



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1541 OF 2010

BETWEEN

BERNARD WANJOHI MURIUKI..... CLAIMANT

VERSUS

KIRINYAGA WATER AND SANITATION COMPANY

LIMITED .....1<sup>ST</sup> RESPONDENT

TANA WATER SERVICES BOARD..... 2<sup>ND</sup> RESPONDENT

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Bernard Wanjohi Muriuki is a Water Engineer. Kirinyaga Water and Sanitation Company Limited [1<sup>st</sup> respondent] [acronym KIRIWASCO], is registered under the Companies Act Cap 486 the Laws of Kenya. It is based at Kerugoya Town, and its objective is to provide water and sanitation services to the people of Kirinyaga. The Tana Water Services Board is created by an Act of Parliament, the Water Act Number 8 of 2002 the Laws of Kenya. It is based in Nyeri Town and is the Body that contracts the various water agents around Central Kenya. The contract between the Water Service Providers [KIRIWASCO], and the Water Services Boards [TANA], is called a Service Provision Agreement. Water Service Providers become agents of the Water Services Boards. These various agents are mainly the Water and Sanitation Companies such as the 1<sup>st</sup> respondent. The structure is founded on the water reforms of 2002 as captured in Act Number 8.

2. The claimant filed a statement of claim on 10<sup>th</sup> December 2010, through the Law Firm of G.N. Gichuhi Ngari and Company Advocates. An amended statement of claim was filed on 27<sup>th</sup> April 2011. The respondents filed a joint statement of reply through the Law Firm of Kahari and Kiai Advocates on 28<sup>th</sup> December 2010. This was followed up by an amended reply filed on 20<sup>th</sup> May 2011. An application filed by the claimant seeking to restrain the respondents from filling up the position of the 1<sup>st</sup> respondent's Managing Director/ Chief Executive Officer, was disposed of in a ruling dated 27<sup>th</sup> April 2011. The claimant testified on 18<sup>th</sup> November 2011, and 16<sup>th</sup> January 2012 when he closed his case. The respondents called Mary Gathoni Nyaga, Managing Director of Murang'a South Water and Sanitation Company, as their sole witness. She had before her deployment at Murang'a, succeeded Muriuki as the CEO of the 1<sup>st</sup> respondent. She gave evidence on 16<sup>th</sup> January 2012, when the respondents' case closed. Mr. Ochola represented the claimant, while Mr. Kinyua appeared for the respondents at the hearing. Subsequently parties filed their closing submissions and were advised at the last mention on 17<sup>th</sup>

February 2012, that the Court would render an Award on notice. There has been some delay in preparing and delivering of the Award. This was occasioned by the problems surrounding the transition of the Industrial Court under the new Constitution and is regretted.

3. Muriuki was appointed by the respondent as its Technical / General Manager through a letter dated 25<sup>th</sup> June 2007. He was entitled to a consolidated salary of Ksh. 100,000 per month. The contract was for a term of three years commencing 1<sup>st</sup> August 2007, lapsing 31<sup>st</sup> July 2010. The terms were varied in a letter from the 1<sup>st</sup> respondent dated 28<sup>th</sup> July 2008, signed by Mr. Gerald Mugo, the 1<sup>st</sup> respondent's Chairman: the claimant was to receive gratuity at the rate of 25% of his consolidated salary for every month worked, at the end of the contract; he would receive an annual bonus equivalent to his monthly salary for every year worked, if he maintained his outstanding performance; he was granted leave allowance once a year at the rate of one-third of his consolidated salary subject to a maximum of Ksh. 30,000; and finally the claimant was advised his entertainment and medical allowances would be considered in his new contract. His salary would be reviewed by the respondents in the new contract. The Board of Directors of the 1<sup>st</sup> respondent reserved the right to terminate the contract prematurely, depending on the claimant's performance. Either party could terminate by giving the other three months' notice, or three months' consolidated salary, in lieu of notice. The contract was renewable. The claimant was supposed to write to the 1<sup>st</sup> respondent six months before the expiry of the current term, expressing his interest for reappointment. He wrote two such letters on 22<sup>nd</sup> and 28<sup>th</sup> December 2009. By a letter dated 14<sup>th</sup> April 2010, the 1<sup>st</sup> respondent renewed the claimant's contract for another three years. The new terms were: a salary of Ksh. 154,000 per month; house rent allowance of Ksh. 40,000 monthly; Ksh. 20,000 telephone allowance monthly; outpatient medical cover of Ksh. 5,000; leave allowance once a year at one-third of his monthly salary, but not exceeding Ksh. 50,000; and commuter allowance of Ksh. 15,000 every month. The Company Staff Rules and Regulations and the Employment Act Cap 226 the Laws of Kenya, were expressed to comprise the law governing the contract. Muriuki was informed by the 1<sup>st</sup> respondent in the same letter of 14<sup>th</sup> April 2010 that his contract would lapse at the end of April 2010. He was to proceed on annual leave of three months immediately. The claimant told the Court that he went on leave as directed. On going back, the 1<sup>st</sup> respondent declined to have him resume duty under the new contract. He was asked to hand over. In breach of the contract, the two respondents went on to advertise for the position of the 1<sup>st</sup> respondent's Managing Director. Muriuki stated he suffered loss and damage as a result of the decision by the respondents. The respondents acted maliciously. The claimant asked for a permanent injunction barring the respondents from employing any other person to the position of Managing Director; a permanent injunction barring the respondents from interfering with the claimant's performance of CEO duties; a declaration that the claimant is entitled to his monthly dues under the existing contract; payment of these dues from September 2010 to-date; costs; interests; and any other suitable reliefs. In the **alternative**, the claimant prayed for 8 days' unpaid salary for the month of September 2010 at Ksh. 41,066.70; salary for October and November 2010 at Ksh. 308,000; three months salary in lieu of notice at Ksh. 462,000; house rent allowance for September, October and November at Ksh. 120,000; entertainment allowance for the same period at Ksh. 60,000; monthly outpatient medical cover for these three months at Ksh. 15,000; airtime allowance over the same period at Ksh. 45,000; and gratuity at 31% consolidated salary for every month worked, from May to November 2010 at Ksh. 334,180. The total figure pleaded came to Ksh. 1,385,246.70. Muriuki also prayed for compensation.

4 Cross-examined, the claimant testified that the advertisement was with respect to the position of Managing Director, while he served as the Technical/ General Manager. The two descriptions referred to the same CEO position. All the terms were used concurrently. The initial contract was for three years. These lapsed on 31<sup>st</sup> July 2010. The contract was renewed in April 2010. He was required to express interest six months before the lapse. He held a discussion with the Board in April 2010. He did not have a copy of the minutes recording such discussion. The minutes of the 1<sup>st</sup> respondent's Board of Directors, attached to the statement of reply for 13<sup>th</sup> April 2010, were forged. When shown another set of minutes by Mr. Kinyua, the witness stated he could not tell if this different set was authentic. He was paid his salary for September 2010. In this other set of minutes, it was recorded that the claimant was asked to leave the meeting because he was the subject of the discussions. He did not know what was discussed. Clause 9 of the contract entitled him to annual leave. The clause required any extension of leave to be

given in writing by the Board. If not approved, there would be forfeiture. He did not write to seek extension. The issue was discussed between him and the Board. It was captured in his letter of renewal. There was verbal communication that he takes the leave at the end of the three years. He handed over on 9<sup>th</sup> June 2010. He received the letter of May 2010 from the 2<sup>nd</sup> respondent sending him on leave. His employer had expressed concerns about poor management practices. Audits carried out during the claimant's tenure had not been availed to the court. It is not true that Muriuki frustrated the audits. He did not victimize staff who assisted the Water Services Regulatory Board [WASREB] in the audit process. He did not terminate these employees' contracts, for their having co-operated with the WASREB. He was aware the 2<sup>nd</sup> respondent wrote to the 1<sup>st</sup> respondent's banks, freezing all the 1<sup>st</sup> respondent's accounts. Muriuki moved to the High Court at Nyeri to un-freeze the accounts. He obtained the orders on 2<sup>nd</sup> June 2010. He was still in office because handing over started on 9<sup>th</sup> June 2010. He was on official leave, not compulsory leave. He signed cheques before he left employment. They were for an amount of Ksh. 600,000. The cheques issued in consultation with the Board. Ksh. 600,000 paid to the claimant was the approved gratuity payment under the old contract. There was a circular issued by TANA on 20<sup>th</sup> April 2010 to all the chairmen of Water Service Providers, complaining that some Boards had extended the contracts of their CEOs, even before the expiry of the current contracts. Muriuki testified he had not seen this circular before he came to Court. He was the General Manager at the time the circular issued. The 2<sup>nd</sup> respondent was concerned about the renewal. The claimant did not see any fault in the manner his contract was renewed. Renewal was in accordance with the contract. The contract was to expire July 2010. It was renewed in April 2010. He was to express interest six months before expiry. Recruitment was in accordance with the law, rules and regulations. There was no advertisement for the position before the claimant was reappointed. There was nothing wrong with the reappointment procedure. Audit carried out by WASREB stated the 1<sup>st</sup> respondent Board Meetings were ad hoc. Muriuki did not agree with this; all meetings had an agenda. Muriuki saw for the first time in Court, the recommendation that Ksh. 290,000 paid in unjustified allowances to the Board, should be recovered from the Board members. He could not recall the exact number of employees per 1000 connections; it was slightly above the recommended level. He did not agree with the Audit that the 1<sup>st</sup> respondent lacked proper appraisal system. A meter reader was made the area Manager for Ndia Mwerua Scheme. There were no suitably qualified employees. The 1<sup>st</sup> respondent advertised to fill the positions. Muriuki followed the correct recruitment procedure. The Audit alleged that Paul Kamau and John Nguru Kamau were recruited without being interviewed. These employees came in as casuals, as the 1<sup>st</sup> respondent waited to recruit suitable staff. Procurement procedures were followed. Muriuki was not part of the procurement team; he would communicate the decision of the Procurement Committee to suppliers. Amua Water Systems Limited won a tender for supply of water meters. Supply was to be done by 9<sup>th</sup> March 2010. Amua quoted Ksh. 1,280 per meter which met specification. It was issued with two local purchase orders; it failed to deliver, and the 1<sup>st</sup> respondent went to the next bidder Doshi and Company Limited, who had quoted Ksh. 1,500 per meter. Doshi was to supply by 19<sup>th</sup> March 2010. The claimant wrote to Amua cancelling its order. Amua went on to supply 500 meters on 12<sup>th</sup> April 2010. Muriuki then cancelled the tender to Doshi and gave it to a third supplier, China Halian Limited. China supplied the meters, at Ksh. 1,750 per meter. Quality was not in issue between what was received from Amua and what came from China. It was the work of the technical team to evaluate. It is not true that the 1<sup>st</sup> respondent lost Ksh. 470,000 in the tender for water meters. The claimant denied that he committed the 1<sup>st</sup> respondent to buying pipes worth Ksh. 3,356,700 prematurely before the total cost of the water project had been made. He did not lead the company into losing value for money worth Ksh. 3,356,700. He is aware the management team he led is no longer working for the 1<sup>st</sup> respondent. He did not know that the actions of the 1<sup>st</sup> respondent's Board were also brought into question. Muriuki raised revenue collection. The Chairman and the Board confirmed this. It is well documented. It was not confirmed through audited accounts. The records were retained by the 1<sup>st</sup> respondent.

5. Re-directed by Mr. Ochola, Muriuki testified that he did not have access to the office after he left. He did not carry with him most documents. There was a Board to which the Managing Director reported. Below the Chairman were managers. The 1<sup>st</sup> respondent is a registered company under the Companies Act Cap 486 the Laws of Kenya. Muriuki was there at the meeting of 13<sup>th</sup> April 2010. The minutes were

signed by the acting Managing Director. Muriuki was the Managing Director. The Minutes produced by the respondents were doctored. They referred to the Technical Manager and the Commercial Manager. These officers were in charge of connections. Some of the issues of inefficiency were addressed by the Board. There were no claims, either of a civil or criminal nature, filed against the claimant for misuse of funds. He has never seen the investigation report prepared by WASREB, which was produced by the respondent as MGN 3[a]. There was no counterclaim filed by the respondents. His letter renewing the contract was signed on 14<sup>th</sup> April 2010, by the Board Chairman. He advertised for job vacancies at the 1<sup>st</sup> respondent in the press. He consulted with the Board before doing so. He was entitled to a gratuity of Ksh. 600,000 at the time he left employment, arising from the first contract. It had the approval of the Board. He went on leave expecting to resume. The WASREB report concluded that the claimant's contract should be terminated immediately.

6. Mary Gathoni Nyaga was sent to Kerugoya by a team headed by the Water Permanent Secretary to act as the Managing Director. She testified that the respondents are under the Ministry of Water. They are governed by the Water Act of 2002. The Ministry formulates policy. The 2<sup>nd</sup> respondent is mandated with the provision of water services. It cannot provide water directly. It contracts agents. These are the Water Service Providers, mostly registered under the Companies Act. The Water Services Regulatory Board [WASREB] is immediately below the Ministry. It supervises the Boards and the Water Companies below it. The Tana Water Services Board has about 27 companies below it. The 1<sup>st</sup> respondent is limited by guarantee. It has stakeholders. She was appointed by the Board of the 1<sup>st</sup> respondent. She was seconded by the 2<sup>nd</sup> respondent. She reported at Kerugoya on 8<sup>th</sup> June 2010 and found a very hostile workplace. It was a divided place that welcomed her. Some of the staff were for, and others against, the previous Managing Director. She was made to understand the claimant was sent on compulsory leave. She would not say he took voluntary leave. There were audits which revealed certain issues. That is why he was sent on compulsory leave. The audit report revealed there was loss of funds; disregard of procurement procedures; and un-procedural recruitment of staff. She did not personally investigate but examined the report and confirmed procedures were flouted. Amua won the tender to supply water meters. There was nothing recorded in writing to show why the tender was cancelled before being handed to another supplier. There was no complaint that Amua had delayed. The quoted prices per meter were higher than the market rates. Amua quoted Ksh. 1,280, Doshi Ksh. 1,500 and China Ksh. 1,750. China meters were low in quality. The staff employment policy was that there should be nine to fourteen employees per 1000 connections. The 1<sup>st</sup> respondent retained 22 staff members. Most were not qualified. A meter reader was made an area manager. The Board did not allow for employment in the manner taken by the claimant. Paul Kamau and John Kamau were employed irregularly. John was a casual employee at the time Mary took over. Paul was a contractual employee whose contract was renewed every three months. This was un-procedural. There was a water project called Kiringa-Mukengeria. The total cost of the project was Ksh. 31,187,130. Muriuki proceeded to purchase pipes worth Ksh. 3,356,700, even before the company knew where the total funding would come from. The pipes were let lying idle at the site. The project had not started off even at the time Mary testified. The claimant withdrew Ksh. 600,000 while on compulsory leave. He was not authorized to do so. The Board continued to pay him a monthly salary for about three months even after he had left. His contract was for a period of three years from 1<sup>st</sup> August 2007 to 31<sup>st</sup> July 2010. The Board would deliberate on whether to grant the claimant a renewal. He expressed his interest in December 2009. The witness did not come across any minutes discussing renewal. There was a meeting of the Board on 13<sup>th</sup> April 2010. The Chairman signed the minutes. Mary was not in the Board at the time. She signed the minutes later. It was in order for her to do so, as she had become the secretary to the Board. The minutes were confirmed at the first Board meeting attended by Mary on 30<sup>th</sup> July 2010. There was a letter from the Board Chairman purporting to renew the claimant's contract. It was not supported by any minutes of the Board. The letter said the effective date of renewal was 1<sup>st</sup> May 2010. The old contract was to expire in July 2010. Mary could not tell whether renewal originated from the Board. If one did not go on leave, there would have to be an explanation why it was not taken. It could only be carried forward with the approval of the Board. There was no record of communication between the claimant and the Board about leave. The claimant did not place anything on the record to explain why he did not go on leave. The Board was not entitled to grant leave at the end of the contract. After the investigations there was nothing for renewal. He was paid his terminal dues and Ksh. 600,000 deducted from his dues. To some extent, he raised the 1<sup>st</sup> respondent's revenue. The company was doing well in

terms of financial performance. Mary could not tell if his contract could have been renewed were it not for the issues raised in the investigations. No member of the Board was retained after the investigations.

7. Mary told the Court on cross-examination that the 1<sup>st</sup> respondent is an agent to the 2<sup>nd</sup> respondent. There is a Service Provision Agreement [SPA] between the two. She was appointed by the Board of the 1<sup>st</sup> respondent. If a water company fails to perform, the 2<sup>nd</sup> respondent is supposed to take over. Mary's appointment was supported by Board minutes. She is a Water Engineer with the Ministry of Water. She did not attend the meeting of 13<sup>th</sup> April 2010. She attended the one of July. In her affidavit sworn on 24<sup>th</sup> September 2010, she referred to minutes in the hands of the claimant. Such minutes had not been brought before the Court. The directors confirmed the minutes on 30<sup>th</sup> July 2010. Investigation was carried from around the date the witness reported for duty at Kerugoya. She reported on 8<sup>th</sup> June 2010. She interacted with the investigation team. She was not certain if she arrived before the investigation team. She did not know if the investigators came earlier. The investigators would report to the commercial or technical manager, in her absence. Investigations kicked off on 6<sup>th</sup> June 2010 which was a Sunday. There were standing officers, such as operations and maintenance staff. They did not have the authority to interact with the investigators. Mary would not say if 8<sup>th</sup>, 9<sup>th</sup> June 2010 were sufficient days for purposes of carrying out investigations. She conceded she testified that John Kamau was given a two year contract. The investigation report mentioned three months renewable contracts. Her earlier testimony was incorrect. She received a copy of the report late, almost at the date she left employment. The tender for water meters was given to China Halian. It is true Doshi was considered before the award to China. The market rate was about Ksh. 1,500 per meter. There was no document to support this but Mary suggested that procurement is guided by market rates. She agreed with Mr. Ochola that prices change. Ksh. 600,000 was deducted from the claimant's gratuity around July/August 2010. The witness did not have anything personal in doing this. Water meters help in regulation of water. WASREB was appointed the investigator because it is the water regulator. The Board was voted out during the Annual General Meeting, after word had reached the consumers about the crisis unfolding at the 1<sup>st</sup> respondent. The Board members were not kicked out by WASREB, but voted out. The Managing Director reports to the Board. The witness agreed she could go against the Board to a certain extent. The Managing Director could defy the Board if it was flouting regulations. The claimant stated that although the 1<sup>st</sup> respondent is a limited liability company, it is under the Ministry of Water and its employees are civil servants. Mary closed her evidence with the clarification that the investigation did not involve her. She was new. There were numerous audits. The report simply confirmed the audits. Eventually water meters were supplied by China. Mary affirmed that she is a Water Engineer and knows about the quality and price of water meters. The report said the China meters were faded and useless. They could not be read. It was a big loss to the 1<sup>st</sup> respondent. Mary is herself a civil servant who has been seconded from Murang'a by the Ministry of water. She remained in the pay roll of the Ministry. The claimant was paid by the 1<sup>st</sup> respondent. The Ministry has a role to ensure the Managing Directors are competent people. The Ministry must be represented at the interview. Directions come from the Permanent Secretary and cannot be ignored.

8. The claimant submitted that he had shown there was a valid and subsisting contract of employment between him and the 1<sup>st</sup> respondent; the respondents unlawfully frustrated the performance of the contract; and the claimant was entitled to the terminal benefits and compensation as pleaded. His contract was renewed in a letter from the Chairman that followed a Board meeting of 13<sup>th</sup> April 2010. Mary was not a participant in the deliberations of 13<sup>th</sup> April 2010. The letter written by the 2<sup>nd</sup> respondent on 20<sup>th</sup> April 2010, acknowledged that some Boards had already met and extended the terms of incumbent Managing Directors/ General Managers. The 2<sup>nd</sup> respondent did not have the power to annul the decision of the 1<sup>st</sup> respondent's Board; it was not involved in the appointment in the first place. The respondents frustrated the claimant's contract. WASREB, whose investigation report was heavily relied on by the respondents in getting rid of the claimant, could not be relied upon. It was a third party who did not have privity of contract with the claimant. The report was of little or no probative value, and was prepared in a hurry. The report finally recommended that the claimant's contract be terminated immediately, which discounts the position that the claimant did not have a valid contract. The claimant asked the Court to grant him the remedies in his claim. The respondents conceded there was a contractual relationship between the 1<sup>st</sup> respondent and the claimant from 1<sup>st</sup> August 2007. Water provision is a function of the

Water Ministry. Under the Water Act 2002, section 4, 'it is the duty of the Minister to promote the investigation, conservation and proper use of water resources throughout Kenya and ensure the effective exercise and performance of any authorities or persons under the control of the Minister of their powers and duties in relation to water.' WASREB has the duty under section 47 to monitor the operation of Service Provision Agreements [SPA] between the Water Services Boards and the Water Service Providers. The renewal of the claimant's contract was not backed up by any minutes of the Board. Renewal could only be considered after the lapse of the initial contract; this had not happened on 14<sup>th</sup> April 2010. The 2<sup>nd</sup> respondent wrote to all Water Providers on 20<sup>th</sup> April 2010 cautioning against renewal of contracts which had not yet lapsed. The claimant did not write to the 1<sup>st</sup> respondent's Board, to allow him to carry forward his leave. The respondents asked the Court to decline the prayers sought.

#### *The Court Finds and Awards:-*

9. The claimant was appointed as the Technical Manager / General Manager of the 1<sup>st</sup> respondent Water Services Provider, on 1<sup>st</sup> August 2007. There was sufficient evidence to show these designations, denoted the Chief Executive Officer of the 1<sup>st</sup> respondent. Clause 2 of the employment contract stated that Muriuki would report directly to the Board. Clause 3 specifically referred to him as the CEO. Investigations carried out by WASREB, and the circular of the 2<sup>nd</sup> respondent dated 20<sup>th</sup> April 2010, all suggest the terms Managing Director and General Manager were used interchangeably. The Court is satisfied these referred to the CEO.

10. The contract was to run for three years ending 31<sup>st</sup> July 2010. It was varied on 28<sup>th</sup> July 2008 in favour of the claimant. He would now be entitled to gratuity; annual bonus; and leave allowance. The variation letter advised the claimant that other terms would be reviewed when the 1<sup>st</sup> respondent considered the claimant's new contract. The claimant was supposed to write and express his interest in a renewed contract, six months before the expiry of the existing contract. There is no dispute he did this on 22<sup>nd</sup> December 2009 and 28<sup>th</sup> December 2009. The Board of the 1<sup>st</sup> respondent met on 13<sup>th</sup> April 2010. There were minutes of the meeting availed to the Court by the respondents. The claimant did not agree that these minutes were a true reflection of the Board proceedings of 13<sup>th</sup> April 2010. The dispute is rooted in the events of 13<sup>th</sup> April 2010.

11. The 1<sup>st</sup> respondent Board Chairman wrote a letter to Muriuki the following day, 14<sup>th</sup> April 2010. The claimant was informed that following his expression of interest, and in view of his outstanding performance, the Board had made a decision to renew the claimant's contract for a period of three years, effective from 1<sup>st</sup> May 2010. The old contract had not yet lapsed by effluxion of time; it was as seen above to lapse on 31<sup>st</sup> July 2010. The Board did however inform the claimant, that his existing contract had been terminated with effect from 30<sup>th</sup> April 2010. His terms under the new contract, were as described in paragraph three of this Award. Muriuki was told to take his pending leave of three months. The respondents denied that such a decision was ever made by the Board. It was not captured in the minutes of 13<sup>th</sup> April 2010. They exhibited a letter dated 20<sup>th</sup> April 2010 from the 2<sup>nd</sup> respondent to all Chairmen of the respective Boards of the Water Agents. The letter noted that some Boards had already met and extended the contracts of the sitting CEOs. The situation had led to the CEOs working under two concurrent contracts. The Boards were advised that they are agents of the Tana Water Services Board and should comply with the Water Act 2002, the State Corporation Act Cap 466, the Companies Act Cap 486 and the various circulars issued by WASREB and Tana Water Services Board. The Boards were told it had become mandatory to advertise all the CEO positions, and fill them competitively in order to revitalize the water sector. The questions raised by this dispute are whether the claimant's contract was validly renewed; whether the respondent un-justifiably prevented the claimant from performing his role under the renewed contract; and whether the claimant is entitled to prayers sought?

12. The first question cannot be answered without some background understanding of the nature and capacities of the parties. Legal arguments have been recorded with relation to the Water Act 2002 and the Employment Act 2007. The respondents gave evidence and argued that the Water Act makes the

provision of water purely a preserve of the State. Section 4[2] retains State control over individuals and corporate entities involved in the provision of water. WASREB acted within the mandate given by the Water Act by investigating the affairs of the 1<sup>st</sup> respondent and by implication, of the claimant. Mary testified that the Water Companies are public entities, and that their employees are public servants. The claimant explained that the 1<sup>st</sup> respondent is a limited liability company. The 2<sup>nd</sup> respondent is a Water Board created under the Water Act; it did not have any legal authority to annul the 1<sup>st</sup> respondent's Board's deliberations and decisions affecting an internal recruitment process; and did not have power to revoke an appointment made by the 1<sup>st</sup> respondent's Board, as it was not the appointing authority.

13. The Ministry of Water and its sub-divisions transferred the management and operations of water services to Water Services Boards after the enactment of the Water Act in 2002. The 2<sup>nd</sup> respondent is one of these regional Boards. Water Services Regulatory Board [WASREB] was created as the licensing authority. Water Services Boards obtain their licenses from WASREB. They in turn get into Service Provision Agreements, with the Water Service Providers. The Water Service Providers may be registered companies such as the 1<sup>st</sup> respondent; Non-Governmental Organizations; or other Community Groups. Most of the Water Service Providers were previously water departments in the Local Authorities. Professor Albert Mumma argues that the Water Reforms revolved around four themes: separation of the management of water resources from provision of water services; separation of policy making from day to day administration and regulation; decentralization of the functions to lower level state organs; and involvement of non-governmental entities in management of water resources and provision of water services. The Act decentralized functions to lower level public institutions. Ultimate decision making remains centralized. [‘Africa Water Laws: Plural Legislative Framework, for Rural Water Management,’- Professor Albert Mumma, 26<sup>th</sup> and 28<sup>th</sup> January 2005, Johannesburg South Africa]. The Water Act divested the Minister for Water of regulatory functions over management of water services; these functions were vested in a new body, the Water Resources Management Authority. The Act took away the provision of water and sewerage regulatory functions from the Minister and vested them in the WASREB.

14. The Employment Act 2007 defines an employer to include any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. An employee is defined as a person employed for wages and includes an apprentice and indentured learner. These definitions cut across the entire Kenyan Labour Laws of 2007. The definitions are based on the traditional employment relationships. It is recognized however that the nature of work is shifting away from physical production towards a service sector. There are changes taking place in the structure of the Industry, and in the Workforce, changes that affect how work is performed. Labour law must always respond to the changes in the organizational relationships, otherwise the traditional employment law concepts shall not fit as the legal framework of a technological society. Looking beyond the statutory definitions, there are three tests in evaluating who the employer and the employee is. These tests are:-

- Four-fold test;
- Economic reality test;
- Multi-factor test.

The Four-fold test looks at the right to hire and fire the employee; who pays the salaries and the wages; who retains the power of dismissal and power to impose disciplinary sanctions; and who controls the employee with respect to the means and methods by which the work is to be accomplished. The test on control is the most important under the Four-fold test. In applying this test, the existence of the right and not its exercise thereof, is important. The Economic Reality test looks at the economic dependence of the employee. This concept seeks to fill the gap created under the control test, taking into account the nature of the modern highly specialized workforce. The Multi-factor test combines aspects of the first two tests: it considers the power of control of the employee with regard to the means and methods of work; and the underlying economic realities of the activity or relationship. It is important in looking at the employment relationship among the three parties to this dispute to have in mind the statutory definitions of employer and employee, and also to recognize that these do not always satisfy the criteria for establishing the nature

of the relationship, particularly given the fact that labour has become flexible, and businesses have had to change their formations, in a fast changing technological world.

15. There is sufficient evidence to show that Muriuki was an employee of the 1<sup>st</sup> respondent KIRIWASCO. The 1<sup>st</sup> respondent hired him and had the power to fire him; it paid his salary; it had the power to discipline the claimant; and through the contract of employment and provision of the law, retained the power to control the employee with respect to the means and method by which his work was to be accomplished. The claimant depended entirely on the 1<sup>st</sup> respondent for his salary and allowances. The definitions of employer and employee under the Employment Act 2007, and in the repealed Employment Act, fit the relationship between the 1<sup>st</sup> respondent and the claimant. Legally, the claimant and the 1<sup>st</sup> respondent concluded a binding contract of employment that was to lapse on 31<sup>st</sup> July 2010. They were not barred from considering renewal; the outgoing contract had a clause on renewal. In doing this, were they bound to consider the concerns of TANA, WASREB and the Ministry? The structure of the Water Bodies is such as to call for the Court to look beyond the Four-fold and the Economic Reality tests. There are multi-factors underlying the relationships among the respective entities. The multi-factor test allows for a look into other relevant considerations, beyond the obvious rights and obligations, contained in the contract and the employment statute. It is not an open and shut case, where the mutuality of obligation is fully dispositive of the disputed issues. Water is an essential resource and its management, provision and regulation is a matter that the State retains control over. The law develops to keep pace with technological advancement. Originally, the control test was all that was considered, but as the workplaces changed and business formations changed, it became important to look at the nature of the work. The nature of the claimant's work, the mandate he was set out to fulfill, concerned other players beyond the boundaries of Kerugoya. It becomes imperative to consider other factors outside the four corners of the contract document. This suggests to the Court that it should not disregard the overall public policy considerations; the multi-tiered structures created to carry out the water reforms; and the role of the 1<sup>st</sup> respondent in implementation of public policy, in determination of this matter.

16. The claimant's contract was to lapse on 31<sup>st</sup> July 2010. It was renewed before the contractual date of expiry. The Ministry of Water had given policy direction that it was now mandatory to fill the positions of Managing Directors/ General Managers, through an open and transparent process, once the existing contracts expired. A number of Water Service Providers rushed to pre-empt the implementation of this policy, by terminating the existing contracts prematurely, and giving new contracts immediately. This was done by the Water Agents behind the back of their Principal, TANA. The claimant's contract which was set to lapse on 31<sup>st</sup> July 2010 was terminated prematurely on 30<sup>th</sup> April 2010. This was done to undermine the implementation of the new policy on competitive recruitment of CEOs given by the Ministry. It was meant to provide the claimant with a *fait accompli*. He would tell off the bureaucrats from TANA, the investigators from WASREB and the Minister himself. He would flash at them the new contract duly signed by a complicit Board Chairman. His methods were however, not without fault. The letter of renewal is dated 14<sup>th</sup> April 2010. It referred to the Board meeting of 13<sup>th</sup> April 2010 as the one that decided the claimant should have a new contract. The minutes produced by the respondents did not contain any item on renewal of the claimant's contract. There was nothing to show that the Board made any resolution to terminate the previous contract prematurely. The claimant alleged that the minutes produced by the respondents of the meeting that took place on 13<sup>th</sup> April 2010, did not reflect a true record. He did not produce any minutes himself. It is hard to see how a man who was the CEO of the 1<sup>st</sup> respondent would not have some sort of a record of the meeting of 13<sup>th</sup> April 2010, if only to contradict the ones produced by the respondents. It was not important that Mary was not present at the meeting of 13<sup>th</sup> April 2010; she was present at the subsequent Board meeting that confirmed what is contained in the minutes of 13<sup>th</sup> April 2010, produced by the respondents. The Court finds that the claimant's contract was not validly renewed; it was a rushed affair done specifically to outdo the Water Services Board, the Water Regulatory Services Board and frustrate the policy direction from the Minister. It was not a contract that can be said to have the validation of a resolution of the Board. The termination of the old contract was itself not shown to have the support of any resolution of the Board. The claimant just persuaded his close friends in the Board to terminate early and give him another term, irrespective of the changing policy of the Ministry communicated by the Water Services Board on 20<sup>th</sup> April 2010.

17. Did the respondents unjustifiably deny the claimant from performing his role under the renewed contract? The answer from the foregoing conclusions, must be no. The respondents, specifically the 2<sup>nd</sup> respondent had no reason to sit back and watch a runaway Board, and a vulpine Managing Director impose a situation, in a matter in which the 2<sup>nd</sup> respondent, WASREB and the Ministry have respective obligations to manage, regulate and give policy leadership. They correctly rejected the *fait accompli* by insisting that Muriuki should hand over to the caretaker Managing Director Mary. The Chairman and the entire Board were subsequently removed by the stakeholders. The claimant and the Board of the 1<sup>st</sup> respondent had on 25<sup>th</sup> May 2010, taken the 2<sup>nd</sup> respondent to the High Court at Nyeri, after the 2<sup>nd</sup> respondent froze the Bank Accounts of the 1<sup>st</sup> respondent. The verifying affidavit in the High Court Claim was sworn by Gerald Mugo the Board Chairman. They argued that theirs is an independent limited liability company, entitled to run, manage and control its own independent Board of Directors without the interference of the 2<sup>nd</sup> respondent. The Court has given its view on why this argument is faulty. As explained by Professor Mumma, the water reforms were aimed at decentralization of functions to lower level public institutions; decision making remains centralized. Every water resource is vested in the State, subject to the rights of user granted by, or under the Water Act or any other written law. Water Services Boards, exercise and perform all or any of their powers and functions under the WASREB licence, through one or more Agents called the Water Service Providers. KIRIWASCO was at all times exercising the powers and functions of TANA. It was wrong for the claimant and the 1<sup>st</sup> respondent to think that the 1<sup>st</sup> respondent was an independent, private commercial entity without any obligation to the public. Had the 2<sup>nd</sup> respondent, WASREB and the Minister accepted the imposition, it would have meant they have surrendered their roles in management, regulation and policy-making to Water Service Providers. The Water Reforms would have no meaning. The old contract was coming to an end. Parties went to great lengths to justify why it ought to have been renewed or renewal refused. In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. The contract required the claimant to express his interest to renew six months before the expiry. He did this in December 2009. This clause did not create any obligation on the 1<sup>st</sup> respondent to renew; it merely directed the claimant on the procedure of seeking renewal. Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination. The WASREB investigations were not a decisive factor. The claimant raised the 1<sup>st</sup> respondent's revenue collection. It was admitted even by Mary that his performance in this respect from 2007, was good. This too did not create any obligation on the part of the 1<sup>st</sup> respondent to renew; it merely was one of the factors that would be taken into account in considering renewal. Reward for outstanding performance was in the annual bonuses promised in the variation of the contract on 28<sup>th</sup> July 2008; it was not in an automatic renewal of the contract. There was nothing to prevent the Ministry to change its policy, and call for competitive recruitment of Water Service Providers Managing Directors. The claimant may have raised the 1<sup>st</sup> respondent's revenue collection from Ksh. 2 million to Ksh. 8 million over the three years he worked; the allegations against him made from the WASREB investigations may, or may not all, have been true. There was evidence from the 2<sup>nd</sup> respondent that technical audits of the 1<sup>st</sup> respondent may have been going on from as early as February 2010. There was evidence that even when sent on compulsory leave, the claimant defied TANA, and continued to advertise in the newspapers, calling on job-seekers to apply for certain jobs at KIRIWASCO. These were not decisive factors and did not create any legal or contractual obligations to terminate the initial contract, or grant a new contract. The 1<sup>st</sup> respondent did not have to justify the end of the fixed-term contract or give reasons for non-renewal. There was nothing improper in asking the claimant to hand over, and in bringing a caretaker Managing Director.

18. Is the claimant entitled to the prayers sought? The short answer again must be no. All the tabulated salaries, allowances and damages relate to the renewed contract. The Court has found this contract to have no validity. It was a contract made contrary to public policy, aimed at defeating the functioning of public bodies, and executed without the backing of a resolution of the Board. No benefits can flow to an employee from such a crafty contract. Muriuki paid himself gratuity of Ksh. 600,000 while on

compulsory leave. TANA would freeze KIRIWASCO bank accounts; Muriuki would un-freeze them and pay himself gratuity. He did not acknowledge the authority of the TANA Water Services Board, although it is clear KIRIWASCO is an Agent of TANA, exercising the powers and functions of TANA. The claimant does not complain that he was not paid any entitlements under his expired contract. Service pay was pleaded for seven months, from May to November 2010. All benefits and damages are sought in relation to the renewed contract. These are not prayers that the Court can grant in view of the findings of the Court on the validity of the renewed contract. Muriuki prayed for an Order that he is supplied with a certificate of service. A certificate of service is a statutory right under section 51 of the Employment Act. It is not to be denied to an employee regardless of the circumstances of his exit. The Court Awards:-

**[a] The 1<sup>st</sup> respondent to supply the claimant with his certificate of service forthwith;**

**[b] Other prayers are rejected;**

**[c] No order as to costs.**

Dated and delivered at Nairobi this \_\_\_17<sup>th</sup> \_\_\_ day of \_\_\_September\_\_\_2012

James Rika

Judge