



Munyua & 8 others (Suing as Njenga Crescent Owners) v Francis Murigi Njenga (F.M.N) Family & another; City County Director of Urban Planning Development & Management & another (Interested Parties) (Environment & Land Petition E003 of 2023) [2024] KEELC 5153 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E003 OF 2023**

**AA OMOLLO, J
JULY 4, 2024**

BETWEEN

**KENNEDY KARIUKI MUNYUA 1ST PETITIONER
CAROLINE NYORORO 2ND PETITIONER
LUCY WAIHERA KARIUKI 3RD PETITIONER
ENIDJOY MAGIRI 4TH PETITIONER
DR. MILLICENT WANYOIKE 5TH PETITIONER
DR. JOE WANYOIKE 6TH PETITIONER
MWAI MATHENGE 7TH PETITIONER
KENNETH NJUGUNA 8TH PETITIONER
MALWEYI INWANI 9TH PETITIONER
SUING AS NJENGA CRESENT OWNERS**

AND

**FRANCIS MURIGI NJENGA (F.M.N) FAMILY 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 2ND RESPONDENT**

AND

**CITY COUNTY DIRECTOR OF URBAN PLANNING DEVELOPMENT & MANAGEMENT INTERESTED PARTY
THE DIRECTOR OF SURVEY INTERESTED PARTY**



JUDGMENT

Petition

1. The Petitioners filed a Petition dated 22nd September 2023 against the 1st and 2nd Respondents seeking for the following prayers;
 - a. A Declaration that the 1st Respondent's actions of blocking the natural drainage system through his PLOT LR. 2259/450 NDEGE LANE, KAREN threatens/violates Articles 25, 26, 28, 40 and 43 (1) (a) of *the Constitution* of Kenya 2010.
 - b. A Declaration that the 1st Respondent's action of blocking the natural drainage system through his PLOT LR. 2259/450 NDEGE LANE, KAREN is unconstitutional, arbitrary, wrongful, null and void and should be stopped forthwith. A Declaration that Approvals No. NEMA/EIA/SPA/13267 and NEMA /SRP/NRB/5/2/1764 which authorized the construction on PLOT LR. 2259/450 NDEGE LANE, are null and void due to noncompliance with the statutory procedure of conducting a proper Environmental Impact Assessment (EIA)
 - c. An Order of mandatory injunction compelling the 1st and 2nd Respondent to immediately unblock the blockage of the natural stormwater drainage on PLOT LR. 2259/450 NDEGE LANE, and reinstate the natural flow of water from the neighbouring properties.
 - d. An Order of permanent injunction barring 1st Respondent from blocking the natural stormwater drainage on PLOT LR. 2259/450 NDEGE LANE, KAREN.
 - e. An Order of mandatory injunction compelling the 2nd Respondent to revoke Approvals No. NEMA/EIA/SPA/13267 and NEMA/SRP/NRB/5/2/1764 and stop construction on PLOT LR. 2259/450 NDEGE LANE, until a proper Environmental Impact Assessment (EIA) is conducted.
 - f. Costs of the Petition
 - g. Any other order that the court may deem just and expedient to grant.
2. The Petition was supported by an affidavit sworn on the 22nd September 2023 by Kennedy Munyua. The Petitioners stated that they are members of a neighborhood association for persons owning homes along Ndege Lane, Off Ndege Road in Karen while the 1st Respondent is the registered and beneficial owner of land known as PLOT LR. 2259/450 situated at NDEGE LANE, KAREN herein after referred to as "the suit land" wherein he is currently constructing residential units.
3. The Petitioners averred that their homes which are more than twenty (20) homes each sitting on more than an acre of land with the neighbourhood extending from Ndege Road to Karen County Club have been in existence for years and throughout depended on the natural drainage of stormwater from the upstream homes bordering Karen County Club towards Ndege Road where there is a main drainage for stormwater, with the last property being the suit land. That throughout the said period, the suit land was an open field, hence the natural flow of stormwater from the upstream properties through part of the land remained uninterrupted.
4. The Petitioners stated that around June 2023, the 1st Respondent commenced mobilization on site for purposes of construction of residential units on suit land well aware that the same is important to the drainage of the neighboring properties. That they wrote a letter to the 2nd Respondent dated



- 12th June 2023 objecting to the grant of the NEMA approval for the Proposed Construction until the question of drainage of stormwater in the neighbourhood is properly and formally addressed but the 2nd Defendant failed to issue a response.
5. The Plaintiffs further stated that despite their objection, they witnessed the erection of a Construction Board on the subject plot indicating that the 2nd Respondent had furnished the 1st Respondent with NEMA Approvals No. NEMA/EIA/SPA/13267 and NEMA/SRP/NRB/5/2/ 1764 granting them a go ahead to proceed with the construction.
 6. They contended that being the immediate neighbours and owners of nearby properties were never invited to participate in the preparation of the Environmental Impact Assessment (EIA) Report before the NEMA Approvals were issued, none of them signed or were invited to sign the said Report and there has been no interruption or inspection from the necessary authorities.
 7. That the 1st Respondent blocked the natural storm water drainage from the plots upstream thus leaving the Petitioners' exposed to severe flooding in the event of heavy rains and all their efforts to seek the redress of the 1st and 2nd Respondents to open up the natural stormwater drainage path have been in vain. That the 1st Respondent has declined to attend meetings to deliberate on the blockage issue whilst the 2nd Respondent has failed to respond to any formal letters and follow ups by the Petitioners seeking his intervention to unblock the drainage.
 8. They further contended that the issuance of approvals by the 2nd Respondent was irregular and unlawful as the same was issued without the 1st Respondent conducting a proper Environmental Impact Assessment (EIA). That by failing to respond to the issues that were formally raised to it by the Petitioners, the 2nd Respondent has failed to perform its statutory functions as designated under section 9(2) of coordinating environmental activities and protecting the rights of the Petitioners to a clean and healthy environment.
 9. The Petitioners stated that through blocking the natural stormwater drainage in their neighbourhood, the 1st Respondent threatened their right to a clean and healthy environment as provided under Article 42 of *the Constitution* by flooding their neighbourhood which will cause the emergence and transmission of waterborne diseases such as cholera, typhoid and malaria. That the storm water from upstream will carry garbage from upstream areas and deposit it in their homes due to the blockage of the water and its contents from flowing and joining the main drainage at Ndege Road and the stagnant water is a ripe for breeding of viruses, bacteria and their carriers such as mosquitos, pathogens whose breeding will threaten the healthy life of the Petitioners' and their families for years thus causing a direct threat to their right to their right to life as guaranteed under Article 26 of *the Constitution*.
 10. That the Petitioners have filed this claim as provided under Article 70 (1), Constitution, 2010 that if a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, 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.
 11. Further that as provided under Article 70 (2) on application under Article 70 (1), this Court has the powers to make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment and to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. Also Article 70 (3) stipulates that for the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.



12. The Petitioners contended that the blockage by the 1st Respondent of the natural stormwater drainage threatens their constitution right to property because when it rains, they will suffer irreparable losses arising from the flooding of their land and weakening of the structural integrity of their homes, their perimeter walls and fences will collapse due to the weight of flood water and the blockage of the rainwater exposing them to security threats to their property.
13. Further, they stated that the blockage of the natural drainage system by the 1st Respondent threatens their rights to human dignity as enshrined under Article 28 of *the Constitution* stating that that they will be forced to abandon their homes rendering them homeless and any stay in an environment that is rendered uninhabitable due to flooding and waterborne disease is an infraction of the Petitioners right to human dignity.
14. Also, they posit that the failure of the 2nd Respondent to perform its statutory duty to order the 1st Respondent to unblock the storm water path in anticipation of the approaching El-Nino rains is a direct threat to the Petitioners right to human dignity.

The Responses:

15. The 1st Respondent did not file any response to the Petition except a replying affidavit sworn by Francis Murigi Njenga on 30th September 2023 in opposition to the notice of motion dated 22/9/2023. In the said affidavit, the 1st Respondent contended that the Nairobi City County - Environment and Urban Planning Department considered his building plan number PLUPA-BPM-002527-N submitted on 30th May, 2023 and issued an approval of the same on 6th July, 2023. That the Nairobi City County considered the issues of drainage and wayleaves before granting the said approval, as evidenced by the conditions of approval annexed thereto.
16. The 1st Respondent averred that the prior to the filing of this Petition, the Petitioners raised the issue of drainage and their desire for a wayleave through the suit land with the Water Resources Authority. The Authority then contacted him for a response which was issued by his building contractors, Petcom Commercial Agencies through a letter to the Water Resources Authority received on 31st May, 2023. Further, that the Water Resources Authority conducted a site visit and through a letter dated 6th June 2023, concluded that the Petitioners' allegations were without merit. Also, that the Petitioners' have not adduced any expert report or even compelling evidence to back their allegations and merit the grant of the orders sought.
17. According to the 1st Respondent, the Petitioners are not concerned with any water drainage issues rather they oppose the fact that he is constructing on the property on the basis of family and succession disputes. Hence the reason why the Petitioners have not backed their allegations with a single report from any technician or expert. It is his opinion that the Petitioners are abusing the process of the court by bringing unfounded and bare application which seeks to stop him from constructing on his property.
18. The 1st Respondent averred further that if the orders sought are granted, it would require a complete re-design of the project site and the fresh submission of building plans to the Nairobi City County Government which would cost him a great expense. He urged the court to dismiss the application so that he is allowed to continue building as per the plans approved.
19. The 2nd Respondent filed a replying affidavit sworn by Catherine Thaithi on 27th February 2024 outlining the sequence of events leading to the issuance of an approval to the 1st Respondent's project. She deposed that in the inspection report dated 9th October 2023 they first received a complaint from Dr. F A Malweyi (0717176891) of an ongoing illegal development being undertaken on a wetland and



- raised the issue with blockage of storm water drain from their properties by the developer, thus raising risk of flooding.
20. That Environmental inspectors visited the site on 25th May 2023 and established that there were excavation activities with an intention to construct a single dwelling unit and the same had not been licensed by the 2nd Respondent and also there was a constructed storm water drainage that had been constructed by the neighbours and was discharging into the suit land.
 21. Further, that the 1st Respondent was issued with an environmental improvement order to stop the construction and apply for an Environmental Impact Assessment from the 2nd Respondent. The 1st Respondent submitted a summary project report on 7th June 2023 and an approval was issued on 27th June 2023.
 22. Ms Catheline stated that 2nd Respondent followed due process in the review of the 1st Respondent's summary project report in compliance with the legal provisions of EMCA and its subsidiary legislations. In detail that the project in subject which is residential (maisonette) development is classified as 'low risk' under the second schedule of EMCA as amended by Legal Notice 31 of 2019, therefore he was required to submit a summary project report of the likely environment effect of the project as provided in regulation 7(1) of the Environmental (Impact Assessment and Audit Regulations) 2003 as amended by Legal Notice No. 32 of 2019 which was submitted on 7th June 2023 and assigned a reference number, NEMA/SPR/NRB/5/2/1764.
 23. That under regulation 7(3) of the regulations, the Authority undertook screening of the summary project report within five days and issued the proponent with an approval to proceed with the project because it considered the project not likely to have any significant adverse environmental impact.
 24. Further, that the 1st Respondent's report was reviewed and issues raised addressed on 15th June 2023 to wit Water Resources Authority (WRA) in a letter dated 6th June 2023 advised that the property is neither a wetland nor does it border a stream or water body, the County had approved the single dwelling unit and the deed plan did not show provision of a storm water drainage through the said property.
 25. The 2nd Respondent's officer averred that another site visit was conducted on 26th June 2023 and it was ascertained that there is no storm water way leave delineated by the survey plan thus the 1st Respondent's project was issued with an EIA summary project approval No. EIA/EIA/SPA/13267 for the proposed project on 27th June 2023.
 26. She explained that the 1st Respondent's application was processed at the summary project level in line with regulation 7 (1), (2) and (3) of the regulations which does not require the project proponent to seek the views of the immediate neighbours and which is only required where the summary project report has been upgraded to a comprehensive project report. It is only where a project report has been upgraded to a full study that the same is processed in accordance with part III of the regulations and which would require the proponent to publicize the project in the newspapers, the radios and convene public hearings as averred by the petitioners.
 27. The 2nd Respondent contended that pursuant to section 58 (5) of EMCA and regulation 7(6) of the regulations, project reports are prepared and signed by a registered environmental impact assessment expert and not by the 1st Respondent's neighbours as alleged in the petition. The deponent stated that on 30th June 2023, she received a further complaint from Dr. Dr. F A Malweyi (0717-176891) seeking intervention to have the drainage unblocked but advised that there was no drain through the suit land and that they should drain storm water to the access road. She further advised them to liaise



with Nairobi City County Engineer to construct a storm water drainage along Ndege Lane to join Ndege road.

28. The 2nd Respondent contended that the present case is one of physical planning and specifically the provision of a way leave for storm and rain water drainage, which is the mandate of the Nairobi City County. In addition, the issues raised in paragraphs 15 and 16 of the Petition as well as prayer (c) and (d) of the petition touch on the EIA summary project report approval process and can only be properly ventilated at the National Environmental Tribunal as provided for in sections 125 and 129 of EMCA 1999.
29. The 1st Interested Party filed grounds of opposition dated 26/3/2024 stating that the Petition filed does not disclose any cause of action against them as an Environment Impact Assessment is solely a function of the 2nd Respondent. That the 1st Interested Party does not take part in conducting environment impact assessment. It pleaded that it has not in any way violated the Petitioners constitutional rights; and that the Petition does not meet the threshold as provided for in the case of Anarita Karimi Nieru v Republic (1976-1980) KLR [12721].

Submissions:

30. The Petitioners filed submissions dated 25th April 2024 framing the issues for determination to be whether they have a right to the flow of natural stream water from their properties through the suit land vide the impugned channel, whether the blockage of the impugned stormwater drainage is a violation of their Right to a Clean and Healthy Environment and the Right to Life , whether flooding of their properties threatens the structural integrity of their mansions in violation of their proprietary constitutional rights and whether the 2nd Respondent (NEMA) was justified in granting the 1st Respondent approvals to block the storm water drainage.
31. In reliance to the case of Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR, which behoves every person to play an active role in environmental protection, they submitted that for the longest they have depended on the natural drainage through the impugned channel and the said flow of natural stormwater from their properties is an integral part of their right to a healthy and clean environment.
32. That the blocking of the natural storm water drainage by the 1st Respondent has caused excessive flooding in their properties as there is no other natural route that rain water can take to exit and drain on the proper drainage that is available along ndege road.
33. The Petitioners submitted that the act of blocking the natural drainage by the 1st Respondent and allowed by the 2nd Respondent, causes a threat to their right to a clean and healthy environment as stipulated under Article 42 of *the Constitution* of Kenya 2010. That with excessive rains, they risk having the structural integrity of their homes irredeemably weakened, and incurring potential losses.
34. Further, the Petitioners submitted that the said blockage of the drainage which will cause flooding leading to collapse of their perimeter walls and fences due to the weight of the rainwater hence threatens their right to property and protection of the property from threats and destruction as provided in Article 40 of *the Constitution*. That there is a risk of being forced out of their homes to seek accommodation elsewhere thus a threat to their human dignity.
35. The Petitioners cited the case of Linda Telles v Director of Planning, Compliance and Enforcement & 6 others [2018] eKLR to state that nuisance that interferes with an owner is sufficient cause for granting an order of permanent injunction and compensation. And in the present case, the Petitioners' blockage



- of stormwater is not only a nuisance, but an action that can also lead to permanent destruction of the property.
36. They argued that from the conduct of the 2nd Respondent, it has failed in its statutory duty to issue an environmental restoration order to the 1st Respondent to rectify the blockage and failed in its duty as an expert in environmental matters. They cited the case of Saadiya Sheikh Muhiddin & another v Nessen Salim Karama & another [2022] eKLR where the court observed that an expert witness though cited by a party, owes a duty to the court to present expert evidence in a professional, independent, objective and non-biased beyond reproach manner and is expected to provide a well informed and balanced opinion on his area of expertise.
 37. The 1st Respondent filed submissions dated 7th May 2024 where he stated that he did not block the drainage as alleged by the Petitioners thus has not violated any of their rights. That as evidenced by the site visit, the Petitioners have dug drainage systems that emptied storm water to the suit land which was undeveloped.
 38. Further, that there is way leave drainage at the end of the Petitioners plots and his plot thus any party acting in good faith should have just dug a short trench to join the way leave drainage emptying storm water to Ndege Lane.
 39. In support of his argument, they also relied in the case of Linda Telles v Director of Planning, Compliance and Enforcement & 6 others [2018] eKLR, where the court cited Lawton L.J. Kennaway v Thompson [1981] 1 QB. 88 that the neighbour who is complaining must remember too that the other man can use his property in a reasonable way and there must be a measure of give and take and live and let live.
 40. The 1st Respondent submitted that the 1st Interested party (Nairobi City County) is by law the party responsible for storm water management citing the case of Amaka Development Ltd v County Government of Taita Taveta [2021] eKLR and [Auto Ancillaries Limited v Kenya Urban Roads Authority & 3 others \(Environment & Land Case 667 of 2015\)](#) 120241 KEELC 1795 (KLR) (21 March 2024) (Judgment).
 41. The 2nd Respondent filed submissions dated 2nd May 2024 stating that it followed due process in the review of the 1st Respondent's summary project report in accordance with Regulation 7 of the Environmental Management and Coordination Act, 1999 as the project is classified as low risk under the second schedule.
 42. It stated that the allegation by the Petitioners that they conspired with the 1st respondent to issue the approval is without basis and that the said approval was for the for the proposed construction of a 2-level maisonette development and not blockage of the drainage. That it is not within its mandate to designate natural and storm water drainage paths.
 43. In their submissions dated 4/6/2024, the Interested party stated that is under no obligation to conduct Environmental Impact Assessment which is solely the 1st and 2nd Respondents duty thus the Petition raises no constitutional issues for determination as against it hence frivolous, vexatious and bad in law.
 44. In support, the 1st Interested party cited the case of Kenya Section of the International Commission of Jurists v Attorney General & 2 others (Criminal Appeal 1 of 2012) [2012] KESC 4 (KLR), where the court considered what constituted "abuse of the process'. It contended that 1st Respondent brought an application to join them in the suit but have failed to prove a case against it and in support cited the case of [Ng'ang'a v Wangui & amp: another \(Civil Appeal 18 of 2020\)](#) 12022/ KEIIC 10228 (KLR) (14 June 2022) (Judgment).



45. After considering the pleadings filed and the submissions rendered and what in my view arise for determination is the question of whether or not the Petitioners have a right to have the storm waters pass through the 1st Respondent's land PLOT LR. 2259/450 NDEGE LANE, KAREN (the right of easement). The Petition is brought as an environmental complaint hence the first port of call is to look at what the law says. The *Environmental Management and Co-ordination Act* of 1999 at the definition section describes an environmental easement" to mean an easement imposed under section 112. Section 2 of the *Land Act* defines an easement as;

“a nonpossessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent, and shall not include a profit’

46. The EMCA provides at section 112

- “(1) A court may, on an application made under this Part, grant an environmental easement or an environmental conservation order subject to the provisions of this Act.
- (2) The object of an environmental easement is to further the principals of environmental management set out in this Act by facilitating the conservation and enhancement of the environment, in this Act referred to as the benefited environment, through the imposition of one or more obligations in respect of the use of land, in this Act referred to as the burdened land, being the land in the vicinity of the benefited environment” (underline mine for emphasis).
- (3) An environmental easement may be imposed on and shall thereafter attach to the burdened land in perpetuity or for a term of years or for an equivalent interest under customary law as the court may determine.
- (4) Without prejudice to the general effect of subsection (2), an environmental conservation order may be imposed on burdened land so as to -
 - (a) preserve flora and fauna;
 - (b) preserve the quality and flow of water in a dam, lake, river or acquifer;
 - (c) preserve any outstanding geological, physiographical, ecological, archeological or historical features of the burdened land;
 - (d) preserve scenic view;
 - (e) preserve open space;
 - (f) permit persons to walk in a defined path across the burdened land;
 - (g) preserve the natural contours and features of the burdened land;
 - (h) prevent or restrict the scope of any activity on the burdened land which has as its object the mining and working of mineral aggregates;
 - (i) prevent or restrict the scope of an agricultural activity on the burdened land;

53. Section 113 allows a person or a group of persons to make an application to the court for the grant of one or more environmental easements. Thus, the law allows for provision of an easement on private land as a tool for environmental conservation or facilitation. In this instance, the Petitioners



are claiming that unless the 1st Respondent allows the pathway for the storm waters, they are likely to suffer environmental harm. The claim is thus properly before the court.

54. Further, section 28 of the *Land Registration Act* No. 3 of 2012 creates and categorizes the right of way as overriding interest. Similarly, section 28(c) and (h) of the same Act provides;

“Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (j) any other rights provided under any written law.”

55. Gacheru J in the case of *Esther Wanjiku Mwangi & 3 Others vs Wambui Ngarachu* (sued as the legal representative of Wangachu Chege-deceased) (2019) eKLR cited *Re Ellenborough Park* (1956) Ch 131 which set out 4 essential characteristics of an easement;

- a. There must be a dominant and servient tenement.
- b. The right must benefit the dominant land.
- c. There must be diversity of ownership or at least occupation.
- d. The right must be capable of lying in grant.

56. This case meets all the four conditions stated in the above case because; the dominant tenement are the parcels of land owned by the Petitioners while the servient tenement refers to the land owned by the 1st Respondent. The right is being claimed by the Petitioners who own the dominant land; the ownership is diverse and the right is capable of lying on the grant in terms the 1st Respondent is on the lower part of the slope to Ndege road where the storm waters flows to join the main drainage.

57. The issue therefore, is whether the Petitioners’ have shown merit to their petition in terms of the alleged losses they are likely to suffer in the event orders compelling the 1st Respondent are not granted. As stated by the parties herein, I did visit the site in the presence of the parties to this suit, and officers from the Water Resources Authority. During the visit, I noted that the area has a mild slope with storms waters flowing from one from the side where the Petitioners parcels are to the downside where the 1st Respondent’s land is situated. The 1st Respondent’s land abuts Ndege road.

58. The 1st Respondent’s contractor and his representative present during the site visit argued that there was an alternative route the Petitioners could channel the storm waters towards. Consequently, we went around the plots behind the fences of the Petitioners parcels but they did not show me any existing easement that could be used for the storm drainage. Secondly, I noted that each of the Petitioners have left on their backyard a pathway/channel which runs continuously across all their plots for the storm waters to flow downwards. It is this pathway that the 1st Respondent has refused to either create or allow the Petitioners to create on his plot so that the channels continues to drain the water on to Ndege road. I also observed that the pathway/channel so created lies behind the houses developed on the Petitioners land and it will also fall behind the 1st Respondent’s development. Lastly, the channel so reserved from my own estimation is approximately two-three (2-3) feet in width running along the fences.



59. The 1st Respondent averred that if the orders sought are granted, it will force him to redesign the project which is already complete. That the redesigning is likely to cause the demolition of the house hence resulting in financial loss to him. This is not true based on my observation during the site visit as there is sufficient space between the house that was under construction and the fence/wall. In any event, the drainage can be constructed by placing a culvert or pipe in a way that still allows the 1st Respondent to use the said space. Thus, the granting of the orders will not in any way bring financial loss to him.
60. Further, the Respondents argued that this matter ought to have been taken to the National Environment Tribunal because the Petitioners are challenging the EIA license granted to the 1st Respondent. The Petition challenged both the grant of the license and a claim for breach of the rights guaranteed under *the Constitution*. As stated hereinabove, the provision of easement is made under sections 112-116 of EMCA which does not confer jurisdiction to the NET. In fact, section 113 is categorical that the application for easement is to be made to the court. The Supreme Court in the case of *Abidha Nicholus vs A.G & Others (2023) eKLR* has also held that this court's jurisdiction cannot be ousted where a claim for breach of constitutional rights have been alleged.
61. Has the alleged right to clean and healthy environment been or is likely to be breached? This court takes judicial notice of the fact that one of the things that happen when it rains and storm waters collects is washing all the dirt/waste on the surface of the land and in the atmosphere. The natural action of collected dirt/waste on land and the atmosphere is the likelihood that the water gets polluted and so if does not gets its way to the established drainage lines, it would expose the people living nearby such as the Petitioners to environmental hazards. This would amount to a breach of their constitutional rights given under section 3 of EMCA and to the provisions of article 42 and 43 of *the Constitution*.
62. Section 3 of EMCA provides thus;
- “(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.
- (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.”
63. *The Constitution* under article 43 (1) (b) states that every person to accessible and adequate housing, and to reasonable standards of sanitation. Under article 70(1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, 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.
64. Consequently, I find that the claim by the Petitioners that the blockage is likely to expose them to water borne diseases is not far-fetched and require to be protected. Secondly, EMCA under section 112 cited above allows for imposition of an easement on servient land so that the Petitioners' claim is not unfounded. In light of the circumstances of this case where the Petitioners cannot vary the course of nature on where the storm waters flows towards due to the gradient of the land where the parcels in question fall, it is imperative that an order be made for imposition of the easement on the 1st Respondent's land.
65. On the question of whether there is a claim as against the 2nd Respondent, the parties here are residents of the Nairobi County. The 2nd Respondent admits that they received complaints from Dr Maywali who is one of the Petitioners in this place and they conducted a report but found no merit



in the complaint. In their replying affidavit, they depose to the complaint falling under the planning department of the Nairobi City County. However, section 9(c) of EMCA requires the 2nd Respondent to establish and review in consultation with the relevant lead agencies, land use guidelines. It is mandated with the role of coordinating government agencies in the management of the environment such that even if the complaint was not under the EIA license, they ought to have addressed it in liaison with Nairobi City County to have the issue resolved.

66. Section 116 (1) of EMCA provides that;

“Any person who has a legal interest in the land which is the subject of an environmental easement, shall, in accordance with the provisions of this Act, be entitled to compensation commensurate with the lost value of the use of the land.”

67. The 1st Respondent as I stated earlier did not file a response to the Petition other than the affidavit sworn in reply to the interlocutory application. Thus, he has not made a claim for compensation to which this court would have addressed herself to.

68. In conclusion, I enter judgement for the Petitioner in the following terms;

- a. A Declaration is hereby given that the 1st Respondent’s actions of blocking the natural drainage system through his PLOT LR. 2259/450 NDEGE LANE, KAREN threatens/ violates Articles 25, 26, 28, 40 and 43 (1) (a) of *the Constitution* of Kenya 2010.
- b. A Declaration is hereby made that the 1st Respondent’s action of blocking the natural drainage system through his PLOT LR. 2259/450 NDEGE LANE, KAREN is arbitrary, wrongful, null and void and is ordered to be stopped forthwith.
- c. An Order of mandatory injunction be and is hereby issued compelling the 1st Respondent under the supervision of the 2nd Respondent to within 14 days of this Judgement unblock the blockage of the natural stormwater drainage on PLOT LR. 2259/450 NDEGE LANE, and reinstate the natural flow of water from the neighbouring properties.
- d. An Order of permanent injunction is granted barring the 1st Respondent from blocking the natural stormwater drainage on PLOT LR. 2259/450 NDEGE LANE, KAREN.
- e. Each party to meet their costs of the Petition

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY 2024

A. OMOLLO

JUDGE

