



**Kimani v Water Services Regulatory Board; Water Services Providers Association
(Interested Party) (Petition 004 of 2020) [2023] KEHC 22356 (KLR)
(Constitutional and Human Rights) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 004 OF 2020
LN MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

PETER KOIRA KIMANI PETITIONER

AND

WATER SERVICES REGULATORY BOARD RESPONDENT

AND

WATER SERVICES PROVIDERS ASSOCIATION INTERESTED PARTY

JUDGMENT

.ARGUMENTS

1. The petition is dated 6th January 2019 but filed in court on the 7th of January, 2020.
2. The petition is commenced by setting out in detail constitutional, statutory and policy foundation for the petition and also the relevant international instruments.
3. The petitioner then expounds on the historical background of water regulation service conservation and provision in this country before finally settling on Sessional paper No. 1 of 1999 on *National Policy on Water Resource Management and Development* which he averred was a key turning point as in addressing issues of water management, water sewerage development, institutional frameworks and financing of the sector.
4. The petitioner alleged that *Water Policy No. 1 of 1999* was given effect by the *Water Act* of 2002 which provided for water services, conservation of water catchment areas, the regulation of water services sector and resolution of disputes. It established:



- i. Water Resource Management Authority
 - ii. Water Trust Fund
 - iii. Water Appeal Board.
 - iv. Water Services Regulatory Board.
 - v. The Water Services Boards, namely:
 - a. Athi Water Service Board
 - b. Tana Water Services Board
 - c. Northern Water Services Board
 - d. Rift Valley Water Services Board
 - e. Coast Water Services Board
 - f. Lake Victoria North Water Services Board
 - g. Lake Victoria South Water Services Board
 - h. Thanathi Water Services Board
5. The Water Act, 2002 created Water Services Boards and Water Service providers were appointed as their agents. The said Water Service providers took over the management of water and sanitation from the defunct municipalities in order to secure water and sanitation revenue for the sector development and including autonomy for effective management of service.
 6. Following the coming into effect of Constitution of Kenya 2010; provision of water services became a devolved function, although not exclusively. The 47 counties applied for transfer of functions to be transitional authority. According to the petitioner, on 9th August, 2013 the Transitional Authority only approved the transfer of function, but did not in effect transfer the functions to the County Governments.
 7. The Water Act, 2016 was subsequently enacted and came into effect on 21st April, 2017. Section 142 (1) and (2) makes it obligatory for the Cabinet Secretary in the Ministry of Water to make regulations on transfer of functions, assets, liabilities and staff in the Water Sector, while Section 152(4) mandates the Cabinet Secretary to publish, in consultation with the county and public sector institutions, a plan of transfer of staff, assets, liabilities and contracts.
 8. According to Section 156 (4) of the Act, regulations made under Section 142 (2) (i) of the Act, requires that the transfer of functions, assets, liabilities and staff be completed within three (3) years following the commencement date of the Act.
 9. Since Section 153 of Water Act, 2016 was stayed; assets managed by the Water Service providers are still under the ownership of Water Services Boards who hold them in trust for the National Government. The Cabinet Secretary of Water has not yet developed a policy on how handover of assets will be done between National and County Governments.
 10. Pursuant to Section 154 of the Water Act, the existing Service providers will continue to operate as County Water Service Providers or Cross-County water service providers within the period that would be specified in the transfer plan by the Cabinet Secretary. The petitioner alleges that there is uncertainty in that Section 154 of the Water Act has a provision to the effect that the period in which Water Service



Providers shall continue to operate as County Water Service Providers is limited to the period specified in the transfer plan of the Cabinet Secretary yet none is in place. Thus he alleges is further compounded by uncertainty in leadership after every election cycle which impacts on management of Water Service Providers.

11. Concerning the Water Services Board (WASREB) Corporate governance guidelines, the petitioner avers that under Section 139 (1) of the *Water Act*, 2016 as read with Article 10 of the *Constitution* of Kenya 2010; the requirement to undertake public consultation in relation to any application made or action proposed to be taken under the *Act* is provided for.
12. That notwithstanding, the petitioner alleged that the said Corporate Management Governance Guidelines, 2018, were enacted in violation of the requirement on public participation as provided for in Section 139 of the *Water Act*, 2016 and Article 10 of the *Constitution*.
13. The petitioner alleges various other specific violations in relation to the said guidelines including: -
 - a. That Water is a concurrent function vested in National and County Government under Forth Schedule hence Article 191 of the *Constitution* applies.
 - b. That the said guidelines do not meet the requirement of democratic and accountable exercise of power as required by the *Constitution* in that they do not provide for self-governance by the people and participation in discussions affecting them as required under Article 174 (a) of the *Constitution*. For instance, Class B shareholders are not allowed to vote in meetings of water service providers and only County Governments and/or its officers are allowed to vote. County Government vote the Chairman's of the Board of Water Service Providers which empowers them to impose a chairman of Board of Directors to the stakeholders thereby mutilating after Article 1 of the *Constitution*.
 - c. That the process of the enactment of the guidelines contravened the citizens right to access to information and freedom of opinion as guaranteed under Article 35 (1) of the *Constitution* by failing to make arrangement for public to obtain copies at reasonable cost of documents relating to application or proposed action which were in possession of the respondent.
14. That specific provisions such 3.2.1, 3.3.2, 3.3.3, 3.3.4, 3.4.3, 3.4.4, 3.4.5 and 3.4.8.4 are unlawful and unconstitutional as they usurp and interfere with the Governance Structure of Water Service Providers and their right to manage their affairs thereby violating Article 1, 10 and 174 of the *Constitution* as read with paragraph II part II of Fourth Schedule of the *Constitution*.
15. Further paragraph 3.4.5.5 that purports to empower County Governors as the sole appointees of the members of the Board of Directors of Water Service Providers.
16. Section 3.3.1 of the regulations purport to limit the institutional model of Water Service Providers to strictly public companies limited by shares yet Section 77 of the *Water Act*, 2016, provides that Water Service providers shall be public limited companies or institutions approved by the respondent.
17. Provisions of paragraph 3.3.2 that proposes that the company which is owned by County Government shall be the one to classify class B Shareholders to entrench public participation which self-defeating as the Water Service provider is a County Government entity and cannot be trusted to choose class B Shareholders who would oversight it. That this arrangement kills the democratic exercise of power participation.
18. Further Class B shareholders have no voting rights and are thus incapable of making any contribution to the Water Service Providers. Other grievances include: -



- a. That the golden share by the National Government is unconstitutional in view of Schedule II as read with Article 6 of the Constitution,
 - b. eligibility criteria for a member of the Board of Directors is discriminatory as it excludes qualified personal not covered under the professional body,
 - c. County Secretary is duplicating role of Company Secretary hence contravenes the Companies Act, 2016,
 - d. Board of Directors is not independent and is susceptible to political interference from the County Government,
 - e. The staff of Water Service Providers have been placed under the County Governments,
 - f. County Governments will own all shares of Water Service Providers in contravention off the fact Water Service is a shared function between County and National Governments.
19. The petitioner thus prayed for the following reliefs: -
- i. That WASREB Corporate Governance guidelines for Water Service 2018 be and are hereby declared as void for being in violation of Article 10 of the Constitution.
 - ii. The gazette notice 11346 of 2019 on Corporate Governance Guidelines for Water Service Sector 2018 be quashed.
 - iii. The WASREB Corporate Governance Guidelines for Water Services, 2018 be and are hereby declared void for violating principles of constitution and being inconsistent with other National legislation.
 - iv. That in the alternative, a declaration of invalidity of WASREB Corporate Governance Guidelines for Water Services, 2018 and in particular for avoidance of Sections 3, 3, 1, 3 up to 3.3.3.9 for being in violation of procedure and principles of constitution and being inconsistent with other National legislation.
 - v. Costs of the petition
 - vi. Such other orders as the Honourable Court shall deem fit.

The Respondent's Case

20. The respondent (Water Services Regulatory Board) responded to the petition through the replying affidavit sworn on 22nd January, 2022 by its Chief Executive Officer, (Engineer Robert Gakubia). He confirmed that the Respondent is the National Regulator of Water and Sewerage Services and having been established in March, 2003 as per of the package on comprehensive reforms in the water sector. Its mandate is derived from Section 70 as read with Section 78 of Water Act 2016 and Fourth Schedule of the Constitution which give National Government a mandate in the water sector. Its main objective is to protect the interest and rights of consumers in provision of water services.
21. He stated that the respondent regulates Water Service Providers by issuing licences for provision of Water Services and oversees the implementation of policies and strategies relating to provisions of Water and Sewerage Services for reasons:
- a. To ensure uniformity of standards in provision of right to water as envisaged in Articles 21 and 191 of the Constitution.



- b. Ensure Kenyans on getting safe water under the right to water.
 - c. Expectation that there should be minimum standards of service quality.
 - d. Affordability and accountability criteria in the right to water in keeping under Article 46 of [Constitution](#).
22. That in line with the exercise of its mandate, it sets rules, approves Water tariffs, enforces standards and offers guidance in the Sector to ensure consumers are protected and have access to efficient, adequate, affordable and sustainable water and sanitation services.
 23. That under Section 72 of [Water Act](#), the respondent is given the power to establish regulations and guidelines to ensure sustainable point of Water Services throughout Kenya and that it is in pursuant of the mandate that the [Corporate Governance Guidelines](#), 2018 whose compliance is mandatory for all water providers were developed. That the aim of these [Corporate Governance Guidelines](#) is to entrench good governance, integrity, transparency and accountability in the leadership and management of water companies/water service providers.
 24. That when process of review of existing Corporate Governance Guidelines for 2009 to pave way for present [Corporate Governance Guidelines](#), 2018 was commenced, all the primary stakeholders who included County Governments and Water Service providers also known and Water Companies were involved as evidenced in the letter Ref. No. WASREB/Copgov/504 Vol. XIII(3) of 8th November, 2018 and draft guidelines report marked RGI.
 25. That subsequent thereto: there was a public consultation notice that was advertised in the Daily Nation Newspaper and also in Kenya Gazette inviting public comments on the contents of the proposed Corporate Governance Guidelines as evidenced the copy of Daily Nation Newspaper of 13th November, 2018 and the [Kenya Gazette Notice No. 12726](#) of 7th December, 2018 exhibited as RG 2 and RG 3 respectively.
 26. Following the said public consultation notice, feedback was received in respect Corporate Governance Guidelines from among others – Water Service Providers Association (Interested Party herein) and the Council of Governors as per the letters Ref. Waspa/Gen/vol. V/2018(166) dated 2nd January, 2019 and letter reference No. COG/2/8 VR 8 (80) OF 26th January, 2019 and exhibited as RG4 and RG5 respectively. That it is upon consideration of all comments that the respondent approved the [Corporate Governance Guidelines](#), 2018 in compliance with the [Constitution](#) and statutory requirements.
 27. The views of interested party were received and considered but in view of legal and policy considerations; the interested party was informed why its recommendations could not be taken on board as per the letter reference No. WASREB/Copgov/504 Vol. Xx Ii (37) dated 23rd January, 2019 and the matrix containing the response exhibited as “RG6”. That consequently, issues/allegations raised in paragraph 47-62 of the petition are in respect to the said police issues that were addressed in the letter aforesaid “RG 6”.
 28. The respondent thus asserted that a reasonable opportunity was availed to the public and the interested party to know about the proposed revised Corporate Governance Guidelines for the Water sector hence the allegation that the petitioner was deprived access to that information is incorrect.
 29. The Respondent thus denied that the process towards formulation of [Corporate Governance Guidelines](#) is contravenes the [Constitution](#) and asserted they were developed within the scope of authority conferred on it under the [Water Act](#), 2016 and are in conformity with the relevant constitutional



requirements. That they are consistent with good governance and rule of law principles and will facilitate sustainable provisions of water services in fulfilment of consumer rights to water.

Petitioner's submissions

30. The petitioner framed three issues for determination namely: -
 - a. Whether the respondent conducted sufficient public participation in the enactment of the *Corporate Governance Guidelines* for Water Services Sector 2018.
 - b. Whether the following provisions impugned of the *Corporate Governance Guidelines* are constitutional namely: 3.3.1, 3.3.1.7, 3.2.1, 3.3.2, 3.3.3, 3.3.4, 3.4.3, 3.4.4, 3.4.5.5 and 3.4.8.4.
 - c. Whether the petitioner is entitled to reliefs sought
31. In respect to the 1st issue, the petitioner submitted that sufficient public participation was not conducted by the respondent prior to enacting the *Corporate Governance Guidelines for the Water Services Sector*, 2018. The petitioner contended this violated Article 10 of the *Constitution* which provides for the participation of the people whenever a proposed public policy decision is required to be made or implemented.
32. In addition, the petitioner cited Section 139 of *Water Act*, 2016 and argued that it was also breached by the respondent for failing implement fully all the requirements provided in that section in carrying out public consultation.
33. In particular, the petitioner cited Section 139(2) which specifies the requirements for a public of notice in respect of proposed action. The notice must be:
 - a. In at least one newspaper of daily circulation; and
 - b. In at least one Kenya Radio Station broadcasting in that locality and
 - c.
 - d) The designated person shall make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the application or proposed action which are in the possession of the designated person.
34. The petitioner further faulted the respondent for only limiting public participation to gathering the views of the Water Service Providers and Council of Governors by deeming them primary stakeholders as indicated in paragraph 16 of the respondent affidavit and proceeding to make policy pronouncement based on their views only instead of giving every person member of public that opportunity to air their views to taking them into account as well. The petitioner relied on the case of *Kenya Small Scale Farmers Forum & Others v Republic of Kenya & 2 Others* (2013) eKLR which laid emphasis on inclusivity and participation of the people as a national value and principle of governance.
35. While acknowledging that the respondent published the intended action in the newspaper on 13th November, 2018; and *Kenya Gazette Notice No. 12726 of 7th December, 2018*; the petitioner contended that the two methods were short of being exhaustive as they did not specifically comply with the requirement for broadcasting in the radio as provided for in Section 139(2) of the *Water Act*, 2016. Further, that no public meeting was held pursuant to Section 139(6) of the *Water Act*.
36. Moreover, the petitioner submitted that the respondent did not avail documents to the public as required in Section 139(4) of the *Water Act*, 2016 and only purported to rely on an on-line platform to fulfil that requirement by providing the particulars of the site where the information could be



obtained via newspaper advertisement of 13th November, 2018. The petitioner submitted that the method chosen by the respondent was meant to limit public participation taking into account that this is a third world country with limited internet connectivity, remote electricity distribution and the fact that only few people have access to smartphones. The Petitioner's counsel thus quipped: -

“...such plight of masses, who are consumers of respondent services inevitably curtail their right to access of information hence locked out in participating to the respondent's agenda. In any case, if citizenry and to participate in such a process, however, remotely, the same cannot be said to be an affordable cost since it will involve travelling long distances to procure services of cyber cafe to the detriment of public contrary to Section 139(4) of *Water Act*, 2016.....”

37. To buttress this position, the advocate for the petitioner relied on the case of *Secretary, Ministry of Information and Broadcasting Government of India v Cricket Association & Another* (1995) 2SCC 161 where the court held: -

“...Democracy cannot exist unless all citizens have a right to participate in the affairs of the policy of the country...”

38. The petitioner argued that the avenue chosen for public participation by the respondent curtailed the petitioners right to information and those of the general public who are consumers of respondent services and thus did not comply with Article 10 and 139 (4) of *Water Act*, 2016. The petitioner relied on the case of *George Ngotho and 26 others v Governor of Kiambu County & 6 others* (2019) eKLR, which emphasized the need for adequate public participation in conformity with Articles 10(2) (a), 174 (d) and (d) and 196 of the *Constitution*.

39. In addition to the above submissions, the petition faulted the specific provisions of the impugned *Corporate Governance Guidelines* namely: - 3.3.1, 3.3.1.7, 3.2.1, 3.3.2, 3.3.3, 3.3.4, 3.4.3, 3.4.4, 3.4.5.5 and 3.4.8.4 and in particular took issue with fact that class B shareholders are not allowed to vote in the meetings of water service providers as only County Government Officers can vote and stated that it is taking away the power of self-governance by the people in participating in the decisions affecting them which is contrary to Article 174 (c) of the *Constitution*.

40. It was contended on behalf of the Petitioner that the provisions in clauses 3.2.1, 3.3.2, 3.3.4, 3.4.3, 3.4.4, 3.4.5.5 and 3.4.8.4 usurp and interfere with governance structure of Water Service Providers and the right to manage their affairs hence violate Articles 1, 10 and 174 of constitution and paragraph 11 part 2 of Fourth Schedule to the *Constitution* and members' right to water and their assets.

41. Further, it was submitted that paragraph 3.4.5.5 is unlawful for empowering the County Government/ County Government to be the sole appointee of the members of the Board of Directors of Water Service Providers and 3.3.1. for limiting the institutional model of Water Service Providers to strictly public companies limited by shares whereas Section 77 of *Water Act*, 2016 yet Section 77 of *Water Act* does not restrict institutional model for Water Service Providers to be companies Limited by shares but public limited companies or any other institution approved by the respondent.

42. It was contended that Clause 3.3.2 which empowers the company owned by County Government to be the one to designate Class B Shareholders to enhance public participation is self-defeating as it empowers the County Government to choose who to hence killing the democratic exercise of power at promoting dictatorship instead of meaningful public participation. Further that clause 3.3.2 is ambiguous for recognizing the importance of Class B shareholders in the supreme structure of governance after an election cycle yet clause 3.4.1 excludes their members of the board. That, whereas



clause 3.3.2.3 aims to achieve public participation transparency and non-discrimination, clause 3.3.2.7 excludes them from the right to vote for Directors at annual general meeting yet they are required to take part in all the meetings.

43. It was argued that the introduction of golden share for national government is unlawful in view of Schedule 2 and Article 6 of the Constitution.
44. That while Article 259 of the Constitution enjoins the court to among others interpret the Constitution in a manner that (a) promotes its proposes, values and principles and in (d); in a manner that contributes to the good governance; hence this article read with Article 10 of the Constitution and applied to Clause 3.3. 2 would show that it does not advance good governance and the court must thus, therefore, not shy away from questioning its constitutionality.

Respondent's Submissions

45. The respondent equally submitted on the three issues that were raised and submitted on by the Petitioner.
46. On whether the respondent conducted sufficient public participation in the enactment of Corporate Governance Guidelines for Water Service Sector 2018, the respondent asserted that its primary stakeholders were involved in the process of review of the guidelines through consultancy report (annexture RG1) which was compiled and shared with the stakeholders.
47. It was the submissions of the respondent that the consultant interacted with County Executive members to gather their views. There was also a public consultation notice that was issued by way of advertisement in the Daily Nation Newspapers of 13th November, 2018 and Kenya Gazette No. 12726 of 7th December, 2018 which invited comments from the public on the contents of the proposed Corporate Governance Guidelines.
48. The respondent submitted that feedback was received in respect of the contents of proposed corporate guidelines from primary stakeholders groups who were the Water Service Providers Association and the Council of Governors.
49. The Respondent after considering the comments received; communicated to the stakeholders the legal and policy consideration that informed the exclusion of the recommendations made by the interested party through its letter dated 23rd January, 2019 – annexture RG 6.
50. The respondent further submitted that it published a notice to the members of general public to give their comments to the draft corporate governance guidelines. It was thus the position of the respondent that the Corporate Governance Guidelines, 2018 did not contravene Article 10 of the Constitution or Section 139 of the Water Act, 2016.
51. The Respondent relied on the case of Khelef Khalifa & 2 Others v Independent Electoral Boundaries Commission & Another (2017) eKLR which set out parameters for attaining the principle of public participation in decision making process as follows: -
 - a. There must be evidence of inclusivity that is to say all stakeholders or those affected by the administrative policy, or law must be given an opportunity to express or ventilate their view well aware of what is at stake.
 - b. The affected people must be given sufficient notice of the nature of the decision to be made and when consultation will be held. The information must be disseminated through public



barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reaches the targeted audience.

- c. The government agency or a public officer in charge of the performance of public participation must of essence take into account the participation of the governed in a quantitative as well as qualitative way. In other words, the engagement must be meaningful and done in good faith rather mere formality.
 - d. Public participation calls for innovation and some level of malleability depending on the nature of the subject matter, for example, culture, geographical issues, logistical constraints e.t.c. the test to be applied is effectiveness and efficiency. The question to be asked is, is the mechanism effective in achieving sufficient public participation.
 - e. Public participation does not mean that everyone must give their views on the issue at hand as to attain such standard at times can be impractical.
52. The respondent also cited the Case of *Nairobi Metropolitan Psv Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* [2014] eKLR where the court stated: -
- “..... to my mind, the process was highly public and there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representation through written memoranda. Further, it does not matter how public participation was effected. What is needed, in my view, is that public was accorded some reasonable level of participation...”
53. The court in that case cited with approval the remarks made by Sachs, J in the *South African Case of Ministry of Health v New Clicks South Africa (PTY) Ltd* where he stated thus: -
- “ what matters at the end of the day a reasonable opportunity is offered to members of public and interested parties to know about the issue and to have adequate say. What amount to reasonable opportunity will depend on circumstances of each case. ...”
54. Also relied on by the respondent was the case of *Mui Coal Basic Local Community & 17 Other v Permanent Secretary Ministry of Energy and 15 others* (2015) eKLR, where the court observed that there ought to be evidence of “intentional inclusivity” in regard to participation by those that are most affected by policy legislation or action, their views are deliberately sought and put into account; although there is no attendant requirement that everyone’s views will be included in the final policy or law as the public body or legislature does not have duty to accept any and every view as this may still or neutralize the exercise of its authority’s or mandate.
55. The respondent contended that Section 77 of *Water Act*, 2016 empowers counties to establish water companies which are special purpose vehicles for provision of Water and Sanitation Services in the counties and County Governments are the owners of these Water Service Providers with all shares vested in them. Consequently, other than general public, all the relevant shareholders that were to be involved in public participation were thus consulted.
56. On the violation of the *Constitution* by Clauses 3.3.1, 3.3.1.7, 3.2.1, 3.3.1, 3.3.3, 3.3.4, 3.4.3, 3.4.4, 3.4.5.5, 3.4.8.4 of the *Corporate Governance Guidelines*, the respondent submitted that the opposite is true as the said guidelines broadly capture the aspirations of Articles 10, 174, 175, 189 and 234 of the *Constitution*.



57. The respondent submitted that they uphold the rule of law and provide an implementation framework of the constitutional provisions that includes stakeholders' participation in the recruitment of Board of Directors of Water Service Providers.
58. That the [Corporate Governance Guidelines](#) provide that the counties should ensure members of the Board are appointed in a transparent and competitive manner and there is stakeholders participation procedure, where all stakeholders in the county are involved in the recruitment process to ensure public has an opportunity to participate in decision making on service delivery that affects them.
59. The respondent submitted that the petitioner is misguided on the participation of Class B shareholders who are appointed from the public and privately registered institutions in the area covered by Water Service Providers as persons directly affected by its operations..
60. The Respondent argued that the representatives of Class B shareholders sit in the Board of Water Service Providers and have right to vote during meetings of the Board including appointment of chairperson of the board but they cannot vote to appoint Directors at the Annual General Meeting as the same is subject to a transparent and competitive recruitment process.
61. The respondent concluded its submission's by insisting that the petitioner is not entitled to any of the reliefs sought.

Submissions by Interested Party

62. The interested party – Water Service Providers Association filed its written submissions dated 7th May, 2021.
63. The interested party reiterated the petitioners submissions on public participation and set out in detail provisions of Article 10(1), (b) and (c) of the [Constitution](#), Sections 102 (a) and (b) as well as Section 139(1), (2), (3), (4) and (5) of the [Water Act](#), 2016 and contended that those provisions of law were not complied with by the respondent in developing the [Corporate Governance Guidelines](#), 2018.
64. The interested party contended that the respondent was categorical that the only stakeholders that it involved in consultations were the Council of Governors and the Water Service Providers Association which was incomplete. The interested party relied on Misc. Application No. 291 & 314 [Republic v Ministry of Agriculture Livestock and Fishers and 3 others ex parte Council of County Governors & Another](#) (2017) eKLR, where the court held that the selective consultation undertaken by the taskforce mandated to come up with the regulation [Coffee \(General\) Regulations](#) 2016 did not amount to public participation as envisioned by the [Constitution](#).
65. It argued that water and sanitation is a matter of concern of each and every citizen and not a matter for the Council of Governors and Water Service Providers only.
66. It submitted that the respondent did not also publish a copy and reasons for decisions it made pursuant to public consultation as required in Section 139(5) of [Water Act](#), 2016.
67. The Respondent contended that the means adopted by the respondent to advertise only through Kenya Gazette and Daily Nation Newspaper leaving out the radio was intended to leave out majority of stakeholders from given their views.
68. Further, the interested party submitted that the respondent failed to consider its comment.



Analysis And Determination

69. Having considered the Petition, the responses to the same, the affidavit evidence relied on and the rivals submissions, it is apparent to me that the issues in this Petition can be summarized as follows:
- a. Sufficiency of the public participation that was carried out by the Respondent prior to publication of [Corporate Governance Guidelines for Water Sector](#), 2018
 - b. The Constitutionality of specific clauses in the Corporate Governance Guidelines, 2018 that were singled out by the Petitioner
 - c. If the Petitioner is entitled to the reliefs sought.
70. The basis for the requirement for public participation is Article 10(2) of the [Constitution](#) which declares democracy and participation of the people as a national values and principles of governance and by dint of Article 10(1), the [Constitution](#) directs that it shall bind state organs, public officers and all persons whenever any of them: -
- a. Applies or interprets the [Constitution](#).
 - b. Enacts, applies or interprets any law
 - c. Makes or implements public policy decisions.
71. This article 10 has been extensively applied in judicial interpretation of the [Constitution](#) by the court over the years. In the [Law Society of Kenya v Attorney General](#) (2016) eKLR a three Judge Bench of the High Court held that public participation exemplifies the popular sovereignty enshrined in Article 1 of the [Constitution](#) whereby citizens are provided with an opportunity to directly give views on matters affecting them prior to those actions being taken by those in authority.
72. Consequently, public engagement or involvement of the citizenry on matters of interest to them is not discretionary by a public entity or authority but a mandatory obligation demanded by the [Constitution](#) under Article 10 of the [Constitution](#). The requirement for consultation is illustrative of the people's exercise of sovereignty through their involvement in matters of interest to them.
73. In the present case, the respondent asserts that it carried out public participation as required by Article 10 of the [Constitution](#). However, the petitioner insists that what the respondent calls public participation was very limiting not only in terms of the method used to carry out the public participation but also on the extent those consulted. The Petitioner contended that it did not even meet both the Constitutional and statutory requirements as provided for in Section 139 of [Water Act](#), 2016 since the respondent merely confined itself to only two stakeholders whom it referred to as its 'primary stakeholders' to the exclusion of the general public who are the consumers of water.
74. The petitioner argued that placing a newspaper advert requiring members of public to visit a web-site in order to access the materials for which their views were required was a deliberate design to minimize participation to the select few and that it went against Section 77 of [Water Act](#), 2016, which in addition to Newspaper Advert, required that radio broadcast to be employed in dissemination of the proposed action.
75. Nevertheless, on its part, the respondent contended that the means it employed namely, 1st firstly, using a consultant to gather views and compile a report, then the newspaper advert seeking public views and the Kenya Gazette advertisements were sufficient means of obtaining feedback on the proposed policy decision.



76. The lingering question, therefore, is, Was there sufficient public participation that carried out by the respondent prior to the publication of [Corporate Governance Guidelines for the Water Sector](#), 2018?
77. That brings the issue of threshold. What is the test of determining that sufficient public participation has taken place? Do we have a public participation meter? My answer to this is twin-fold.
78. Firstly, if the law provides for specific step by step conditions that must be fulfilled in carrying out public participation, strict compliance with all the legal steps becomes the measure for determining the sufficiency of the public participation as provided by the statute since the court will just be ticking those boxes by considering the evidence that is tendered towards fulfilment of the requisite statutory conditions.
79. If, however, there are no specific steps laid out by the law except for the general requirement of public participation; the determination of whether the level of participation carried out was sufficient will be a question of fact to be decided on the basis of reasonableness test. The parameters applied in [Khelef Khalifa & 2 Others v Independent Electoral and Boundaries Commission & Another](#) (2017) eKLR (*supra*) would thus come in handy.
80. In the present case, it is my considered view that Section 139 of [Water Act](#), 2016 specifically gives effect to the principle of public participation under Article 10 of the [Constitution](#).
81. It is necessary to set out the portions of the said Section 139 of the [Water Act](#), 2016 that I consider relevant to this determination.

Section 139(1) states:

1. A requirement imposed by or under this [Act](#) for a person in this section referred to as the designated person to undertake public consultation in relation to any application made, or action proposed to be taken under this [Act](#) shall be construed as a requirement to ensure that this section is complied with in relation to that application or action.
2. The designated person shall publish a notice in relation to the application or proposed action —
 - (a) in at least one national newspaper of daily circulation; and
 - (b) in at least one Kenyan radio station broadcasting in that locality.
- 3) The notice shall —
 - (a) set out a summary of the application or proposed action;
 - (b) state the premises at which the details of the application or proposed action may be inspected;
 - (c) invite written comments on or objections to the application or proposed action;
 - (d) specify the person or body to which any such comments are to be submitted; and s
 - (e) specify a date not earlier than thirty days after publication of the notice by which any such comments are required be received.
- 4) The designated person shall make arrangements for the public to obtain copies, at reasonable cost, of documents relating to the application or proposed action which are in the possession of the designated person.



- 5) The designated person shall consider —
- (a) any written comments received on or before the date specified under subsection (3) (e); and
 - (b) any comments whether in writing or not received at any public meeting held in relation to the application or the proposed action at which the designated person was represented or pursuant to any other invitation to comment.
82. The court must thus determine whether the evidence provided by the respondent, which the petitioner contests, fulfilled the above statutory requirements in regard to public consultation as the section is intended to give effect to provisions of Article 10(2) of the *Constitution*.
83. I will set out the descriptive account provided by the Engineer Robert Gakubia, Chief Executive Officer of the 1st Respondent in regard to the public consultation process that the respondent carried out as stated in his affidavit dated 22nd January, 2020, paragraphs 14-18. He stated as follows: -
- “ 14. That in order to address governance challenges affecting the water sector in Kenya, the Respondent commenced the process of review of the Corporate Governance Guidelines by engaging the primary stakeholders namely County Governments and Water Service Providers otherwise water companies. See annexed copy of the letter Ref WASREB/Copgov/504 Vol. Xxiii/ (3) dated 8th November 2018 and the Draft Guideline and Report of the Consultant with regard to interactions with stakeholders inter alia County Executive Committee Members in charge of Water Affairs marked as RG 1.
 15. That the Respondent subsequently issued Public Consultation Notice by way of advertisement through the Daily Nation newspaper and the Kenya Gazette inviting comments on contents of proposed Corporate Governance Guidelines See annexed copies of the public consultation notice as published in Daily Newspaper of 13th November 2018 and copy of *Gazette Notice No. 12726 of 7th December 2018* marked as RG 2 and RG3 respectively.
 16. That following public consultation notices aforementioned the Respondent received feedback on the contents of the proposed Corporate Governance Guidelines, from primary stakeholder groups namely Water Service Providers Association (herein after the interested party) and the Council of Governors. See annexed copies of letter Ref: Waspa/Gen/Vol.v/2018(166) dated 2nd January 2019 and Letter Ref. COG/2/8 VOL8(80) dated 25th January 2019 marked as RG 4 and RG5 respectively.
 17. That after careful consideration of all comments received from Water Service Providers Association and review of the proposed guidelines, the Respondent approved the Corporate Governance Guidelines, 2018 in compliance with the Constitutional and the statutory requirements.
 18. That the Respondent acknowledged receipt of views received from the interested party herein and upon consideration did communicate to the Interested Party the legal and policy considerations that informed exclusion of recommendations made by the interested party. See annexed letter Ref.



Wasreb/Copgov/504 Vol.xxiii/ (37) dated 23rd January 2019 and the matrix detailing response by the Respondent marked as RG 6.”

84. From the foregoing revelation by the respondent’s Chief Executive Officer, it is quite evident that the respondent was only interested in the views of two main stakeholder whom it called primary stakeholders and engaged throughout the consultative process. These were the County Government, through the Council of Governors one hand and the Water Companies, also known as Water Service Providers. Otherwise called “primary stakeholders”. What baffles me however is members of public or th general public who are consumers of the water or services that were being provided are not considered as fallig in that category. Were they secondary?
85. Indeed, at paragraphs 17 of the affidavit comfotably confirms that the it published the Corporate Governance Guidelines for the Water Sector after considering the feedback received from its two primary stakeholders. No mention at all is made of any views received from members of the public prior to making that decision or whether public views counted despite the fact that in paragraph 15 it is indicated that on 13th November, 2018 the respondent published an advertisement in the Daily Nation calling out the members of public to give comments on the review of the proposed Corporate Governance Guidelines. The said notice annexed as RG3 reads: -

“Public Participation On The Corporate Governance
Guidelines, 2018

AS per the requirements of Article 10 of the Constitution of Kenya, 2010 and section 139 of the Water Act, 2016, Water Services Regulatory Board invites comments on the 2018 Corporate Governance Guidelines for the water services sector.

The Guideline amends the Guidelines issued in 2009 and published in 2010 through Gazette Notice No. 7045 of 18th June, 2010 and have been prepared after a consultative process with the primary stakeholders that include the CECM Water Affairs Committee of the Council of Governors.

The purpose of the Guideline is to embed minimum standards of governance in the oversight and leadership in water service provision in the Republic of Kenya. Good governance, public participation, efficiency and economy are critical in creating sustainable water service provision where consumer protection is paramount.

The soft copy of the Guideline is to be found <https://wasreb.go.ke/corporate-governance-guidelines/>

The public is invited to submit written comments within the next thirty (30) days to the following email address: info@wasreb.go.ke.

Hard copies shall be sent to:

Chief Executive Officer,
NHIF Building, 5th Floor, Wing A
Box 41621-00100,

Nairobi

Signed by

Chief Executive Officer



Water Services Regulatory Board”

86. The above notice was issued in compliance with Section 139(2) (a). However, there is no mention by the respondent, apart indicating the views of ‘primary stakeholders’ were considered, that there any views by the public or if such public views were considered alongside those of the ‘primary stakeholders’. There is no record whatsoever that any such views were captured let alone being given any consideration apart from the mere advertisement. My view is that there can be no greater primary stakeholder than a consumer of a product. As was held in *Okiya Omtatab Okoiti v. Refugee Affairs Secretariat (RAS) Kenya & 2 others* [2020] eKLR:

“...Public participation in the decisions of administrators is confirmed as a national value and principle of governance under Article 10 of the *Constitution*, and therefore everyone would anticipate that all policy decisions and administrative actions would involve their input. By failing to hold any public forum to gauge the concerns and obtain the input of the refugee community, the respondents did infringe the legitimate expectation held by the refugees that the Guidelines governing the election of their leaders would be subjected to public participation...”

87. It is the finding of this court that there cannot have been adequate public consultation without direct engagement with the public who are the consumers. Public entities must now realize that this is a new dawn where the public cannot be taken for granted in making decision on matters of interest to them. No evidence was provided, despite the being invited to submit written memoranda that any such memoranda was sent by members of general public. No meaningful effort was made to engage the public on radio or through public barazas to ensure its participation. The consultant did not bother to collect public views, he merely confined himself to the views of the Council of Governors and the Water Companies/Water Service Providers.

88. To this extent, I would agree with the petitioner that there was inadequate public consultation. The notice inviting public comments was immaterial as the respondent appears to have put it there merely for the sake it and did not bother to find out if any views were presented by members of public pursuant to the notice. It is thus safe to hold that the input by the members of the public was not taken into account prior to the development of *corporate governance guidelines for water sector*, 2018. In *Kenya Human Rights Commission v Communication Authority of Kenya & 4 others*, Constitution Petition No. 86 of 2017, the court held 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...”

89. Further, It is noteworthy that the *Water Act*, 2016 uses the conjunctive word “and” immediately after the newspapers advert, hence the designated person in this case “the respondent” ought to have advertised the proposed action both in the newspaper and on radio, which was not done. This relevant statutory provision was thus contravened as well. Failure to comply with this statutory requirement in facilitating public participation means that the legal requirement set out by the Act as measure for ensuring meaningful public participation was also not met by the respondent.



90. The failure by the respondent to demonstrate that members of general public were actively engaged in development of these guidelines deprives them of their legitimacy. As was observed in *Republic v Ministry of Finance & Another Ex parte Nyong'o* Nairobi HCMCA No. 1078 (HCK) 2007 KLR: -
- “...It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests...”
91. The respondent cannot speak of the *Corporate Guidelines* being developed in the interest of the public when it is evident that its input was given a wide berth. The general public was not a factor as there is no evidence that its views were considered by the respondent prior to making the decision in question.
92. The upshot of the foregoing is that the said *Corporate Government Guidelines* by the respondent fall short of the constitutional and statutory requirements as already highlighted in the foregoing. Consequently, even without going through a detailed scrutiny of the specific clauses in the said *Corporate Governance Guidelines* for the Water Sector 2018 that were outlined by the petitioner also contended contain unconstitutional clauses, it is the finding of this Court that on the basis of lack of carrying adequate public participation alone, they have failed the constitutional and statutory test and cannot therefore stand.
93. Consequently, the court finds that this petition succeeds. The result is that the petitioner is entitled to the following reliefs: -
- i. That WASREB *Corporate Governance Guidelines for Water Service*, 2018 be and are hereby declared void for violating Article 10 of Constitution and Section 139 of the *Water Act*, 2016 on Public Participation.
 - ii. The Gazette Notice 11346 of 2019 on *Corporate Governance Guidelines for Water Service Sector*.
 - iii. Each party to bear its own cost of the suit

Dated, signed and delivered at Nairobi this 22nd day of September, 2023.

L N MUGAMBI

JUDGE

