of a "public company" under Section 10 of the Companies Act, and therefore it is not under the public domain.
41. For a better appreciation of the nature of the exparte applicant, the directorship is made up of between 7 to 11 directors according to Article 31(a) its Memorandum and Articles of Association: The directors according to Article 31(b) shall be:
 - “ 1. Two(2) directors from the local authority where one (1) shall be a professional officer
 2. Two(2) members from the business community and manufacturing community nominated by their bodies
 3. One (1) local professional from the professional bodies nominated from the body
 4. One (1) person from resident organization- water users association
 5. One (1) person from a duly registered NGO
 6. One (1) woman from Maendeleo Ya Wanawake
 7. One (1) woman from any other woman organisation
 8. Others as shall be decided by the subscribers”
42. The transfer of duties from national to county governments which informed the actions of the respondents does not meet the threshold set out in the law. The respondents have not shown that the ex-parte applicant was intrinsically or even extrinsically an entity or a creation of the national government; and thus that they could invoke sections 23 and 24 of the Transition to Devolved Government Act, as read with the Fourth Schedule of the Constitution, and as read with Legal Notice no 180 of 2013. These provisions and the legal notice all contemplate the transfer of functions from the National government to the county government as annotated above.



43. It must be noted as follows: whilst the Fourth Schedule to [the Constitution](#) contemplates the distribution of functions between the National and County governments, the Sixth Schedule at section 15 contemplates the devolution of functions under or in the national government from the national government to the county governments, of the functions assigned to them under Article 185.
44. As it is not proven that the ex-parte applicant was an entity created by the national government, the respondents cannot, willy nilly, seek to take over its functions under the pretext of distribution of functions and devolution of functions. It is clear that the ex-parte applicant was not an entity, society or company limited by guarantee created by or under the auspices of the national government
45. The ex-parte applicant's bundle of documents exhibit two documents that evidence the conversion from society to company limited by guarantee. Present in the bundle are the minutes of the meeting that led to the conversion, as earlier noted. Nothing in the minutes or other documents availed to the court show that the proprietorship belongs or belonged to the national government. As such, the ex parte applicant cannot be said to be under the ambit of the [Transition To Devolved Government Act, 2012](#). That Act by its title reads as follows:

“An Act of Parliament to provide a framework for the transition to devolved government pursuant to [section 15](#) of the Sixth Schedule to [the Constitution](#), and for connected purposes” . (Emphasis added).

The sixth schedule at section 15 contemplates the devolution of functions from the national government to county governments of the functions assigned to them under Article 185

46. What must be determined, therefore, is the status of the society/exparte applicant before and after conversion to a company limited by guarantee. The Public Benefit Organizations (PBO) Act 2013 Act defines a PBO as a voluntary membership or non-membership group of individuals or organizations, which is autonomous, non-partisan, and non-profit. It is locally, nationally, or internationally organized and engages in public benefit activities.
47. The PBO Act defines a “public benefit activity” as one that supports or promotes the public benefit by: enhancing or promoting legitimate economic, environmental, social, or cultural development; protecting the environment; or lobbying or advocating on issues of general public interest or the well-being of a group of individuals or organizations (PBO Act Sections 5(1) and 2(1)).
48. However, the Public Benefit Organizations (PBO) Act 2013, though assented to in 2013 did not come into force until after a High Court judgment so ordered on October 31, 2016, (Onguto, J). However, the definition of a public benefit activity well defines what the Ex parte applicant was as a society and when it metamorphosed from society to a Company limited by guarantee.
49. From the proceedings of the 2nd respondents, no evidence was tabled has been before its assembly and in court to show that the Ex-parte applicant was indeed a function and or entity within the meaning of a function or entity formed under the National Government. There was therefore nothing to warrant the operation, in respect of the exparte applicant, of Schedule 4, Schedule 6 section 15, Article 185 of [the Constitution](#) 2010 as read with Section 23 and 24 of the [Transition to Devolved Government Act](#) and Legal notice 180 of 2013.
50. There is no doubt in my mind that the repealed [Water Act](#) 2002 was adhered to whilst the exparte applicant was in operation. It appears that the Ex-parte applicant was a Society that was essentially a community-based organization, and later converted to a company limited by guarantee with the involvement of party members. Indeed, it complied with the provisions of the [Water Act](#) 2002 and [Water Act](#) 2012, and in particular with section 47 of the [Water Act](#), 2002 which allowed for companies



to be registered as either by shares, by trusts under trust law, as a society under the *Societies Act* and as a natural person.

Whether the 1st and 2nd respondent act was Ultra Vires

51. Having failed to show that the ex-parte applicant was and is a function of or created under the national government, it is clear that the proceedings and orders to dissolve the ex-parte applicant were outside the parameter the 1st and 2nd respondents. The operations contemplated in the at the fourth schedule, sixth schedule at section 15 and article 185 of *the Constitution* of Kenya, and Section 23 of the *Transition To Devolved Government Act*, 2012 as read with Legal Notice 180 of 2013, cannot apply or relate to the exparte applicant. Despite their seemingly well intentioned claim to serve the people of Nyandarua, the 1st and 2nd respondent over-stepped their legal mandate.

52. In Daniel Ingida Aluvaala and another v Council of Legal Education & Another, it was stated that:

“Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another where the court held as follows:-

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”

53. In Council of Civil Service Unions v. Minister for the Civil Service^{^} Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action ultra vires. These grounds are illegality, irrationality and procedural impropriety. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely proportionality. What Lord Diplock meant by “Illegality” as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it

54. The respondents here are similarly constrained by the doctrine of legality. That is, they can exercise only those powers bestowed upon them by the law. The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. Being constrained by that doctrine, the respondents must ensure that their decisions conform to the relevant provisions of the law. The respondents have not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with the law and Regulations.

55. In Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR the Court of Appeal stated of judicial review, as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he



take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

56. In the present case, the decisions of the 1st and 2nd respondent communicated in the resolutions of the 1st respondent under the hand of the Speaker on 5th April 2016, including the decision to seek the dissolution of the Ex parte applicant were not in accord with the law.

Conclusions and disposition

57. What are the reliefs available to the applicants, if any? In its petition, the applicant sought inter alia, the following reliefs:

- “a) An order for certiorari to remove to this court and quash the resolutions by the 2nd Respondent dated 5th April 2016, which resolutions ordered for inter alia.
- b. An order for certiorari to remove to this court and quash the directive by the 1st Respondent dated 18th April 2016 ordering the Ex-parte applicant to inter alia call for a meeting of its membership and conduct election of officials, which meeting has now been scheduled for the 2nd of July 2016.
- b. An order of prohibition to prohibit and restrain the 1st and 2nd Respondents from enforcing the former’s resolution made on 5th April 2016 ordering for dissolution of the Ex-parte applicant, and to further restrain and prohibit the Respondents from, in any way, interfering with the running and management of the Ex-parte applicant’s water distribution services and projects within the Nyakanja community in Nyandarua County.
- b. An order of prohibition to prohibit and restrain the Respondents from in any way appropriating the assets, offices, equipment and machinery applied towards the Ex-parte applicant’s project, specifically with respect to the supply of water to the members of the Nyakanja community, within Nyandarua community, within Nyandarua County, as provided for under the Water Act 2002.

58. In light of the foregoing discussion, I restate that I have found that the respondents acted ultra vires and beyond the scope of their legal powers. As such the applicant is entitled to the reliefs as set out in the above paragraph. They are hereby granted as prayed.

59. In addition, in recognition of the resolution of members of the Society “to convert the Society to Nyakanja Water and Sanitation Company” the Court also further orders and directs as follows in the interests of justice and good order:

- a. That in order to streamline and protect the assets of the Ex parte applicant, the land parcels held in the name of the Nyakanja Water Services Provider Society shall be transferred to the Nyakanja Water and Sanitation Company within 180 days from the date of this judgment.
- b. That in order to enforce and accomplish the resolution and intentions of members of the Nyakanja Water Society to transfer to the Water Company, all Service Provision Agreements shall be transferred to the Water Company within 180 days from the date of this judgment.



- c. The Water Society shall within 180 days from the date of this judgment, hold a general meeting at which its assets, liabilities and operations shall be transferred to the Water Company, and the Water Company shall receive the same and thereafter continue with the operations that were theretofore conducted by the Water Society.

60. Orders accordingly.

DATED AND DELIVERED ONLINE FROM KERUGOYA HIGH COURT THIS 14TH DAY OF FEBRUARY, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

Gitau for Ex-parte Applicant

Akango for 1st Interested Party

Githinji for 1st & 2nd Respondents

Quinter, Court Assistant

