



**Ndambuki v County Government of Makueni & 4 others (Environment & Land
Petition E001 of 2023) [2025] KEELC 4971 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 4971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION E001 OF 2023**

EO OBAGA, J

JULY 3, 2025

**IN THE MATTER OF THE CONSTRAVENTION OF UNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 10, 28, 40, 42, 60, 69 & 70 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL
OF RIGHTS UNDER ARTICLE 22 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL
OF RIGHTS UNDER ARTICLE 23 OF THE CONSTITUTION**

AND

**IN THE MATTER OF SECTIONS 3, 42, 58, 59, 86 OF THE ENVIRONMENTAL
MANAGEMENT AN CORDINATION ACT, 1999 AND ITS REGULATIONS**

AND

IN THE MATTER OF SECTION 7, 11, 70, 110 AND 139 OF THE WATER ACT, 2016

AND

**IN THE MATTER OF THE AFRICAN CONVENTION ON THE
CONSERVATION OF NATURE AND NATURAL RESOURCES, 2016**

BETWEEN

THOMAS NDUNDA NDAMBUKI PETITIONER

AND

COUNTY GOVERNMENT OF MAKUENI 1ST RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND
RESPONDENT**



WATER RESOURCES AUTHORITY	3 RD RESPONDENT
RUTH MBENEKA	4 TH RESPONDENT
PENINNAH MWIKALI	5 TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed this Constitutional Petition on 25th August, 2023 in which he sought the following reliefs:
 - a. A declaration that the drilling, constructions and consequential piping of water as carried out by the agent of the 1st Respondent in Title Number Makueni/Uvaleni/161 or any portion thereof is unlawful and threatens, infringes and/or violates the rights of the Petitioner and residents of the surrounding area under Article 42 as read with Article 60, 69 and 70 of *the Constitution*.
 - b. A declaration that the 1st Respondent threatened and/or violated the rights of the Petitioner under Article 40 of *the Constitution* by trespassing and laying the intended pipes and construction machines through the title number Makueni/Uvaleni/1761 or any portion thereof without compensation.
 - c. A declaration that the 4th and 5th Respondents had no capacity to sign the proposal document of May, 2023 as land owners of title number Makueni/Uvaleni/161 or any portion thereof and the proposal document of May, 2023 is thus null and void for want of capacity.
 - d. A judicial review order of certiorari be issued to bring to this court and quash the proposal document of May, 2023 and the decisions and deliberations made by the 1st Respondent in furtherance of construction, use and application of the Mbiini borehole.
 - e. A declaration that the 1st Respondent infringed and/or violated the rights of the beneficiaries of the estate of Philip Ndambuki Mukelelya and the petitioner under Article 40 of *the Constitution* by purporting to compulsorily acquire title number Makueni/Uvaleni/161 or any portion thereof without due process of the law and compensation.
 - f. A declaration that the 1st, 2nd and 3rd Respondents jointly and severally, by failing to develop a proper monitoring process to ensure sustainable management of environment including assessing the efficacy of the Mbiini borehole and its effect to the surrounding ecosystem infringed the rights of the Petitioner under Articles 10, 28, 42, 60 and 69 of *the Constitution*.
 - g. A permanent injunction be issued against the 1st Respondent barring its agents or whomsoever from trespassing, carrying out any drilling, intended piping, constructions or in any manner whatsoever claiming ownership, possession or access to the Mbiini borehole on title number Makueni/Uvaleni/161 or any portion.
 - h. A permanent injunction be issued against the 1st Respondent barring its agents or whomsoever from trespassing, carrying out any pipping, constructions or in any manner whatsoever claiming access to title number Makueni/Uvaleni/1761 or any portion.



- i. An order directing the 1st Respondent to compensate the Petitioner and the Estate of the Proprietor of title number Makueni/Uvaleni/161, the late Philip Ndambuki Mukelelya for trespassing on to title number Makueni/Uvaleni/161 or any portion.
- j. An order directing the 1st Respondent to compensate the petitioner for trespassing on to his title number Makueni/Uvaleni/1761 or any portion.
- k. An order of prohibition under Article 23 of *the Constitution* be issued jointly and severally against the Respondents prohibiting them and their agents, servants or employees from undertaking any further decision or action in respect of the Mbiini borehole project.
- l. An order for reparation be issued compelling the 1st Respondent to reinstate title number Makueni/Uvaleni/161 and title number Makueni/Uvaleni/1761 to their initial position by backfilling the impugned borehole and removing all construction related and borehole drilling materials resting thereon.

Background

2. In May, 2023 the Kasikeu ward climate planning Committee submitted a project proposal to the Makueni County Climate Change and Planning Committee in respect of drilling of a water borehole at Mbiini. The project was duly approved and the project went ahead and has since been completed. The Petitioner made an application seeking to have injunctive orders stopping the project but the application was overtaken by events as the project was completed before the application could be heard.

Petitioner's Contention

3. The Petitioner contends that he is the registered owner of LR. No. Makueni/Uvaleni/1761 and a beneficial owner of the adjacent title LR. No. Makueni/Uvaleni/161 which is registered in the name of Philip Ndambuki Mukelelya who is deceased. In or around May, 2023 the 4th and 5th Respondents agreed to give a portion of LR. No. Makeune/Uvaleni/161 measuring 20x15 metres for the construction of Mbiini water borehole.
4. It is the Petitioner's contention that the consent which the 1st Respondent obtained from the 4th and 5th Respondents to construct a borehole on LR. No. Makueni/Uvaleni/161 was null and void as the 4th and 5th Respondents had no legal capacity to grant the said consent over land belonging to Philip Ndambuki Mukelelya who is deceased.
5. The Petitioner states that during the construction of the borehole, the 1st Respondent brought heavy machinery and pipes and in the process, they encroached on his adjacent land thus causing acts of waste. It is his contention that the waste was caused by the loading and offloading of the heavy machinery which were involved in the delivery of equipment and construction materials.
6. The Petitioner further contends that the 1st Respondent purported to compulsorily acquire portions of LR No. Makueni/Uvaleni/161 and 1761 without compensation thus infringing his constitutional rights and those of the beneficiaries of LR No. Makueni/Uvaleni/161 who include himself. The National Land Commission was not involved in the acquisition of the land.
7. In the same petition, the Petitioner contends that upon the 1st Respondent realising that they had not followed the law, a survey was conducted and it was stated that the 20x15 portion where the borehole was constructed was on riparian land.



8. The Petitioner further states that there was no Environmental Impact Assessment report made; that the project did not have any approval from National Environment Management Authority and that there was no public participation.
9. The Petitioner contends that the 2nd and 3rd Respondents failed in their statutory duties. On the part of the 2nd Respondent, the Petitioner contends that the 2nd Respondent did not monitor the project as required by law.
10. The Petitioner further contends that the project failed to recognize the ecosystem of the adjacent Kwangole River contrary to Articles 42, 60 and 69 of *the Constitution* and was against the principles of environmental governance under International Law. He states that the project has been completed in total disregard of principles of sustainable development which dictate that the environmental needs of the present must be met without compromising the ability of future generations to meet their own.
11. Though the 1st, 2nd and 3rd Respondents entered appearance, they did not file any response to the petition. The 1st Respondent filed a notice of Preliminary Objection against the Petitioner's notice of motion and petition but the preliminary objection was dismissed vide ruling delivered on 22nd May, 2024.

Petitioner's Submissions

12. The Petitioner filed written submissions dated 21st November, 2024. The Petitioner submitted that his constitutional rights under Article 40 of *the Constitution* were violated. He states that pipes were laid under his property known as Makueni/Uvaleni/1761 and that machines were passing through his land while going to drill a borehole on Makueni/Uvaleni/161.
13. The Petitioner further submitted that he is one of the beneficiaries of Makueni/Uvaleni/161 where the borehole was constructed but that he was not compensated. The Petitioner relied on the case of Patrick Musimba –vs- National Land Commission & 4 others.

“As the taking of a person's property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the state by both *the constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the state or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”.

14. The Petitioner also submitted that the 4th and 5th Respondent had not authority to sign an agreement with the 1st Respondent as they did not have power of attorney as regards his property or grant of letters of administration in respect of his father's property being Makueni/Uvaleni/161. He submitted that the 4th and 5th Respondents' act of giving consent to the 1st Respondent to drill a borehole which affected his property and that of his father was a nullity. He relied on the case of Republic –vs- Karisa



Chengo & 2 others (2017) eKLR where the court quoted Lord Denning M.R. in Benjamin Leonard Mcfoy United African Company Limited (UK)(1962) AC 152 where it was held as follows:

“If an act is void, then it is in law a nullity. It is not only bad....and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

15. The Petitioner also submitted that various provisions of the *Environmental Management and Co-ordination Act* No. 8 of 1999 (EMCA) were breached.

Analysis and Determination

16. I have carefully considered the petition by the Petitioner as well as his submissions. The Supreme Court clearly set out what a petitioner ought to demonstrate in his/her petition in the case of Communication Commission of Kenya & 5 others –vs- Royal Media Services Limited & 5 others (2014) eKLR where it was stated as follows:

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievances. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru –vs-Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement”.

17. The Petitioner is alleging that his constitutional rights were violated. He cites Article 40 and 42 of *the Constitution*. I will examine whether his rights under the aforesaid articles were violated and whether he is entitled to the reliefs he is seeking.

18. Article 40 of *the Constitution* states as follows:

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 26 Constitution of Kenya [Rev. 2022]
 - b. In any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person—
 - a. To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - a. Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or



- b. Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. Requires prompt payment in full, of just compensation to the person; and
 - ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.
 - 4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
 - 5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
 - 6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
19. The Petitioner alleges that a portion of his father’s property known as Makueni/Uvaleni/161 was compulsorily taken without compensation. In the case of his property known as Makueni/Uvaleni/1761, he claims that pipes were laid on his property which have limited the use of his land. He also states that heavy machines were passing through his land.
20. There was no compulsory acquisition which was undertaken over either the Petitioner’s property or his father’s property. The Petitioner has stated in his petition that the 1st Respondent caused a survey to be done which showed that the portion of 20x15 metres from Makueni/Uvaleni/161 fell on riparian land. If this is the Petitioner’s own position, then the issue of compulsory acquisition does not arise as all riparian land is not private land which can be acquired by either the County Government or National Government.
21. If heavy machinery passed through the Petitioner’s land and pipes were laid as alleged, then this is no basis upon which a Petitioner can allege violation under Article 40 of *the Constitution* on the basis of compulsory acquisition. If the heavy machines destroyed his land in whichever form, his remedy lies elsewhere but not through a Constitutional Petition.
22. Article 42 of *the Constitution* is tied to Article 70 of the same constitution. The two Articles provide as follows:
- Article 42:
- 1. Every person has the right to a clean and healthy environment, which includes the right—
 - a. To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
 - b. To have obligations relating to the environment fulfilled under Article 70.
 - 1. If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, [Rev. 2022] Constitution of Kenya 39 violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
 - 2. On application under clause (1), the court may make any order, or give any directions, it considers appropriate—



- a. To prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - c. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
3. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
23. In the case of Communication Commission of Kenya & 5 others (Supra), the Supreme Court of Kenya stated that there is necessity of a link between the aggrieved party, the provisions of *the constitution* alleged to have been contravened and the manifestation of contravention or infringement. The Supreme Court went on to state that such principle prays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
 24. In the instant case, the Petitioner had moved to stop the drilling of the borehole. He did not succeed as the project went on and was completed. The project is benefitting many members of the community. The Petitioner has not even remotely demonstrated how that project would affect the ecosystem of the adjacent Kwangole River and how it will affect or has affected the vast green basin of Kwangole River or even how the borehole will degrade or has degraded the surrounding vegetation and water catchment areas.

Disposition

25. The Petitioner has not demonstrated how the constant drawing of ground water from the borehole over time will destabilize the surrounding ecosystem resulting in drying up of wells and shallower boreholes or degradation of the green basin of Kwangole River.
26. As the Petitioner has not demonstrated any infringement of his rights under Article 40 and 42 of *the Constitution*, he is not entitled to any of the reliefs in the petition. The Petitioner did not disclose his relationship with the 4th and 5th Respondents yet he wanted the court to declare that they did not have capacity to sign the proposal document of May, 2023 as land owners of Makueni/Uvaleni/161. This in itself shows that the Petitioner was not bringing this petition in good faith as was observed in the case of Communication Commission of Kenya & 5 others (Supra). I therefore find that the constitutional petition by the Petitioner is devoid of merit. The same is dismissed with no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY, 2025.

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HON. E. O. OBAGA

JUDGE

In The Presence Of:

Mr. Mapesa for Petitioner

Ms. Majune for 2nd Respondent

