

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT ELDORET
PETITION NO. E010 OF 2024

**IN THE MATTER OF: ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 19, 20, 21(1), 22 & 165 OF THE
CONSTITUTION OF KENYA.**

-AND-

**IN THE MATTER OF: VIOLATION OF FUNDAMENTAL RIGHTS
& FREEDOMS UNDER ARTICLES 43 (1)(D) & 47 OF THE
CONSTITUTION OF KENYA**

-AND-

**IN THE MATTER OF: INTERPRETATION & ENFORCEMENT OF
ARTICLES 6 & 10 OF THE CONSTITUTION OF KENYA**

-AND-

**IN THE MATTER OF: DEVOLUTION OF POWERS AND
FUNCTIONS UNDER ARTICLES 174, 185 & 186 OF THE
CONSTITUTION OF KENYA**

-AND-

**IN THE MATTER OF: THE 4TH SCHEDULE OF THE
CONSTITUTION OF KENYA**

-AND-

**IN THE MATTER OF: THE WATER ACT, CAP 372 LAWS OF
KENYA**

-BETWEEN-

PETER KIMANI WAWERUPETITIONER

VERSUS

**ELDORET WATER & SANITATION COMPANY...1ST
RESPONDENT**

**WATER SERVICES REGULATORY BOARD.....2ND
RESPONDENT**

**THE HON. ATTORNEY GENERAL3RD
RESPONDENT**

JUDGEMENT

1. The Petitioner herein did file an Amended Petition dated 28.05.2025 (hereinafter referred to as **“the present Petition”**) against the 1st, 2nd and 3rd Respondents seeking the following Orders: -
 - (i) A declaration that the provision of water and sanitation services including the determination of tariffs and charges related to water services is a matter that is within the exclusive functional area of County Governments.
 - (ii) A declaration that in totality, the Water Act 2016 subordinates Counties to the National Government with respect to the provision of water services and is hence unconstitutional to that extent.
 - (iii) A declaration that to the extent that the 2nd Respondent as constituted under Section 71 of the Water Act 2016 does not have representation of the County Governments despite the fact that it superintends a function of the County Governments, that section is unconstitutional.
 - (iv) A declaration that to the extent that the Water Act, 2016 grants the 2nd Respondent power and oversight over the 1st Respondent, including power to approve the 1st Respondent’s composition, the Act violates the oversight and legislative competence of County Assemblies and is, to that extent, unconstitutional.
 - (v) A declaration that to the extent that the Water Act 2016 reposes the power to evaluate, recommend and approve water and sewerage tariffs on the 2nd Respondent, as well as the power to issue water service licence to the 1st Respondent, it violates the competence of the County Assembly to legislate for the County Government and it is hence unconstitutional.

- (vi) A declaration that by determining charges for water and sewerage services, the 2nd Respondent would be determining charges for a service that it does not itself render, which is a violation of Article 209(4) of the Constitution.
 - (vii) A declaration that to the extent that the Water Act 2016 fails to incorporate the tariff and pricing policy guidelines under the County Government Act, and does not bind the 2nd Respondent to consider those guidelines while evaluating, recommending and approving water and sewerage tariffs, the Water Act is an undue fetter on the mandate of counties that flows from the constitution.
 - (viii) A declaration that in approving the increased tariffs, the Respondents violated the right to public participation of users of water in Uasin Gishu and the residents at large contrary to the constitutional and statutory frameworks and that such approval is illegal, null and void ab initio.
 - (ix) A declaration that the totality of the Respondents' actions were in violation of the right to fair administrative action of the residents of Uasin Gishu, consumers of water services and the general public at large in that those actions were taken without affording the residents an opportunity to be heard and further because no written reasons have been provided to date.
 - (x) Any other appropriate relief that the court may in accordance with the circumstances of this case grant.
 - (xi) Costs.
2. The prayers sought in the present Petition are premised on various grounds contained therein and in the Petitioner's Supporting Affidavit, which include the following amongst others:-

- i. The Petitioner, a Member of County Assembly for Huruma Ward in Uasin Gishu, claimed that he had brought the Petition on his own behalf, as well as his constituents and also on behalf of other members of the public.
- ii. The Petitioner did plead that the Water Act, 2002 was promulgated under the pre-2010 Constitutional Order which had centralized all aspects of development of water resources and supply of water services under the relevant minister.
- iii. That under the old Act, the supply of water and sewerage services was under the domain of the Water Services Regulatory Services Board (WASREB) which played a dominant role in decisions relating to management, regulation, tariff development and water services policy, and whose composition was determined by the relevant Minister and the President.
- iv. The Petitioner averred that under the said Act, the Minister constituted Water Service Boards (WSBs) which were licensed to provide water services through the agency of Water Service providers.
- v. Pursuant to this, the 1st Respondent herein, among other entities, was set up as a Water Service Provider under the Companies Act and given responsibility to render water and sewerage services, but they were under the Central Government.
- vi. The Petitioner avers that the 2010 Constitution promulgated on 27th August, 2010 devolved the powers and functions of the government and as a result the function of provision of water and sanitation services was designated to be undertaken by the County Governments.
- vii. The Petitioner pleads that thereafter, the Water Act, 2016 was enacted which repealed the Water Act, 2002 and was meant to bring the water regime in line with the new

constitutional dispensation, and grants different mandates to different institutions to manage and regulate the use of water, including WASREB and the County Governments.

- viii. That the 1st Respondent is a Water Service Provider under Section 2 of the Act, which allows County Governments to establish Water Service Providers to be licensed by the 2nd Respondent per Section 74 thereof.
- ix. He stated that there is no representation of County Governments in the membership of the 2nd Respondent, who also has the mandate to evaluate, recommend and approve tariffs to be charged by the Water Service Providers.
- x. According to the Petitioner, the 2nd Respondent purported to exercise its aforesaid mandate by publishing on the MyGov Online Newspaper dated 23rd April, 2024 indicating that some 13 Water Service providers, including the 1st Respondent, had applied for approval of a tariff review *“to enable the water utilities to operate at full cost recovery for sustainable provision of water services and meet conditions necessary for improving service delivery, which include among others, minor investments”*.
- xi. That the said notice indicated that a physical hearing for members of the public would be held at the County Hall on 15th May, 2024 alongside a virtual hearing and invited members to hand in written memoranda by 23rd June, 2024.
- xii. That the 1st Respondent further issued notice dated 3rd May, 2024 inviting comments on the proposed tariff review and reiterated the public hearings slated for 15th May, 2024 however the proposed tariffs were not provided and members were asked to obtain them from its various offices in Eldoret.

- xiii. He claims that vide Notice published on 07.10.2024, the 1st Respondent gave notice that it had adjusted its water and sewerage services tariffs as per Gazette Notice no. 12825 dated 04.10.2024 as approved by the 2nd Respondent.
- xiv. The Petitioner further claims that the 1st Respondent receives money from the County Government of Uasin Gishu for implementation of water and sewerage services, which has set in motion various plans and projects meant to improve the said services.
- xv. It is the Petitioner's case that by purporting to review, recommend and approve the tariffs for water and sewerage services offered by the 1st Respondent, the 2nd Respondent intrudes into the exclusive functions of Uasin Gishu County.
- xvi. The Petitioner further claimed that the tariffs are inequitable as they fail to consider the income inequalities prevalent in Uasin Gishu County, meaning that the poor people and communities especially in informal settlements will be directly discriminated against since they cannot afford the new cost attached to the delivery of a service that is now a right under the constitution.
- xvii. The Petitioner pleaded that the impugned Gazette Notice No. 12825 published on 4th October, 2024 attempts to justify the tariff review, however, from the Public Accounts Committee of Uasin Gishu County Assembly, there are inherent inefficiencies in the management of water services by the 1st Respondent leading to poor service delivery and water shortages.
- xviii. The Petitioner averred that better management practices would improve efficiency in water service delivery without substantial increase in the tariffs, and that in any event, it had not been shown how the Respondents arrived at the new tariffs.

- xix. The Petitioner claimed that the new tariffs are neither justifiable nor reasonable in the circumstances.
- xx. Further, that due to the powers vested on the 2nd Respondent by the Water Act 2016, the 1st Respondent has to undergo the ignominy of periodic reviews of its licensee conditions, which process is unconstitutional.
3. The present Petition was duly served on the 1st and 2nd Respondents.
4. The 1st Respondent did oppose the present Petition by filing a Replying Affidavit dated 7.07.2025 (hereinafter referred to as **“the 1st Respondent’s Response”**) wherein it stated as follows;-
- i. The 1st Respondent pleaded that it is a Water Service Providers established in 1997 under the Companies Act, who alongside other water service providers proposed for a tariff review to enable utilities operate a full cost recovery for sustainable provision of water.
 - ii. The 1st Respondent averred that the Water Act provides for public participation at Section 139 thereof, pursuant to which, the 2nd Respondent issued notice in the MyGov newspaper on 23rd April, 2024 inviting comments from members of the public on the proposed new tariffs.
 - iii. Further to that, the 1st Respondent claims it also issued notice informing members of the public of the proposed new tariffs which notices both meet the requirements at Section 139 of the Act.
 - iv. The 1st Respondent claims that on 26.03.2024 and 24.04.202, the 2nd Respondent published a notice for public consultation on the MyGov newspaper, which was also aired on Radio Alpha and Changei Radio, as

well as the Respondents' websites and social media platforms.

- v. The 1st Respondent pleads that on 15.05.2024, the Respondents jointly held a hybrid public participation meeting, which was attended by various stakeholders and attracted several views and comments.
- vi. The 1st Respondent explains that consumers were taken through the process of tariff approval, adjustment and implementation among other factors, and those present were given ample opportunity to cross-examine and seek clarification on the proposed new tariffs and all these were captured in the minutes.
- vii. The 1st Respondent claims that at the end, the attendees agreed with the tariff review, and to this extent they had complied with the requirements of section 139 as well as the Constitution of Kenya thus the increase in water tariffs is legal.
- viii. The 1st Respondent further averred that the Water Act established the Water Tribunal under Section 121 thereof mandated to deal with any complaint against any institution established under the Water Act and appeals arising therefrom directed to this court.
- ix. The 1st Respondent thus claims that this court lacks jurisdiction to entertain the matter in the first instance but is only allowed to exercise appellate jurisdiction.
- x. On this note, the 1st Respondent claimed that raising the issue of increased tariffs and public participation in this petition offends the doctrine of Constitutional avoidance which reserves Constitutional remedies as a measure of last resort.

- xi. According to the 1st Respondent, the Water Act is presumed to be Constitutional until otherwise declared by this court, thus any action taken under its authority is constitutional.
 - xii. The 1st Respondent averred that the role of providing water services is performed by water service providers while the 2nd Respondent merely regulates them, which does not amount to usurping or discharging the role, but merely provides guidance.
 - xiii. The 1st Respondent averred that nothing in the Act bars the Cabinet Secretary from appointing anyone from the County Governments or Council of Governors as a member of the Water Board.
 - xiv. The 1st Respondent pleaded that the Water Service Providers established under Section 77 of the Act is an organ of the County Government and the Water Act does not preclude the County from exercising oversight authority of it.
 - xv. Further, that the 2nd Respondent does not decide on tariffs, but merely evaluates and recommends, and the water service providers have the discretion of deciding the tariffs to charge.
 - xvi. The 1st Respondent averred that in increasing the water tariffs, they considered Article 47 of the Constitution and the Fair Administrative Actions Act and its decision was made after collecting views and hearing the people of Uasin Gishu.
 - xvii. The 1st Respondent prayed that the present Petition be dismissed with costs.
5. The 2nd Respondent did also oppose the present Petition through a Notice of Preliminary Objection dated 12.05.2025

seeking to have the Petition dismissed the present Petition on the following grounds; -

- i. THAT the entire Amended Petition and Application are bad in law as they offend Sections 82 and 121 of the Water Act, 2016.
 - ii. THAT this Court lacks Jurisdiction to hear and determine the present Petition as it offends the provisions of Sections 82 and 121 of the Water Act, 2016.
 - iii. THAT the present Petition is therefore premature, an abuse of the court process, vexatious and frivolous.
6. Further to the Notice of Preliminary Objection dated 12.05.2025, the 2nd Respondent also did file a Replying Affidavit dated 20.05.2025 (hereinafter referred to as **“the 2nd Respondent’s Response”**) on the following grounds: -
- i. The 2nd Respondent stated that it is the National Regulator for water and sanitation services, established under Section 70 and 72 of the Water Act, 2016 with the principle objective of protecting the interests and rights of consumers in the provision of water services.
 - ii. As such, the 2nd Respondent is mandated through the provisions of Section 72(1)(b) of the Water Act, 2016 to evaluate and recommend water and sewerage tariffs to the County Water Service providers and approve the imposition of such tariffs in line with consumer protection standards.
 - iii. Pursuant to Section 72 of the Water Act, 2016, the 2nd Respondent is obligated to establish Regulations and Guidelines to guide licensed utilities on compliance with the provisions of the Act and ensure sustainable provision of water services throughout Kenya.
 - iv. That the 2nd Respondent established the Tariff Guidelines whose objective is to establish tariffs that balance commercial, social and ecological interests by ensuring access to all while allowing water services providers to recover justified costs, which guidelines the 1st and 2nd

Respondent must adhere to in approving customer tariffs charged by water service providers.

- v. With regards to the present Petition, the 2nd Respondent averred that all statutory provisions enjoy a rebuttable presumption of constitutionality and the onus lies on the person asserting otherwise to establish the alleged unconstitutionality.
- vi. The 2nd Respondent averred that the Water Act was jointly enacted by both the National Assembly and the Senate since the management, use and protection of water is a responsibility shared by the national and county governments, towards progressive realization of rights under Article 43(1)(b) and (d) as read with Article 21(2) of the constitution.
- vii. The 2nd Respondent pleaded that national regulation of the water sector is inevitable since it is an imperative tool to set uniform standards in resource management and service provision, and is necessary for monitoring obligations to ensure sustainability of water for present and future generations.
- viii. The 2nd Respondent thus claimed that the national regulation of water and sanitation services in no way usurps the county governments' mandate on provision of water and sanitation services thus the claim of usurpation of powers is false and misleading.
- ix. As regards the review of the water and sewerage tariffs, the 2nd Respondent disclosed that the applicable provision is Section 139 of the Water Act, 2016 as read with Articles 10 [2] and 232 of the Constitution.
- x. The 2nd Respondent pleaded that the objective of water tariffs is to raise enough revenue to guarantee inter alia sustainable water services and ensuring the tariffs are socially acceptable.

- xi. That Section 159(b) of the Water Act amended Section 120 of the County Government Act to provide that a county government shall adopt and implement tariffs and pricing subject to existing national government law and policy, thus the 2nd Respondent is well within its powers to approve water services tariffs for the 1st Respondent.
- xii. The 2nd Respondent pleaded that it complied with the provisions of Article 10(2), 232(1) of the Constitution as read with Section 139 of the Water Act by publicizing the proposed tariff adjustment application and inviting views and/or objections from consumers.
- xiii. The 2nd Respondent confirmed that a hybrid consultative meeting was jointly organised and held by the 1st and 2nd Respondents prior to the finalisation of the approval process by the 2nd Respondent.
- xiv. That the Notices for public consultation were duly published, setting out a summary of the application, the venue of the public consultation and invited written comments and or objections to the application as well as the closing date for such comments.
- xv. In addition to the above, the 2nd Respondent averred that the Notice was again broadcasted in two radio stations within the locality of Uasin Gishu County being Radio Alpha and Changei FM.
- xvi. Further, that invitations to the hybrid public consultation meeting were sent to stakeholders and customers representing different consumer groups with a copy of the proposed tariffs posted on the notice board of the 1st Respondent's regional offices and the Respondents' websites.
- xvii. That aside from the consumer comments, the 2nd Respondent also considered the findings of the Social Economic Study conducted by the 1st Respondent which informed the tariff adjustment process.

- xviii. The 2nd Respondent further averred that there is nothing under the State Corporations Act or the Water Act requiring that county governments have representation on the regulatory board, and that granting the orders sought would defeat the state's duty in progressive realisation of the right to water under Article 43 of the Constitution and Section 63 of the Water Act.
- xix. The 2nd Respondent averred that the present Petition is devoid of merit and should be dismissed with costs.
7. After the filing of the Respondents' responses, parties were directed to file their submissions in support and in opposition of the present Petition.
8. The Petitioner duly filed his final submissions dated 21.07.2025 and the 1st and 3rd Respondents filed their submissions dated 4.12.2025 while the 2nd Respondent's submissions are dated 31.07.2025.
9. The Court has indeed perused the present Petition in detail, the 1st and 2nd Respondents responses as well as the submissions of the Parties herein.
10. The issues for determination in the present petition can then be summarized as follows: -

ISSUE NO. 1- WHETHER OR NOT SECTION 70 AS READ WITH SECTION 72 OF THE WATER ACT OF 2016 IS UNCONSTITUTIONAL IN RELATION TO PROVISIONS OF SCHEDULE IV OF THE KENYAN CONSTITUTION, 2010?

ISSUE NO. 2- WHETHER SECTION 77 AS READ WITH SECTION 78 OF THE WATER ACT 2016 CONTRAVENES ARTICLE 185(2) OF THE KENYAN CONTITUTION, 2010?

ISSUE NO. 3- WHETHER SECTION 72 OF THE WATER ACT, 2016 IS IN CONTRAVENTION OF ARTICLE 209(3) OF THE KENYAN CONSTITUTION, 2010?

ISSUE NO.4- WHETHER SECTION 139 OF THE WATER ACT, 2016 CONTRAVENES ARTICLE 10, 43, 60 AND 232 OF THE KENYAN CONTITUTION, 2010?

ISSUE NO. 5 - WHETHER SECTION 72(1) (B) AS READ WITH SECTION 139 OF THE WATER ACT, 2016 CONTRAVENES ARTICLE 47 OF THE KENYAN CONTITUTION, 2010.

ISSUE NO. 6- WHETHER THE NEW PROPOSED TARIFFS BY THE 2ND RESPONDENT CONTRAVENE THE PROVISIONS OF ARTICLE 27 OF THE KENYAN CONTITUTION, 2010.

ISSUE NO.7- WHETHER THE GAZETTED REVIEWED TARIFFS BY THE 2ND RESPONDENT CONTRAVENE THE PROVISIONS OF ARTICLE 43 OF THE KENYAN CONSTUTION, 2010

ISSUE NO. 8- WHETHER THE PROPOSED NEW TARIFFS GAZETTED BY THE 2ND RESPONDENT WERE IRRATIONAL, UNRESPONSIBLE AND IN BAD FAITH

ISSUE NO. 9-WHETHER THE PRESENT PETITION IS MERITED

ISSUE NO. 10- WHO BEARS THE COSTS OF THE PRESENT PETITION?

11. The court having identified the issues for determination hereinabove, the same will now be discussed as provided below.

ISSUE NO. 1- WHETHER OR NOT SECTION 70 AS READ WITH SECTION 72 OF THE WATER ACT OF 2016 IS UNCONSTITUTIONAL IN RELATION TO

THE PROVISIONS OF SCHEDULE IV OF THE KENYAN CONSTITUTION, 2010?

12. The first issue raised by the Petitioner is in relation to Section 72 of the Water Act, 2016 as read with the Fourth Schedule of the Kenyan Constitution, 2010.
13. According to the Petitioner, the Fourth Schedule of the Kenyan Constitution, 2010 assigns the functions of water provision and sanitation on the County Governments therein.
14. Unfortunately, the Petitioner was of the view that Section 72 of the Water Act, 2016 did retain the provision of water services and sanitation with the National Government contrary to the express provisions of the Fourth Schedule Part I of the Kenyan Constitution, 2010.
15. It was therefore the Petitioner's prayer that the provision of Section 70 as read with Section 72 of the Water Act, 2016 contravenes the express provisions of the Fourth Schedule, Part II of the Kenyan Constitution, 2010.
16. To answer this question, it is important to appreciate the provisions of Article 43 (i) (d) of the Kenyan Constitution, 2010 which guarantees the right to clean and safe water in adequate quantities.
17. The Fourth Schedule of the Kenyan Constitution, 2010 has been divided into 2 parts.
18. Part I of the Fourth Schedule in the Kenyan Constitution, 2010 outlines the functions allocated to the National Government.
19. Part II of the Fourth Schedule in the Kenyan Constitution, 2010 outlines the functions allocated to County Governments.

20. In Part I of the Fourth Schedule to the Kenyan Constitution, 2010, the following function was specifically assigned to the National Government; -

“(2.) The use of International Waters and Waters Resources”

21. On the other hand, Part II of the Fourth Schedule to the Kenyan Constitution, 2010 did specifically assign the following function to the County Governments; -

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

(b) water and sanitation services”

22. The definition of what consists “Water Resources” is provided in Section 2 of the Water Act, 2016 which deals with interpretation as follows: -

“water resource” means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifers, 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;

23. On the other hand, the definition of “Water services” means as follows; -

“any services of or incidental to the supply or storage of water and includes the provision of sewerage services.”

24. It is clear in the Court’s mind that the Fourth Schedule of the Kenyan Constitution, 2010 did assign different roles to the National Government and to the County Governments.

25. The Fourth Schedule of the Kenyan Constitution did assign the function of managing, preserving and/or exploring of any new water resources to the National Government.

26. Similarly, the Fourth Schedule of the Kenyan Constitution, 2010 did assign the function of distributing water services and sanitation within each county to the respective County Governments.
27. Is it therefore possible that when one talks about water resources it means the same as water services and sanitation?
28. The answer to this question is in the negative.
29. The reason is that when one refers to water resources, it refers to the sources of where the resource known as water is tapped from for the benefit of the entire Country including the marginalized, semi-arid and arid areas.
30. The mandate of the National Government in line with Part I of the Fourth Schedule of the Kenyan Constitution, 2010 is to ensure that the water resources within the Country provide sufficient water for distribution to every citizen within the corners of this great Republic in line with Article 43 (d) of the Kenyan Constitution, 2010.
31. The intention of the drafters of the Constitution in placing this function on the National Government as provided in Part I of the Fourth Schedule of the Kenyan Constitution, 2010 was to have an overview of all the available water resources within the territorial jurisdiction of Kenya and ensure that all the county Governments receive their equitable share of this resource in line with Article 43 (d) of the Kenyan Constitution, 2010.
32. In addition to the above, the National Government was also entrusted with the obligation to ensure sustainable use of the water resources and protection of the same for the benefit of the present and future generations.

33. On the other hand, Part II of the Fourth Schedule of the Kenyan Constitution, 2010 did place the responsibility of distribution of the water from the various water resources to every citizen on the devolved County Governments in an equitable manner to ensure safe and clean, adequate water supply.
34. The assignment to distribute the resource known as water to the County Governments did not create an ownership right to the said County Governments and in fact remains a National resource in accordance to Part 1 of the Fourth Schedule of the Kenyan Constitution, 2010 based on the available water resources within the Republic.
35. Based on this background, it is clear that the water being distributed and supplied to the citizens within each County Government a National Resource which is managed by the Water Act of 2016.
36. With this fact in mind, Section 70 of the Water Act, 2016 establishes the Water Services Regulatory Board (2nd respondent herein) with an intention to ensure that the National resource known as water is supplied to every citizen of the country keeping in mind the rights of the consumers supplied by the Water Service Providers.
37. In particular, Section 72(1) (a - p) of the Water Act, 2016 outlines the functions of the Water Services Regulatory Board.
38. A review of the functions and powers contained in Section 72 of the Water Act, 2016 demonstrates that the core mandate of the Water Services Regulatory Board is to ensure that every citizen has access to safe and clean water in adequate quantities by ensuring that the water service providers put in place enough infrastructure to serve the citizenry within its jurisdiction.

39. In addition to the above, the Water Services Regulatory Board ensures that the Water Service Providers have enough facilities to keep sufficient water for the use of the citizens within its jurisdiction.
40. Of similar importance, the Water Services Regulatory Board is a forum to handle complaints from the water users regarding the quality or nature of the water services and make recommendations or guidelines to improve water service provision and sanitation.
41. Lastly, the water Services Regulatory Board also has the mandate to make recommendations on how water services can be extended to the marginalized.
42. In a nutshell, the Water Services Regulatory Board is the entity that ensures the achievement of Article 43 of the Constitution.
43. As such, Section 70 as read with Section 72 of the Water Act, 2016 does not contravene the functions assigned to the County Government under Part II of the Fourth Schedule of the Kenyan Constitution, 2010.

ISSUE NO. 2 - WHETHER SECTION 77 AS READ WITH SECTION 78 OF THE WATER ACT, 2016 CONTRAVENES ARTICLE 185(2) OF THE KENYAN CONSTITUTION, 2010.

44. The second issue raised by the Petitioner is whether Section 77 as read with Section 78 of the Water Act, 2016 contravenes Article 185(2) of the Constitution.
45. Article 185 of the Constitution provides for the legislative authority of County Assembly.
46. Article 185(2) provides for powers to a County Assembly to make laws that are necessary for or incidental to the effective

performance of the functions and exercise of the powers of the County Government under the Fourth Schedule.

47. Article 185(4) specifically provides that the County Assembly may receive and approve plans and policies for the management and exploitation of the County Resources, and secondly, the development and management of its infrastructure and institutions.
48. Section 77 of the Water Act, 2016 provides that a County Government shall establish water services providers.
49. Section 77(3) of the Water act, 2016 requires that the water services providers may be a public limited liability company established under the Companies Act, 2015 or other body providing water services as may be approved by the Water Services Regulatory Board.
50. The responsibilities of the Water Services Providers under Section 78 of the Water Act, 2016 are provided as provision of water services within the area specified by the license and secondly, the development of County Assets for water services provisions.
51. Section 79 of the Water Act, 2016 creates the Board of the Water Services Providers and their qualifications.
52. Section 80 of the Water Act, 2016 specifically prohibits a member of the Board of Directors of any Water Services Provider from being a serving member of the County Government, any serving Member of Parliament or anyone holding an office in a political party.
53. The question that needs to be answered is whether Section 77, 78, 79 and 80 of the Water Act, 2016 contravenes the provisions of Article 185(2) of the Kenyan Constitution, 2010.

54. To be able to answer this question, it is critical for the Court to remember that water is a National Resource.
55. In other words, the County Governments do not have any ownership rights of the resource known as water.
56. In essence therefore, the National Resource called water cannot be regulated by any County Government as provided in Article 185(4) of the Kenyan Constitution.
57. The interpretation of the Court is that Section 77 of the Water Act, 2016 was to engage the County Governments through the establishments of Water Services Providers to assist in distribution of the natural resource known as water to every citizen within its area of jurisdiction.
58. It is on this foundation that Section 80 of the Water Act, 2016 did expressly prohibit the nomination or election of any serving elected member of the County Government or a service member of Parliament or a political office holder to the Board of Directors.
59. The intention of this limitation provided under Section 80 of the Water Act, 2016 was that keeping in mind that the water services providers were public companies incorporated for the benefit of the County residents, the public other than elected County Officials would be in charge to ensure that there was equitable water distribution and supply to the general public in advancement of safe, clean and adequate water as envisaged in Article 43 of the Constitution.
60. In other words, the resource known as water is not a County Resource and the provisions of sections 77, 78, 79 and 80 of the Water Act, 2016 is not in contravention with the provisions of Article 185 of the Constitution.

ISSUE NO. 3- WHETHER SECTION 72 OF THE WATER ACT, 2016 IS IN CONTRAVENTION WITH

ARTICLE 209(3) OF THE KENYAN CONSTITUTION, 2010?

61. The third issue raised by the petitioner regards the provisions of Article 209(3) and (4) of the Kenyan Constitution, 2010 as read with section 72 (1) (b) of the water Act, 2016.
62. According to the petitioner, the County Governments are entitled to levy a charge on the services rendered.
63. The petitioner states that section 72(1) (b) in the Water Act, 2016 places the functions of evaluating and recommending water and sewerage tariffs to the Water Services Regulatory Board.
64. In essence therefore, the petitioner did submit that the powers and functions vested on the Water Services Regulatory Board under section 72(1) (b) of the Water Act contravene the express provision of Article 209(3) of the Kenyan Constitution 2010.
65. First and foremost, Article 209 (3) of the Constitution provides as follows:-

“209. Power to impose taxes and charges.

(3) a County may impose:-

(a) Property rates

(b) entertainment taxes, and

(c) any other tax that it is authorized to impose by an Act of Parliament.

(4) the national and county governments may impose charges for the services they provide.”

66. Based on the provisions of Article 209(3) of the Kenyan Constitution, 2010; there are two principle charges namely; property rates and entertainment charges which are expressly allowed by the Constitution, 2010 for the County Governments to collect.

67. However, Article 209(3) (c) also gives a window for the County Governments to impose any tax allowed through an Act of Parliament.
68. The Act of Parliament that deals with water resources and its articulation to the general public is the Water Act, 2016.
69. Unfortunately, the Water Act 2016 did not authorize the County Governments to impose any water and sewerage tariffs on the consumers within their jurisdictions.
70. To this end then, there is no basis within the Act of Parliament dealing with water resources and its articulation, which is the Water Act of 2016, that permits the County Governments to either fix the chargeable tariffs or review the said water and sewerage tariffs.
71. The petitioner has also sought to rely on the provisions of Article 209 (4) of the Kenyan Constitution, 2010 which allows the County Governments to impose charges for the services they provide.
72. As earlier stated, the Water Services Providers, who according to the provisions of section 77(3) of the Water Act, 2016 are established as public limited liability companies under the Companies Act, 2015.
73. The implication of the Water Service Providers being public limited liability companies is to create a separate and distinct legal entity from the County Governments as established under Article 176 of the Kenyan Constitution, 2010.
74. One fundamental issue that comes into play is that the Water Service Providers being public limited liability companies as provided under the Water Act, 2016 is because they are agents of the Water Services Regulatory Board established

under section 70 of the Water Act, 2016 with a view of handling the national resource called water.

75. In essence therefore, the mandate and functions of the Water Service Providers is anchored in the Water Act 2016 to handle a national resource called water and not a Count Asset as envisaged under Article 209 (3) and (4) of the Kenyan Constitution, 2010.
76. In conclusion, section 72 91) (b) of the Water Act, 2016 is not in contravention with Article 209 (3) and (4) of the Kenyan Constitution, 2010.

ISSUE NO.4- WHETHER SECTION 139 OF THE WATER ACT, 2016 CONTRAVENES ARTICLES 10, 43, 60 AND 232 OF THE KENYAN CONTITUTION, 2010

77. In this issue, the Petitioner is of the view that section 139 of the Water Act, 2016 does not meet the requirements of public participation as envisaged in Articles 10, 43, 60 and 232 of the Kenyan Constitution, 2010.
78. Article 10 states that all public servants shall be guided by the values and principles of good governance in the exercise of their duties.
79. Article 43 specifically provides that every citizen of this country should enjoy both the economic and social rights prescribed therein including the right to clean and safe water in adequate quantities.
80. Article 60 relates to the principles of land policy which should be managed in an equitable, efficient, productive and sustainable manner for the general good of the country.

81. Lastly, Article 232 deals with the values and principles that guide all public servants in discharging their duties to the citizenry of the country.
82. On the other hand, section 139 of the Water Act, 2016 deals with the procedure applied by the Water Services Regulatory Board in conducting public participation during an exercise of evaluating and/or reviewing the applicable water tariffs within the jurisdiction of a particular Water Service Provider.
83. Section 139(2) of the Water Act, 2016 gives a detailed action plan undertaken by the Water Services Regulatory Board to ensure an open and transparent public participation within a defined area of a Water Service Provider during an evaluation and/or review exercise of the water tariffs.
84. Section 139(2) (a) and (b) gives two methodologies to which the Water Services Regulatory Board applies in notifying the general public.
85. The first methodology is by publishing the application seeking an evaluation and/or review of the water tariffs within a specific area of jurisdiction of the concerned Water Service Provider in at least one national newspaper of daily circulation.
86. The second methodology is by way of an announcement in a Kenyan Radio Station broadcasting within the locality of that Water Service Provider.
87. The intention of the first methodology is to notify all persons who could be having an interest within the specific area of jurisdiction of the Water Service Provider, who is seeking an evaluation and/or review of the water tariffs but are not within the said area of jurisdiction.
88. The second methodology is geared specifically to the citizenry who are within the particular area of jurisdiction managed by

the Water Service Provider that has made an application for evaluation and review of the water and sewerage tariffs to the Water Services Regulatory Board.

89. Section 139(3) of the Water Act, 2016 prescribes the information required in the notice to be published under section 139(2) of the Water Act, 2016.
90. In the notice provided under section 139(3) of the Water Act, 2016 a summary of the application or proposed action by the Water Service Provider must be disclosed, the premises at which the details of the application or proposed action may be inspected, identified and invitations for written comments or objections to the application or proposed action provided for and the person to whom such written comments or objections will be submitted to identified.
91. Section 139(5) (5) of the Water Act, 2016 provides that the decision by the Water Services Regulatory Board in relation to an application or a proposed action made by a Water Service Provider must be published in accordance to subsection 139(2) of the Water Act and further availed to the general public at the same premises as that which the notice under subsection 139(3) was published.
92. In the Amended Petition before court, the petitioner did not challenge the procedure outlined under section 139 of the Water Act, 2016 and/or demonstrate the unconstitutionality thereof.
93. The petitioner's grievance was that the steps provided under section 139 of the Water Act, 2016 had not been complied with by the 2nd respondent herein.
94. In essence therefore, the petitioner's recourse for the exercise of whether the 2nd respondent did comply with the provisions of section 139 of the Water Act, 2016 or not is provided for under section 119 of the Water Act, 2016.

95. In conclusion, this court is of the finding that section 139 of the Water Act is not in contravention with Articles 10, 43, 60 and 232 of the Kenyan Constitution, 2010.

ISSUE NO. 5 - WHETHER SECTION 72(1) (B) AS READ WITH SECTION 139 OF THE WATER ACT, 2016 CONTRAVENES ARTICLE 47 OF THE KENYAN CONSTITUTION, 2010.

96. In this issue the Petitioner did plead that Article 47 of the Kenyan Constitution, 2010 was fundamentally infringed in the process of evaluating and/or reviewing the water tariffs by the 1st and 2nd Respondents.

97. The Petitioner was of the considered view that the citizenry within the area of jurisdiction of the Water Service Provider, who is the 1st Respondent, were not given an opportunity to make their comments or air their views before the decision to approve the new tariffs was made by the 2nd Respondent.

98. As such, the Petitioner did object to the procedure applied by the 2nd Respondent in deciding on the application for evaluation and /or review of the water tariffs within the jurisdiction of the 1st Respondent which is the Water Service Provider.

99. The main issue raised by the Petitioner in this issue is the non-compliance of Section 139 of the Water Act, 2016 before the decision to review the water and sewerage tariffs was made by the 2nd Respondent while implementing the provisions of Section 72(1) (b) of the Act.

100. Such an omission relating to compliance of Section 139 of the Water Act, 2016 is not a constitutional issue but one which should be mitted to the Water Tribunal established under Section 119 of the Water Act for redress.

101. In essence therefore, this Court hereby makes a finding that the Petitioner herein has not demonstrated any breach of

Article 47 of the Constitution by either the 1st or 2nd Respondents which cannot be remedied by the internal dispute resolution mechanisms provided under the Water Act, 2016.

ISSUENO.6-WHETHER THE NEW PROPOSED TARIFFS BY THE 2ND RESPONDENT CONTRAVENE THE PROVISIONS OF ARTICLE 27 OF THE KENYAN CONTITUTION, 2010.

102. On this issue, the Petitioner herein invokes the provisions of Article 27 of the Constitution as read with section 117 of the County Governments Act.
103. The Petitioner pleads that Section 117 of the County Government Act provides for basic parameters that must be considered in making decisions for the public services it offers to the residents of the said county.
104. The first parameter of every County Government is to give priority to the basic needs of the public, comply with the respective policies and standard provided by the national government and lastly promote the development of public service delivery institutions to ensure that all members of the public have access to the basic services.
105. The Petitioner further sought to rely on Section 117 (2) of the County Government Act which provides for the prudent, economic, efficient, effective and sustainable use of available resources.
106. The Petitioner did aver that he was aggrieved by the new water tariffs published by the 2nd Respondent for the reason that they had failed to consider the economic inequalities prevalent within the jurisdiction of the 1st Respondent.
107. The Petitioner was of the view that according to the Kenya Demographic and Health Survey, 2022; 21% of the Uasin Gishu residents did not have access to basic drinking water,

while 50% of the Uasin Gishu residents did not have access to basic sanitation services.

108. Based on these statistics, the review of the water tariffs as published by the 2nd Respondent would result in the inability to access this basic rights and create an inequality in contravention of Article 27 of Constitution, 2010.
109. The gist of the Petitioner's grievances is the outcome emanating from the proposal of evaluation and/or review of the water tariffs submitted by the 1st Respondent to the 2nd Respondent.
110. The question to be answered in this issue is whether the decision of the 2nd Respondent to review the water tariffs within the area of jurisdiction of the 1st Respondent would amount to a form of discrimination to the residents within the area of jurisdiction of the 1st Respondent.
111. This court is alive to the fact that the economic ability of the citizens within the jurisdiction of the 1st Respondent is diverse and not the same.
112. However, the Court does not have the power or ability to identify the economic status of the citizens within the area of jurisdiction of the 1st Respondent.
113. Due to this economic variance of every citizen, Section 139 of the Water Act gives an opportunity to every citizen who is to be affected by an evaluation and/or review of the water and sewerage tariffs to make a direct contribution in writing to the 2nd Respondent before a decision is made.
114. Section 139(5) (5) of the Water act, 2016 places a mandatory responsibility on the 2nd Respondent to publish the decision resulting in a review of water and sewerage tariffs and give the grounds upon which that decision was arrived upon.

115. If any citizen is not satisfied with the decision of the 2nd Respondent published under section 139 (5) (5) of the water Act, 2016, the statute creates a Water Tribunal under Section 119 of the Act to reconsider the reasons relied upon by the 2nd Respondent in reviewing the water and sewerage tariffs in issue.
116. From an overview of Section 139 of the Water Act, 2016, it's clear in the mind of this court that the process of public participation is geared towards giving an opportunity to every citizen within the area of jurisdiction of the 1st Respondent not to be discriminated during the exercise of evaluating and/or reviewing water and sewerage tariffs.
117. In fact, the Water Act, 2016 reinforces Article 27 of the Constitution by creating an oversight body which is the Water Tribunal under Section 119 of the Water Act to ensure that the comments and participations made by the citizenry within the 1st Respondent's jurisdiction have been considered in the 2nd Respondent's decision.
118. The Petitioner's reliance on Section 117 of the County Government Act is in the Court's view misplaced and misguided.
119. To begin with, the County Government of Uasin Gishu did not file any Affidavit claiming any legal duties and/or responsibilities under the law to undertake any evaluation and/or review of water tariffs within the area of jurisdiction of the 1st Respondent.
120. Consequently therefore, as earlier stated in Issue No. 2 above, the resource known as water is not a County resource which can be administered through the County Government Act.
121. The non-compliance with Section 117 of the County Government Act cannot therefore automatically be said to have resulted in any form of discrimination under Article 27 of the Kenyan Constitution resulting in a disadvantage on

the citizenry within the area of jurisdiction of the 1st Respondent.

122. Article 27 of the Constitution protects individual and group rights.
123. So far, the Petitioner did not provide any proof of an individual or group of persons who have specifically pleaded to have been discriminated against on the basis of their economic inability to access the resource known as water due to the reviewed water tariffs by the 2nd Respondent.
124. In conclusion therefore, this Court has no evidence to uphold the allegations that the citizenry within the 1st Respondent's jurisdiction have been discriminated against in relation to the access to water and sewerage services based on the decision published by the 2nd Respondent with regards to the new water and sewerage tariffs.

ISSUE NO.7- WHETHER THE GAZETTED REVIEWED TARIFFS BY THE 2ND RESPONDENT CONTRAVENES THE PROVISIONS OF ARTICLE 43 OF THE KENYAN CONSTITUTION, 2010.

125. The Petitioner in this issue seeks to interpret Section 85 of the Water Act, 2016 against the provisions of Article 43 (1) (d) of the Kenyan Constitution, 2010.
126. Section 85 of the Water Act, 2016 provides the requirements for any entity to be licensed as a Water Services Provider.
127. Section 86 of the Water Act, 2016 on the other hand provides the requirements that a Water Service Providers must comply with in seeking to be permitted as a Water Service Provider.
128. The Petitioner's grievance is predominantly based on Section 86(2) (b) and (c).

129. Section 86(2) (b) of the Water Act reads as follows: -

“(b) the technical and financial capability of the applicant to provide the services and perform the functions authorized by the license.

(c) evidence that the water services to be provided will be commercially viable”

130. The argument by the Petitioner is that these two provisions create a business element in the provision of Water services by the water Service Providers.

131. The net effect of the Water Service Providers being business entities increases the costs of water, therefore rendering it inaccessible, or controls its access based on economic basis and curtailing the right to clean and safe water in adequate quantities as envisaged in Article 43(1) (d) of the Constitution.

132. To understand the intention of the drafters of the Water Act 2016, it is important to read Section 85 of the Water Act, 2016 together with Section 70 and Section 77 of the said Water Act, 2016.

133. Section 70 of the Act establishes the Water Services Regulatory Board with the principle objective of protecting the interests and the rights of consumers in the provision of water services.

134. The interpretation of the Court as regards Section 70 of the Water Act, 2016 was to safeguard the consumers of water from exploitation by the water service providers keeping in mind that water is a National resource which should be accessible to all the citizens of the Country in line with Article 43 (1) (b).

135. In view of the fact that the previous Municipal Councils had various infrastructures for waters and sanitation services

within their areas of jurisdiction, the drafters of the Water Act, 2016 did create the water services providers under Section 77 (3) of the Water Act, 2016.

136. These water services providers were to operate as separate and distinct from the County Government.
137. In essence, the water services providers were required to run the services of water distribution and sanitation with a controlled commercial plan to ensure sufficient distribution of the water to the citizens within its area of jurisdiction and keep in mind the growth and expansion in terms of the population, development areas and industrial purposes.
138. These growth in terms of population, development and industrial use would require futuristic planning in both manpower and infrastructure.
139. As such, the water services providers are required to present their technical and financial plans demonstrating their capability to provide the services and perform the functions that will be assigned to them.
140. It is also crucial to mention that Section 86 (5) (c) and (d) state as follows; -

“(c) the applicant has presented a sound plan for the provisions of efficient, affordable and sustainable water service;

(d) the applicant has proposed satisfactory performance targets and planned improvements and an acceptable tariff structure.”

141. It is therefore clear that although the water services providers are commercial entities, the services they offered in an efficient, affordable and sustainable manner through

an acceptable tariff structure approved by the Water Services Regulatory Board.

142. An acceptable tariff structure approved by the 2nd Respondent must be one that has been subjected to public participation under Section 139 of the Water Act, 2016 and if in dispute adjudicated and determined by the Water Tribunal under Section 119 of the Water Act, 2016.
143. In essence, the requirements provided under Section 85 and 86 of the Water Act, 2016 are to ensure that Article 43 of the Constitution, 2010 is adhered to and that the water services providers have capacity to cater for the present population as well as the future populations through sustainable infrastructures and related manpower.
144. This Court, therefore, is of the view that the conditions imposed by Section 85 and 86 of the Water Act, 2016 by the 2nd Respondent in regards to licensing of the water services providers do not increase the cost of the water to result to an infringement of Article 43 (1) (d) of the Constitution, 2010.

ISSUE NO. 8- WHETHER THE PROPOSED NEW TARIFFS GAZETTED BY THE 2ND RESPONDENT WERE IRRATIONAL, UNRESPONSIBLE AND IN BAD FAITH?

145. Based on the findings in Issues No. 1, 2,3, 4, 5, 6 and 7 hereinabove, this Court is of the considered view that the proposed new tariffs were not irrational, irresponsible and in bad faith as regards the compliance of the various Articles of the Constitution, 2010 cited by the Petitioners.

ISSUE NO. 9-WHETHER THE PRESENT PETITION IS MERITED?

146. The Court having made the various findings on the Issues outlined hereinabove, the Court is of the view that the

present Petition is not merited and the Orders sought herein cannot be granted.

ISSUE NO. 10- WHO BEARS THE COSTS OF THE PRESENT PETITION?

147. Costs are usually awarded to a winning party.

148. However, keeping in mind that the present Petition is generally a public interest litigation file, it is only fair that each party bears its own costs.

CONCLUSION

149. In conclusion, this Court hereby makes the following orders in the determination of the present Petition; -

A. THE AMENDED PETITION DATED 28.05.2025 IS NOT MERITED AND IS THEREFORE HEREBY DISMISSED.

B. THIS BEING A PUBLIC INTEREST LITIGATION MATTER, EACH PARTY WILL BEAR ITS OWN COSTS.

DATED, SIGNED and DELIVERED in ELDORET this 13TH DAY OF MAY 2026.

EMMANUEL.M. WASHE
JUDGE

IN THE PRESENCE OF:

Court Assistant: Brian

Counsel for the Petitioner: Mr. Oduor

Counsel for the Respondents: Ms. Cheruiyot for 1st Respondent

Ms. Chidzao for 2nd Respondent