



REPUBLIC OF KENYA



**Mpapale & 4 others v Mombasa Water Supply and Sanitation Co Ltd (Constitutional Petition E054 of 2022) [2023] KEHC 2229 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E054 OF 2022**

**OA SEWE, J**

**MARCH 17, 2023**

**BETWEEN**

**KENNEDY MUDI MPAPALE ..... 1<sup>ST</sup> PETITIONER  
RUKIA KHAMISI ..... 2<sup>ND</sup> PETITIONER  
MOSES OMONDI OTIENO ..... 3<sup>RD</sup> PETITIONER  
ABDALLA NYANDO ..... 4<sup>TH</sup> PETITIONER  
TARACISIO MWANIKI ..... 5<sup>TH</sup> PETITIONER**

**AND**

**MOMBASA WATER SUPPLY AND SANITATION CO. LTD ..... RESPONDENT**

**RULING**

1. Before the Court for determination are the two applications dated 3<sup>th</sup> October 2022 (the 1<sup>st</sup> application) and 31<sup>st</sup> October 2022 (the 2<sup>nd</sup> application). The 1<sup>st</sup> application was brought by the petitioners under Rule 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (otherwise known as “the Mutunga Rules”). It seeks orders that:
  - (a) Spent
  - (b) Pending the hearing and determination of the Petition, the Court be pleased to issue a temporary interim order suspending and/or staying the implementation of the Water Kiosks and Stand Pipes Management Policy, 2019, formulated by the Mombasa Water Supply and Sanitation Co. Ltd.
  - (c) Spent
  - (d) The costs of the application be provided for.



2. The application was premised on the grounds that the petitioners and those they represent came to learn of the existence of the subject policy at its implementation stage as there was no public participation, and that they were therefore not financially prepared for its implementation. They further complained that, taking into consideration the financial implications associated with the implementation of the policy, the same cannot be complied with at once; yet the respondent has threatened to disconnect the petitioners' water supply and the supply for other members of the association, thereby exposing them to substantial and irreparable loss.
3. The application is supported by the affidavit sworn on 3<sup>rd</sup> October 2022 by the petitioners in which they deposed that the entire membership of the Mombasa Water Kiosk Operators Association came to learn of the subject policy when they received bills that included a questionable sum of Kshs. 10,000/=; and that on inquiring from the respondent what the amount was for, they got to learn that the sum had been charged pursuant to the policy aforementioned. They therefore complained that the policy was formulated in contravention of the Constitution in so far as there was no public participation or involvement of the affected persons.
4. At paragraph 8 of the Supporting Affidavit, the petitioners deposed that, even if the policy had been formulated in accordance with the Constitution, its implementation could only be undertaken in phases. Accordingly, they approached the Court for the aforementioned orders pending the hearing and determination of their Petition. They annexed several documents to their affidavit in support of their averments, including a copy of the policy.
5. As the application was brought under a Certificate of Urgency, an order was issued on 4<sup>th</sup> October 2022 for the same to be served on the respondent for orders inter partes on 7<sup>th</sup> October 2022. There was however no appearance for or by the respondent on 7<sup>th</sup> October 2022. Accordingly, the Court granted Prayer 3 of the Notice of Motion, thereby staying the implementation of the policy pending the hearing and determination of the application. Thereafter, on the 31<sup>st</sup> October 2022, the respondent filed the 2<sup>nd</sup> application, seeking the following orders:
  - (a) That the 2<sup>nd</sup> application be heard alongside the application dated 3<sup>rd</sup> October 2022.
  - (b) That the Court be pleased to grant leave for the joinder of the Water Services Regulatory Board (WASREB) to this Petition.
  - (c) That pending the hearing and determination of the instant application and the application dated 3<sup>rd</sup> October 2022 the Court be pleased to vacate and/or set aside its orders issued on 13<sup>th</sup> October 2022.
  - (d) That the Court be pleased to consolidate this Petition with Mombasa High Court Civil Case No. E022 of 2021.
  - (e) That the costs of the application be borne by the petitioners.
6. The 2<sup>nd</sup> application was premised on the grounds that the Water Kiosks and Stand Pipes Management Policy came into force on 14<sup>th</sup> February 2020 upon promulgation of the Guidelines for Water Vending by the sector regulator, WASREB. It was further asserted that the policy was put in abeyance to allow the Water Services Regulations, 2021, to come into force, which Regulations came into force on 12<sup>th</sup> August 2021. Accordingly, the respondent prayed that WASREB be enjoined as an interested party in the proceedings as the state corporation is the sole national regulator for water services in Kenya that is mandated to oversee the implementation of water policy and licensing.



7. At paragraph 10 of its Supporting Affidavit sworn by Habiba Ali, the respondent averred that the petitioners are already litigating with other would be officials of the outfit known as Mombasa Water Kiosk Operators Association in Mombasa High Court Civil Case No. E122 of 2021: *Kennedy M. Mpapale & others v Gabriel Amuok and others*, which is pending judgment; and therefore that the 2 suits ought to be consolidated for the Court to make a final determination on the issue of legitimacy of membership of the said association. Thus, the respondent averred that the Court may have granted conservatory orders to persons who are not officials of the association.
8. The respondent further averred that this is one in a series of cases that have been filed against it by individuals claiming to be members of the Mombasa Water Kiosk Operators Association. Some of the cases were listed at paragraph 15 of the respondent's affidavit to demonstrate a lack of bona fide on the part of the petitioners. They accordingly prayed for the setting aside of the conservatory orders, as no justification exists to stay the implementation of the policy.
9. The respondent also filed a response to the 1<sup>st</sup> application on 10<sup>th</sup> November 2022. The Replying Affidavit was sworn by Maldrine Mwakio Mshai and it goes to show that both the respondent and WASREB undertook public participation and sensitization activities targeting all their consumers, including the petitioners in connection with the subject policy. The respondent reiterated its stance that the petitioners do not represent the entire membership of the Mombasa Water Kiosk Operators Association as the issue of membership is being litigated before this Court; hence the prayer for consolidation of this case with Mombasa HCCC No. E122 of 2022.
10. In response to the 2<sup>nd</sup> application, the petitioners filed an affidavit on 28<sup>th</sup> November 2022, contending that WASREB is a legal entity capable of suing in its own name; and therefore that if it was in its interest to be enjoined to this suit then it would have made the application in its own right. For that reason, the petitioners urged that prayer 2 of the 2<sup>nd</sup> application be declined. They further averred that it would be improper to consolidate this case with Mombasa HCCC No. E122 of 2022; pointing out that that suit is a civil case against the Registrar of Societies. They concluded their Replying Affidavit by stating that, if individual members of the association chose to sue the respondent, they did so within their rights as individuals and the cases have nothing to do with the instant Petition. They accordingly prayed for the dismissal of the 2<sup>nd</sup> application, contending that it has been brought in bad faith.
11. The application was canvassed by way of written submissions, pursuant to the directions given herein on 2<sup>nd</sup> November 2022. The parties were thereafter given an opportunity to highlight their submissions on 8<sup>th</sup> February 2023. On behalf of the petitioners, Mr. Odongo submitted that a party seeking a conservatory order need only demonstrate that he has a prima facie case with a likelihood of success; and that unless the order is granted, there is a real danger that he will suffer prejudice as a result of the violation. He relied on *Kevin K. Mwiti & others v Kenya School of Law & others*, among other authorities, to buttress this argument. He pointed out that public participation is a cardinal requirement under Articles 10 and 232(1) of the *Constitution* and therefore that the petitioners have demonstrated a prima facie case in that regard in addition to showing that the imposition of an additional deposit of Kshs. 10,000/= will occasion them irreparable loss.
12. On his part, counsel for the respondent underscored the fact that this Petition is a public interest litigation, brought to challenge the respondent's lawful mandate. He proposed the following as the issues for determination in the Petition in the final analysis:
  - (a) Whether the respondent is the lawful county water service provider for the service areas known as Mombasa County for purposes of Section 154 of the *Water Act*, 2016;



- (b) Whether the water kiosk system envisaged under the repealed [Water Act](#), 2002, still applies under the [Water Act](#), 2016;
  - (c) Whether the tariff setting for consumer protection is a reserve for WASREB and the respondent under the [Water Act](#), 2016;
  - (d) Who are low-income consumers (LICs) in the applicable law relevant to the water sector.
13. Accordingly, for purposes of the 1<sup>st</sup> application, counsel proposed the issues to be:
- (a) Whether the petitioners have established a prima facie case with a likelihood of success; and whether the petitioners will suffer prejudice if conservatory orders are not granted;
  - (b) Whether the denial of the conservatory relief will enhance constitutional values and objects of the specific right of consumer protection in the Bill of Rights;
  - (c) Whether the public interest will be served by a decision to exercise discretion to deny conservatory order.
14. I have given careful consideration to the applications, the responses thereto as well as the submissions made by Counsel for the parties, including the authorities cited by them. It is imperative to bear in mind that at this stage, the Court need not examine closely the merits of the petitioners' case. The need for caution to not delve into the merits prematurely was aptly expressed thus by Hon. Ibrahim, J. (as he then was) in the [Muslim for Human Rights & 2 others v Attorney General & 2 others](#) [2011] eKLR:

“In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the “trial” and upon completion thereof when a final judgment is to be delivered. As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case. The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a-vis the case of either parties. This principle is similar to that in temporary or interlocutory injunctions in civil matters.

15. Similarly, in Nairobi High Court Petition No. 16 of 2011: [Centre for Rights Education & Awareness \(CREAW\) & 7 others v Attorney General](#), the view was expressed that:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”



16. Expressing itself on the matter of conservatory orders, the Supreme Court, in the case of *Gatirau Peter Munya v Dickson Mwenda Gitbinji & 2 others* [2014] eKLR offered the following viewpoint (at paragraph [86]):

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

17. Hence, it is now settled that an applicant for conservatory orders for purposes of Article 22 and 23(3) (c) of the Constitution must satisfy the Court as to the following three considerations:

- (a) That he/she has a *prima facie* case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory;
- (c) That public interest weighs in his/her favour.

18. Accordingly, in respect of the 1<sup>st</sup> application the petitioners main ground for complaint is that the subject policy was formulated without public participation, which is a constitutional imperative under Article 10(2) of the *Constitution*. They accordingly deposed that the entire membership of the Mombasa Water Kiosk Operators Association came to learn of the policy when they received bills that included a sum of Kshs. 10,000/=; and that as matters stand, the respondent has threatened to disconnect water supply for non-payment. Additionally, the petitioners contended, at paragraph 8 of the Supporting Affidavit, that, even if the policy had been formulated in accordance with the *Constitution*, its implementation could only be undertaken in phases.

19. Although the respondent refuted these assertions and endeavoured to demonstrate that public participation was undertaken, it remains to be seen, on the basis of evidence presented in the Petition itself, whether or not there was public participation. Hence, in *Kevin K Mwiti & others v Kenya School of Law & others* (supra), it was held that:

“A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.

20. Thus, I am convinced that the petitioners have shown a *prima facie* case to warrant the issuance of the orders sought.

21. In the 2<sup>nd</sup> application, the respondent is seeking the following orders:



- (a) That the 2<sup>nd</sup> application be heard alongside the application dated 3<sup>rd</sup> October 2022. (spent)
  - (b) That the Court be pleased to grant leave for the joinder of the Water Services Regulatory Board (WASREB) to this Petition as an interested party.
  - (c) That pending the hearing and determination of the instant application and the application dated 3<sup>rd</sup> October 2022 the Court be pleased to vacate and/or set aside its orders issued on 13<sup>th</sup> October 2022. (spent)
  - (d) That the Court be pleased to consolidate this Petition with Mombasa High Court Civil Case No. E022 of 2021.
  - (e) That the costs of the application be borne by the petitioners
22. On joinder of WASREB as an interested party, the starting point is Rule 2 (b) of the *Mutunga Rules* in which an interested party, for purposes of constitutional petitions, has been defined under as follows:
- “interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;
23. Thus, Rule 7 of the *Mutunga Rules* goes on to provide that: -
- (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.
  - (2) A court may on its own motion join any interested party to the proceedings before it.
24. It is apparent therefore that an application for joinder as an interested party can only be made either at the instance of the party concerned or the Court. It would appear then that the prayer for joinder of WASREB as an interested party, without the involvement or concurrence of that entity, is misconceived.
25. Granted the Court’s findings in respect of the 1<sup>st</sup> application, it would follow that prayer 3 of the 2<sup>nd</sup> application cannot lie. In any case, that prayer is spent. Similarly, the prayer for consolidation is ill conceived, given the indication by the respondent itself that the other matter has already been concluded and is pending judgment. Moreover, the assertion by the petitioners that the subject matter in the other case is disparate and distinguishable from the cause of action herein has not been refuted by the respondent. The respondent did not deem it appropriate to annex the pleadings in the other matter to its Supporting Affidavit enable the Court have an appreciation of the issues in contest in the other suit.
26. In the result, I find no merit in the 2<sup>nd</sup> application. The same is hereby dismissed.
27. In the result therefore, having weighed the competing interests of the petitioners as against the public interest presented in the petition by the respondent, it is my finding that the petitioners have made out a good case for the issuance of conservatory orders as sought. Accordingly, it is hereby ordered that:
- (a) Pending the hearing and determination of the Petition, a conservatory order suspending and/or staying the implementation of the Water Kiosks and Stand Pipes Management Policy, 2019, formulated by the Mombasa Water Supply and Sanitation Co. Ltd. be and is hereby granted.
  - (b) The costs of the two applications be costs in the cause.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17<sup>TH</sup> MARCH 2023**

**OLGA SEWE**

**JUDGE**

