



**Kenya Water and Sanitation Civil Society Network & 9 others v Cabinet Secretary, Ministry of Water & 4 others; Council of Governors & another (Interested Parties) (Constitutional Petition E108 of 2023) [2023] KEHC 27625 (KLR) (Constitutional and Human Rights) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 27625 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E108 OF 2023**

**M THANDE, J  
JULY 21, 2023**

**BETWEEN**

**KENYA WATER AND SANITATION CIVIL SOCIETY NETWORK ..... 1<sup>ST</sup> PETITIONER  
MOUNT KENYA EWASO WATER PARTNERSHIP ..... 2<sup>ND</sup> PETITIONER  
LIKII WATER RESOURCES USERS ASSOCIATION ..... 3<sup>RD</sup> PETITIONER  
LIKIUNDU WATER RESOURCES USERS ASSOCIATION ..... 4<sup>TH</sup> PETITIONER  
JOSEPH M.K. MWINGIRWA ..... 5<sup>TH</sup> PETITIONER  
FRANCO MWITI ..... 6<sup>TH</sup> PETITIONER  
SAMUEL MAINA ..... 7<sup>TH</sup> PETITIONER  
JUSTIN NJERU ..... 8<sup>TH</sup> PETITIONER  
DAVID MWITI NABEA ..... 9<sup>TH</sup> PETITIONER**

**AND**

**REGEN TEREM SHPP LIMITED ..... PROPOSED PETITIONER**

**AND**

**THE CABINET SECRETARY, MINISTRY OF WATER ..... 1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
WATER RESOURCES AUTHORITY ..... 3<sup>RD</sup> RESPONDENT  
WATER SERVICES REGULATORY BOARD ..... 4<sup>TH</sup> RESPONDENT**



THE NATIONAL ASSEMBLY OF KENYA ..... 5<sup>TH</sup> RESPONDENT

AND

COUNCIL OF GOVERNORS ..... INTERESTED PARTY

THE SENATE OF KENYA ..... INTERESTED PARTY

## RULING

1. The genesis of this matter as can be gleaned from the record is the Water Resources Regulations, 2021 promulgated by the 1<sup>st</sup> which set out inter alia water use charges. The Petitioners contend that the water use charges are so exorbitant and unaffordable that they amount to a violation of the right of the Petitioners and other Kenyans to clean and safe water in adequate quantities, under Article 43(1)(d) of *the Constitution*. The Petitioners further claim that the Regulations were promulgated in contravention of Section 11(1) of the *Statutory Instruments Act*. They therefore moved to this Court by way of a Petition dated 5.4.23, challenging the constitutionality and legality of the Water Resources Regulations, 2021, (the impugned Regulations).
2. Together with the Petition, was filed an Application of even date in which the Petitioners seek the following orders:
  1. Spent
  2. That pending the hearing and determination of this Application and/or Petition, an order of stay be issued to stay the implementation of the Water Use Charges set out in Part B of the Second Schedule of the Water Resources Regulations, 2021.
  3. Spent.
  4. That pending the hearing and determination of this Petition, a conservatory order of injunction be issued to restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from levying, enforcing and/or implementing the water use charges set out in Part B of the Second Schedule of the Water Resources Regulations, 2021.
  5. That pending the hearing and determination of the Petition herein an order of stay be issued to stay the implementation of the Water Resources Regulations, 2021 and the Water Services Regulations, 2021.
  6. That costs of this application be in the cause.
3. The Application is premised on the grounds on the face of it and on the supporting affidavit by Joseph M.K. Mwingirwa sworn on even date. The grounds are that the exorbitant increase by between 200% and 500% of water use charges set out in Part B of the Second Schedule of the impugned Regulations amounts to a violation of rights of the Petitioners and other Kenyans to clean and safe water in adequate quantities as protected by Article 43(1)(d) of *the Constitution*. The Petitioners contend that the water use charges are based on a free market agenda espoused and promoted by the World Bank, yet *the Constitution* envisages that the Kenyan State shall implement policies in the water sector, that protect, promote and fulfil the right of the greatest number of people to clean and safe water in adequate quantities. Further that the impugned Regulations allocate a nominal role and participation to the county governments which effectively strips the Petitioners and the general public of institutional safeguards in the regulation, provision and management of water resources.



Accordingly, unless the orders sought are granted, unwarranted suffering and disruption of irrigation and other socio-economic activities will occur and the quality of lives of millions of Kenyans will be at stake.

4. The Petitioners further contend that the Water Services Regulations, 2021 and the impugned Regulations were promulgated without involving the Senate, in contravention of Section 11(1) of the *Statutory Instruments Act*, 2013 as read with Articles 94, 95 and 96 of *the Constitution*. The impugned Regulations are void, having been transmitted to the Senate after the expiry of the timelines provided for under section 11(1) of the *Statutory Instruments Act*. Further, that there was ineffective public participation which has occasioned dire consequences in terms of the exorbitant and unprecedented increment of water use charges. As such, granting the orders sought will promote the rule of law and facilitate the climate for the State to effectively discharge its obligations envisaged under Articles 21 and 43 of *the Constitution*.
5. When the matter came up for directions on 5.6.23, the Court granted conservatory orders in terms of prayers 2 and 3 of the Application. This provoked the filing of the Applications dated 12.6.23 and 13.6.23 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 3<sup>rd</sup> Respondent respectively. Both Applications seek in the main, the setting aside of the conservatory orders of 5.6.23. In the alternative, the 3<sup>rd</sup> Respondent sought the said orders be varied to apply only to the Petitioners before Court.
6. In addition to their application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents also filed a preliminary objection dated 20.6.23 raising the following points of law:
  1. That the High Court lacks jurisdiction under Article 165(5)(b) of *the Constitution* in respect of matters falling within the jurisdiction of the Courts contemplated in Article 162(2)(b) of *the Constitution*.
  2. That Article 62(1)(i) and (j) of *the Constitution* defines public land to include all rivers lakes and other water bodies as defined by an Act of Parliament (such as the *Water Act*) as well as the territorial sea, the exclusive economic zone and the sea bed thus ousting the jurisdiction of this Honourable court.
  3. That Article 260 of *the Constitution* defines land to include any body of water on or under the surface as well as the marine waters in the territorial sea and exclusive economic zone; From this constitutional definition water resources constitutes public land.
  4. That Section 13(1) of the *Environment and Land Court Act* provides that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
    - a. Relating to environmental planning and protection, climate issues land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - b. relating to land administration and management;
    - c. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - d. any other dispute relating to environment and land.
  5. That Section 2 of the *Water Act* No. 43 of 2016 (Interpretations) contemplates that the Court conferred with the jurisdiction to enforce the *Water Act* is Environment and Land Court



7. Given that the preliminary objection challenges the jurisdiction of this Court to entertain the Petition, it is imperative that the same is dispensed with first.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that this Court lacks the jurisdiction to determine matters herein as they fall under Article 162(2)(a) and (b) of *the Constitution*. Citing the case of South African Constitutional Court decision of Vuyile Jackson Gcaba vs Minister for Safety and security First & Others, they argued that from the Petitioners' pleadings, the challenge of the constitutionality of impugned Regulations and the allegation of the violation of the economic and social right to clean and safe water in adequate quantities under Article 43(1)(d) are all intricately connected to the environment and land. As such, the matter can only be determined under Section 13(2)(e) of the *Environment and Land Court Act* No. 19 of 2011 (the ELC Act) by the Environment and Land Court (ELC) as a dispute relating to environment and land. Further that water falls under the definition of land under Articles 62(1) and 260 of *the Constitution*. Additionally, it is contemplated under Section 2 of the *Water Act*, that it is the ELC that has jurisdiction in the interpretation of the Act. Accordingly, the jurisdiction of this Court to entertain the Petition is ousted. They urged the Court to decline jurisdiction in this matter and dismiss it.
9. For their part, the Petitioners submitted that none of the issues raised in the Petition fall within the jurisdiction of the ELC. Whereas Section 2 of the *Water Act* envisages that the court conferred with jurisdiction to enforce the *Water Act* is the ELC, their Petition does not seek to enforce the *Water Act*, but *the Constitution*. Under Article 19, 22, 23 and 165 of *the Constitution*, the High Court is vested with the jurisdiction to enforce the Bill of Rights and therefore as long as Article 43 of *the Constitution* is one of the provisions in the Bill of Rights, it is untenable for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to expect that it will be enforced in the ELC.
10. It is a truism that jurisdiction is everything and gives a court the power, authority and legitimacy to entertain a matter before it. The locus classicus on jurisdiction is the oft cited case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1., where Nyarangi, JA. famously stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.
11. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.



12. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which provides as follows:

(3) Subject to clause (5), the High Court shall have—

- a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - i. the question whether any law is inconsistent with or in contravention of this Constitution;
    - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - iii. (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - iv. a question relating to conflict of laws under Article 191; and
  - e. any other jurisdiction, original or appellate, conferred on it by legislation.
13. The unlimited original jurisdiction of the High Court in civil and criminal matters includes the authority to uphold and enforce the Bill of Rights and to enforce of *the Constitution*. Under Article 22(1) of *the Constitution*, every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23(1) confers upon this Court in this regard as follows:

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

14. Similarly, under Article 258(1) every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
15. As can be seen from the above provisions, this Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and further to hear and determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.
16. Article 165(5) of *the Constitution* provides for instances where the High Court shall not have jurisdiction. This is in respect of matters reserved for the exclusive jurisdiction of the Supreme Court or falling within the jurisdiction of the courts contemplated in Article 162(2). A look at Article



162(2) shows that the disputes over which this Court shall not have jurisdiction are those relating to employment and labour relations and the environment and the use and occupation of, and title to, land.

17. The ELC Act was enacted pursuant to the Article 162(3) of *the Constitution*, the purpose of which is to give effect to Article 162(2) of *the Constitution*. The jurisdiction of the ELC is stipulated in Section 13 as follows:
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes——
    - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - b. relating to compulsory acquisition of land;
    - c. relating to land administration and management;
    - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - e. any other dispute relating to environment and land.
  3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
  4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
  7. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
    - a. interim or permanent preservation orders including injunctions;
    - b. prerogative orders;
    - c. award of damages;
    - d. compensation;
    - e. specific performance;
    - f. restitution;
    - g. declaration; or
    - h. costs.
18. The jurisdiction of this Court and that of the ELC is different and distinct. Pursuant to Article 165(5) of *the Constitution*, this Court is precluded from entertaining matters reserved to the ELC. By inference and given the jurisdiction stipulated in Section 13 of the ELC Act, the ELC is precluded



from entertaining matters reserved for the jurisdiction of the High Court. In so finding, I am duly guided by the holding in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR, where the Supreme Court addressed the issue of jurisdiction of this Court and the Courts contemplated under Article 162(2) of *the Constitution*. The Court stated:

51. Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from *the Constitution*, or legislation (see *In Re the Matter of the Interim Independent Electoral Commission*, at paras. 29 and 30; and *Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others*, Sup.Ct. Civil Application No. 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC. Such legislation is to be interpreted in line with relevant constitutional provisions hence our position in *Gatirau Peter Munya v. Dickson Mwenda Kithinji and Two Others*, Sup. Ct. Civil Application No. 5 of 2014; [2014] eKLR, where we examined the constitutional provisions alongside legislative provisions on elections, and held [para. 77] that "the *Elections Act*, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of *the Constitution*, and that in interpreting them, a Court of law cannot disengage from *the Constitution*." In the instant case too, we take guidance from *the Constitution*, as we interpret it alongside the relevant statute law, pertaining to the specialized Courts.
52. In addition to the above, we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court. (emphasis)
19. A careful reading of the ELC Act will show that the jurisdiction of the ELC to enforce rights is limited, and is not as wide as that of the High Court. On enforcement of rights under the Bill of Rights, Section 13(3) of the Act limits the jurisdiction of the ELC to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*. Section 13 of the ELC Act does not confer upon the ELC, the jurisdiction to hear and determine applications touching on any other fundamental rights and freedoms or the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*. That jurisdiction is reserved to the High Court.
20. The gravamen of the Petitioners' claim in this case, is that the water use charges contained in Part B of the Second Schedule of the impugned Regulations are astronomically high and will result in the infringement of the right to clean and safe water in adequate quantities as protected by Article 43(1)(d) of *the Constitution*. They further contend that the impugned Regulations were promulgated without the involvement of the Senate and in contravention of Section 11(1) of the *Statutory Instruments Act*,



as read with Article 94, 95 and 96 of *the Constitution*. They further contend that there was ineffective public participation which has occasioned dire consequences in terms of exorbitant and unprecedented increment on water use charges. All these are matters fall within the jurisdiction of this Court under Article 165(3) of *the Constitution*.

21. Having considered the foregoing, I find that although the preliminary objection does raise a pure point of law, it is clear that the issues raised by the Petitioners in their Petition are not for the ELC, but fall within the exclusive jurisdiction of the High Court. The preliminary objection is thus not merited.
22. I now turn to the Applications for setting aside of the orders of 5.6.23 in which the Respondents have asked this court to review its orders on the premise that there was misrepresentation of facts by the Petitioners, namely that the impugned Regulations came into effect on 1.3.23. Their position is that the implementation of the impugned Regulations has been wholly undertaken and should not be stayed. Further that the orders would not leave a vacuum in operations of the 3rd Respondent, given that the previous regulations ceased to have effect by operation of law. The Respondents further submitted that the Petitioners misrepresented to the Court that it was a mandatory requirement for Senate to be involved in the development of the impugned Regulations. They submitted that consideration and approval of the Regulations by the National Assembly was adequate as use of water resources is a function of the National Government. The Respondents further asserted that there was misrepresentation that no or no adequate public participation was undertaken. The Respondents' position is that they have exhibited extensive documents confirming invitation to the public for public participation. reasons were given as to why the Petition challenging the impugned Regulations was filed a year after the implementation of the same.
23. The Petitioners countered this by submitting that the right to collect any tax or levy is founded on the principle of legality and constitutionality. As such, no State agency can justify violation of fundamental rights on the grounds that its operations will be adversely affected. Further that no evidence of the amount that the 3<sup>rd</sup> Respondent will lose on account of the orders remaining in place has been placed before the Court. The Petitioners also asserted that the Government is obligated to finance the operations of the 3<sup>rd</sup> Respondent through the taxes imposed under Article 209 of *the Constitution*. The issue whether the operations of the 3<sup>rd</sup> Respondent should be financed using water use charges is therefore for determination at the hearing of the Petition. According to the Petitioners therefore, the contention by the Respondents that the operations of the 3<sup>rd</sup> Respondent will be ground to a halt unless the orders are set aside is ingenuous.
24. Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) provides:

An order issued under rule 22 may be discharged, varied or set aside by the Court either on its own motion or on application by a party dissatisfied with the order.
25. Rule 22 makes provision for written submissions. Accordingly, the scope of Rule 25 appears not to apply to conservatory orders. Rule 3(8) however reiterates the inherent powers of the Court to do justice as follows:

Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.



26. In the absence of explicit provisions in the Rules, the Court will fall back on the Civil Procedure Rules. I find guidance in this proposition in the case of *Karl Wehner Claasen v Commissioner of Lands & 4 others* [2019] eKLR, where the Court of Appeal had this to say of an apparent lacuna in the Rules:

[I]n the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.

27. This Court has jurisdiction to review orders as provided for in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. Section 80 allows an aggrieved litigant to apply for review of an order or decree and empowers the Court to make such order as it deems fit as follows:

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

28. Order 45 Rule (1) of the Civil Procedure Rules stipulates the grounds upon which an order may be reviewed:

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

29. The law allows an aggrieved party to apply for review of an order on the basis of discovery of new and important matter or evidence which after due diligence, was not within his knowledge. Such application must be made without unreasonable delay. A mistake or error apparent on the face of the record is another ground upon which a party may seek review of orders. An order may also be reviewed for any other sufficient reason.

30. In the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR the Supreme Court laid down the guiding principles in an application of review of Court orders as follows:

31. Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:



- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
  - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
  - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
  - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
  - v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
  - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
    - a. as a result a wrong decision was arrived at; or
    - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.
31. And in the case of *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR, the Court of Appeal held as follows:
- A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
32. Upon the grant of conservatory orders pending the hearing and determination of a petition, the Court is not *functus officio* and still retains the power to, if satisfied, review or set with great caution. An order for review or setting aside of orders will ordinarily be granted to correct an error or oversight or to effect a review of the proposed order so that the orders may be able to deal more appropriately with the issues before it. It is well settled that the Court will exercise its power in this regard in exceptional circumstances, where the justice of the case requires the Court to act, or where the error that has occurred will if not corrected, would cause a serious miscarriage of justice.
33. In present case, the Respondents cite misrepresentation as the ground upon which they seek the setting aside or reviewing the orders herein. In the case of *Okiya Omtatah Okiiti v The Commissioner*



General, Kenya Revenue Authority & Others Pet No. 532 OF 2017, Mativo, J. (as he then was) set out what must be established where misrepresentation has been alleged as follows:

The matters which must be established to impugn an order on the basis of misrepresentation can be summarised as follows:-<sup>1</sup>

First, the particulars of the misrepresentation claimed must be exactly given and the allegations established by the strict proof.

Secondly, it must be shown that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the order.

Thirdly, mere suspicion of misrepresentation raised by fresh facts later discovered will not be sufficient to secure relief... The claimant must establish that the new facts are so evidenced and so material that it is reasonably probable that the action will succeed.

Fourthly, mere allegation of misrepresentation will not normally be sufficient to attract such drastic and exceptional relief as the setting aside of an order.

Fifthly, it must be shown by admissible evidence that the successful party was responsible for the misrepresentation which taints the order under challenge.

Sixthly, the burden of establishing the components necessary to warrant the drastic step of setting aside an order or judgment allegedly affected by misrepresentation or other relevant taint, lies on the party impugning the order. It is for that party to establish the misrepresentation and must do so clearly.

34. Defence of the supremacy of *the Constitution* and the law is a key consideration when considering an application for conservatory orders. I am aware that at this stage I must not delve into the merits of the respective parties' case so as not to preempt the Petition. For the purpose of this ruling however, it will suffice to state that compliance or noncompliance with *the Constitution* and the *Statutory Instruments Act* is a core issue in granting conservatory order.
35. In the case of *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022)* [2023] KECA 80 (KLR) (3 February 2023) (Judgment), the Court of Appeal addressed the issue of involvement in the Senate in enactment of a piece of legislation and stated:

22. In order to determine whether authority to enact a particular piece of legislation vested only in the National Assembly or concurrently in the National Assembly and the Senate, it was necessary to determine whether the legislation in question was a legislation with regard to a matter concerning county governments that fell within a functional area listed in the Fourth Schedule part 2 of *the Constitution*. Where the legislation fell within the functions in the Fourth Schedule, there was no difficulty determining whether it was a matter concerning the county governments. Difficulties could only arise where the legislation fell outside any of the matters covered in the Fourth Schedule and the court was invited to determine whether it was a matter for the National Assembly or county governments. Even then, in such situations, courts had come up with a test.

<sup>1</sup> See Kirby P (with whom Hope JA and Samuels JA agreed) in *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at pp538 - 539; see also *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd (No 2)* (1992) 37 FCR 234 at p241; *Magarditch v. Australia and New Zealand Banking Group Ltd* (1999) 17 ACLC 1275 and *Pembroke School Incorporated v. Human Rights and Equal Opportunity Commission* [2002] FCA 1020 and *Di Carlo v Dubois* [2007] QCA 316 at [30].



36. The Respondents were enjoined to demonstrate to the Court that the involvement of the Senate was not necessary in the making of the impugned Regulations and that the same were promulgated in accordance with the *Statutory Instruments Act*. Further they were required to demonstrate that no violation or threat of violation of the rights of the Petitioners and the public would be occasioned by what was referred to as exorbitant water use charges. water use charges therein were not such as would threaten or violate the rights of the Petitioners. From the material placed before the Court, I see no clear evidence of the alleged misrepresentation. On the other hand, the Petitioners have raised an apposite issue that impugned Regulations were promulgated in contravention of the law.
37. The Fourth Schedule of *the Constitution* provides for the distribution of functions between the National Government and the County Governments. Part 1 lists the functions of the National government. Relevant to the matter herein is Section 22 which provides:
- Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—
- a. fishing, hunting and gathering;
  - b. protection of animals and wildlife;
  - c. water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and
  - d. energy policy. (emphasis)
38. Part 2 of the Fourth Schedule lists all functions that have been devolved to the counties. Section 11 provides:
- County public works and services, including—
- a. storm water management systems in built-up areas; and
  - b. water and sanitation services.
39. As can be seen from the foregoing, the question as to whether water is a devolved function and whether the Senate ought to have been involved in the making of the impugned Regulations is contented and needs to be interrogated further. This can only be done at the hearing of the Petition.
40. For this Court to set aside or vary the conservatory orders as sought, it must be satisfied that the irreparable injury will be occasioned to the Respondents if the orders are not granted. The injury complained of is loss of revenue for the 3rd Respondent from the water use charges. This must be juxtaposed with the legal requirement that all taxes must be grounded on the principle of legality and constitutionality.
41. The conservatory orders issued on 5.6.23 were intended to preserve the substratum of the Petition pending the hearing and determination of the Application by the Petitioners. After considering the material before me, I am persuaded that if the conservatory orders were to be set aside, the subject matter of the Petition will be jeopardized with the result that the same will be rendered nugatory and a mere academic exercise. Further the public interest lies in this Court discharging its constitutional mandate of ensuring that all laws and actions of public bodies including the imposing of water use charges conform with the law. Accordingly, my finding is that nothing has been placed before me to review this position and set aside the orders in question.



42. Going back to the Petitioner's Application dated 5.4.23, it was averred that the Council of Governors wrote through its Acting CEO Mary Mwiti wrote to the Clerk of the National Assembly protesting against the impending increase of water user charges vi the impugned Regulations. Following a public outcry, the Council of Governors through its then Chairman Hon. Martin Wambora wrote to all governors urging them to instruct the respective water services providers to refrain from implementing the new water charges until an intergovernmental meeting is held between the Council of Governors and the Ministry of Water, Sanitation and Irrigation to discuss all the contested provisions of the regulations. Consequently, in or around August 2021, the 1<sup>st</sup> Petitioner presented a petition to the National Assembly and the Senate praying of the expungement of offending provisions in the impugned Regulations.
43. It was further averred that pursuant to standing Order 232(1) of the Senate standing Orders and upon listening to all the relevant stakeholders at a meeting of key stakeholders held on 13.9.21, including the Water Ministry, Council of Governors, Water Resources Authority and Water Services Providers, Associations the Senate Land, Environment and Natural Resources Committee resolved that the water user fees be lowered. It was further stated that a subsequent meeting between the Water Ministry and the National Assembly Committee on Delegated Legislation was held to review irrigation water charges, but the Senate was not involved. The Ministry failed to transmit the impugned Regulations, 2021 to the Senate as required under Section 11(1) of the *Statutory Instruments Act*. As such, the impugned Regulations became void after the expiry of the timelines stipulated under section 11(1) of the *Statutory Instruments Act*.
44. In its report, the Senate recommended that the 1<sup>st</sup> respondent conducts fresh and effective public participation on draft Regulations and thereafter publishes them and transmits them to both Houses of Parliament in accordance with section 11(1) of the *Statutory Instruments Act*, 2013. This notwithstanding in January 2023 the Ministry of Water informed the public that the impugned Regulations will take effect on 1.3.23 to the dismay of the various Water Resources Users Associations which are threatened with bankruptcy will cease to operate to the detriment of millions of people. It was therefore deposed that it is only fair that this Court stays the further implementation of the impugned Regulations which are unconstitutional and unreasonable same pending the hearing and determination of the Petition.
45. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the Application vide a replying affidavit sworn by Dr. Kipronoh Ronoh on 22,6,23 2023. He deposed that in compliance with the requirement to undertake consultations, the 1<sup>st</sup> Respondent undertook public and stakeholder consultations during the development of the impugned Regulations as detailed in the said replying affidavit. Further that the Regulations were subjected to the requisite scrutiny by the Committees on delegated legislation of the National Assembly and Senate in accordance with the *Statutory Instruments Act*. He deposed that it was not mandatory for Senate to be engaged in the development of the subject regulations as the regulation of use of water resources in the country is a National Government function by virtue of Article 66 as read with Article 260 of *the Constitution*. Further that a Bill not concerning counties is only to be considered by the National Assembly and passed in accordance with Article 122 of *the Constitution*. The impugned Regulations had no provisions affecting the functional areas of the county government hence the involvement of the Senate was not required.
46. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case that the impugned Regulations came into operation on 9.2.22 and that communication was issued to all water sector institutions to commence implementation of the same. Accordingly, the Respondents and the general public would be prejudiced as protection of water resources across the country is at risk of being compromised should the orders suspending implementation of the water use charges orders sought be granted order. Further that the orders



- now in place have paralyzed the operations of the 3<sup>rd</sup> Respondent and jeopardized its ability to fulfil its constitutional and statutory mandate of protecting and regulating the use of Water Resources throughout the country. Additionally, public funds have been applied for the extensive consultation forums and for engaging consultants for the development of the impugned Regulations and accompanying statutory documents. Additionally, Regulation 134 revoked the Water Resources Management Rules, 2007. As such, the grant of the conservatory orders will result in a vacuum in the regulatory mandate of the 3<sup>rd</sup> Respondent envisaged in the Water Act. It was therefore in the interest of justice, fairness and public good that the orders sought in the Application and Petition are not granted.
47. In affidavits sworn by John N. Kinyanjui on 26.4.23 and 13.6.23, the 3<sup>rd</sup> Respondent reiterated the averments of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It was averred that the 3<sup>rd</sup> Respondent has in accordance with the mandate vested on it under Section 12(c) of the Water Act, and Section 12(e) which allows it to collect water permit fees and water use charges, the 3<sup>rd</sup> Respondent commenced implementation of the impugned Regulations following their coming into operation of the through Legal Notice No. 170 of 2021 on 9.2.22. By a letter dated 14.2.22, the 1<sup>st</sup> Respondent called upon the 3<sup>rd</sup> Respondent and other water sector institutions to commence implementation of the Regulations along the Water Services Regulations 2021, the Water Harvesting and Storage Regulations, 2021 and the National Water Policy. It was reiterated that the implementation and enforcement of the Regulations and any other regulations developed under the Act, is an obligation placed on it under section 12(c) of the Act. It was also averred that the grant of the orders sought by the Petitioners would have negative and prejudicial repercussions on the statutory mandate of the 3<sup>rd</sup> Respondent and the management and use of water resources in the country. Further that by dint of Regulation 84(3) of the Regulations the water use charges payable to the 3<sup>rd</sup> Respondent are to be used by it to meet the costs of discharging its regulatory functions as well as utilizing the monies collected towards its overhead and incidental costs. As such the orders sought shall be extremely detrimental to and will cripple the 3<sup>rd</sup> Respondent and its operations across all its 32 offices countrywide as well as the country's water resources. This is more so because the Water Resources Management Rules, 2007 have since been repealed by the coming into operation of the Regulation 134 of the impugned Regulations.
48. The 3<sup>rd</sup> Respondent further asserted that the issuance of any orders of injunction suspending the implementation of an already operational legislation requires a substantive hearing, evaluation of all the parties' pleadings and accompanying documents which cannot be done at the interim stage. The purpose of regulating the management and use of water in the country is to ensure sustainable exploitation and equitable use to achieve the obligations placed on the state under Article 66 and 69(1) of the Constitution. The Regulations further secure the right to clean and safe water in adequate quantities as guaranteed under Article 43(1)(d) of the Constitution through Regulations 47(1), and 47(2).
49. Additionally, the 3<sup>rd</sup> Respondent stated that the issues herein are directly and substantially in issue in Nairobi High Court Petition No. E118 of 2022- James Kamau Murango s AG. WRA & Another which is pending judgment. Hence proceeding with the petition and application would be risky especially if the 2 courts arrive at opposing decisions. This therefore calls for stay of proceedings herein. Further that the impugned Regulations came into operation on 9.2.22 and that no grounds have been provided to the Court as to why the application and Petition herein challenging implementation have been brought now. Further that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Petitioners and the 1<sup>st</sup> Interested Party herein are not legal entities capable of suing and should be expunged from the record. The 3<sup>rd</sup> Respondent urged that the Application and Petition be dismissed.
50. In a replying affidavit sworn on 4.7.23 by Dr. Julius Itunga, the 4<sup>th</sup> Respondent urged that the Petition and Application be dismissed with costs.



51. On its part, the 5<sup>th</sup> Respondent filed grounds of opposition dated 9.5.23 raising grounds that the Petitioners have failed to meet the test for the grant of conservatory orders set out by the Supreme Court of Kenya in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* (2014) eKLR; that contrary to the assertion made by the Petitioners Section 158 of the *Water Act* explicitly recognized the responsibility of County Governments; that Part I to the Fourth Schedule of *the Constitution* expressly provides for use water resources as one of the functions of National Government, further the function of policy formulation in the water sector still remains with the National Government; that contrary to the Petitioners claim, the impugned regulations were subjected to public participation which the Petitioners themselves admit that indeed the draft regulations were subjected to public participation; that the assertion that the impugned Regulations were made in contravention of Article 94(5) of *the Constitution* is unfounded; that the Regulations were tabled before the National Assembly as required under Article 95(5) and Section 11 of the *Statutory Instruments Act*; that the impugned Regulations provide for an efficient system in ensuring that water services are provided efficiently and that the water service providers' roles and responsibilities are catered for and proper systems have been put in place to regulate various aspects of the water sector and therefore staying the Regulations will hamper effective provisions of water services; that the Petitioners have not demonstrated what prejudice they stand to suffer if the conservatory orders are not granted. The 5<sup>th</sup> Respondent urged that the Application be dismissed.
52. In a replying affidavit sworn by Jeremiah Nyegenye, CBS om 20.6.23, the 2<sup>nd</sup> Interested Party stated that the prayers sought herein constitute an encroachment on the exclusive legislative mandate of Parliament as set out under Article 1(3) and 94 of *the Constitution* and that such remedies if any, should be sought under Article 119(1) of *the Constitution*. Reliance was placed on the case of *Justus Kariuki Mate & another v Marin Nyaga Wambora & another* [2017] eKLR on the doctrine of separation of powers. It was further stated that the jurisdiction of the High Court is limited to considering whether Parliament has complied with all the constitutional requirements and standing orders and interpreting whether enacted legislation is inconsistent with *the Constitution*. Parliament may not be directed by the Court or any other institution, on the issue that goes into a law, as was held by the High Court in the case of *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR. It was further averred that every law enacted by Parliament is presumed to be constitutional and the burden of proving the contrary rests with the person alleging as such. The Petitioners have failed to discharge this burden as they have failed to demonstrate any constitutional provision which has been violated in the passing of the *Water Act*.
53. It is the Petitioners' case that they have placed before the Court compelling material and evidence to demonstrate that the impugned Regulations violate their rights and those of other Kenyans to clean and safe water in adequate quantities. They contend that the impugned Regulations have limited the right of access to water by making water unaffordable to majority of Kenyans. Access to water has thus been made a privilege rather than a fundamental right in Kenya thereby negating and compromising the State's obligation under Article 21 of *the Constitution*. The Petitioners submitted further that they and the 1<sup>st</sup> Interested Party have demonstrated a lack of effective public participation during the formulation and passage of the impugned Regulations. Additionally, that the impugned Regulations came into force before the contentious issues were resolved. County Governments were excluded in the making of the Regulations despite the fact that water and sanitation services are devolved functions under the Fourth Schedule of *the Constitution*. They further argued that their contention that the impugned Regulations were formulated and passed in contravention of Section 11(1) of the *Statutory Instruments Act* has been endorsed by the Senate. The impugned Regulations are therefore defective on fundamental grounds of substance and procedure and are not on mere irregularities, technical oversight and human errors. Reliance was placed on the case of *Scot vs. Brown, Doering, McNab &*



- Co. (3) [1892] 2Q cited with approval in the case of Mapis Investment (K) Ltd vs. Kenya Railways Corporation [2005] 2KLR and Kenya Pipeline Company Ltd vs. Glencore Energy (UK) Ltd (2016) eKLR.
54. The Petitioners further submitted that based on the exposition on illegality and in view of the cogent evidence that on a prima facie basis the impugned Regulations are illegal in substance and tainted with procedural improprieties, this Court should not allow the continued implementation of the impugned Regulations, pending hearing and determination of the Petition. They further contended that the Petition would be rendered nugatory if the orders sought are not granted. They have set out the prejudice and irreparable loss they stand to suffer if the implementation of the impugned Regulations is not stayed. This has not been controverted by the Respondents. Further, that there can be no greater public interest in this case than for this Court to act in accordance with Article 19, 20 and 21 of *the Constitution*.
55. For their part, the Respondents submitted that the grant of the orders sought by the Petitioners would have negative and far-reaching effects on the public including excessive use and wastage of water resources. This can lead to water scarcity, particularly in areas with high demand and limited supply. It can also result in inequality in access and distribution and allocation of water resources, in that powerful entities or individuals could exploit water for their own benefit leading to inequalities. Without proper management, excessive water extraction, pollution, and habitat destruction tend to occur, leading to the degradation of aquatic ecosystems, loss of biodiversity, and disruption of ecological balances which could harm wildlife, fisheries, and overall ecological health. Due to unavailability of funds for regulation, limited oversight in industrial and agricultural activities can lead to water pollution. This informs the rationale of the regulatory framework for payment of water use fees under Part B of the Second Schedule of the Regulations.
56. It was further submitted that the said water use charges encourage responsible and efficient water use, by creating a financial incentive for users to reduce consumption. Water abstraction fees help allocate water resources based on their economic value. Water use fees provide a reliable source of revenue to support water management activities and the development and maintenance of water infrastructure in the interest of the public. This helps to promote equity and fairness in water allocation. Additionally, the implementation of the impugned Regulations has been wholly undertaken and should not be stayed as was the position in the Supreme Court case of Kenya Tea Growers Association Anor vs. NSSF Board of Trustees 13 Others SC. Pet Application No. E004 of 2023 as consolidated with No. E002 of 2023. Regarding public participation in development of the Regulations, the Respondents relied on the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR and submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have annexed extensive documents to their replying affidavit confirming invitation to the public for public participation hearings, availability of the draft regulations for public scrutiny, various stakeholder consultations, their deliberations and outcomes amongst others. They contend that the same was extensive and adequate. Further that the question as to whether or not the ingredients for public participation were satisfactorily met is a matter that is only capable of being determined upon hearing parties on merit and taking into account evidence. Reliance was placed on the cases of Trade Union Congress of Kenya v National Hospital Insurance Fund [2015] eKLR; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra); and Republic v Water Services Regulatory Board & 3 others Ex- Parte Paul Mwangi Mwaniki 2 others [2017] eKLR.
57. The Respondents further submitted that it was not mandatory for the Senate to be engaged in the development of the impugned Regulations. The consideration and approval of the impugned Regulations by the National Assembly was sufficient, given that the use of water resources in the



Country is a function of the National Government. Concerning the pith and substance test, it was argued that the impugned Regulations were developed by the 1<sup>st</sup> Respondent pursuant to the provisions of Article 66 of *the Constitution* and the functions designated to the National Government to regulate the use of international and waters and water resources as expressed in paragraph 2 of Part I of the Fourth Schedule to *the Constitution*. On the contention by the Petitioners that the water use charges are exorbitant and unaffordable, the Respondents argued that the Court ought not be concerned with the quantum of increment of fees or charges and whether or not they were or not justified. Reliance was placed on the case of Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs. County of Nairobi Government & 3 others Petition No. 486 of 2013. The Respondents submitted that the grant of the orders sought would leave a vacuum as the previous Water Resources Management Rules, 2007 have since been repealed by coming into operation of Regulation 134 of the impugned Regulations.

58. The Respondents further submitted that the legal principle of constitutionality applies to the impugned Regulations and urged the Court not to grant the orders of stay of the already implemented Regulations before the substantive hearing and evaluation of all parties' pleadings and accompanying documents. They asserted that a grant of the orders sought would have extensive negative and prejudicial repercussions on the 3<sup>rd</sup> Respondent's statutory mandate and management and use of water resources in the country, to the detriment of the wider public. On the other hand, the Petitioners do not stand to suffer any prejudice as the 3<sup>rd</sup> Respondent would be able to reimburse any costs incurred by the Petitioners compared to the extent and effort to be applied in pursuing payments of water use fees were the Petition to fail. They further submitted that should the orders sought not be granted, the Petition will not be rendered nugatory.
59. The Petitioners impugn the Regulations under challenge, on grounds that the same were not subjected to public participation. This goes counter to Article 10 of *the Constitution* which provides that public participation as a national value and principle of governance shall bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions.
60. The Petitioners further claim that the water use charges in Part B of the Second Schedule of the impugned Regulations are so exorbitant, that they violate the right of the Petitioner and of the public to clean and safe water in adequate quantities as guaranteed in Article 43(1)(d) of *the Constitution*.
61. Additionally, the Petitioners contend that the 1<sup>st</sup> Respondent did not involve the Senate in the promulgation of the impugned Rules, yet water is a devolved function under Part 2 of the Fourth Schedule of *the Constitution*. They thus assert that the impugned Rules were promulgated in violation of Section 11(1) of the *Statutory Instruments Act* and are thus void by dint of Section 11(4) of the said Act.
62. I have considered all the issues raised by the Petitioners concerning the impugned Regulations. I am keenly aware I cannot at this stage delve into the merits of the case which must await the full hearing of the Petition. Upon evaluation of the rival submissions however, I find that the Petitioners have established a prima facie case with a probability of success. It is therefore necessary that the substratum of the Petition is preserved pending the determination of the same failing which the Petition will be rendered nugatory. Further public interest requires that the constitutionality of the impugned Regulations be determined before further implementation. I am of the view that if the Petition were to fail, the water use charges not paid in the intervening period will be recoverable from the Petitioners and other water users, as the Respondents have adequate mechanisms and machinery to enforce payment.



63. Article 23 of *the Constitution* has conferred upon this Court, the authority to uphold and enforce the Bill of Rights and provide remedies as follows:
1. The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
  2. ...
  3. In any proceedings brought under Article 22, a court may grant appropriate relief, including—
    - a. a declaration of rights;
    - b. an injunction;
    - c. a conservatory order;
    - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
    - e. an order for compensation; and
    - f. an order of judicial review.
64. Among the appropriate reliefs available to a party who alleges and proves denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights is a conservatory order. Rule 23 of the Mutunga Rules provides that despite any provision to the contrary, a Judge before whom a petition is presented shall hear and determine an application for conservatory or interim orders. The purpose of a conservatory order is to preserve the substratum of the petition before Court, pending the hearing and determination of the same.
65. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court set out the threshold for the grant of conservatory orders as follows:
86. “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within 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 supplicant’s case for orders 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 causes.
  87. The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
    - i. the appeal or intended appeal is arguable and not frivolous; and that
    - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.



88. These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
- iii. that it is in the public interest that the order of stay be granted.
89. This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution*.
66. In accordance with test established by the Supreme Court, a party seeking conservatory orders must first demonstrate to the Court that the petition is arguable and not frivolous. Second that unless the orders sought are granted, the suit were it to succeed, would be rendered nugatory. Thirdly, that it is in the public interest that the orders sought are granted.
67. In *Free Kenya Initiative & 6 others v Independent Electoral & Boundaries Commission & 4 others; Kenya National Commission on Human Rights (Interested party)* [2022] eKLR Mrima J, stated:
- The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.
68. A prima facie case was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR where the Court of Appeal stated:
4. A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
69. On irreparable damage Mrima, J. had this to say in the case of *Law Society of Kenya v Attorney General & another* [2020] eKLR:
70. Generally, any infringement or threat to infringement of *the Constitution* is an affront to the people of Kenya. That is the clear purport of the Preamble and Chapter 1 of *the Constitution*. In this matter the gist of the Petition is the constitutionality of Section 5 of the *Public Order Act*. Before this Court pronounces itself on the Petition, the Petitioner has preliminarily demonstrated that *the Constitution* is under attack. In the unique circumstances of this matter I find that the general public stands to suffer great prejudice if *the Constitution* is not allowed to reign.
70. Black’s Law Dictionary Tenth Edition at page 1425 defines public interest as:
- The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.



Public Interest Litigation is defined in the same dictionary as:

A legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

71. The Petitioners' claim herein, is that the impugned Regulations were not subjected to public participation and that they contravene the right of the Petitioners, their member organizations and the general public they serve, to clean and safe water in adequate quantities as protected by Article 43(1)(d) of *the Constitution*. Further, that the function of the county governments was relegated to a subsidiary role. The Petitioners contend that the promulgation of the impugned Regulations amounts to a breach by the Respondents, of the State's duty under Articles 21 and 43 of *the Constitution*. Further that the impugned Regulations offend the provisions of Section 11(4) of the *Statutory Instruments Act* and came into force despite the fact that in its Report dated June 2022, the Senate Standing Committee on Land, Environment and Natural Resources recommended that the 1<sup>st</sup> Respondent conducts fresh and effective public participation on draft regulations and thereafter publish and transmit them to both Houses of Parliament in accordance with Section 11(1) of the *Statutory Instruments Act*.
72. Article 21 of *the Constitution* provides as follows:
1. It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
  2. The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.
  3. All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.
  4. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.
73. As can readily be seen from the above provision, the State is enjoined to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. Article 260 defines State as the collectivity of offices, organs and other entities comprising the government of the Republic under *the Constitution*. The Respondents herein, all fall under the definition of State. As such the constitutional obligation to make every effort to ensure the realization of the rights guaranteed under Article 43, is placed upon them. Article 43 guarantees to every person economic and social rights. Relevant to the Petition herein, is the right to clean and safe water in adequate quantities under Clause (1)(d). It is the Petitioners' case that the exorbitant water use charges will, and have infringed upon this constitutional right, by making water inaccessible to a majority of Kenyans.
74. The Petitioners' contention is that the impugned Regulations were promulgated in contravention of Article 10 of *the Constitution* in that there was no public participation. Further that the impugned Regulations were promulgated without the involvement of Senate yet water is a devolved function. That the Senate endorsed the contention by the Petitioners that the impugned Regulations are unlawful. Further that Section 11(4) of the *Statutory Instruments Act* was violated.



75. It is noted that the contention of the illegality and unconstitutionality of the impugned Regulations is opposed by the Respondents.
76. The impugned Regulations, were published by the 1<sup>st</sup> Respondent pursuant to the powers conferred under Section 142 of the Water Act. The Regulations are statutory instruments within the definition set out in Section 2 of the Statutory Instruments Act which provides as follows:
- “statutory instrument” means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.
77. The Statutory Instruments Act was enacted for the purpose of providing for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith. In particular, the Act facilitates the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance.
78. Section 11 of the Act provides for the laying of statutory instruments before Parliament as follows:
1. Every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.
  2. Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of the Constitution, all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.
  3. The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.
  4. If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect but without prejudice to any act done under the statutory instrument before it became void.
79. Section 11(1), of the Act requires that a copy of a statutory instrument is within 7 sitting days after publication of the impugned Regulations, is transmitted to the responsible Clerk for tabling before the relevant House of Parliament. Subsection (4) provides that such statutory instrument shall cease to have effect immediately after the last day for it to be so laid if subsection (1) is not complied with.
80. It is the Respondents’ case that water is a function of the National Government. The Regulations were therefore tabled before the National Assembly and that it was not necessary for them to be tabled before the Senate.
81. Part 1 of the Fourth Schedule of the Constitution provides for the functions of the National Government. As regards water, paragraph 22(c) provides that the National Government shall have the function of protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including in particular water protection, securing sufficient residual water, hydraulic engineering and the safety of dams. Part 2 of the Fourth Schedule lists all



functions that have been devolved to the counties. Among those functions is water and sanitation as set out in paragraph 11(b). This is a

82. The question as to whether water is a function of the national government or county governments and whether the impugned Regulations ought to have been laid before the Senate is seriously contested and requires further interrogation. The issue goes into the legality and constitutionality of the impugned Regulations. This can only be determined after the full hearing of the Petition.
83. It is trite that the content and the manner in which legislation is adopted and passed must conform to *the Constitution*. Article 10 of *the Constitution* as follows:
1. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them--
    - a. applies or interprets this Constitution;
    - b. enacts, applies or interprets any law; or
    - c. makes or implements public policy decisions.
  2. The national values and principles of governance include--
    - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
    - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
    - c. good governance, integrity, transparency and accountability; and;
    - d. sustainable development.
84. National values and principles of governance are binding on all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*, enacts, applies or interprets any law, or makes or implements public policy decisions. Public participation is a constitutional imperative, which plays a central role in legislative, policy and executive functions of Government. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views taken into account. In the oft cited South African case of *Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others* CCT 86/08 [2010] ZACC 5, the Court captured the essence of public participation thus:
- [E]ngagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.
85. Public participation has been entrenched in our Constitution as one of the national values and principles of governance that binds all state organs including the 1<sup>st</sup> Respondent, when, inter alia enacting law and formulating and implementing public policy decisions. In *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR, Mativo, J. (as he then was) stated:

49. In a recent decision of this court, I observed that "my analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government." Both local and foreign



jurisprudence are awash with decisions holding that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.

86. Similarly, in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR the Supreme Court stated:

96. From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.

87. The Respondents have argued that there was adequate public participation before the promulgation of the impugned Rules.

88. It is a well settled principle that all legislation, including subsidiary legislations enjoys the presumption of constitutionality. This was reiterated by Majanja, J. in the case of *Susan Wambui Kaguru & 4 Others v Attorney General & Another* [2012] eKLR. The learned Judge stated:

I have given thought to the arguments made and once again I reiterate that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every Kenyan to obey the very law that are passed by our representatives in accordance with our delegated sovereign authority.

89. And in the case of *Kizito Mark Ngaywa v Provincial Administration & Another* [2011] eKLR, Ibrahim, J. (as he then was) stated:

I am still persuaded by the above-mentioned principles of Constitutional interpretation. In the Bishop Joseph Kimani case, the court observed as follows:-

“It is a very serious legal and Constitutional step to suspend the operation of statutes and statutory provisions. The courts must wade with care, prudence and judicious wisdom. For the High Court to grant interim orders in this regard, I think one must at the interlocutory stay actually show that the operation of the legislative provision are a danger to life and limb at that very moment.”

90. The Court appreciates that suspending the operation of a statute or regulations has serious implications. However, where there is prima facie unconstitutionality, the Court should not shy away from granting conservatory orders. It has been stated repeatedly that presumption of constitutionality, is not a finding of constitutionality. It is critical that the supremacy of *the Constitution* is protected and there can be no greater public interest than upholding *the Constitution* and the law.

91. In this regard, I associate with the holding in *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR, where Odunga, J. (as he then was) stated:

42. In my view, if the Court has power to declare an enactment void and invalid, likewise the Court must have jurisdiction in deserving cases to suspend provisions of an enactment if to do otherwise is likely to render whatever decision the Court may arrive at a mirage. Our



Constitution for example in Article 29(d) outlaws torture and freedom from torture is one of the fundamental freedoms which by virtue of Article 25 of *the Constitution* cannot be limited. If Parliament was to purport to pass an Act which introduces torture, it would be illogical for the Court to stand back and say that it has no jurisdiction to grant conservatory orders. To do so would amount to the Court ceding not only its powers but failing to protect *the Constitution* as envisaged in Article 21(a) of *the Constitution*. What use would a favourable determination of the petition be to the victim of torture if by the time of the determination, the torture has taken place and freedom lost beyond recall. I therefore do not subscribe to the notion that under no circumstances can conservatory orders be granted where a piece of legislation is under challenge.

92. I have considered all the issues raised by the Petitioners concerning the impugned Regulations as well as the contentions by the Respondents. I am keenly aware I cannot at this stage delve into the merits of the case. All the contentious issues raised herein, not least the finding of the Senate in its report that the impugned Regulations ceased to have effect for contravention of Section 11(4) of the *Statutory Instruments Act*, can only be determined after the full the hearing of the Petition. Suffice it to say however, that upon evaluation of the rival submissions, I find that the Petitioners have established a prima facie case with a probability of success. If the substratum of the Petition is not preserved and implementation of the impugned Regulations continues, there is a likelihood that the Petition will be rendered nugatory. Public interest requires that the legality and constitutionality of the impugned Regulations be determined, before implementation is resumed.
93. My finding therefore is that the Petitioners have met the threshold for the grant of conservatory orders.
94. Lastly, I consider the Application by the proposed 10<sup>th</sup> petitioner dated 14.6.23 in which it seeks to be joined as the 10<sup>th</sup> petitioner herein. It submitted that it is a stakeholder and beneficiary of water services that are governed by the *Water Act* and controlled by the Water Regulations Authority. Its participation in the proceedings herein will aid in the resolution of the matters arising and included in the Petition being that it is a key stakeholder in the industry. It further submitted that it is fully reliant on the laws and regulations governing water services in the conduct and ensured continuance of its business. Hence any and all orders, determinations and decisions by this Court will directly impact and affect it. It fully associates itself with the contents of the Petition and its interests are duly addressed therein which would not necessitate it to introduce any new matters apart from what is contained in the Petition
95. The 3<sup>rd</sup> Respondent opposed the application for joinder of the proposed 10<sup>th</sup> Petitioner and submitted that Rule 7 of the Mutunga Rules does not anticipate joinder of petitioners to proceedings. It submitted that the application is made in bad faith and will be to the grave detriment of the 3<sup>rd</sup> Respondent. It also does not serve to add any new information not already pleaded by the parties herein. It was further submitted that the proposed 10<sup>th</sup> Petitioner is seeking to challenge compliance and/or otherwise, with the provisions of the *Energy Act*, a completely separate matter from that brought by the Petitioners. Further that no prejudice will be occasioned to the proposed 10<sup>th</sup> Petitioner if the application is disallowed since it is still at liberty to file a proper independent petition where relevant parties will have the opportunity to give evidence on contested issues. It was submitted that in any event, based on assessment of issues raised, the court may on application of parties or its own motion, direct consolidation of any such petition with that before this court. The third Respondent urged that the application be dismissed as the proposed 10<sup>th</sup> Petitioner is not a necessary party. In the alternative it should be joined as an interested party.



96. The joinder of the proposed 10th petitioner is also opposed by the 5th Respondent. It argued that the proposed 10<sup>th</sup> Petitioner has not met the threshold for joinder. Further that the application does not meet the conditions set out under Rule 5 of the Mutunga Rules. There is no demonstration of any ground to warrant addition or joinder. The applicant has also not shown the prejudice it will suffer should the application not be allowed. It has also not shown that it will raise novel or address issues not yet covered by the principal parties in this matter. Also not demonstrated is that its concerns will not be taken care of by the Petitioner or how it will be affected by the outcome of these proceedings. The 5<sup>th</sup> Respondent further contended that the issues raised by the proposed 10<sup>th</sup> petitioner are already pleaded in the Petition. The Court should therefore decline to admit it as a Petitioner as it will simply crowd the matter. Lastly, that the Court will reach a definitive determination in the Petition without the proposed 10<sup>th</sup> Petitioner. It urged that the application be dismissed with costs.

97. Rule 5 of the Mutunga Rules provides for the Addition, joinder, substitution and striking out of parties. On joinder of parties, the Rule 5(d)(ii) provides as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

- ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

98. The Court may add to proceedings before it, any person who to have been joined as a party or whose presence is necessary to enable the Court adjudicate upon and make a just determination of the issues in controversy before it. In the case of *Pizza Harvest Limited V Felix Midigo* 2013 eKLR Havelock, J. considered who a necessary party was and stated:

I have also taken cognizance of the case of *Amon v Raphael Tuck & Sons Ltd* (1956) 1 All ER 273, in which Devlin, J held at p. 286-287:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

99. And in the case of *EG v Attorney General; David Kuria Mbote & 10 Others (Interested Parties)* [2021] eKLR the Court of Appeal held as follows:

1. The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in *Hamisi Yawa & 36,000 others vs. Tsangwa Ngala Chome & 19 others* [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -



- a. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
- b. The intended party's presence would enable court to resolve all the matters in the dispute.
- c. The intended party would suffer prejudice in case of non-joinder.
- d. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.

The Court went on to state:

15. While it is not lost to us that the appellant is a member of the LGBTIQ community, we are persuaded that the inclusion of the applicant in the appeal will not in any way prejudice the proceedings or the parties. In our view, the applicant's inclusion will afford the Court an opportunity to hear the various perspectives of the concerned parties which will in turn enable it to conclusively determine the matter.

100. In the case of Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR the Supreme Court stated:

37. From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined (sic) in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

101. It is evident that the issue of joinder is a matter for the discretion of the court which discretion must be exercised in line with set parameters. The proposed 10<sup>th</sup> Petitioner has demonstrated that it has an interest in the matter as it is a stakeholder and beneficiary of water services. As such, its presence will enable the Court get a different view concerning the matter as was aptly stated by the Court of Appeal in the case of EG v Attorney General (supra). It has also been shown that the proposed 10<sup>th</sup> petitioner is fully reliant on the laws and regulations governing water services in the conduct of its business. The decision of this Court will therefore impact it and it will suffer prejudice if not included as party in the Petition. Further, the proposed 10<sup>th</sup> petitioner does not seek to introduce new issues not pleaded



in the Petition. Having considered the foregoing, I am satisfied that the proposed 10<sup>th</sup> petitioner is a necessary party herein and its application for joinder as a petitioner is merited.

102. In the end I make the following orders:

- i. The preliminary objection dated 20.6.23 is hereby dismissed.
- ii. The Applications dated 12.6.23 and 13.6.23 are hereby dismissed.
- iii. The Application dated 5.4.23 is hereby allowed as prayed.
- iv. The Application dated 14.6.23 is allowed. Regen Terem Shpp Limited is hereby joined in these proceedings as the 10<sup>th</sup> petitioner on terms that it shall file and serve its documents by 4.8.23.
- v. No order as to costs.

**DATED AND DELIVERED IN NAIROBI THIS 21ST DAY OF JULY 2023**

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**M. THANDE**  
**JUDGE**

