



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC PETITION NO. 4 OF 2021**

**IN THE MATER OF ALLEGED CONTRAVENTION OF CONSTITUTIONAL RIGHTS, NEGLIGENT/CARELESS BREACH OF STATUTORY DUTY OF CARE & RESPONSIBILITY AND DEPRIVATION OF PROPERTY RIGHTS CONTRARY TO THE PRINCIPLES OF LAND POLICY AND OBLIGATIONS IN RESPECT OF THE ENVIRONMENT (CHAPTER 5 OF THE CONSTITUTION OF KENYA, ARTICLE 60,66,67 &69)**

**BETWEEN**

**CRYSTAL CHARLOTTE BEACH RESORT.....PETITIONER**

**AND**

**THE REGISTRAR OF LANDS, BONDO.....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION .....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**MINISTRY OF ENVIRONMENT & FORESTRY.....4<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF SIAYA..... 5<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The Petitioner herein *vide* his Petition dated 28<sup>th</sup> January 2021 and filed in court on 4<sup>th</sup> February 2021 is seeking **a declaration** that the Respondents jointly and severally, owed the Petitioner a Statutory Duty of Care in the conduct of his affairs and in all dealings with and pertaining to the Petitioner or his property, in all matters officially before them for administrative action. **Moreover, a declaration** that the properties known as SIAYA /GOT AGULU 1282, SIAYA GOT AGUL/74 &SIAYA/ GOT AGULU/1542 are by their nature riparian lands and therefore public land, and should not have been allocated to either the Petitioner or any private citizen. **Furthermore, a declaration** be and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents negligently and carelessly breached their statutory duty of care to the public and the Petitioner in particular, by permitting the demarcation and registration of SIAYA /GOT AGULU 1282, SIAYA GOT AGUL/74 &SIAYA/ GOT AGULU/1542 in the name of the Petitioner and his predecessors in title.

She also sought a declaration that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents negligently and carelessly breached their statutory duty of care to the public and to the Petitioner in particular by permitting and licensing the Petitioner to carry out commercial development on SIAYA /GOT AGULU 1282 knowing or having reason to know or being reasonably expected by dint of their offices, that the said properties were riparian lands and the development would come to waste.

She further sought a declaration that the 5<sup>th</sup> Respondent negligently and carelessly breached its statutory duty of care to the public and the Petitioner in particular, by approving the architectural drawings and construction on SIAYA/GOT AGULU/1282 in the name of the Petitioner and his predecessors in title and a declaration that the Respondents have by their conduct breached Articles 40,62,67 and 69 of the Constitution of Kenya.

Lastly, a declaration that the loss and damage suffered by the Petitioner following the rise in water levels and the flooding on SIAYA /GOT AGULU 1282, SIAYA GOT AGUL/74 &SIAYA/ GOT AGULU/1542, based on reliance of the title documents, approvals and licensing by the Respondents is attributable to the Respondents, jointly and severally and they must make good his loss.

The petitioner prays for an award of Kshs. 100,000,000.00 being the reasonable cost of the destroyed resort on SIAYA/ GOT AGULU/1282.and Kshs.3,000,000.00 being the value of SIAYA GOT AGUL/74 &SIAYA/ GOT AGULU/1542 and Kshs.300,000,000.00 being the reasonable legitimate expectation of returns on investment.

The petitioner seeks General Damages and an award of costs.

#### **Petitioner's Case**

It is the Petitioner's case that sometimes in 2015, he decided to invest in the hospitality industry and specifically in Lake Victoria region and he therefore scouted for appropriate and suitable beach properties on the shores of the lake. He identified land parcel number SIAYA/GOT AGULU /1282 situate in the Eastern shores of Lake Victoria, within Siaya County.

That before purchasing the land, the Petitioner had architectural drawings prepared for purposes of approval by the County Government of Siaya and other mandatory departments of the government. The drawings were presented to the authorities and were approved by the respective departments. The Petitioner carried out due diligence and confirmed that the suit property was not public land as it was registered in the name of John Amoto Mirapi. Due process was followed and the property was registered in the name of the Petitioner.

The Petitioner sought approval of the development from NEMA who directed him to prepare and present to them an Environmental Impact Assessment Project Report which was presented to NEMA on 27<sup>th</sup> October 2016.The Petitioner was issued with an official receipt of the report and a license which approved construction of the proposed beach resort on parcel number SIAYA/GOT AGULU/1282.The Petitioner has stated that construction of the resort costed him Kshs. 100,000,000/=

The Petitioner has stated that in 2019, ICDC considered investing in it and requested him for a Scientific Business Plan detailing the status of the business and its aspirations which report was prepared. It is the Petitioner's case that at the time of preparing the Business Plan, the resort was earning approximately Kshs. 900,000/= per month and with the expected impetus from ICDC, the earnings were projected at Kshs. 6,000,000/= per month. That in December 2019, the water levels rose high levels that the resort was completely swallowed by the lake and destroyed the property completely.

The Petitioner avers that the resort was forced to close down and reopened in August 2020 after the construction of a walk away over the lake and that the parking grounds, gardens, terraces, all buildings on the ground floor, including the kitchens, restaurants, discotheque were all swept away. He further stated that what remains of the resort are miserly structures that were on higher stilts which cannot stand the waves from the lake.

He stated that neither the County Government nor the National Government provided any relief or assistance. He alleges that the expected rise in the water levels of the lake were facts within the knowledge of the Government of Kenya as confirmed by the Permanent Secretary in the Ministry of Environment & Forestry.

It is also the Petitioner's case that he lost two adjacent parcels that is SIAYA GOT AGUL/74 &SIAYA/ GOT AGULU/1542 adjoining the resort, which the Petitioner had purchased at Kshs. 3 Million for future expansion.

#### **4<sup>th</sup> Respondent's Case**

The 4<sup>th</sup> Respondent filed a Replying Affidavit in response to the Notice of Motion, the Petition and the Supporting Affidavit where Erick Akotsi deposed and stated that the Directorate of Urban Rivers Restoration Program is mandated to coordinate a holistic and integrated approach to cross-cutting issues of restoration of riparian. That the rising water of Lake Victoria, Turkwel Dam and the Rift Valley Lakes can only be attributed to an act of God.

He stated that the Ministry of Environment in its efforts to respond to the rising water levels of Lake Victoria, Turkwel Dam and the Rift Valley Lakes appointed a multi-agency team and the main task was to undertake a scoping mission on the lakes and assess the socio-economic impacts and causes of the rising water levels from 21<sup>st</sup> October to 21<sup>st</sup> November 2020.That the multi-agency reports yet to be launched and made public.

He further stated that the Petitioner has not demonstrated how his fundamental rights and freedoms under the Constitution have been violated by the Respondent and that the prayers sought in the Petition are not in public interest. The Petition is frivolous, vexatious and an abuse of the court process and should be dismissed with costs to the Respondents.

#### **5<sup>th</sup> Respondent's Case**

The 5<sup>th</sup> Respondent filed a Replying Affidavit on 26<sup>th</sup> May 2021 in opposition to the Notice of Motion Application and the Petition where Bens Roddy Umayah who is the Physical Planner for the County Government of Siaya deposed and stated as follows:

That this suit is bad in law, frivolous, scandalous, vexatious, fatally defective, ill conceived, otherwise an abuse of the court process and ought to be struck out and dismissed with costs to the 5<sup>th</sup> Respondent. That the 5<sup>th</sup> Respondent is mandated to perform certain functions relating to physical planning and regulating development control and these functions include, but are not limited to County planning and development as stipulated under Part 2 Section 8 of the Fourth Schedule of the Constitution.

The 5<sup>th</sup> Respondent is guided by the provisions of the Constitution of Kenya 2010, the County Government Act no. 17 of 2012, the Physical and Land Use Planning Act no. 13 of 2019, the Urban Areas and Cities Act No. 13 of 2011. That the 5<sup>th</sup> Respondent received and processed

an Application for development approval in respect of the suit property from the Petitioner and issued a conditional approval. The approval was subject to the Petitioner obtaining a positive Environment Impact Assessment report from the 3<sup>rd</sup> Respondent and other approvals for the development of the suit property and further implement in strict adherence to the approved building plans.

That structural drawings submitted by the Petitioner in respect of the suit property contained suspended buildings only and there was no provision for permanent buildings built at ground level. That the conditional approval issued by the 5<sup>th</sup> Respondent was with respect to the suspended buildings and all suspended buildings in the suit property were not affected by the floods.

He further stated that the architectural drawings submitted by the Petitioner in respect of the suit property did not contain any development area he alleges were affected by the floods and in the alternative, any development undertaken outside the approved plan was done without obtaining the relevant building approvals or relevant consent from NEMA. It is the 5<sup>th</sup> Respondent's case that from the pictorial evidence submitted by the Petitioner and site visit by the 5<sup>th</sup> Respondent revealed that the structures are still standing after the floods are those that were built as suspended structures in accordance with the structural drawings. The structures that were submerged are those that were built at ground level which were never authorized because they were not in the structural drawings therefore built without development permission.

The developments affected by the floods in the suit property were done without obtaining requisite approvals and the developments did not comply with the suspended nature of the approved building plan. All the development undertaken outside the approved structural drawings are irregular and illegal. That it would be unfair for the Petitioner to lay blame on the 5<sup>th</sup> Respondent for the rising waters of Lake Victoria which were unforeseeable and it is not in the purview of the 5<sup>th</sup> Respondent to determine when Acts of God or naturally occurring phenomenon may occur.

It is the 5<sup>th</sup> Respondent's case that the floods and the rising waters of the Lake Victoria were beyond the control of the 5<sup>th</sup> Respondent. That the entire Petition and Application has failed to establish a link between the alleged actions of the Respondent and the alleged loss suffered in respect of the suit property.

### **The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents Case**

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents failed to file their Replying Affidavit as per the court's direction.

### **Petitioner's Submissions**

The Petitioner filed his Submissions on 13<sup>th</sup> July 2021. He defined what constitutes an act of God as defined by The Legal Dictionary to mean an event that directly and exclusively results from the occurrence of natural causes that could not have been prevented by the exercise of foresight or caution; an inevitable accident.

**Black's Law Dictionary** defines act of God as:

***“An overwhelming, unpreventable event caused exclusively by forces of nature, such as earthquake, flood or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight.”***

The Petitioner relied in the case of **Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited (2018) eKLR**.

In Jill M. Fraley in his article, “Re-examining Acts of God”, (2010) Pace Environment al Law Review, Vol 27, in replying on the definition by Congress in several statutes in the United States of America Propounds that:

***“[A]n act of God is “an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” This definition includes multiple elements: (1) “natural” causation; (2) a lack of foreseeability; (3) that “nature” must be the exclusive or sole cause; and (4) the effects must not have been preventable by reasonable due care or foresight of the defendant. While the concept of acts of God cannot be reduced to simply the idea of “forces of nature,” acts of God are understood to be a subset of these, thereby immediately raising the question of which acts are natural and which are human.”***

The Petitioner relied in the case of **Railroad Company v Reeves**, 77 U.S. (10 Wall.) 176 where the court laid down the guidelines on acts of God where it stated as follows:

***“If you shall be satisfied from the proof that the tobacco was injured while the cars upon which it was being shipped were standing at the depot in Chattanooga by a freshet which submerged the cars containing the tobacco, and that no human care, skill, and prudence could have avoided the injury, then such injury would be occasioned by the ‘act of God,’ and the defendant would not be liable. But, if you believe that the cars containing the tobacco were brought within the influence of the freshet by the act of the defendant, or its agents, and that if the defendant or agents had not so acted the tobacco would not have been damaged, then the injury would not be occasioned by the ‘act of God,’ and the defendant would be liable for the damage sustained.”***

It is the Petitioner's submission that the government was aware of flooding of the lakes in the region as there was cyclical that would occur every 50 years, that there was poor governance on the part of the state which permitted persons to settle on what would have been riparian land and that the government was under an obligation to resettle and compensate those affected by flooding cases.

On the issue of statutory duty of care, the Petitioner submitted that if the government was aware that flooding would occur cyclically, it owed a duty of care to the public by ensuring that such information is available to the Petitioner. He relied in the case of **X (Minors) and Others v Bedfordshire L.A., (1953) 3 ALL E.R.353**, where it was observed as follows:

***“A simple claim of a breach of the statute could not be maintained on its own. As statutes rarely specifically confer a common law right of action on individuals, a common law right of action, however, could be inferred in the interpretation of the statute if the statute was intended to protect a particular class of person. A second claim of the negligent or careless performance of a statutory duty or power could be maintained provided the plaintiff could establish the first claim of breach of statutory duty.”***

On the issue of quantum on damages, the Petitioner submitted that none of the Respondents disputed the figures and valuations averred by him and therefore he should be compensated.

He further submitted that he should be given the orders sought in the Petition as the Respondents ought to have known that by licensing and approving the Practitioner’s project on riparian land was contrary to the statutory duty of care, they owed to him and the public.

#### **Respondents Submissions.**

The Respondents herein failed to file and serve their submissions as per the directions of the court.

#### **ANALYSIS AND DETERMINATION**

It is not in dispute that the Petitioner purchased three parcels of land namely SIAYA /GOT AGULU 1282, SIAYA GOT AGUL/74 &SIAYA/ GOT AGULU/1542 and he invested in land parcel number SIAYA/GOT AGULU 1282. Before embarking on construction of the resort, the Petitioner sought for approval from the County Government and NEMA. The 5<sup>th</sup> Respondent herein through its Replying Affidavit has stated that it approved the development plan but it was a conditional approval. It is the 5<sup>th</sup> Respondent’s case that the structural drawings submitted by the Petitioner were suspended buildings only and there was no provision for permanent buildings built at ground level as per the copy of the structural drawings. This court has looked into the approvals and confirms that the Petitioner was required to build suspended buildings and not permanent buildings.

It is the 5<sup>th</sup> Respondent’s case that the events of the floods and the rising water levels are an act of God as the circumstances were unforeseeable. An Act of God was defined in **Chitty on Contracts Volume 11** as:

***“an operation of natural forces (as opposed to an act of man) which it was not reasonably possible to foresee and guard against like lightning, extraordinary weather conditions, some extraordinary natural event or a totally unexpected heart attack.”***

In **RYDE V BUSHELL & ANOTHER (1967) EA 817** the East African Court of Appeal held as follows: -

***“(i) The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;***

***(ii) Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence.”***

The Petitioner has stated that the Respondents being the government breached their statutory duty of care as the government was aware that the properties bought by the Petitioner were located within riparian areas and it should not have registered the properties in the name of the private proprietors. That it is the duty of the government to protect riparian lands by ensuring that such lands are not infringed upon or used for any other purpose other than conservation of the environment. It is the Petitioner’s case that the County Government of Siaya ought not to have approved the architectural drawings and that NEMA should have determined whether the proposed project was on riparian land.

It is this court’s view that the Petitioner before developing on the suit property he had intention of building a beach resort as he had decided to invest in the hospitality industry and specifically in the Lake Victoria region. After approvals from the relevant government bodies, he confirmed that the property was not on riparian land. The Petitioner was required to build suspended buildings and not permanent buildings. From the annexures, this court has established that the Petitioner had constructed both suspended buildings and permanent buildings. The 5<sup>th</sup> Respondent has stated in its Replying Affidavit that the suspended buildings that the Petitioner was required to build were not affected by the floods and that the developments undertaken outside the approved plan was done without obtaining building approvals or relevant consent from NEMA.

The 5<sup>th</sup> Respondent has also confirmed in the Replying Affidavit that the structures that are still standing after the floods are those that were built as suspended structures in accordance with the structural drawings and that the structures that submerged are those that were built on ground level which were never authorized. The Petitioner by building structures not approved by the 5<sup>th</sup> Respondent and the 4<sup>th</sup> Respondent acted contrary to the law. The essentials of a cause of action in event of a statutory breach, is highlighted in Halsbury’s Laws of England 3<sup>rd</sup> Ed. Vol. 36 para. 689 in the following words:

***“In order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation, which on the proper construction of the statute was intended to be a ground of civil liability to a class of person of***

**whom he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection and must establish that the breach of statutory obligation caused, or materially contributed to, his injury or damage.”**

Although the Petitioner herein has stated that the Respondents owed him a duty of care and that the government was aware that flooding would occur cyclically, the government ought to have ensured that the information is availed to the public. This court is of the view that since the Petitioner had constructed structures contrary to the structural drawings submitted for approval, the structures built contrary to the law were destroyed by the floods while the suspended structures were not destroyed by the floods, the Petitioner cannot hold the Respondents liable. The rising water levels and the floods were unforeseeable and the Respondents were not in a position to control the same.

In the case of *Blyth v. Birmingham Waterworks Co. English Court - 1856 11Exch. 781*, where the Court exonerated the Defendant from liability on account of unexpected frost which blocked the pipes and held as follows: -

**“The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, in as much as the expansion of the water would force up the plug out of the neck, and the stopper being encrusted with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug... However, that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.”**

In the case of *Tennent vs E.A Glasgow (L. Westbury L.C) 1233*, the Court on appeal upheld the defence that that the damage was occasioned by an unprecedented fall of rain and that the Defendant was not liable. The Court held: -

**“It appears to me to be perfectly clear that this was a contingency against which no human foresight could provide against and which no person was bound to provide. Therefore, I quite concur with my noble and learned friend thinking that the appeal ought to be dismissed... I apprehend that there can be no doubt at all that this was an extraordinary and unprecedented flood, as it is called; nor that it was one which it is impossible for any person merely building a wall to enclose his grounds to provide against nor was it necessary to provide for against.”**

The Petitioner has prayed for compensation for the damages of Kshs. 403,000,000/= occasioned by the floods however, based on the above analysis it has been clearly established that the Respondents cannot be held liable as the Petitioner decided to build structures contrary to the approved plans and as a result the structures were destroyed by floods that were unforeseeable and were beyond human control. In conclusion, this court finds that the Petition lacks merit and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2022.**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**