

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC PETITION NO. E009 OF 2025

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS AS ENshrINED UNDER ARTICLES 2, 10, 19, 20,
21, 22, 23, 40, 42, 43, 47, 69 AND 70 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND COORDINATION
ACT (EMCA), CAP 387 LAWS OF KENYA**

AND

**IN THE MATTER OF DISASTER RISK MANAGEMENT POLICY AND RELATE
FRAMEWORK OF THE GOVERNMENT OF KENYA**

AND

**IN THE MATTER OF VIOLATION AND THREAT OF VIOLATION OF THE
PETITIONERS' CONSTITUTIONAL RIGHTS TO PROPERTY, CLEAN AND
HEALTHY ENVIRONMENT, HUMAN DIGNITY, SECURITY AND HOUSING.**

BETWEEN

Dr. PETER MBAE.....1ST PETITIONER

WASHINGTON NDIRANGU MWERI.....2ND PETITIONER

STEPHEN KIMANI KAMAU.....3RD PETITIONER

TABITHA WAMBUI KIMANI.....4TH PETITIONER

MARQUES KARIUKI MUCHAI.....5TH PETITIONER

**(Suing on behalf of the affected residents and landowners of Kihoto Area,
Naivasha Sub County, Nakuru County)**

AND

THE CABINET SECRETARY, MINISTRY OF INTERIOR

AND NATIONAL ADMINISTRATION.....1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF LANDS, PUBLIC WORKS, HOUSING
AND URBAN DEVELOPMENT.....2ND RESPONDENT**

THE COUNTY GOVERNMENT OF NAKURU.....3RD RESPONDENT

JUDGEMENT

1. Vide a Petition dated the 4th November, 2025, the Petitioners herein sought from court the following orders;
 - i. Declaration that the flooding and rising water levels of Lake Naivasha constitute a national disaster.
 - ii. An order directing the Respondents to immediately embark on facilitating the evacuation of all residents currently affected by the flooding and rising water levels.
 - iii. To establish and operationalize a multi-agency task force that shall embark on the enforcement of the Orders issued herein.
 - iv. An order compelling the Respondents to identify and allocate alternative safe land for relocation of all persons affected.
 - v. An order directing the Respondents to identify and compensate all victims who have lost property or land within 6 months of issuance of the Order.
 - vi. An order directing the Respondents to create and enforce a permanent buffer zone.
 - vii. An order directing the Respondents to publish a comprehensive status report within twelve months.
 - viii. Any other order the Court may deem just and expedient.
 - ix. Costs of the Petition.
2. The Petition was supported by an Affidavit of equal date sworn by Washington Ndirangu Mweri, the 2nd Petitioner herein who deponed that he is the registered owner of land parcel known as Naivasha/Town Block 1/1576 which land he jointly owns with the 3rd Petitioner. That since the year 2019, the water of Lake Naivasha had steadily risen, inundating extensive portions of land within Kihoto, Karagita, and adjacent areas resulting in the displacement of hundreds of families, destruction of property, and submersion of public amenities including roads, schools, churches, and boreholes. That subsequently, the affected

residents had been forced to abandon their homes and move to higher grounds or makeshift shelters without any structured resettlement plan or humanitarian assistance.

3. That nonetheless, despite repeated appeals to both the National and County Governments, there had been no coordinated or effective response, nor had the situation been declared a National Disaster, as required under national disaster management framework. That indeed, pursuant to the provisions of Articles 26 and 43 (1) (b) of the Constitution, every person has the right to life and to accessible and adequate housing and reasonable standards of sanitation respectively. That further, the provisions of Article 42 of the Constitution guarantee the right to a clean and healthy environment while Article 40 protects the right to property, subject to the law.
4. He deponed that pursuant to the provisions of Article 169 (1) (d) of the Constitution, the state was obligated to encourage public participation in environmental management and protect the environment for the benefit of the present and future generations. That on the other hand, the provisions of Article 70 empower the court to issue orders to prevent or discontinue acts that threaten the environment or violate the right to a clean and healthy environment. That indeed, under the provisions of Section 3 of the Environment and Land Court Act, the court had jurisdiction to hear and determine disputes relating to the environment and land, including enforcement of constitutional rights thereto.
5. That the Environment Management and Coordination Act (EMCA) establishes the legal framework for environmental protection and sustainable management, placing the primary obligation on the National Environment Management Authority (NEMA) and other state agencies to prevent and mitigate environmental degradation. That on its part, the National Policy for Disaster Management (2018) mandates the National Government, through the Ministry of Interior and National Administration, to coordinate disaster response, including flooding, displacement and post-disaster recovery.
6. He elucidated that in the year 2020, the Departmental Committee on Environment and Natural Resources of the National Assembly had conducted an inquiry into the rising water levels in Kenya's Rift Valley Lakes, including Lake Naivasha and published a detailed report. That the said Report had identified

Lake Naivasha as one of the areas most severely affected, with substantial displacement of residents, loss of farmland and threat to public safety and economic activities. That subsequently, the aforementioned Report had recommended that:

- i. The declaration of the event as a national disaster;
- ii. Immediate relocation and compensation of affected residents;
- iii. Creation of buffer zones around the lake to prevent future encroachment; and
- iv. Establishment of a multi-agency task force to oversee environmental recovery and sustainable land use.

7. That however, despite the said recommendations being tabled in Parliament, no tangible action has been implemented, leaving the affected residents in dire humanitarian conditions to date. He contended that the situation in Kihoto constitutes a national disaster within the meaning of the Constitution and the National Policy for Disaster Risk Management, given the scale, magnitude, and socio-economic impact. That accordingly, the failure by the Respondents to declare the event as a national disaster and to coordinate an effective response violates the Petitioners' rights to life, dignity, property, housing, and a clean and healthy environment. He thus deponed that the continued displacement of residents and loss of livelihood without redress had amounted to state neglect contrary to the provisions of Article 21 (1) of the Constitution which requires the state to respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

8. That accordingly, it was in the interest of justice that the Honorable Court issues the orders sought in the instant Petition including:

- i. Declaration that the flooding constitutes a national disaster;
- ii. Mandatory orders compelling the Respondents to assist the affected residents relocate to safer grounds;
- iii. Compensation of residents who have lost property and land;
- iv. Implementation of the 2020 Parliamentary Report recommendations; and
- v. Establishment of a permanent buffer zone and task force around Lake Naivasha.

9. That from the foregoing, the Honorable Court’s intervention was constitutionally necessary to avert further suffering and safeguard the rights of the affected residents. He thus urged the Court to allow the instant Petition as prayed.
10. The Respondents did not participate in the Petition despite service.
11. On 24th November, 2025, directions were taken for the disposal of the Petition by way of written submissions, wherein only the Petitioners complied and filed their submissions dated 4th December, 2025, in which they framed four (4) issues for determination as follows:
 - i. Whether the continued flooding of Lake Naivasha constitutes a national disaster requiring urgent state intervention;
 - ii. Whether the Petitioners’ constitutional rights under Article 28, 40, 42 and 43 have been violated;
 - iii. Whether the Respondent have breached their statutory and constitutional obligations under Article 69-70, EMCA, the Lake Naivasha Management Plan and the national disaster management framework; and
 - iv. Whether the Petitioners are entitled to the remedies sought.
12. The Petitioner’s Submissions regarding the flooding of the Kihoto area in Naivasha was that the State had failed to protect its citizens from a foreseeable environmental disaster. They contended that the unprecedented rising water levels of Lake Naivasha since 2019 had created a humanitarian and environmental crisis wherein the National and County Governments (the Respondents herein) had failed in their constitutional and statutory duties to manage this disaster, leading to widespread displacement and suffering.
13. On the first issue for determination, they submitted that since the years 2019/2020, Lake Naivasha had experienced a dramatic rise in water levels which then caused displacement of hundreds of households, destruction of homes, schools, churches, infrastructure, and the breakdown of essential services. That indeed the 2020 Parliamentary Report on the Rising Levels of Rift Valley Lakes had expressly recognized the Kihoto flooding as a disaster which had been triggered by abnormal hydrological and geophysical changes linked to climate variability. The Report had then recommended emergency intervention, relocation and compensation.

14. That under the National Disaster Risk Management Policy, a situation qualified as a national disaster where it caused loss of life, widespread displacement, extensive damage, which required extraordinary measures beyond county capacity. It was thus their submission that the Kihoto flooding had satisfied the said criteria and therefore the Respondents' inaction in declaring the area a disaster zone and thereafter to co-ordinate evacuation, relocation, mitigation and restoration, had constituted a dereliction of their constitutional and policy obligations.
15. On the second issue for determination as to whether the Petitioners' constitutional rights had been violated, they relied on the provisions of Articles 28 of the Constitution to contend that families had been forced to abandon homes and therefor live in makeshift shelters which had in turn exposed them to cold, disease and insecurity. That the state's failure to provide evacuation, resettlement or temporary shelter had thus violated the provisions of Articles 43 (1) (b) and 28 of the Constitution. They placed reliance in the Supreme Court's decision in **Mitu-Bell Welfare Society v AG & 2 Others [2021] eKLR** in support of their argument to the effect that the State was obligated to protect vulnerable persons from homelessness.
16. They further argued that whether the displacement arose from forceful eviction or environmental disaster, the state's obligation to protect, resettle and preserve dignity remained unchanged. That accordingly, the Respondents' failure to evacuate, shelter and relocate the Petitioners was unconstitutional.
17. On the issue for determination on the right to property under the provisions of Article 40 of the Constitution, the Petitioners submitted that being the lawful owners and residents of the impugned area, they had seen their property submerged or destroyed without compensation or a formal acquisition process. That the state's failure to prevent foreseeable harm, to compensate their loss or provide relocation had violated the provisions of Article 40 (3) of the Constitution and the principles as had been espoused in the decided case of **Virendra Ramji Gudka & 3 Others v AG [2014] eKLR**.
18. They maintained that the flooding of Lake Naivasha had been foreseeable, scientifically documented and officially acknowledged by Parliament in the year 2020 and therefore the Respondents' failure to mitigate, regulate settlement,

enforce riparian protections and to respond to the disaster had rendered them culpable for violation the Petitioners' rights.

19. That the flooding had caused water contamination, sanitation collapse, and increased disease, which the State had failed to mitigate so as to provide a clean and healthy environment as envisaged under the provisions of Article 42 of the Constitution. They relied on the holding of the decided case of **Kenya Wildlife Service v James Mutembei [2019] eKLR** to submit that where the failure of the state exposed its citizens to environmental hazards, it could not escape liability. That the Respondents' failure to enforce environmental safeguards around Lake Naivasha had subjected the residents to prolonged environmental harm which was in violation of the provisions of Article 42 of the Constitution.
20. They argued that since the state bore the duty to ensure sustainable environmental management, protect water catchments and establish riparian zones under the provisions of Article 69 (1) of the Constitution wherein EMCA and the Lake Naivasha Management Plan mandated a 100-metre riparian buffer zone and to impose duties on the National and County authorities to prevent occupation of vulnerable zones and mitigate environmental hazards, the Respondent had breached their constitutional and statutory obligations under the provisions of Articles 67-70 of the Constitution and EMCA, when they failed to:
 - i. Enforce riparian protection;
 - ii. Implement mitigation and early-warning measures;
 - iii. Regulate human settlement in a high-risk zone;
 - iv. Execute the Parliamentary recommendations of the year 2020;
and
 - v. Coordinate disaster management despite clear evidence of a worsening crisis.
21. They placed reliance in the decided cases of **Joseph Leboo & 2 Others v Director Kenya Forest Service & Another [2013] eKLR** and **Save Lamu v NEMA & Others [2019] eKLR** to submit that the Petitioners herein continue to suffer displacement without humane settlement and therefore the state must take precautionary measures to prevent environmental harm, even where scientific certainty was lacking.

22. They argued that the Petitioners were entitled to the remedies sought citing the provisions of Article 23(3) of the Constitution to the effect that the Court was empowered to grant appropriate reliefs including declarations, compensation, orders for restoration, structural interdicts and ongoing supervision.
23. That since the Petitioners herein had demonstrated continuing humanitarian and environmental crisis, ongoing violation of fundamental rights and failure by the Respondents to implement Parliamentary recommendations and statutory duties, the reliefs sought were not punitive but restorative, protective and forward-looking aimed at securing formal disaster declaration and emergency intervention, facilitating immediate evacuation and humanitarian support, compelling relocation and resettlement of the affected community, ensuring compensation for lost homes and property, enforcing permanent riparian buffer zones and establishing an accountable, multi-agency recovery and environmental governance framework.
24. They hinged their reliance on the decided case of **Republic v Cabinet Secretary for Interior & 2 Others Ex Parte Patricia Olga Howson [2014] eKLR** to submit that where it had been found that the state had failed to prevent foreseeable harm, judicial intervention was not only justified but necessary. They sought that the court grants them the reliefs as sought in their Petition.

Analysis and Determination.

25. I have considered the undefended Petition herein, its Affidavit in support, the written submissions and the authorities herein cited. The Petitioners bring this Petition on their own behalf and on behalf of the affected residents and landowners of Kihoto Area, Naivasha Sub County, Nakuru County under the provisions of Articles 2(1), 23(1)-(3), 28, 40, 42, 43, 69 and 70 of the Constitution alleging violation of their right in terms of human dignity, adequate housing, property and clean and healthy environment.
26. The Petitioners contend that the unprecedented rising water levels of Lake Naivasha since 2019 has created a humanitarian and environmental crisis. They argue that the National and County Governments (the Respondents herein) have failed in their constitutional and statutory duties to manage this disaster, leading to widespread displacement and suffering.
27. Their contention was that families are living in makeshift shelters without essential services thus depriving them dignity and housing which is contrary to

the provisions of Articles 28 & 43 of the Constitution. They argue that the State must protect vulnerable persons from homelessness. That although the Constitution guarantees them a right to property under Article 40, lawful landowners have seen their property submerged or destroyed by water without compensation or a formal acquisition process. That that flooding has caused water contamination, sanitation collapse, and increased disease, which the State has failed to mitigate thus depriving them a clean and healthy environment as envisaged under Article 42 of the Constitution.

28. They argue that the flooding was foreseeable and scientifically documented in a 2020 Parliamentary Report but the Respondents failed to:

- i. Enforce the 100-meter riparian buffer zone.
- ii. Implement early-warning systems or coordinate evacuation.
- iii. Resettle residents humanely as required by law.

29. They therefore seek the Court's intervention for restorative and structural remedies, including:

- i. A formal declaration of a national disaster.
- ii. Immediate humanitarian support and evacuation.
- iii. Compulsory relocation, resettlement, and compensation for lost property.
- iv. The establishment of a multi-agency task force to oversee recovery and enforce permanent environmental buffer zones.

30. From the aforesaid narration, I find the issues for determination herein as being;

- i. Whether or not the Petitioners have proved their case to the required standard
- ii. Whether Petitioners' rights under the Constitution were violated by the Respondents and what remedies if any are available to them.

31. It is trite in respect to Constitutional Petitions for the Petitioners to prove, on a balance of probabilities that their fundamental rights and freedoms as protected by or under the Constitution had been violated, by not only clearly identifying the relevant and specific Articles of the Constitution that had been contravened, but by availing evidence, through affidavit or otherwise of such

violation as per the required standard set out in the holding in the case of **Anarita Katimi Njeru vs The Republic [1979] eKLR** where the court had held as follows:

“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.”

32. The Petitioners have given a clear background of the matter in issue stating that over the past several years from 2019/2020 Lake Naivasha had experienced a dramatic rise in its water levels which then caused displacement of hundreds of households, destruction of homes, schools, churches, infrastructure, and the breakdown of essential services. That therein in 2020, the Departmental Committee on Environment and Natural Resources of the National Assembly conducted an inquiry into the rising water levels in Kenya's Rift Valley Lakes, including Lake Naivasha, and published a detailed report (Annexed as WNM-3) which was tabled in Parliament. That the 2020 Parliamentary Report expressly recognized the Kihoto flooding as a disaster which had been triggered by abnormal hydrological and geophysical changes linked to climate variability. The Report then recommended emergency intervention, relocation and compensation.
33. That despite the said recommendation, the Respondents had failed to implement the same. That since the year 2019, the water of Lake Naivasha had steadily risen, inundating extensive portions of land within Kihoto, Karagita, and adjacent areas resulting in the displacement of hundreds of families, destruction of property, and submersion of public amenities including roads, schools, churches, and boreholes thus forcing the affected residents to abandon their homes and move to higher grounds or makeshift shelters without any structured resettlement plan or humanitarian assistance. That despite repeated appeals to both the National and County Governments, there had been no coordinated or

effective response, nor had the situation been declared a National Disaster, as required under national disaster management framework.

34. It is based on the Respondent's inaction that they raised grave questions of public interest concerning environmental governance, socio-economic rights, disaster management and the State's duty of care to vulnerable communities.

35. The Petitioner's case is that despite the Parliamentary Report (2020) having identified Lake Naivasha as one of the areas most severely affected, with substantial displacement of residents, the failure of the Respondents to declare the event a national disaster and to coordinate an effective response thereby had resulted into the following:

36. Continued displacement, of residents and loss of livelihood without redress amounted to state neglect contrary to Article 21(1) of the Constitution, which provided as follows;

"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights".

37. The Petitioners anchored Article 21(1) of the Constitution on human rights as their primary focus of all State organs which required them to observe, respect, protect, promote and fulfil the rights and freedoms enshrined in the Bill of Rights including environmental rights. I therefore hold that by ignoring the Parliamentary recommendations, the Respondents did not just fail a task but breached their foundational duty to protect and fulfill the Bill of Rights.

38. In the case of **Kimeu & 3074 others v Kenya Pipeline Company Ltd & another (Environment and Land Petition 9 of 2019 & Petition 8 & 12 of 2019 (Consolidated)) [2025] KEELC 5239 (KLR) (11 July 2025) (Judgment)** also Known as the **Thange River Oil Spill case**, the court held that Article 21 demands "proactive and sustained commitment," not passivity. The Respondent's silence 'therefore for more than 4+ years after the recommendation, I find was therefore a definition of constitutional passivity.

39. The Petitioners' grievance was that due to the displacement of hundreds of families, there had been loss of life which was in contravention of Article 26 of the Constitution that provides as follows;

"Every person has the right to life".

40. The right to life encompasses the fundamental principles that every person has a right to exist and the State has a duty to protect it. The General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR) the right to life, is to the effect that the said right is a supreme right from which, no derogation is permitted even in situations of armed conflict or other public emergencies. Article 4 of the African Charter on Human and Peoples' Rights (ACHPR) establishes the right to life as a fundamental right. Every human being is entitled to respect for their life and integrity of their person and no one can be deprived of this right. Article 3 of the Universal Declaration of Human Rights (UDHR) provides that everyone has a right to life, liberty and security of the person.
41. In modern Kenyan jurisprudence, the "Right to Life" is interpreted broadly and is not just about the absence of death but about the conditions required to sustain life. When therefore the State allows families to live in floodwaters contaminated by sewerage and surrounded by wild animals, they are placing the residents of Kihoto in a life-threatening environment. The failure to evacuate or provide clean water to the Petitioners was therefore a direct threat to the right to life.
42. The Petitioners' Petition was also based on the fact that due to the rising waters of Lake Naivasha, and inaction by the Respondents, they, their families, residents and landowners of Kihoto Area had been forced to live in makeshift shelters without essential services thus depriving them dignity and housing in contravention of the provisions of Articles 28 and 43 of the Constitution which provide as follows;
43. Article 28 of the constitution provides as follows;
- "Every person has inherent dignity and the right to have that dignity respected and protected".*
44. Whereas Article 43 (1)(b) of the Constitution is to the effect that;
- Every person has the right—*
- (b) to accessible and adequate housing, and to reasonable standards of sanitation;*

45. Articles 28 and 43 of the Constitution are often argued together as "dignity" is the quality of life, and "housing " is the physical requirement for it. Living in "makeshift shelters" without sanitation herein documented by the Petitioners was per se violation of Article 28 of the Constitution.

46. Their grievance was that not only had the situation deprived them of dignity and housing but that the state's failure to prevent foreseeable harm, to compensate their loss or provide relocation had violated the provisions of Article 40 (3) of the Constitution wherein their properties had been submerged in the water.

47. The provisions of Article 40(3) of the Constitution provide as follows;

(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.

48. That not only had the flooding caused water contamination, sanitation collapse, and increased disease, but the State had also failed to mitigate so as to provide a clean and healthy environment as envisaged under the provisions of Article 42 of the Constitution which provides as follows;

“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''.

49. In support of their allegations, the Petitioners annexed copies of title deeds to land parcel No. Naivasha /Town Block 1/ 1576, which land is jointly owned by the 2nd and 3rd Petitioners, title to land parcel No. Naivasha /Town Block 1/ 1571 owned by the 4th Petitioner, No. Naivasha /Town Block 1/ 194 (Kihoto) owned by the 5th Petitioner, WNM-1 as well as pictures and a video link. <https://www.youtube.com/watch?v=7CwjssycCOM> showing the extent of flooding in Kihoto Area as WNM 2.

50. The issue of violation of the right to human dignity, adequate housing, property and clean and healthy environment under the provisions of Articles 28 and 43, 40 and 42 of the Constitution was decided by the supreme Court of Kenya in holding in the case of **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)**, when it observed as follows at paragraphs 146, 147, 148, 149, 152, 153 and 155.

“From the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredibly unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many. What with each successive government erecting the defence of “lack of resources? The situation is compounded by the fact that, for reasons incomprehensible, the right to housing in Kenya is

predicated upon one's ability to "own" land. In other words, unless one has "title" to land under our land laws, he/she will find it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction.

150.

This scenario has inevitably led to the emergence of the so called "informal settlements", an expression that describes a habitation by the "landless". In their struggle to survive, many Kenyans do occupy empty spaces and erect shelters thereupon, from within which, they eke their daily living. Some of these settlements sprout upon private land, while others grow on public land. It is these "settlers" together with their families who face the permanent threat of eviction either by the private owners or State agencies. The private owners will raise 'the sword of title', while the State agencies will raise 'the shield of public interest'. So where does this leave the right to housing guaranteed by article 43 of the Constitution? "

51. From the above holding, it is clear that the court's holding was that the 2010 Constitution is a "transformative" document intended to protect the vulnerable, even if they are on public/riparian land, in that they had "protectable interest" in their housing. That the right to housing (Art. 43) is not just about a roof over one's head, but is a component of the right to human dignity (Art. 28) and that the right to housing accrues to every individual by virtue of being a citizen. That the State cannot simply watch a community become homeless due to a foreseeable disaster and do nothing. The right to housing includes a "reasonable standard of sanitation" which is impossible in a submerged estate like Kihoto.
52. I have also considered the Petitioners' annexed the detailed report by the Departmental Committee on Environment and Natural Resources of the National Assembly, into the rising water levels in Kenya's Rift Valley Lakes, including Lake Naivasha, as WNM-3 its adoption thereto and the recommendations therein to the effect that:

"The Committee recommends as follows:

(i) On the first prayer that a recommendation, be made for resettlement of the affected home owners, the Committee

recommends that after remarking of the riparian area around Lake Naivasha, the Chairman of the National Land Commission and the Cabinet Secretary for Lands and Physical Planning should ensure expeditious resettlement of those found to be in possession of genuine land ownership documents and are found to be within the confines of the remarked riparian area.

(ii) On the second prayer that a recommendation be made that the Government repossesses the affected flooded lands and compensate the home owners with alternative land equivalent in value to their repossessed lands, the Committee recommends that the Ministry Cabinet Secretary for Water, Sanitation and irrigation, the Chairman of the National Land Commission and the Cabinet Secretary For Lands and Physical Planning should urgently spearhead the remarking of the riparian area around Lake Naivasha and consequently chart a way forward for those to be found within the remarked riparian areas.

(iii) On the third prayer that the National Assembly intervenes to ensure a buffer zone is erected to minimize cases of Human Wildlife Conflict and hasten compensations to any individual falling prey to wildlife attack, the Committee recommends that:

a) The Cabinet Secretary for Water, Sanitation and Irrigation should ensure robust implementation of the lake Naivasha Protection Rules that were gazette in 2012 which include the lake Naivasha Catchment Area Protection Order, 2012, Lake Naivasha Ground Water Conservation Area Order, 2012 and the determination of Lake Naivasha Water reserve.

b) The Cabinet Secretary for Tourism and Wildlife should fast track the compensation of claims emanating from the Human-Wildlife Conflict in Kihoto Estate, Naivasha.

(iv) On the fourth prayer that the National Assembly makes any other order or direction that it deems fit in the circumstance of the case, the Committee recommends that:

a) The Cabinet Secretary for Devolution should:

i. spearhead provision of nets to curb mosquito infestation and deal with clean water provision and the waterborne diseases emanating from the poor sanitation in the Kihoto Estate area since health was a largely devolved function.

ii. institute a rehabilitation programme to rehabilitate, relocate, and restore damaged infrastructure such as water supplies, sewerage plants, fish handling facilities, among others.

b) The Cabinet Secretary for Water, Sanitation and Irrigation should ensure finalization and implementation of the National Lake Basin Management Strategy which will provide an integrated framework for the sustainable management and use of Lake Basin resources.

a) The Cabinet Secretaries for Environment and Forestry, that for Water, Sanitation and irrigation, that for Lands and Physical Planning and the Chairman of the National Land Commission should spearhead efforts to support all the 47 Counties to prepare Climate Resilient County Spatial Plans that will anticipate such challenges in a more predictive manner. The plans should clearly delineate the new proposed high-water marks and provide clear land use and physical planning guidelines that will avert the continued encroachment of developments in areas considered as riparian areas, under the relevant laws''.

53. Alongside with the report, the Petitioners also annexed copies of the following minutes.

i. "MINUTES OF THE 57TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES HELD VIRTUALLY ON WEDNESDAY 15TH SEPTEMBER, 2021 AT 10.00 AM.

MIN.NO. DC/ENR/257I/2021: - RESPONSE To A PUBLIC PETITION REGARDING DISPLACEMENT OF RESIDENTS OF KIHOTO HOME OWNER SELT'- HELP GROUP, KIHOTO ESTATE IN NAIVASHA AS A RESULT OF LAKE NAIVASHA'S RISING WATER LEVELS.

- ii. MINUTES OF THE 33RD SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES HELD IN THE COMMITTEE ROOM ON 2ND FLOOR, CONTINENTAL HOUSE AND VIRTUALLY ON WEDNESDAY 30TH JUNE, 2021 AT 10.00 AM.

MIN.NO. DC/ENR/141/2021: - MEETING WITH THE PETITIONERS ON THE PETITION REGARDING DISPLACEMENT OF KIHOTO HOMEOWNERS' SELF.HELP GROUP, KIHOTO ESTATE BY THE RISING WATER LEVELS OF LAKE NAIVASHA".

54. The comprehensive report, and the accompanying minutes, I find was a "game-changer" for the Petitioners' case wherein the burden of proof shifted significantly toward the Respondents who saw it fit to stay away from the proceedings despite service. The said Report I find, proves that the State had Actual Knowledge of on the ongoing in Kihoto area, within Naivasha Sub County, Nakuru County, (Parliament) having had officially investigated the crisis, confirmed its severity, and issued specific recommendations for action. The Respondents' failure to implement the report, I find transitions into actionable negligence. The minute-taking of the 57th and 33rd sittings shows that the State (through the Committee) engaged directly with the Kihoto Homeowners Self-Help Group and therefore created a Legitimate Expectation under Administrative Law under Article 47 of the Constitution.

55. The State's silence and total failure to act on these recommendations was a "betrayal of trust" for which the Courts, under Article 70 of the Constitution are empowered to remedy and/or enforce.

56. The Committee at recommendation (ii) had advised the Government to as follows;

"that a recommendation be made that the Government repossesses the affected flooded lands and compensate the home owners with alternative land equivalent."

57. This recommendation would then have triggered a process known as compulsory acquisition as is found in Part VIII, Section 107 to 133 of the Land Act

2012 wherein the process of compulsory acquisition was laid down in the decided case of **Patrick Musimba vs. National Land Commission & 4 Others [2016] eKLR.**

58. Secondly, the State had admitted that the area had become a hazard under its jurisdiction wherein it had recommended that;

“that the National Assembly intervenes to ensure a buffer zone is erected to minimize cases of Human Wildlife Conflict”

59. I have further considered that the 2020 Parliamentary Report entitled “Report on a Petition Regarding Displacement of Kihoto Homeowners Self-help Group, Kihoto Estate by the Rising Water Levels of Lake Naivasha, Nakuru County” herein annexed as WNM-3 in the Petitioners supporting affidavit was presented to the House by the Hon. Speaker, on behalf of the Petitioners on 4th March, 2021 and subsequently committed to the Committee on 8th March, 2021 for consideration pursuant to Standing Order 227. The Committee consequently seized the matters raised in the Petition and processed it through deliberative meetings and written submissions from the Petitioners, the Ministry of Environment and Forestry, the Ministry of Water, Sanitation and Irrigation, and that of Tourism and Wildlife all with a view to responding to the prayers sought by the petitioners. The Committee also conducted an inspection visit of the site on the 10th September 2021.

60. It is therefore the court’s holding that where the National Assembly adopted the report recommending urgent humanitarian aid which report was ignored for years, this amounted to a breakdown of the Rule of Law.

61. The Petitioners further contended that that pursuant to Article 69(1)(d) of the Constitution, the State was obligated to encourage public participation in environmental management and protect the environment for the benefit of present and future generations.

62. Article 69(1)(d) of the Constitution provided as follows;

“The State shall—

.....

(d) encourage public participation in the management, protection and conservation of the environment”

63. Article 69(1)(d) of the Constitution establishes Environmental Democracy, which means that the people most affected by environmental changes—like the

residents of Kihoto—have a constitutional right to be involved in the decisions that affect their land and safety. The Petitioners argued that by failing to consult or include the community in the Lake Naivasha Management Plan or disaster mitigation strategies, the State treated them (residents} as passive victims rather than active stakeholders and therefore failed to protect their homes from the rising water levels. That participation was not just a courtesy, but a mandatory procedural requirement as was held in **Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] KENET 98 (KLR)** as follows:

“In Constitutional Petition No. 305 of 2012: Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others a three-judge bench of the Kenya Constitutional Court set out the minimum basis for adequate public participation as follows: -

“97. From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be

prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

*Sachs J. of the South African Constitutional Court stated this principle quite concisely thus: "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. **(Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))"***

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information.

*See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)**. In relevant portion, the Court stated: "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*

64. By not sharing information with the Petitioners, under Article 69(1)(d) of the Constitution, where the State had a duty to share information and to provide data on the Rising water levels (Early Warning Systems) of the Planned relocation or mitigation measures, thereby keeping the Kihoto residents "in the dark" about the foreseeable flooding of 2019/2020 they had thereby violated the essence of Article 69(1)(d).

65. As submitted, the Environment Management and Coordination Act (EMCA) establishes the legal framework for environmental protection and sustainable management, placing the primary obligation on the National Environment Management Authority (NEMA) and other state agencies to prevent and mitigate environmental degradation. On its part, the National Policy for Disaster Management (2018) mandates the National Government, through the Ministry of Interior and National Administration, to coordinate disaster response, including flooding, displacement and post-disaster recovery.
66. The connection between these legal frameworks and the Petitioners' plight is the State's failure to fulfill its protective "Ombudsman" role. By citing EMCA and the National Policy for Disaster Management (2018), I find that the Petitioners removed their Petition from a "natural disaster" argument to a "legal negligence" argument. The connection therefore lay in three specific legal obligations that were allegedly breached;
67. Under Environment Management and Coordination Act (EMCA), the National Environment Management Authority (NEMA) was not just a "clean-up" agency but had the mandate to anticipate and prevent environmental accidents, including floods.
68. That the rising levels of Lake Naivasha were not a sudden event. Since the 2021 Parliamentary Report identified Kihoto as a high-risk zone, NEMA had a statutory duty to enforce land-use guidelines and create safeguards like dykes or remarking riparian zones to protect the built environment. Therefore by allowing the environment to degrade to the point where homes are permanently submerged, NEMA failed in its "supervisory and coordination" role over Lake Naivasha's ecosystem.
69. Secondly the National Disaster Policy 2018 shifted the State's role from reactive relief (giving food after a flood) to proactive risk reduction wherein the Ministry of Interior was mandated to coordinate "post-disaster recovery" and "resettlement." By failing to declare Kihoto a National Disaster, the Ministry had therefore deliberately "short-circuited" the legal triggers that would have released emergency funding and resources for the resettlement of the Petitioners. This is because the policy requires a "continuum of care" from relief to rehabilitation. The Petitioners' transition into makeshift shelters therefore

shows that the Ministry of Interior failed to coordinate the rehabilitation phase required by the 2018 Policy.

70. Lastly, National Environment Management Authority (NEMA) and the Ministry of Interior I find, created a legal "pincer movement" against the Respondents to the effect that whereas NEMA had the duty to ensure the Environmental Protection of the lake (destruction of the Petitioner's homes) one the other hand the Ministry of Interior had the duty to ensure Humanitarian Recovery that the homes were replaced once the disaster hit. The Petitioners are "trapped" because NEMA did not protect the environment, while the Ministry of Interior has not managed the disaster and neither of them is taking responsibility for the Kihoto community.

71. I find that the laws are not suggestions but are mandates where EMCA creates the "Standard of Care" for the lake's environment, the 2018 Policy creates the "Operational Manual" for the disaster and the "2021 Report" proves that the State knew they were failing both.

72. Section 2 of the The Environmental Management and Coordination Act (EMCA), 1999 defines precautionary principle as the principle where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The Precautionary Principle recognizes the limitations of science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there is uncertainty. This principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities. Indeed, under Principle 15 of the Rio Declaration the same is to the effect that:

"Where there are warnings of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason of postponing cost-effective measures to prevent environmental degradation."

73. The Precautionary Principle, is therefore a "legal shield" for the Petitioners wherein its core message to the State is simple: "Do not wait for 100% scientific certainty before acting to prevent a disaster." And therefore, in their case, the

Petitioners argue that the Respondents cannot use the complexity of climate change or hydrological cycles as an excuse for their delay. The state therefore had a duty to look at the rising water in 2019/2020 and act immediately, even if they were not sure exactly how high the lake would go for once a "threat of harm" was shown, it was up to the State to prove that their *inaction* was safe—not for the Petitioners to prove exactly how the disaster happened.

74. In this case, the 2021 Parliamentary Report was the "scientific warning" whereby by ignoring it, the Respondents violated the principle by postponing measures (resettlement and remarking riparian zones) despite clear evidence of "serious and irreversible damage" to the Kihoto community.
75. The Respondents effectively adopted a "wait and see" approach which the Precautionary Principle specifically forbids especially when human life and property were at risk.
76. In **Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Chagamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR)**, the Supreme Court of Kenya had held as follows;

“In addition to the polluter pays principle there is also the precautionary principle which directly impacts on environmental liability. The precautionary principle marks a shift from post-damage control (civil liability as a curative tool) to the level of pre-damage control (anticipatory measures of risks). Principle 15 of the Rio Declaration on Environment and Development states in that context;

[i]In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

(See also Kariuki Muigua, Attaining Environmental Justice for Posterity Vol 2 Glen Wood Publishers Limited Pg 26-47).”

Section 3(5) of the EMCA embodies these principles to guide the courts at arriving at a determination in an application for redress for a contravention to a clean and healthy environment. The same have been described under section 2 of the Act as follows;

"polluter-pays principle" means that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law;

"precautionary principle" is the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;"

77. From the above holding, the Supreme Court emphasized that regulatory bodies must be proactive, not reactive. The same logic therefore applies here where NEMA should have enforced the 100-metre buffer zone *before* the homes were submerged.

78. The Precautionary Principle is the engine that drives Article 69 (State's obligation to protect the environment) and therefore where the State fails to apply precaution, a citizen can move to court under Article 70 to stop the harm before it becomes permanent. The Petitioners' argument in this case as I perceive it is as follows:

"We told you the water was rising in 2021. You were not sure of the exact cause, but you knew our houses were drowning. By law, you should have acted then. Your delay has turned a manageable flood into a permanent humanitarian disaster."

79. Under the National Disaster Risk Management Policy (2018) and the National Disaster Risk Management Bill, a situation is classified as a disaster when it meets these specific criteria:

- (a) uses or threatens to cause —
 - (i) death, injury or disease;
 - (ii) damage to property, infrastructure or the environment; or
 - (iii) significant disruption of the life of a community; and
- (b) is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources;

80. "Disaster risk" therefore means the potential loss of life, injury, or destroyed or damaged assets which could occur to a system, society or a community in a specific period of time, determined probabilistically as a function of hazard and therefore I find the 2021 Parliamentary Report contains a factual finding that the Kihoto flooding satisfies these elements. With this in mind, I end by holding that the Respondents herein violated the Petitioners rights as envisaged under Articles 2(1), 23(1)(3), 28, 40, 42, 43, 69 and 70 of the Constitution and proceed to direct as follows;

- i. The Respondents shall implement the recommendations of the Report by the Departmental Committee on Environment and Natural Resources of the National Assembly, into the rising water levels in Kenya's Rift Valley Lakes, including Lake Naivasha, and:
- ii. Immediately mobilize national emergency resources for the provision of clean water, sanitation, and medical supplies to the displaced residents of Kihoto.
- iii. Formally initiate the Resettlement Action Plan as recommended by the 2021 Report by identifying and allocating an alternative safe land for relocation of all persons affected by the floods.
- iv. Thereafter, they shall facilitate the evacuation of all residents currently affected by the flooding and rising water levels.
- v. In the alternative, the Respondents shall value and compensate all affected landowners/victims holding genuine ownership documents and/or whose land has been submerged

or repossessed for the riparian reserve whereby the said victims shall surrender the titles to the repossessed land, to the state.

- vi. An order is herein issued directing the Respondents to remark the riparian boundary of Lake Naivasha and thereafter create and enforce a buffer zone.
- vii. The Respondents shall also establish and operationalize a multi-agency task force that shall embark on the enforcement of the orders issued herein and file a comprehensive Action Plan in this Court within thirty (30) days, detailing:
 - i. The timelines for the resettlement and/or compensation of the Petitioners;
 - ii. The steps taken to restore any damaged infrastructure in the Kihoto area
 - iii. The measures implemented for the permanent protection of the Lake Naivasha riparian zone.
- viii. To retain jurisdiction over this matter, the Respondents shall appear every **sixty (60) days** to report on the progress of the implementation of the Action Plan until full compliance is achieved.
- ix. The Petition having been brought in public interest, there shall be no costs.

Dated and delivered via Teams Microsoft at Naivasha this 22nd day of January 2026.



M.C. OUNDO

ENVIRONMENT & LAND COURT- JUDGE