LAD CASE STUDY

Water, Water Everywhere? Devolution and the Water Sector in Kenya's Counties

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Great Expectations: Nearly 1 in 2 Kenyans Lack Access to Clean Water Prior to Devolution

As of 2009, at the time of Kenya's last census, roughly half the population lacked access to clean water. The shortage was more pronounced in the nation's northern, arid sections. In 2013, taking office as the face of the first, highly anticipated, decentralized governments after the major constitutional reform of 2010, Kenya's governors faced immediate pressure from citizens to address the lack of access to water. Expectations were particularly high that county governments in the marginalized northern areas of the country, physically much closer to the people they governed, would perform better than the national government in the provision of basic services.

This case looks at the challenges and choices facing Issa Oyow, Garissa County Executive Committee Member (CECM) for Water and Sanitation. CECM Issa assumed his position, the equivalent of a minister at the county level, in early 2018 [see Figure 1.1. in Exhibit 1]. Like other leaders in the water-scarce north of Kenya, CECM Issa and the Garissa County leadership faced several difficult challenges pertaining to the financing and management of the water sector, including:

- **How should the existing water company and community water user associations be transformed to expand access to services across the county?** The water companies operating prior to devolution were clearly underperforming, and rural community water user associations lacked the technical and managerial capacity to oversee water services or financing for water investment. The result was limited and inequitable access to water across the county.
- **How should the county confront the national government's failure to fully devolve finances and control?** Traditionally, the bulk of capital expenditure for the water sector flowed through regional agencies (such as the Northern Water Services Board) controlled by the national government and supported by donors. While the reforms might have been expected to devolve funding to the counties, such change did not occur, leaving counties with limited funding for water from the fiscal transfers they received to implement their core functions. Total reliance on the county's own revenues would not adequately serve the neediest. At the same time, the national government, using the statutory instruments enacted prior to devolution and later through the 2016 Water Act, was intent on maintaining a number of devolved functions at the national level, limiting the county's ability to implement reforms for increased access.

Jason Lakin conducted interviews and prepared this case (with the assistance of Kamotho Waiganjo) under the supervision of Roger Leeds of Johns Hopkins SAIS. This case was developed solely as a basis for class discussion. It is not intended to serve as a historical record, a source of primary data, or an illustration of effective or ineffective management.

- **How should public participation be incorporated into county water policy?** The 2010 constitution required greater public participation in policymaking, but government officials also realized that if communities were not involved in the water sector, water service provision could quickly become difficult to manage and quality would also suffer. County officials like CECM Issa needed to consider how to incorporate public views into county water legislation, and the ongoing evolution of sector policies.

In attempting to reform the sector, CECM Issa, like other county officials, faced opposition from the national government, which refused to release funds or functions that it had held prior to the 2010 constitutional reform. He also faced resistance from local actors, such as the water company GAWASCO, which did not report to the county. Community water user associations, which long predated counties, provided most of the water to the population. The user associations commanded a local constituency and could not be radically reformed overnight. In some cases, the water user associations viewed county interventions as a threat to their control over resources. County Assemblies in Garissa and elsewhere generally supported executive-led water reforms, but they also wanted to exercise more control over local water companies and the distribution of resources.

The task for CECM Issa and his counterparts in other northern counties was to navigate the interests and needs of all these stakeholders while also delivering improved water access to the people of Garissa.

Background: Kenya's Ambitious Decentralization Reform

In a national referendum in 2010, Kenyans overwhelmingly approved a new constitution. The new supreme law promised major institutional reforms, including substantial political, fiscal and administrative decentralization. Beginning from a structure comprised of 175 local authorities, 8 provinces and 250 districts (the provincial administration), Kenya would dissolve the entire local authority system, radically restructure the provincial administration, and create 47 new county governments with elected governors and legislative assemblies. The counties would be given resources to carry out such key functions as service delivery in health, agriculture, early childhood education, and water and sanitation, among others. All the reforms were to be implemented simultaneously after the elections of August 2013.

The promise of devolved power was a long time coming in Kenya. The country's first independence-era constitution had introduced a version of federalism, known locally as *majimbo*, which had promised significant autonomy to regional governments, including tax powers and a role in managing security. Within five years, however, power was recentralized in the presidency under one-party rule, the second house of the national legislature representing the regions was abolished, and regional governments, after being denied funds and functions, were themselves finally eliminated in 1968.

Demands for decentralization grew in the 1990s as Kenya returned to a multiparty system, and these demands continued to gather force after the ruling party KANU (Kenya African National Union), which had ruled Kenya continuously since independence, finally lost power in 2002. Nevertheless, resistance to constitutional reform remained powerful, and it was only after the

contested election and post-election violence of 2007-8 that momentum was sufficient to finally push through a referendum on a new constitution. While the constitution was passed in 2010, county governments did not come into being until 2013, when fresh elections were held for both national and county offices.

The first county administrations served from 2013 to 2018. This was a period of transition, as institutions were set up, laws passed, and civil servants adapted to a system in flux. Kenya's counties faced a vast array of transition challenges as they assumed responsibilities that had previously been handled by the national government and much smaller local authorities. Continued tensions between the national and county governments over jurisdiction also slowed progress. As a result, counties delayed in setting up institutions and approving policies for key sectors such as water and sanitation. Another cause of delay was the fact that national water legislation and water policy were still under development by the national government; the law was passed only in 2016, and the policy has yet to be finalized. Even as these laws and policies were under review, campaigning began for the 2017 elections, further slowing county progress. Nevertheless, at a broader level, these first county governments laid the foundation for governors and county assemblies to function as envisioned by the constitution.

The Problem: Improving Water for Kenyans in the North

When the Garissa County Executive Committee Member (CECM) for Water and Sanitation, Issa Oyow, took office in early 2018, he found a water sector in disarray. Access to water had improved in northern Kenya since the last census in 2009, but in general, it remained below the national average when counties took over in 2013.

Overall county access levels also masked significant inequalities. While access to water in Garissa overall was not far below the national average in 2009 (51% versus a national average of 53%), inequalities in access at ward level were severe. Even as some wards in Garissa (e.g., Goreale, Damajale) appeared to have nearly universal access to improved water, in others (e.g., Maalamin, Hulugho) almost no one had access to improved water. Access to water in Garissa was geographically polarized, with access levels higher in and around the central regions of the county, closer to Garissa Town and Daadab, which hosts the country's largest refugee camp (see Figure 1.2 in Exhibit 1).

Unsurprisingly, water emerged as a priority in the first set of County Integrated Development Plans (CIDP) produced by governors during the 2013-18 administration. In Garissa, for example, the CIDP included the following target: to increase the proportion of the population with access to safe drinking water from 27,725 households to 90,000 households by 2017 (for more on the Garissa CIDP, see Exhibit 2).

While there was clearly a need for improved access to water, and the demand for water had been expressed and captured in county planning documents, Garissa still lacked county legislation on water and sanitation as of early 2018. The situation was similar in other northern counties, where legislation was introduced as early as 2015, but the executive either failed to push it, or the assembly failed to approve it, during the first county administration.

Water companies in the northern counties were either dysfunctional or nonexistent. Garissa's water company was in financial distress and had failed to deliver on its mandate for many years. The county estimated that only 25 percent of residents of Garissa Town, the main service area for the company, had access to water as of the end of 2017.[i] Access to water in rural and peri-urban areas was also low. The situation was similar or worse in other northern counties. In Marsabit, for example, neither of the major towns had a functional water company at the outset of devolution, and water demand far exceeded access.[ii],[iii]

At the same time, the counties lacked control over the water sector. As we detail below, the national government and its agencies, empowered by the 2016 Water Act, were attempting to claw back powers that the 2010 constitution had devolved to counties, leaving county governments with an asymmetry between the demands they faced for improvement of the sector and the policy levers available to them.

Legal Framework for Managing the Water Sector

In charting a path forward, CECM Issa had to consider the legal context for counties confronting citizen demands for improved water. Although new national policy and legislation aimed to update existing water laws in light of the 2010 constitution and the devolution of important aspects of water provision to counties, differing interpretations of the constitution ultimately created additional confusion over roles and responsibilities.

The Constitution and Functional Assignment

Kenya's 2010 constitution included a significant devolution of power and resources to 47 new county administrations. The constitution provided a basic description of the functions of the national and county governments in its Fourth Schedule, with the national government performing largely policy roles while the county governments were assigned service delivery roles. A few functions were assigned concurrently to both levels.

It was understood that these broad categories would need further refinement after the constitution was approved. The task of clarifying the roles of the two levels of government, and the boundaries between them, was given to a temporary agency known as the Transition Authority (TA). While the TA did issue some further guidance on various functions covered by Schedule 4 in 2013 and 2016, the agency was unable to fully unbundle and assign functional responsibility in many sectors, including water and sanitation.

In 2013, the Transition Authority issued an official notice clarifying the meaning of country control of water and sanitation services. Counties were responsible for:

(b) water and sanitation services including rural water and sanitation services, provision of water and sanitation service in small and medium towns without formal service providers, water harvesting (specific to counties), urban water and sanitation services with formal service provision including water, sanitation and sewerage companies, excluding Water Services Regulatory Board (WASREB) and Water Resources Management Authority (WARMA).

This notice detailed the extent of county water and sanitation services (e.g., rural, peri-urban and urban), but did not delineate the roles of the two national agencies (WASREB and WARMA) that were excluded from county control, nor the eight national Water Service Boards (including the Northern Water Services Board active in Garissa and Marsabit), which controlled most of the sector's financial resources and responsibility for major infrastructure development.

In 2016, another official notice affirmed the continued relevance of the nationally managed Water Service Boards (rechristened Water Works Development Authorities in the 2016 Water Act). These agencies were given some responsibility for regional water management, but also for so-called "national public works," another undefined category in the constitution's Fourth Schedule. The same notice clarified that Water Service Providers (mainly the public water companies) were to be managed by counties. The relationships between these entities remained unclear, and there was no explicit mechanism for coordination.

Laws and Policies

This muddle was not resolved by subsequent policy or legislation. Kenya's parliament approved a new Water Act in 2016, replacing the 2002 Water Act, but in a number of ways this new law failed to account for the changed requirements of the 2010 constitution.

Exhibit 2 compares essential provisions of the 2002 and 2016 Water Acts related to the roles of the two levels of government. The provisions clearly show more continuity than change in the institutions and responsibilities created by the two laws. In particular, the persistence of national state corporations (e.g., Water Service Boards) and agencies (e.g., Water Resources Management Authority), albeit renamed, demonstrates resistance to the required restructuring of state agencies in order to devolve powers and financing to counties, a reform required by the division of responsibility between the two levels of government envisioned in the 2010 constitution. The 2016 Act is also silent on the role of community water associations, as was the 2002 law, presumably leaving their management to counties.

The 2016 Act retains control of permits for water abstraction as a national prerogative, controlled by the Water Resources Authority, and the act seems to give precedence in water use to national water works over county works. It does not establish mechanisms of consultation with counties on decisions about abstraction or the placement of water works.

There are differences, of course, between the 2002 and 2016 laws. One is in the role of the Water Works Development Agencies, successors to the Water Service Boards. In both laws, these agencies function as regional suppliers of water distribution assets, but under the new law, they pass on management of these assets to counties or Water Service Providers, rather than retaining them. However, the law is not clear on how counties can influence the decision to undertake certain water works in the first place. The law does force the Cabinet Secretary for Water to appoint board members to the WWDAs "from counties," but these are not county officials and their appointment does not ensure a formal coordination process.

The 2016 law also created a National Water Harvesting and Storage Authority (NWHSA) without consideration that this is a shared function of the two levels of government. Although

the policy suggests that this agency will facilitate coordination with all actors in the sector, including the counties, the legal formation of the body and the functions it has been granted do not promote coordination. For example, the authority has no county representation on its board.

All in all, the 2016 legislation created confusion about the roles of counties and national agencies and fell short of the more fundamental reforms envisioned by the 2010 constitution. This meant that government officials, like CECM Issa, were caught in a bind: facing demands from citizens for improved water access but also confronting a legal morass concerning their mandate.

Counties collectively opted to petition the courts in 2016 to prevent the implementation of the Water Act.[iv] They argued that many of the law's provisions undermined devolution and diverted resources from counties to support superfluous national agencies. This petition, lodged by the Council of Governors in December of 2016, remains undecided as of the writing of this case study, meaning that the courts have not determined the constitutionality of the Water Act.

The national government meanwhile proceeded to develop a water policy that failed to address the gaps in the 2016 Water Act, thereby creating further conflict with counties. The draft policy, which has never been finalized, acknowledges the need for coordination with counties, but fails to specify how to achieve it. The section on water and sanitation services specifically recognizes the importance of intergovernmental coordination in several places, but it speaks only of the need to develop frameworks and create mechanisms for coordination. Sharing of water resources, which are inequitably distributed across the country, demands a regional mechanism above the level of the county but nevertheless involving counties in the process of decision-making. Though acknowledged in the 2018 draft policy, this remains unfinished business for the sector.[v]

The Challenge of Financing Water at County Level

Prior to devolution, the water budget was controlled nationally through the Ministry of Water, the Water Service Boards, and various water sector agencies. The water budget was not large. Table 4 captures actual expenditure in the years immediately prior to devolution (2011/12 and 2012/2013) by the national Ministry of Water and Irrigation. The recurrent budget was miniscule, while capital expenditure was small but not insignificant. The water budget was dominated by a handful of large items. Roughly half the total budget was channeled through Water Service Boards (see Exhibit 4).

Table 4: Water Financing Before Devolution (Ksh billions)

Budget Year	Recurrent	Capital	Total MDA Recurrent	Total MDA Development	Share of Total MDA Budget (%) Recurrent	Share of Total MDA Budget (%) Development
2012/13	4.0	13.9	621.1	193.9	< 1%	7.2%
2011/12	3.8	15.4	684.7	210.7	< 1%	7.3%

Source: Controller of Budget, Budget Implementation Review Reports, Fourth Quarter, 2011/12 and 2012/13, actual expenditure

Note: MDA refers to Ministries, Departments and Agencies, and covers all major government departments but excludes budget items like debt repayment

At the outset of devolution, the National Treasury expected to devolve just under Ksh 5 billion out of the 2012/13 budget to counties for operating water services.[vi] This amounted to less than 30 percent of actual spending in the sector in 2012/13, and reflected questionable assumptions about the degree to which responsibility in the sector should have been devolved to counties. These assumptions were of course in line with those highlighted in the legislation and policy discussed above.

As recently as 2018, the national water budget had not changed dramatically.[vii] By 2018/19, the total national budget for the Ministry of Water and Sanitation had risen to nearly Ksh 53 billion, more than 25 percent larger than immediately prior to devolution. The increase suggests that relatively little water sector funding has been devolved to counties in recent years. The figures also show that donors continue to channel a significant degree of water infrastructure financing through the national government: Ksh 36 billion of the Ksh 49 billion ministry budget in 2018/19 was externally financed through a mix of grants and loans.

Lack of funding has left counties in difficult straits. Under the constitution, counties rely heavily on intergovernmental transfers, which should include funds for the functions they carry out. They can also raise funds from local taxes and service charges, as well as attracting their own donor support. But each of these additional sources is limited, and overreliance on service charges could be regressive, placing the cost of services on those who can least afford it.

In practice, counties have only raised a small share of revenue from their own local sources, including user fees. In 2014/15, local revenues amounted to just 15 percent of what was received from national transfers. By 2017/18, local revenue had actually fallen to just under 10 percent.[viii] This situation is even worse in northern counties like Garissa. Local revenues amounted to only one percent of Garissa's total expenditure in 2014/15, and just over one percent in 2017/18.[ix]

Local revenue has clearly not proven a mechanism for raising substantial new funds to finance expansion of service delivery. This insufficiency may be due in part to lack of capacity or to poor or corrupt administration at county level. However, northern counties also have small, agricultural economies with relatively low growth in per capita income over time. If Kenya's 47

counties had equally large economies, they would each contribute 2.1 percent of total GDP, but Garissa contributes only 0.6 percent of national GDP.[x]

What are the main sources of local revenue for Garissa? As in most counties, local revenue comes from business permits and land rates. In 2018/2019, of the projected own-source revenue of Ksh 250 million (itself optimistic), only 1.6 million was to be generated from water-related service charges, but even this was overly ambitious.[xi] Projected sector revenues were less than half a million the year before.[xii] And in 2016/17, these revenues were either not collected or not reported; they were shown as zero in the county's budget review for that year.

The case of Marsabit is also instructive. The county has basically collected almost nothing in water revenues since inception. Last year, the county appointed a managing director to a newly formed water company. The company's staff are paid by the county, and the company received a grant of Ksh 15 million in FY 2018/19. Up to now, therefore, it represents a *net cost* to the county.

Moreover, the urban kiosks that provide water in Marsabit Town are not run directly by the company. They have traditionally been run by NGOs, such as women's groups or groups of people with disabilities, which retain some of the funds they collect for their own use. These organizations are politically well connected; attempts by the water company to take over the kiosks and their revenue from water have not been successful. This is a common problem facing northern counties: how to absorb existing politically connected non-state water providers, and the revenue they collect, into the county system.

In conclusion, even the very small revenues projected from collection of fees in the water sector are likely not collected in full, and some of these revenues are retained by community groups rather than the government. This means that the sector requires heavy subsidies from constrained budgets with declining local revenues, and little funding from the national level.

What is to be Done in Garissa?

In early 2018, Garissa County began pursuing legislative reform of the water sector. At this point, the county had to make important decisions about how to manage the sector and what to include in its legislative package. Some of the key questions included:

How Should the Urban Water Company GAWASCO be Reformed to Ensure its Ability to Provide Adequate Services?

In Garissa, at the onset of devolution, there was one Water Service Provider, the Garissa Water and Sewerage Company (GAWASCO), formed in 2006. GAWASCO was licensed and contracted by the Northern Water Services Board (one of the national WSBs) to provide water services to Garissa town, but the company was not active in the rural parts of the county. Lack of accountability and mismanagement were rife at the water company. As CECM Issa put it:

> *Everything was wrong in GAWASCO. There were corporate management challenges: the roles of the board and management were not clear. The manner of board appointments was not clear. Coverage was very poor. The company was not able to*

> *finance basic operations; it was unable to pay its electric bill. And the communities that were accessing water were not paying for it.*

In addition, GAWASCO was not responsible to the county, but to the Water Services Board. In 2018, County Executive Committee Member Issa began pressuring GAWASCO to at least change its senior management. Although the county lacked direct control over the board, it was able to exercise some influence because the company was subsidized through the county budget. Nevertheless, the county wanted to further reform the company through the law, ensuring its accountability to county leadership.

How should the law revise the structure and function of the company? CECM Issa believed that proper restructuring of the water company's board and management would result in better services with improved financial management. The principal issue was determining who should sit on the board of the company and how they should be appointed. Counties also faced choices about the kinds of diverse interests to include on the board, and the educational or professional qualifications to require. Should the board include regional representation (for example, ward or sub-county officers in the areas where the company provided services), should it represent water consumers, and how (both urban residents and government or commercial users), and should it represent other professional stakeholders, such as engineers, or others with experience in the water sector who were not part of government? Kenya's water sector reforms since the 1990s have emphasized the importance of independent and autonomous agents acting in the sector, and this emphasis was not undone by the 2010 constitution. Therefore, counties had to balance the desire for control over water companies with the desire for effective autonomy of corporate entities.

County executives also had to decide how to handle demands from their county assemblies for more involvement in appointing or vetting water company board members. Should executives accommodate these demands, which might give water companies more legitimacy, or resist them to maintain greater autonomy for the water company from political considerations? While county executives worried about politicizing water companies, the county assembly members were concerned about ensuring that the chair of the board had the right qualifications and would represent the interests of their constituents. As the Speaker of the Marsabit County Assembly noted,

> *We wanted some kind of control measure so that we have a hand in who the executive is appointing. So not for everyone, but at least the head [of the company] must be someone who is properly vetted, a person of integrity, who does not have cases in court; it should not be about tribal or clan best interests, or just friendship. They must have certain minimum standards.*

As the speaker's comments suggest, control over political appointments in many counties may also have an ethnic or clan dimension, with governors and assembly members wrangling over which clans or sub-clans should be represented in powerful offices.

How Should the Rural Water Sector be Restructured to Ensure Accountability and Increasing Access to Water Services Throughout the County?

Across counties, local departments of water shared responsibility with community groups for providing access to water. As we have seen, national legislation says little about these groups, in spite of their prevalence. But existing community water user associations often lacked the capacity to oversee water services or financing for water investment. As CECM Issa noted,

> *In rural areas, there were a number of boreholes that were managed by community associations, on a volunteer basis. But there were serious maintenance issues with these boreholes. The associations were collecting money but there were no clear policies on how to use these funds, and there was a lot of leakage and mismanagement of resources.*

At the same time, these groups were run by community members, many of who were respected or politically well placed. Adopting a heavy-handed approach to regulating them could alienate communities, creating political hazards for county executives if they appeared to be trampling community leadership.

Many, if not most, community water user associations long predated both the county and the national agencies. While these associations do call on the county to support them with repairs and maintenance, they have managed their own affairs for many years. Such associations may be keen on financial support, but reluctant to accept further oversight from the county. How should these groups be reformed to avoid generating political conflict with communities while still professionalizing rural water services?

One approach, pursued by Nakuru County, involves pressuring water user associations to cede control to the county government whenever they ask for financial support, a process that does not require local legislation. Nakuru's CEC for Water, Festus N'geno, noted that, with a few exceptions, WUAs were not self-sustaining, and so the county was able to step in:

> *We tell them: if you want to manage, no problem. But don't come and tell me that you cannot pay the utility bills. You cannot tell me that you are running a borehole and you cannot repair with the money that you are collecting. If they tell me they have a borehole and it is broken and they cannot repair it, then we say: If you want Ksh 100,000 to fix it, hand over the project to us. The committee has to decide to hand over to the county. They will do the minutes and turn it over. Then we send the water company to go and assess. Then they take it over.*

Beyond relying on the county water department and the WUAs, counties could also choose to create rural water companies as the main players in the rural sector. The central logic of having a company is to create a more market-oriented approach to managing supply and demand and the charging and use of water fees. Service providers in rural areas are less likely to be able to operate in this way without major subsidies than are providers in urban areas, but this does not preclude the creation of a company, which may still improve operational efficiency and enhance revenue collection. A number of counties have opted for creation of rural water companies, but in these cases the county's rural areas may be less dispersed and the water resources more plentiful than in more expansive and arid counties like Garissa.

How Should the County Confront the National Government over Financing and Control of Functions, Given Resistance to Devolution?

As we have seen, national legislation and financing decisions have attempted to maintain a strong role for national agencies in the sector in spite of devolution, effectively squeezing county capacity to drive the water agenda. National agencies have continued to undertake water projects, often without consulting with host counties, and times interfering with and/or duplicating county interventions. Many of the projects promoted by these national bodies are not in the County Integrated Development Plans, which are meant to be the master plan for development in each county. Not all such projects are done without consultation; in Garissa, for example, the county has been able to collaborate with the Northern Water Services Board on a project funded by the African Development Bank. But this is the exception rather than the rule.

While counties can try to negotiate with national agencies individually, taking on national entities that encroach on county functions might best be accomplished through collective action with other counties, such as engagement between the Council of Governors and the national government or, where dialogue fails, through joint legal action.

County leaders have clearly recognized the importance of dialogue; after filing a court case against the 2016 Water Act, they continued to pursue direct engagement as well. In March of 2018, water sector stakeholders from the two levels of government met to approve an intergovernmental framework for the sector.[xiii] Festus N'geno, the Nakuru CECM for Water and the Chair of the Caucus of County CECMs for Water, described the progress on the Water Sector Intergovernmental Consultation and Cooperation Framework a year later:

> *There is a water agreement that we were all supposed to sign that shows the roles and responsibilities. We signed it in March 2018. It was signed by both parties but they have not implemented it. For example, [national agencies] now need to consult the counties before implementing new projects, but that has not changed.*

The failure to implement this agreement has left many counties considering the pursuit of independent action and legislation that directly contradicts national policy and law and reclaims powers for individual counties. This would mean passing local legislation that includes language arrogating to Garissa the power to license and charge for permits for water abstraction, and to register and manage water service providers, even though the 2016 law gives these powers to national agencies.

Such measures could invite direct conflict with the national government, however. Early in 2019, the national Water Resources Agency ran advertisements in major news media stating that the counties could not authorize or charge for permits to construct boreholes. The ads suggested that attempts to include language in county laws authorizing county governments to conduct such functions would be challenged. And indeed, 2018 county water legislation of exactly this type in another county—Murang'a—was challenged by the national Water Services Regulatory Board in February 2019 when the county attempted to take control of the water companies operating within its borders.[xiv]

How should Garissa CECM Issa ensure financing for the water sector? We have seen that although the national government has failed to devolve financing to counties for water, most counties generate relatively little from their own revenue sources, including water charges. There are several alternatives. One would be to focus on donor financing, trying to lure directly to Garissa some of the funding that goes to national agencies. For the last couple of decades, water sector donors to Kenya have insisted on some form of ring fencing as a condition of financial support. Thus, Garissa might set up a special water fund to manage external funds transparently and separately from other budget support in order to attract donors. Alternatively, the county could accept the continued role of existing national agencies as intermediaries, while trying to influence the nature and location of their projects.

On the other hand, Garissa could focus on increasing the efficiency of the county's own institutions, including the water company and WUAs, to raise more funds and improve management. One way to do so would be greater investment in water technology, such as prepaid water meters (or water ATMs) that help to reduce wastage and ensure payment. Marsabit has invested in a small number of prepaid meters in Marsabit Town, and the county government claims that, although total collections remain small, the investment has led to substantial increases in revenue collection.

How much of Garissa's budget should be used for subsidizing the water company versus investing in direct service provision? With limited financing, this question turns not only on how much should be invested in urban versus rural provision, but also on how much market discipline to apply to the water company and to what extent subsidies should continue. Similarly, given limited funds, should the capital budget focus on traditional water infrastructure or on innovative technologies?

How Should Public Views be Incorporated into the County Water Legislation and, in Ongoing Fashion, into Sector Operations?

Public participation in policymaking is a requirement of the 2010 constitution, though its precise meaning is not clarified in the document. County governments are nevertheless obligated to demonstrate that they have incorporated public views in policy processes. Moreover, effectively incorporating public views, and especially user or beneficiary views, into the policy process can reduce later conflict with communities. There are many potential sources of conflict in the sector, including insufficient water supply exacerbated by climate change, competition between livestock and household users, and demands for quality and access in a context of limited financial resources. These conflicts may be worsened by ethnic and clan/sub-clan tensions. Community water user associations are supposed to help manage water conflicts, but whether they do so effectively is an open question. How should the public be invited to engage with government agencies, including the local water department and water company, in order to enhance service delivery and defuse conflict?

Public participation also highlights complex policy challenges in resource-poor contexts. For example, the public may reject reforms it sees as overly punitive, even though such rejection reduces the ability of the government to change behavior. For example, there is controversy over

the degree to which county laws should punish polluters or those who waste water. Clearly, policymakers need to change public behavior gradually, without criminalizing whole populations and inviting backlash. In Marsabit, during public participation conducted by the County Assembly, a frequent concern about proposed legislation was that the county should not use heavy fines to sanction residents who failed to harvest water at their homes, especially if the county did not also provide them with water tanks.[xv] The push for domestic water harvesting is, of course, vital since Marsabit Town relies heavily on a limited water supply from nearby springs, but the cost of harvesting could be punitive for individual poor households.

Similarly, while the introduction of prepaid water meter technology may help to enhance revenue and reduce wastage, some community members have raised concerns that it also excludes the poorest from water access. Prior to its introduction, water user associations would exercise discretion in waiving fees for the poorest, but such measures are problematic under a metered system. The concerns raised by citizens are genuine and suggest that governments must find structured ways to engage communities in addressing them.

Moving Forward

CECM Issa and the leadership of Garissa county must act quickly to ensure that they do not disappoint constituencies expecting real change in their lives, given the many interests of different stakeholders (see Exhibit 5). Legislative and executive action is needed to:

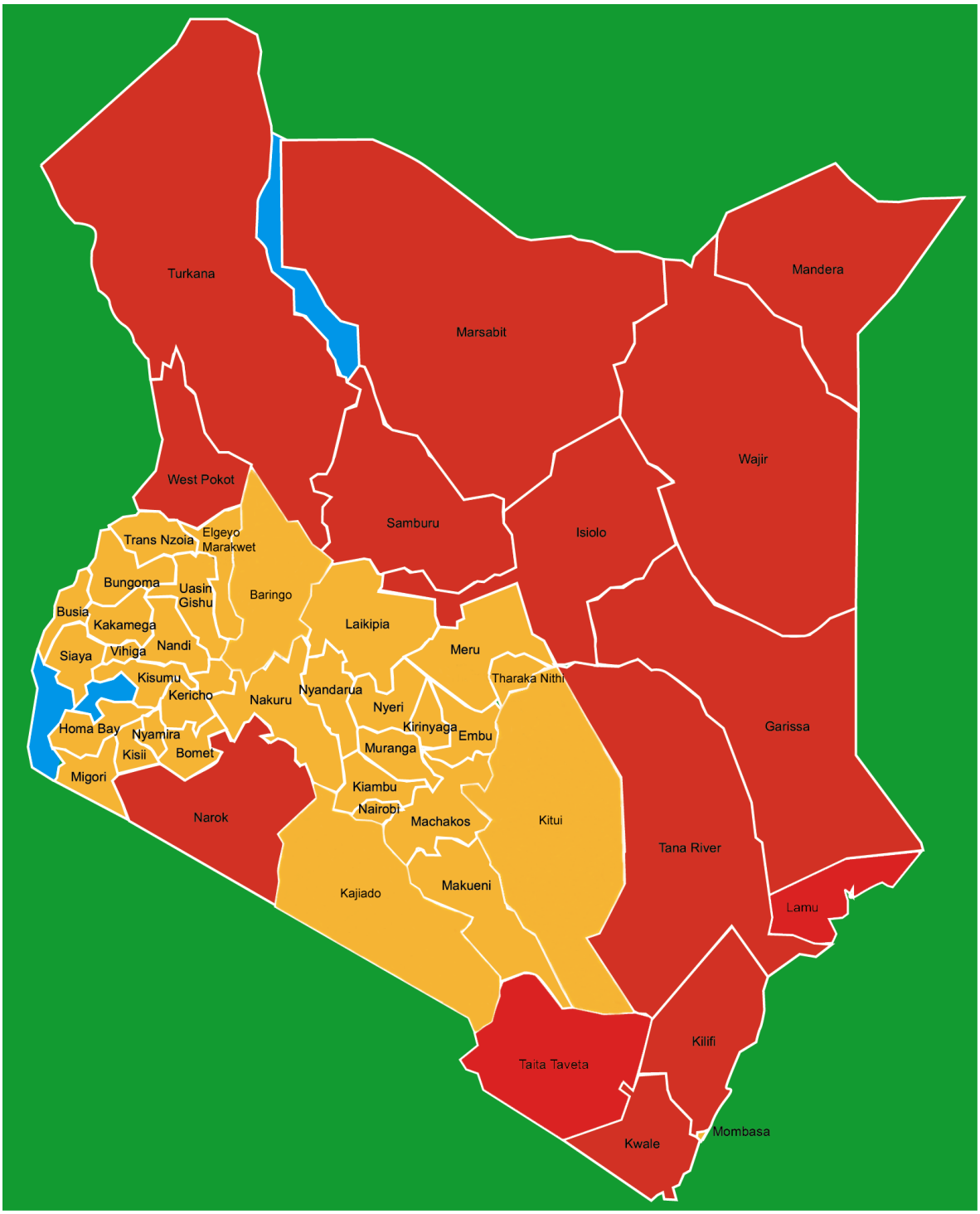
- **Reform the existing urban water company (GAWASCO) and expand rural water access.** This might involve county legislation, new regulations, financial tools, or other mechanisms designed to professionalize and hold to account water providers.
- **Engage with the national government either collectively with other counties, or as Garissa alone, to seek improved financial prospects and a larger margin of autonomy to undertake water sector reforms.** This could involve collective action with other counties, legislation aimed at recapturing county control, persuasion of national agencies to direct project financing to the county, or a focus on reforming local revenue and water use policies.
- **Build constructive relationships with the public around local water policies that are seen to advance access and manage conflict without punishing the poor.** This could involve formal or informal mechanisms of engaging the public and attempts to punish or persuade community members to ensure behavior change.

What decisions should Garissa county take?

Appendices

Exhibit 1: Access to water in northern counties in 2009 and 2014

Figure 1.1: Kenya's 47 counties (with original 14 "marginalized counties" in red, as classified by 2013 marginalization policy)



Source: Commission on Revenue Allocation, www.cra.go.ke

In 2009, about 53 percent of the country had access to improved water sources. This was inequitably distributed, however: only 44 percent of the rural population had access, while the figure was 71 percent in urban areas. Access to water and improved sanitation was below the national average in northern counties.

Annex Table 1.1: Access to improved water and sanitation in Kenya's northern counties

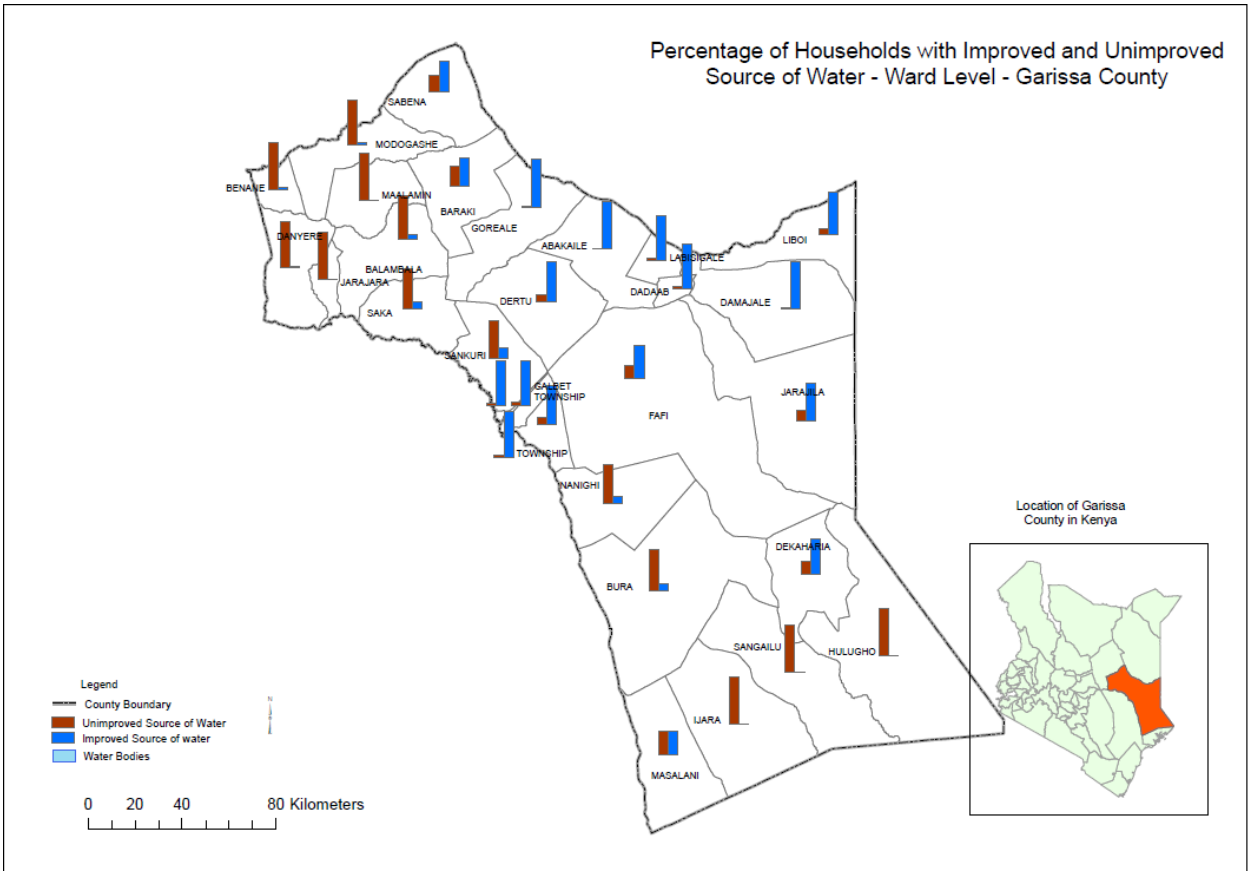
County	**% Access to improved water (2009)**	**% Access to improved water (2014)**
Turkana	39%	37%
Wajir	46%	48%
Mandera	38%	47%
Marsabit	38%	54%
Garissa	51%	61%
Isiolo	59%	82%
National Average	**53%**	**71%**

Source: 2009 Census, KNBS; 2014 DHS; access to improved water in the 2014 DHS is the combination of: piped into dwelling; piped to yard/plot; public tap/standpipe; piped to neighbor; tube well or borehole; protected well; protected spring; rainwater; bottled water

The 2014 Demographic and Health Survey showed that access to water had improved around the country by the time counties came into being. National access to improved water was up to 7 in 10 households, but large gaps remained between urban and rural areas, with urban areas reaching nearly 90 percent coverage, while rural areas remained just below 60 percent.

In the north, Isiolo continued to show above average access in 2014, but the remaining northern countries all had rates of coverage below average, ranging from 37 to 61 percent.[xvi]

Figure 1.2: Access to improved water in Garissa County by ward, 2009 Census



Source: Kenya National Bureau of Statistics and Society for International Development. 2013. "Exploring Kenya's Inequality: pulling apart or pooling together." Garissa County report.

Exhibit 2:

Table 2.1: Garissa County Integrated Development Plan (CIDP) Water Sub-Sector Objectives

Sub-sector	Issues/ Problems	Causes	Development Objectives
Water	*Inadequate access to safe drinking water *Long distances to water points	*Persistent drought; *Poor water management interventions *Pressure on water points from large livestock herds. *Poor water harvesting techniques *High investment cost (pumps and canals); Long distance to water points	*To increase the proportion of population with access to safe drinking from 27,725 households to 90,000 households by 2017 *To reduce the average distance to water points from 25Km to 10 Km by 2017

Source: Garissa CIDP, 2013-2018

Exhibit 3: 2002 v. 2016 Water Act

At the time that the 2002 Water Act was approved, it was seen as a step toward decentralizing the water sector and encouraging greater public participation in water resource management.[xvii] The 2002 legislation also created a number of quasi-independent agencies, which remain active in Kenya today. Water Service Boards would manage and invest in water infrastructure assets, while Water Service Providers (WSPs) would run operation of these assets on a day to day basis through service contracts.

The Water Services Regulatory Board would license and regulate these WSPs, which were mainly autonomous public companies, replacing the local government Water and Sewerage Departments as service providers. This was meant to introduce more independent and professional management of water services. At a policy and strategy level, the 2002 Water Act created the Water Resources Management Authority (WARMA) to develop a national water strategy and issue permits for water usage. The 2002 law remained largely silent on the role of community water associations, which had always played a large role in the provision of water. The table below compares the 2002 and 2016 legislation.

Table 3.1: Comparing the 2002 and 2016 Water Acts

2002 Water Act	2016 Water Act	Key Differences	Questions
Water Services Regulatory Board to license and regulate Water Service Providers	**Water Services Regulatory Board to license and regulate Water Service Providers**	**None**	**Counties are in charge of water services, so should national government set and monitor standards for licensing while leaving actual licensing and regulation to counties?**
Water Service Boards are created as state agencies to receive licenses to provide water in specific areas, and may contract with Water Service Providers to perform their functions	**Water Works Development Agencies are created as state agencies to develop and maintain waterworks and provide water services until operations are turned over to counties or Water Service Providers**	**2016 Act introduces concept of passing water assets to counties or WSPs, and also brings appointees from counties onto the board**	**How do WWDAs coordinate with counties on development of assets? Act requires appointees from counties (undefined, but maybe residents?) but not official coordination**
Water Service Providers created in law as a company, NGO or any person providing water with a license from WASREB	**Water Service Providers created in law as a company, NGO or any person providing water with a license from WASREB**	**None**	**Should there be coordination between national and counties on licensing requirements?**
Water Resources Management Authority (WARMA) is	**Water Resources Authority (WRA) is responsible for overall**	**None**	**Should permits for water**

responsible for sector planning, protection of catchment areas and water quality, issuance of permits for water use and setting charges for water use. Abstraction of groundwater through wells requires a permit from WARMA.	**sector management, issuance of permits for water abstraction and water use and setting and collecting of fees for water use. Abstraction of groundwater through boreholes requires a permit from the WRA.**		**abstraction within counties (for boreholes, etc.) be handled by counties?**
State scheme is defined as a project designed to provide water for public use that takes precedence over other uses	**National Public Water Works is defined as a cross-county asset for storage or distribution of water controlled by national government that takes precedence over other uses**	**The 2016 Act leaves space for within-county assets, but retains national control of cross-county assets**	
Minister to prepare Water Services Strategy to ensure water and sanitation services to all parts of country	**Cabinet Secretary to prepare Water Services Strategy every five years to ensure access to water for all Kenyans, and a financing and investment plan for the sector aggregated from county plans**	**The 2016 Act creates a link between national and county plans, implying that national investment will be based on county plans**	
National Water Conservation and Pipeline Corporation to undertake development works and management of assets for provision of bulk water	**NWCPC replaced by National Water Harvesting and Storage Authority created as national state corporation to develop, maintain and manage national waterworks for storage and flood control**	**The 2016 Act renames state agency to manage water storage, which is a shared function, with no county participation and without clear distinction from the Water Works Development Agencies**	**May help ensure sufficient water, but does it also infringe on county functions?**

Exhibit 4: Financing Water

Table 4.1 shows the concentrated nature of the water budget prior to devolution, with roughly 4/5 of the budget captured by just five items, and the overall budget dominated by the Water Service Boards.

Table 4.1: Ministry of Water and Irrigation Budget, 2012/13[xviii]

Agency	Recurrent	Capital	Share of Recurrent	Share of Capital
Water Service Boards	1.6 billion	Ksh 19 billion	26%	53%
Water Conservation/Dam Construction	0	Ksh 4.6 billion	0%	13%
National Irrigation Board	0.6 billion	Ksh 2.7 billion	10%	8%
Headquarters (Professional & Technical Services)	0.8 billion	Ksh 2.7 billion	13%	7%
District Water Services	1.7 billion	0	28%	0%
Sub-Total for Major Items	**4.7 billion**	**29 billion**	**77%**	**81%**
Total for Ministry of Water	**Ksh 6.1 billion**	**Ksh 35.8 billion**		

Source: Ministry of Finance, Budget Estimates

The tables below show Garissa and Marsabit budgets and expenditures on water between 2014/15 and 2017/18. Garissa figures are for the Department of Water (2014/15-2016/17) and Water and Irrigation (2017/18); in Marsabit, they are for the Department of Water, Environment & Natural Resources.

Table 4.2: Garissa Budget and Expenditure on Water

Budget Year	Water Budget	Water Expenditure	Total Budget	Total Expenditure	Share of Water in Total Budget	Share of Water in Total Expenditure	Water Expenditure/ Water Budget	Total Expenditure/ Total Budget
2014/15	1,129	757	7,501	6,596	15%	11%	67%	88%
2015/16	897	864	7,361	6,546	12%	13%	96%	89%
2016/17	916	740	7,401	7,124	12%	10%	81%	96%
2017/18	623	297	7,849	6,507	8%	5%	48%	83%

Table 4.3: Marsabit Budget and Expenditure on Water

Budget Year	Water Budget	Water Expenditure	Total Budget	Total Expenditure	Share of Water in Total Budget	Share of Water in Total Expenditure	Water Expenditure/ Water Budget	Total Expenditure/ Total Budget
2014/15	383	442	5,628	4,388	7%	10%	115%	78%
2015/16	753	728	5,834	5,279	13%	14%	97%	90%
2016/17	888	631	6,610	6,141	13%	10%	71%	93%
2017/18	708	558	7,630	6,568	9%	8%	79%	86%

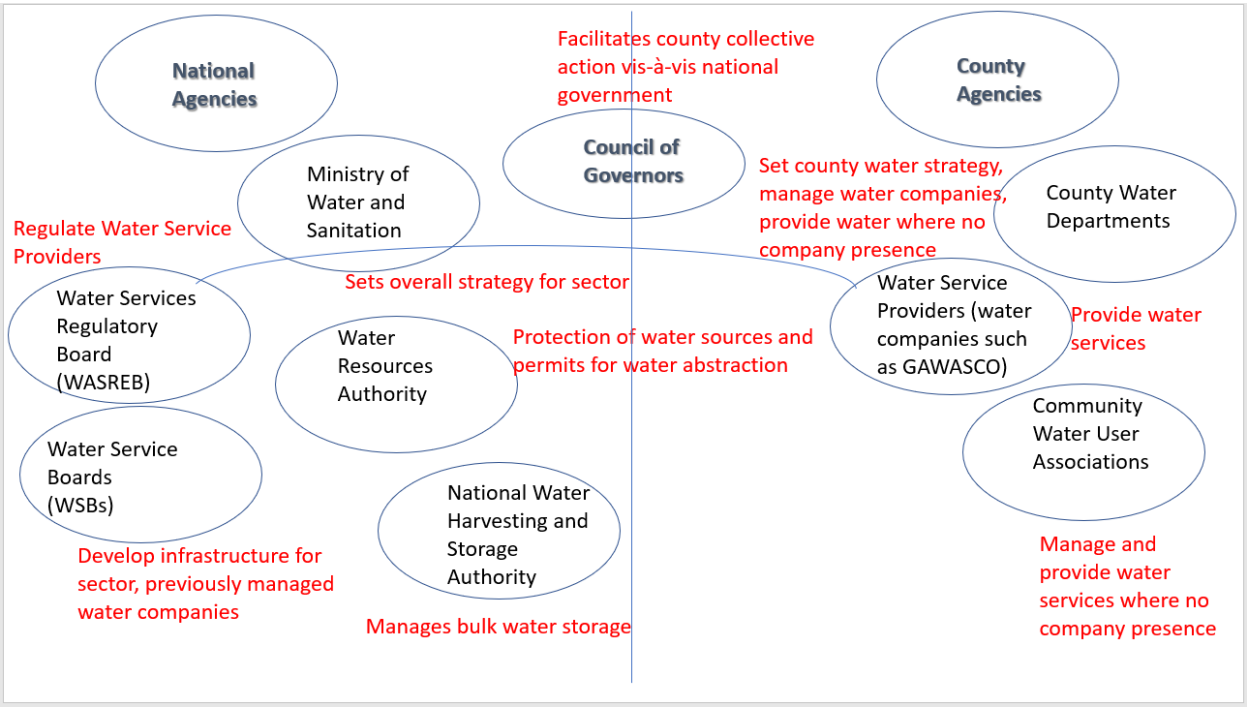
Notes: This data is based on figures from the Controller of Budget's Budget Implementation Review Reports. Budget figures in 2015/16 to 2017/18 are based on the original budget presented in the first quarter Controller reports, while the expenditure figures are based on the fourth quarter (annual) figures. (We do not use fourth quarter budgeted figures because they reflect supplementary budgets; first quarter budgets are presumed to be original budgets, though they may have already been amended). In 2014/15, departmental data was not available for the counties in the first quarter, so we use the second quarter COB report's budgeted figures.

Exhibit 5: Stakeholders and Interests

Table 5.1: Which stakeholder interests must CECM Issa consider?

Stakeholder	**Interests and incentives of stakeholder**
GAWASCO (urban water company)	Continued autonomy from county government and opportunities to manage resources without effective local oversight
Community water user associations	Autonomy from county but financial support as needed, responsive to community members before county government
County assembly	Greater control over executive, and over the water companies and improved access to water for their constituents
National government agencies (Water Service Boards, etc.)	Continued control over the sector with minimal transfer of authority and financing to counties
External donors	Continued support to water sector but interest in continued relationships with national agencies and ring-fencing of their loans and grants
County residents	Increased access to water, respect for local community institutions, deference to needs of poorer members of community and potential resistance to paying full cost of water

Figure 5.1: National and County Agencies in Kenya's Water Sector



Note: The sector is in flux and so these relationships and names are changing. The Water Service Boards are supposed to transition to Water Works Development Agencies, though they are still commonly referred to as WSBs.

Endnotes

[i] County Government of Garissa, "In Garissa, we are not leaving anyone behind in our water development plans," Daily Nation, advertisement, March 22, 2019. These figures are lower than what the 2009 census data show for the Garissa Township ward, but that data may not reflect population change in the intervening decade.
[ii] Marsabit County Integrated Development Plan, 2013.
[iii] Concern Worldwide 2013.
[iv]https://www.nation.co.ke/news/Governors-challenge-implementation-of-Water-Act/1056-3486738-vv0i98z/index.html
[v]For a more detailed comparison of the 2002 and 2016 laws, see Elizabeth Gachenga, "Kenya's Water Act (2016): real devolution or simply the 'same script, different cast,'" Chapter 20, in Kameri-Mbote, Patricia; Paterson, Alexander; Ruppel, Oliver C.; Orubebe, Bibobra Bello and Kam Yogo, Emmanuel D. "Law | Environment | Africa," 2019. Available at https://www.nomos-elibrary.de/10.5771/9783845294605/law-environment-africa.
[vi]https://www.internationalbudget.org/publications/brief19/
[vii] There have been changes in how the budget is structured and classified, with more detail on budgets for large infrastructure projects, albeit without clarity about who is responsible for implementing them.
[viii]These figures for national transfers include donor funds.
[ix] Data based on Controller of Budget reports.
[x] From KNBS, *Gross County Product 2019*. Figures are average for 2013-2017.
[xi] Garissa County, Revenue Analysis 2018/19, BREAKDOWN OF REVENUE BY SOURCE OF FUND Vote 3359000000 Garissa County - County Revenue Fund
[xii] Garissa Program Based Budget 2017/18
[xiii]http://cog.go.ke/component/k2/item/55-water-sector-players-hold-first-ever-water-summit
[xiv]https://www.nation.co.ke/counties/muranga/Wasreb-nullifies-Muranga-water-board/1183310-4998790-j8l58r/index.html
[xv]County Assembly of Marsabit, "Public participation report on the Marsabit County Water Services Bill 2018: 14th September to 21st September 2018."
[xvi]Author calculations based on Kenya Demographic and Health Survey, 2014.
[xvii]For background on the 2002 reform, see: K'akumu, O. A. (2006) 'Privatization model for water enterprise in Kenya', *Water Policy*. doi: 10.2166/wp.2006.047; K'Akumu, O. A. (2008) 'Mainstreaming the participatory approach in water resource governance: The 2002 water law in Kenya', *Development*, 51(1), pp. 56–62. doi: 10.1057/palgrave.development.1100457.
[xviii]We do not have data for these years on actual expenditure at sub-Ministry level, but we can get a sense of the share of the budget going to different areas by looking at budgeted figures. In 2012/13, just four items accounted for more than 80 percent of the capital budget.