



Wamaua & 2 others v Attorney General & 4 others (Petition E002 of 2022) [2025] KEELC 925 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEELC 925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
PETITION E002 OF 2022
LN GACHERU, J
FEBRUARY 11, 2025**

BETWEEN

**HON MARY WAMAUA 1ST PETITIONER
GANAMI DAM SELF HELP GROUP 2ND PETITIONER
SUSAN WANJIRU WAITHAKA 3RD PETITIONER**

AND

**HON ATTORNEY GENERAL 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT
WATER RESOURCES AUTHORITY 3RD RESPONDENT
NATIONAL WATER HARVESTING AND STORAGE AUTHORITY 4TH
RESPONDENT
INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE 5TH RESPONDENT**

JUDGMENT

1. Petitioners herein brought this Petition dated 5th April 2022, which is anchored on various provisions of *the Constitution* of Kenya 2010; and have sought for various for prayers against the Respondents herein. The prayers sought are: -
 1. A declaration that the Petitioners and all community local farmers of Kenol-Nagami Dam area have traditional farming rights and overriding interests to the areas and ways along and adjacent to water spill way of Nagami Dam capable of recognition and enforcement under Articles 26, 28, 40, 43 and 70 of *the Constitution* of Kenya, 2010.



2. A declaration that as a result of the traditional farming rights and overriding interests of the local farmers, the government may only regulate or interfere with such rights only for compelling and substantial objectives, justifiable in a modern democratic society such as the conservation and management of the resources, or development of a project of national interest as required by Article 24 of *the Constitution*.
 3. A declaration that even where the Government has made a determination that it is necessary to limit the traditional farming rights and overriding interests of the local farmers, it must do so subject to full and prompt compensation as provided for under Article 40(3)(b) of *the Constitution*.
 4. A declaration that, given the dynamic and indeterminate way in which the government can, even in the exercise of all due diligence and good faith compensate local farmers for loss of traditional farming rights, the local farmers must be given priority to farm for food and commercial purpose over other user groups in respect of spill water ways and/or paths.
 5. A declaration that the Petitioners and Nagami Residents' right to a clean and healthy environment is potentially at risk of being violated.
 6. An order do issue compelling the Respondents to undertake Control audit/Environmental audit in respect of the subject Nagami dam situated at Kenol, Muranga County and to file report in court.
 7. An order do issue compelling the Respondents to undertake survey and/or determination of actual boundaries of Nagami dam situated at Kenol, Muranga County and file report in court.
 8. Any other, further or better relief that this Honourable court may think fit and just to give in the circumstances of this case.
 9. Costs of this Petition to be granted to the Petitioners.
2. The 1st Petitioner is the Member of Parliament for Maragua Constituency, where the suit properties are situated. She represents the people of Maragua Constituency including the members of 2nd Petitioner and the 3rd Petitioner herein.
 3. The 2nd Petitioner is a Self Help Group which is a conglomerate of residents of Nagami Dam in Maragua Constituency of Murang'a County, while the 3rd Petitioner is allegedly a resident of Nagami Dam area, in Maragua Constituency, and she filed the Petition herein on her own behalf and on behalf of others for public interest.
 4. This Petition is anchored under Articles 2(1), 3, 10, 20, 22, 23, 26, 28, 40, 42, 43, 69, 70, 165 and 258 of Constitution, wherein the Petitioners have alleged that the Respondents herein contravened Articles 26, 28, 40, 42, 43, 69 of Constitution and breached several of their rights. They also averred that the Respondents contravened the provisions of the Environment Management & Co-ordination Act 1999(EMCA) the *Water Act*, 2016.
 5. It was the Petitioners averment that they are residents of Nagami Dam area and are traditional farmers, who derive their livelihoods directly from farming, and they have time in memorial farmed on the disputed area using relatively small farm tools, deploying small amount of capital and energy in the area immediately adjacent to the spill water way/paths of the dam.
 6. Further, that the Petitioners have concretized and enjoyed traditional farming rights in the area immediately along the dam's spill way, and these traditional farming rights are directly related to their



- social and economic rights, which are protected under Article 43 of *the Constitution*; being right to life guaranteed under Articles 26; right to human dignity protected under Article 28, as well as right to property guaranteed under Article 40 of *the Constitution*.
7. It was the Petitioners' contention that the Respondents have prevented the local farmers from exercising their traditional farming rights along the paths reserved as a spill way for Nagami Dam situated at Kenol-Murang'a County. Further, that the Respondents have destroyed and/or cut down the crops belonging to the traditional farmers of Nagami Dam area, situated at Kenol-Muranga County.
 8. The Petitioners also contended that the actions of the Respondents of preventing, restraining and/or destroying the cultivated crops belonging to community members violates their constitutional rights, therefore the Petitioners seek to enforce their right to clean and healthy environment of the residents of Nagami area and Maragua Constituency, where the said Nagami Dam is situated.
 9. The Petitioners further contended that no proper boundary demarcation has been done to ascertain the riparian side of the dam, and the private lands adjacent to the said Nagami Dam, hence fueling conflicts within Nagami Dam area. They claimed that the Dam has never been subjected to any Environmental Impact Assessment and/ or Social Audit(EIA) by way of control audit and/or environmental/monitoring audit, hence exposing residents to tragedies. Further that the actions of the Respondents have purported to deny the residents of Nagami area, the abstraction or use of overflow water from Nagami Dam.
 10. The Petitioners particularized the violations of *the Constitution* by the Respondents; being that the Respondents have threatened to violate, the Petitioners traditional farming rights on area reserved and/or adjacent to water spill way of the Nagami Dam, which act negates the Petitioners' social and economic rights protected under Articles 43, 26, 28 and 40 of *the Constitution*.
 11. Further that the Respondents have violated rights to clean and healthy environment of the Petitioners contrary to Articles 43, 69 and 70 of *the Constitution*. They also claimed that Article 69 of *the Constitution* imposes obligation on the state in respect of the environment, and among the obligations imposed on the state include the duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. Further that the state is also obligated to ensure equitable sharing of the accruing benefits, and is required to encourage public participation in the management, protection and conservation of the environment.
 12. Further, that the state is also required to eliminate processes and activities that are likely to endanger the environment. Therefore, the Petitioners, are seeking to enforce their right to clean and healthy environment of the residents of Kenol-Nagami Dam area and Maragua Constituency, where the Dam is situated.
 13. It was their further allegation that no proper boundary demarcation has ever been done to ascertain the riparian side of the Dam, and the private land adjacent to the Dam which omission has fueled conflict within the Nagami Dam area. The Petitioners urged the court to compel the Respondents to conduct environmental audit and/or monitoring audit in respect of the said dam in order to ascertain the Petitioners claim of infringement and/or threatened infringement of right to health and clean environment.
 14. The Petition is opposed by the 2nd, 3rd 4th & 5th Respondents herein.
 15. The 1st and 5th Respondents through the Attorney General filed their Ground of Opposition to the Petition dated 20th September 2022, and averred that the Petition herein does not meet the tested threshold of the Constitutional Petitions, as laid down in the case of Anarita Karimi Njeru vs Republic



- [1979]eKLR, and further buttressed in the case in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance [2014]eKLR;
16. Further that the Petition offends the principle of constitutional avoidance; and not each and every violation of law must be raised before the Court, as a constitutional issue, since there exists alternative remedies through statutory law that the Petitioner first ought to have pursued; that the Petitioners have not demonstrated how the Articles of *the Constitution* relied on in the instant Petition were infringed; that the Petitioners have not demonstrated how the 1st and 5th Respondents have violated their constitutional rights; that the Petition itself is fatally defective, and an abuse of the court process and the Attorney General sought for the dismissal of the Petition herein with costs
 17. In the Replying Affidavit sworn by Njoki Mukiri on 11th August 2022, the 2nd Respondent averred and conceded that it is tasked with issuing Environment Impact Assessment licenses as provided for under the Environment Management and Coordination Act (EMCA), on consultation with the lead Government agencies. Further, that the Environment Impact Assessment is a critical examination of the effect of a project that identifies both negative and positive impacts of any development activity or project; how it affects people, their property and the environment. Also, Environment Impact Assessment identifies measures to mitigate the negative impact while maximizing on the positive ones.
 18. The 2nd Respondent also averred that indeed the project herein is located within Mitubiri/ Wempa area in Murang'a South of Murang'a County. Further, the deponent also averred that from the available records, at NEMA Murang'a offices, the project was not issued with Environment Impact Assessment licensed, since the said requirement was established by Environment Management and Coordination Act came into force in 1999, and the Dam was constructed in 1980s.
 19. Therefore, it was the 2nd Respondent's contention that the Petition is untenable against it since Environment Impact Assessment(EIA), ought to be conducted pre-project and not post-project as the said Dam has been in existence and been in operation for long.
 20. Further, it was deposed that 2nd Respondent conducts control audit where there is an environmental management plan in place mitigating negative impact, as identified in the environmental assessment exercise where in this case none was undertaken.
 21. It was further averred that social audits are not within the mandate of the 2nd Respondent in the exercise of its mandate as provided for in the law. It was claimed that the 2nd Respondent has always remained conscious of the statutes and regulations in place, and has made every step necessary of ensuring that it adheres to the law, and it upholds it. The 2nd Respondent urged the court to dismiss the instant Petition with costs to it.
 22. The 3rd Respondent filed a Replying Affidavit through Patricia Musau dated 18th may 2013, who averred that the 3rd Respondent is designated by the *Water Act* 2016, as an agent of the National Government responsible for regulating the management and use of water resource in the Country. Further, she averred that the said regulatory power is vested in the 3rd Respondent on the basis of the power given to the State under Article 66 of *the Constitution* of Kenya 2010, to regulate the use of any law or any interest or right over any land.
 23. Further, that by virtue of its statutory mandate, the 3rd Respondent is empowered under section 12 of the Act to regulate activities in and/or in relation to the protection of a water resource.
 24. She deposed that in discharging its mandate, the 3rd Respondent is required to undertake water quality, surveillance, and monitoring so as to ensure protection and conservation of water resources. Therefore, in doing so, the 3rd Respondent is clothed with powers to ensure that no solid or other wastes including



- agricultural chemicals which prevent a risk to water resources quality are discharged into a water resources. Further, that the 3rd Respondent is tasked with protecting riparian reserve.
25. The 3rd Respondent confirmed that Nagami Dam was constructed in 1980, and is located within Wempa area in Mitubiri Division of Murang'a South Sub-county. The deponent also confirmed that on 9th October 2020, a complaint was lodged at the 3rd Respondent Murang'a sub-basin office of Nagami Dam area by farmers regarding Nagami Dam dispute.
 26. He averred that the complainant had complained that land including the Dam area was sold to an individual developer despite it being the land in which the farmers had been cultivating on. He contended that following the said complaint, a team of officers from the 3rd Respondent offices accompanied by other stakeholders visited the site on 14th October 2020, and on 28th September 2024, to investigate the complaint.
 27. Further, that following the said site visit, a Report was prepared which report was marked DMU1, and the said report showed that the land in dispute is situated immediately downstream of the dam, and that farmers grow horticultural crops for their livelihood. It was also observed that the land located downstream of and bordering the dam was sold to an individual by the name of Peter Mwangi.
 28. He deposed that after the site visit and observation, it was resolved that all activities being carried out on the disputed land ought to stop until the dispute was resolved. The farmers were given 90 days to harvest crops on the pieces of land in dispute, and no further planting of new crops was to take place until the determination of the dispute.
 29. It was further deposed that Nagami Dam consists one of the main sources of water for Kabuku River, which is at great risk of destruction due to human activities if the riparian reserve is not protected.
 30. Further, she deposed that the cultivation of crops on a riparian reserve has deleterious effect on the flow of a water resource with serious consequences for the ecology, and the court was urged to apply the prevention principle to prevent activities that may cause damage or harm to the dam, which dam is constructed on Ginia stream, a tributary of Kabuku river.
 31. Further that the water supply primarily depends on availability and quality of surface water and ground water resources hence the need to protect water resources and prevent activities that would pose a risk to water resources.
 32. The deponent contended that since he who comes to equity must come with clean hands and the farmers having encroached on a riparian reserve, and undertake cultivating activities on the said reserve cannot benefit from their own misdoing in the quest of protection of their constitutional rights.
 33. The 3rd Respondent denied violation or at all of the applicant's constitutional right, and that the Court is enforcing its obligations which is imposed on the state under *the Constitution* and which is within its statutory mandate.
 34. The deponent further averred that their advocate has advised them that under Article 69 of *the Constitution*, the state is under an obligation to deal with the environment and natural resources and ensure the sustainable exploitation, utilization, management and conservation and the equitable sharing of the accrued benefits
 35. Unfortunately, the 3rd Respondent urged the court to direct the County Surveyor, Murang'a County, to undertake a survey to determine the boundary of the land reserved for the Dam at the earliest. It urged the court to dismiss the instant Petition.



36. The 4th Respondent; Natural Water Harvesting & Storage Authority, in opposition to the Petition filed its Grounds of Opposition dated 15th August 2022, and stated that; the Petitioner has no legal basis to file a cause of action against the 4th Respondent, and it urged the court to dismiss the Petition sua sponte;
37. Further that the 4th Respondent has not been involved in any of the activities mentioned in respect of the Dam, being the construction of the said Dam; carrying out a feasibility study on the dam; or involvement in any other manner; that the Petitioner does not set out with precision the manner in which the 4th Respondent violated the Petitioners constitutional and human rights.
38. Therefore the said Petition is fatally defective and bad in law for failure to adhere to the principles set out in the case of Ananta Karimi Njeru –vs- Republic[1979]eKLR; that the Petition is vexatious, scandalous, and/ or an abuse of the court process and therefore, the 4th Respondent ought to be expunged from being a party, as the Petitioner does not disclose any reasonable cause of action against the 4th Respondent, and the court was urged to dismiss the Petition against it.
39. The Interested Party; Huts of Gold court applied to be joined in the suit and filed its Replying Affidavit dated 3rd March 2023, in opposition to the instant Petition. Consequently, Peter Mwangi Maina, swore a Replying Affidavit, and averred that he is one of the Directors of Interested party, and that the interested party was the registered owner of land parcels Nos Mitubiri/Wempa/Block 1/12345, situated in Gikono area in Kabati, in Murang'a County measuring approximately 80 acres.
40. He further deposed that the Interested party purchased the suit land from Kandere Muhethu Company Limited in 2020 as was evident from the exhibit attached to the Petition. He further averred that after the purchase the land parcel No. Mitubiri/Wempa/Block 1/12345, which was an agricultural land, the same was changed to residential use and a perimeter wall was erected around it.
41. Further that the Interested party subdivided the said title into smaller plots among them title numbers Mitubiri/Wempa/Block 1/13337 and 13338, measuring about 1.322ha, and 1.323ha, respectively and the two parcels of land are adjacent to each other.
42. It was his allegation that the previous owner of this land parcel, Kandere Muhetu Company Limited, and the owners of neighboring land agreed to set aside land for the construction of a dam. Ganami Dam, which is also which is also referred to as Nagami Dam and part of the Dam falls within title number Mitubiri/Wempa Block 1/13337 and 13338. Further that the Water spill way also falls within title number Mitubiri/Wempa/Block 1/13337 and 13338, which belong to the Interested party.
43. He also averred that the Dam was constructed in 1980s and the Environment Impact Assessment(EIA), was not required then for the construction of the Dam. The deponent contended that a group of people from Gikono area without consent encroached on the two titles which are private lands owned by Interested party, whereas the said group of people believe the subject area is a public land.
44. He further contended that the said group of people destroyed the perimeter wall that the Interested party had constructed around the entire parcel of land, causing the Interested party to go at a loss of about Kshs.500,000/= spent on the construction.
45. Further that after the Interested party engaged the said group, and the authorities on the encroachment of its land, the County surveyor of Murang'a prepared a Report of survey, and boundary beacons dated 25th August 2021, over the subdivided title No. of Mitubiri/Wempa/Block 1/12345.



46. He contended that the report of the County surveyor Murang'a established that the said group of area residents had encroached and forcibly carried out agricultural activities on the Interested party's parcels of land as per the attached exhibit 5.
47. It was his further contention that upon confirmation of boundaries by the County Surveyor, the said group of residents except the 1st and 3rd Respondents voluntarily left the area demarcated as private land being the area contained in the title numbers, Mitubiri/Wempa/Block 1/13337 and 13338.
48. Further, it was the Interested party's contention that the Petitioners insistence on continuing with the illegal trespass and cultivation over its land is unfair. Further, that the 1st Petitioner, who is a politician organized goons wielding crude weapons to enforce the illegal occupation of the said land titles.
49. Further, the Interested Party contended that the 1st Petitioner illegally trespassed on said land titles, and addressed media within the said land. He alleged that the action of the Petitioners to trespass on the two parcels of land without the consent of the Interested party was therefore illegal, and it reported the said illegality to the authorities and at Gikono Police post.
50. The deponent further averred that the Petitioners have sought to trespass and farm on the private land without the consent of the owners, and the Petitioners have not raised any environmental hazard posed by the said Ganami Dam. He further averred that the Petitioners want to use the court to enforce illegal trespass and/or appropriation over private property, and the issue of environmental hazard raised by the Petitioners is a clever strategy, calculated to hoodwink the court into allowing the Petitioners to illegally farm on the private land belonging to the Interested party.
51. The Interested party also contended that the Petitioners are aggrieved because the Interested party has enforced its right to property, but not because there is any constitutional grievances. Further that the Petitioners are only interested in alleged 'traditional farming right', but no such rights exist within *the Constitution* of Kenya, and even if such right exist, it cannot be enforced over a private property, and in favour of third parties.
52. The Interested party further contended that its right to own and enjoy its private property is on the verge of being arbitrary deprived and restricted by private persons against the rights guaranteed under Article 40 of *the Constitution* of Kenya. Therefore, granting the prayers sought by the Petitioner would be equivalent to aiding an illegality which is trespass over private property.
53. The Interested party also denied that its land is a riparian reserve, as contended by the Petitioners. It denied that the Petitioners have carried out agricultural activities on the land for about 20 years, and that the person allowed to occupy and use the land adjoining a water body is the adjacent land owner, and not third parties from far.
54. It also contended that the previous owner of this land, Kandere Muhethu Company Limited had always utilized the land through lease, subdivision and sale to interested buyers among other uses and not the Petitioners herein.
55. Alternatively, the Interested party contended that the issues raised herein falls under the jurisdiction of civil court and not a constitutional court, and therefore the court had no jurisdiction.
56. The Petition herein was canvassed by way of written submissions. The Petitioners filed their written submissions dated 20th March 2023, through Keaton & Keaton Advocates, and gave the background of the case before analyzing the issues.
57. It was their submissions that the dispute herein is over an area of land that borders the land parcels No. Mitubiri/Wempa/Block 1/13337 and 13338, owned by Interested party, but the area in question is



- in Nagami Dam. It was their further submissions that the Petitioners herein represent (50)fifty other farmers, who do not lay claim over the said land, since the said land is a riparian reserve and water catchment area, that was reserved as a Water spill way area for Nagami Dam, during its construction.
58. Further that as traditional farmers carrying out small farming activities, they have only been using the said land for cultivation of the crops which they use to feed their families during the dry and/or the rainy season, and they always vacate it during the high season in order not to be affected and/or interfere with the natural cause of the Dam. They also submitted that they have been playing a protective role of the said area, and that the status has remained so since the construction of Nagami Dam, until around 2020, when the Interested party bought the adjacent land being Mitubiri/Wempa/Block 1/13337 and 13338, and sought to evict them from the said area.
59. It was their further submissions that the traditional farming rights are directly related to their social and economic rights protected under Article 43 of *the Constitution*; their right to life under Article 26, and their right to property under Article 40 of *the Constitution*.
60. The Petitioners identified these issues for determination being:
- i. Whether the petitioners' rights have been or stand to be violated by the acts of the respondents and interested party, and
 - ii. Whether the court has a duty to protect the petitioners from any intended or actual violation.
 - iii. Whether the interested party can lay claim to or otherwise a riparian land and/or area.
61. On the first issue the Petitioners submitted that the Respondents and Interested party threatened, intimidated and forcefully stopped the Petitioners from carrying out any farming activities on the disputed land, destroyed their crops and/or farm produce and evicted the 2nd and 3rd Petitioners from the disputed area.
62. It was their further submissions that the Respondents and Interested party's action resulted in the Petitioners not being able to access their crops, and/or produce, thus having difficulties in accessing their crops for food at home. Further that the Petitioners are farmers, and people of small means, and have been using the disputed area(land) for their traditional farming activities for over 20 years without interruption.
63. Therefore, it was submitted that the act of the Respondents and Interested party are a breach of the Petitioners' constitutional rights, and they violated a number of constitutional provisions including Article 10 on the National Values, Article 27 on Equality and Freedom from discrimination, Article 28 on Human Dignity, and Article 43(1)(2) on the Right to free from hunger and have adequate food of acceptable quality.
64. The Petitioners relied on various decided cases to buttress their claim. On the right to health, the Petitioners relied on the case of P.A.O & 2 Others vs the Attorney General [2012]eKLR, where the court held: -
- “in my view, the right to health, life and human dignity are inextricably bound. There can be no argument that without health, the right to life is in jeopardy.
-ones inherent dignity as a human being with the sense of self-worth and ability to take care of oneself is compromised”
65. Further it was submitted that a significant component of realization of right to health is in respect of food, as food is very important if not most important need of a human being and therefore, any act



that is geared towards depriving this basic need ought to be declared unconstitutional. The Petitioners relied on the case of *Githungiri vs Republic KLR* [1986], on the need to always respect *the Constitution*, where the court held: -

“We also speak knowing that it is our duty to ask ourselves what is the use of having a constitution if it is not honoured and respected by the people. The people will lose faith in *the constitution* if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law, you destroy justice thereby also destroying the society”

66. The Petitioners invited the court to ensure that the constitutional rights of the Petitioners are protected.

67. On whether the Interested party has a right to evict the Petitioners from the riparian land and/or area, it was submitted that the Interested party had no claim over the riparian land and/ or area whatsoever, whether the said area had been gazette or not. Further, that the Petitioners had a duty to ensure that the said riparian area was protected from any encroachment and/or privatization. It was also submitted that the riparian reserves are important to ensure the slowing down of the flow of water, and reduction of soil erosion and flood damage.

68. For the above submissions the Petitioners relied on the case of *Milimani Splendour Management Limited vs NEMA and 4 others* [2019]eKLR ,where the court held: -

“the measurement of the riparian reserve will be based on the high and low watermarks, and not the center of the river in conformity with the definition of the high and low watermarks under the regulations made under EMCA.”

69. The Petitioners also relied on The *Land Act*, No. 6 of 2012, for the definition of Riparian reserve to mean: -

“The land adjacent to the ocean, lake, sea, river, dams and water courses as provided under *Survey Act* Cap 299 or any other written law”

70. Further, the Petitioners relied on the Environment Management and Coordination (Wetlands, River Banks, Lake, shores and sea shore Management) regulations, 2009 which states: -

“Wetlands” means areas permanently or seasonally flooded by water where plants and animals have become adapted; and include swamps, areas of march, peat land, mountain bogs, bank of rivers, vegetation, areas of impeded drainage or brackish, salt or alkaline; including areas of marine water the depth of which at low tide does not exceed 6 meters. It also incorporates riparian and coastal zones adjacent to the wetlands.”

71. Further, the Petitioners submitted that water resources constitute public land within the meaning of Article 62 and 260, of *the Constitution* and Water Resources Authority, who are the 3rd Respondent herein, and who are mandated by the *Water Act* 2016, as the Agent of National Government responsible for regulating the management and use of the water resources in the country.

72. Therefore, it was the Petitioners’ submissions that the Interested party had no proprietary rights over the suit land, since a riparian land is a public land as defined by Article 62(1)(1) of *the Constitution* and cannot therefore be appropriated and/or alienated for private use and thus the Interested party has no right to evict the Petitioners.



73. Further, it was submitted that if the said riparian area is part of the suit property of the Interested party, then the same is illegal, and the title deed ought to be revoked as the same must have been unlawfully appropriated for private use and registered in the name of the interested.
74. For the above submissions the Petitioners relied in the case of Kenya National Highway Authority vs Shalien Masoud Mughel and 5 others [2017]eKLR, where the Court was emphatic that public land and resources, are held in trust for the needs of the society. Further, it was held that alienation of land that defeats public interest goes against the letter and spirit of the articles of *the Constitution*.
75. Further, it was submitted that the 3rd Respondent having confirmed that the land in issue was a riparian reserve, then the same should be considered as a riparian for the purposes of this Petition, and the court should ensure that the same is protected either by Petitioners herein who are the community members, or relevant Government agencies: -
76. Finally, the Petitioners urged the Court to allow the Petition herein with costs to them.
77. The Attorney General for the 1st and 5th Respondents did not file any submissions and so did the 2nd Respondent. However, the 3rd Respondent filed its written submissions dated 14th August, 2023, through Tracey Makori Advocate, and identified one issue for determination being; whether the Petitioners are entitled to the reliefs sought.
78. The 3rd Respondent submitted that the National Government agency responsible for regulating the management and use of water resources, and therefore by virtue of its mandatory mandate, the 3rd Respondent is empowered under section 12 of the *Water Act* 2016, to regulate activities in or in relation to the protection of the water resources. Further that the 3rd Respondent is tasked to protect the riparian reserves, which mandate and derived from the power given to the state by Article 66 of *the Constitution* to regulate the use of any land or any interest or right over land.
79. The 3rd Respondent also relied on various other Articles of *the Constitution* to point out the obligations of the State such as Articles 62, 69, 70 and 260. The 3rd Respondent also submitted that water resources constitute public land, and that riparian land is subject to the regulations on the use contemplated under Article 66 of *the Constitution*.
80. The 3rd Respondent relied on various decided cases among them; ELC Petition No E017 of 2021: Sultan Palace Development vs Water Resource Authority, wherein the court held that measure being undertaken by the Respondent were in tandem with its statutory mandate, as provided by *the Constitution* and the *Water Act* 2016.
81. Further, the 3rd Respondent relied on the case of Milimani Splendor Management vs NEMA and 4 others [2019]eLKR where the court held:-
- “It now behoves every person to play an active role in environmental protection in light of the Article 69 (2) of *the Constitution*, which places the duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to River Kirichwa.”
82. It was its further submissions that Nagami Dam constitutes one of the main sources of water from Kabuku River, which is at great risk of destruction due to human activities ,if the riparian reserve is not protected, therefore it was its submissions that cultivation of crops on a riparian reserve has a



deleterious effect on the flow of water resources with serious consequences from the ecology, and the court should employ the prevention principle to prevent such activities that would cause damage or harm, to this dam which is constructed on Ginia stream, which is a tributary of Kabuku river.

83. The 3rd Respondent also relied on the case of Kenya Association of Manufacturers and 2 others vs Cabinet Secretary – Ministry of Environment and Natural resources and 3 others [2017]eKLR where the court held:-

“Besides *the Constitution* guaranteeing the right to a clean and healthy environment to every person, Article 69 of *the Constitution* sets out the obligations of the State in respect of the environment. One of these is the requirement to ensure sustainable exploitation, utilization, management and conservation of the environment. The State is also enjoined to eliminate processes and activities that are likely to endanger the environment.”

84. Further, it relied on the case of V/D Berg Roses & Project Agro Lease Limited vs Attorney General & Minister of Environment & Mineral Resources [2016]eKLR, where the court held:-

“20. It will be seen from the above, that firstly, every person has the right to own property. Such property ought not to be taken away by the State without payment of compensation. The petitioner has issue with the cited provisions of the LNMO because it is their view that their horticultural business will be greatly affected. The petitioner has stated that they undertake agricultural activities within the riparian land and that they have structures on the riparian area of Lake Naivasha. By being asked not to undertake these activities within the riparian area, it is their view that their right to property is being taken away without compensation.

21. There is of course contention as to whether or not the petitioner owns the property in issue. But let us put that aside for the moment. Assuming that it is owner, do the impugned provisions violate *the Constitution* especially Article 40 which protects the right to property? I do not think so. If I got the argument of the petitioner right, it is his view that since he owns the land in issue, he should be allowed to use it as he wishes whether or not it falls within a riparian area.

22. The argument of the petitioner is fundamentally flawed. Simply because you own land, does not give you a licence to use it as you wish. *The Constitution* itself provides at Article 60 that land should be held in a manner that is sustainable. One of the principles of land use and management under Article 60 is the sound conservation and protection of ecologically sensitive areas.

25. It will be observed from Article 69 above that the State, among other things, is supposed to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. It is also supposed to eliminate processes and activities that are likely to endanger the environment. The State can and does this by use of legal instruments, whether it be Acts of Parliament, or regulations made within existing statutes. Individuals too, also have a duty to cooperate with the State to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.



26. There is no absolute right given to one to use his land as he wishes. All land must be used in a manner that does not endanger the environment. This is where planning and land use management comes in. Laws will and shall continue to be made to manage land use, so that use of land, is in conformity with the obligation to protect the environment as provided in *the Constitution*. Rules and regulations will also continue being made. If we do not have laws and rules, then what we will have is everybody doing what they think should be done on their land, even where such activities cause harm to the environment.
28.I am appalled to hear from the petitioner that she wants to do as she wishes on the land in issue simply because she believes she owns the land or has leased it. There is no such room. As I have said earlier, *the Constitution* itself requires that land must be used in a manner that is sustainable and friendly to the environment. Let shame be upon the person who faults a law that is aimed at protecting the environment and let bigger shame be upon the person who wishes to undertake activities that will no doubt cause harm to the wetland of Lake Naivasha which is our pride and our heritage.
29. If one looks at the provisions impugned by the petitioner with sobriety, the only conclusion one can reach is that they are actually aimed at protecting the environment and are in perfect harmony with *the Constitution*. In the said regulations, paragraph (m) attempts to stop all agricultural activities on riparian land. What is wrong with that? You cannot have people farming horticultural crops which no doubt utilize chemicals in an area such as this. You need to have some sort of precaution exercised, for there is great danger that dangerous chemicals will seep into the lake and harm the flora and fauna therein.
85. Further, reliance was sought in the case of Baljit Sokhi and another vs Charity Ngilu, Cabinet Secretary, Ministry of Lands, Housing and Urban Development and another [2021]eKLR where the court held: -
- “ 42. The importance of the environment to the people of Kenya is demonstrated by the fact that respect for the environment as our heritage forms part of the preamble to our Constitution. Chapter 5 of our Constitution is dedicated to land and the environment. *The Constitution* states that land in Kenya must be held and used in a manner that is equitable, efficient, productive and sustainable in line with the principles that land as a resource, must be managed in a sustainable and productive way, and that sound conservation mechanisms must be employed.”
86. Ultimately, the 3rd Respondent submitted that the Petitioners have not met the threshold for the grant of the orders sought in the Petition, and as such there was no basis for the grant of the orders sought by the Petitioners. Further that granting the orders sought by the Petitioners herein would mean that the Petitioners can carry out their horticultural activities on the suit property, notwithstanding the fact that the activities would endanger the environment and the water resources.
87. The Interested party filed its written submissions dated 11th May, 2023, through Patrick Law Associates and opposed the Petition. It was their submissions that the subject area is a private land owned by the Interested party, which area is situated behind Nagami Dam wall. It was also submitted that there was



no proof of environmental hazard and/or breach of constitutional rights as alleged by the Petitioners herein, and there was no single case of where Nagami Dam caused harm to the said Petitioner.

88. Further that the issue of constitutional rights and environmental hazard raised by the Petitioners are just clever strategies calculated to hoodwink the Court into allowing the Petitioners to illegally access, and farm on the private land. Further, that the law does not recognize traditional farming rights, as claimed by the Petitioners over the subject land. It also submitted that even if the area in question is a riparian reserve as alleged, the Petitioners who are third parties may not have granted access/occupation to carry out farming activities therein.
89. The Interested party further submitted that the Petition herein does not disclose any justifiable constitutional grievances, and it is not possible to tell of the constitutional remedies sought by the Petitioners.
90. It was further submitted that the Petitioners are aggrieved because the Interested party sought to enforce its right to property, but not because there is any constitutional grievances.
91. It was their further submissions that as provided by section 7 of the *Land Act* 2012, title to land may be acquired through allocation. Land adjudication process, compulsory acquisition prescription, settlement program, transmissions, transfer and long term lease exceeding twenty one years created, out of private land”. Therefore the Petitioners have not demonstrated that they own or are entitled to the subject land through any of the means stated above, and therefore they are not entitled to compensation.
92. The Interested party also submitted the Petitioners pleaded that Nagami Dam does not have the Environment Impact Assessment, that was issued following the audit of the proposed development. It was further submitted that the said dam was constructed in 1980s, before the enactment of EMCA in 1999, and therefore at that time the requirement for Environment Impact Assessment was not there, and the said Environment Impact Assessment could not have been carried out retrospectively.
93. Further, it was also submitted that Control/Environment audit was not plausible since the environment audit is the systematic documented, periodic and objective evaluation of how activities and process of an ongoing project to determine how far these activities and program conform with the approved Environment Impact Assessment study report of that specific project.
94. It also submitted that since Nagami Dam project is an already complete project, and Control Audit is not possible post project period, and Environment Impact Assessment study had not been issued, then the 3rd Respondent cannot be accused of failure to carry out EIA. Reliance was placed on paragraph 2 of Environment (Impact Assessment Audit) Regulations 2003, which states: -

“ a systematic evaluation of activities and processes of an ongoing project to determine how far these activities and programmes conform with the approved environmental management plan of that specific project and sound environmental management practices.”

95. The Interested party also relied on paragraph 31 of Environment (Impact Assessment and Audit) Regulations 2003, which states: -

- “ 31 An environmental audit study shall be undertaken on the following
- (1) development activities which are likely to have adverse environmental impacts
-
- (a) ongoing projects commenced prior to the coming into force of these regulations; or



(b) new projects undertaken after completion of an environmental impact assessment study report.”

96. In conclusion, the Interested party submitted that its right to own and enjoy its private property is on the verge of being arbitrary deprived and restricted by the Petitioners against Article 40 of *the Constitution*. Further, that granting the prayers sought by the Petitioner is equivalent to acting on an illegality, which is trespass over private property.
97. Consequently, the Interested party urged the court to dismiss the petition with costs. Further, the Interested party filed supplementary submissions dated 9th December 2023, through Wachira Muturi Advocates, and submitted that the Surveyor’s Report dated 23rd August 2023, erroneously indicated that there was a survey carried out on 23rd March 2023, yet no Survey was carried out on the material day, the presence of all the parties.
98. Further that on 23rd March 2023, the Surveyor informed the parties that the exercise was not possible without Ganami Dam design, and therefore the exercise was postponed to enable the Surveyor obtain a copy of the Dam design. Therefore, the Survey report was generated from the Surveyor’s office.
99. Further that the Surveyor’s Report shows that the disputed area behind the Dam wall is part of title No Mitubiri/Wempa/Block 1/13337 and 13338, and the said report states that part of the title fall inside water mass. The Interested Party argued that the comments and recommendation made by the Surveyor violate the provisions of Article 40 of *the Constitution*, which guarantees right to property.
100. It was also submitted that the said Report improperly recommends excision of the two titles to reduce the acreage. Further, that the said act is akin to an act of compulsory acquisition, and is outside the ambit of the Survey office.
101. Further, the Interested Party submitted that the Surveyor proceeded to state an incorrect position that Ganami Dam was a public project in making his comments on the findings and recommendations. Therefore, the Surveyor erroneously ended up forming the overlay between the Dam and adjoining land as an encroachment; whereas the dam is simply within private land.
102. It was the Interested party further submissions that the comments and recommendations made by the surveyor are biased against the Interested party as the Surveyor’s analysis dwelt on matters not required under the referral order. Further that the said report contravened the previous report dated 25th August 2021, which had been prepared by the District Surveyor (Muranga), which had been prepared in the presence of the parties and the area administration.
103. In conclusion, the Interested party submitted that the Petitioners intend to grab land belonging to the Interested party for their illegal agricultural activities. Reliance was sought in Solai Dam Case of Peter Mbae vs NEMA and 4 Others: Law Society of Kenya and 2 Others (Interested party) [2020]Eklr, which dealt with similar issue, wherein the court reaffirmed that Environment Impact Assessment and Social Audit Report would not apply to Solai Dam, which existed before the Colonial era.
104. Further that there was no proof that the people’s rights to clean environment had been breached. The court also observed that the Dam breaching its wall did not mean that any actions or omissions posed a threat to the right to clean and healthy environment.
105. The above are the pleadings, the respective written submissions of the parties herein, the cited authorities and the relevant provisions of the law which the court has carefully considered and finds that the issues for determination herein, and which if determined would lead the court to arrive at a finding of whether the Petition is merited or not are;



- i). Whether the suit land constitutes riparian land?
- ii). Whether riparian land is subject to private ownership?
- iii). Whether the Petitioners are entitled to the Orders sought?

Whether the suit land constitutes riparian land?

106. In response to the Petitioners’ prayer, the Court authorized vide its Ruling of 8th December 2022, that the District Surveyor to visit the disputed area, survey and mark the boundaries, and then a Survey Report be submitted to the Court indicating whether the suit land falls on riparian land or not. The Court had allowed the Petitioners’ prayer in the following terms:

“Survey to be conducted to ascertain the boundaries of the Nagami Dam in order to ensure that no public land, in this case, riparian land is owned privately, and whose use could be detrimental to the environment.”

107. The Court has reviewed and analyzed the Survey Report dated 22nd August 2023, which was filed before the Court on 23rd August 2023. Further, the Court has perused the earlier Survey Report by the District Surveyor, dated 25th August 2021, and records of the minutes of meetings at which Nagami Dam, which was conceptualized in 1985, all of which were produced by the Interested Party, together with the rival pleadings, evidence and submissions of the parties.

108. The Survey Report dated 22nd August 2023, was prepared and signed by Lazarus M. Ndivo – Land Surveyor Assistant 1, in the Ministry of Lands, Public Works, Housing & Urban Development. In the said Survey Report, under the pictorial image captioned Fig. 4: and titled “Satellite imagery showing Dam position against the map representation”, it reads as follows: “From the above plotted data, it’s evident that, the planned subdivisions on LR no. 10729, which resulted to parcel nos. MITUBIRI / WEMPA BLOCK 1/13337 & 13338, did not respect the already existing Dam boundaries. In that regard, part of land parcel no. MITUBIRI/ WEMPA BLOCK 1/13337 & 13338, lie within water mass and in the dam area, and cannot therefore be taken to be properly planned as cannot be beacons. The area for the dam is given as approximately 46.0 Acres on the maps whereas the actual taken by the dam on the ground is approximately 168.0 Acres. From the google earth satellite imagery its clearly seen that, the Dam’s Spill Way which forms part of the Dam area as its usually and in accordance to Dam Design Drawings, passes through land parcels no. MITUBIRI WEMPA BLOCK 1/13337 & 13338. The Dam spill way cannot belong to a different owner than the dam itself as it forms part of the dam.”

109. The findings of the above referred Survey Report leave no doubt that the parcels of land referred to as Mituburi/ Wempa/ Block1/ 13337 & 13338, which are registered in the name of the Interested Party, forms part of the Spill Way of Nagami Dam, making it riparian land and, therefore, public land.

110. A previous Survey Report annexed to the Interested Party’s Replying Affidavit sworn by Peter Mwangi Maina on 3rd March 2023, and authored by the District Survey Office, Murang’a, dated 25th August 2021, which was filed before the Court states as follows under the section titled “RECOMMENDATIONS”:

“The residents of Kihui Mwiru scheme who claims that the land they have encroached is a dam reservoir, and that they have the right to farm are not Bona fide owners. The Ministry of Environment/WARMA should clarify whether it is a riparian reserve, but there are boundaries in the RIM showing that the bona fide owner is the proprietor of subject parcel”.



111. From the Survey Report dated 25th August 2021, it is clear that District Survey Office, Murang'a who was commissioned to undertake a survey of the disputed land area by the Interested Party herein entered the finding that the suit land appeared to subsume a riparian reserve, hence, the call for clarification to issue from the Ministry of Environment & Natural Resources, as to the boundaries of the land in issue.
112. Further, the second Survey Report dated 22nd August 2023, which was prepared after survey work was undertaken on the directives of this Court recorded that Mitubiri/Wempa/Block1/13337, and Mitubiri/Wempa/1/13338, have subsumed riparian land belonging to Nagami Dam.
113. Further, the above Survey Report dated 22nd August 2023, also found that the dam area encompasses about 168 Acres on the ground, whereas on the map, the said dam is said to occupy only 46 Acres. The maker of the said report, in his findings contained on page 3 of the Surveyor's report under the heading "FINDINGS", notes as follows:
- "Below is the CAD (Computer assisted drawing) illustrating fully the ground situation in relation to the map."
114. The Interested Party objected to the County Surveyor's report, which was authorized by the court, and described it as the fruit of a desk survey, as it was not accompanied by a site visit. Further, the Interested Party contended that the County Surveyor communicated to the parties that he was not in a position to conduct the survey as directed by the Court, because he did not possess a copy of the design of Nagami dam.
115. However, it is trite that he who alleges must prove, as provided by Section 107 of the *Evidence Act*. The Interested Party herein did not call sufficient evidence to prove that there was no site visit conducted in respect of the Survey Report dated 22nd August, 2023.
116. Therefore, this Court would have no reasons to doubt that the District Surveyor visited the disputed area, as directed by the court, and carried out the survey work and marked the boundaries as directed by the court. Consequently, the court holds and finds that the Petitioners have demonstrated on the required standard that the disputed land area constitutes riparian land/ and or reserve. The said disputed area being a riparian land, as provided by Article 67 of *the Constitution*, then the said land is public land.
117. Therefore, it is the finding and holding of the Court that the area reserved for the water mass of Nagami Dam as proposed to be the Spill-way thereof, encompasses portions of land parcel Nos Mitubiri/ Wempa Block 1/13337 and Mitubiri/ Wempa Block 1/13338, as seen in the satellite images denoted in Figure 2; Figure 3 and Figure 4 in the Survey Report dated 22nd August, 2023, and the said disputed area is a dam reserve thus public land.

Whether the riparian land subject to private ownership?

118. The Petitioners submitted that the riparian land is by definition a public land, and, therefore not amenable to individual or private ownership. In opposition, to that argument and submission, the Interested Party contended that nothing in the laws of Kenya forbids a private party from owning riparian land, and that according to the definition of "Riparian Area" set out under the Water Regulations 2021, which came into force on 1st February 2023, (repealing the Water Resources Management Rules 2006), riparian status does not entail a change of ownership, but imposes management controls on land use as directed by the Water Resources Authority.



119. The Interested Party further submitted that the riparian status imposes certain obligations related to environmental management on a private entity which is in control of a given riparian area.
120. The Water Regulations 2021, define a "riparian area" as follows:
- “land which by virtue of the proximity of the land to a water body, management obligations shall be imposed on the owner of the land by the Authority.” (i.e., the Water Resources Authority).
121. The Interested Party also contended and submitted that following its purchase of the suit property, it applied for a change of user of the title thereof from agricultural to residential use, and erected a perimeter wall around the suit land.
122. The Petitioners contended that the disputed land area should not be privately-owned by the Interested Party herein, as is currently the case. The Interested Party, on the other hand, asserted and claimed the ownership of the suit land, and it relied on the provisions of Article 40 of *the Constitution* of Kenya, which guarantees the right to property.
123. Section 12(2) of the *Land Act*, allows for allocation of public land, but prohibits the allocation of public land that is along watersheds, river or stream catchments, public water reservoirs, lakes, beaches, fish landing areas, riparian, and the territorial sea. Section 2 of the *Land Act* defines riparian reserve to mean the land adjacent to the ocean, lake, sea, rivers, dams and water courses.
124. The Court has entered the finding and holding that the disputed land area is riparian land/ and or reserve and it forms part of the Nagami Dam’s water mass area. From the above provisions of law, it is clear that a riparian reserve cannot be allocated to a private owner, and the said riparian reserve needs to be protected.
125. The Survey Report dated 22nd August 2023, made the following finding:
- “The Dam spill way cannot belong to a different owner than the dam itself as it forms part of the dam.”
- The allocation of riparian land to private parties such as Interested Party herein albeit with enhanced responsibilities is contemplated under the Water Regulations 2021; However, the said allocation is disallowed pursuant to the provisions of Sections 2 and 12(2) of the *Land Act*.
126. It is the holding of this Court that according to the doctrine of hierarchy of laws as set out under the *Judicature Act*, CAP 4, the Court is bound to accord priority to primary legislation in this case, the *Land Act* No.6 of 2012, over subsidiary legislation, in this case, the Water Regulations, 2021.
127. Therefore, this Court holds and finds that the title deeds in respect of land parcel nos. Mitubiri Wempa Block 1/13337 and Mitubiri Wempa Block 1/13338, offend the provisions of Sections 2 and 12(2) of the *Land Act*, by allocating private rights in respect of riparian land.
128. Having found that the said titles offends the above provisions of law, then the two titles are candidates of rectification. Section 80 (1) & (2) of the *Land Registration Act* provides as follows:
- Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.



- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

129. In exercise of the powers granted to this court by Section 80 of the *Land Registration Act*, this Court directs and orders that the two titles be rectified, and the rectification can only be done by cancellation of the said two title deeds of Mitubiri Wempa Block 1/13337, and Mitubiri Wempa Block 1/13338, on grounds of mistake, for having subsumed the dam area, as captured in the Survey report dated 22nd August 2023.
130. Further, the court directs that fresh title deeds should be issue restoring the riparian land of Nagami Dam to the said dam. The Director of Surveys shall conform to the Survey Report dated 22nd August, 2023, signed by Lazarus M. Ndivo – Land Surveyor Asst. 1, during preparation of the new title deeds.

Whether the Petitioners are entitled to the Orders sought?

131. It was argued by the Interested Party that since the Petitioners do not own any adjoining land next to Nagami Dam, it shall be illegal for the Petitioners to stake a claim over either private land, or over a riparian land/reserve existing between a water resource and private land.
132. The Petitioners too admitted that they do not own the disputed land area, but were claiming rights to continue using the Water Spill area of Nagami Dam, which they have used for long, and that such use would guarantee them right to life, human dignity and to clean environment.
133. For the avoidance of doubt, the Petitioners are not laying claim to the disputed land area, rather, their claim is founded on social and economic rights in the form of traditional farming rights and overriding interests over the suit land.
134. In the case of Veronica Njeri Waweru & 4 others vs The City Council of Nairobi & others, Nairobi Petition No. 58 of 2011, the Court reasoned as follows:

“The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licences to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land and they therefore cannot be deprived of that which they have no rights over.”

135. Addressing itself to the question of violation of social and economic rights set out under Article 43 of *the Constitution* of Kenya, the Court in the case of Veronica Njeri Waweru & 4 Others vs The City Council of Nairobi & Others, Nairobi Petition No. 58 of 2011 stated as follows:

“Article 43 (b) guarantees to everyone the right to accessible and adequate housing and to reasonable standards of sanitation.... Article 43 (3) deals with the right to housing. It does not encompass, in my view, persons in the circumstances of the petitioners in this case who are in their own words, operating businesses such as garages, hardware and furniture shops and who have invested millions of shillings in their businesses on the road reserve. Indeed, even in the case of those who may be poor residents of informal settlements, the duty of the state may be limited to putting up in place policies to ensure access to adequate housing.”



136. Further, in the case of Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others (Civil Appeal no. 218 of 2014), the Court of Appeal held as follows (at paragraph 136 of the Judgment):

“... Whereas socio-economic rights are recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another. In Latin, socio-economic rights cannot confer rights in alieno solo. Under the law as it stands today, enforcement and realization of socio-economic rights does not override the provisions of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya). Prescriptive rights to land cannot be acquired in the name of enforcement of socio-economic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineering, take away and re-distribute property rights. Subject to Article 25 of *the Constitution*, all provisions in the Bill of Right are to be treated as equal with no one provision overriding another.”

137. This court will also refer to the holding of the Supreme Court in the case of Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021), where the said Court held as follows:

“...where the landless occupied public land and established homes thereon, they did not acquire title to the land, but they had a protectable right to housing over the same. *The Constitution* of Kenya, 2010, radically transformed land tenure in Kenya by declaring that all land in Kenya belonged the people of Kenya collectively as a nation, communities and individuals. It also created a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation had an interest, however indescribable, however unrecognizable, or however transient, in public land.”

138. The Petitioners claimed that the Respondents have violated and threaten to infringe on their social and economic rights by forbidding them to cultivating on riparian land. The Petitioners further admitted that they were engaged in horticultural farming on the suit land. The 2nd and 3rd Respondent acknowledged that the Petitioners were indeed undertaking farming activities on the disputed area.

139. The 2nd Respondent observed that cultivation of crops on a riparian reserve has a deleterious effect on the flow of a water resource, and the said activity has damaging consequences on the local ecology. The Court takes note of the observations entered by the 2nd Respondent that farming activities carried out by the Petitioners on the suit property interfere with the flow of water on Kabuku River.

140. In light of the environmental risks posed by continued farming by the Petitioners on the suit land, the Court holds and finds that the Petitioners claim based on social and economic rights is unmerited, for the reason that a riparian land is public land wherein, normal economic activities by individuals are either strictly controlled or outlawed altogether. There is an added risk of chemicals such as pesticides and insecticides used in horticultural farming by the Petitioners washing into the Dam water thereby, occasioning serious health problems to those who depend on the water flowing through Nagami dam and Kabuku River.

141. The Petitioners deployed the phraseology of Section 30, of the Registered *Land Act*(Cap 300 Repealed), which provided for “overriding interests” in land, that is, those interests that do not require registration to be recognized and enforced by the Courts. The Court finds and holds that the



Petitioners herein have not established any overriding interests belonging to them in respect of the suit property.

142. Further, the Court holds and finds that the legally-recognized ways of acquiring land in Kenya are as follows: allocation; land adjudication process; compulsory acquisition; prescription; settlement programs; transmissions; transfers; and, long-term leases exceeding twenty-one years created out of private land.
143. Considering the above analysis of the facts, evidence and provisions of law, the Court finds and holds that it would be acting ultra-vires if it were to declare a novel category of ownership rights over land founded upon the doctrine of “traditional farming rights”, as proposed by the Petitioners herein.
144. Pursuant to the provisions of Article 40 of *the Constitution* which provides that the rights stipulated therein do not apply to any illegally-acquired property, the Court holds and finds that the Petitioners herein are not entitled to compensation following the directives that they vacate the suit property and cease all farming activities thereon.
145. Having now carefully considered the Pleadings herein, though the 1st and 5th Respondents alleged that the Petition herein failed to meet the threshold principles set out in Anarita Karimi’s case. However, they failed to file their written submissions to expound on their grounds of opposition, and those grounds of opposition remained mere allegation. See the case of Charter Bank Limited vs Frank N. Kamau [2016]eKLR where the court stated that: -

“It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statement of facts since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and unchallenged.”

146. Further, the court finds that the Petitioners stated the facts of their Petition, and the articles of *the Constitution* that were alleged by breached. The Petition herein met the threshold of a Constitution Petition as set out in the Anarita Karimi’s case. See the case of Kiragu v Chuka University (Constitutional Petition E001 of 2023) [2024] KEHC 2241 (KLR) (6 March 2024) (Ruling) where the court held: -

“Rule 10 of the Mutunga Rules governs that the form that a constitution should take. Rule 10(2) of the same Rules specifically provide as follows: -

- “(2) The petition shall disclose the following—
- a. the petitioner’s name and address;
 - b. the facts relied upon;
 - c. the constitutional provision violated;
 - d. the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - e. details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;



- f. the petition shall be signed by the petitioner or the advocate of the petitioner; and
- g. the relief sought by the petitioner.”

147. However, after analyzing the available evidence and the exhibits produced thereon, especially the District Surveyor Report, the court finds that the disputed land area is a Riparian land, and thus a public land. Though the Petitioners alleged that they have been using the said land, this court cannot find and hold that their constitutional rights have been breached and that they are entitled to the declarations sought.
148. On prayer No.6, it is evident that the referred Nagami Dam was constructed in 1985 or thereabout, and the provisions of the Environment and Management Co-ordination Act (1999), were not applicable. Therefore, the Environmental Impact Assessment was not a requirement, and this court cannot hold and finds that the Respondents failed to prepare an EIA and/ or Social Audit Report for the Nagami Dam.
149. On prayer No.7, the court did direct the District Surveyor to carry out the Survey and mark the boundaries. A Survey Report dated 23rd August 2023, was filed in court by the said District Land Surveyor, which this court has considered.
150. On prayer No.8 of any other better relief that the court may find fit to grant, the court has already found and held that as per the District Land Surveyor’s Report, the Interested Party, land parcels Nos Mitubiri/ Wempa/ Block 1/ 13337 & 13338, have consumed part of the Nagami Dam area. For the above reasons, the court directs that the two title deeds should be cancelled and rectified accordingly as provided by section 80(1) of the [Land Registration Act](#) 2012. This court directs as above, that two titles be cancelled, and be rectified after marking the boundaries for the Ngami Dam, as per the District Land Surveyor’s Report dated 23rd August 2023.
151. Considering all the evidence herein, the final orders of this court are that the two titles held by the Interested Party herein being Mitubiri/Wempa/Block 1/13337 and 13338 be cancelled and rectified. Thereafter the District Surveyor to mark the boundaries of Nagami Dam and the two parcels of land referred above and new titles be issued conforming to the County’s Surveyors findings of 23rd August, 2023.
152. On the issue of costs, the court finds and holds that the Petitioners are persons of limited economic means, therefore, the Court directs that each party to bear its own costs.
153. Ultimately, the court finds and holds that the Petitioners’ Petition dated 5th April 2022, is not merited, save for the prayer of any other relief that the court may deem fit to grant, and which the court has granted as above.
154. Consequently, the instant Petition dated April 5, 2022, is hereby dismissed, save for the cancellation of the two titles held by the Interested Party; Mitubiri/ Wempa/ Block1/ 13337& 13338, and rectification of the same, as per the County’s Surveyor’s Report.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY, 2025

L. GACHERU

JUDGE



11/2/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Keaton/ Yegon for the Petitioners

Ms. Muyai holding brief for Ms. Sakami for 2nd Respondent

Mr. Mwangi for interested party

N/a for the other Respondents

