



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.26 OF 2015**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**AND**

**NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**

**OSANO & ASSOCIATES.....2<sup>ND</sup> RESPONDENT**

**ATHI WATER SERVICES BOARD.....3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF ENVIRONMENT,**

**WATER & NATURAL RESOURCES..... 4<sup>TH</sup> RESPONDENT**

**AND**

**NAIROBI CITY WATER & SEWERAGE**

**COMPANY LTD.....1<sup>ST</sup> INTERESTED PARTY**

**WATER SERVICES REGULATORY BOARD.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Application herein was filed on 28<sup>th</sup> January 2015 by the Petitioner together with his Petition of even date. The Application is premised on an advertisement appearing in the “Daily Nation” newspaper of 21<sup>st</sup> January 2015 in which the 1<sup>st</sup> Respondent, the Nairobi City County Government (hereinafter “**the County**”) sought to recruit Directors of the Nairobi City Water and Sewerage Company (hereinafter “**the Company**”), the 1<sup>st</sup> Interested Party herein.

2. It is principally the Petitioner’s case that the 1<sup>st</sup> Respondent, by purporting to have the status and capacity to recruit Directors of the said Company, was in breach of paragraph 4.2.4 of the Corporate Governance Guidelines published by the Water Services Regulatory Board vide Legal Notice No.7045 of

2010 (gazetted on 18<sup>th</sup> June 2010). For avoidance of doubt, and since a *prima facie* interpretation of that paragraph, would essentially determine the Application, Para 4.2.4 of the Guidelines aforesaid reads as follows;

#### 4.2.4 Stakeholder participation procedure:

This process shall apply where the WSP is in start up phase and is running assets previously owned by the local authority or any other Government scheme. After a board of directors of a company is already in existence the WSPs will advertise for the positions following the criteria above;

***“2. The water service board shall advertise in the local media positions for the board of directors for an existing water company and shall set the criteria for those eligible to apply in accordance with the guidelines.”***

3. In his Supporting Affidavit in support of the Application and in his submissions filed on 16<sup>th</sup> March 2015, the Petitioner’s case is that a proper reading and interpretation of paragraph 4.2.4 aforesaid can only lead to the conclusion that;

(i) Based on its heading i.e. **“stakeholder participation procedure”**, its intention is that pursuant to **Article 10(2)(a)** of the **Constitution**, participation of the people in governance is a fundamental principle underlying the Constitution 2010. In the event, stakeholders must be involved in the appointment of the Board of Directors of the Company, a position that the County is averse to.

(ii) The words used in it would point to the fact that the process created thereunder would apply both where water service provider (WSP) such as the Company, is in a start up phase and where the WSP is running assets previously owned by a local authority or any other Government Scheme.

(iii) It must be read with Paragraph 4.2.1 of the Guidelines which stipulates that all WSP must have **“a professional mix of directors appointed from the local authority and directors appointed from stakeholders through a stakeholder participation procedure such that no individual or group of individuals can dominate its decision making.”** That the import of the above provisions read together is that the 1<sup>st</sup> Respondent cannot, solely, determine the appointment of the Company’s Directors.

(iv) In addition to the above, paragraphs 4.2.2, 4.2.4 and 4.2.5 must be read together with **Article 235** of the **Constitution** with the effect that where an illegality is perpetrated in the manner that Directors are appointed, then the County should not be allowed to benefit from its own mischief by arguing that non-appointment of Directors in the manner it wishes, would cripple the rendering of water services within Nairobi.

4. The Petitioner further contends that in her judgment in **Nai H.C. Petition No.143 of 2014** Mumbi Ngugi J. made categorical findings and directed specifically that **“the appointment of the Directors of the Nairobi Water and Sewerage Company be carried out afresh in accordance with the law”** but that the County was still intent on not doing so, hence the present proceedings.

5. As regards the retention of the 2<sup>nd</sup> Respondent as a consultant with regard to the appointment of Directors of the Company, it is the Petitioner’s case that even if a consultant were to be hired, the 3<sup>rd</sup> Respondent is the correct entity to do so in order to maintain checks and balances. In any event that since the 2<sup>nd</sup> Respondent has admitted that it is not compliant under the **Human Resource Management Professionals Act, 2012**, it was not qualified to undertake the consultancy offered to it by the County.

6. For the above reasons, the Petitioner prays for orders as follows;

***“(1) That pending the hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to grant a conservatory order staying the 1<sup>st</sup> and 2<sup>nd</sup>***

*Respondents' on-going recruitment exercise as advertised on page 43 in the Daily Nation published on Wednesday, January 21, 2015, and on other dates within our media, inviting applications from the public to fill nine (9) positions in the Board of Directors of the Nairobi City Water and Sewerage Company Limited (hereinafter, the NCWSC).*

*(2) That pending the hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to issue a temporary order of Prohibition prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever to the advertisement on page 43 in the Daily Nation published on Wednesday, January 21, 2015, and or any other similar publication, inviting applications from the public to fill nine (9) positions in the Board of Directors of the NCWSC.*

*(3) That this Honourable Court be pleased to issue a temporary order ordering the 2<sup>nd</sup> Respondent to demonstrate to the Court that the firm is duly registered with and licenced to operate by the Institute of Human Resource Management (IHRM) as required by Section 41 of the Human Resource Management Professionals Act 2012.*

*(4) That this Honourable Court be pleased to join other parties relevant to this Application/Petition as and when it deems fit.*

*(5) That consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.*

*(6) That costs be in the cause.”*

7. In response, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 25<sup>th</sup> February 2015 by Ms Lillian W. Ndegwa, County Secretary and Head of its County Public Service. It also filed written submission on 11<sup>th</sup> March 2015 and its case is that the Petition and Application are a gross abuse of Court process and that the Petitioner is being used as a proxy by persons who desire to have specific persons appointed to the Board of the Company. Further, that the Petitioner has incessantly filed suits against and/or concerning the 1<sup>st</sup> Respondent which action has greatly hampered the ability of the 1<sup>st</sup> Respondent to exercise its constitutional mandate to provide water and sanitation services to millions of residents of the Nairobi City County.

8. In addition, it is the contention of the 1<sup>st</sup> Respondent that the issues regarding Guidelines has previously been the subject of litigation in **Nairobi H.C. Petition No.143 of 2014** (as consolidated with **Petition No.42 of 2014** and **J.R. Application No.140 of 2014**) and that Mumbi Ngugi J. had made salient findings as to the relationship between the County and the Company as well as the place of the Guidelines in the constituting of the Company's Board of Directors. I will return to the relevant findings later in this Ruling. Suffice it to say at this point however that as far as the County is concerned, the learned judge found that because the Company is not a start up Company, having been in existence for the year 2003, any reliance on paragraph 4.2.4 is misguided.

9. It is also the County's case that Paragraph 4.6.4 of the Guidelines has given shareholders of the Company, supreme authority in overseeing the entire process of the election and appointment to its Board. That read together with **Section 7** of the **Sixth Schedule** to the **Constitution** as well as **Articles 10(2), 73 and 232(1) (g)** of the **Constitution**, the advertisement in the “Daily Nation” newspaper which triggered the present proceedings, was lawful and proper in the circumstances.

10. It is also the County's contention that the Water Services Regulatory Board and the Athi Water Services Board have all reached a common position that the recruitment of Directors of the Company is a mandate exclusively reserved for the County.

11. That for the above reasons, the 1<sup>st</sup> Respondent prays that the Application should be dismissed with costs.
12. On its part, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 13<sup>th</sup> February 2015 by Dennis Osano Kute and also filed submission on 13<sup>th</sup> March 2014. Its case is that its appointment as a consultant was public, competitive, transparent and had no flaws whatsoever.
13. Further, in association with the 1<sup>st</sup> Respondent, that it placed the impugned advertisement in two local daily and weekly newspapers and encouraged *inter alia*, female candidates in line with the Constitution, to apply for appointment. It had no intention and did not in way insinuate that it was giving previous Board members of the Company any preference in the appointments.
14. As for the allegation that the **Human Resource Management Professional Act No.52 of 2012** was applicable to it, the 2<sup>nd</sup> Respondent referred the Court to the decision of Mumbi Ngugi J in **H.C. Petition No.450 of 2012: Wycliffe Gisebe Nyakina & Anor vs Institute of Human Resource Management & Anor** where the learned judge stayed the operations of the said Act. His submission in that regard was therefore that the Act was wholly inapplicable in any circumstance to it.
15. Lastly, it is the 2<sup>nd</sup> Petitioner's submission that what the Petitioner seems to be challenging concerning the 2<sup>nd</sup> Respondent is the manner in which the County procured its services and that the correct procedure for mounting such a challenge is by filing an appeal to the Public Procurement Oversight Authority and not by filing a Constitutional Petition. Reliance for that submission was made on **The Speaker of the National Assembly vs Karume [2008] I KLR 425**.
16. The 2<sup>nd</sup> Respondent therefore prays that the Application be dismissed with costs.
17. I note that at the hearing of the Application, Mr. Wangila for the 1<sup>st</sup> Interested Party, the Company, supported the submissions made on behalf of the County while Mr. Sifuma appearing for the 3<sup>rd</sup> Respondent, Athi Water Services Board, supported the Petitioner's position. Miss Irari for the 4<sup>th</sup> Respondent on the other hand also supported the position taken by the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party.
18. In any event, the 3<sup>rd</sup> Respondent relies on the Affidavit of Clement Mugambi sworn on 9<sup>th</sup> February 2015 and in addition, Mr. Sifuma submitted that in paragraph 4.2.4(3) of the Guidelines, a Selection Committee ought to be put in place to recruit Directors of the Company and not the 2<sup>nd</sup> Respondent.
19. Further, that the Water Services Regulatory Board Party in the absence of County Legislation on the appointment of Directors of WSPS directed all Companies, like the present one, to align their Constitutions with the Guidelines but the Company had not done so.
20. Regarding letters dated 8<sup>th</sup> April 2014 and 20<sup>th</sup> August 2014 which gave certain directions to Water Boards such as the Company, he submitted that the former was addressed to all Water Boards and setting out the agency relationship between the 3<sup>rd</sup> Respondent and the Company. The latter on the other hand did not direct the Company to employ a consultant to recruit its Board members and further, that the 1<sup>st</sup> Respondent, in the nature of things, cannot appoint its own consultant and later, transparently, purport to ratify the decisions of the Consultant.
21. It is therefore the 3<sup>rd</sup> Respondent's case that the law was flouted by the 1<sup>st</sup> Respondent and the Application should be allowed as prayed.
22. On his part, Mr. Mukuru for WASREB also supported the Petitioner's position and added that the Guidelines should be fully applied because the 1<sup>st</sup> Respondent was selectively applying the same. That a Stakeholders Selection Committee is absolutely necessary to ensure sustainability and a human rights-

based approach to the appointment of Directors of the Company.

23. Like Mr. Wangila, he argued that the import of the letters of 8<sup>th</sup> April 2014 and 20<sup>th</sup> August 2014 were determined by Mumbi Ngugi J in her judgment in the case earlier cited and the role of consultants was thereby clarified.

24. Lastly, it was his submission that only the Athi Water Services Board can and should lawfully steer the process of appointment of Directors of the Company and not the 1<sup>st</sup> Respondent.

25. I have considered the matters raised by the Parties and it is obvious to me that in their submissions, Parties forgot two fundamental facts;

(i) I am not, at this stage, interrogating the merits of the Petition dated 27<sup>th</sup> January 2015. Arguments made before me went to the root of the Petition.

(ii) No party addressed me on the principles and the law applicable to an application such as the one before me.

26. I should therefore begin by addressing issue No.(ii) above and in that context, what is the Petition dated 27<sup>th</sup> January 2015 all about? As a corollary to that question what then is the application before me all about?

27. The Application principally seeks conservatory and other orders relating to the advertisement in the "Daily Nation" newspaper of 21<sup>st</sup> January 2015. The other order relating to the requirement that the 2<sup>nd</sup> Respondent should comply with the requirements of the **Human Resources Management Professionals Act No.5 of 2012** cannot be determined one way or the other as it is clear to me that the issue whether such compliance can be made after the Act was stayed by Mumbi Ngugi J in **H.C. Petition No.450 of 2012 (supra)** is debatable. The orders sought are also final in nature and can only be granted in a judgment and not in an interlocutory application Ruling such as this one.

28. That then leaves me with the issue of conservatory orders. Whereas such orders can be granted under **Article 23(3) (c) of the Constitution**, in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** the Supreme Court expressed itself as follows regarding such orders;

*"The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.*

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

29. The above being the law on the subject, has the Petitioner met the test set out therein? In answer to that question, firstly, it is obvious that an interpretation of paragraph 4.2.4 and related paragraphs of the Guidelines cannot be made finally at this stage but suffice it to say that all Parties have raised serious issues in that regard and none has raised frivolous concerns.

30. Secondly, there is also the contested question whether Mumbi Ngugi J. gave a conclusive determination of all the matters now being litigated upon. Suffice it to say that *prima facie*, the issues before me relate to a fresh recruitment of Directors of the Company after the learned judge's judgment in **H.C. Petition No.143 of 2014 (supra)**, and whether therefore her judgment has any bearing to present issues is a matter for a conclusive determination at the hearing.

31. Thirdly, and more fundamentally, the issues raised in the Petition and Application relate to the values and principles of good governance, transparency and accountability, integrity and participation of the people as set out in **Article 10** of the **Constitution** as well the principles of involvement of the people in policy making, fair competition and merit as the basis of appointments and affording equal opportunities for appointments under **Article 232(1)** of the **Constitution** – See also **Gatirau Peter Munya (supra)**.

32. In that regard, the issue whether the 1<sup>st</sup> Respondent has abided by the above principles and whether the 2<sup>nd</sup> Respondent was lawfully qualified to undertake the advertisement in question are serious matters that require interrogation in depth at the hearing of the Petition.

33. Fourthly, it is not surprising, arising from the above findings, that the Parties are split in the middle as to who should undertake the recruitment of Directors of the Company. It would have been expected that the County, the Company, Athi Water Services Board and WASREB should know their roles and the source of their mandates thereof. It would also have been expected that a round-table meeting would have resolved any overlaps and grey areas arising. It would have been expected that after the judgment of Mumbi Ngugi J. in **H.C. Petition No.143 of 2014**, each Party would conduct itself within certain known parameters. The fact that they have all found themselves back to Court means that *prima facie*, all is not well with them and their systems.

34. Lastly, it is clear to me that the protestations by the 1<sup>st</sup> Respondent that the present proceedings are motivated by factors other than the public interest is not borne by the pleadings and submissions before me. The defender of the public interest by dint of **Article 157(6)** of the **Constitution** is the Attorney-General and it is instructive that in the Application before me, he does not share the 1<sup>st</sup> Respondent's position.

35. Lastly, it is obvious by now that I see merit in the Application dated 28<sup>th</sup> January 2015 and for the reason given above, it is granted in the following terms only;

***“That pending the hearing and determination of the Petition herein a temporary order of Prohibition is hereby issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect, in any way whatsoever from giving effect to the advertisement on page 43 in the “Daily Nation” newspaper published on Wednesday, January 21, 2015, and or any other similar publication, inviting applications from the public to fill nine (9) positions in the Board of Directors of the Nairobi City Water and Sewerage Company Limited.”***

36. As for costs, let the same abide the outcome of the Petition.

37. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Miss Kabita holding brief for Mr. Atunga for 2<sup>nd</sup> Respondent

Miss Said Holding brief for Mr. Ojienda for 1<sup>st</sup> Respondent

Mr. Njuguna for 1<sup>st</sup> Interested Party

**Order**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**Further Order**

Mention on 17/9/2015

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**