

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC PETITION E056 OF 2022

SAMORA SIKALIEH, suing as the Chairman of

KAREN LANGATA DISTRICT ASSOCIATIONPETITIONER

Versus

FREDRICK CHEGE KAMENWA1st RESPONDENT

WATER RESOURCES AUTHORITY2nd RESPONDENT

WATER SERVICES REGULATORY BOARD3rd RESPONDENT

JUDGMENT

1. The Petitioner took out this Petition dated 28.11.2022 against the three (3)

Respondents seeking to be granted the following orders:

- (i) **A Declaration that the 1st Respondent has infringed the Petitioner's member's economic and social rights under Article 42 (1)(d) of the Constitution to clean and safe water in adequate quantities and acted inequitably and in contravention of the Karengata Local Physical Development Plan 2016 (LPDP) by illegally selling water on a commercial basis**

contrary to the express terms of his domestic permit No. WRM / 30/ NRB / 3AA / 15040/G issued by Water Resources Authority on 29th June 2019, and negatively impacting the adequacy of groundwater resources.

(ii) A Declaration that the 2nd Respondent has breached its statutory duty to implement Regulation 52 of the Water Resource Regulations 2021 by:

- a) Failing to stop the 1st Respondent from contravening his domestic permit No. WRMA/ 30N/ NRB / 3AA/15040/G aiding and abetting the illegal sale of water on a commercial basis
- b) Failing to determine the allocation plan for a given aquifer or part thereof and the spacing of boreholes within a radius of 500 metres.
- c) Failed to be guided by the regulation of groundwater development, leading to the proliferation of boreholes within a 500–metre radius.
- d) Failed to scientifically gather scientific data on individual aquifer characteristics, water quality and aquifer use in the Karengata area.

e) Failing to maintain an allocation plan available and accessible to the public on its website or any of its offices, showing

(iii) A Declaration that the 2nd and 3rd Respondents have:-

a) Failed to carry out their constitutional and statutory regulatory oversight in water resource management by failing to take steps to conserve the water aquifer and strictly implement the licensing and monitoring of water abstraction permits

b) Failed in their constitutional and statutory duty to protect the environment and natural resources with a view to establishing a durable and sustainable system of water protection and securing sufficient residual water as set out in the Fifth Schedule of the Constitution.

(iv) An Order of MANDAMUS be issued to compel the 2nd and 3rd Respondents to:

a) Forthwith undertake a physical ground survey of all boreholes in the Karengata area in compliance with Regulations 52, The Water Resources Regulations, 2021 and establish valid authorisations, locations, distances from each other, the number and construction details, age, current status and use, current abstraction and use.

- b) Enforce the Water Act and punish any person who abstracts and sells water on a commercial basis without a valid licence.**
- c) Maintain an allocation plan available and accessible to the public on its website or any of its offices in compliance with Regulation 52 (3) The Water Resources Regulations 2021.**
- d) Provide the Hydrogeological Assessment / Survey Report and Borehole Completion Report that formed the basis for the original application for water permit No. WRMA /30/ NRB/ 3AA/ 15040/G issued by Water Resources Authority on 29th June 2019.**
- e) Establish the revenue loss by the illegal sale of water on a commercial basis and impose penalties and backdated water charges with interest from 29th June 2019 to date against the 1st Respondent and file and serve the report of revenue loss in court within seven (7) days of assessment.**
- f) Provide daily water meter readings and records of verifiable bowser water sales covering the period from 29th June, 2021, to the date of the order of the court establishing the total water illegally abstracted over and above 20 cu m (cubic metres) per day allowed by the domestic water permit No. WRMA / 30/ NRB/3AA/15040/G issued by Water Resources**

Authority on 29th June 2019 to the 1st Respondent and file and serve the report within seven (7) days of completion.

g) Take appropriate steps to cancel the domestic permit NO. WRMA/30N/NRB/3AA/15040/G issued by Water Resources Authority on 29th June 2019 to the 1st Respondent for abuse of the water permit.

h) Investigate and prosecute the 1st Respondent for contravention of various provisions of the Water Act and the Water Resources Regulations, 2021.

(v) An Order of PROHIBITION be issued restraining the 2nd and 3rd Respondents from issuing the 1st Respondent with a water permit or licence to sell water abstracted from his borehole located on his property located along Acacia Avenue in Karen on a commercial basis contrary to the domestic permit No. WRMA / 30/ NRB/ 3AA/15040 / G issued by Water Resource Authority on 29th June, 20219

(vi) A PERMANENT INJUNCTION restraining the 1st Respondent, his servants, agents or otherwise howsoever from selling water on a commercial basis, allowing any water bowsers access to his boreholes located on his property located along Acacia Avenue in Karen contrary to the domestic permit

No. WRMA / 30/NRB/ 3AA/15040 / G issued by Water Resources Authority on 29th June, 2019.

(vii) General damages to be paid by the 1st Respondent.

(viii) Costs be awarded to the Petitioner.

2. The Petitioner pleads that

On account of inadequate public water supply and the consequent high density of boreholes per square kilometre, the aquifers are being depleted at an alarming rate. Ten (10) years ago, boreholes were dug to depths of between 100 and 200 meters. The majority of those boreholes at those depths have dried up, and it is now common to dig up to 400 metres to access water.

3. He states that the 1st Respondent was given a domestic water permit No. WRMA/30/NRB/15040/G by the 2nd Respondent on 29th June 2019. Soon after obtaining the permit, the 1st Respondent began selling water on a Commercial basis, which the Petition assert is illegal. The illegality is stated, inter alia, that, contrary to his permit for 20 cu m per day, the 1st Respondent was abstracting about 30 cubic metres daily for sale.

4. Sometimes in 2021, a complaint was made to the 3rd Respondent (WRA) about the illegal use of the borehole. In mid-2021, officials from WRA visited the site and threatened to cap the borehole if the illegal abstraction continued. As no action was taken to implement the threat, the 1st

Respondent continues to conduct this illegal action with impunity and contravenes the express order of WRA.

5. That the letter from the 2nd Respondent has not inspired confidence in the Petitioner, as it amounted to little more than a slap on the wrist for the 1st Respondent, with the 2nd and 3rd Respondents' officials merely advising him to legalise his position and obtain a commercial water abstraction permit. This was a total failure and a dereliction of the constitutional and statutory oversight vested in the 2nd and 3rd Respondents.
6. During the duration of his five (5) year water permit, the 1st Respondent would have been entitled to a maximum water volume of 36,500m³ [20.00m³ /day x 365 days x 5 years]. The 2nd and 3rd respondents should immediately carry out an audit of the amount of water abstracted since the borehole was commissioned and show the total water abstracted to date using the readings from the 1st Respondent's water meter installed on the borehole, in compliance with Regulation 57(3) of the Water Resources Regulations 2021. The 1st Respondent has committed an offence under Section 145 (g) of the Water Act by neglecting and refusing to comply with the lawful orders given by WRA in 2021 and by WRA in its letter of 11th October 2022 notifying him that he was commercially selling water contrary to his domestic water permit.
7. The Petitioner pleaded that they wrote to the 3rd Respondent vide a letter dated 18.10.22 and 31.10.22 demanding that actions be imposed on the 1st

Respondent. Instead, the 1st Respondent continued to sell water on a commercial basis, whose sales have adversely affected the environment and residents within his vicinity.

8. The Petitioner accuses the 2nd Respondent of breaching its statutory duties under Regulations 52 as follows: -

- a) Failing to determine the allocation plans for a given aquifer or part thereof and the spacing of boreholes within a radius of 500 metres**
- b) Failed to be guided by the regulation of groundwater development, leading to the proliferation of boreholes within a 500-metre radius.**
- c) Failed to scientifically gather scientific data on individual aquifer characteristics, water quality and aquifer use in the Karengata area.**
- d) Failing to maintain an allocation plan available and accessible to the public on its website or any of its offices.**
- e) Failing to liaise and cooperate with the Petitioner in the equitable and efficient management of water resources in Karengata for the benefit of all consumers.**

9. Under part D of the Petition, the particulars of constitutional provisions violated are set out. Inter alia, the 1st respondent has infringed on their right to a clean and healthy environment under article 42 and is in contravention

of the Karengata local Physical Development Plan 2016 (LPDP) by illegally selling water on a commercial basis contrary to the express terms of permit no WRMA/30/NRB/3AA/15040/G.

10. The 2nd and 3rd Respondents have infringed the constitutional obligation imposed under Article 69 of the Constitution when they:

- i. Failed to ensure sustainable exploitation, utilisation, management and conservation of the environment and resources and ensuring the equitable sharing of the accruing benefits of borehole water [per Article 69(1)(A)]**
- ii. Failed to encourage and involve the petitioner in public participation in the management, protection and conservation of the environment in Karengata [per Article 69(1)(d)].**
- iii. Failed to establish environmental audit and regular monitoring of all existing boreholes in Karengata [per Article 69(1)(F)].**
- iv. Failed to eliminate the commercial abstraction of water contrary to domestic water permits issued, which amounted to activities likely to endanger the environment by substantially reducing the further lifespan of the aquifer on account of accelerated depletion [per Article 69(1)]**

11. The petition was opposed by the Respondents' separate set of Replying affidavits. The 1st Respondent swore a replying affidavit dated 26/6/2024. He deposed that before submitting his application for the water permit in

2015, he instructed a qualified water professional, J.G. Muchira, to conduct hydrogeological investigations on his parcel No. L.R. 12159/30 in Karen.

12. Following his instructions, J.G. Muchira issued a report in July 2015. The report concluded that the proposed borehole was viable and was expected to yield reasonable amounts of water. The 1st Respondent deposes that the report showed his borehole would abstract water only from the deepest aquifers within the upper Athi series with no foreseen interference with existing boreholes.

13. He contends that he complied with the process required by the 2nd Respondent by submitting the requisite documents. He also engaged the Aaron Drilling company, which proceeded to drill. The test pumping results revealed a discharge rate of 16 m³/hr. According to him, the applicable regulations allow an abstraction rate of 60% of the total yield, which amounts to 230.4 cubic meters per day.

14. The 1st Respondent states that it is on this basis that, upon his application, the 2nd Respondent granted him a permit to abstract groundwater up to 96 cubic meters daily, which is about 25% of the borehole yield.

15. The 1st Respondent avers that the Petitioner has not challenged the authorisation to drill the borehole or abstract the water that the Petition is based on untrue statements of fact, pure guesswork, with a view to unfairly raising claims against him. That the Petitioner has failed to provide identifiable vehicles involved in the Commercial sale of water.

16. He avers that the 2nd Respondent is fully within its mandate to provide directions and guidance to permit license holders regarding compliance with relevant laws and regulations. He urged the dismissal of the Petition.
17. The 2nd Respondent filed a replying affidavit sworn by Robinson Kimari, sworn on 27.2.2024, in opposing the petition. Mr Kimari deposes that Section 11 of the Water Act established the 2nd Respondent, while Section 12 sets out its functions. The 2nd Respondent affirms the issuance of the water permit to the 1st Respondent, adding that it was to expire on 29.6.2024 (after a period of five (5) years). He deposed that the permit was issued for domestic use, and that the water allocation for abstraction was 20 cubic metres per day.
18. The 2nd Respondent deposes further that this permit was issued subject to the conditions in Sections 41 and 42 of the Water Act, inter alia, installation of a measuring and controlling device at the borehole for accurate measurement of Water abstracted and payment of water use fee.
19. The 2nd Respondent avers that its officers visited the 1st Respondent's site following a complaint by the Petitioner's letter dated 19.9.2022. During the visit, the officers issued an invoice for 169,346 to pay arrears. They also gave him a letter notifying him of the commercial use of borehole water, in violation of the domestic water allocation.
20. The 2nd Respondent deposed that following the Court Order dated 16.2.2023, they carried out a survey and filed a report explaining the rationale and basis

of a hydrogeological assessment of the borehole in question (annex JNK-3) in considering the 1st Respondent application for water permit, the 2nd Respondent stated it considered the hydrogeological Survey carried out concerning an existing borehole shall not demonstrate the impact it has on the aquifer.

21. That the Nairobi Aquifer Suite covers an area of 5816 Km² covering Nairobi, Kajiado, Machakos, Kiambu, Murang'a and Nyandarua counties. The Nairobi Aquifer Suite provides groundwater to meet domestic and public water supply, irrigation, and industrial needs in the Nairobi Metropolitan and its environs.
22. That it is therefore not possible to carry out a hydrogeological assessment for a specific borehole to determine its impact on the aquifer; what can be assessed is the consumption attributed to one borehole and not the impact that the borehole has on the entire Nairobi aquifer.
23. That the 2nd Respondent is in the process of developing the Nairobi Aquifer Water Allocation Plan, which is in draft stage. The said water allocation plan has already undergone stakeholder consultations and is awaiting finalisation.
24. That I am advised by the 2nd Respondent's advocate on record which advice I verify believe to be true that the allegations by the Petitioner that the 2nd Respondent has failed to carry out its statutory duty by failing to take steps to conserve water aquifers and implement the licensing and monitoring of

water abstraction permits is not true and no evidence has been adduced to demonstrate this.

25. Vide a replying Affidavit sworn 23.11.2023 by Dr Julius Itunga, the 3rd Respondent states that it has been wrongly sued. Dr Itunga deposes that:-

Additionally, Regulation 72 and 73 of the Water Services Regulations 2021 provide that regulation of water vendors, including borehole operators, is an obligation of the water service provider within whose service area the water vending is located.

26. He avers that the 3rd Respondent published a Notice in the Standard Newspaper on 31.1.2023 advising all water service providers to register Water Vendors within their respective areas of service.

27. The 3rd Respondent deposes that the Petition does not disclose a reasonable cause of action against the 3rd Respondent. He urged the Court to dismiss the Petition with costs.

28. The Petitioner filed submissions dated 21st November, 2026, with opening statements setting out the background to the petition as well as analysing the hydrogeological survey report produced by the 2nd Respondent. The Petitioner raised three questions for the determination of the dispute as follows:

- i. Whether the impugned permit L Number has ceased by operation of law upon the demise of the 1st Respondent;**

- ii. Whether the 1st Respondent has violated the Petitioner's members' constitutional right to a clean, safe, and adequate water under Articles 43(1)(d) and 42 of the Constitution;
- iii. Whether the 2nd and 3rd Respondents (WRA and WASREB) failed in their statutory and constitutional duties to regulate and protect water resources;
- iv. Whether the Respondents' actions and omissions have contravened the principles of sustainable environmental management; and
- v. Whether the Petitioner is entitled to the declaratory, injunctive, and prerogative orders sought.

29. Regarding issue (i), the Petitioner submitted that with the demise of the 1st Respondent, the permit has terminated by operation of law as contemplated under **Section 45(1)(b) of the Water Act that reads:**

45. Permit to be linked to land or undertaking

(1) A permit shall specify, as far as practicable, the particular portion of any land, or the particular undertaking to which the permit is to be appurtenant, and on its grant the permit shall, subject to the provisions of this section, during the period for which it remains in force—

(a) be appurtenant to that portion of land or that undertaking; and

(b) pass with any demise, devise, alienation, transfer or other disposition, whether by operation of law or otherwise.

30.They state that the domestic permit No. WRMA/30/NRB/3AA/15040/G, issued to the deceased 1st Respondent on 29th June 2019, was personal to him. Consequently, there being no evidence presented to this Court of any transfer, assignment, or succession of the permit to another person or entity, the borehole can no longer be lawfully operated. Unless and until a fresh application is made to the 2nd Respondent for issuance of a new permit. Any continued abstraction, distribution, or sale of water from the said borehole by third parties, successors, or beneficiaries would constitute unauthorised abstraction and be punishable under Section 38 of the Water Act, 2016.

31.On the second point raised, the Petitioner submits that it is not disputed that the 1st Respondent was issued with a domestic water permit No. WRMA/30/NRB/3AA/15040/G on 29th June 2019. However, the said permit authorised the abstraction of up to 20 cubic metres of water per day, strictly for domestic use that the permit was never intended to support the commercial sale of water or large-scale abstraction.

32.That the evidence before this Court demonstrates that the 1st Respondent has wilfully violated the terms of his permit by:

(a) Selling water commercially to an estimated 30 water bowsers daily;

(b) Abstracting in excess of 300 cubic metres per day, nearly fifteen times the permitted limit; and

(c) Continuing these illegal activities despite formal complaints, warnings, and written directives from the WRA.

33. That the conduct of the 1st Respondent amounts to not only a breach of the terms of the permit but also a breach of article 69 of the Constitution, which binds every person to conserve and sustainably use natural resources. In support of this argument, the Petitioner rely on the Scientific and Environmental studies presented, including the 2019 Journal of Water Resource and Protection, Vol. 11 No.5, May 2019: titled “**An Assessment of Groundwater Grab Syndrome in Langata Sub County, Nairobi City, Kenya**”, which confirms that the Karen-Langata aquifer faces severe depletion risks due to excessive borehole density and over-abstraction. The average groundwater rest levels have dropped by approximately 79 metres, signalling an alarming depletion of aquifers and an existential threat to sustainable water access in the area.

34. The Petitioner also cites the case of **Kenya Association of Manufacturers v Cabinet Secretary, Ministry of Environment and Natural Resources [2017] eKLR**, in which the Court reaffirmed that economic activities cannot override environmental and public health considerations, and that the right to

a clean and healthy environment imposes both negative and positive duties on all actors, including private individuals.

35. Further reliance was placed on section 85 of the Water Act, which prohibits any person from providing water services without a licence from the 3rd Respondent herein. Therefore, the claim by the 1st Respondent that the 2nd Respondent subsequently granted him permit to engage in further commercial use of the borehole without WASREB licencing is an unlawful attempt by the Respondents to sanitize a wrongful act.

36. The Petitioner also stated that the 1st Respondent has not produced any evidence to counter the 2nd Respondent's finding that he had engaged in commercial use of the borehole. There is also no evidence that the 1st Respondent obtained any licensing from the 3rd Respondent to continue engaging in the impugned commercial use of the borehole. Therefore, they contend that the 1st Respondent's conduct to engage in the sale and supply of water drawn from the borehole without WASREB licensing is not only unlawful, but also injurious to the Petitioner's members' right to clean, safe, and adequate water under article 43(1)(d) of the Constitution.

37. The Petitioner continued that under Section 12(1) of the Water Act, 2016, the WRA is responsible for, inter alia, regulating the management and use of water resources, monitoring and enforcing compliance with water use permits, and enforcing the Regulations made under the Water Act. On the other hand, the WASREB is mandated, under Section 72 of the Water Act, to

regulate the provision of water services, including licensing of commercial water service providers, ensuring compliance with standards, and protecting consumer interests. 43. At the constitutional level, Article 69(1) imposes binding obligations on the State and its agencies.

38. That the evidence before this Honourable Court clearly demonstrates that the 2nd and 3rd Respondents were fully aware of the 1st Respondent's unlawful conduct but failed, neglected, and/or refused to take appropriate enforcement measures. Inter alia, despite receipt of complaints on breach of the permit, by its letter dated 11th October 2022, the 2nd Respondent merely advised the 1st Respondent to apply for a commercial water use permit. That the 2nd Respondent has prosecuted the 1st Respondent for contravention of various provisions of the Water Act and the Water Resources Regulations, 2021. It is averred for the Petition that this tepid response amounted to condonation of illegality and a dereliction of statutory duty.

39. Additionally, the Petitioner asserts that despite being notified of the ongoing illegal sale of water, the 3rd Respondent neither commenced investigations nor took steps to restrain the 1st Respondent's commercial operations. Its silence constitutes regulatory negligence and abdication of constitutional responsibility.

40. That the cumulative effect of the 2nd and 3rd Respondents' inaction has been to allow rampant over-abstraction of groundwater, depletion of aquifers, and violation of the residents' constitutional rights to clean and safe water. Such

inaction also offends the principle of sustainable development articulated in Section 3(5) of the Environmental Management and Co-ordination Act (EMCA) and recognised by the courts as binding on all environmental decision-makers.

41.They continued to submit that by failing to regulate the proliferation of boreholes and to maintain an Aquifer Allocation Plan as required under Regulation 52 of the Water Resources Regulations, 2021, the 2nd and 3rd Respondents have undermined the principle of sustainable use and conservation of natural resources they contravened Article 69

42.In support of this argument, they cited the holding in **National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others [2023] KECA 775 (KLR)**. It is trite that when a public body fails to perform its statutory duties, especially those designed to actualise or protect constitutional rights, such omission amounts to a violation of the Constitution itself. The Court stated as follows:

“These findings notwithstanding, in the present appeal, the law that regulates the state’s obligations in relation to the right to a clean and healthy environment and environment protection is public law, and the state’s liability occurs when it violates its statutory or constitutional obligation or duty, (the wrongful act), and a linkage is established between the wrongful act and the damage or injury

caused by the environment (the causal link). The Constitution places positive obligations upon the State and state agencies to promote and protect the right to a healthy environment by taking “all necessary measures”. State liability may thus derive from an administrative authorisation, an absence of regulation, or from inadequate measures relating to the activities of private actors that result in harm to the environment. The violation of the right to a healthy environment may be invoked not only where the pollution or nuisance originates from the actions of the State or its organs, but also if it results from lack of effective regulation of private activities.”

43. That the unchecked drilling of boreholes within short spatial distances has led to aquifer depletion, declining water tables, and well interference, contrary to the precautionary principle, which demands that environmental harm be prevented even in the absence of full scientific certainty.

44. Secondly, the Respondents have breached the principle of intergenerational equity by permitting unsustainable groundwater extraction in Karengata. They posit that the Data from the LPDP 2016 and scientific studies show significant aquifer depletion, and the Respondents’ inaction undermines the protection of environmental resources for current and future generations. The principle above was affirmed in the case of **Peter K. Waweru v Republic [2006] KEHC 3202 (KLR)**.

45. It is the Petitioner's further submission that the Respondents have breached the principle of cooperation and integration in environmental management by failing to collaborate with the Petitioner, the lawful coordinator of Karengata's water and ecological systems. They rely on the case of Professor Albert Mumma v County Government of Nairobi [2021] KEELC 1223 (KLR), which confirmed that the Petitioner must be consulted and involved in all matters covered by the LPDP. The court stated thus:

“As the residents of Karen and Langata District Association are entitled to a clean and healthy environment as provided under Article 42 of the Constitution. The Respondent's disregard of the physical planning and legal framework has adversely affected the environment. I agree with the Petitioner's submission that by failing to give effect to the Recognition Agreement, this has hindered the Petitioner's members from effectively participating in the management and conservation of the environment as provided for under Article 69(1) of the Constitution.”

46. The Petitioner concluded by submitting that it is entitled to the declarations sought in this Petition.

47. There were no submissions filed on behalf of the 1st Respondent. The 2nd Respondent filed submissions dated 17th December, 2025, stating inter alia that while the Petitioner has framed this Petition as one of regulatory

abdication, the evidence on record demonstrates that the 2nd Respondent acted within its statutory mandate, undertook inspections, issued compliance directives, collected water use charges, and complied fully with all court orders.

48. The 2nd Respondent raised two issues which they discussed in their submissions to wit;

a. Whether the 2nd Respondent failed in its statutory and constitutional duties;

b. Whether the reliefs sought lie against the 2nd Respondent.

49. The 2nd Respondent quoted the provisions of sections 11 and 12 of the Water Act in answering the allegations of breach of Statutory duty. It submits, in implementing its mandate, the 2nd Respondent is guided by the functions assigned to it under Section 12 of the Act, including amongst others:

I. Enforcement of Regulation made under the Act.

II. Receive water permit applications for water abstraction, water use and recharge, and determine, issue, vary water permits; and enforce the conditions of those permits.

III. Collect water permit fees and water use fees.

50. The 2nd Respondent submits that following issuance of the water permit, it conducted inspections; issued enforcement notices; collected water use charges and penalties; and carried out its regulatory mandate (that the

Petitioner relies heavily on expert opinion to argue aquifer depletion and reserve encroachment). The 2nd Respondent submits that hydrogeological assessments are area-wide scientific exercises, not determinations based on a single borehole in isolation. Further, Nairobi's aquifer system serves domestic, industrial, and public needs across several counties.

51. The 2nd Respondent submits that in 2022 it commenced preparation of the Nairobi Suite Aquifer Water Allocation Plan to allocate water among domestic, commercial, industrial and environmental uses while protecting the Reserve. This process included public participation and stakeholder consultations (county governments, water users, technical experts and others), which informed data collection, modelling and policy direction. The 2nd Respondent contends that preparing an Aquifer Allocation Plan is a complex, multi-layered statutory and technical exercise requiring aquifer-wide scientific data collection, hydrogeological modelling and technical validation, and must comply with constitutional public-participation requirements and the Water Act, 2016, including meaningful engagement with county governments and other stakeholders.

52. Thirdly, the Allocation Plan and any accompanying regulatory instruments are governed by the Statutory Instruments Act, 2013, which requires the preparation of a Regulatory Impact Statement, public consultation, justification of proposed regulatory measures, and publication. These

procedural requirements are mandatory, and failure to observe them exposes the instrument to invalidation.

53. Fourthly, on completion, the Allocation Plan must be tabled before Parliament in accordance with the Statutory Instruments Act. The 2nd Respondent therefore submits that the delay in finalising the Aquifer Allocation Plan results from compliance with mandatory constitutional and statutory procedures undertaken in good faith to secure sustainable, lawful and legally defensible groundwater regulation.

54. On whether the reliefs sought lie against the 2nd Respondent, it submits the remedies sought are misconceived because;

- a) Prayer 4 is unnecessary as the 2nd Respondent is already performing the challenged actions under its statutory mandate:**
- b) Regulation 52 (Water Resources Regulations, 2021 — repealed) did not require a physical ground survey of all boreholes; the 2nd Respondent conducts periodic monitoring and maintains a database of valid authorisations and permits.**
- c) Enforcement actions sought in prayer 4(b) are being carried out in the exercise of the Water Act.**
- d) An allocation plan for the Nairobi Aquifer Suite is under development; once operational, it will be published on the 2nd Respondent's website and offices.**

e) The Hydrogeological Assessment/Survey Report underpinning the original water-permit application was provided to the Petitioner and annexed to the 2nd Respondent's bundle (15 March 2023).

f) The matters in prayer 4(f) have been addressed in the 2nd Respondent's replying affidavit of 5 June 2023.

55. The 2nd Respondent urged the court to dismiss the Petition with costs.

56. The 3rd Respondent filed submissions dated 19th February, 2025, asserting that the regulation of groundwater abstraction by private borehole operators is the preserve of the 2nd Respondent. The provision of water services, a devolved function under the Fourth Schedule of the Constitution, is carried out by special-purpose vehicle companies owned by the County Governments. As such, WASREB issues operating licences to these companies, which have exclusive rights to provide water services within their licensed area.

57. It also submits that, pursuant to its regulatory mandate under section 72 of the Water Act and Regulation 74 of the Water Services Regulations 2025, which regulate water vending, it published the Guidelines on the Regulation of Water Vending in 2019 to guide licensed water service providers in regulating water vending systems within their service areas.

58. They contend that in the present petition, the Karen-Langata area is assigned to Nairobi City Water and Sewerage Services Company (NCWSC). This means that no other water service provider, including a small-scale provider

or a borehole operator, is permitted to provide water services within NCWSC's service area without NCWSC's express consent and permit, in accordance with Regulation 74 of the Water Services Regulations 2025 and the **Guidelines on Regulation of Water Vending** published in 2019. Consequently, the 1st Respondent in this case ought to have applied for a permit from NCWSC before the construction of the borehole and any subsequent provision of water services.

59. It cites the case of **Independent Policing Oversight Authority v Siddique w/o Arshad Sharif & 6 Others (Civil Appeal E802 of 2024) [2025] KECA 1456 (KLR)**, in which the Court of Appeal set aside the High Court's decision that IPOA had failed to carry out its mandate. The Court found that the trial court erred in holding that IPOA, with the other state organs, had failed to carry out prompt and independent investigations into the shooting of the deceased, and was therefore jointly and severally liable for violation of the rights of the deceased and the 1st - 3rd respondents with respect to the investigations. The court noted that IPOA duly carried out its mandate under section 6 of the Independent Policing Oversight Authority Act.

60. Lastly, the 3rd Respondent submits that the Petitioner herein has failed to demonstrate how the 3rd Respondent's actions directly led to the alleged aquifer depletion, thus, there is no nexus between the 3rd Respondent's actions and the alleged violation of the Petitioner's rights.

61. It placed reliance on the case of **Ngotho & Another Versus Permanent Secretary of Ministry of Education (As the Successor of the Ministry of Science, Education and Technology) & 2 others (Constitutional Petition 396 of 2018) 2025] KEHC 12531 (KLR)**, where the Court found that the Petitioners failed to prove any violation of their rights under the constitution and proceeded to dismiss the petition.

Analysis and Determination:

62. I have read the pleadings filed together with the submissions rendered. In the determination of this dispute, I adopt some of the questions framed by the parties in their submissions as follows;

- a) **Whether or not the water permit issued to the 1st Respondent has been terminated by operation of the law.**
- b) **Whether or not the claim against the 1st Respondent could continue upon his death**
- c) **Whether or not the 2nd and 3rd Respondents abrogated their statutory duty, which resulted in violations of the Petitioner's rights.**
- d) **Whether the reliefs sought are merited.**

63. In the course of these proceedings, the court was informed of the death of the 1st Respondent by his counsel on record. The Petitioner, the 2nd and 3rd

Respondents did not dispute this information, and no application was made to substitute him. In their submission, the Petitioner stated that the permit number WRMA /30 /NRB /3AA /15040/G automatically ceased upon the death of the 1st Respondent because it had been issued personally to him. They relied on the provisions of section 45 (1)(b) of the Water Act that; **(b) pass with any demise, devise, alienation, transfer or other disposition whether by operation of law or otherwise.**

64. On the face of the impugned water permit, it is discernible that it was issued to the 1st Respondent in his individual capacity. It was therefore incumbent upon the administrator of his estate if any to provide evidence that the permit would constitute assets that continue despite the death. No such evidence was presented, nor any application made to the 2nd Respondent to transfer the permit.

65. Additionally, the 2nd Respondent deposed that the permit no. WRMA/30/NRB/3AA/15040/G issued on 29th June 2019 was valid for a period of five (5) years. The 5th year ended on 29th June, 2024, hence the inference that it was terminated by operation of law. Therefore, as at the time the parties filed their submissions, and the time of writing this judgment, there is no valid permit that can be used to abstract water on the parcel of land L.R. NO 12159/30 located in Karen, Nairobi County.

66. Despite submitting that the 1st Respondent's permit had terminated following his death, the Petitioner still argued their case against the 1st

Respondent, stating that the 1st Respondent's sale of water contravened the conditions upon which the permit had been issued. The legal maxim "***Actio Personalis Moritur Cum Persona***" means "**a personal right of action dies with the person.**" This principle underscores that personal claim, such as tort or contract claims, typically cannot be pursued after the death of the parties.

67. However, the principle was revised to allow certain claims to subsist. The Law Reform Act Cap 26 provides thus under section 2;

"2. (1) Subject to the provisions of this section, on the death of any person, after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

68. In a situation such as this where the 1st Respondent has not been substituted, can the court make a finding apportioning liability against a deceased person? The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See ***Onyango Oloo v. Attorney General [1986-1989] EA 456***). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in ***Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:***

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

69. In his replying affidavit filed before his demise, the 1st Respondent had wholly denied the claim brought against him. Consequently, if the Petitioner intended to pursue his estate for liability, they ought to have moved the appropriate court for authority to allow for substitution and inclusion of the estate of the 1st Respondent to these proceedings. No such steps were taken; hence, I decline to make any decisions on the alleged illegalities and/or breaches of the Constitution and Statutes levelled against the 1st Respondent. To do so would contravene the principles of natural justice.

70. I now proceed to determine the question of whether or not the 2nd and 3rd Defendants did not perform their Statutory mandates resulting in violations of the Petitioner and its members, rights under article 42 and 43 of the Constitution. The 3rd Respondent pleaded by way of replying affidavit and submissions that it plays no role in regulation of abstraction of water citing the provisions of section 72 of the Water Act.

71. Section 72(1) of the Water Act provides thus:

“The powers and functions of the Regulatory Board shall be to—(a). determine and prescribe national standards for the provision of water services and asset development for water services providers; (b). evaluate and recommend water and sewerage tariffs to the county water services providers and approve the imposition of such tariffs in line with consumer protection standards;(ba). evaluate and recommend bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic and commercial purposes;(bb). evaluate and recommend tariffs and approve the imposition of such tariffs in line with consumer protection standards for irrigation purposes;(c). issue licences, set conditions for water service provision, and accredit water services providers and bulk water services providers;(d). monitor and regulate licensees and enforce licence conditions;(e). develop a model memorandum and articles of association to be used by all water companies applying to be licensed by the Regulatory Board to operate as water services providers;(f). monitor compliance with standards including the design, construction, operation and maintenance of facilities for the provision of water services by the water works development bodies and the water services providers.

72. The 3rd Respondent explained that it had performed this role by developing the **Guidelines on Regulation of Water Vending published in 2019**, to guide licensed water service providers on how to regulate water vending systems within their service areas. The 3rd Respondent states that the Guidelines provide inter alia that: water kiosks, water tankers, hand-drawn carts, water points (Shallow wells and springs), and private boreholes, operating within the service area of a licensed water service provider, should inter alia:

- a) **acquire a permit from the water service provider,**
- b) **source water for vending only from approved sources,**
- c) **charge rates approved by the water services provider, which are compliant with guidelines issued by the Regulatory Board.**
- d) **operate vending kiosks or water tankers at approved locations,**
- e) **submit vendors' health certificates - vendors handling the water should be regularly checked for any communicable disease by public health units to ensure no pathogenic contamination takes place.**

73. It is their argument that the body that ought to have been sued for any illegalities by the 1st Respondent is Nairobi Water and Sewerage Services Limited. However, as stated above, the impugned permit originated from the 2nd Respondent, which body is not regulated by the 3rd Respondent. The

Petition does not disclose with specificity the obligation the 3rd Respondent was required to perform but failed to perform.

74. Since the impugned water permit was issued by the 2nd Respondent, it was incumbent on the Petitioner to establish a nexus between the roles played by the 2nd and the 3rd Respondent to justify holding the 3rd Respondent liable. From the provisions of section 72 of the Act and Regulation 74 of the Water Services Regulations 2025, which set out the regulation of water vending, it appears that the mandate of the 3rd Respondent is limited to regulating the activities of the Water Service Providers.

75. The impugned water permit was specific that it was for abstraction for domestic use. It did not empower the 1st Respondent to operate as a water service provider so that it brought the 1st Respondent in the class of people whose activities are regulated by the 3rd Respondent.

76. The 2nd Respondent is at the center of this petition, for issuing the impugned water permit and also being blamed for not taking any serious action despite complaints lodged by the Petitioner. On the first limb, the 2nd Respondent deposed that in processing the application by the 1st Respondent, it considered the Hydrogeological Survey report which was carried out by the 1st Respondent in respect to the borehole in question. It goes further to state that a hydrogeological assessment of aquifers are carried out to determine ground water balance and aquifer characterisation (yield, potential and water quality).

77. The 2nd Respondent affirmed that it is not possible to carry out a hydrogeological assessment for a specific borehole to determine its impact on the aquifer (the entire Nairobi aquifer). That what can be assessed is the consumption attributed to one borehole. Further, the 2nd Respondent stated that it was in the process of developing the Nairobi Aquifer Water Allocation Plan and had taken strides towards its finalization.

78. It is my considered opinion that the 2nd Respondent by way of affidavit is admitting that as at the time of the lodging this petition, it was not in a position to determine the impact of any specific borehole on the Nairobi Aquifer. Yet, when the Petitioner lodged a complaint that the 1st Respondent was contravening the conditions of the permit meant for domestic use by selling the water (commercial use), the 2nd Respondent after confirming the use was indeed not domestic, advised the 1st Respondent to apply for a commercial license. It facilitated the 1st Respondent to abstract more water on common basis.

79. In a situation where the 2nd Respondent was not in a position to determine the impact of this borehole or any borehole within the Nairobi area on the Aquifer, one would expect that they would apply the precautionary principle by limiting the usage until the Nairobi Water Aquifer Allocation Plan is completed. Instead of permitting the common use the account that the 2nd Respondent, I find violated Article 69 (l) (a) on sustainable use of

80. The 2nd Respondent stated that preparation of the Allocation Plan is a rigorous process which requires a substantial amount of resources and that it had taken strides towards its finalization. However, it does not indicate the timelines within which this process is likely to be completed. For this uncertainty on when the process shall be completed with no assurance that licenses for common abstraction will not be issued in the intervening period, I hold that the fears of the Petitioner are founded and their submission that a perceived delay of four (4) years while the Karen-Langata aquifer faces severe depletion risks and dropping water levels is a violation of the State's positive obligation under Article 69(1) to ensure sustainable management of natural resources.

81. The second limb of the complaint is that despite the findings of the 2nd Respondent's field officers that the conditions of the permit number..... was abused by the holder (as contained in their letter dated 11.10.2022), no action was taken. The Petitioner describes the response in the letter of 11th October, 2022 as not inspiring confidence as it amounted to a slap on the wrist and not taking immediate steps to prevent the illegalities that were committed.

82. The issue here is what does the law empower the 2nd Respondent to do where a holder of a license breaches the conditions thereof? Section 49 (1) gives the 2nd Respondent powers to cancel a permit subject to serving notice on the permit holder. In this case, the 2nd Respondent opted to order the permit holder to vary the permit as provided for under Section 46 (2) of the Act.

83. The operating Act allowed the 2nd Respondent to either vary or cancel a permit whose conditions had been breached. Although the variation should have been granted pursuant to the provisions of Section 50, I find the 2nd Respondent had discretion to exercise either of the options.

What Orders should be granted?

84. As I have already stated herein above, I shall not make any finding against the 1st Respondent deceased because he was not substituted. Therefore, reliefs under paragraphs (i), (iv) (a), (f) (h) (i) and (vi) of the Petition collapses.

85. For prayers (ii) and (iii) of the Petition, I hold the same was not supported by the pleadings and the evidence adduced. They are general and to grant them would place the court in a supervisory role over an independent body thus contravening the doctrine of separation of powers.

86. Prayer (iv) (a) is available and shall be granted for compliance with timelines to be set by this court. Paragraph iv (b) is already provided for under the Water Act and the attendant regulations

87. The 2nd Respondent stated that it was already in the process of completing the Nairobi Aquifer Allocation Plan. Once the policy document is ready, it can be published in their website as prayed for under paragraph (iv)(c) of the reliefs.

88. Prayer (iv) (d) is spent since the 1st Respondent annexed the hydrogeological survey report in his reply to this Petition. Paragraph (iv) (g) is overtaken by events as the permit expired by operation of law.

89. The Petitioner sought for general damages but didn't demonstrate any direct harm/inconvenience suffered as a result of the actions of the 1st Respondent. Further, the damages were sought directly as against the 1st Respondent – deceased so this prayer cannot issue.

90. In conclusion, I find the Petition succeeds only in terms of prayer (iv) (a) and (c). The final orders granted are:

a) An order of mandamus does issue against the 2nd Respondent compelling it to

i) Within a period of Six (6) months, undertake a physical ground survey of all boreholes in the Karengata area in compliance with Regulations 52 of The Water Resources Regulations, 2021, and establish valid authorisations, locations, distances from each other, the number and construction details, age, current status and use, and current abstraction and use and share the report with the Petitioner.

ii. Within six months from the date of this judgment, publish in their website or make available in their offices, copies of

**the Nairobi Aquifer Allocation plan in compliance with
Regulation 52 (3) of the Water Resources Regulation 2021.**

iii. Each party to bear their respective costs of the petition

**Dated, signed & delivered at Kisii on the virtual platform this 5th of March,
2026.**

**A. OMOLLO
JUDGE**

ORIGINAL