Kinuthia v Athi Water Works Development Agency & 2 others (Environment & Land Petition E033 of 2022) [2023] KEELC 21396 (KLR) (7 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21396 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E033 OF 2022

JA MOGENI, J

NOVEMBER 7, 2023

IN THE MATTER OF APPLICATION UNDER ARTICLES 22 (1) AND 23 OF THE CONSTITUTION OF KENYA 2010 FOR THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS AND SECTION 75 (2) OF THE CONSTITUTION OF KENYA (REPEALED)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20 (2), 21 (1), 27, 40 (1), 40 (3), 47, 50 (1) AND 51 (1) OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 75 (1) (C) OF THE CONSTITUTION OF KENYA (REPEALED)

AND

IN THE MATTER OF THE CONSTRUCTION OF LAVINGTON-RIRUTA TRUNK SEWERS

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF THE PROPERTY KNOWN AS LAND REFERENCE NUMBERS DAGORETI/RIRUTA/110

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS RULES, 2013

BETWEEN

ROWLAND THIONGO KINUTHIA .... PETITIONER

AND

ATHI WATER WORKS DEVELOPMENT AGENCY .... 1ST RESPONDENT

MINISTRY OF WATER, SANITATION & IRRIGATION .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition for hearing and determination before me is dated 17/08/2022. The Petitioner prayed for the following orders and declarations in the petition: -

    a. A declaration that the Petitioner's rights under Articles 40(3) (a), (b) and 47 (1) of *the Constitution* were violated.

    b. A declaration that the purported compulsory acquisition of the wayleave on the Petitioner's portion of land excised from Dagoreti/Riruta/110 was executed without due administrative process, fair and prompt compensation as is required under Article 40 of the 2010 constitution.

    c. A declaration that the Petitioner's right from deprivation of property under Article 40(2) and his right to acquire and own property in any part of Kenya under Article 40(1) of *the Constitution* has been contravened by the 1st and 2nd Respondents.

    d. A declaration that the 1st and 2nd Respondents were under statutory obligation to comply with the provisions of *the Constitution* and the *Land Act*, 2012 in so far as compulsory acquisition is concerned.

    e. A declaration that the alleged compensation for Dagoreti/Riruta/110 was not prompt and commensurate and as such unjust, null and void as the procedures required by law were not strictly adhered to by the 1st and 2nd Respondents.

    f. The Respondents be ordered to compensate the Petitioner in the sum of Kes. 1, 750,000/- in value for unlawful deprivation of the portion of land excised from Dagoreti/Riruta/110 and interest thereof.

    g. The Respondents be ordered to pay the petitioner 15% statutory disturbance compensation to the tune of Kes. 262,500/- and interest thereof.

    h. The Respondents be ordered to compensate the Petitioner a sum of Kshs. 1,405,990/- from the year 2011 to the date of determination of this petition as compensation for the loss of business and interest thereof.

    i. Compensation for loss of future earnings and interest on (f, g and h) hereinabove.

    j. Costs of this petition.

    k. Such other order(s) as this Honourable Court shall deem just.

2. The Petitioner's case is expressed through the petition, the supporting affidavit and supplementary affidavit both sworn by Rowland Thiongo Kinuthia and submissions. The 1st Respondent filed its Replying Affidavit and a further Replying Affidavit in response to the Petition on behalf of the 2nd and 3rd Respondents.

The Petitioner's Case.

3. The Petitioner's' case is that that at all material times, he was the beneficial owner of part of all that property known as Dagoreti/Riruta/110 measuring approximately 1.9020 Hectareswithin Nairobi

County. The Petitioner annexed a copy of the certificate of title issued to Francis Kinuthia Thiongo as proof of ownership.

4. That sometime in 2011, the Government of Kenya, through the Ministry of Water, Sanitation and Irrigation and one of its agencies, Athi Water Works Development Agency (then Athi Water service Board) proposed the construction of the Lavington-Riruta Trunk Sewer necessitated acquisition of lands through which the road passed. That according to the design plans of the said project, the sewer trunk would then cut through a portion of his property (Dagoreti/Riruta/ 110) and this precipitated the need to acquire the said portion by the Respondents for the public benefit.

5. The Petitioner contends that the 1st and 2nd Respondents proceeded to compulsorily acquire the portion that was excised on the property and the intended project was executed. The Petitioner avers that his land Dagoreti/ Riruta/110, a portion of which the Lavington-Riruta Sewer Trunk Project was developed, was acquired despite the Notice of Intention to acquire having not been served upon him. To this acquisition, he only received compensation for the perimeter fence that had been assessed at Kshs. 106,000/-.

6. The petitioner avers that the Respondent never actually paid for acquisition of the wayleave, a fact acknowledged by the 1st Respondent in the various correspondences with the Petitioner.

7. He contended that the Respondent is tasked with the procedural mandate of ensuring that the steps of Compulsory acquisition are followed from the issuance of the notice of intention to acquire to the compensation of the proprietor of the land that is subject of acquisition.

8. The Petitioner avers that the portion excised from the suit property has been valued at Kshs. 1, 750, 000/-. The Petitioner annexed a valuation report marked as “RTK2” in support of this allegation. Deductively, the sum rendered as compensation by the Respondent is not commensurate to the actual value of the land portion of land that was compulsorily acquired

9. The Petitioner further avers that from the said Property, he operated a primary school, Green Valley Academy. From the said school, the Petitioner collected an annual income of Kshs. 1,405,990/-.

10. The Petitioner further avers that he has lost this income by dint of the fact that he was forced to close shop and as such, subjected to further deprivation of the said income, which income, he was never compensated for. He also annexed a copy of the certificate of registration and financial statements of the business and marked them as “RTK3 (a) and (b) in support of his claim.

11. The Petitioner avers that the encroachment rendered the land useless for any productive purpose and despite the unlawful acquisition, the Petitioner is yet to be compensated, fairly and promptly.

12. Further, the Petitioner deponed that the actions of the 1st to 3rd Respondents amount to compulsory acquisition of his property, albeit without following the procedures under Sections 107, 111, 112, 113, 114 and 148 of the *Land Act* 2012 and as such in violation of my fundamental rights under Article 47 of *the Constitution*. The said acquisition was without due procedure and as such unconstitutional and a violation of his right to property under Article 40 of *the Constitution* of Kenya.

13. That as it stands, he is greatly prejudiced by the acts and/or omissions aforementioned as the same severely violate his fundamental rights and freedoms as guaranteed under *the Constitution* of Kenya. As a result of the violation and deprivation of the said property, he has suffered and continue to suffer loss and damage.

14. Lastly, the Petition contends that his fundamental rights as set out in *the constitution* have been infringed on and this Honourable Court has power to grant such remedy as stipulated under Article 165(3) of *the Constitution* of Kenya. That it is only fair and just that this Petition be allowed as prayed.

15. The Petition is opposed. The Respondents opposed the Petition through Replying Affidavit sworn by Eng. Joseph Kamau on 11/01/2023 and a further Replying Affidavit sworn by Eng. Joseph Kamau on 21/06/2023.

Respondents' Case

16. The Respondents disputed the Petitioner's claim seeking for compensation for the purported acquisition of wayleave. The Respondents stated that the trunk sewer was laid on a road reserve and riparian land and there was no compulsory acquisition of any land as alleged. The Respondents stated that the Lavington-Riruta Trunk Sewer project involved construction of an 8.5km sewer line that would serve the Southern and Western parts of Nairobi including Lavington, Riruta Satellite and Kawangware estates in Nairobi. The project work was completed and a certificate of substantial completion dated 29/06/2012 issued exhibit JK. According to them, the sewer line was laid on a road reserve and along riparian land and the same was established by the report by the Water Resources Authority (WRA) dated 9/05/2023 exhibit JK 7.

17. More particularly, in their Replying Affidavit, the Chief Manager, Water and Sanitation Services contended that the 1st Respondent is responsible for the development, maintenance and management of water and sewerage infrastructure in the counties of Nairobi, Kiambu and Murang'a Counties. That on or about the year 2010, the 1st Respondent undertook construction of the Lavington-Riruta Trunk Sewer Extensions Project Contract No. AWSB/WASSIP/COMP.L1/W-7/2009 being a component of the Water and Sanitation Service Improvement Project (WaSSIP) financed by the Government of Kenya. (Annexed and marked JK-1 is an extract of the contract document for the project.)

18. He contends that the Lavington-Riruta Trunk Sewer project involved construction of an 8.5km sewer line to serve the Southern and Western parts of Nairobi including: Lavington, Riruta Satellite and Kawangware estates in Nairobi. The works included but were not limited to excavation, laying, testing and backfilling a total of approximately 8km trunk sewers of diameter ranging from 255mm to 750mm spigot and socket concrete pipes covering Lavington, Riruta North and Riruta South Areas in Nairobi City.

19. The 1st Respondent confirms that the project works have since been completed and a Certificate of Substantial Completion dated 29/06/2012 issued. They produced a copy of Certificate of Substantial Completion issued on 29/06/2012 and marked it as "JK-2".

20. The Chief Manager deponed that the project did not involve compulsory acquisition as alleged by the Petitioner.

21. Further, the 1st Respondent disputes the Petitioner's claim seeking compensation for compulsory acquisition of his afore-mentioned parcel as the trunk sewer was laid along a road reserve and along riparian land and therefore did not affect the suit parcel.

22. In response to paragraph 7 of the Petitioner's Supporting Affidavit, and contrary to what has been deponed therein, the 1st Respondent avers that it conducted a Valuation Assessment and Resettlement Action Plan for all parcels and assets that were to be affected by the afore-said project. From this assessment, the assets belonging to the Petitioner which would be affected by this project included a timber/ iron sheet fence measuring approximately 31m by 2.5m and crops totaling to 700No. Kales, 400 No. managu and 200 No. tomatoes. Hence the total compensation amount for the affected

structure and crops as assessed at that time was totaling to Kshs.106, 000/-. They annexed a copy of the crop assessment form dated 17/02/2011, "JK3".

23. From the structure assessment and crop assessment compensation forms duly signed by the Petitioner on 17/02/ 2011, the compensation amount was never disputed and was therefore paid in full by the 1st Respondent in good faith to compensate the Petitioner for the semi-permanent structure and the crops existing along the route which the trunk sewer would traverse. (They annexed a copy of letter dated 10/08/2021, compensation schedule and Cheque payment voucher evidencing payment to the Petitioner, all marked as JK-4 (a), (b) and (c).

24. It is therefore not tenable for the Petitioner to allege unlawful acquisition of land yet the trunk sewer is evidently laid on a road reserve and along riparian reserve, well within Public Land and therefore such construction of the trunk sewer would be deemed lawful and as of right contrary to the averments made by the Petitioner. That further, a certificate of electronic evidence for the photos showing the situation on the ground is also attached. (The Respondents adduced a copy of the certificate of electronic evidence marked as JK-5 (c).

25. In any case, the Respondents aver that the 1st Respondent compensated the Petitioner for the damages suffered in respect of crops and structures existing on the Petitioner's parcel which were to be affected by laying of the trunk sewer as at that time.

26. Contrary to the averments made by the Petitioner at Paragraphs 8 and 9 of his supporting affidavit, and without prejudice to the foregoing averments by the Respondents, notice was indeed given to the Petitioner and all persons to be affected by the afore-mentioned project. Save that in this case, Notice of Intention to Acquire would not apply as the project component did not involve any compulsory acquisition as alleged, and particularly as relates to the Petitioner's parcel. The Respondents produced letters dated 4/08/2009 (marked as JK-6(a) (b) (c) and (d)) inviting project affected communities for a stakeholders meeting.

27. Having perused and familiarized with the Valuation Report dated 6/07/2022 and marked RTK-2 forming part of the Petitioner's bundle, it is admitted therein at page 5 that the 1st Respondent indeed communicated their "intent to acquire" which was communicated via letter dated 4/08/2009 REF No. AWSB/WaSSIP/COMP.1/W-7/2009 (72).

28. The Respondents also dispute the assertions made paragraphs 10 of the Petition and the Supporting Affidavit therein annexed relating to valuation of the suit portion indicating the current market value owed to the Petitioner as Kshs. 1,750,000/-. The 1st Respondent compensated the Petitioner for the damages suffered in respect of crops and structures existing on the Petitioner's parcel which were to be affected by laying of the trunk sewer. The Petitioner also accepted the compensation without raising issues and it is therefore evident that the Petitioner is not coming to court with clean hands.

29. In response to the afore-mentioned, it is Respondents' contention that the project referred to commenced on 10/08/2009 and was substantially completed on 29/06/2012, and therefore the Valuation Report relied on by the Petitioner is inapplicable and should be rendered nugatory as it assesses the value of suit property as at July, 2022 whereas the alleged claim arose between 2009 and 2011. That paragraphs 11 of the Petition and the Supporting Affidavit relating to the Petitioner's claim of collection of an annual income of Kshs. 1,405,990/- from his private school are disputed. The Respondents assert that they have not had sight of the financial statements marked RTK-3 (b).

30. The Respondents also contend contrary to paragraph 13 of the Petitioner's Supporting Affidavit, that due procedure was followed. However, the procedure as relates to compulsory acquisition was not applicable in this case as there was no compulsory acquisition of the Petitioners land.

31. The Respondents aver that the Petition is devoid of merit and does not raise any triable issues. That the Petitioner's Petition is only an afterthought intended to prejudice the Respondents if at all, considering the time lapsed since completion of the Lavington-Riruta Trunk Sewer project.

32. The Respondents have never prior to the Petition before this Honourable Court and contrary to the averments made at paragraph 15 of the Petition, received any claims disputing the compensation already awarded to the Petitioner. That the Petitioner is guilty of laches in which case, the Petition is marred by unconscionable delay which has not been undisputedly explained.

33. In their further replying affidavit, the Respondents contended that Athi Water Works Development Agency (AWWDA) did not undertake any compulsorily acquisition as alleged as the trunk sewer was laid along a road reserve and along riparian land.

34. That vide a letter dated 16/03/2023 AWWDA engaged the Water Resources Authority (WRA) in the marking of the extent of riparian way leave within Dagoretti/Riruta/110. The process of riparian marking was completed and a report was forwarded to AWWDA by Water Resources Authority (WRA) vide a letter reference WRA/8/25 VOL.III/ (19) dated 9/05/2023 (A copy of WRA report dated 9/05/2023 has been produced and marked as JK7).

35. From the report filed by WRA, WRA has confirmed that the sewer line is laid within the riparian reserve as seen on the layout map. (See JK-8, a copy of the layout map of the area). The report by WRA further confirmed the piece of land is developed with permanent residential houses which have encroached on the riparian reserve area. The trunk sewer has been laid down in the riparian reserve with two manholes located on the subject property. The riparian reserve area extent was identified but marking and pegging by placement of beacons could not be carried out by WRA due to the encroaching developments within the reserve.

36. The Respondents aver that the Petitioner is required to remove all the encroaching permanent developments within the riparian reserve and ensure that none of the proscribed activities under the *Water Act*, 2016 and the Physical and Land Use Planning Development Control and Permissions (General) Regulations 2021 should be carried within the riparian reserve.

37. In light of the above, they contend that the claim by the Petitioner cannot be sustained and they pray that this Honourable Court dismisses the Petition with costs to the Respondents.

Written Submissions

38. The Court gave directions on the filing of written submissions on 11/07/2023 and the parties duly complied. The Petitioner filed his written submissions dated 11/08/2023 on the even date and the Attorney General filed written submissions dated 13/09/2023 on behalf of the 1st 2nd and 3rd Respondents on 15/09/2023.

Analysis and Determination

39. I have very carefully considered the Petition together with the supporting and supplementary affidavits, the Respondents' Relying Affidavit and further Replying Affidavit together with the written submissions filed by both parties. I have also considered the relevant constitutional and statutory frameworks. Similarly, I have considered the relevant jurisprudence on the key issues in the petition. I postulate that the issues for determination are:

    a. Whether the trunk sewer was laid along riparian reserve.

    b. Whether there was compulsorily acquisition.

c. What reliefs is the Petitioner entitled to in this Petition?

Whether the trunk sewer was laid along riparian reserve.

40. It is the Petitioner's case that the acquisition of his land and subsequent encroachment without following due procedure is unconstitutional and a violation of his right to property under Article 40. The thrust of Article 40 is to protect proprietary rights under the law.

41. Turning to the issue of whether or not the petitioner's right to property was violated, the Court is tasked to determine whether the trunk sewer was laid along riparian reserve and whether there was compulsory acquisition of the Petitioner's land.

42. In this case, the Petitioner claims that the Respondents acknowledged not compensating them for a way leave on their land, as the sewer line was allegedly constructed on riparian reserve. They refer to a Ministry of Lands and Planning report dated 8/08/2023, which confirmed that the sewer line encroached on the Petitioner's land. The Petitioner argues that the riparian determination should not be used as a basis to deny compensation, citing Section 116(1) of the *Water Act* Management Rules 2007.

43. On the other hand, the Respondents dispute the authenticity of the Ministry of Lands and Physical Planning report, stating it was done without their involvement or the court's leave. They argue that the Water Resources Authority's report dated 9/05/2023 indicates that the sewer line is within the riparian reserve, as per Rule 14 of the Physical and Land Use Planning Development Permission and Control (General) Regulations 2021. They also refer to the *Water Act* 2016, which defines the riparian land extent. The Respondents emphasize that no activities are allowed on riparian land, as per Regulation 118 and Schedule 6 of the Regulations. They maintain that the trunk sewer was laid within the riparian reserve and did not encroach on the Petitioner's land. They assert that the riparian determination doesn't change ownership but enforces management controls for water resource protection.

44. There is no dispute as to the Petitioner's ownership of the suit property to the extent that it does not encroach in the riparian reserve. The claim is for a purported compulsory acquisition as the Petitioner asserts that the Respondents acquired way leave for construction of the sewer line on his property.

45. The Environmental Management and Coordination Act (wetlands, shores and oceans) of 2009 offers a definition of a riparian reserve as the land adjacent to a river, lake, or sea, starting from the highest normal water mark. The width of this reserve is determined from the highest water mark, signifying the historically recorded water level in contact with the shore or bank. It is important to note that the legislation specifying the official size of government-owned riparian land is not uniform and employs a non-standard calculation method. This method dictates that the riparian area on each side of the river should equal twice the river's width, as per the observations presented in Lelo, F.K., Chiuri, W., and Jenkins, M.W. (2005) in their study on managing the River Njoro watershed in Kenya. Furthermore, the width of the riparian zone establishes the boundaries below which permanent construction is not permitted.

46. The Water Quality Regulations (2006) under the EMCA set forth a riparian width ranging from a minimum of six (6) meters to a maximum of 30 meters on either side, based on the highest recorded flood level. These regulations strictly prohibit any developments below this specified flood level.

47. The Water Resource Management Rules of 2007, developed in accordance with the *Water Act*, define riparian width as the land on both sides of a watercourse, starting at a minimum of six (6) meters or extending to the full width of the watercourse, up to a maximum of 30 meters from the top edge of the watercourse's bank. The width of the watercourse is determined by measuring the distance between the

top edges of its banks. These rules also require the Water Resources Management Authority (WRMA) to clearly mark the riparian boundary for any watercourse or body of water on land.

48. Additionally, the *Survey Act* stipulates that when allocating land along a tidal river, a reservation of at least 30 meters in width above the high water mark must be established for government purposes. In this context, the high water mark refers to the mean high water mark during spring tides.

49. A literature review conducted by Hawes, E. and Smith, M. (2005) in their unpublished work on riparian buffer zones and their recommended widths revealed that the width of the riparian buffer should not be uniform across the watershed but should be determined by the intended management objectives.

50. The legislative framework outlines maximum and minimum riparian widths that must be maintained as government land. However, these lands have not been officially gazetted, and there are varying interpretations within different legislations, resulting in legislative gaps that have been exploited. The lack of clear demarcation and overlapping criteria for delineating riparian buffer widths complicates their management and exacerbates the issue of encroachment.

51. According to the *Land Act* of 2012, riparian zones are considered government-owned and, therefore, public properties. The Act also grants the National Land Commission the authority to allocate public land to private owners. However, public land demarcated as ecologically sensitive, particularly along watersheds, rivers, and stream catchments, cannot be allocated to private developers. This underscores the principle that riparian buffer land, being both public and environmentally delicate, should not be allocated to private developers under the Act.

52. It is apparent from the definition of "environment" under Environment Management and Co-Ordination Act, No. 8 of 1999 that land is inextricably linked to the environment and in fact is part of the environment both in its natural and built forms. The definition of public land under Article 62 of *the Constitution* includes the riparian reserve which is defined as the land between the high and low water marks. Under Section 2 of the *Water Act* 2016, streams are water resources. By dint of Section 5 of the *Water Act*, streams are vested in the National Government. Under Section 7 of the *Water Act*, no instrument of conveyance or title vests in any person any property, right, interest or privilege in respect of water resources.

53. Section 12 (2) of the *Land Act* provides for allocation of public land and notes that the Commission in allocating land shall ensure that public land that is along watersheds, river and streams catchments, public water reservoirs, lakes, beaches, fish landing areas, riparian and the territorial sea as may be prescribed is not allocated. Section 2 of the *Land Act* defines riparian reserve to mean the land adjacent to the ocean, lake, sea, rivers, dams and water courses.

54. The importance of the environment to the people of Kenya is demonstrated by the fact that respect for the environment as our heritage forms part of the preamble to our Constitution. Chapter 5 of our Constitution is dedicated to land and the environment. *The Constitution* states that land in Kenya must be held and used in a manner that is equitable, efficient, productive and sustainable in line with the principles that land as a resource, must be managed in a sustainable and productive way, and that sound conservation mechanisms must be employed. Sound conservation for the riparian reserves would entail the prevention of soil degradation and protection of the river water. To this end, Regulation 6(c) of the Environmental Management and Co-ordination (Water Quality) Regulations of 2006 prohibits the cultivation and development of the land that is within the minimum width of 6 meters and maximum width of 30 meters of a river or stream. These measurements are to be based on the highest recorded flood level. See Baljit Sokhi & another v Charity Ngilu, Cabinet Secretary, Ministry of Lands, Housing and Urban Development & another [2021] eKLR.

55. In discussing the riparian reserves, the Court in Milimani Splendor Management Limited v National Environment Management Authority & 4 others [2019] eKLR observed that:

> "It is useful to review the legislation on riparian reserves in Kenya. Section 29 of the Physical Planning Act empowers local authorities, which refers to county governments, to prohibit or control the use and development of plots within its area. The section mandates the local authority to consider and grant development permissions. It can also prohibit the subdivision of existing plots into smaller areas. One of the conditions to be complied with in a scheme of subdivision under Regulation 15 of the Physical Planning (Subdivision) Regulations of 1998 is that wayleaves or reserves along any river, stream or water course should be of not less than 10 metres in width on each bank except in areas which flood.
>
> Rule 111 of the Survey Regulations of 1994 provides for a reservation of not less than 30 metres in width above high-water to be made for Government purposes but allows the Minister to direct that a lower width of the reservation be made in special circumstances. It is not clear from this regulation how the riparian reserve is to be measured considering that rivers vary in sizes and may also meander in their course as they flow downstream. Regulations 40 and 88 of the Survey Regulations of 1994 stipulate where and how line and river beacons are to be placed by the surveyor.
>
> Rule 6 (c) of the Environmental Management and Coordination (Water Quality) Regulations, 2006 prohibits any person from cultivating or undertaking any development activity within the full width of a river or stream to a minimum of six metres and maximum of thirty metres on either side based on the highest recorded flood level.
>
> Rivers and all land between the high and low watermarks constitute public land pursuant to Article 62 of *the Constitution*. Black's Law Dictionary, 10th edition defines a watermark as the highest or lowest point to which water rises or falls. The dictionary defines the high watermark in a river not subject to tides as the line that the river impresses on the soil by covering it long enough to deprive it of agricultural value and the low watermark as the point in a river to which the river recedes at its lowest stage.
>
> The Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009 defines the high watermark as the historical recorded point of the highest level of contact between the water and the bank while the low watermark is defined as the historical recorded point of the lowest level of contact between the water and the bank. The river bank is defined as the rising ground from the highest normal watermark bordering the river in the form of rock, mud, gravel or sand; and in case of flood plains would include the point where the water surface touches the land which is not the bed of the river.
>
> The court notes that the Regulations under EMCA came into force later than those made under the *Survey Act* and Physical Planning Act. In defining the riparian reserve, all these pieces of legislation did not take into consideration the land between the high and low watermarks stated in *the Constitution* of 2010. From the definition of the high and low water marks in the Environmental Management and Co-ordination (Wetlands, River Banks, Lake Shores and Sea Shore Management) Regulations 2009, it is evident that the measurement of the riparian reserve is to be pegged on the riverbank and the highest point on the land which water gets to during flooding. The riparian reserve is not to be measured from the centre of the river as the Petitioner contended."

56. A perusal of the survey report dated 8/08/2023 by the Ministry of Lands which the Petitioner is relying on, establishes that someone on behalf of the regional surveyor undertook a site visit on 17/07/2023 with the aim of establishing the position of the constructed manhole in relation to the 3m riparian for Dagoretti/Riruta/6738. The proprietors of the land and the advocate handling this case were present. The findings from the site visit were that the boundary line of the river was found to be at its position but the Athi Water Service have constructed a manhole far from the 3m way leave of the riparian of the stream. The surveyor pointed out that the 3m from the center line of the stream is where the sewer line belongs and is where the manhole should be constructed, if constructed beyond this, it is treated as encroachment to the land. In this case, Ms. Miriam W. Kigathi found that the Dagoretti/Riruta/6738 has an excision of sewer line constructed 5m from the center line of the stream to the edge of the manhole.

57. A perusal of the report dated 9/05/2023 by the Water Resources Authority filed by the Respondents established that a site visit to the area on 30/03/2023 and they found that the piece of land is developed with permanent residential houses which has encroached the riparian reserve area and that a trunk sewer has been laid down in the riparian reserve with two manholes located within Dagoretti/Riruta/110. They stated that a riparian reserve extent of 10 meters on the left bank of the water course was marked as provided under the *Water Act* 2016 and the Physical and Land Use Planning Regulations 2021 from upstream to downstream. That the riparian reserve was identified but marking and pegging by placement of beacons could not be carried out due to encroaching developments within the reserve.

58. The *Water Act*, 2016 on its part under Regulation 116 (2) of the Water (Plan of Transfer of Water Services) Rules, 2005 provides as follows;

> " Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse shall be defined as a minimum of six meters or equal to the full width of the watercourse up to a maximum of thirty meters on either side of the bank."

59. Regulation 118 on its part prohibits any activities on riparian land provided under Schedule 6 of the Regulations. Schedule 6 notes that no tillage, cultivation, clearing of indigenous trees or vegetation, building of permanent structures, excavation of soil or planting of exotic species that may have adverse effect to the water resource is allowed.

60. The *Water Act* 2016 under Regulation 11 (2) of the Water (Plan of Transfer of Water Services) Rules, 2005 provided that "unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse shall be defined as a minimum of 6 meters or equal to the full width of the watercourse up to a maximum of 30 meters on either side of the bank."

61. Rule 14 of the Physical and Land Use Planning Development Permission and Control (General) Regulations 2021 provides as follows:

> " The following standards shall apply during the measurement of riparian reserves for the purposes of these Regulations—
>
> a. for rivers, a minimum riparian reserve of ten meters or a reserve that is equal to the average full width of the river measured from the highest water mark, whichever is higher, but which shall not exceed thirty meters, on either side of the river shall be maintained: Provided that in the case of a flood plain, the

riparian reserve may be higher as may be determined by the Water Regulation Authority:"

62. Whereas the Court observed in Milimani Splendour Management Ltd –(supra) that there are conflicting legal provisions on the measurement of the riparian reserves in Kenya and there is need for Parliament to harmonize the different laws to guide the surveyors in determining the boundaries of privately held land that is adjacent to rivers and other water bodies, it is not certain whether Parliament has harmonized the different laws identified in the judgment.

63. From the above provisions of the law, it can be observed that a riparian reserve should be within a minimum of ten (10) meters or six (6) meters measured from the highest mark and a maximum of 30 meters on either side of the river.

64. In this case, the Petitioner has maintained that Dagoretti/Riruta/6738 has an excision of sewer line constructed 5m from the center line of the stream to the edge of the manhole. That the Athi Water Service have constructed a manhole far from the 3m way leave of the riparian of the stream. His surveyor pointed out that the 3m from the center line of the stream is where the sewer line belongs and is where the manhole should be constructed. From the definition of the high and low watermarks in the Regulations made under EMCA, it is evident that the measuring of the 5-metre or 3m riparian reserve from the center of stream to the Petitioner's suit land was erroneous as it does not take into account the high and low watermarks which are determined with reference to the level of contact between the water and the bank and not from the center of the river. In any case, whether the trunk sewer was 5m or 3m from the riparian reserve, in my view, it is still within the riparian reserve as per the provisions of the law.

65. Further, a glance at the photographs produced by the Respondents clearly shows the distance between a certain fence and the trunk sewer is 1.17m. It appears that the trunk sewer is next to an iron sheet fence as well. This iron sheet fence which I can safely assume that it belongs to the Petitioner is dangerously close to the edge of the tributary. From the photographs produced by the Respondents, it is evident that the structures/ Petitioner's fence/wall is erected on the riparian land and has encroached on the riparian reserve in breach of Regulation 116 (2) and 118 of the Water (Plan of Transfer of Water Services) Rules, 2005.

66. The report dated 9/05/2023 by the Water Resources Authority established that a site visit to the area on 30/03/2023 and they found that the piece of land is developed with permanent residential houses which has encroached the riparian reserve area. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to River Kirichwa Kubwa.

67. Based on the circumstances of this case, it is my considered view that the Petitioner has not demonstrated that the trunk sewer has encroached onto his suit property. To the contrary, I opine that the trunk sewer is within the riparian reserve and therefore the Petitioner is not entitled to the riparian land adjacent to the suit property.

68. On whether there was compulsory acquisition, flowing from the allegations with respect to encroachment by the trunk sewer, the Petitioner has accused the Respondents of acquiring his land without following due procedure.

69. Once again, riparian zones are considered government-owned and, therefore, public properties. The *Land Act* grants the National Land Commission the authority to allocate public land to private owners. However, public land demarcated as ecologically sensitive, particularly along watersheds,

rivers, and stream catchments, cannot be allocated to private developers. This underscores the principle that riparian buffer land, being both public and environmentally delicate, should not be allocated to private developers under the Act.

70. It was the Petitioner's submission that even if the Court was to find that the sewer line was constructed on a riparian reserve, the legal position is that the riparian section is still the Petitioner's property which he ought to have been compensated for. This is false. I am wholly guided by the observations made by the Court in the case of Aloys Mataya Moseti v National Environment Management Authority & another [2020] eKLR wherein it was observed that "...... riparian land cannot be privately owned by the petitioner." [Emphasis mine].

71. In summary, the Petitioner seeks compensation for compulsory acquisition, while the Respondents argue that no such acquisition occurred, and the Petitioner lacks proprietary rights over the riparian reserve.

72. The Petitioner submits that the Respondents acknowledged they didn't compensate them for the acquisition of a way leave on their property, asserting that the sewer line encroached on their land. The Petitioner argues that even if the sewer line was constructed on a riparian reserve, they should still be compensated. They cite the *Land Act* 2012 and assert that the acquisition process was not conducted in accordance with the law.

73. On the other hand, the Respondents submit that the alleged compulsory acquisition doesn't apply because the riparian reserve is considered public land, vested in the National Government. They refer to the *Land Act* 2012 and claim that the Petitioner failed to involve the National Land Commission, which is mandated to deal with compulsory acquisition issues. They also mention that the Petitioner accepted compensation for crop and structure damages caused by the project. The Respondents argue that the Petitioner's claim is time-barred and that they have no proprietary rights over the riparian reserve. They maintain that there was no compulsory acquisition of the Petitioner's land. They relied on Mahareus Obaga Anunda v Kenya Electricity Transmission Co. Ltd [2015] eKLR and Milimani Splendor Management Limited (supra) to support their position.

74. Under Article 62(1) (i) of *the Constitution*, rivers are public land. Under Section 7 of the *Water Act*, no instrument of conveyance or title vests in any person any property, right, interest or privilege in respect of water resources.

75. Similarly, Section 2 of the *Land Act* defines riparian reserve to mean the land adjacent to the ocean, lake, sea, rivers, dams and water courses. Section 12 (2) of the *Land Act* provides for allocation of public land and notes that the Commission in allocating land shall ensure that public land that is along watersheds, river and streams catchments, public water reservoirs, lakes, beaches, fish landing areas, riparian and the territorial sea as may be prescribed is NOT allocated.

76. The Petitioner submitted that it is not in dispute that the 1st Respondent never compensated the Petitioner for acquisition of way leave. That this has been admitted in their replying affidavit under the mistaken belief that they ought not to have paid due to the determination that the sewer line was constructed on a riparian reserve. It is the Petitioner's submission that they have adduced evidence that proves to the contrary that the sewer line did encroach on the Petitioner's land. According to the Petitioner, it is clear that the acquisition process was not conducted in accordance with the law as set out under Part VIII of the *Land Act* 2012. That the required notices were also not duly served as required by the law. The Respondents submitted that for a claim of compulsory acquisition to suffice, the Government must have acquired ownership of one's private property. The State cannot purport to/be alleged to have compulsory acquisition on public land since it is already vested in the Government.

77. I agree with the Respondents' submission. Riparian reserves are considered public land. It is also true that there is a process that is recognized by the law in order for a property to be compulsorily acquired. However, having held that the trunk sewer is within the riparian reserve and that the Petitioner is not entitled to the riparian land adjacent to the suit property, it follows that the portion of land in which the Petitioner claims to have been acquired by the 1st Respondent was not available for compulsory acquisition in the first place, as it is public land and therefore there was no compulsory acquisition.

78. It is my considered view that the Petitioner has failed to demonstrate that his land was compulsorily acquired. Accordingly, I find that there is no evidence that the Petitioner's land was compulsorily acquired. The Court is also not persuaded that the Respondents breached the Petitioner's right to property and/or the Petitioner's right to fair administrative action was contravened by the Respondents.

PARA 79.

On whether or not the Petitioner is entitled to the reliefs sought in the Petition, since he has failed to establish that the Respondents breached the Petitioner's right to property and/or the Petitioner's right to fair administrative action was contravened by the Respondents, it would follow that he is not entitled to those reliefs. There would be no legal basis for granting the prayers sought.

80. On the material placed before this Court, I am not satisfied that the Petitioner has established that his property rights have been contravened or violated and that he is entitled to protection thereof. In my view the suit herein is premature and does not meet the threshold for a constitutional petition as the Petitioner has not demonstrated the manner in which her constitutional rights have been violated in accordance with the principle laid down in the case of Anarita Karimi Njeru v Republic 1979 eKLR where the court held that:

> " We would, however, again stress that 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. Accordingly, I decline to grant the orders sought in the Petition dated 17/08/2022. Each party will bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2023.

....

MOGENI J.

JUDGE