



**Export Processing Zones Authority v Mavoko Water and Sewerage Company Limited
& 3 others; Water Services Regulatory Board (Interested Party) (Environment &
Land Petition 11 of 2019) [2025] KEELC 1253 (KLR) (11 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 11 OF 2019**

AY KOROSS, J

MARCH 11, 2025

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER THE ABOVE ARTICLES OF THE CONSTITUTION**

AND

**IN THE MATTER OF: EXPORT PROCESSING
ZONES ACT, CAP 517 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF: WATER ACT, 2016

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT

AND

**IN THE MATTER OF: LEGAL NOTICE NO. 74 OF 1997 ISSUED UNDER
KENYA GAZETTE SUPPLEMENT NO. 42 PUBLISHED ON 6TH JUNE 1997**

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY PETITIONER

AND

MAVOKO WATER AND SEWERAGE COMPANY LIMITED . 1ST RESPONDENT

NAIROBI WATER AND SEWERAGE COMPANY LIMITED 2ND RESPONDENT

MINISTRY OF WATER AND SANITATION 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

WATER SERVICES REGULATORY BOARD INTERESTED PARTY



JUDGMENT

Introduction

1. All the parties herein are public bodies. Significantly, some of the parties have had a protracted dispute over the control of and ownership of water and sewerage infrastructure that the World Bank financed as a public utility but is allegedly under the petitioner's control.
2. Upon such construction, the petitioner, through a gazette notice of 6/06/1997, was contracted as a water undertaker by the 3rd respondent's predecessor to supply water within its boundaries and to certain properties.
3. Since 1997, the laws in the water sector have been amended and repealed several times, resting with the *Water Act* (2016).
4. The dates the provisions of this Act commenced are diverse as some commenced on 21/04/2017, 3/05/2019 or 7/12/2022. Some parts of this Act are yet to commence, particularly Part III, Section 37(5); Part IV, Section 74(4); Section 85(3); and Part VIII, Section 139(7).
5. With the repeals, enactments and amendments of the various laws in the water sector, there has been uncertainty as to who owns this public facility, and this has been the source of several disputes.
6. In a ruling rendered by this court on 17/05/2023 which dealt with a plethora of applications by various parties, the interested party (IP) was joined to these proceedings and the court found this petition was not sub judice to Machakos ELC No. 35 of 2010, Machakos ELC No. 315 of 2009, Milimani ELC No. 150 of 2015 and a Notice of Appeal in Machakos High Court No. 150 of 2019. Moreover, it found that this court had the requisite jurisdiction to entertain the petition.
7. Having dealt with all preliminary issues, the matter was thereafter slated for a hearing on merits.

Petitioner's case

8. The constitutional petition dated 5/07/2019 that is the subject of this decision is lodged by a state corporation established by the Ministry of Industry, Trade and Cooperatives and is created under the Export Processing Zones Authority Act (EPZA Act).
9. The petitioner described its mandate as to stimulate economic development by promoting export-oriented manufacturing, creating jobs, attracting investment and creating linkages within the domestic economy.
10. In the petition, it seeks the following reliefs from this court:
 - a. A declaration that the respondents have breached and or threatened to breach the petitioner's rights guaranteed under Articles 40 and 47 of *the Constitution* of Kenya.
 - b. A declaration that the respondents' actions violated and/or threatened to violate the provisions of Article 10 of *the Constitution*.
 - c. A permanent mandatory injunction order does issue stopping the respondents whether by themselves, their officers, employees and/or agents from trespassing onto, damaging, controlling, accessing, installing any meters, off-takes and/or any other devices and/or continuing to interfere in any manner whatsoever, with the petitioner's water infrastructure including the 19km trunk main firestone, 8500m³ ground level reinforced tank at Beacon



Ranch Mlolongo, 18m³ elevated steel tank and distribution mains at Kitengela, water mains to the 50m³ stone tank at Pump House, Pump House and ancillary works, 12.9 km of 250mm diameter rising falling to 2000m³, reinforced concrete 7.5km from Kitengela and 5km distribution mains. In particular for the avoidance of doubt;

- i. The respondents be compelled to take away, pull down or otherwise remove all meters (except the bulk water meter at Firestone offtake), installations, fixtures, fittings, effects and or any assets whatsoever, installed on the petitioner's water infrastructure or any part thereof.
 - ii. Upon such removal, the respondents do make good to the reasonable satisfaction of the petitioner all damage caused by such removal.
 - iii. In default of compliance with this order, the petitioner be at liberty to remove all meters (except the bulk water meter at Firestone offtake), installations, fixtures, fittings, effects and/or any assets whatsoever installed on the petitioner's water infrastructure and to recover the costs of such removal from the respondents.
- d. A permanent injunction be issued restraining the respondents whether by themselves, their officers, employees and/or agents from trespassing onto, damaging, controlling, accessing, installing any meters, offtakes and/or any other devices and or interfering and/or continuing to interfere in any manner whatsoever with the petitioner's water infrastructure including the 19km trunk main from Firestone, 8500m³ ground level reinforced tank at Beacon Ranch Mlolongo, 18m³ elevated steel tank and distribution mains at Kitengela, water mains to the 50m³ stone tank at Pump House, Pump House and ancillary works, 12.9 km of 250mm diameter rising falling to 2000m³, reinforced concrete 7.5km from Kitengela and 5km distribution mains.
- e. A permanent injunction be issued restraining the respondents from interfering in any manner whatsoever with the petitioner's statutory roles and responsibilities for the provision and/or supply of water within the boundaries of the Export Processing Zones area, certain properties outside them but along the pipeline route from the Nairobi City Council Water Supply offtake near Firestone Factory.
- f. Any other orders that this honourable court may deem necessary to grant.
- g. Costs of the petition.
11. The petitioner's case is set out in the petition and supporting affidavit deposited on 4/07/2019 by the petitioner's Acting Chief Executive Officer (petitioner's CEO), George Makateto.
12. Briefly, it stated that to enhance the petitioner's execution of duties, the World Bank, between 1992 and 1994, established a water and sewerage project at the Athi River EPZ.
13. It was contended this project comprised the 19km trunk main firestone, 8500m³ ground-level reinforced tank at Beacon Ranch Mlolongo, 18m³ elevated steel tank and distribution mains at Kitengela, water mains to the 50m³ stone tank at Pump House, Pump House and ancillary works, 12.9 km of 250mm diameter rising falling to 2000m³, reinforced concrete 7.5km from Kitengela and 5km distribution mains (disputed infrastructure).
14. Additionally, it asserted under the repealed *Water Act* (Cap 372) that it was appointed as a water undertaker, as evidenced by the gazette legal notice no. 74 of 1997.



15. Further, according to it, notwithstanding the subsequent enactment of the repealed *Water Act*, 2002 and *Water Act* (2016), its water undertaking license was never revoked as they were maintained by Sections 114 and 115 of the former and 156 and 157 of the latter.
16. It stated Regulation II (A) (8) of the *Water Act* (Plan of Transfer of Water Services) Rules, 2005, provided a legal framework for the transfer of water and sewerage infrastructure nevertheless, the 3rd respondent and its predecessors had not taken any steps to effect the transfer of the disputed infrastructure.
17. It argued the respondents had interfered with the disputed infrastructure severally, and each of the allegations is summarised below: -
 - a. Allegations against the 1st respondent
 - i. On 13/02/2019, the 1st respondent's team were spotted patrolling the petitioner's waterline and attempted to access Beacon Ranch reservoir in Mlolongo and its pump house, but this action was repulsed;
 - ii. On 21/02/2018, the 1st respondent whose water is conveyed to it by the 2nd respondent through the petitioner's infrastructure, without permission broke into the petitioner's property on LR no. 18474/1 and vandalised the access gate, used backhoe excavators to excavate distribution lines to Kitengela and the petitioner, accessed the petitioner's pump house and even installed meters; and, excavated the distribution lines.
 - b. Allegations against the 2nd respondent
 - i. On 6/02/2019 and 14/02/2019, the 2nd respondent attempted to install a bulk meter at the Kapa area but was repulsed by the petitioner; and
 - ii. On 13/03/2019, the 2nd respondent drilled into the petitioner's waterline to create a take-off point; and
 - iii. On 20/02/2019, the 2nd respondent informed it that it would install a bulk meter along the Kapa waterline to monitor unaccounted water and even excavated a portion of the pipeline; and
 - iv. On 21/02/2019, the 2nd respondent attempted to move the petitioner's takeoff point at Firestone to the waterline at Kapa.
 - c. Allegations against the 3rd respondent
 - i. It instructed the County Commissioner of Machakos and other persons to bar the petitioner from dealing with the disputed infrastructure and water distribution services.
18. The petitioner maintained these actions had caused loss and damage, particularly causing acute water shortage and sewer effluent contamination, destruction of its infrastructure and water distribution services and negating its achievement of the Kenya government's Big Four Agenda.

1st respondent's case

19. The 1st respondent opposed the petition by filing a replying affidavit sworn on 17/07/2023 by its Chief Executive Officer (1st respondent's CEO), Michael Mang'eli.



20. He averred the 1st respondent is a creature of Section 77 of the [Water Act](#) (2016) duly licensed by the IP to supply water to Mlolongo, Kitengela, Athi River and Mavoko areas.
21. He stated the petitioner had failed to disclose to the court that according to a gazette notice no.4574 of 19/07/2020 which was issued under Section 8 of the [Water Act](#) (2016), the 3rd respondent's successor -Ministry of Water, Sanitation and Irrigation, designated the disputed infrastructure as a National Public Works.
22. He argued the import of this gazette notice was that the parties' management of water infrastructure, including the disputed infrastructure, was terminated and its management divested to the Athi Water Works Development Agency (AWWDA) established under Section 68 of the [Water Act](#) (2016). According to him, the suit was moot.
23. He further argued that since the disputed infrastructure was public property, private rights could not accrue over it as it was meant to serve the public in Mavoko municipality, Kitengela, the petitioner and surrounding areas.
24. He averred the petitioner had not proved its case as it had not demonstrated its proprietorship over the disputed infrastructure, stated provisions of the law violated and precisely stated the manner of infringement.
25. He contended the suit infrastructure was owned by the government in trust for Kenyans and the petitioner and respondents as authorised agencies could deliver water and sewerage services for the benefit of the public.
26. In giving a background of the disputed infrastructure and various laws, he stated the disputed infrastructure was built by the government through World Bank funding to aid in the supply of water to the public.
27. He stated water was drawn from the 2nd respondent to supply mains in Mlolongo, Kitengela, Athi River and Mavoko areas and further the disputed infrastructure was to collect waste and channel the affluent therefrom to Kinanie which is outside the petitioner's area.
28. He stated Section 113 of the repealed [Water Act](#) (2002) directed that all water services be undertaken by the Water Services Boards (WSB) and directed the relevant cabinet secretary to gazette Water Rules to regulate the smooth transition of water services from the national government or state corporations to the WSB.
29. He contended in compliance and as envisaged by Sections 111 and 113 of the repealed [Water Act](#) (2002), the cabinet secretary by gazette notice no.101 of 2005 made the Water (plan and transfer of water services) Rules (Water Rules).
30. He asserted Rule 5 thereof and Section 1.B.2 of the transfer made certain particulars on the transfer of assets from the government or its corporations to WSB.
31. He argued with the operationalization of the repealed [Water Act](#) (2002) and Water Rules therein; the legal notice 74 of 1997 which appointed the petitioner as a water undertaker, was revoked.
32. Moreover, he stated by dint of Section 74 of the [Water Act](#) (2016), the petitioner could not purport to supply water commercially as it did not have a license from the IP.
33. He averred that since 2009, the 1st respondent had been managing the disputed infrastructure, and it had spent colossal sums of money on fixtures and meter installation.



34. He argued if the reliefs sought were granted, there would be a violation of *the Constitution* as the public would be denied essential services.
35. He stated that furthermore, the petitioner was selfish as it wanted to supply an unlimited, unregulated and unmonitored supply of water, thus obstructing the 1st respondent from carrying out its duties. He urged the court to dismiss the petition.

2nd respondent's case

36. A response was made by a replying affidavit that was deposed by its Acting Operational & Maintenance Manager (2nd respondent's officer), Eng. Samuel Maina, who deposed it on 27/02/2020.
37. As observed by the court, the affidavit was in response to both the petition and a spent application and on that basis, this court shall only summarise averments that are of significance to the petition.
38. In his affidavit, he maintained the suit property was public property therefore, the petitioner could not own it and that under Section 5 of the *Water Act*, water resources are held in trust for the people of Kenya.
39. According to him, the petitioner's water undertaker permit ceased existence by operation of law upon enactment of the *Water Act* 2002 and the body that was vested with the authority to supply water was the Athi Water Services board which had delegated its license to the 2nd respondent.
40. He was categorical that the 2nd respondent owned the subject bulk meter (2nd respondent's meter) which it had leased to the petitioner and was located 150 meters from the boundary of KAPA towards Nairobi.
41. He stated to monitor all water within the boundaries of Nairobi and account for its non-revenue water, the 2nd respondent intended to install an additional meter on the disputed infrastructure's line at a point approximately 150m from the perimeter wall of KAPA towards Nairobi.
42. Moreover, he denied the petitioner's allegations that it intended to shift the 2nd respondent's meter or damage the petitioner's disputed infrastructure in an attempt to unlawfully install a bulk meter.
43. He was categorical that the change of meter location was in line with the 2nd respondent's mandate to deliver water services to the people of Nairobi between GM and KAPA oil, who are rightfully within the 2nd respondent's jurisdiction.
44. He stated, moreover, that the 2nd respondent was better placed to determine the most appropriate place to install the meter.
45. Lastly, he asserted the petition had many shortfalls as the infringed rights and the manner they were infringed were not properly outlined in the petition.

IP's case

46. A response was made by a replying affidavit that was deposed by its Chief Executive Officer (IP's CEO), Eng. Robert Gakubia, and it was deposed on 13/08/2019.
47. He stated the IP was created in March 2003 as the national regulator for water and sanitation services, and such a creation was a result of raft reforms in the water sector envisaged under the *Water Act* (2002).



48. Furthermore, its statutory functions were retained under Sections 70 and 72 of the [Water Act](#) (2016), and its functions were to realise sustainable water systems and development set out by Part 1 of the Fourth Schedule of [the Constitution](#).
49. He asserted the IP's function breathed life into Articles 21, 43(1) (d), 46 and 191 of [the Constitution](#) and it was to ensure consumers' rights in the provision of water and sewerage were well protected and it did so by licencing and regulating water service providers including the petitioner.
50. He argued that the 1st and 2nd respondents were duly licenced by it to supply water within designated areas and by a framework, the 1st respondent supplied water to the 2nd respondent through the disputed infrastructure.
51. Further, he asserted that in carrying out its duty, the IP set the tariff charged by the 2nd respondent to the petitioner for water supply.
52. He contended the petitioner was guilty of material non-disclosure on certain inter-cabinet secretarial engagements as evidenced by various correspondence.
53. He accused the petitioner of breaching several laws, including operating without a license, overcharging water consumers with an unregulated water bill, failing to pay a regulatory levy to the IP of 1%, and operating as a water provider, yet the EPZA Act never gave the petitioner such a mandate. He averred that the petitioner's actions were contrary to the provisions of the [Water Act](#) (2016).

Petitioner's response to the 1st respondent's and IP's cases

54. In response to these cases, the petitioner's CEO, who had earlier been mentioned, deposed a supplementary affidavit sworn on 13/09/2019. Although some of the averments therein are spent as they dealt with the motion dated 5/07/2019, a portion of it was on the IP's replying affidavit.
55. Probably because of the nature of this particular supplementary affidavit, the petitioner was granted leave to file a further affidavit, and in compliance, an affidavit deposed by its Assistant Manager Beatrice Muiruri on 25/03/2025 was filed.
56. In them, it was averred the petitioner was not guilty of non-disclosures as the documents presented by the IP as a demonstration of such transfer of the disputed infrastructure fell short of the Water Rules. She also maintained that the 1st respondent and IP had misconstrued the law.
57. She asserted that the AWWDA was established under Section 65 (1) of the [Water Act](#) (2016) by the relevant cabinet secretary. She contended this was done by legal notice no. 28 of 2019, and it covered the areas of Nairobi, Kiambu and Murang'a.
58. She acknowledged that though the cabinet secretary had the authority to define the geographical scope of a water work, no such designation was ever made on the disputed infrastructure.
59. She stated this was so since the gazette notice no. 4574 of 19/07/2020 on the AWWDA referenced the Gigiri-CBD-Mavoko-Kitengela pipeline which was a different property from the disputed infrastructure.
60. She stated that, in any case, the AWWDA could not purport to cancel the petitioner's permit unless it first complied with Sections 46 and 48 of the [Water Act](#) (2016).
61. She insisted that the saving provisions of Section 114 of the repealed [Water Act](#) 2002 and Section 157 of the [Water Act](#) (2016) allowed the petitioner to carry out its water undertaking services. She further



asserted that the management of the disputed infrastructure had never been under the control of WSB or AWWDA.

62. She stated that although the Water Rules outlined several procedures for the transfer of water infrastructures to WSB, the relevant cabinet secretary had not undertaken the process of undertaking the transfer of the disputed infrastructure from the petitioner.
63. She contended ELC Case no. 35 of 2010 had already determined the disputed infrastructure belonged to the petitioner and the instant petition was on the unlawful interferences over the water infrastructure on diverse dates in 2019, which were issues that were not in ELC Case no. 35 of 2010.
64. Significantly, the 3rd and 4th respondents did not participate in these proceedings.

Parties' written submissions

65. As directed by the court, the petition was canvassed by written submissions. The petitioner's law firm on record M/s. Munyai Muthama & Kashindi Advocates filed written submissions dated 25/03/2025 and a supplementary one dated 30/04/2024.
66. By them, the following issues were framed for resolution, whether the petitioner's constitutional rights had been violated; whether the petitioner was a water undertaker and owned the disputed infrastructure, whether the petition was moot, whether the suit was res judicata and sub judice; whether there had been a violation of the petitioner's rights and whether the petition raised constitutional issues.
67. The 1st respondent's submissions were filed by the law firm of M/s. Mulekyo & Co. Advocates dated 7/05/2024 and identified the following issues for determination: whether the petition was moot; whether the petition was an abuse of the court process; whether there was a threat to the petitioner's rights; and who bears the costs of this petition.
68. The 2nd respondent's submissions were filed by the law firm of M/s. Wamae & Allen Advocates dated 1/12/2023 and identified the following issues for determination: whether the petitioner was entitled to the reliefs sought and whether the petition met the threshold of a constitutional petition.
69. Upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the parties' arguments on the particular issue as contained in the rival submissions and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Legal basis of the petition

70. The petition is expressed to have been brought under several provisions; even so, it states the particular provisions of *the Constitution* that were violated by the respondents are Articles 10, 40 and 47. These provisions provide thus: -

Article 10

- “(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.



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

Article 40 (1)

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

- (a) of any description; and
- (b) in any part of Kenya.”

Article 47 (1)

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

Preliminary issues.

71. Before I proceed further, it is paramount I set certain issues straight as they have already been determined by this court in *Kapa Oil Refineries Limited & 7 others v Export Processing Zones Authority & 2 others* [2019] eKLR (previous case) and in my humble opinion, it would be futile to regurgitate them in this judgment.
72. In this previous case, which has been referenced by the petitioner, the petitioner (1st defendant), 1st respondent (2nd defendant) and Tanathi Water Services board were sued by several limited liability companies that sued them over a sewer line they had connected at KAPA. This connection was made at the instigation of the Tanathi Water Services Board.
73. I have taken time to appreciate this decision that was rendered by my brother Angote J, and in it, the learned judge resolved some of the issues and determined the petitioner’s water undertaking permit had not been cancelled by operation of the law. The relevant excerpt of this decision is as follows: -
- “133. Unlike the local authorities whose mandate to provide water services was automatically curtailed by the provisions of the 2005 Rules, Section 112 and 114 of the *Water Act*, 2002 allowed the 1st Defendant to continue offering those services.”
74. This decision was rendered on 4/10/2019 which was during the subsistence of the *Water Act* 2016 which was and still is the law on water but this matter was filed shortly before the pronouncement of its outcome. In my view, this may explain why some of the issues in the previous decision and this case overlapped; nonetheless, I must categorically state this suit is not res judicata.
75. The legal landscape in the water sector has not changed much since this decision was rendered. Additionally, the petitioner’s permit, which was protected under the *Water Act* 2002, was preserved by the saving provisions of Sections 156 and 157 of the *Water Act* 2016.



76. By Sections 142 (2) (i) and 156 (4) of the Water Act 2016, the relevant Cabinet Secretary was required to enact regulations on the mode of transfer of functions, assets, liabilities and staff from one entity to another within 3 years from when the Water Act 2016 commenced. However, this has not happened to date.

Issues for determination

77. Turning to the matter at hand, I have carefully considered the pleadings, rival submissions, provisions of law relied upon, and judicial precedents cited, and the issues that arise for determination are as follows: -
- a. Whether the petition meets the threshold of a constitutional petition.
 - b. Whether upon establishment of AWWDA, the disputed infrastructure was vested in it and the petitioner's permit was cancelled.
 - c. Whether the petitioner proved its rights to property protected under Articles 10, 40 (1), and 47 (1) of the Constitution had been violated by the respondents.
 - d. What orders should be made concerning the petition, including an order on costs?

Analysis and determination

78. The issues that are identified in the preceding paragraph as arising for determination shall be addressed herein in a sequential manner.

a. Whether the petition meets the threshold of a constitutional petition.

79. In their affidavits, both the 1st and 2nd respondents contended this petition fell far short of the test since the complaints were not pleaded concisely, the provisions of law that were infringed were not disclosed, and the manner of violation was not disclosed.

80. In arguing this position, reliance was placed on the well-cited decision of Anarita Karimi Njeru Vs. Republic [1979] eKLR, where the court stated as follows:

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed ...”

81. Nevertheless, in the more recent decision of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, the Court of Appeal stated a constitution petition must be drawn with precision but its method of presentation does not have to be formalistic and what is key is that from reading the pleadings, the court can define issues. It stated as follows: -

“However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”



82. A summary of the petitioner's case and the legal basis of the petition was highlighted earlier in this judgment. Moreover, this court easily discerned the issues for determination, which were drawn from the pleadings.
83. As can be seen from the abridged facts, the legal foundation of the petition, the rights allegedly violated, and some of the reliefs sought, it is clear the claim met the principles of Anarita Karimi Njeru (Supra).
84. Consequently, I respectfully disagree with the 1st and 2nd respondents and find the petition has met the legal threshold and is properly before the court.

b. Whether upon establishment of AWWDA, the disputed infrastructure was vested in it and the petitioner's permit was cancelled.

85. Section 8(1) of the Water Act (2016) defines national public water works as water works which have been designated by the Cabinet Secretary through a notice published in the Gazette.
86. Of importance is that before the Cabinet Secretary gazettes a national water works, Section 67 of the Water Act (2016) mandatorily requires her to first consult the relevant stakeholders.
87. Since the 1st respondent contends the disputed infrastructure vested in AWWDA, this court is called upon to examine the relevant gazette notice.
88. By gazette notice no. 4574 of 6/07/2020, the Cabinet Secretary for Water, Sanitation and Irrigation designated the bulk water systems and water treatment facilities falling in the following jurisdiction as national water works that were vested with AWWDA: -

- “(a) Northern Water Collector Tunnel System comprising: Northern Collector Tunnel Phase 1, Kigoro Water Treatment Plant and water transmission pipelines from Thika Dam to Kigoro Treatment Works at Gigiri reservoirs.
- (b) Ruiru II Dam Water Supply System comprising Ruru II Dam, Ruiru II Dam Water Treatment plant and Ruiru II water transmission pipelines.
- (c) Karimenu 11 Dam Water Supply System comprising Karimenu 11 Dam, Karimenu 11 Dam Water Treatment Plant and Karimenu II water transmission pipelines.
- (d) The water supply system to Nairobi, Thika Dam, Mwagu and Kimakia intakes, Ngethu Water Treatment Plant, Ruiru Dam, Sasumua Dam, Sasumua Water Treatment Plant, Kabete Water Treatment Plant, Ng'ethu-Gigiri Transmission pipelines, Sasumua-Kabete transmission pipelines, Kabete-Karen-Ongata Rongai pipeline and Gigiri-CBD-Mavoko-Kitengela pipeline.
- (e) Dandora Estate Sewerage Treatment Plant and Kariobangi Wastewater Treatment Plant
- (f) Nairobi Dam”

89. Having scrutinised the legal notice no. 74 of 3/06/1997, which appointed the petitioner as a water undertaker, its area of operation is very explicit and cannot be confused with the areas of jurisdiction vested in AWWDA. This gazette notice no. 74 of 3/06/1997 states in part: -

“The Export Processing Zones Authority



to be a water undertaker responsible for provision of an adequate supply of water within the boundaries of the Export Processing Zones Area, certain properties outside them but along the pipeline route from Nairobi City Council Water Supply off-take near Firestone Factory

This area is delineated in BLUE, on Plan No. EPZA, WU/01 deposited in the Office of the Director of Water Development, Maji House, Nairobi and the Office of Export Processing Zones Authority, Nairobi”

90. Moreover, the mere fact that there was no evidence of prior consultation between the cabinet secretary and the petitioner as required by Section 67 of the *Water Act* (2016) confirms there was never any intention for the disputed infrastructure to be vested in AWWDA.
91. Therefore, on this issue, I agree with the petitioner and find the creation of AWWDA had no bearing whatsoever on the disputed infrastructure and, or the petitioner’s permit.

c. Whether the petitioner proved its rights to property protected under Articles 10, 40 (1), and 47 (1) of *the Constitution* had been violated by the respondents.

92. Palpably, the petitioner’s main bone of contention was that the respondents had allegedly vandalised and or interfered with the disputed infrastructure which it termed as unlawful, unjustified, unreasonable, unwarranted and in bad faith.
93. According to it, the respondents had infringed its constitutional rights under Articles 10, 40 and 47 of *the Constitution*.
94. In matters of evidence, it is trite law that he who alleges must prove, and Section 107 of the *Evidence Act* stipulates as follows;

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

95. On evidentiary burdens, courts are usually guided by Sections 107-109 of the *Evidence Act*. The alleged violation of its constitutional rights having been rebutted, the legal and evidential burden shifted to the petitioner to prove its case.
96. By Section 107(1) of the *Evidence Act*, the burden lay upon the petitioner to substantiate its allegations as such evidence was essential to its case. See Peter Ngari Kagume & 7 Others V Attorney General [2009] eKLR.
97. This court also concurs with the decision of Leonard Otieno v Airtel Kenya Ltd (2018) eKLR, where Mativo J (as he then) expressed himself as follows;

“Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”



98. Now, turning to the petition, the petitioner made several allegations against the respondents and in my humble view, I must agree with the 2nd respondent's counsel that these assertions were unsubstantiated by tangible evidence.
99. It emerged from this case that the petitioner, 1st and 2nd respondents have a working relationship as the petitioner receives water from the 2nd respondent for its use and other 3rd parties and at the same time, uses the disputed infrastructure to convey water to the 1st respondent.
100. Unfortunately, none of the parties availed agreements (if any) for this court to appreciate their contents and whether they had a bearing on the various correspondence from the 2nd respondent to the petitioner.
101. Be that as it may, as for the acts of trespass or vandalism allegedly by the 1st respondent, the petitioner contended it was the registered owner of the LR. no. 18474/1, which was trespassed onto and vandalised by the 1st respondent on 21/02/2018.
102. It was based on this ownership that it produced several photographs as proof of acts of trespass and vandalism.
103. However, this LR. no. 18474/1 was not the subject of determination in the previous case, and no finding was ever made on its ownership in respect of it.
104. Additionally, the dispute in the previous case dealt with the issue of ownership of a sewerage trunk-line sewer line running from the petitioner's location to a place called Kinanie and not the disputed infrastructure.
105. Moreover, the petitioner did not produce a copy of the title document of LR. no. 18474/1 or a search certificate thereof to prove ownership. Suffice it to say, the production of vouchers and settlement thereof by World Bank did not prove ownership of the disputed infrastructure.
106. In my view, it was expected that the petitioner would produce copies of title documents, certificates of official searches, way leave registration (if any), the plan mentioned in gazette legal notice no. 74 of 1997 and architectural designs, but that was not so.
107. In the absence of these crucial documents, its allegations of vandalism that allegedly took place on LR. no. 18474/1 or on the disputed infrastructure was bound to fail as it never proved ownership or, if at all, that LR. no. 18474/1 ever existed.
108. Furthermore, the petitioner alleged the 2nd respondent made attempts to install a bulk meter on the disputed infrastructure and that the 1st respondent was seen patrolling it. However, these assertions were unsubstantiated by tangible evidence.
109. The correspondence of 12/02/2024 by the 2nd respondent to the respondent merely expressed its intent to undertake a meter installation at the disputed infrastructure and even invited the petitioner to get in touch with it in case of any clarifications. This letter was categorical that it would not interfere with the petitioner's water supply.
110. The petitioner did not respond to the contents therein but instead forwarded an inter-ministerial letter which explained why a bulk water meter could not be installed by the 1st and 2nd respondents on its infrastructure.
111. It is uncertain if this infrastructure included the disputed infrastructure. After this, there was no further communication by the 2nd respondent to the petitioner.



112. On examination of the correspondence between the 2nd respondent and petitioner, I agree with the 2nd respondent's counsel that the correspondence between them could not be construed as a violation of Articles 10, 40 and 47 of *the Constitution*.
113. Similarly, too, allegations against the Machakos County Commissioner were unsupported by any shred of evidence. As a result, I find the claims against the respondents were not proved to the required standards.
114. Upon consideration of the petition herein, I find the petitioner has failed to provide credible evidence in support of the alleged violation of its constitutional rights.
115. Having failed to prove that the respondents had violated the petitioner's rights under Articles 10, 40 and 47 of *the Constitution*, the court also finds and holds that the basis upon which any reliefs sought could be granted fail.
116. The upshot is that I find the petition dated 5/07/2019 is without merit and I hereby dismiss it. It is trite law costs follow the event but for the reason all parties are government entities, each party shall bear its respective costs.

Orders accordingly.

DATED AT MACHAKOS THIS 11TH DAY OF MARCH, 2025

HON A. Y. KOROSS

JUDGE

P11. 03.2025

Delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Miss Wango'ndu holding brief for Mr. Tugee for Petitioner.

Mr. Otieno together with Mr. Nadio and Mr Mutugi for 2nd respondent.

Mr. Mulekyo for 1st respondent.

N/A for 3rd and 4th respondents.

Ms Kanja- Court Assistant

