



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CONSTITUTIONAL PETITION NO. 55 OF 2018

BETWEEN

MERCY WANJIKU KIMWE.....1ST PETITIONER

ANTONY MUTIRIA MWANGI.....2ND PETITIONER

JANE NYAMBURA WANYOIKE.....3RD PETITIONER

AND

THE GOVERNOR, MURANG'A COUNTY.....1ST RESPONDENT

MURANG'A WATER & SANITATION CO. LTD.....2ND RESPONDENT

TANA WATER SERVICE BOARD.....3RD RESPONDENT

WATER SERVICES REGULATORY BOARD.....4TH RESPONDENT

AND

PETER KAHARA MUNGA.....1ST INTERESTED PARTY

JOSEPH H. KIMURA.....2ND INTERESTED PARTY

RULING

1. The pith of the dispute is the *control* and *management* of water resources in Murang'a county.
2. To the *petitioners*, the question for decision is whether the violent *takeover* of Murang'a Water and Sanitation Company (hereafter the 2nd respondent or *Muwasco*) by the governor (the 1st respondent) is lawful. To the 1st respondent, the issue is straightforward: *Who* between the governor of the county government of Murang'a and *Muwasco* has the *power* or *right* to provide water to the residents?
3. The three petitioners are *residents* of the county. They have filed separate depositions sworn on 8th October 2018. There is also a *further affidavit* sworn by the 3rd petitioner on 15th October 2018.
4. Their case is that *Muwasco* has exclusive mandate to supply water and sanitation services. They referred at length to the framework for conservation and use of water resources under the ***Water Act***

2016. In particular, section 79 (1) of the Act provides that water service providers shall be managed by a *board of directors* in accordance with the **Companies Act 2015**.

5. They aver that the 1st respondent *unlawfully* appointed the 2nd interested party to *replace* the 1st interested party as chairman of Muwasco. The 1st respondent did so through *Legal Notice Number 8391* published in the *Kenya Gazette* of 15th August 2018. The action is impugned for want of *public participation* as decreed by section 87 of the **County Governments Act**.

6. Since Muwasco is a *body corporate*, I was urged to find that the action breached the Articles of Association of the Company among other laws.

7. The petitioners thus pray for a *conservatory order* to stay *implementation* of the Gazette Notice pending the hearing and determination of the petition.

8. The petitioners contend that the 1st respondent contravened Articles 10, 21, 43, 46, 47 and 232 of the **Constitution**.

9. In the further affidavit by the 3rd petitioner it is averred that the takeover by the 1st respondent was “*not procedural or based on any law*” and that Murang’a county has not laid down a “*proper legal framework*” to run water services. I was referred to the *Meru County Water and Sanitation Act 2014*. The latter provides for appointment of board members; and, transfer of functions by the independent water service providers.

10. The 1st interested party supports the petition. He avers that he is the *bona fide* chair of Muwasco. He has listed a number of achievements during his tenure: enhancing efficiency and reliability; broadening the income base; establishing a bottling plant; and, setting up a training school for water technicians.

11. He has annexed minutes of the 6th Annual General Meeting of the company held on 15th January 2016. The company resolved to re-elect him as a director. As he was the sole candidate for chairman, the selection committee recommended him for the post. The resolutions were carried.

12. The 1st interested party refers at length to the *regulations* and *guidelines* by the 4th respondent and the Articles of Association of Muwasco. He avers that the impugned gazette notice violated the procedures of appointment and removal of directors or chairman of Muwasco.

13. It is the case of the 1st respondent that the actions of the 1st respondent contravene Articles 10, 21, 43, 46, 47 and 232 of the **Constitution**. He avers further that the conduct breaches section 79 of the **Water Act 2016**, the **Companies Act** and articles 67 and 68 of the company’s Articles of Association.

14. The interference by the 1st respondent has led to “*widespread destruction of the 2nd respondent’s property*” through a raid on 2nd August 2018. He also avers that the appointment of the 2nd interested party was not preceded by *public participation*.

15. The 1st interested party is also aggrieved by “*unprintable insults hurled at [him] and [his] family by the 1st respondent in public forums*”. He strongly feels that any *personal* differences with the governor should not be a guise to disrupt water services in the county.

16. The 2nd respondent also supports the petition. It has filed a lengthy replying affidavit sworn by *Daniel Ngang’a*, the Managing Director. The deposition however deviates from *facts* into full arguments of the law and regulations. That is true of paragraphs 3 to 28; and, 40 to 49 of the affidavit.

17. I can condense the arguments as follows: that management of water resources is a *shared* function between the national and county governments; and, that the role of the county “*appears to be that of a recipient of water for the purpose of making it available to the citizenry*”.

18. I should point out that those assertions are contested by the 1st respondent in the *further replying affidavit* sworn on 19th October 2018.

19. The 2nd respondent avers that the correct legal framework governing the water sector is to be found in the **Constitution**, the **Water Act 2016**, the **Companies Act 2015** and the Memorandum and Articles of Association of the company.

20. Paragraphs 32 to 36 of the deposition deal with the impugned actions or disruptions by the 1st respondent. The 2nd respondent avers that the company employs 130 permanent and pensionable employees. Unless the 1st respondent is restrained from “*playing cheap and unsustainable populist politics*” the water sector and livelihoods of these employees will be destroyed.

21. The 4th respondent equally supports the petition. It has filed a replying affidavit sworn by *Robert Gakubia*, the C.E.O of the Water Services Regulatory Board. He avers that section 72 of the **Water Act 2016** protects *consumer rights* to water. The repealed **Water Act 2002** on the other hand recognized commercial water service providers such as Muwasco.

22. At paragraph 9, he avers as follows-

“That upon the onset of devolution in 2013, all water service providers were subsumed [in] to the new county governments as county entities to provide water services on their behalf. As a regulator to the sector, the 4th respondent in 2013 issued advice to the new county governments on how to proceed in taking up their role”

23. The petition is contested by the 1st respondent. The governor concedes appointing the 2nd interested party as an *interim* chairman. He avers that Article 186 of the **Constitution**; and, Section 11 (b) of Part II of the Fourth Schedule of the **Constitution** devolved *County Public Works and Services* including *water and sanitation* to the county government. In a synopsis, the activities of Muwasco usurp the powers of the county government and violate the **Constitution**.

24. Reliance was also placed on *Legal Notice Number 178 of 2013* in which the *Transitional Authority* approved transfer of water services or water companies to the counties.

25. The 1st respondent also relied on the decision of the High Court in **Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang’a & Others**, Murang’a, Jud. Rev. 5 of 2017 [2018] eKLR. Waweru J had ruled that water services were a devolved function; and, that the *ex parte* applicants could only “*continue to provide those services only until such time as the County Government was ready to take on that function*”.

26. The 1st respondent takes up cudgels on Muwasco’s blockade of “*a peaceful and orderly transfer*” of the company to the county. The application is also attacked for being *sub judice*; for offending Article 22 of the **Constitution**; and, running counter to the doctrine of *issue estoppel*.

27. The 2nd interested party also opposes the petition. There are *grounds of opposition* dated 11th October 2018. Their gravamen is that the impugned gazette notice has been implemented; that this is a corporate dispute disguised as a constitutional petition for enforcement of the *Bill of Rights*; and, that the action is *sub judice* or *res judicata*.

28. The 3rd respondent did *not* enter an appearance in the matter.

29. The petitioners filed skeleton submissions and a list of authorities on 19th October 2018. The 2nd respondent and 1st interested party filed their submissions and precedents on even date. The 1st respondent filed submissions on 19th October 2018 together with a list of authorities.

30. On 19th October 2018 I heard further arguments by all learned counsel.

31. The main petition is *pending* for hearing. I *cannot* comment on the merits of the action at this stage. That will be the true province of the trial court.

32. I sympathize with the petitioners: they are the proverbial grass caught in a vicious fight between Muwasco and the 1st interested party on the one hand; and, the governor and the county government on the other hand. It is also evident that the petitioners *largely* side with Muwasco and the 1st interested party. But being residents of the county, they have a right to present this petition.

33. To succeed in an application of this nature, the applicant must show that it has a *prima facie* case with a likelihood of success; that unless the *conservatory order* is granted the applicant will suffer *serious prejudice*; or, that the main petition will be rendered *nugatory*. See generally ***Giella v Cassman Brown and Company Limited*** [1973] E.A 358, ***Suleiman v Amboseli Resort Limited*** [2004] 2 KLR 589.

34. In addition, the court must carefully weigh the *public interest*. There is a long line of authorities on that aspect including ***Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others*** Supreme Court of Kenya, Petition No 2 of 2013 [2014] eKLR, ***Centre for Rights Education and Awareness & 7 others v Attorney General***, High Court, Nairobi, Constitutional Petition No. 16 of 2011 [2011] eKLR, ***British American Tobacco Kenya Ltd v Cabinet Secretary for the Ministry of Health & 2 others*** High Court, Nairobi, Constitutional Petition No. 143 of 2015 [2015] eKLR, ***Flemish Investments Limited v Town Council of Mariakani***, Mombasa High Court Case 459 of 2010 [2012] eKLR, ***Marius Wahome Gitonga v Kenya National Highways Authority***, Eldoret, High Court Petition 16 of 2015 [2015] eKLR.

35. The confluence of principles applicable in granting an ordinary *injunction* and a *conservatory order* were succinctly captured by the Supreme Court in ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 others*** [supra]. The distinguishing feature relates to *public interest*. The court must bear in mind the inherent *merit* of the case *versus* the *public interest*. The learned judges of the Supreme Court had this to say-

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

36. Like I have stated, the main petition remains unheard. The petitioners have made powerful arguments on the legal framework underpinning the conservation and supply of clean reliable water. I remain alive that Muwasco is a *distinct* legal entity managed by a board of directors; and, that it performs critical functions of supplying water and sanitation services in Murang’a.

37. On the face of it, the impugned gazette notice appointing the 2nd interested party contravenes the *Articles of Association* of the company. See ***Okiya Omtatah Okoiti & 3 others v Nairobi City County & 5 others***, High Court, Nairobi Pet. 143 of 2014 [2014] eKLR, ***Benson Ritho Mureithi v J. W. Wakhungu & 2 others***, High Court, Nairobi Pet. 19 of 2014 [2014] eKLR.

38. But I say that very carefully and *without* making a finding. Fundamentally, the trial court will have to determine whether the *functions* of water and sanitation have been completely *devolved* to the counties.

39. But at this stage, I cannot shut my eyes to the text of the Constitution which reigns supreme. **Article 187 (1)** of the ***Constitution*** provides as follows-

“A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—

(a) the function or power would be more effectively performed or exercised by the receiving government; and

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.”

40. Article 187 (2) then states-

“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]

41. I have then looked at the *Fourth Schedule* which deals with *distribution* of functions between the national and county governments. Part 2 of the schedule at section 11 grants county governments the following functions-

“County public works and services, including—

(a) storm water management systems in built-up areas; and

(b) water and sanitation services.” [Emphasis added]

42. Paragraph 9 of the replying affidavit by the 4th respondent, the Water Services Regulatory Board, concedes that *“upon the onset of devolution in 2013, all water service providers were subsumed [in] to the new county governments as county entities to provide water services on their behalf”*. The regulator also gave *advice* to the new county governments on how to proceed.

43. But that is not to say that the governor or county government of Murang’a can wake up one morning and *violently* take over the management of the water service providers. The **Constitution** in the *Fourth Schedule* envisioned a negotiated and *orderly* transition. For example, some assets of Muwasco *may* belong to the *national government*. Accrued loans and other debts *will* need to be re-assigned or transferred. That position must be respected and remains a live issue in the main petition.

44. The existing water service providers on the other hand *should* let go at some point. See ***Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang’a & Others***, High Court, Murang’a, Jud. Rev. 2 & 5 of 2017 [2018] eKLR. The less I say about it the better.

45. I have weighed the *merits* of this case *against* the *public interest*. Applying the principles I set out for grant of *conservatory orders*; and, mirrored against the provisions of the *Constitution*, I find that the petitioners have *not* made out a *strong* case for grant of the conservatory order. The Notice of Motion dated 8th October 2018 is hereby *dismissed*. The main petition shall be heard on *priority*.

46. Costs shall abide by the judgment in the main petition.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 1st day of November 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. T. Kamwaro for the petitioner instructed by Kamwaro & Associates Advocates.

Mr. Kamau holding brief for Mr. Ngang'a for the 1st respondent instructed by Mbugua Ngang'a & Company Advocates.

Mr. Kabathi for the 2nd respondent and 1st interested party instructed by Kabathi & Company Advocates.

No appearance by the 3rd and 4th respondents.

Mr. Kamau for the 2nd interested party instructed by P. W. Kamau Advocates.

Ms. Dorcas, Court Clerk.