



REPUBLIC OF KENYA



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Mpapale & 5 others (All Suing in their Capacity as Elected/Appointed Representatives of the Mombasa Water Kiosk Operators Association) v Mombasa Water Supply and Sanitation Company Limited (Constitutional Petition E054 of 2022) [2024] KEHC 10841 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E054 OF 2022**

OA SEWE, J

JULY 18, 2024

**IN THE MATTER OF ALLEGED VIOLATION OF THE NATIONAL VALUES
AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES
10, 174, 184, 196, AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF THE PRINCIPLES
UNDER SECTION 4 OF THE WATER ACT, 2016 AS READ WITH
ARTICLES 10, 43, AND 232 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED USURPATION OF THE CONSTITUTIONAL
AND STATUTORY POWERS VESTED IN THE COUNTY GOVERNMENT
BY SECTION 12 OF THE COUNTY GOVERNMENT ACT AS READ WITH
SECTION 158 OF THE WATER ACT, 2016 AND THE 4TH SCHEDULE TO THE
CONSTITUTION**

AND

IN THE MATTER OF WATER KIOSKS AND STAND PIPES MANAGEMENT POLICY, 2019

AND

**IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTION
UNDER ARTICLE 258 OF THE CONSTITUTION**

BETWEEN

**KENNEDY MUDI MPAPALE 1ST PETITIONER
RUKIA KHAMISI 2ND PETITIONER
MOSES OMONDI OTIENO 3RD PETITIONER**



ABDALLA NYANDO 4TH PETITIONER
TARACISIO MWANIKI 5TH PETITIONER
MICHAEL OGWENO AMISI 6TH PETITIONER
ALL SUING IN THEIR CAPACITY AS ELECTED/APPOINTED
REPRESENTATIVES OF THE MOMBASA WATER KIOSK OPERATORS
ASSOCIATION

AND

MOMBASA WATER SUPPLY AND SANITATION COMPANY
LIMITED RESPONDENT

JUDGMENT

1. The petitioners, Kennedy Mudi Mpapale, Rukia Khamisi, Moses Omondi Otieno, Abdalla Nyando, Taracisio Mwaniki and Michael Ogweno Amisi, approached the Court vide their Petition dated 3rd October 2022. They described themselves as members of Mombasa Water Kiosk Operators Association. They averred that the Association is a duly registered society pursuant to the provisions of the *Societies Act*, Chapter 108 of the Laws of Kenya. The petitioners accordingly brought the Petition on their own behalf and on behalf of the other members of their Association.
2. The petitioners averred that the water kiosk system was intended to complement the Government's efforts under the *Water Act*, 2002 to expand the water supply network to reach residents in low-income areas. To that end, the Association with the help of some financial institutions, invested in laying the pipe network and the purchase of easements from affected land owners with a view of expanding the water supply network in their target areas. Thus, the petitioners contend that their Association is a key stakeholder in the Mombasa County water supply sector.
3. Their cause for complaint is that they were neither notified nor their views sought by the respondent during the formulation of the Kiosk and Stand Pipe Management Policy, 2019. Their contention was that they only got to learn of the existence of the Policy when they saw an unexplained billing of Kshs. 10,000/=; and that when they made enquiries with the respondent, they were informed that the charge was in line with the new Water Kiosk and Stand Pipe Management Policy, which they were advised to obtain from the respondent's website.
4. The petitioners further stated that, upon downloading and studying the document, they discovered that it was not in conformity with the vision behind the creation of the water kiosk system. They averred that the main objective for the introduction of the water kiosk system was to supply safe, reliable and affordable water to the low income areas, while the Policy, as formulated, appears to create new categories of charges which only raise operational costs to the detriment of the residents.
5. The petitioners further complained that the Policy has created a new design and structural set up for water kiosks whose construction not only requires huge funding but also entails new understanding and renegotiation of easements. They further averred that the Association prepared a Memorandum and sent it to the respondent on 17th May 2022 and requested the respondent to:
 - (a) Stop and/or suspend the implementation of the Policy;
 - (b) Cause to be reviewed the grey areas in the Policy



- (c) Organize public participation with the Association to get their opinion and views on what the water kiosk sector really needs;
 - (d) Seek the views of the consumers in the low income residential areas to get to know their plight;
 - (e) Conduct proper civic education and sensitization programmes to enable both the operators and the consumers understand the Policy well.
6. At paragraph 17 of the Petition, the petitioners contended that the Policy as worded is immensely confusing, because it is not easy to know with certainty the difference between kiosk operators, stand pipe operators, water operating agents, and water vendors; or which provisions apply to each of these four categories of service providers. Accordingly, it was their contention that the Policy is intended to exploit the members of the Association, and if not checked, will breed cartels within the water sector.
7. The petitioners therefore averred that, despite their requests to the respondent through their Memorandum and through a demand notice, the respondent has remained adamant and insists on implementing the Policy as is. They were, in the premises, constrained to file the instant Petition in which they prayed for the following reliefs:
- (a) A declaration that the manner in which the Water Kiosk and Stand Pipe Management Policy, 2019 was formulated by the respondent violates the national values and principles of governance as enshrined in Articles 10, 174(c), 196(1)(b) and 232(1)(d) of *the Constitution* for want of public participation and is therefore unconstitutional, null and void.
 - (b) A declaration that the manner in which the Water Kiosk and Stand Pipe Management Policy, 2019 was formulated by the respondent violates the principles envisaged under Articles 10, 43, 60 and 233 of *the Constitution* and is therefore null and void.
 - (c) A declaration that the Water Kiosk and Stand Pipe Management Policy, 2019 as formulated by the respondent amounts to a usurpation of the constitutional and statutory powers accorded to the County Government by Section 120 of the County Government Act as read with Section 158 of the *Water Act*, 2016 and the Fourth Schedule (10th function) to *the Constitution*.
 - (d) Any other orders that the Court may deem just to grant.
8. In its undated Response to the Petition, the respondent denied the allegations set out in the Petition and put the petitioners to strict proof thereof. The respondent averred that it sent out invitation letters to all stakeholders including water kiosk operators. The respondent further averred that it organized a public participation meeting which was duly attended by officials of the Association. The respondent pointed out that it had no way of ascertaining whether there were in existence two divergent groups of Mombasa Water Kiosk Operators Association during the public participation meetings.
9. The respondent further averred that the current status of water kiosks and stand pipes in its water supply area exhibit a haphazard system of management which is in dire need of streamlining; and therefore the Policy was long overdue. It further stated that the Policy was formulated in accordance with the Guidelines for Water Vending as issued by the Regulator, Water Services Regulatory Board (WASREB)
10. As for the charge of Kshs. 10,000/=, the respondent explained that the same is for purposes of security, which can either be refunded at the end of the contract, be used to repair damages occasioned by the customer's negligence or be applied towards settling any outstanding debts. It was therefore the respondent's prayer that the Petition be dismissed with costs or in the alternative, the same be referred for Alternative Dispute Resolution.



11. The respondent filed what it referred to as a Further Affidavit sworn on 28th July 2023 by its Managing Director, Mr. Abdirahim Farah. It endeavoured to draw a distinction between public participation and public sensitization and averred that the two are mutually exclusive. The respondent then indicated that, while public sensitization is within its mandate, public participation on Water Vending Guidelines is within the province of WASREB as the regulator of water services. The respondent reiterated its stance that the impugned Water Kiosks and Stand Pipes Management Policy significantly contains provisions of the Guidelines for Water Vending by WASREB.
12. The respondent further underscored its assertion that it did not formulate the impugned Policy arbitrarily or in isolation, but in accordance with the Regulator's Guidelines and Licence for provision of water services. At paragraph 23 of the Further Affidavit, the respondent deposed that, while public participation is generally valuable in decision-making processes, there can be instances where it may be constrained or overridden for various reasons. The respondent then proceeded to list the following reasons for consideration by the Court:
 - (a) Time constrains: It contended that in urgent situations or time-sensitive matters, the decision-making process may require quick action, limiting the scope for extensive public participation, such as in cases of immediate public safety concerns or emergencies.
 - (b) Expertise and Technical complexity: The respondent contended that some decisions involve highly technical or specialized knowledge where public participation may be less effective in contributing to the decision-making process.
 - (c) Privacy and confidentiality: The respondent averred that in certain situations, the subject matter may involve confidential or sensitive information, necessitating limited public participation to protect individual privacy or national security.
 - (d) Regulatory requirements: It was the assertion of the respondent that regulatory concerns such as protecting public health or ensuring consumer safety ought to take precedence over public participation.
13. Hence, the respondent urged the Court to take the foregoing into consideration in determining the Petition.
14. The Petition was canvassed by way of written submissions, pursuant to the directions given herein on 5th May 2023. The petitioners thereafter filed their written submissions dated 24th May 2023. They responded to the assertion about lack of locus standi by relying on Article 258 of *the Constitution* and submitted that they have the requisite locus standi to present the Petition. The petitioners also relied on Articles 10, 174(c) and 232 of the Constitution as to the requirement for public participation, contending that it is not a right to be trifled with. The petitioners relied on Robert N. Gakuru & others v Governor Kiambu County & 3 Others PARA 2014. eKLR, among other authorities to buttress their submissions.
15. The respondent relied on its written submissions dated 7th July 2023 in which it proposed the following issues for consideration:
 - (a) Whether the petitioners are the duly recognized officials of the Mombasa Water Kiosk Operators Association;
 - (b) Whether the Water Services Regulatory Board (WASREB) held a stakeholder public participation prior to formulation of its Guidelines for Water Vending and the respondent's formulation of its Water Kiosks and Standpipes Management Policy, 2019.



- (c) Whether the matter should be subjected to Alternative Justice System/Alternative Dispute Resolution.
16. In the respondent's submission, the petitioners are not the registered officials nor do they represent the entire membership of the Mombasa Water Kiosk Operators Association for the reason that the membership and recognition as officials of the Association are issues pending determination before the Court in High Court Civil Case No. E122 of 2021: Kennedy M. Mpapale & others v Gabriel Amok & 3 others. The respondent further submitted that a considerable section of its consumers in Mombasa County is compliant with the impugned Policy and have since disassociated themselves from the Petition. According to the respondent, the consent and authority given by the purported members of the Association to institute this Petition is only representative of the rogue faction of the Association, which formation is outside the ambit of the *Societies Act*.
 17. The respondent submitted that, as a corporate entity, it is well versed with the requirements pertaining to public participation and the prevailing legal framework for public participation in decision-making processes. It made reference to Articles 10, 27, 33, 35 and 119 of *the Constitution* and Section 87 of the County Government Act, 2012 as the key provisions providing for citizen participation and the applicable principles. It nevertheless reiterated its stance that the responsibility of ensuring public participation is that of the Regulator; and that the Regulator undertook comprehensive public participation before promulgating the Guidelines for Water Vending which informed the impugned Policy.
 18. The respondent placed reliance on Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR, Josphat Muriu Ndegwa (suing on his own behalf, in the public interest and on behalf of other bar owners in Nyandarua County) v Nyandarua County Assembly & another [2021] eKLR on the applicable principles and urged the Court to be guided thereby.
 19. Lastly, the respondent submitted that the Petition was prematurely filed before exhaustion of all the other avenues for dispute resolution. For instance, they pointed out that the petitioners had the option of approaching WASREB for resolution of its dispute pursuant to Regulation 89 of the Water Services Regulations, 2021. It was on this account that the respondent proposed that the matter be referred to ADR pursuant to Article 159(2)(c) of the Constitution.
 20. The respondent further posited that, instead of suspending the Policy, it would be in the interest of justice for the Court to order for the re-commencement of the process of sensitization to all concerned stakeholders and consumers within the respondent's area of operation. In the respondent's view, this will be in line with the directive by the County Government of Mombasa issued on 21st June 2023 to the County Executive Committee Member for Water, Natural Resources and Climate Change Resilience.
 21. The respondent filed Supplementary Submissions dated 28th July 2023 to address the issues raised in its Further Affidavit. Accordingly, the respondent made specific reference to the directive dated 21st June 2023 from the Office of the Governor requiring the respondent to carry out sensitization on the Regulator's guidelines and implementation of the Policy. The respondent reiterated its assertion that the petitioners are only out to circumvent compliance with the Policy.
 22. I have carefully considered the pleadings filed herein by the parties as well as the written submissions filed on their behalf by learned counsel. Since the respondent raised two technical issues, it is imperative that the issues be determined upfront; namely, whether the petitioner's locus standi and whether the doctrine of exhaustion is applicable to the facts of this case.



23. The respondent submitted that the petitioners are not the duly recognized officials of the Association and therefore have no locus standi to bring this Petition. They pointed out that there is a pending suit, being Mombasa High Court Civil Case No. E122 of 2021: Kennedy Mudi Mpapale & others v Gabriel Amok and 3 others involving the different factions of the Association and posited that since the petitioners are not the registered officials of the Association, they do not represent the entire membership and therefore have no mandate to file or prosecute this Petition.
24. On their part, the petitioners contended that they approached the Court for the vindication of their right to public participation in the formulation of the said Policy, not only as officials and members of the Mombasa Water Kiosk Operators Association, but also on their own behalf as individual citizens of Kenya. Hence, the first issue to consider is whether they have the requisite locus standi.
25. It is not surprising therefore that the petitioners placed reliance on Article 258 of *the Constitution* to support their assertion that they have a right to approach the court on the ground that the right to public participation in the formulation of the Policy has been violated. That provision states:
- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
26. It is plain then that Article 258(1) of *the Constitution* gives a right to every person claiming that *the Constitution* has been contravened or is threatened with contravention to institute court proceedings. Article 258 (2) (b) and (d) of *the Constitution* provides that the proceedings can be filed by a person acting as a member of, or in the interest of, a group or class of persons and an association acting in the interest of one or more of its members. It is plain then that under the aforementioned Article, the petitioners had the right to bring this Petition and cannot be faulted on account of the pending dispute as to the bona fide officials.
27. Further to the foregoing, it is now trite that Article 3(1) of the Constitution has had the effect of widening the scope of locus standi considerably. The Supreme Court made this clear in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR thus:
- ...The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, Sup. Ct. *Petition No. 7 of 2013*; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis...
- (67) It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in



general. In *John Wekesa Khaoya v. Attorney General, Petition No. 60 of 2012*; [2013] eKLR the High Court thus expressed the principle (paragraph 4):

“...the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by *the Constitution* in Articles 22 and 258 of *the Constitution* which ensures unhindered access to justice...”

(71) Articles 22 and 258 of *the Constitution* provide that every person has the right to institute proceedings claiming that *the Constitution* has been contravened; and “person” in this regard, includes one who acts in the public interest...”

28. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal had earlier held:

(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in article 258.”

29. A similar position was taken in the case of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR thus:

It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the court for redress as long as the person holds bona fide grounds for believing that *the Constitution* is under threat ought to be welcome...”

30. In the premises, it is immaterial that the petitioners did not have the written authority of the bona fide officials of the Association. I find succour in the decision of Hon. Makau, J. in *Offshore Trading Company Limited v Attorney General & 2 others* [2021] eKLR, that:

...the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under “The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013, otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of Constitutional Petitions and which have no requirement that the Petitioner must exhibit a board resolution or swear a verifying Affidavit. In addition thereto *the Constitution* abhors Technical objections of this nature expressly at Articles 22, 3(b)(d) and 159 of *the Constitution*.”

31. In the instant Petition, I note that the deponent of the Supporting Affidavit has expressly deponed at paragraph 1 of the supporting affidavit that he is duly



authorized by the Board of Directors of the Petitioner to swear the Affidavits. The 3rd Respondent cannot question that averment without offering contrary evidence... There is therefore no basis for the 3rd Respondent's objection in the absence of evidence to the contrary.

...

33. In view of the Mutunga Rules and authorities cited herein above, I find that even if the filing of Resolution was a requirement in Constitutional Petition, I would find that it would be against Article 48 of *the Constitution* on access to justice..."
31. On the doctrine of exhaustion, needless to mention that Article 159 (2) (c) of the Constitution mandates the courts to encourage and enforce the use of alternative forms of dispute resolution. It is equally true that, under Section 82 of the *Water Act*, a party aggrieved by the decision of a water service provider may appeal against the decision to the Regulatory Board which has the power to vary, reverse or confirm the decision of the water service provider.
32. It was therefore the contention of the respondent that the petitioners had the option to approach the Water Services Regulatory Board and lodge a complaint as per the provisions of Regulations 89 and 90 of the Water Services Regulations, 2021. It is worth noting however that, what is in issue is not a decision by the respondent, but the allegation that it formulated the Water Kiosks and Stand Pipes Management Policy without heeding the dictates of *the Constitution* as to the requirement for public participation. This is therefore an alleged violation of *the Constitution* and therefore not a fit or proper dispute for disposal pursuant to Regulations 89 or 90 of the Water Services Regulations.
33. In the case of Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, the court held:
- While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly vs James Njenga Karume {1992} KLR 21), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia it was held that:
- "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint PARA in its totality. ...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."
34. More importantly, the alternative solution must be appropriate for the grievance and adequate as a means of redress. In Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, the court held:
46. "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may,



in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake...”
35. The instant Petition is challenging the formulation of the Water Kiosk and Stand Pipe Management Policy, 2019 which according to them violated Articles 10, 43, 60, 174(c), 196(1)(b), 232(1) (d) and 233 of *the Constitution*. It is plain that the issues raised cannot be resolved under Regulations 89 and 90 of the Water Services Regulations. Moreover, the Supreme Court pointed out, in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment), that:

105 ...the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court...”

36. In the premises, it is my finding that the Petition herein is properly before this court and the respondent’s reliance on the doctrine of exhaustion is misplaced.
37. Turning now to the merits of the case, and as has been pointed out herein above, the centerpiece of this Petition is the Kiosks and Stand Pipes Management Policy, 2019. A copy thereof appears at pages 11 to 59 of the Petition. The document is attributed to the respondent as the policy owner. At page 13, the purpose of the Policy is set out thus:

The purpose of this policy is to determine and establish the framework for the registration, operations, monitoring and evaluation of sustainable water kiosks and stand pipes within the Company’s service area.”

38. While the petitioners contend that the Policy was formulated in violation of *the Constitution*, the respondent asserted that the regulator, WASREB, conducted the requisite public participation and generally complied with all the requirements of *the Constitution* and the applicable provisions of statute. Accordingly, the issues for consideration in this Petition are:
- (a) Whether the formulation of the Water Kiosks and Stand Pipes Policy as formulated by the respondent is a usurpation of the powers of the County Government under Section 120 of the County Government Act as read with Section 158 of the *Water Act*, 2016, and,
- (b) Whether, in formulating the impugned Policy, the respondent violated Articles 10, 43, 60, 174(c), 196(1) (b) 232(1) (d), and 233 of *the Constitution* of Kenya.



A. On whether the formulation of the Water Kiosk and Stand Pipe Policy by the respondent is a usurpation of the powers of the County Government under Section 120 of the County Government Act as read with Section 158 of the Water Act, 2016:

39. One of the prayers in the Petition is for a declaration that the formulation of the Water Kiosks and Stand Pipes Policy, 2019 by the respondent amounts to usurpation of the County Government's statutory powers under Sections 120 of the County Governments Act as read with Sections 158 of the Water Act. In determining this issue, this court has looked at the description of the respondent in the Petition and how they have described themselves in the Defence. The respondent is described as a company that offers water supply and sewerage services.
40. Section 2 of the Water Act defines a water services provider as a company, public benefits organization or other person providing water services under and in accordance with a licence issued by the Regulatory Board for the service areas defined by the licence. From a reading of the Water Act, it is clear that water service providers are established by the County Governments, but they must be licensed by the Water Services Regulatory Board to be allowed to provide any service within any County. (See Sections 73-78 of the Water Act).
41. In the same vein, Section 120 of the County Government Act provides:
- (1) A county government or any agency delivering services in the county shall adopt and implement a tariffs and pricing policy for the provision of public services.
 - (1A) Notwithstanding subsection (1), a county government or any agency delivering services in the county shall adopt and implement tariffs and pricing policy subject to the existing National Government laws and policies.
 - (2) A county government or agency delivering services through service delivery agreements, shall comply with the provisions of this section.
 - (3) A tariff policy adopted under subsection (1) shall reflect the following guidelines—
 - (a) users of county services should be treated equitably in the application of tariffs, fees, levies or charges;
 - (b) the amount individual users pay for services should generally be in proportion to their use of that service;
 - (c) poor households shall have access to at least basic services through—
 - (i) tariffs that cover only operating and maintenance costs;
 - (ii) special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of service; or
 - (iii) any other direct or indirect method of subsidies of tariffs for poor households;
 - (d) tariffs shall reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges;
 - (e) tariffs shall be set at levels that facilitate the financial sustainability of the service, taking into account subsidy from sources other than the service concerned;



- (f) provision may be made in appropriate circumstances for a surcharge on the tariff for a service;
 - (g) provision may be made for the promotion of local economic development through special tariffs for categories of commercial and industrial users;
 - (h) promotion of the economic, efficient, effective and sustainable use of resources, the recycling of waste and other appropriate environmental objectives; and
 - (i) full disclosure of the subsidies on tariffs for poor households and other categories of users.
- (4) A tariff policy may differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and other matters as long as the differentiation does not amount to unfair discrimination.
- (5) A county government may make laws and regulations to give effect to the implementation and enforcement of tariff policies.
42. In terms of the responsibilities of a county government, Section 158 of the [Water Act](#) provides:
- A county government shall subject to sections 70(1)(a) and (b), 117 and 120 of the [County Governments Act](#) (Cap. 265)—
- (a) give effect to national water services standards and conditions set by the Regulatory Board for purposes of ensuring consumer protection; and
 - (b) take into consideration the requirement relating to tariffs gazetted by the Regulatory Board while imposing tariff.
43. Clearly, Sections 120 and 158 of the County Government Act and [Water Act](#) respectively are explicit that tariffs and pricing policies are to be adopted and implemented by either the county government or its agencies. In this case, the respondent as the agent of the County Government of Mombasa had the mandate to create its own tariffs and pricing policies as it did, and there is therefore no evidence of usurpation demonstrated.

B. On Whether the respondents violated Articles 10, 43, 60, 174(c), 196(1) (b), 232(1) (d), and 233 of [the Constitution](#) of Kenya:

44. The gravamen of the petitioners’ case is that the Water Kiosks and Stand Pipes Management Policy, 2019, was formulated without public participation. According to the petitioners, the policy was rolled out without their knowledge and that they only came to know about it sometime in April 2022 when they observed a strange amount of Kshs. 10,000 in their billing.
45. In response to the petitioners’ assertions, the respondent contended that public participation was duly undertaken by the Regulator. It is instructive therefore that Section 4 of the [Water Act](#) states:
- the Cabinet Secretary, the Authority, the Regulatory Board, county governments and any person administering or applying this Act shall be guided by the principles and values set out in Articles 10, 43, 60 and 232 of [the Constitution](#)”.



46. As pointed out herein above, the formulation of water tariffs and pricing policy is the mandate of the County Government or any agency delivering the said service on its behalf. Accordingly, Section 72 (1) (b) of the *Water Act*, stipulates that it is the responsibility of the Water Services Regulatory Board to:

evaluate and recommend water and sewerage tariffs to the county water services providers and approve the imposition of such tariffs in line with consumer protection standards.”

47. In carrying out their respective mandates, the Regulator, the County Government and its agencies, including the respondent are under obligation to ensure compliance with the relevant provisions of *the Constitution*. The concept of public participation is entrenched at Article 10 (2) which provides:

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

48. Public participation is also provided for in Articles 174(c), 196(1) (b) and 232(1) (d) of *the Constitution* and Section 4 of the *Water Act* as well as Section 120 of the *County Governments Act*. Sections 87 and 115 of the *County Governments Act* also make it clear that public participation plays a central role in both legislative and policy functions of the County Governments.

49. The place of public participation was emphasized by the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR, held:

(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- (i) As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just



to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

- (v) Public participation is not an abstract notion; it must be purposive and meaningful.
- (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- (ix) Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

50. The Supreme Court reiterated the above components of meaningful public participation in *Attorney-General & 2 others vs. Ndiu & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021)* (Consolidated) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent).

51. Accordingly, the burden of proof was on the respondent to demonstrate that the impugned Policy, which is attributed to it, was formulated in accordance with the dictates of Article 10(2) above, in terms of public participation. This point was made by the Supreme Court in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013)* (Consolidated) [2013] KESC 6 (KLR) (16 April 2013) (Judgment), as follows:

...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden..."

52. Likewise, in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR it was emphasized that:

65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to



a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

53. The Supreme Court reiterated the position in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) and held:

“A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or live in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”

54. In this instance the petitioners discharged their burden of proving that no public participation was conducted in connection with the formulation of the subject Policy. Having done that, it was upon the respondent, whose assertion it was that public participation was carried out by the regulator, to prove their assertion. No evidence was presented by the respondent to prove their allegations that public participation was conducted.

55. The document annexed to the Further Affidavit sworn on 28th July 2023, is in respect of the Water Vending Guidelines and not the Policy mentioned herein. The respondent conceded at paragraph 8 of that affidavit that, other than that, no other public participation engagement was undertaken. It is therefore my finding that there was no public participation in the implementation and enactment of the Water Kiosks and Stand Pipes Management Policy, 2019.

56. It is manifest that the respondent formulated and implemented the Water Kiosks and Stand Pipes Management Policy, 2019 in contravention of Articles 10, 174(c), 196(1) (b) and 232(1) (d) of the Constitution.

57. The Petitioners have not shown how Articles 43, 60 and 233 of *the Constitution* have been infringed. Accordingly, the Petition is hereby allowed in the following terms:

(a) A declaration be and is hereby issued that the manner in which the Water Kiosks and Stand Pipes Management Policy, 2019 was formulated by the respondent violated the national values and principles of governance as enshrined in Articles 10, 174(c), 196(1)(b) and 232(1)(d) of *the Constitution* for want of public participation and therefore the said Policy is unconstitutional, null and void.

(b) Each party to bear own costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JULY 2024

OLGA SEWE

JUDGE

