REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION NO 54 OF 2018

GEORGE NGOTHO & 26 OTHERS…… PETITIONERS

VERSUS

THE GOVERNOR OF KIAMBU COUNTY

& 6 OTHERS……..…… RESPONDENTS/INTERESTED PARTIES

CONSOLIDATED WITH

PETITION NO 52 OF 2018

1. WILSON KABATA

2. MINNIE MATHWE

3. JOSEPH GAKANGA.....PETITIONERS

VERSUS

1. COUNTY GOVERNMENT OF KIAMBU

& 2 OTHERS.....RESPONDENTS

AND

PETITION NO 41 OF 2018

KINUTHIA WAMWANGI & 2 OTHERS.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF KIAMBU

& 3 OTHERS .....RESPONDENTS/INTERESTED PARTY

JUDGMENT

1. On 22.11.18 this Court ordered the consolidation of three petitions, namely, **Petition No. 41 of 2018** by **Kinuthia Wamwangi and 2 others, Petition No.52 of 2018** by **Wilson Kabata and 2 others** and **Petition No. 54 of 2018** by **George Ngotho and 26 Others**. Petition 54 of 2018 was appointed the lead file.

2. In the Petition No. 41 of 2018, the Petitioners have named the County Government of Kiambu, the Water Services Regulatory Board **(WASREB),** the Attorney General as the 1st to 3rd Respondents respectively. Also enjoined as an Interested Party is the Thika Water and Sewerage Company Ltd. In the **Petition No. 52 of 2018,** the Respondents are the County Government of Kiambu and the County Executive Committee Member, Water Sanitation and Environment Kiambu County.

3. In **Petition No. 54 of 2018,** the Petitioners have sued four Respondents, namely, the Governor, County Government of Kiambu, the

County Government of Kiambu, the County Executive Committee Member in-charge of Water, Environment, Energy and Natural Resources and the Attorney General (the 1st to 4th Respondents). Also enjoined as the 1st to 3rd Interested Parties are the Ministry of Water and Irrigation, Water Resources Authority, and WASREB, respectively.

4. Multiple averments make up the rather lengthy Petition in **Petition No. 41 of 2018**. The gravamen of the Petition is distilled in the reliefs at the end of the Petition. Principally, the Petitioners are aggrieved by the provisions of Section 4(1) of the Kiambu County Water and Sanitation Services Act (hereafter the Act) and the Amendment thereto in 2018 with regard of Section 4(1) of the Act, the Petitioners contend that the section is unconstitutional, unlawful, null and void because:-

a) it fails the requirement for the promotion of democratic and accountable exercise of power as required under Article 174(a) of the Constitution.

b) it does not provide for self-governance by the people and their participation in decisions affecting them as required under Article 174(c) of the Constitution.

c) it fails to recognize the rights of counties to manage their own affairs as envisaged under Article 174 (d) of the Constitution.

d) it does not promote social and economic development and provision of proximate easily accessible services to the people under Article 174(f) of the Constitution.

e) it infringes on the right to clean and safe water in adequate quantities for affected users, a right guaranteed under Article 43 (1) (d) of the Constitution, and the process of its enactment was not compliant with Sections 77, 86 and 97 of the Water Act.

f) it infringes upon consumer rights guaranteed under Article 46(1) (a) (b) and (c) with regard to quality of goods, consumer information on goods and services safety and economic interests, and its enactment was in violation of mandatory requirements of Section 9(4) of the Consumer Protection Act and of the Competition Act.

5. With regard to the Kiambu County Water and Sanitation (Amendment) Act 2018 (hereafter the Amendment Act) the Petitioners assert that it is unconstitutional unlawful, null and void for the following reasons:-

a) It was enacted in violation of the requirement for public participation in Respect of legislative Process, as provided for under Article 196 (b) of the Constitution and Section 139 of the Water Act.

b) It infringes upon the right to clean and safe water in adequate quantities as guaranteed under Article 43(d) of Constitution and the enactment therefore did not comply with the mandatory provisions of Section 77, 86 and 98 of the Water Act.

6. The Petitioners therefore seek declarations that Section 4(1) of the Act and the Amendment Act are unlawful, unconstitutional, null and void. They also seek a declaration that the Amendment Act be amended to recognize the nine existing water service providers in Kiambu County; a declaration directed at **WASREB** to ensure compliance with the Constitution and the law in relation to water services in Kiambu County; and a declaration that "any amalgamation, dissolution, fragmentation or dismantling" of the Thika Water and Sewerage Company (Interested Party) be undertaken in conformity with the Constitution, the Water Act, the consumer and competition Acts.

7. The Petition is supported by a brief affidavit sworn by the 1st Petitioner who asserts to bring the Petition in the interest of water consumers within the jurisdiction of the Interested Party and in Kiambu County. He deposes inter alia that the Interested Party is one of nine limited liability companies within Kiambu County created for the purpose of provision of water services in their respective jurisdictions; that it is a stable and well-managed company and that the Amendment Act is inimical to the enjoyment of the fruits of devolution by the Petitioners and other water users in the jurisdiction of the Interested Party.

8. A response and Replying affidavit to this Petition were field by the Interested Party on 9/7/18 principally supporting the Petition and highlighting in particular:

a) Non -participation by the Interested Party in the passing of the Amendment Act.

b) Opposition to purported dissolution of the Interested Party which is a private company under the Companies Act with wide representation, through an act of the County Assembly.

c) That the nine water services providers in Kiambu County are licensed by **WASREB**.

9. On 17/7/18 **WASREB** filed its Replying affidavit, sworn by **Engineer Robert Gakubia**, the Chief Executive Officer. He deposed that the Water Act 2016 was jointly enacted by both houses of Parliament as the management, use and protection of water is the concurrent responsibility of the county and national government; that the chief role of **WASREB** is the protection of the interests and rights of consumers of water and related services, including the prescription of national standards for water provisions services and asset development for water services providers and standards of commercial viability of such providers.

10. That at devolution, all water service providers were subsumed under county governments to provide water services on their behalf as provided in Section 154 of the water Act, 2016; that **WASREB** took issue with the Amendment Act regarding its rationale and want of public participation and issued a public notice **"RG1"** in the print media; that while proper merging of water service providers to large water companies may achieve economies of scale and lead to lower prices for consumers, good governance was essential especially through the

active participation of local consumers and that the Petitioners' concerns are legitimate.

11. On 25th September 2018, **WASREB** filed a Further Affidavit sworn by the Chief Executive Officer Engineer **Robert Gakubia** reiterating depositions in initial affidavit and in addition contending that:

i) despite the water service providers existing prior to devolution being subsumed in the county governments, the transition is incomplete as transfer from the national government of physical assets, liabilities including land, infrastructure transmission lines, trunk services has not been completed, and that though still vested in the national government these facilities and assets are used by water service providers to provide water services to consumers, pursuant to an agreement with Athi Water Services Board.

ii) that **WASREB** in April 2018 issued national guidelines to guide the clustering of water companies under S. 77 of the Water Act annexure **"RG 2"**, which include a mandatory requirement for feasibility study.

iii) that the process leading to the enactment of the 2015 County Act and clustering of all water companied into two Companies (as provided in Section 4 (1) was participatory and entailed a professional study, and that **WASREB** was fully involved.

iv) that the Amendment Act creating one water company was a unilateral departure from the process in (iii) above and did not entail proper study or assessment of viability of or rationale for departure, did not involve comprehensive public participation, and **WASREB** was also excluded

v) that the county government had embarked on the attempted winding up of existing water service companies without the involvement of **WASREB** and Athi Water Services Board and in contravention of the law, namely the Water Act and the Companies Acts

vi) that the merger of 8 water companies into one entity without a coherent plan is inconsistent with best practices on mergers and violates the national values of good governance and viability standards as envisaged under the Water Act. Ultimately, **WASREB** supported the Petition.

12. The replying affidavit in respect of the 1st Respondent was sworn by **John Muhia,** who describes himself as the Chief Officer in charge of Water, Environment and National Resources at the County Government of Kiambu. It was filed on 13th June, 2018. The gist of the affidavit is that the petition lacks merit and fails to demonstrate the rights violated and the manner thereof; that the impugned Act and Amendment Act do not purport to dissolve the existing water companies but to rationalize the management and delivery of water and sanitation services through the creation of an "umbrella" company with regional offices within the country as envisaged in Section 59 of the Act; that the integration of water services management was preceded by a study conducted by the County Government in conjunction **GIZ** and the world Bank **[Annexure "JMI").**

13. It is contended that there was adequate public participation at County level and that members of the public and the nine water services providing companies participated in the process; that the object of the integrated water resources management is to rationalize delivery of water services to make them efficient and to achieve economies of scale. Further that, the viability of the integration has been ascertained; that the breadth of the Interested Party's area of coverage is inconsistent with devolution; and that the existence of multiple water service providers is inconsistent with devolution, uneconomical, unsustainable and not an achievement of devolution and does not accord with the provisions of Articles 176(2) and 174(f) of the Constitution regarding the decentralization of functions and provision of services by the county government.

14. Defending the integration, the deponent says its aim is to achieve the equitable distribution of water resource in a sustainable and effective manner will not affect the county's funding of services and infrastructural development or the standard and quality of water; that the county has developed a policy frame work to guide it as well as communities and water companies for long-term resource sustainability **[annexure "JM5"].**

15. Moreover, it is asserted that on the facts of this Petition the Consumer Protection Act and the Competition Act do not apply; and in any event, this court lacks jurisdiction under the said acts. Conversely, it is further deponed that disputes relating to water regulation ought to be resolved by the institution created under the Water Act 2016.

16. It is deposed that the impugned Amendment Act recognizes all the existing water service providers, retaining them as regional offices of the proposed Kiambu Water Company whose composition reflects diversity and includes the leadership of the said nine water companies. It is contended that the petition is actuated by personal reasons and is contrary to the objects of devolution.

17. On his part, the Attorney General [3rd Respondent] opposed the Petition through grounds filed on 19th October 2018 to the following effect. The Petitioners have not demonstrated how their constitutional rights have been violated or supplied evidence or a factual basis to that effect; the Petitioners have misinterpreted the Constitution and their rights are not absolute; and that the petition lacks merit and does not raise a cause of action against the Respondents.

18. Also on record is a further affidavit by the 1st Petitioner filed on 21/11/18, which principally reiterates the contents of the Supporting affidavit, some legal argumentation, and assertions to the effect that the integration of water services will deny the county residents accrued benefits of devolution and that centralization of services is contrary to the provisions of Section 77, 86, and 97 as the Water Act 2016.

19. The Petitioners in **Petition 52 of 2018** are **Wilson Kabata and 2 Others** (suing as officials of **Juja Farm Water Supply Society**) hereinafter the Society. Sued in the petition are the County Government of Kiambu, the County Executive Committee Member responsible for water, Sanitation and Environment, Kiambu County (1st and 2nd Respondents). The Petitioners describe their society as one registered

under the Societies Act and licensed under the Kiambu Water and Sanitation Services Act to operate as a private county water project, and is funded through its membership; that the Society has contracts with third party water service providers such as Water Resources Management Authority (WARMA) and through its business earns the Society and its members a livelihood.

20. It is further averred that subsequent to being denied approval in respect of the Kiambu Water Company by **WASREB,** The 1st Respondent amended the Act with the object of wresting control from private water companies in Kiambu; that the Amendment act was enacted without due public participation thereby violating the Petitioners legitimate expectations under Article 47 and that the Petitioners were discriminated through exclusion, contrary to Article 27 of the Constitution.

21. It is therefore averred that the Amendment Act contravenes Articles 10, 27, 47, 174, 196 of the Constitution and Section 3, 87 and 91 of the County Governments Act. The Petitioners therefore pray for a declaration that Section 22A of the Amendment Act is unconstitutional. The Petition is supported by the affidavit of **Wilson Kabata** which repeats *seriatim* the averments contained in the Petition.

22. The Respondents replying affidavit was sworn by **John Muhia** who described himself as the Chief officer in charge water, Environment and Natural Resources, Kiambu County Government. Admitting the legal status of the Juja Farm Water Supply Society as a county water entity, the deponent denies any intention to alienate from the Society its management of water projects and asserts that the integration envisaged under the Amendment Act does not target private Community Water Service providers but rather, the nine major water companies in the County.

23. Asserting the functional responsibility of the county government to oversight the utilization of water resources under the management of societies, he depones that the Amendment Act was enacted pursuant to proper public participation and that Section 22A aimed to enhance accountability, good governance, and financial prudence by and practical assistance to the county projects, all in tandem with the objects of devolution. The deponent contends that neither the Act nor the Amendment Act contain unconstitutional provisions. Terming the petition as imprecise and without merit the deponent urges for its dismissal.

24. In a further affidavit sworn by **Wilson Kabata** the deponent asserts that as a registered society duly licensed and operating under its own Constitution, **[annexure WK1]** Juja Farm Water Supply Society does not need external oversight and interference by the county government in purported exercise of its functions under its constitution and that, contrary to the depositions in the Replying affidavit, the amendment introduced through Section 22A of the Amendment Act as read with S.4 of the principle act applies equally to private and public water service providers. Concerning public participation, the deponent reiterates that it was inadequate and in violation of the relevant constitutional and statutory requirements. The deponent further reiterates depositions contained in the supporting affidavit.

25. The 27 Petitioners in Petition 54 of 2018 approach the court through their respective officials, and are variously described as county, self-help water projects, trusts and associations. They have sued the Governor Kiambu County, the County Government Kiambu, the County Executive Committee member in charge of Water, Environment, Energy and Natural Resources and the Attorney General. [1st to 4th Respondents respectively]. Also enjoined as Interested Parties the Ministry of Water and Irrigation, Water Resources Management Authority and **WASREB** [1st to 3rd Interested Parties respectively]. I notice that the Petitioner in Petition 52 of 2018 is included in this petition as Petitioner No. 6.

26. It is averred that all the 27 Petitioners are variously registered as societies, under the Societies Act, as self-help groups and community based organizations **(CBOS)** under the Ministry of Labour/Social Society and Services and the Ministry of Gender, Children and Social Development, Ministry of East African County, Labour and Social Protection, as projects under the Ministry of Home Affairs, National Heritage and Sports, Ministry of Gender, Children and Social Development and trust under the Trustees (Perpetual Succession) Act. It is averred that the Petitioners' core function/objective is the supply of clean, safe water inadequate quantities to their respective members, pursuant to the Water Act 2016 and the Kiambu County Water and Sanitation Act and are duly licensed by the relevant regulatory authorities including **NEMA, WARMA** and **WASREB,** for that purpose.

27. It is averred further that the Petitioners are governed through elected officials on behalf of the members and for their benefit; that the Petitioners own assets including land and boreholes for purposes of supplying water to members at a minimal cost, in promotion of the realization of the right in Article 43(1) (d) of the Constitution. Asserting the unique nature of this right, the Petitioners contend that the 2nd Respondent was obligated to consult extensively with stakeholders, including the Petitioners and consumer organizations; that the said Respondent failed to conduct adequate public participation as prescribed in Articles 10 and 196 of the Constitution and Section 139 of the Water Act 2016.

28. The Petitioners aver that some of the provisions of the Amendment Act, namely, 22A (3), (4), (5), (6) and (8) are unlawful and unconstitutional in so far as they purport to usurp and interfere with the governance structure of the Petitioners and their right to manage their affairs thereby violating Article 174(d), 185 and 186 of the Constitution as read with paragraph 11 Part 2 of the Fourth Schedule to the Constitution, and the members' right to water and to their assets. That the impugned enactments failed to consider/neglected views of stakeholders.

29. Also challenged for want of constitutionality are Sections 72(1)(e), 74, 77, 79, 80, 86(2) (a) of the Water Act of 2016 for promoting unfairness, inequality and discrimination in provision of water services contrary to the provisions of Articles 10(2)(b) and 27(1) and for being oppressive to the Petitioners. The Petitioners aver that in failing to conduct adequate public participation in respect of the Amendment Act, the 2nd Respondent contravened the principles of public participation espoused in Article 10 and 196 of the Constitution as read with Section 87 and 91 of the County Governments Act and Section 139 of the Water Act 2016.

30. It was averred further that, that the process of the enactment of the Amendment Act contravened the objective and principle of devolution espoused in Article 174(c) and (d), the Petitioners' right to access to information and freedom of opinion as guaranteed under Articles 32(1), 35(1); that the rights to privacy and to freedom of association and protection of property under Articles 31 and 40(1) and (3) as read with Article 174(d) and the right to clean , safe water in adequate quantities under Article 43(1) (d) were violated, particularly by the enactment of Section 22A of the Amendment Act.

31. Regarding the concurrent function in respect of water, vested in the national and county government under the Fourth Schedule to the Constitution, the Petitioners invoke Article 191 of the Constitution and aver that Section 22A of the Amendment Act is in conflict with Sections 72(1) (b) and 159 of the Water Act 2016 as read with Section 117(1) of the County Governments Act.

32. The Petitioners therefore seek declarations to the effect that:

i) the Respondents' failure to conduct adequate participation violates Article 10 as read with Article 196 and Section 139 of the Water Act 2016 in that the provisions of Section 22A (3), (4), (5), (6) and (8) of the Amendment are unconstitutional

ii) that Section 22A (3), (4), (5), (6) and 8 are unconstitutional in so far as they contravene Articles 10(2) (b), 27(1), 31, 32(1) 35(1), 36, 40 and 191 of the Constitution.

iii) that provisions of Section 22A are inoperative in so far as they are in conflict with provisions of the County Governments Acts, Societies Act, Water Act and regulations made thereunder.

iv) that Sections 74 and 77 of the Water Act contravene Articles 10 and 27(1) as read with Article 185 and 186 of the Constitution, and that the provisions of Section 72 (1)(e); 79, 80, 86(2) (a) of the Water Act 2016 contravene Articles 10(b) and 27(1) of the Constitution and are therefore unconstitutional.

33. The Petitioners also seek a permanent injunction to restrain the Respondents from enforcing Section 22(3), (4) and (5) of the Amendment Act and further declarations.

34. The petition is supported by the affidavit of **George Ngotho** described as the secretary of the 1st Petitioner, and sworn in his own behalf and on behalf of all the Petitioners. The affidavit repeats in deposition form the substance of averments in the petition.

35. The Respondents' Replying affidavit was sworn on 12th June 2018, by one **John Muhia** for the 3rd Respondent, on his own behalf and on behalf of the 1st and 2nd Respondents, and is to the following effect. That water and sanitation services being devolved functions, fall within the aegis of the county government; that the intention of the county government is to assist the existing water service companies to put up infrastructure through financial assistance and subsidy in respect of services. Hence, the County Government requires representation in the water companies; that the Amendment Act the bill was publicized and public participation facilitated; that different entities including the nine water companies and members of public gave views.

36. The deponent defends the representation of the county government as provided in the impugned section 22A of the Amendment. Stating that it is imperative that the county government be involved in the provision of water services and water companies, particularly in view of issues such as cross-border regulation, infrastructure development and financing of the companies, as well as standardization of the quality and adequacy of water; that indeed the water companies are admittedly not self-sustaining as evidenced by their engagement with third parties.

37. It is further deposed that Act and Amendment act are constitutional and no demonstration has been made by the Petitioners to the contrary; that the Petition lacks merit, is imprecise as to the provisions of the Constitution infringed and the manner thereof.

38. The Attorney General (4th Respondent) and the Ministry of Water and Irrigation [1st Interested Party] filed grounds in opposition to the Petition to the effect that:

a) the Petition does not demonstrate the alleged conflict between Sections 22A (3), (4), (5), (6) and 8 of the Amendment Act along with Sections 72(1) (e), 74, 77, 79, 80 and 86 (2)(a) of the Water Act 2016 and the cited provisions of the Constitution

b) the Amendment Act was enacted pursuant to Article 185 as read with Section 11(b), Fourth Schedule granting the County Assembly power to enact legislation necessary for or incidental to the effective performance of the functions and powers of the county government.

c) Regulations of a society cannot supersede the provisions of the county legislation impugned herein.

The 4th Respondent and 1st Interested Party therefore sought the dismissal of the Petition.

39. **WASREB** filed a Replying affidavit through the **CEO Robert Gakubia**. To the following effect. **WASREB** is the national regulator in respect of water and sewerage services, the principle object being the protection of the interests and rights of water consumers. That WASREB's mandate is set out in Section 70 as read with Section 72 of the Water Act 2016, pursuant to the concurrent relevant mandate of

the national and county government as found in the Fourth schedule to the Constitution. That the functions of **WASREB** entail regulation through licensing of water services providers and the implementation of relevant laws, policies and strategies, prescribing and enforcing standards, rules and regulations and approving tariffs, with the aim of achieving consumer protection and enhancing their access to efficient, adequate and sustainable water services.

40. With regard to the impugned Amendment Act the deponent cites the provision of Article 43(1) (b) and (d) as read with Article 21(2) of the Constitution, and deposes that the Water Act 2016 provides the legal framework for regulation, management and development of water resources, water and sewerage services; that Section 94(1) protects all persons' and communities' access to water, regardless of whether the provision of such services is commercially viable and asserts that the county governments are duty bound to take measures for the provision, in rural areas not considered commercially viable, of quality water services directly or through the management by county organizations or private persons that all entities engaged in water service provision.

41. That water service providers must be licensed by WASREB in order to assure *inter alia* uniformity in standards in quality of water, affordability and consumer protection. The deponent further denies that 3rd Interested Party was privy to alleged consultations by the 1st – 3rd Respondents in connection with the Amendment Act or the rationale behind the amendment; that Sections 74 and 77 of the Water Act embody the legal framework envisaged in Article 191(2) and (3) regarding uniformity in application of legislation establishing norms and standards for service provision and that the impugned provisions of the Water Act 2016 are not unconstitutional. Finally, it is deposed in support of county governments that they have constitutional obligation to implement national government policies in respect of natural resources, environmental conservation as provided in Part 2 of the Fourth Schedule to the Constitution.

42. For its part, the 2nd Interested Party (WARMA) responded by filing a motion on 20th June 2018, seeking that its name be struck off from the Petition, principally because no cause of action was disclosed against it in Petition 54 of 2018 and that its mandate under the Water Act 2016 is to act as an agent of the national government in the formulation and enforcement of Standards, Procedures and Regulations *inter alia* for the management and use of water resources and issuance of water permits, and is not responsible for regulation, licensing or accreditation of water service providers.

43. The motion is supported by the affidavit sworn by **Janet Oleme**, the Chief Legal Officer in the 2nd Interested Party. By an order of this court made on 17th September, 2018 the application by the 2nd Interested Party was deemed to be its response to the Petition. Parties were also directed to file skeletal submissions.

44. The Petitioners were heard on 22nd November 2018.For the Petitioners in Petition 52 of 2018, two issues were framed, namely whether there was adequate and appropriate public participation prior to the enactment of the Kiambu County Water and Sanitation Services Amendment Act of 2018 (the Amendment Act); and whether the Petitioners are therefore entitled to the orders sought. It was the Petitioners submission that, despite the ramifications the Amendment Act portends to the operations of private water service providers in Kiambu County, the Act was hurriedly enacted and without the participation of key stakeholders such as the Petitioners who are directly affected. That the impugned process was contrary to the principles of public participation under Article 10 of the Constitution and violated the Petitioners' rights under Article 47 of the Constitution.

45. As to how adequate public participation ought to look like, they cite the decision in **Robert N. Gakuru and Others v Governor Kiambu County and 3 Others [2014] eKLR.** It was submitted that the principle of public participation flows from the sovereignty principle espoused in Article 1 and is a key pillar in the objects of devolution under Article 174 of the Constitution. Reliance was placed on the South African decision in **Doctors for Life International v The Speaker of the National Assembly and Others (CCT 12/05) 2006 2 ACCII** as cited in **North Rift Motor Bike Taxi Association v Uasin Gishu County Government [2014] eKLR.** It was argued that the county government failed to disseminate necessary information on the impugned amendment bill as required, thereby also breaching the Petitioners rights to information under Article 35, and further that, the enactment of the Amendment Act was in violation of Section 87 and 91 of the County Governments Act, infringed on the Petitioners' legitimate expectation to be consulted on matters affecting them.

46. Moreover, as to the substance of the Amendment Act it was contended that the effect is unconstitutional; that the Petitioner was a duly licensed and registered county water project under the Kiambu County Water and Sanitation Services Act 2015, funded and run by its members. Therefore, any attempt to wrest control of its management and to subject it under the oversight of the County Government is unlawful and unwarranted interference in the management of the affairs of the Petitioner Society. The Petitioner society asserted that they were therefore entitled to the orders sought.

47. The Petitioners in Petition 41 of 2018 take issue with the 1st Respondent's annexures proffered in proof of public participation and assert the same related water policy and maintain that there was no public participation conducted in respect of the Amendment Act. It was also submitted that Section 4(1) of the Amendment Act offends Sections 77, 86 and 97 of the Water Act of 2016. That the resultant purported merging of water companies violates Section 9 of the Consumer Protection Act and Section 41(1) of the Competition Act. Moreover, that the Petitioners being incorporated entities, the provisions of the Companies Act would govern any merger thereof.

48. Counsel for the Petitioners in **Petition No. 54 of 2018** associated himself with submissions of the Petitioners in Petitions No.52 and 41 as regards the question of public participation and the alleged contravention by the impugned law of the Constitution and national legislation. Restating the objects and legal status of the Petitioners in Petition 54/18 counsel submitted that, the notice to the public annexed to the County Government's Replying affidavit, does not comply with Sections 138 and 139 of the Water Act 2006. Further that, that Sections 72(1) (e), 74, 77 and 79, 80, 86(2)(a) of the Water Act 2016, in so far as they purport impose certain governance structures on private entities and to qualify/limit access to the right to water are unconstitutional. The court was urged to consider those limitations in the context of Articles 10, 43, 40 and 174(d) of the Constitution.

49. The Interested Party (Thika Water and Sewerage Co. Ltd) and 2nd Respondents in **Petition 41/18** support the Petition. Asserting that there was no public participation preceding the Amendment Act. The Interested Parties pointing to the annexures in the County Governments Replies, submits that this did not demonstrate that public participation was undertaken, as notice was issued only 4 days to the

consultative meeting, where neither the Interested Party, nor participants from Thika area were represented.

50. Further that, from the annexures, none of the nine existing water companies, and in particular those drawn from Thika area participated or submitted memoranda during the consultative meeting. Besides, the participants present in the meeting opposed the merger of the water companies proposed in the Amendment bill. The Interested Party relied on several authorities including **Okiya Omtata Okoiti v Commissioner General, KRA & 20 Others [2018] e KLR** and **Mui Coal Basin Local Community and 15 Others v P.S Ministry of Energy and 15 Others [2015] e KLR.**

51. The Interested Party argued that Section 22A of the impugned Amendment Act contravenes Section 77 and 154 of the Water Act 2016, as to commercial viability of water companies, in accordance with standards prescribed by the 2nd Respondent (WASREB) and as to the competitive stakeholder procedure prescribed in appointment of directors of water companies, respectively. The Interested Party also contended that, the World Bank Report annexed as "**JMI"** to the County Government's response to the Petition did not propose the merger of all water companies into one but rather, the clustering of them under the East and West cluster.

52. The 2nd Respondent in Petition 41 of 2018 and the 3rd Interested Party in Petition No.54 of 2018 **[WASREB]** partly supported Petition No.41 of 2018. **WASREB** views the impugned Amendment Act as an unlawful as in its view, it is designed to:

i) merge all hitherto existing water companies in the county into one entity (Section 4(1)

ii) donate power to the governor and responsible county executive to unilaterally appoint board of directors of the new single entity without competitive public procedure (Section 6, 22A)

iii) delete national standards recognized in the parent act of 2015 (Section 5b)

iv) donate power to the responsible county executive to unilaterally appoint a secretary to the management of county rural community water service providers (Section 6, 22A)

53. Expanding on the right to water and sanitation under the Constitution and international law, **WASREB** submitted that the right impacts upon other human rights including, equality, non-discrimination, participation etc. And that the State is under a duty pursuant to Article 21(2) to take legislative, policy and other measures, including the setting of standards for the progressive realization of rights under Article 43. Thus the national standards on the right to water are set in the national legislation, in this case, the Water Act of 2016.

54. Citing the provisions of section 4 of the Water Act 2016, **WASREB** submitted that the county government and the cabinet secretary responsible are bound by the principles and values in Articles 10, 43 and 232 in administering the Act, itself mediated between the two houses of Parliament due to the concurrent functions placed on the two levels of government over the subject matter. That the policy, standards and regulation function was however not devolved as per the Legal Notice No 167 of 2013 and Gazette Notice 2238 of 1st April 2016 issued by the Transition Authority.

55. **WASREB** takes issue with the effect of the impugned Amendment Act as outlined in (i) to iv) above, for contravening Articles 10, 46 and 232 of the Constitution and sections and 139 of the Water Act 2016; sections 72(1) (e) , 74(4) , 96(2), 97, 98 of the Water Act 2016;the Companies and the Societies respectively. **WASREB** contends, with regard to sections 5,6,8 and 22 of the Kiambu County Water and Sanitation Act 2015 that these reflect the correct legal position *vis a vis* the Constitution and national legislation.

56. WASREB argues that at the onset to devolution all urban and county owned water service providers were subsumed under the County Governments to be run and to provide services in accordance with standards set in section 77 of the water Act 2016 respectively. And that any changes regarding the clustering of such water service providers must be in carried out in compliance with sections 97, 98 and 139 of the Water Act.

57. The Interested Party submitted that in light of the national standards, county legislation on water services must approximate to those standards that under section 74 of the Water Act 2016 the County Government is obligated to ensure that water provision companies operate in accordance with national standards. In that regard the interested party supported the Petitioners in Petition 54 of 2018 in so far as Section 22A of impugned Amendment Act is concerned.

58. However, the Interested Party opposed the remainder of the Petition. The Interested Party emphasized the need for regulation and oversight of rural water schemes as required under Section 74 of the Water Act 2016 further that, under Section 77 of the Water Act 2016 Act, the county government is responsible for enforcing standards and that the petitioners in Petition 54/18 are not exempted. It was argued that Rural Water Schemes were contemplated as **"any other body"** under Section 77 (3) and were to be brought under the purview of the County Government.

59. The Interested Party defended Sections 77(3), 79, 80, 72(1) (e), 94 of the Water Act 2016, giving reasons. The Interested Party takes the view that in this instance, the County Government acted in a whimsical and peremptory manner regarding an issue that had far-reaching ramifications. They relied on the case of **Katiba Institute and 3 others v AG and 2 others [2018] eKLR** and the decision of the Court of Appeal in **Kiambu County Government and 3 others v Robert N. Gakuru and others [2017] eKLR.**

60. The Water Resources Management Authority **[WARMA]** sued as the 2nd Interested Party in Petition 54 of 2019 submitted that its functions under Section 12 of the Water Act 2016 relate to the formulation and enforcement of standards for the conservation and management of and use of water resources, quality and water abstractions etc., whereas the function of regulation and provision of water services is a shared function between the national government and the County Government. They argue that no cause of action or relief has been pleaded against them.

61. Defending Sections 72, 74, 77, 79, 80 and 86 of the Water Act 2016 impugned in the Petition 54 of 2018, WARMA submitted that the Petitioner had not demonstrated how the sections infringe on the rights of the Petitioners. Counsel urged the Court to strike off **WARMA's** name from the Petition and to grant costs in light of notice to the Petitioners in this regard, by way of their application filed on 20th June 2018.

62. Counsel for the Governor, Kiambu County and the County Government responded as follows. Firstly, that water is a function shared between the National and County Government and the latter can pass legislation in respect of the said function. It was contended that where a conflict of county and national legislations arises, Article 191 of the Constitution would apply. He argued that the County Assembly (not sued herein) is responsible for the enactment of county laws, while the executive merely executes such law. In his view, the challenges in the petitions herein related to an action by the County Assembly, which is a distinct body under the doctrine of separation of powers. He took the position that challenges premised on the Competition Act and the Consumer Protection Act fall within the purview of the tribunals established under those Acts and could only be brought before the High Court by way of appeal. Counsel relied on the Court of Appeal decision in **Legal Advice Centre and 2 Centre V The County Government of Mombasa and 4 others [2018] eKLR,** in that regard and asserted that the Petitions are improperly before this court.

63. As regards the principles applicable in construing the law and the Constitution ,counsel cited the decision of the Court Appeal in **Centre for Rights Education and Awareness and Another v John Harun Mwau and 10 others [2012] eKLR.** He asserted that in deference to the doctrine of separation of powers under Article 10 of the Constitution this court cannot supervise the exercise of the lawmaking function or implementation of such law by the County Government.

64. Counsel took the position that the issue of public participation in this case is a bogeyman. Referring to exhibited adverts in the Replying affidavit placed with various media to invite views on the impugned law and subsequent hearings, counsel asserted that the public was given an opportunity to give views; that the public did give their views on the said law, as demonstrated by material on the Replying Affidavit. Moreover that the members of the County Assembly who are the people's representatives also gave their views. He further submitted that the facilitation of public participation must be within reasonable limits as stated in **Coalition for Reform and Democracy (CORD) and 2 others v Republic of Kenya and 10 others [2015] eKLR.**

65. Counsel pointed out that in that case, notice was issued on 10th December for the submission of views between 11th and 15th December, and that the court found that the said notice and public participation was adequate, noting too the representative capacity of the members of the National Assembly and the participation of 46 stakeholders for the entire country. He asserted that no petitioner has complained that the notice was to short, and cited the Court of Appeal decision in **SACCOS Union Limited and 23 others v County Government of Nairobi and 3 others [2014] eKLR.**

66. He argued that the requirement for public participation does not mean that every individual be consulted and that the process must be considered as whole. See **Mumo Matemu v Trusted Society of Human Rights and 5 Others [2013] eKLR.** Contrasting the facts of instant case with those in **Kenya Human Rights Commission v Hon. A.G. and Another [2018] e KLR,** counsel submitted that the Respondents have attempted to demonstrate that there was adherence to the requirement for public participation and urged the court to dismiss that ground of the Petitions.

67. Concerning the specific impugned amendments, counsel argued that Section 22A merely supplemented the existing provision in Section 22 of the Act which provided for clustering of all water service companies into two, the latter which was supported by a study by the World Bank and extensive public participation, adding a disclaimer that the County Government is not bound by the World Bank study recommendations. Explaining the rationale of the amendment, counsel contended the County Government viewed the east/west clustering inequitable, as the former was more endowed with water and other resources than the latter, and that the disparity could only be addressed by financing one company serving all the residents wherever situated.

68. Reiterating the right to water and the importance of regulation, counsel adopted submissions by **WASREB** and also pointed out that the Petitioners herein have failed to demonstrate how the impugned sections of the law violate the Constitution, beyond the complaint in respect of public participation. For the latter proposition counsel once more referred to the **Mumo Matemu case.** In justifying the power donated to the County Government under S 22A (3), (6) of the Amendment Act, counsel argued that the amendments cannot be construed to provide for the taking over, of the functions in decision making or assets of the self-help groups, by the County Government.

69. Concerning Petition 54/18 in particular, counsel submitted that the Constitution, not the Water Act 2016 regulates the exercise of the legislative powers of the county assembly. Thus, section 139 of the Water Act 2016 is not applicable. Emphasizing that water services must be regulated and noting that in principle **WASREB** is not opposed to merger of water entities, the Respondent's counsel contended that the Petitioners were merely resisting regulation. That the consumers' right to clean, safe water for every resident cannot be achieved without the impugned amendments. He urged the court to uphold devolution by sustaining the impugned amendments.

70. The Attorney General (AG) opposed the Petition and associated himself with the submissions by the County Government. It was submitted that every legislation enjoys a rebuttable presumption of constitutionality as stated in **Ndyanabo v A.G. [2001] 2 E.A 485** and that, the present Petitioners have failed to rebut such presumption in relation to the impugned law. Secondly, that in testing the constitutionality of a statute, the purpose and effect thereof must be considered, as stated in **Olum and Another v Attorney general [2002] E.A. 508;** and that in this case, the purpose of the impugned amendment is to provide a regulatory framework for water service providers.

71. The AG asserted that the Petitioners have merely alleged contravention of constitutional provisions by the Amendment Act without demonstrating how the purpose of the act infringes on their rights. Emphasizing the objects of devolution under Article 174 of the Constitution, the AG submits that the right of communities to manage their affairs under Article 174(d) is facilitated and achieved within county government structure and that the said article shields such communities from unwarranted interference by the national government. He took the view that the Petitioner's interpretation of the article is faulty.

72. The A.G submitted that pursuant to the Paragraph 11(b) of Part 2 of the Fourth Schedule to the Constitution the County Government is

responsible for county public works, water and sanitation services. And that, Article 185 (2) and (4) of the Constitution empowers the county government to make any laws necessary for the performance of its functions and for policies and plans in respect of management and exploitation of a county's natural resources, respectively. Thus, the argument by the Petitioners that the impugned amendment law (Section 22A in particular) violates Articles 174(d) of the Constitution holds no water. Moreover, that the Petitioners have failed to demonstrate how the Amendment Act violates their rights under Article 40 and 43 of the Constitution.

73. As regards the Petitioner's complaint that Sections 72 (1) (e) 74, 77, 79, 80, 86(2)(a) of the Water Act 2016 violate Articles 10 and 27(1) of the Constitution, the Attorney General asserts that the impugned sections give effect to the objects of the Water Act 2016, whose purpose and effect is consistent with the provisions of the Section 10 and 11 (b) Part 2 Fourth Schedule to the Constitution. The A.G. submits that the Petitioners in Petition 54 of 2018 have not demonstrated how the impugned Sections violate their rights under Articles 10 and 27(1) of the Constitution.

74. In their rejoinders, the Petitioners distinguish the provisions of Section 22 of the Act and Section 22A of the Amendment Act and point out that the former relates to regulation, while the latter represents interference with the operation private water service providers. That the net effect of the impugned Amendment Act is the wresting of control of private entities by the Respondents. And that the amendments are not as innocuous as the Respondents purport. That the Petitioners sought and obtained necessary licenses and approvals and are not opposing regulation but undue interference by the County Government.

75. Regarding public participation, they assert that a mere semblance of it or participation of public through elected representatives is not enough. They assert that section 91 of the County Government Act provides for the facilitation of public participation while Section 139 of the Water Act 2016 prescribes the necessary notice. That the newspaper advert the Respondents rely on is not compliant with this prescription. Moreover, that the matter at hand being unique and involving actions that have a profound effect on the public, demands extensive public participation.

76. In answer to technical challenges on the suitability of the Governor as a Respondent in Petition 54 of 2018 and the jurisdiction of this court, the Petitioners assert that the Governor is the **CEO** of the Service Board under the County Governments Act, and plays a role in enactment of legislation through the giving of assent . On jurisdiction it was submitted that under Article 165 of the Constitution, this court and not other bodies, has the mandate to interpret the Constitution and that the Petitions herein raised issues related to the protection of consumers among other constitutional issues. With regard to the joinder of **WARMA**, it was submitted that the functions of **WARMA** and **WASREB** as stipulated in Sections 11 and 12 of the Water Act 2016 are inextricably intertwined.

ANALYSIS AND DETERMINATIONS

77. The court has considered the pleadings, rival affidavit material and arguments raised by the respective parties in the three Petitions. The background to the suits can be stated briefly. In 2015 the County Assembly of Kiambu enacted the Kiambu County Water and Sanitation Services Act. The objects of the Act as stated in the preamble are:

> **"… to provide for development, regulation and management of county public works related to water and sanitation services, storm water management systems and water conservation and connected Services"**

78. On the face of it, these objects resonate with the related functions of the county government as delineated in Section 11 (a) and (b) in Part 2 of the Fourth Schedule to the Constitution. Section 4(1) of the Kiambu County Water and Sanitation Act (hereinafter the Act) provided for the establishment of two "County Water and Sanitation Service Providers", which by virtue of Section 4(4) were to be the successors of the nine water service providers in existence, namely:

a) Limuru Water and Sewerage Company Ltd

b) Githunguri Water and Sanitation Services Ltd

c) Kikuyu Water Company Ltd

d) Kiambu Water and Sewerage Co. Ltd

e) Karuri Water and Sanitation Co. Ltd

f) Gatundu South Water and Sanitation Company Ltd

g) Karimenu Water and Sanitation Company Ltd

h) Ruiru, Juja Water and Sewerage Company Ltd

i) Thika Water and Sewerage Co Ltd

79. Section 59 of the Act provided for the transition envisaged in Section 4 of the Act and was to the effect that, upon the Act coming into operation "***all the funds, assets and other property, both movable and immovable, which immediately before such date were vested in a former company …. shall vest in the respective assigned water service provider".*** The section also provides for the transition of staff and board members of the nine water service providers and of rights, powers and liabilities however arising to the respective water service provider.

80. The commencement date of the Act is 27th April 2017. From the material before the court, it is apparent that the anticipated transition had not commenced or been completed by the date when the County Government of Kiambu commenced the process of amending the Act. However, as will become evident, some consultation had been undertaken between the county government and the nine companies leading to an endorsement and adoption of a clustering criteria of the nine water service providers. It was agreed to adopt a clustering of the nine water entities into two clusters. And more specifically that, the water service providers listed at paragraph 2 above at items b,f,g,h,i would fall under the eastern cluster while those at items a,c,d,e would be in the western cluster.

81. The Kiambu County Water and Sanitation Services amendment Act (hereinafter the Amendment Act) was passed by the County Assembly in March 2018. The date of assent by the Governor, Kiambu County is 7th March 2018 and the commencement date the 28th March 2018. The Amendment Act amended several Sections of the original Act, including Sections 4, 5, 6, 7, 8, 9, 22, 58 and 59.

82. The enactment of the Amendment Act prompted the present suits. The petitions raise a myriad of issues. A common issue arising in all three petitions relates to the adequacy of public participation during the enactment process. The key issues for determination in the petitions, to my mind are as follows:

a) Whether there was adequate public participation during the enactment process of the Amendment Act, in compliance with *inter alia* Articles 10(2)(a), 34, 47, 174 and 196 of the Constitution as read with Sections 87 and 91 of the County Governments Act and Section 139 of the Water Act 2016.

b. (i) Whether the provisions of Section 77 of the Water Act 2016 are inconsistent with Articles 185 and 186 and paragraph 11 of Part 2 of the Fourth Schedule to the Constitution.

b(ii) Whether the provisions of Section 72(1) (e), 74, 79, 80, and 86(2) (a) of the Water Act 2016 violate the rights of Petitioners under Articles 10 (2) (b) and 27(1) and constitute an unjustifiable limitation to their right to water under Article 43(1)(d) of the Constitution.

c) Whether the provisions of Section 4(1) of the original Act and as amended, and Section 22A of the Amendment Act and indeed the entire Amendment Act, infringe upon the Petitioners' right to water under Article 43 (1)(d) of the Constitution, offend Article 174 of the Constitution and are in conflict with Sections 77, 86, 97 and 98 of the Water Act 2016.

Preliminary Issues

83. Before delving into the core issues identified above, I find it necessary to deal with objections taken by Counsel for the County Government and the Governor. These touch on the jurisdiction of this court to handle certain aspects of the challenges raised by the Petitioners to the impugned laws and the propriety of the joinder of the Governor, Kiambu County in the Petition 54 of 2018.

84. I understand the objection on jurisdiction to be partial, in relation to challenges by the Petitioners that were based in part on the Consumer Protection Act the Competition Act as well as related references to provisions made to the Water Act 2016. The court has considered the provisions of the Water Act 2016, and especially Section 121(1) and (2) which provide for the jurisdiction of the Water Tribunal created by the Act. The jurisdiction of the Water Tribunal is limited to appeals on decisions or orders made by the Cabinet Secretary, WASREB or disputes arising from business contracts in respect of water resources or water services. Under Section 124, the Environment and Land Court has jurisdiction to entertain appeals from the Water Tribunal.

85. With regard to the Consumer Protection Act, actions in respect of disputes arising from consumer agreements or other consumer transactions are to be filed in the appropriate court as provided in Section 84. The Competition Tribunal created under Section 71 of the Competition Act deals with appeals by persons affected by decisions by the Competition Authority or orders made under section 46 in relation to mergers under.

86. As can be seen from the core issues already identified for determination, the dispute presented before this court in the three Petitions does not relate to any of the disputes anticipated in the three Acts of Parliament. The Petitioners' challenges are based primarily on constitutional provisions to which the Consumer Protection Act, and the Competition Act are ancillary. The matters raised in the Petitions are those encompassed in Article 165(3) (d) of the Constitution, and fall under the jurisdiction of the High Court. The tribunals created under statutes have no jurisdiction to entertain such matters. The suits herein are therefore properly before this court.

87. With regard to the joinder of the Governor, County Government of Kiambu in Petition No.54 of 2018, it was correctly pointed out by the Petitioners' counsel that the Governor plays a role in the legislative process of the County Assembly. The Governor is a member of the County Executive Committee which is part of the County Government, pursuant to Article 176(1) as read with Article 179. Under sub-article (4) of the latter Article, the governor is the chief executive of the county. The functions and responsibilities of the governor as stipulated in Section 30 of the County Governments Act include the duty, to:

"g) consider, approve and assent to bills passed by the county assemblies."

See also Section 21(1) of the County Governor Act.

88. The Specific role of the governor in the procedure stipulated for the enactment of legislation by the county government is more particularly set out in Section 24(2), (3), (4), (5) and (6) of the County Governments Act. Thus, not only does the governor consider for assent bills before presentation to the county assembly, he also considers gives the final assent to the bills upon which they are gazetted and come into force 14 days after such publication. It is my firm view that the Governor of the County Government was properly enjoined as a Respondent for the purposes of the Petition No.54 of 2018. For all the foregoing, this court did not find any merit in the technical objections

taken by Counsel for the Respondent.

a) **Whether the Amendment Act was subjected to Adequate Public Participation as required by the Constitution and relevant law**

89. In considering this question, it is apposite to note that under Article 10(1) the national values and principles of governance espoused in Article 10 of the Constitution binds 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"

90. Principles relating to the devolution of power and participation of the people occupy a central place in the Constitution and elements thereof are to be found embedded in key articles of the Constitution. Articles 174 and 175 of the Constitution set out the objects and principles of devolved government, respectively. Article 174 provides *inter alia* that the objects are, to promote democratic and accountable exercise of power, to give powers of self-government to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them, to recognize the right of communities to manage their own affairs and to further their development and to facilitate the decentralization of state organs, their functions and services from the capital of Kenya. Article 175 provides *inter alia* that county governments shall be based on democratic principles and separation of power.

91. In the exercise of it legislative authority under Article 185 of the Constitution, the county assembly is obligated to bear these principles and objects in mind , together with the rights and fundamental freedoms enshrined in all the bill of rights, which for purposes of this case would include the rights under Article 10 (participation of the people and protection against discrimination); Article 35 (information); Article 43(1) (d)(water); Article 46 (consumer protection) and Article 47 (fair administrative action).

92. The legislative authority of the county government is to be exercised principally for objects related to or incidental to the functions and powers of the county government in the Fourth Schedule to the Constitution and pursuant to Articles 186 as read with 187 .For the purposes of this case, Section 11 Part 2 of the Fourth Schedule to the Constitution provides that county public works and services, including storm water management systems in built-up areas and water and sanitation service are functions of the county government.

93. There is no dispute that certain aspects of the water function such as conservation and management of water resources and the formulation and enforcement of national standards and regulation of water service providers fall within the purview of the national government pursuant to section 22 Part 2 of the Fourth Schedule to the Constitution. Inevitably, there may be some areas of overlap in functions between the two levels of government and Article 189 addresses the relationship between the two levels of government. What cannot be disputed is that under the Fourth Schedule to the Constitution, the provision of water and sanitation services in the county is the exclusive function of the county government. WASREB has conceded this fact in its representations.

94. In this regard, I would associate myself with the sentiments expressed by **Kimondo J** in **Murang'a County Government v Murang'a South Water and Sanitation Co. Ltd and Another [2019] e KLR** to the effect that the powers and function reserved for the county government by the Constitution under Section 11 Part 2 of the Fourth Schedule cannot be exercised by any other organ or body without the express consent or authority of the county government. See also **Kahuti Water and Sanitation Co. Ltd and 4 Others v Governor, Murang'a County and 2 Others [2017] e KLR** where **Waweru J,** in a preliminary ruling observed *inter alia* that

"What appears indisputable prima facie, is that the provision of water and sanitation services is a devolved function of the county governments under the Constitution."

95. While exercising its legislative mandate under Article 185 of the Constitution, the county assembly is specifically obligated under Article 196(1) of the Constitution to ---

"a) conduct its business in an open manner, and hold its sittings and those of its committees, in public and

b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees".

96. In urging their case, the Petitioners in Petition 54 of 2018 herein made heavy weather of the provisions of Section 139 of the Water Act 2016 in attacking the public participation process undertaken by the county government in respect of the Amendment Act. They assert that the notice given of the Amendment bill leading to the Amendment Act did not comply with the said section.

97. Section 139 of the Water Act 2016 proves that:

"(1) A requirement imposed by or under this Act for a person, 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 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) ….

b) …

(3) The notice shall –

a) …

b) …

c) …

(4)……

(5)…..

(6)……" (emphasis added)

98. While this section incorporates ingredients or requirements that *ex facie* are necessary for effective public consultation or participation, a proper reading of sub-section 1 in the context of the entire Water Act 2016 leaves no doubt that this general provision does not relate to the legislative process of county governments but to "requirements imposed by or under" the Act to undertake public consultation. Not even sections 97 and 98 of the Water Act 2016 which provide for the clustering of water service providers and re-assignment of a provider's service areas refer to the legislative exercise of the County Government. No specific primary provision in the Water Act 2016 applicable to the legislative process of the county government, and requiring public consultation or participation as prescribed in Section 139(1) of the Water Act 2016, was cited by the Petitioners.

99. A complete reading of Section 139 will show that it does not encompass county legislation concerning water and sanitation services, but is a general provision regarding administrative applications as for instance, in respect of licences, and actions by various persons under the Act. Indeed, a reading of Section 139(5) confirms this view, as it states that:

> **"(5) The designated person shall publish in accordance with subsection (2), notice of the fact that a <u>copy of the decision and the reasons for the decision in relation to the application or proposed action</u> is available for public inspection….."** (emphasis added).

Thus, in my considered view, Section 139 is of no moment in regard to the exercise of the county's legislative mandate.

100. The applicable law in so far as the county legislative process is concerned is the County Governments Act. The preamble thereof states:

> **"An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes".**

101. The provisions of Chapter Eleven of the Constitution relate to matters in respect of devolved government, including the legislative authority of county assemblies (Article 185) and objects and principles of devolved government (Articles 174 and 175). see also the objects of the County Governments Act in Section 3 thereof. Section 87 of the County Governments Act sets out the principles of citizen participation in counties, which include timely access to information, data, documents and other information relevant or relating to policy formulation and implementation and reasonable access to the process of formulating and implementing laws, regulations, approval of development proposals, projects, budgets, the granting of permits and establishment of specific performance standards, and the like.

102. Section 91 goes on to provide that:

> **"The county government shall facilitate the establishment of structures for citizen participation –**
>
> **a) information communication technology-based platforms**
>
> **b) town hall meetings**
>
> **c) ….**
>
> **d) notice boards: announcing appointments, …. And other important announcements of public interest**
>
> **e) …..**
>
> **f) ….**

g) establishment of citizen for a at county and decentralized units".

103. In this case, the County Government of Kiambu has indeed attempted through its Replying affidavit to demonstrate that, there was adherence to the requirement for public participation in the enactment of the impugned Amendment Act. This answer must be examined through the prism of the standard prescribed in the Constitution and statutory provisions outlined above as well as principles distilled from relevant case law.

104. In so doing, it is not lost on the court that the County Assembly where the elected representatives deliberate on bills provides indirect public participation. Secondly, that the subject matter of the suits before it is indeed a unique and scarce natural resource that is necessary for the sustenance of life and health. The submission made by **WASREB** that the right to water has a direct bearing on many other rights and fundamental freedoms is therefore on point.

105. According to the **Final Reports of The World Bank entitled Technical Assistance under the Kenya Devolution Multi – Donor Trust Fund (Task 1)** dated February 2017, attached to the Replying affidavit of the County Government filed in **Petition 41/18** and marked annexure **"JM1":**

> **"Kenya is classified by the United Nations as a water scarce country and has a population of 46 million people, mostly residing in rural areas, with an increasing migration to urban and town centres. According to the WASREB Impact Report 9, approximately 20.3 million people reside in areas served by 84 public regulated water utilities and 2 private utilities. Water coverage (access) currently stands at 55% in urban and urbanizing areas … has grown, albeit slowly, from 48% in 2010. Considering that the annual growth within the last four years is about one percentage point, the water sector should grow annually by at least five times the current annual growth rate to reach Kenya's vision 2030 target of universal access to water.**
>
> **The WASREB impact Report 9 notes that sewerage coverage stands at 15%. Coverage has declined from 19% in 2010. To attain the vision 2030 target of 100% wastewater network coverage for the urban population, the sector requires an average growth in sewer connections of approximately 350,000 which translates to 3.2 million people".**

106. Notably, there are disparities in the supply of water and sewerage services in rural as compared to urban areas, and naturally, some parts of the country may be more endowed with water resources than other areas (see for instance pg. 3 of **Final Report Task 2** at page 81 of the Respondent's annexures above). The report indicates that some of the county water service providers are fairly successful.

107. The local communities who through self-help may have created homegrown solutions for their water supply needs, and established successful water service providers who have entrenched themselves in this competitive ecosystem may naturally be opposed to ceding the control enjoyed over many years. Equally, they may be apprehensive that their water supplies and indeed their right to water are likely to be curtailed if the *status quo* changes. The opposition of the water service providers before this court to the change introduced through the Amendment Act is palpable in these petitions and in the memoranda submitted by some of the community water projects during the legislation process of the impugned Amendment Act.

108. Yet, the County Government of Kiambu, in fulfilment of its mandate under the Fourth Schedule to the Constitution, is obligated to ensure equitable distribution and access to water for all the county residents in realization of their constitutional right to clean, safe water in adequate amounts. What I am saying is that the exploitation, distribution and control of water resources necessarily engenders tension between competing resource demands by different actors. These interests must be balanced for the common benefit of county residents. Competition for scarce resources attends all the social economic rights in Article 43 of the Constitution. Moreover, in as much as the facilitation of equitable distribution and sharing of scarce resources such as water require elaborate policy and legal frameworks, the process of negotiating and balancing divergent interests while creating such frameworks is necessarily political in nature. Such negotiation involves the people directly and indirectly through elected representatives.

109. Public participation is entrenched in the County Governments Act (Section 3 and 87 and 91) in line with Articles 10, 174 and 196, *inter alia* espousing the said principle. Section 87 of the County Government Act provides for the principles of citizen participation in counties. **Lenaola J** (as he then was) in **Nairobi Metropolitan PSV Sacco** observed that:

> **"[45] The Petitioners have attacked the impugned legislation on grounds that it failed to comply with the process of public participation as required by the Constitution. Where legislation fails to comply with the Constitution, courts have powers to make necessary orders in that regard as was held in the Constitutional Court of South Africa in the case of *Doctor's for Life International v The Speaker National Assembly and Others (CCT 12/05) 2006 ZACC II* where it was stated as follows;**
>
> > ***"It is trite that legislation must conform to the Constitution in terms of both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have the powers to declare such legislation invalid".***

110. The learned Judge further observed that**:**

> **"The essence of the duty for the public to participate in legislative process is to my mind an aspect of the right to political participation in the affairs of the State. In this aspect, the Constitutional Court of South Africa in the case of *Doctors for Life International v The Speaker National Assembly (supra)* explained the importance of public participation as follows;**
>
> ***"The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and or be elected into public office. The general right to participate in the conduct of public***

affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all, it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to Ngcobo J *also observed in the South African case of* ***Matatiele Municipality & Others - Vs- President of the Republic of South Africa & Others (2) CCT73 05A [2006] ZACC 12; 2007 (1) BCLR 47 (CC) that democracy envisages both direct participation by citizens and through representation by those elected as representatives".***

111. Returning to the ***Metropolitan*** *case* ***Lenaola J*** *(as he then was) concluded that:*

"Applying the above principles and in the totality of the evidence before me, it is clear that the 1st and 2nd Respondents involved the public in the process leading to the enactment of the Nairobi City County Finance Act of 2013 ,they engaged those who would be affected by their decision and the latter were given details of the proposals and an opportunity of stating their objections if any. To my mind the process was highly public as there were public forums, meetings with stakeholders, media reports and even lobbying and an opportunity to make written representations through written memoranda.

Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he expressed himself as follows;

"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

I am also in agreement with the sentiments expressed by Chaskalson, Chief Justice of South Africa, in the Constitutional Court of South Africa case *of Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he stated that;

"[155] It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations." *(emphasis added)*

112. **Odunga J** in **Robert N. Gakuru** case (supra) stated that:

"Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process…… Parliament and the provincial legislature must be given a significant discretion in determining how best to fulfill their duty to facilitate public participation. This discretion will apply in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislature programmes. Yet however great leeway given to the legislature, the courts can, and appropriate cases will, determine whether there has been the degree of involvement that is required by the constitution. What is required ……will no doubt vary from one case to case."

113. At paragraph 26 of the Replying affidavit of the 1st Respondent filed in Petition 41 of 2018, it is deposed *inter alia* that:

"The integration of water resources management was informed by study, research and analysis conducted by both the county government and the world bank and the…… It was not a random thoughtless and arbitrary venture".

Annexure **"JM1"** earlier referred to is exhibited as proof of this deposition. Further, at paragraph 28 the deponent outlines the steps taken by the county government in compliance with the requirement for public participation. He exhibited annexure **"JM2"** being copies of an advertisement in the local dailies and a vernacular radio station as well as copies of minutes of presentations at public hearings **(annexure "JM3").** It is stated that all the nine water service providers in the county participated in the hearing and raised no objection to the Amendment Act. Photographs marked **"JM4"** are proffered as evidence of such participation.

114. The court, in considering the Petitioners' complaint that there was inadequate public participation has perused the material in the Respondents' Replying affidavits in **Petition 41/18** and **Petition 54/18**. Regarding the notices to the public marked annexure" **JM2"** (found at page 237 and 238 of the Respondents' documents) , the former gives adequate details in respect of the subject matter, on the face of it. In total, five days' notice, with an intervening weekend, are given for the public to file written memoranda and for oral presentations on the amendment bill, which could be accessed on the county portal as per the notices.

115. The list of participants who attended the public hearing held at the county offices on 2nd March 2018 (at pages 247 to 249 of annexure "**JM3"** in the Respondents' Replying affidavit in **Petition 41/18)** reflects 32 persons in attendance. The minutes at pages 240 – 242 document the presentations and attendance of representatives of several stakeholders in the water service provision sector and other entities. Significantly, WASREB did not participate in the public participation exercise and complain that it was excluded therefrom by the Respondents.

116. Some of these stakeholders who are also petitioners in **Petition No.54 of 2018** presented written memoranda. These stakeholders are:

1) Muguga village Self-Help Water Project

2) Gitaru Self-Help Water Project

3) Kabete Community Water Providers Association

4) Mutego Water Services Society

5) Kenya National Chamber of Commerce and Industry

6) Kahuho sublocation Water Project

7) Kanyariri Self-Help Water Project

8) Kamuguguga Self help Water Project

117. The memoranda, on a cursory perusal, appear to address several provisions of the Amendment bill and significantly, the same contentious clauses of the Amendment Act challenged in these petitions.

> 118. In **Mui Coal Basin Local Community & 17 Others v Permanent Secretary Ministry of Energy & 15 Others [2015] e KLR** cited by an Interested Party, the court observed that public participation did not mean that everyone must give their views, which would be impracticable. Rather that, there ought to be evidence of "intentional inclusivity" in the participation program and which, on the face of it, took into account the principle that **"those most affected by a policy, legislation or action must have a bigger say: and their views more deliberately sought and put into account."** That notwithstanding, there is no attendant requirement that everyone's views will be included in the final policy or law: the public body or legislature conducting such public participation has no duty to accept any and every view, the opposite of which would effectively neutralize and stall the exercise of the authority's mandate.

119. In the final analysis, the rule of the thumb is that a reasonable opportunity is given to the public and all interested parties, and especially those most likely to be affected by the legislation or policy , with timely access to information that is relevant to a process of legislation or formulation of policy, to facilitate the appreciation of the issue for consideration, and an appropriate opportunity to make a response.

120. It does seem from some of the documents in the Respondents' bundle that there were concurrent fora held on the same date (2nd March 2018) at Gatundu South, Ruiru, Limuru, Kikuyu as reflected at pages 250 to 294 of the Respondents' bundle of annexures. However, as pointed out by the some of Petitioners and **WASREB**, these hearings were on the face of it in respect of a water policy and not the Amendment bill itself.

121. In justifying as reasonable the efforts made by the county government to facilitate public participation, counsel relied on the case of **Coalition for Reform and Democracy (CORD) and Others V Republic of Kenya and Others**. Although the notice in that case was five days for submission of comments to an Act proposed by the National Assembly, the court noted that three full days were set aside for the receipt of views through public hearings by the parliamentary committee concerned. Secondly, that there was some urgency regarding the Act impugned in that case and indeed parliament was recalled from recess to deal with the said legislation.

122. The court has not been told that there was any urgency accompanying the passage of the Amendment Act herein, and why for instance, only one day and venue had been reserved for receipt of oral presentations. Yet, as this court endeavored to demonstrate earlier, questions pertaining to water and sanitation services are critically important to every person.There is no discernible explanation for the fact that all the nine water companies who on the face of it were the most likely to be affected by the Amendment Act, especially the proposed section 4(1) thereof, failed to submit memorandum or to attend the public hearing.

123. In contrast, some community water projects availed themselves by sending memoranda and attending the public hearing. The indirect explanation or reason given by the Thika Water and Sewerage Co. Ltd **[Interested Party** in **Petition 41/18]** for its failure to present its views on the Amendment Act is that the notice given was too short. Nevertheless, it is evident from the Respondents' annexure **JM3** that the nine water companies in the county, recognized at Section 4 of the Act sought to be amended, had in 2017 been actively engaged in The World Bank Study and deliberations leading to the unanimous adoption of the actual cluster assignment of the nine water companies in the two water entities envisaged in the 2015 Act. (see pages 3 – 4 of the **World Bank Final Report Task 2** found at pgs. 81 – 82 of the County Government annexures.] The Amendment Act was introducing a key provision resulting in the formation of one giant county water service provider.

124. Whereas the legislative agenda of a county ought not to be stymied by the deliberate avoidance of key parties of public participation, in my view, it behoved the County Government to directly engage once more, the nine water companies to solicit their views on the proposed single-provider model which clearly departed from the dual clustering model unanimously agreed upon earlier between the County Government and the nine water service providers as per the World Bank Report above.

125. The County Government could have reasonably discharged that duty by for instance, sending a written invitation, compliant with the requirements in section 87 and 91 of the County Governments Act, to these water service providers to present their views. Mere photographs as tendered by the County Government as evidence of alleged attendance and non-objection of the water service providers do not suffice. To be sure, by the foregoing the court is not saying that the views of these entities would necessarily determine the outcome of the process, or that if they declined the invitation, the public participation process stood vitiated. All that was required of the County Assembly/Government was to demonstrate that a solicitation for views was made directly to the nine water service providers.

126. In effect, the Amendment Act portended serious implications concerning water provision in a county where from material before the court, many historically self-help discrete bodies and groups had hitherto been relied on to deliver water services to the citizens of the county. Considering this fact, and the acute importance of the right to water, it is my view that the County Government ought to have made more deliberate efforts, firstly, to especially solicit the views of the nine existing water service providers recognized in the Act, and such other entities. This in no way suggests that their views would be necessarily incorporated in the Amendment Act. Secondly, to ensure the widest possible reach of dissemination of the notice concerning the legislation in the county in order to obtain the highest possible level of public participation. Again, this in no way means that every resident had to give their views.

127. From its material, the County Government confined its oral public hearings to one day at the county offices, in addition to the 7- day window allowed for submissions of written memoranda. I associate myself with the sentiments by **Odunga J** in **Robert N. Gakuru's case** where he observed *inter alia* that:

> **"The County assemblies ought to do whatever is reasonable to ensure that as many of their constituents were aware of (the intended legislation) and where the legislation in question involves such important aspect as payment of taxes and levies, the duty in even more onerous. I hold that it is the duty of the County assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge".(**emphasis added**)**

128. Similarly, in this case, the legislation involved the all-important matter of provision of water and sanitation services. The duty of the County Government to notify the public of the intended legislation was onerous. The corresponding and equally important duty flowing from the duty to give notice is the obligation on the part of the county government to provide appropriately adequate opportunities for the public to give their views on the legislation. This is what is envisaged by Articles 174 and 175 of the Constitution. The County Assembly has its role but its representation of the people is no substitute for the direct participation by the electorate. Water is indeed an important and critical resource for every household and it was incumbent on the county government to create opportunity to as many people as possible to give their views on the impugned legislation, for instance, by holding concurrent public hearings in several strategic venues in the county.

129. Therefore, given the nature of the subject matter and implications of the Amendment Act, it is my view that in this instance, the efforts made by the county government were not reasonable and that the resultant public participation fell below the standard required in such a weighty question. I find therefore that the Amendment Act was unconstitutional and therefore invalid as the enactment process does not pass muster the prescribed constitutional standard found in Articles 10, 174 and 196 of the Constitution as read with Section 87 and 91 of the County Governments Act.

> b. **Whether Sections 72(1)(e), 74, 77, 79, 80, 86(2) (a) of the Water Act 2016 are inconsistent with the provisions of Articles 185 and 186 as read with the Fourth Schedule to the Constitution thus unconstitutional and also violate the Petitioners' rights under Articles 10(2) (b) and 27(1) of the Constitution and constitute an unjustifiable limitation to their right to water under Article 43(1)(d) of the Constitution.**

130. In the following part of the judgement the court will collapse issues b(i) and b(ii) into one convenient issue as stated above. The starting point in considering the above issue must be that by virtue of the provisions of Article 62(1), (2) an (3) of the Constitution as read with Section 5 of the Water Act 2016, every water resource in Kenya is vested in and held by the national government in trust for the people of Kenya.

The term "water resource" is defined in the Water Act 2016 to mean:

> **"any lake, pond, swamp, marsh, stream, water course estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground, and includes sea water and transboundary waters within the territorial jurisdiction of Kenya."**

Pursuant to the provisions of Article 186(1) as read with paragraph 22 (c) of Part 1 of the Fourth Schedule to the Constitution, the function and powers of water protection, securing sufficient residual water, hydraulic engineering and the safety of dams belongs to the national government. According to the **Kenya Gazette Notice No. 2238 of 2016** published by the Transition Authority in **The Kenya Gazette of 1st April, 2016** the sub-set of functions relating to licensing of water utilities, standard setting, dissemination, monitoring and enforcement of standards, consumer protection within the national government water function and powers were assigned to the Water Services Regulatory Board. Although assented to on 21st April,2016 the Water Act, 2016 has a commencement date of 21st April 2017.

131. The objects of the Water Act 2016 are stated to be to provide regulation, management, and development of water resources, water and sewerage services and other connected purposes. Section 72 sets out the powers of the Water Services Regulatory Board **(WASREB)** itself created by section 70, for the principal object of protecting **" the interests and rights of consumers in the provision of water services"**.

132 The powers and functions of WASREB contained at Section 72 of the Act incorporate the functions set out in the Kenya Gazette Notice No. 2238 of 2016. Under Section 72(1) (e) WASREB is mandated to develop model memorandum and articles of association to be used by all water companies applying to be licensed by the board to operate as water services providers. Sections 74 and 86 provide for the licensing of water service providers and the procedure and requirements for such licences. Section 77 imposes a duty on the part of the county government to establish water service providers in compliance with the commercial viability standards set by WASREB. Such entities are also to be licensed by the WASREB.

133. Sections 79 and 80 make provision for the constitution of boards of directors of water service providers under the Companies Act or any other written law and excludes certain persons, including sitting elected representatives in Parliament or county assembly from eligibility as board members.

134. The Petitioners in Petition No.54 of 2018 claim that the provisions of Section 72(1)(e),79, 80 and 86(2) of the Water Act 2016 are discriminatory of them as community water projects/ self-help groups hence violate their rights as guaranteed under Articles 10(2)(b) and 27(1) and by extension limit their right to water in Article 43 (1) (d) of the Constitution, and are therefore unconstitutional. According to **Black's Law Dictionary, 9th Edition** discrimination entails *inter alia* a failure to treat all persons equally *"when no reasonable distinction can be found between those favored and those not favored"*

135. In **Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR ,** the Court of Appeal after reviewing jurisprudence from local and other jurisdictions on the subject concluded by stating that:

> **"From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by *Article 27*, unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of the Constitution should be determined by applying a three - stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of *Article 27* will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the constitution. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of the constitution."** (emphasis added)

136. In submissions, counsel for the Petitioners argued that in so far as these provisions impose certain governance structures on private entities, this amounts to an unjustified qualification or limitation to the right to water under Article 43(1) (d) and are unlawful. It seems that the discriminatory aspect pleaded in the petition was to be implied from the foregoing submission because counsel did not attempt to demonstrate how the impugned provisions contain a differentiation affecting his clients that is arbitrary or unreasonable created for an illegitimate purpose, or that the differentiation has no rationale purpose.

137. With regard to the constitutionality of a statute or provision, it is trite that an act of parliament enjoys a rebuttable presumption of constitutionality and the onus lies on the person asserting otherwise to establish to the court's satisfaction the alleged unconstitutionality of a provision or act of parliament. Thus, it is not enough for such a party to merely throw before the court provisions he asserts to be unconstitutional. See **Ndyanabo v Attorney General of Tanzania [2001] EA 459.**

138. In the case of **Elle Kenya Ltd and Others v the Attorney General and 3 Others [2013] e KLR. Lenaola J** cited with approval the decision in **Re Application by Bahadur [1986] LRC 545(Const)** and observed that:

> **"I must at this point point out, that as courts have always done that in interpreting legislation, it is not the role of this court to interrogate the wisdom or otherwise of … enacted laws. As the court stated in Re Application by Bahadur [1986] LRC 545 (Const); "I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what is done is fair until the contrary is shown. It is not the function of the court to form its own judgment as to what is fair and then to "amend or supplement it with new provisions so also make it conform to that judgment."**

Lenaola J, (as he then was) further stated:

> **"It is therefore not the business of this court to distill what it thinks should have been the law... The US Supreme Court in US Supreme Court in US v Butler 297 US 1 (1936) had this to say under a similar issue:**
>
> > **"When an Act of Congress is approximately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenging and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislature policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends"**

139. The court in examining the constitutionality of a statute ought to assume that the legislature understands and appreciates the needs of the electorate and that the legislature enacts laws they consider reasonable for meeting these needs. See **Nairobi Metropolitan PSV SACCO v County Government of Nairobi**.

140. In this regard, the object and effect of a statute are relevant considerations. In **Queen v Big M. Drug Mart Ltd (1985) 1 SCR 295, which has been cited with approval by our superior courts, it was held that:**

> **"... both purpose and effects are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, are clearly linked. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus validity."**

141. This calls for the proper construction of a statute as stated in **Murugi Geteria Mugo v Judges and Magistrates vetting Board and Others [2013] e KLR:**

"It is trite that, in construing a statutory provision, the first and foremost rule of construction is that of literal construction. All that the court has to see at the very outset is what does the provision say in its plain, grammatical and ordinary language. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of its statutes need not be called into aid save when the legislation intention is not clear. However, the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words displayed by the legislature. In the words of Lord Greene M.R in the case of Re A debtor (No. 335 of 1947) (1948) 1 ALL ER 533 at Page 536 it was stated that: -

> **"there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used".**

142 The Court proceeded to state that:

"If the language is clear and explicit, the court must give effect to it, for in that case the words of the statute speak the intention of the legislature. (See War Bruton vs Loveland (1832) 2 B at 480 for Jindal CJ at P 489) and Major General Tunyefunza vs A.G Court of Appeal petition no.1 of 1996).

In the case of P. Asokan vs Western India Plywoods Cannanore AIR 1987 KER 103 the court expounded and shed more light on statutory interpretation as follows:

> **"….in relation to the interpretation of statutes, courts have a positive role to play. If a section yields two different interpretations, that which leads to an arbitrary or shockingly unreasonable result has to be eschewed. If an interpretation is such that it will expose the enactment to a distinct peril of interpretation such that it will expose the enactment to a distinct peril of invalidation as offending a constitutional provision, the courts would be fully justified in reading down the provision and giving it an interpretation consistent with its constitutionality. Even the courts, without much of enthusiastic exuberance of judicial activism, can bring about just results by meaningful interpretation".** (Emphasis added)

143. It is clear that the impugned provisions apply equally to all water service providers including those established by the county government under Section 77 of the Water Act. Secondly, that they align with the functions assigned to the national government under the Fourth Schedule. As earlier observed, water resources in Kenya vests in and are held by the national government in trust for the people of Kenya, all of whom are entitled to enjoy the right to water as guaranteed in Article 43 (1)(d) of the Constitution.

144. All the Petitioners herein including those in **Petition No.54/18** agree that water is a unique and important resource and have emphasized that they are duly licensed by **WASREB**. The provisions of the Water Act 2016 which provide for licensing and of water service providers are intended to regulate the provision of water services, for the ultimate benefit and protection of consumers. It would be nothing short of anarchy if any and every person were at liberty to provide water services howsoever and wherever and of the quality, and in a manner that suited to him. To allow such a *laissez-faire* situation would be injurious to public health and irresponsible on the part of any government.

145. Regulation serves the purpose of upholding standards, which is the clear duty of the national government in the realization of the people's right to clean, safe water in adequate amounts. The Petitioners in Petition 54/18 have not shown how the provisions of Sections 74 and 86 limit their rights under Article 43(1)(d) of the Constitution and/or how the section are discriminatory against them.

146. It is an established principle of law that anyone who wishes the court to grant relief for the violation of the Constitution, of any right or fundamental freedom under the Constitution is obligated to plead and demonstrate the constitutional provisions violated or infringed and the manner of such infringement. The imposition of certain requirements under Section 72(1) (e),74, 79 and 80 and 86(2) of the Water Act 2016 to the governance structures of water service providers serves the regulation object so that such companies have sound and accountable governance in order to be effective in carrying out their mandate.

147. Section 79(1) of the water Act 2016 extends the company governance requirements found in the Companies Act to water service providers. It would be absurd to suggest that the requirements under the Companies Act violate the right to acquire and own property or that they represent discrimination against businesses. Besides, section 79(1) does allow for alternative governance structure under "any other written law". Indeed some of the Petitioners in Petition 54 of 2018 were variously registered as societies under the Societies Act, trusts under the Trustees (Perpetual Succession) Act or as community based organizations and self-help groups under the aegis of different national government ministries such as the Ministry of Gender Children and Social Development and Ministry of Home Affairs, National Heritage and Sports, and the like.

148. The requirements for licensing, adoption of certain governance structures by water service providers under the Water Act 2016 in this case are rational and consistent with the limitation allowed under Article 24 of the Constitution. The Petitioners' rights must be enjoyed and exercised within the context of the limitation of the law to accommodate the corresponding enjoyment of the rights of other persons.

149. Where the legislation is said to violate fundamental rights and or freedoms, a key plumb line is provided in Article 24 which provides as follows:

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

150. In view of the foregoing, there is no demonstrable unjustified limitation of the right to water as claimed by the Petitioners in Petition 54 of 2018 and it has not been shown that they have been discriminated against. This court finds no merit in the challenge raised by the Petitioners in Petition 54/18 regarding the provisions of Section 72(1) (e), 74, 79, 80 and 86(2) of the Water Act 2016.

151. Similarly, I find no merit in the objections made with regard to Section 77 of the Water Act 2016. Section 77 (1) of the said Act echoes the powers and functions of the county government under Article 186(1) as read with section 11 of Part 2 of the Fourth Schedule to the Constitution. The section also provides for the requirement of compliance with standards of commercial viability set by the **WASREB**, which is also responsible under subsection 5, to make Regulations to govern the standard of water to be supplied by water service providers set up by the county government under subsection (1).

152. It is not clear from submissions made by the Petitioners in **Petition 54/18** why this provision is offensive to them. They did not demonstrate how the provision is inconsistent with Articles 185 and 186(1) of the Constitution. It is not accurate to assert, as counsel did that Section 77 donates the power of regulation of water service providers to the county government. Subsection (3) allows for the establishment of water service providers established under the Companies Act or **"any other body providing water services as may be approved by the Regulating Board."** Despite the provisions of Section 77(1) and (2), under Section 94(1), a duty is placed upon the county government to effect measures for the provision of water services to rural areas not considered viable for such provision.

153. Subsection 3 provides that any installations made pursuant to that duty **"may be managed by the county associations, public benefits associates or a private person under a contract with the county government"**. There is no merit in the objection taken in respect of Section 77 of the Water Act 2016. I do agree with the submissions made by some of the Interested parties and Respondents that the purport of the impugned sections is attuned to the realization that rather than the derogation of the right to water under Article 43(1) (d) of the Constitution.

154. In my considered view, these Sections and the Water Act 2016 read as a whole, cannot be said to be inconsistent with Articles 185 and 186 and the Fourth Schedule to the Constitution or to be discriminatory against the Petitioners in Petition 54 of 2018, or to unjustifiably limit their right to water. The suggestion, implicit in these Petitioners' case, that they ought to be exempt from key regulatory provisions and or that their rights and claims under Article 43 (1) (d) in view of Article 174 of the Constitution ought to be applied in a more expansive manner are not legally tenable in the scheme of things. Such notion is misplaced. In the circumstances, the court answers the second issue in the negative.

c. **Whether the original Section 4(1) of the Kiambu Water and Sanitation Act 2015 and as amended, and Section 22A of the Amendment Act and indeed the entire Amendment Act infringe upon the Petitioners' right to water under Article 43(1) (d) and offend Article 174 of the Constitution, in addition to being in conflict with Sections 77, 86, 97 and 98 of the water Act 2016.**

155. The court has already found that the entire Amendment Act is unconstitutional for want of adequate public participation. As such the entire Amendment act is liable to be struck down. In the circumstances, it would be academic to consider whether any or all of provisions therein violate the Petitioners' rights as stated above. This leaves for determination, the challenge raised in respect of Section 4(1) of the Kiambu County Water and Sanitation Services Act (the Act). The challenge was raised by the Petitioners in Petition 41 of 2018. Therefore, the issue under consideration in this part of the judgment can be refined for clarity as follows:

Whether Section 4(1) of the Act infringes upon the right of the Petitioners guaranteed under Article 43(1) (d), offends Articles 174 (c), (d) and (f) of the Constitution and is in conflict with Sections 77, 86, and 97 of the Water Act, 2016.

156. It seemed from some of the Petitioner's averments, particularly at paragraph 54 of the Petition that the Petitioners were in addition to other objections also challenging the enactment process of Section 4(1) of the Act, on account of lack of public participation in its enactment. This averment is however not supported by any deposition in the Petitioners' supporting affidavits filed. It has to be said that the matter of public participation is one of fact and cannot be canvassed through bland averments. There is no corresponding prayer sought in the petition in connection with the alleged absence of public participation in respect of the Act or Section 4(1) thereof. In any event the objections herein in respect of public participation were roundly traversed at paragraphs 15, 16, 17 and 28 of the affidavit filed by **WASREB** on 25th September 2018 and in the Respondents' Replying affidavit.

157. The written submissions of the Petitioner, albeit sometimes referring erroneously to the Amendment Act as the Kiambu Water and Sanitation Services Act 2015, do not touch on the aspect of public participation in respect of the Act, or indeed address any of the other challenges thereto pleaded as pleaded in the Petition. The references in the footnotes clearly refer to the Amendment Act and not the 2015 Act.

158. During oral highlighting of written submissions, counsel for the Petitioners basically reiterated the written submissions filed earlier.

Thus, the Petitioners in Petition 41 of 2018 appear to have abandoned in toto their challenge to Section 4(1) of the Kiambu Water and Sanitation Services Act as regards its purported infringement of the Petitioners' rights under Articles 43(1) (d), violation of Article 174 (c), (d) and (f) and its purported conflict with Sections 77, 86 and 87 of the Water Act 2016.

159. Perhaps this abandonment is well advised. The sometimes partial and self-serving construction of the provisions relating to the objects of devolution canvassed in relation to Section 4(1) of the Act in particular, appeared narrow and to ignore the import *inter alia* of the provisions of section 11 of Part 2 of the Fourth Schedule to the Constitution, Articles 185 and 186 of the Constitution, the provisions of Article 187(2) of the Constitution as read with the provisions of Section 77(1) of the Water Act, the latter which imposes a duty on county governments to establish water service providers in counties.

160. Article 187(2) on the other hand provides that :

> **"If a function or power is transferred from a government at one level to a government at the other level—**
>
> **a) arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred; and**
>
> **(b) Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule."** (emphasis added)

161. In my considered view, it is a distortion of the objects and principles of devolved government to suggest that devolution amounts to a *carte blanche* which permits persons and entities, effectively to wrest a function assigned to a devolved entity. On this point, I agree with the submission by the Attorney General that the concept of devolution projected by some of the Petitioners amounts to a misinterpretation of Article 174. Devolution is achieved within the structures prescribed in the Constitution. County water entities dealing in water resources as some of the Petitioners herein, a resource held by government as a trust for the people, cannot properly jettison the county government from its mandate concerning the water function under the Constitution, without appearing to overthrow the provisions of Articles 174, 186(1), 187(2) as read with Part 2 of the Fourth Schedule to the Constitution.

162. In this regard, I could not agree more with **WASREB's** Engineer Gakubia's depositions in the Replying affidavit filed on 25th September 2018 in **Petition 41 of 2018** to the following effect:

> **"10. THAT upon the onset of devolution in 2013, all water service providers were subsumed to the new county governments as county entities to provide water services on their behalf and this is underscored by section 154 of the water Act 2016. In terms of governance this means that the shareholder is the county government, the board of directors includes members of the executive arm of the county government from the water/finance sectors and members from the local served public appointed through a competitive stakeholder procedure as per the national governance standards in section 77 of the water Act 2016.**
>
> **11. THAT as regards complete transition to devolution there is a remaining important aspect which is the transfer of physical assets and liabilities i.e. land, heavy infrastructure such as treatment works, transmission lines, trunk Sewers which the Cabinet Secretary in the Ministry of Water and Sanitation is supposed to complete within the 3 year transition period in the Water Act 2016. All these (assets and liabilities are) still vested in the national government however the water service providers (such as the interested party) possess and use these assets to provide water service to consumers in the county through an agreement signed with Athi Water Services Board**….(emphasis added)

163. In the said affidavit Engineer Gakubia states that clustering or merging of non-viable water entities enhances their commercial viability. He further endorses the legitimacy of the County Government's intentions to merge water service providers in order to achieve economies of scale for the benefit of consumers in the county.

164. Part of the consultation process that had occurred in the Kiambu County before and after the enactment of the 2015 Act and deposed to at paragraphs 15 – 17 of Engineer Gakubia's affidavit is documented in the annexure **"JM1"** attached to the County Government's Replying affidavit filed in **Petition 41 of 2018.**

165. **"JMI"** is comprised of 3 segmented but related reports described as Task 1, Task 2 and Task 3. It is a bulky and somewhat technical document. Nevertheless, having skimmed through the said reports and especially conclusions of the studies conducted the court noted two important take-aways. First, that the nine water service providers recognized in Section 4 of the Kiambu Water and Sanitation Services Act were actively engaged by the consultants during the studies. Secondly, with particular regard to one of the most contentious issues in this suit, namely the merger or clustering of nine water service providers in the county, the said providers participated in related deliberations and final decision.

166. For instance, at page 3 of the Final Report Task 2 (found page 81 of the Respondent's annexures) the 5 criteria used to assess the clustering options are stated. The criteria is stated the report which further stated that:

> **"3. Financial position**
>
> **The team gathered audited financial information from each WSP (9) Water Service Provider) to better understand and assess the financial impact of different clusters. This included an examination of cash flows, operations and maintenance coverage and debtors and creditors …**

5. Stakeholder inputs

The cluster analysis and recommendations need to benefit from input of those who know the realities on the ground and have a direct stake in the outcome of the clustering decision. This input was gathered in a December 7 workshop with County Government Officials and WSP (Water Service Providers) Senior managers."

167. The report indicates at the end of that page that three clustering scenarios were put forth and proceeds to state:

"5. Unanimous decision on the selected cluster. The team presented the clustering rationale, analysis and findings to County Officials and WSP managers, and after group discussions and sharing of views, unanimously agreed on the following cluster, which is a slight revision of the East West cluster noted above.

1. **East cluster: Gatundu – Karemenu, Githunguri, Ruiru – Juja, Thika**

2. **West Cluster: Karuri, Kiambu, Kikuyu, Limuru"**

168. Under this arrangement, the Interested Party in **Petition 41 of 2018** was assigned to the Eastern cluster. At pg. 4 of the report (found at pg. 82 of the Respondent's annexures) the report continues to state that:

"Participants in the workshop noted that this East – West scenario was (1) politically acceptable (2) met the shared water services and infrastructure criteria and (3) clustered WSPS facing similar challenges and opportunities"

169. The nine WSPs including the Interested Party in **Petition 41/18** having been thus involved, and having also endorsed the above clustering post the 2015 Kiambu Water and Sanitation Services Act, would not appear sincere when they subsequently declare support for the Petition, and asserting before this court that Section 4(1) of the Act violates their rights and contravenes the Constitution. This particular challenge and that raised by the Petitioners **in Petition 54/18** to the licensing and governance provisions in the Water Act 2016 appear to be opportunistic objections that are devoid of merit.

170. Similarly, the application by the Interested Party dated 6th July 2018 as filed in **Petition 41 of 2018** is evidently an irregular and opportunistic attempt by the Interested Party to expand or amend the case pleaded in **Petition 41/18** by the Petitioner therein. The prayers sought in the motion bear no evident relationship to the Petition and on the face of it, the motion represent a separate cause of action. The motion cannot be sustained and is hereby struck out.

171. In closing, I should say that, the realization of the objects of devolution goes hand in hand with the implementation of devolution within the four corners of the Constitution and relevant laws. Courts would not allow any person or group of persons no matter how well organized, vociferous or powerful to subvert devolution by unlawfully or unreasonably resisting the actualization of the constitutionally assigned powers and functions of the county government as they relate to water and sanitation services.

172. It stands to reason that the devolved governments are a key fulcrum to the realization of the fruits and benefits of devolution through their fulfilment of their assigned mandate, including the water function. Water service providers such as the Interested Party in **Petition 41 of 2018** who continue to use public infrastructure and assets to deliver water, an asset held in trust for the people should be the first to recognize this fact. (see paragraph 11 of Engineer Gakubia's affidavit referred to above)

173. In this regard, I would add my voice to that of **Waweru J** in Kahuti **Water Sanitation Co. Ltd and 4 Others v the Governor Murang'a and 2 others [2017] e KLR** where the learned Judge observed *inter alia* that:

"It is also apparent, prima facie, that the *Ex parte* applicants are engaged, and have been so engaged, in legitimate businesses of providing water and sanitation service to the residents of Murang'a county. But it should be obvious to anyone, again *prima facie*, that after the promulgation of the new Constitution, the *Ex parte* applicants would have a limited time to continue doing so independently because the provision of water and sanitation services was now a devolved function of the County Government of Murang'a and that the 4 would probably continue to provide those services only until such time as the County Government was ready to take on that function."

174. Equally, the sentiments of **Kimondo J** in **Mercy Wanjiku Kimwe and 2 Others v Governor, Murang'a County and 5 Others [2018] e KLR,** appear apt. Citing with approval the above statements in **Kahuti Water Kimondo J** proceeded to state that:

"But that (devolution of water and sanitation services function to county governments) is not to say that the governor or county government can wake up one morning and violently take over service providers (subsumed within the county governments by dint of devolution). The Constitution in the Fourth Schedule envisioned a negotiated and orderly transition ….. The existing water service providers on the other hand should let go at some point."

Disposition

175. Having answered issue (a) in the affirmative and issues (b) (i) and (b)(ii) and c in the negative, the court hereby issues a declaration that the entire Kiambu County Water and Sanitation Services Amendment Act of 2018 is unconstitutional and invalid for want of adequate public participation under Articles 10 (2) a), 174(c) and (d) and 196 of the Constitution as read with Section 87 and 91 of the County Governments Act. In the result, all the three Petitions have succeeded, in that respect.

176. These Petitions involved a matter of great public interest and it is only just that the court directs that all the parties, except **WARMA** bear their own costs in the suits. **WARMA** served an early notice in **Petition 54/18** that their inclusion in the suit was a misjoinder. They filed a motion seeking to be removed from the suit, but counsel for the Petitioners in **Petition 54/18** maintained that **WARMA** had been properly joined. It was apparent even then, that from the inception of the suit, there was no cause of action pleaded against **WARMA** nor any reliefs sought against them. No case was made against them during the hearing.

177. In my determination at this stage, there was no justification at any time for the joinder of **WARMA** in **Petition No. 54 of 2018. WARMA** is a public body operating on public funding drawn from tax payers. It has incurred unnecessary costs defending a suit in which neither had a role nor was a necessary party. It would be unconscionable to saddle the taxpayer with such unnecessary costs. In the circumstances, I order that the Petitioners in **Petition 54 of 2018** do pay full costs to **WARMA** in respect of the said suit.

DELIVERED AND SIGNED AT KIAMBU THIS 14TH DAY OF NOVEMBER 2019

…….

C. MEOLI

JUDGE

In the presence of:

Mr. Ngugi for the Petitioners in Petition 41/18

Mr. Mwangi appearing with Mr. Wanjohi for the 1st Respondent and

holding brief for Mr. Okeyo for Interested Party in Petition 41/18

Mr. Marete for the Petitioners in Petition 54/18

Mr. Mwangi for the 1st to 3rd Respondents

Mr. Mwangi holding brief for Mr. Ojiende for Petitioner in Petition 52/18

Mr. Mwangi appearing with Mr.Wanjohi for the Respondents in Petition No.52/18

Court Assistant - Kevin