Guyo v Kenya Electricity Generating Company PLC (KENGEN); National Assembly (Interested Party) (Environment & Land Petition 4 of 2022) [2025] KEELC 3 (KLR) (15 January 2025) (Judgment)

Neutral citation: [2025] KEELC 3 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 4 OF 2022

FM NJOROGE, J

JANUARY 15, 2025

BETWEEN

ALI WARIO GUYO ..... PETITIONER

AND

KENYA ELECTRICITY GENERATING COMPANY PLC (KENGEN) ..... RESPONDENT

AND

THE NATIONAL ASSEMBLY ..... INTERESTED PARTY

JUDGMENT

1. By a Petition dated 25/1/2022 the Petitioner prayed for the following orders:

    1. An order and declaration do issue that the Respondent have acted in breach of Articles 40, 42, 43 and 46 of the *Constitution* of Kenya, 2010.

    2. An order and declaration do issue that the affected residents of Galole, Garsen, Balambala, Bura and Fafi Constituencies are entitled to protection under the law and the *Constitution* of Kenya, 2010.

    3. An order do issue that the Respondent pay the following sum/monies being compensation towards the affected residents of Galole, Garsen, Balambala, Bura, Garissa Township and Fafi Constituencies following the loss and damages occasioned by release of excess water from the dams operated by the respondent:

        a. Garsen constituency – Kshs. 1,200,000,000/-

        b. Galole constituency – Kshs. 200,000,000/-

c. Bura constituency – Kshs. 300,000,000/-

d. Balambala constituency – Kshs. 200,000,000/-

e. Fafi constituency – Kshs. 200,000,000/-

f. Garissa township constituency – Kshs. 200,000,000/-

4. An order do issue compelling the Respondent to implement the findings and recommendations made by the interested party's departmental committee on energy.

5. Any other or further orders, writs and directions this honourable court considers appropriate and just to grant for the purpose of the enforcement of the fundamental rights and freedoms of the residents of Galole, Garsen, Balambala, Bura Tana River and Fafi constituencies.

2. The Petitioner described himself as a member of Parliament for Garsen constituency, and that he filed the present petition in public interest and on behalf of the affected residents of Galole, Garsen, Bura, Fafi, Garissa township and Balambala constituencies.

3. A background of the petition which is supported by affidavits sworn by the Petitioner on 25/1/2022 and 5/5/2022, is that sometime in the month of April 2018, the Respondent, a government parastatal charged with the responsibility of generating electricity within the Republic of Kenya, deliberately and maliciously released excess water without notice from its dams located along the upstream part of Tana River, thereby resulting into massive flooding at the same river's downstream part; the flooding affected the livelihoods of the residents living downstream along and in the lower areas of river Tana; there occurred loss of livestock, displacement of residents, destruction of properties and infrastructure and widespread of waterborne diseases.

4. The Petitioner's and residents' efforts to have the Respondent take responsibility bore no fruit hence causing them to move the Interested Party vide a public petition dated 26/6/2018. The Interested Party moved its Departmental Committee on energy to investigate the plea and consider the claim for compensation, which it did, and it prepared a report making certain recommendations in favour of the residents. The said report was adopted by the Interested Party on 6/12/2018. Several meetings ensued thereafter between the Respondent, Petitioner and the Ministry of Energy with the sole aim of settling the residents which never actualized. On 28/7/2021, the then Respondent's CEO even requested for 14 days to negotiate with the Petitioners and their advocates; that however did not happen and the Respondent is yet to comply with the directives made by the Interested Party's Departmental Committee.

5. According to the Petitioner, the Respondent's negligent actions caused the flooding, and failure to comply and implement the recommendations means that the Respondent is in blatant violation of Article 10 (2) (a), (b), 25 (a), 40 (1), 42, 43 (1), 46 (1) and 70 (2) (c) of the *Constitution* of Kenya.

Respondent's case

6. The Respondent filed five sets of replying affidavits sworn by various individuals. The first was sworn by Engineer Ginalius Njiraini on 20/4/2022, wherein he stated that at the material time, he was deployed as the respondent's Assistant Manager, Control Dispatch. Part of his duties was to oversee the day to day operations and management of the 5 dams (Masinga, Kamburu, Gitaru, Kindaruma and Kiambere) along the Tana River. The deponent denied the alleged negligence and stated that despite not being under any constitutional or common law obligation to compensate the affected residents, the Respondent discretionally set aside and spent a significant part of its CSR budget to support the affected residents, which support remains a work in progress.

7. He added that the massive flooding was caused by an act of God in the form of unforeseeable extreme and abnormal levels of rain experienced during the months of March and April 2018 in the upper and lower catchment areas of the Tana River. He gave a narration of how the five dams work and how they regulate water levels in the rivers to reduce flooding along the Tana basin. According to him, it was thus misleading to allege that the Respondent deliberately released excess water from the dams which caused the flooding.

8. The deponent further asserted that once it became clear that the water levels in the said dams had drastically risen to spilling levels, the Respondent issued notifications in respect of the same to the national government via the County Commissioners of Garissa County and Tana River county, and to the Secretary General of the Red Cross. He exhibited copies of notifications dated 27/11/2015 addressed to the County Commissioners, Garissa and Tana River Counties, and others dated 21/10/2015 and 19/10/2015 to and from Kenya Red Cross all marked 'KenGen 2'.

9. The deponent also raised a claim on limitation; that the petition was statute barred under the *Limitation of Actions Act*.

10. The second replying affidavit was sworn on 20/4/2022 by Willis O. Ochieng who stated that he is the Respondent's Chief Energy Planner and an expert in meteorology, hydrology, renewable energy, integrated water resource management and climate change. He deposed that part of his duties was to prepare hydro-power generation projections based on weather forecasting information, monitor water levels and inflows into the hydropower dams and issuance of early warnings for extreme weather events.

11. He deposed that from data retrieved from the Water Resource Authority (WRA), water levels in the Tana River had risen to flood levels from as early as mid-March in 2018, owing to heavy inflows joining the Tana River downstream of the Kiambere dam. That the river levels continued to rise and were at 5.1 meters in Garissa as at 17/4/2018, one month before the first dam (Masinga) was full. As at 20/4/2018, Masinga dam was at 1043.6 meters above sea level, against the full supply level of 1056.50 meters. The situation remained the same up to the end of April 2018 at which point it was at 1049.93 meters. He deposed that Masinga dam only started to spill into the rest of the four dams on 16/5/2018. The deponent narrated that the excessive flow was probably caused by River Thiba which joins the cascade after Masinga dam. As a result, Kiambere dam (the last dam) started overflowing on 24/4/2018. He annexed a copy of the data set as 'W.O.O -1' and 'W.O.O-2' as illustration of some of the numerous unregulated seasonal flows.

12. He equally annexed 'W.O.O-3', an alert issued by the Meteorogical Department on 27/3/2018 warning the general public of the excess rainfall. He asserted that the above normal rainfall received during the material dates and specifically in the catchment areas which feed River Thiba, and in other catchment areas which feed all unregulated rivers downstream of the Kiambere dam, is what triggered the unprecedented water levels in the downstream parts of the river Tana, which caused the river to burst her banks and flood the downstream areas referred in this petition.

13. According to this deponent, the construction of the dams has greatly improved the flooding situation previously experienced in the said areas, by how they operate. To demonstrate this, he annexed as 'W.O.O-4' a copy of a study done by Maingi J.K & Marsh S.E. quantifying hydrologic impacts following dam construction along the Tana River.

14. He added that as at 17/3/2018, when the water levels rose to 4.9m (water levels above 3.5m classified as a flooding situation) at Garissa Station, some of the downstream areas such as Tana River, Garsen, Bura and Garissa were already experiencing flooding because of the heavy rains.

15. In his further affidavit sworn on 14/6/2022, Willis Ochieng reiterated the contents of his previous affidavit and further deposed that the hydro dams were at all material times well maintained, help in controlling flooding and asserted that it was for the petitioner to prove the contrary. He also distinguished the petitioner's claims regarding his exhibits on rainfall patterns and stated that it is the forecast of rains in the catchment areas that mattered in those exhibits, and forecasts of rains in the coast and other areas were not relevant to the subject at hand.

16. The fourth and fifth sets of affidavits were sworn by Grace Chepkwony on 20/4/2022 and 14/6/2022. She is said to the Respondent's officer deployed as a Community Relations Manager. She deposed that the Interested Party's report contained only recommendations and not directives as alleged; that the recommendations required engagements between the parent ministry and the community with a view of compensating or working out a framework for supporting the affected residents. To her, that has since been happening, notwithstanding the lack of civil liability to compensate the affected residents. She exhibited as 'G.C-1', copies of letters addressed by the Respondent to the ministry regarding the issue of perennial flooding along the Tana River basin. She also annexed as 'G.C.-2' a copy of the Interested Party's Departmental Committee report dated 6/12/2018.

17. She further asserted that the Respondent has so far spent approximately Kshs. 15,000,000/- of its CSR budget in support of the affected residents. Further annexing the Respondent's memorandum of association ('G.C-3'), the deponent stated that the Respondent has not been granted any corporate or statutory mandate to prevent, control, manage or even mitigate the devastating effects of floods caused by excess water levels in any of the dammed rivers or the unregulated rivers downstream of the Kiambere dam.

18. In her further affidavit, Grace Chepkwony added that since 2019, the Respondent had had several engagements with the Petitioner and his advocate with a view of finding an amicable solution of the dispute herein. She devoted two lengthy paragraphs in her affidavit (4, and 6) to details of how the respondent has been extensively engaged with other stakeholders in attempts to address the issues affecting the residents of the affected areas. The relevant meetings, she deposed, were held on 28/7/2021, 9/8/2021, and 9/9/2021. She annexed a copy of a letter dated 20/8/2021 ('G.C-3') addressed by the Respondent to the Petitioner's counsel confirming that position. She narrated that the Respondent has continued to participate in multi-agency meetings to discuss the status of the implementation of the said recommendations. In addition, there has been several correspondences regarding the same between the Respondent and the parent ministry. She annexed copies of the relevant letters.

19. She added that there was no request for a window for negotiations as alleged by the Petitioner and averred that in any event, that, perchance it had happened, could not amount to admission of liability.

20. In support of the Petition, the Interested Party filed a Replying Affidavit sworn on 26/4/2022 by Michael Sialai, Clerk of the National Assembly. He highlighted the findings and recommendations of the Departmental Committee on Energy following a public petition dated 26/6/2018 filed by the Petitioner at the National Assembly. He confirmed that the said report was adopted by the Interested Party on 6/12/2018 and committed to the Committee on Implementation to enforce the resolutions passed by the Departmental Committee On Energy.

21. He added that the Implementation Committee held several meetings regarding the same together with the Respondents, Petitioners and Ministry of Energy, with the last meeting being on 28/7/2021, where the then Cabinet Secretary for Energy Mr Charles Keter and the Respondent's CEO Ms. Rebecca Miano requested for 14 days to negotiate with the Petitioners and their counsel with a view of settling their grievances.

22. The Petition was canvassed by way of written submissions.

Petitioner's Submissions

23. Counsel for the Petitioner had three issues for determination in the submissions dated 3/9/2024. Firstly, whether the Petitioner's tortious claim for compensation is statute barred under Section 4 (2) of the *Limitation of Actions Act*. It was counsel's argument that the cause of action cannot be said to have accrued on 24/4/2018 because the Interested Party's committee conducted investigations and made recommendations which the Respondent was expected to comply with. He added that by the Respondent's own admission, there has been ongoing deliberations between the parties. According to counsel therefore, Section 4 (2) was not applicable in this case and in any event, the cause of action could only be said to have accrued when the Petitioner issued a demand letter on 3/8/2021.

24. Counsel added that the said provision could not apply to claims for compensation for constitutional violations or otherwise a constitutional tort. He relied on the case of *Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (the then District Commissioner, Rongai District) & 3 others* [2019] eKLR, and *Maina v Attorney General & another* [2023] eKLR.

25. Secondly, Counsel discussed whether the Respondent breached its duty of care by failing to issue an early warning of the impending spillage of the Seven Forks dams, and the Kiambere dam in particular, resulting into huge losses and damage for the affected residents. On the onset, counsel submitted that the respondent is a public limited company incorporated under the *Companies Act* hence a state corporation and a public entity bound by the principles of public service under Article 232 (1) of the *Constitution*, particularly, to act in a transparent manner and provide to the public timely, accurate information. Contrary to the said provision, the Respondent did not issue any form of warning of an impending dam spillage until hours after the massive flooding on 24/4/2018. To counsel, this was a clear demonstration of the level or negligence attributable to the Respondent.

26. Counsel added that the defence raised by the Respondent that the flooding was caused by an act of God could not hold and that the common law obligations established in *Rylands v Fletcher* and *Donoghue v Stevenson* were applicable in this case. To interrogate the said defence, counsel relied on the case of *Kenya Wildlife Service V Rift Valley Agricultural Contractors Limited* [2018] eKLR where the Supreme Court laid out the test to be considered. According to counsel, the Respondent ought to be held liable for the effects of the flooding caused by the spillage of the dams, for firstly, failing in its duty to supply timely and accurate information to the affected communities.

27. On the applicability of the act of God defence, counsel added that the events leading to the massive flooding experienced were foreseeable with the exercise of due care and foresight. He submitted that in any case, the Respondent admitted that the rainfall experienced at the material time and the resultant flooding was not a new phenomenon, noting that there had been previous flooding incidents over the same areas. To counsel, had the Respondent keenly observed the filling capacity of the dams from the onset of the heavy rains in March 2018, and issued timely warnings, the damage would have been avoided.

28. The final issue counsel submitted on was whether the Petitioner is entitled to the reliefs sought on behalf of the residents in the affected constituencies. It was counsel's submission that Article 23 (3) of the *Constitution* grants the court authority to grant the reliefs sought by the Petitioner. He added that an award for damages as compensation was equally proper as there was no doubt that members of the mentioned constituencies were tragically affected. To support the claim for damages, counsel relied on the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR and *Mitu-Bell Welfare Society v KAA & 2 Others, Initiative for Strategic Litigation in Africa [amicus curiae]* [2021] eKLR.

29. In addition to the prayers pleaded in the Petition, counsel sought additional five prayers which I have taken into consideration.

Respondent's Submissions.

30. In the submissions dated 18/10/2024, counsel for the respondent identified seven issues for determination, firstly, whether the petition is statute barred. Citing Section 4 (2) of the *Limitation of Actions Act*, counsel argued that since the cause of action arose on 24/4/2018, and the petition filed on 25/1/2022, the same was statute barred for being filed beyond the three years' period stipulated for tortious claims. He added that the argument that the allegations in the petition amount to "constitutional torts" could not stand as there was no reason given as to why there was inordinate delay in filing the same.

31. On whether the Respondent violated the Petitioner's constitutional rights, counsel submitted that the Respondent has not refused to comply with the recommendations of the Energy Committee as is expected of it under Article 10 (2) (a) of the *Constitution*; neither did the Respondent violate Article 10 (2) (b) by releasing excess water from the dams without due notification. He explained that the said spilling was not deliberate. In relation to Article 25 (a) of the *Constitution*, counsel submitted that the Respondent did not release the water from the dams as alleged, hence it was not responsible for the displacement and destruction caused. Counsel raised the same argument in relation to the alleged violation of Article 40, 42, 43 (1) and 46 (1). To counsel, the allegations raised were not substantiated.

32. The third issue counsel submitted on was whether the Respondent failed to comply with the principles contained in *Rylands v Fletcher*. He argued that the present petition did not fall within the ambit of the doctrine of strict liability espoused in the said case. He analyzed the applicability of the rule established in that case, two-fold. Firstly, whether the construction of the dams was a natural use of land and secondly, whether there was an escape of the mischievous agent.

33. Regarding the former, he argued that natural use of land was explained in the same case and by F. H Newark in his article "*Non-natural User and Rylands v Fletcher*", The Modern Law Review Vol 24 No. 5, 1961, pp 557-71 ISTOR at Page 561, in three phases including ordinary course of enjoyment, accumulation of water and by operation of the law of nature. To counsel, the construction of dams across a river is part of the proper and ordinary way of using water from a river, therefore the construction of the dams along River Tana was a natural use of land. He argued that where the owner of a land without negligence uses his land in the ordinary manner of its use, though mischief may be occasioned to his neighbor, he will not be held liable in damages. To support this argument, he relied on the case of *Eastern and South African Telegraph Co. V Cape Town Tramsway Co*s.

34. Counsel further submitted that the rule in *Rylands v Fletcher* presupposes an artificial accumulation of the mischievous agent for liability to arise; and no liability would arise where there is a natural accumulation of the mischievous agent. To counsel, the water in the present case unlike in *Rylands v Fletcher*, was not artificially brought by the Respondent but from natural causes. He added that the Respondent could not be held liable for water flowing through the natural law of gravity to the Petitioner's land. Counsel asserted that there was no evidence to the contrary. He relied on Section 107 of the *Evidence Act* and the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR).

35. Counsel argued that one of the exceptions to the rule in *Rylands v Fletcher* was an act of God which he submitted was spelled out by Jim M Fraley in his article "*Re-examining Acts of God*", that one of the key components of an act of God is that the damage complained of must be as a result of a natural causation. Counsel submitted that floods were a natural phenomenon due to an extraordinary level of

rainfall, as was held in *Nichols v Marsland*. He argued that the Respondent did not reasonable expect that heavy rainfall. To counsel, the floods were unprecedented as was explained in *Nashville C. & St. L. Ry -V- Yarbrough* [1915] hence not preventable by reasonable due care or foresight by the Respondent. Counsel relied on the cases of *Cobb v Smith* and *Trout Brook Company V Willow River Power Company*.

36. The next issue counsel submitted on was whether the petitioners have pleaded special damages. Relying on the case of *Okulo Gondi v South Nyanza Sugar Company Limited* [2018] eKLR, counsel submitted that special damages must be both pleaded and proved. He argued that the Petitioner has failed to lay out a precise monetary qualification supporting the compensation sought, particulars of damages, or names of the specific persons affected. To further buttress this argument, counsel relied on the case of *Sombo v Ministry of Lands, Housing and Urban Development; Ngundu & 38 others (Interested Party)* (Environment & Land Petition 4 of 2021).

37. The sixth issue was whether the recommendations made by the Interested Party are binding on the Respondent. Counsel argued that the National Assembly's authority to make recommendations upon hearing of a petition cannot supersede this Court's mandate under Article 165 (3) (b) of the *Constitution* to determine the question of whether a right or fundamental freedom has been denied or violated. This mandate, he stated, was expounded in the case of *William Odhiambo Ramogi & 3 others v AG & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR.

38. On whether such recommendations were binding, counsel was guided by the Supreme Court's Advisory Opinion in Reference No. 3 of 2019 - *Council of Governors & 47 others and AG & 3 others (Interested parties); Katiba Institute & 2 others (amicus curiae)* [2020] eKLR. He submitted that recommendations made by the National Assembly however weighty and persuasive, were not binding. Counsel found guidance in the article "*Right to Petition in India*" by B. Venkatakrishnappa and M. Gurunath- Verfassung Und Recht in Ubersee/Law and Politics in Africa, Asia and Latin America, Vol. 22 No. 3, 1989, pp. 316-20 JSTOR. According to Counsel, the court cannot issue an order compelling the implementation of the recommendations but should independently determine whether there was breach of any of the said rights.

39. Counsel further submitted that the Petitioner is not entitled to the reliefs sought for failure to prove any of the allegations raised in the Petition and urged the court to dismiss the Petition with costs to the Respondent. He ultimately relied on the case of *Lekulai & 90 others v AG & 3 others* (Constitutional Petition E297 of 2020) [2023] KEHC 26467 (KLR); and *Superior Homes (Kenya) PLC V Water Resources Authority (WRA) & Others* (Constitutional Petition 12 of 2019) [2019] KEELC 819 (KLR).

Interested Party's Submissions

40. According to Mr. Mwinyi, counsel for the Interested Party, the only issue for determination is whether the Interested Party delivered on its mandate in directing the Respondent to implement its resolutions. Counsel highlighted the provisions of Article 95 (2) and 5 (b) of the *Constitution*, on the role of the National Assembly; Article 117 (2) on its powers, privileges and immunities, and Article 124 and 125 of the *Constitution*. He further quoted Section 14 of the *National Assembly (Powers and Privileges) Act* and Standing Orders 191 and 216 (5) (a) of the National Assembly Standing Orders on the powers, privileges and mandate of departmental committees. He equally quoted the case of *Washington Jakoyo Midiwo v Minister, Ministry of Internal Security & 2 Others* [2013] eKLR, and *Sonko v Clerk, County Assembly of Nairobi City & 11 others* (Petition 11 (E008 of 2022) [2022] KESC 26 (KLR) to submit that the on the above basis, the Departmental Committee on Energy received the aforementioned public petition; that upon conducting its investigations, the said committee made certain recommendations which were adopted by the Interested Party on 6/12/2018; that the Interested Party committed to the Committee on Implementation to enforce the resolutions which

convened several meetings on the same with relevant parties. In the foregoing, counsel urged the court to find merit in the petition.

Analysis and Determination

41. Having considered the pleadings, evidence, submissions and authorities presented, I identify the following issues for determination: -

    i. Whether the Petition is statute barred;

    ii. Whether the flooding that occurred on 24/4/2018 was as a result of the Respondent's negligence;

    iii. Whether the Respondent violated the Petitioner's rights guaranteed under Articles 40, 42, 43 (1), and 46 (1) of the *Constitution* of Kenya;

    iv. Whether the Petitioner is entitled to an award of compensation as prayed.

Issue (i)

42. First, I will address the Respondent's contention that this is a suit founded on tort disguised as a constitutional petition. The Petitioner's choice to file a constitutional petition calls for scrutiny of two important concepts. First is the doctrine of constitutional avoidance. Second, is the law of limitation of actions. These two concepts can preclude a court from entertaining a case. Even where a court possesses the requisite jurisdiction, it may perfectly be entitled to decline to entertain a matter if any of these two concepts are established. The law of limitation of actions is clear. Undeniably, the alleged flooding took place on 24/4/2018. This petition was filed on 26/1/2022, after the lapse of three years. Section 4 (2) of the *Limitations of Actions Act* provides: -

> "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

43. The facts pleaded in this petition disclose elements of a tort. The Petitioner, however, claims that the respondent is liable for constitutional torts against him and the affected residents and that in such cases, the *Limitation of Actions Act* would not apply. In *John Atelu Omilia & another v Attorney General & 4 others* [2017] eKLR The petitioners averred that the prosecution wilfully withheld evidence from the court, even though it had been recorded earlier in form of statements by their co-accused, and that the DPP charged them with a serious offence knowing that they were innocent, which was a great abdication of his constitutional responsibility. The petitioners further averred that the said evidence only came out during cross-examination and the statements were not supplied to them as required before the trial began. The question arose as to whether or not the petitioners ought to have instituted a suit claiming damages for malicious prosecution as opposed to a constitutional petition. The court in that case (Mativo J) defined a constitutional tort as follows: -

> "A "constitutional tort" refers to a private civil suit brought to redress a constitutional violation. Constitutional torts are violation of one's constitutional rights by a government servant. "Constitutional tort" actions are an avenue through which individuals can directly appeal to the *Constitution* as a source of right to remedy government-inflicted injury. This sort of access is a recent phenomenon. Before the twentieth century, the *Constitution* primarily served a structural function, with litigation focused on the limits of government power. Suits seeking to hold government liable for individual injuries were brought in state courts pursuant to the common law. It was not until the U.S. Supreme Court decisions in

Monroe v. Pape and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that individuals began arguing that the *Constitution* entitled them to damages for wrongful injury.

When examined as an individual remedy, it becomes clear that the "constitutional tort" action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, "constitutional tort" actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights. Instead of having a wholly negative effect on the scope of constitutional rights, the "constitutional tort" remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals' injuries. Regardless of whether or not one can justify monetary awards for constitutional rights violations on compensation or deterrence grounds, as an individual remedy, the "constitutional tort" action serves a unique role in the range of remedies courts use to enforce the *Constitution*. The "constitutional tort" action sets and enforces limits on governmental discretion in a way that structural injunction and other remedies cannot.

"Constitutional tort" actions compensate and deter constitutional rights violations. That is, remedying an individual's injury with a damage award which enforces the *Constitution* and sets adequate monetary disincentives to unconstitutional action. "Constitutional tort" actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action; a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty to the plaintiff to avoid violating that right. Thus, a protective right in a sense imposes a correlative duty on the government.

A court must bear in mind constitutional norms when deciding whether the case before it is in principle one in which the wrong doer should be held liable. The principles themselves, are embodied in a test, focusing on the subjective question as to whether the conduct complained is consistent with constitutional norms. The particular question to be decided in this matter is the liability of the state for acts committed by its agents while on duty."

44. Similarly, in the case of *Kimunai Ole Kimeiwa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others* [*supra*] cited to me by the Petitioner, the Court stated that:

> As Prof. Michael Well explains, the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights' liberty interests in circumstances where the official's conduct is fairly characterized as an abuse of power."

45. From the cited cases, it is apparent that 'constitutional torts' provide an avenue for individuals to demand compensation for the violation of their rights by the State, and is a claim that is mostly pursued against the State where there has been an abuse of power.

46. The Respondent in this case is defined as a governmental parastatal company charged with the responsibility of generating electricity within the Republic of Kenya. The primary acts and omissions the petitioner attributes to it, be it the alleged malicious and deliberate release of water from its reservoirs or the alleged failure to alert the residents of the flood prone areas that floods would affect them shortly, are in connection with the operations relating to the process of power generation.

47. The petitioner has alleged that those tortious acts and omissions, allegedly borne of the respondent's negligence, are in violation of various provisions of the *Constitution*. The secondary omissions attributed to the respondent arise from alleged failure to comply with the recommendations of the interested party, and though not definable as torts in themselves, arose from the primary torts and are linkable to the theme of public administration and governance in the *Constitution*.

48. In the end it is clear that entire petition arises from a constitutional tort with regard to which no limitation should apply unless the delay in lodging the claim is so inordinate that it would not be possible to do justice in the case between the parties. In the present case the delay by the petitioner overshot the usual limitation period of three years by only one year which does not amount to inordinate delay that would obstruct a just determination in the matter. For the foregoing reasons, the Respondent's objection on limitation must, and hereby does, fail.

Issue (ii)

49. The second issue is whether the flooding that occurred on 24/4/2018 was as a result of the Respondent's negligence and malice. The petitioner bases his claim on the strict liability rule in the decision in *Rylands v Fletcher* [1861-73] ALL ER REP 1. It is not disputed that there was massive flooding on 24/4/2018 along the River Tana that affected residents of Galole, Garsen, Balambala, Bura and Fafi Constituencies.

50. The Respondent explained that it operates the Seven Forks dams on the Tana River, and that these dams play a significant role in managing water flow in the region. The Petitioner alleged that the Respondent was either negligent or malicious in its management of the dams, leading to severe flooding. The petitioner's primary concern was that the Respondent had released large volumes of water without adequate warning to downstream communities, resulting in destruction of property, displacement of people and loss of lives.The Respondent contended that the massive flooding was caused by an Act of God in the form of unforeseeable extreme and abnormal levels of rain experienced during the months of March and April 2018 in both the upper and lower catchment areas of the Tana River. To determine whether the Respondent was negligent and responsible for the flooding or whether it was an unavoidable consequence of extreme weather, I think it is important to consider the nature of the dam operations and weather conditions and risk assessment and communication.

51. The Respondent avers that the dams are primarily for hydro power generation but they also regulate water flow by collecting flow from the catchment areas during seasons of high rainfall and releasing it gradually through the electricity generation machinery. However, sudden and unpredictable weather events can lead to conditions where excess water flows into the dams; in such circumstances, the design of the dams is such that there is a spillway through which the excess water flows back into the river without having to go through the electricity generation machinery.

52. In the petitioner's own exhibits attached to the petition, Exh AWG3, the ministerial answers given in response to an inquiry from the Clerk of the Senate state that the power stations management does not deliberately release water into the river as alleged; that the dams are designed to hold certain amounts of water; that the respondent does not release excess water from the dams because when these maximum levels are attained, there is an inbuilt and automatic control mechanism that allows water to naturally spill back into the river Tana. The respondent pointed out, and this court holds that it is the correct position, that it is this sort of spillage that has been misconceived by the petitioner to constitute a basis, albeit false, for the claim that the respondent deliberately and maliciously released excess water back into the river Tana.

53. This court's observation is that the cascade of dams helps in storing and handling a great deal of water- the respondent puts it at 2,237,000,000,000 (two trillion, three hundred and twenty-seven billion) litres of water - which would have otherwise naturally flowed downstream from the upper catchment areas. This court further agrees with the respondent that the handling of this volume of water through the cascade of dams helps completely preventing, delaying, reducing or mitigating the extent of flooding in the mentioned areas during periods of abnormal or excessive rainfall, and disagrees with the petitioner when he asserts that the dams have worsened the flooding problem in the two counties of Tana River and Garissa. Even with the presence of the dams, evidence adduced by the respondent shows that floods have been a constant feature in Garissa and Tana river for many decades, only that they are usually not as severe as those of 2018. Were the dams not there, this court thinks that it would be a regular catastrophe of annual floods for areas downstream of the dams. Further and more relevantly, if the respondent's dams had not been built the excess water would still have flowed naturally downstream to cause the floods complained of, and for that reason.

54. It is clear from *Rylands v Fletcher* that for a defendant to be held liable he must have made a non-natural use of his land; he must have brought something on his land which is likely to occasion some mischief if it escaped; the thing in question must have actually escaped and damage must have been occasioned to the claimant's property as a result of that escape. The court in *Rylands v Fletcher* held as follows:

> We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. ... If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

55. As things stand, it can not be said that the respondent would be able to store within its dams more water than they were designed to contain, or that it attempted to store such excessive water. The word "overflow" in this case in relation to the dams can not be deemed to have the natural meaning of a liquid or substance escaping over the edge of a reservoir. The evidence from the respondent is that there is an automatic system of channeling excess water out of the dams since it can not be stored. This deliberate channeling through a designed spillway happens before water can fill up and escape over the dam wall and may have a bearing on the intention of averting damage to the dam wall. This court is persuaded

that the hydro-electricity generation in the dams Seven Forks cascade are constructed in a manner that allows excess water to simply flow back into the River Tana when the dam is full; the further finding is that when that excess water flows through the spillway and back into the river without generating any electricity, it is as though it had not been harnessed by the respondent for the original purpose of the dams in the first place.

56. In my view, the natural river courses across which dams are constructed are meant for natural river flow. In contrast with the facts in Rylands v Fletcher where the defendants imported in a non-natural way onto their land a large amount of water and stored it up in a reservoir and were bound to thus keep it secure at their own peril, the present respondent never imported water from any other source but only intervened to exploit the river water's hydroelectric generation potential in situ. It matters not that the water passed through the dam before it occasioned damage. In this court's opinion, the facts in this case are different from a scenario, for instance, where the dam wall may collapse and suddenly release the stored mass of water thus occasioning damage. They are also different from a scenario in which a defendant may have pumped excess water from his premises to the detriment of other persons. In this case the respondent simply allowed the water to seek its natural course once again by force of gravity by avoiding to store it. By avoiding to store excess water and thus allowing the excess water for which the dam had no storage room to flow back into the river course, the respondent can not be said to have been effecting a non-natural use of the land; that outflow can not be said to be an "escape" of water from the dams owned and operated by the defendant within the meaning of the rule in Rylands v Fletcher; neither can it be attributed to any negligence on the part of the respondent. This court hence finds no good ground upon which to find the respondent liable for damage occasioned by the flooding that occurred in April 2018.

57. Further, this court observes that the respondent should not be held liable for the flooding arising from the other rivers with natural, unregulated flow that join the Tana River at confluences located downstream of the cascade of dams. (see Para 8(o) of the replying affidavit of Eng. Ginalius Njiraini dated 20/4/2022). These rivers are inter alia: Thura-Ena, Mara, Mutonga, Kathita and numerous seasonal streams.

58. Another reason for not holding the respondent liable is that there has been adduced evidence of abnormal rainfall which occurred during the months of March and April 2018 in both the upper and downstream catchment areas of the Tana River basin, which occasioned a phenomenal increase in river water levels and the bursting of river banks. The respondent has exhibited as Exhibit "WOO5" a bundle of newspaper extracts from various dailies bearing reports of the flooding that had occurred in downstream areas before the 24th April 2018 date the respondent is alleged to have released waster from the dams. For instance, there is a Daily Nation report of Friday March 25 2018 with the caption: "More than 3000 displaced by floods in Tana River." Another from an outlet called Citizen News dated 13/4/2018 reads: "Photos: Garissa –Malindi road cut off after floods." Yet another from the Standard Digital dated 11/4/2018 reads "Five killed in Tana River flooding." There is one from the Daily Nation dated Monday April 16 2018 which reads: "Families in Garissa displaced as river Tana bursts its banks." The dates of those reports are the basis of the assertion by the respondent that even prior to the date of alleged release by the respondent of excess water from its cascade of dams, the areas mentioned in this petition were already flooded and the residents were experiencing considerable hardships, which assertion I agree with. Coupled with the fact that there is nothing non-natural that the respondent did to add to the natural rain water volume, the evidence of abnormal rainfall which occurred during the months of March and April 2018 in both the upper and downstream catchment areas of the Tana River basin means that the resultant floods and the damage occasioned can only be termed as an Act of God.

59. The petitioner's second allegation regarding the release of the excess water from the dams is that the dam walls were not well maintained (see Para 8 of the Petitioner's supplementary affidavit) It cannot be deciphered whether by that statement the petitioner meant that there was deliberate release of water that was intended to prevent the dams from sustaining structural damage, of that defects in the dam walls led to escape of water which caused the damage. Either way, the respondent's response regarding the claim that it failed to maintain dam walls is that there was no evidence to support that claim in its entire dichotomous nature, and this court agrees with that answer. The upshot of the foregoing is that the petitioner has not proved that the respondent either maliciously or negligently released excess water from any of the dams back into the river Tana.

60. The last point to address in establishing if the respondent is to bear any liability for the effects of the floods of April 2018 is whether it gave notification, or late notification, of the spillage of water back to the river. In the further replying affidavit sworn by Willis O. Ochieng, it was stated that the Meteorological Department prior to the flooding had issued a weather forecast with a clear warning that above normal rainfall was expected in several parts of the country in April 2018. It was indeed averred that the country began to experience heavy rainfall during the month of March, 2018. The Respondent was thus aware of the heavy rainfall as early as on 27/3/2018 when the warning was issued. The Respondent has been made the one to answer for the flooding by the petitioner

61. With the ample notice issued by the Meteorological Department, conduct of proper risk assessments and issuance of early warnings to the communities likely to be affected, and their prior relocation from areas prone to flooding, should have been undertaken. Had that been done, the impacts of such floods would have been mitigated. While there may have been extenuating circumstances such as the massive scale of rainfall, I do not for a moment think that the Respondent has demonstrated that it adequately prepared for extreme weather conditions after that weather forecast was made. That finding is however not the same as finding that in failing to prepare for the floods situation, the Respondent should be held negligent. The question that must be first answered is: to what extent is the respondent liable for informing the general populace that they are in danger of being adversely affected by floods, or for undertaking any remedial action to alleviate the adverse effects of flooding?

62. Grace Chepkwony, one of the deponents on behalf of the respondent exhibited the respondent's Memorandum of Association and averred that the respondent is a public limited liability company partially listed at the Nairobi Stock Exchange and is owned by diverse shareholders besides the government who is the majority shareholder; its primary corporate mandate has always been, and still is, the generation of hydroelectric power from dams and other power generation sources in the country; it has not been granted any corporate or statutory mandate to prevent, control, manage or even mitigate the devastating effect of floods caused by excess water levels in any of the dammed rivers or any of the unregulated numerous rivers downstream, and in any event it lacks the requisite resources for such a vast objective. It is pointed out by Ms Chepkwony that flooding usually is widespread in many parts of the country and is a matter that should fall squarely in the responsibility of the national government or national government entities. The deponent avers that even the interested party can take note of the perennial problem and play a part by allocating budgetary resources to curb it, and calls for a policy formulation and implementation in a multi-agency setting to address perennial floods not just in Tana River and Garissa but also in the entire republic. This court needs no prompting in order to take judicial notice that floods do not only occur in Garissa and Tana River, but also in other areas of the country including urban areas. Upon perusal of the respondent's Memorandum of association, it is apparent that flood control is not part of its mandate. True, the respondent has admitted to offering a helping hand to the residents of the affected area but it asserts that action was on a corporate social responsibility (CSR) basis and not to meet the originally set out corporate objectives or any statutory obligations.

63. The concept of corporate social responsibility is a recent phenomenon. Long ago many businesses were obsessed primarily with maximizing profits. Of late however, business managements have recognized that they have a responsibility to do more than simply maximize on profits for their shareholders, and they have undertaken a social responsibility to do what is good for society at large. It is a concept that goes a long way to galvanize business entities to resolve local problems for residents, improve their lives and livelihoods, better the ecological and social environments and maintain amity between business and the local people especially where local resources are being exploited for profit. In this regard it is understandable when a profit driven business sets apart a small percentage of its budget for implementation of the concept. However, the magnitude of the implementation of the concept is usually dependent of the implementing business corporation's primary goals; it is clear that corporations' management, much as they have to create a good business environment, usually have to be accountable to shareholders some of whom may not be keen on or even aware of the concept and so the funds allocated for the concept may be minimal in comparison with the business profits. In the present case, the respondent has indicated that it is amenable to CSR (see para 4 and 5 of the respondent's further replying affidavit dated 14/6/2022).

64. The answer to the question asked at the beginning of the analysis on the present issue then is clear. The respondent has no express statutory obligations save those normally reserved in law for environmental conservation and management on the part of business corporations. Also, those actions under CSR that cost little, like issuing notice to the populace that flooding may occur, should not be difficult but they are not mandatory for the respondent. On the strength of the evidence adduced by affidavit by both parties in this case, I find that the respondent issued notification that there would be floods. The information was conveyed to the county governments and agents of the Ministry of Interior in the national Government that is, the County Commissioners of Garissa and Tana River. It having been established that notice was issued, the petitioner at para 24-28 maintains that the respondent issued a short notification of spillage of excessive water on 24/4/2018. In this court's view, first, the extra flooding was happening when the residents were already suffering the effects of prior flooding that has not been attributed to the respondent; secondly, the Meteorological Department had already issued a warning regarding higher than normal rainfall for the period March to May 2018, such that every concerned person or institution was deemed aware of the dangers of flooding during that period. The court has also found that evidence adduced herein has exonerated the respondent from the claims that it deliberately and maliciously released water and caused flooding. Thirdly, the corporate mandate of the respondent not having encapsulated flood control measures and procedures, there is no basis on which to gauge the suitable length of such notice to the public, and in any event, the necessity for such notice arose while earlier floods had already engulfed the affected areas. Fourthly, the notices given to the County Commissioners and the County Governments of both counties sufficed, for it is these offices and levels of government that had the broad jurisdiction and administrative personnel network on the ground extending over and beyond the flood plain, and who had the concrete responsibility of tracking the events in terms of rainfall patterns in the course of their governance responsibilities in order to save their subjects from adverse effects of abnormal rainfall and flooding. In the circumstances outlined herein, the claim that the notification was given on the day of the alleged flooding, though true, does not mean that the issuance of that notice was late. A piece of evidence from the petitioner's affidavits whose impact is likely to be overlooked is this: the affected areas are hundreds of kilometres away from Kiambere, the last dam in the cascade, and it would take long for the water released from the Kiambere dam –the respondent's estimate is 4 days - to reach the affected areas (which were already flooded by 24/4/2018 (the date of the notice)). However, by the time of issuance of the notice, other unregulated rivers and streams downstream of the Seven Forks Cascade of dams had already occasioned extreme flooding to the localities mentioned in the petition. Considering that the event of flooding was already

happening in the downstream areas by 24/4/2018, it is not possible to hold that the respondent's notice was not sufficient; besides, despite having the opportunity to rebut the respondent's written response, the petitioner has not even attempted to perform the task of distinguishing the effects of flooding occasioned by the unregulated rivers and streams vis a vis flooding that purportedly arose from the spillage of excess water from the respondent's dams. The petitioner's claim of insufficient notice must fail on those grounds.

65. Having found that the flooding that occurred on 24/4/2018 was not as a result of the Respondent's negligence or malice, there is no basis upon which hold the respondent liable for violation any constitutional rights of the residents of the areas mentioned in the petition, and they are not entitled to any compensation from the respondent and the entire petition thus lacks merit. The other issues for determination herein above being nos (iii) and (iv) as framed herein above are thus sufficiently answered.

66. Before penning off this court must make several observations and recommendations for claimants in the position of the present petitioner. It is quite evident that what happened in April 2018 that occasioned the petitioner and his compatriots loss and damage may have arisen from climate change. It is apparent that any of the respondent's undertakings or remedial actions to prevent flooding or alleviate the adverse effects of flooding would naturally depend on the respondent's voluntary CSR budget which is clearly not much. In the circumstances, this court finds that the responsibility of the respondent even through CSR is quite minimal but still helpful in a way for the welfare of the residents of the affected areas and it should be maintained.

67. Climate change impacts are nowadays being experienced in the form of extremes of the elements - eg. increased temperatures, erratic rainfall, floods and droughts. Residents of affected areas including the petitioner herein who is expressed to be an elected Member of Parliament, must be discouraged from resorting to blaming for the adverse effects of natural phenomena such as floods the persons carrying out business for profit or for a public service, unrelated to the management of natural phenomena and begin dealing with the real problem. The perils of climate change are known to most governments of this day. In a briefing *Financing Adaptation in Africa: The Key to Sustainable Development?* (https: saiia.org.za/research/financing-adaptation-in-africa-the-key-to-sustainable-development/) published by the South African Institute of International Affairs (SAIIA) the authors observe as follows:

> "The impacts of climate change come at a great cost. Events such as floods, tropical cyclones and drought have the potential to reverse development gains, owing to the damage to infrastructure, crops and homes and the loss of livestock and human lives. A 2019 report by the government of Mozambique after Cyclone Idai, for example, estimated damages across the four affected provinces at $1.4 billion, with transport infrastructure, housing, manufacturing and energy infrastructure the most affected, while total losses were estimated at $1.39 billion, with the agriculture, industry and commerce sectors hit the worst...To reduce the risks, vulnerabilities and impacts faced by African countries, continued and significant financial and technological resources need to be channelled into strengthening resilience and adaptive capacity. "

68. The pertinent questions that should appeal to both leaders and ordinary citizens alike are as follows: are there statutory mechanisms vide which the problem can be addressed? Are there elected and appointive governance systems in place, at the helm of resource allocation, policy formulation and planning which should serve them in their time of need regarding climate change? Are there legal provisions that can be applied to secure climate action compliance on the part of both parastatal and private organizations

or agencies (such as the respondent) operating within the counties (which were not brought to the fore by the current petitioner)?

69. In the devolution setup, county governments are according to the 6th Schedule of the *Constitution*, responsible for county planning and development within their counties, including land surveying and mapping. They are also responsible for implementation of specific national government policies on natural resources and environmental conservation including forestry. Additionally, they are responsible for ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and local locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level. All these functions are in the *Constitution*. They cover matters regarding which the concerned county governments should have evidence of utilization of allocated climate action funding, for instance, by control of floods, intensive afforestation (or re-afforestation) of the catchment areas to ensure more ground absorption of the rain water to prevent or mitigate floods with the added benefit of recharging of ground water resources, surveying of the land and mapping to identify areas prone to floods with a view to resettling citizens in safer areas.

70. The petitioner invoked Articles 42 and 43 of the *Constitution* of Kenya, 2010. The said Articles provide:

> 42. Environment
>
> 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.
>
> 43. Economic and social rights
>
> (1) Every person has the right—
>
> (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
>
> (b) to accessible and adequate housing, and to reasonable standards of sanitation;
>
> (c) to be free from hunger, and to have adequate food of acceptable quality;
>
> (d) to clean and safe water in adequate quantities;
>
> (e) to social security; and
>
> (f) to education.
>
> (2) A person shall not be denied emergency medical treatment.
>
> (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

71. Under Article 22(1) of the *Constitution*, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. The Petitioner contested that as a result of the massive flooding, the communities' rights guaranteed under the above provisions were greatly infringed. The Petitioner

sought compensation in the terms stated under prayer 3 above. The said sums are substantial amounts to the tune of Kshs. 2.3billion. In my view, these damages are special in nature.

72. The effects of the flooding were not and cannot be disputed. The Petitioner deposed that the floods caused loss of livestock, displacement of human life from their homes, destruction of property and infrastructure thus hindering movement and supply of essential goods and services, blockage of access to basic amenities such as schools and hospitals and the widespread of waterborne diseases like cholera. The Respondent indeed admitted that it set aside part of its CSR Budget for purposes of supporting the affected residents to fund provision of relief food and other forms of support. However, those are problems unquestionably within the jurisdiction of either the national and the county governments to resolve.

73. Upon the mention of Tana River County in this petition, which will be taken only as an example of numerous other counties, it has been noted that the *Tana River County Climate Change Act* was enacted in 2021, the object of which is to put in place frameworks and mechanisms for mobilization and facilitation of the county governments, communities and other stakeholders to respond effectively to climate change through appropriate adaptation and mitigation measures and actions and for connected purposes. That *Act* provides for an institutional framework for planning and implementation including bodies such as a County Climate Steering Committee, a County Climate Change Planning Committee, Ward Climate Change Planning Committees; Section 32 of the *Act* provides that the CEC environment shall in consultation with the Steering Committee and relevant stakeholders formulate a five-year county climate change action plan to run concurrently with the National Climate Change Action Plan and the County Integrated Plan. Under Section 33 the County Climate Change Action Plan shall be crafted to address the specific needs and circumstances of the county and in this regard this court is of the view that even though no needs are listed, the elimination of flooding in that particular county should be one of the most urgent. Part V of the *Act* provides for the roping in of public and private entities into performing duties in relation to climate change. (This is a range of provisions that should have been of great succour to the petitioner herein had he shown that they had been invoked by the county Government; it is a range of statutory provisions inspired by the fact that semi-autonomous government agencies receive allocations directly from the government and others from external or international development partners for climate-related investments and are expected to diligently apply these to climate action.) Indeed, in their call for transparency the authors of the report "*The Landscape of Climate Finance in Kenya On the road to implementing Kenya's NDC*" (March 2021) by Peter Odhengo et al call for transparency in the reporting of climate expenditure by SAGAs as follows:

> "Due to the data challenges highlighted in this report, only a partial depiction of SAGAs financing for climate projects is provided. There is a critical need to ensure that expenditures from all public actors in Kenya, including SAGAs, are released and reported through IFMIS at the national and county level. This will ensure tracking of SAGA's expenditure and avoid double counting. To improve reporting, it is important that each SAGA uses the same climate terminology of the treasury or other funders, to ensure that data reconciliation is possible when the same information is collected from both perspectives."

74. It is possible that had the petitioner specifically addressed the issue of what climate action funding the respondent or the two counties of Tana River or Garissa had either set aside or received from the government or from other sources, then this court would have involved those counties and had a wider latitude for investigation of his claim.

75. Part VI of the *Tana River County Climate Change Act* relates to public participation and access to information on matters related to the *Act*, and in particular provides for the development of a comprehensive county strategy for public education and awareness on climate change which shall be validated at public meetings organized by Ward Planning Committees in every ward. Under Section 42, That strategy shall be mainstreamed into the County Climate Change Action Plan. Section 44 provides for capacity building that will equip individual citizens and communities in the county for effective participation in climate change governance and response. In the same section, provision is made for support by the planning committee of communities to enable them form community based organizations and other frameworks for effective mobilization and engagement with climate governance and issues within the county.

76. The goal of the County Climate Change Fund (CCCF) is, according to Peter Odhengo, et al in "*The Landscape of Climate Finance in Kenya On the road to implementing Kenya's NDC*" (March 2021) https:www.climatepolicyinitiative.org/wp-content/uploads/2021/03/The-Landscape-of-Climate-Finance-in-Kenya.pdf// is "...to create, access, and use climate finance to build communities' resilience and reduce vulnerabilities to climate change in a coordinated way." For the Tana River County, a County Climate Change Fund is established under Section 46 of the Act. It is financed by initial capital of 2% of the county development budget, and annual appropriations by the County Assembly of not less than 2% of the county development budget, money received from the National Climate Change fund, monies from the International Climate Finance received directly by the county or through other intermediaries, donations, fees, charges, fines etc. received by the county government in relation to activities in the county that adversely impact on the climate.

77. With regard to monies received through intermediaries, this court is aware of the existence of a programme by the name FLLoCCA, (Financing Locally Led Climate Action), a government of Kenya programme co-funded by the World Bank and other bilateral partners (governments) being implemented by the Ministry of the National Treasury and Economic Planning in collaboration with *inter alia*, the Council of Governors since 1/2/2022. That programme is meant to deliver locally led climate resilience action and strengthen county and national government's capacity to manage climate risks, and it focuses on capitalizing both national and county governments Climate Change Funds in terms of capacity building and implementation of locally led community actions for climate resilience.

78. A cursory glance at the 2024 Annual Performance Assessment Appeals Report and related documentation reveals that Tana River County Government received Kshs 122,498,870/= through the FLLoCCA programme; it had appropriated for itself from its development budget Kshs 110,000,000/=. The total funds available for climate change action in the year 2023 was therefore Kshs 232,498,870/=. Through FLLoCCA the county government of Garissa received Kshs 173,580,354/= while it had set aside for its climate change fund Kshs 80,000,000/= bringing the total amount available in 2023 for climate action to Kshs 253,580,354/=. There are counties such as Bungoma which reportedly had more than Kshs 400,000,000/= at their disposal in their climate action fund in that year. It would appear that compliant counties stand to gain much by the end of the FLLoCCA programme.

79. Planning, however, is crucial for effective application of these funds. In the South African Institute of International Affairs (SAIIA) briefing cited earlier herein it is further observed as follows:

> "Lack of adequate planning and readiness by countries to take up adaptation finance is another barrier to accessing these funds. Several African governments face challenges in developing proposals to access multilateral climate funds such as the Green Climate Fund, Global Environment Facility, Climate Investment Funds and Adaptation Fund. This is owing to a combination of factors, including a lack of technical skills to develop bankable

proposals. In most cases, they also lack access to adequate climate data or the capacity to interpret climate data. This is indispensable in developing a strong project climate rationale that demonstrates the extent of country vulnerability to climate change, and the precise way in which the proposed interventions will address these vulnerabilities."

80. In conclusion, it can be said that in Kenya considerable efforts have been made to mainstream climate change considerations into the country's plans, policies, strategies, projects and programmes. It is possible to see that there is a robust legal and institutional framework for climate action. Within the current economic setting of multiple and competing development priorities, there is also some reasonable funding for implementation of climate action. However, in the Annual Performance Assessment Appeals Report cited earlier it is clear that with regard to county governments in Kenya, there are still gaps in planning that militate against the enjoyment of the full range of benefits under the FLLoCCA programme. In the report "*The Landscape of Climate Finance in Kenya On the road to implementing Kenya's NDC*" (March 2021) by Peter Odhengo et al the author of the foreword states as follows:

> "Tracking and reporting of climate finance flows has become a central concern for development and economic policy. Tracking helps to provide comprehensive data on climate change-relevant budgeting and spending, enabling the government to make informed climate policy decisions. Alongside other climate data, such as GHG inventories and vulnerability studies, climate finance data will serve as a cornerstone of data-driven decisions on climate investments in the country. Climate finance tracking is therefore essential to provide a standardized guide to identify climate-related projects and track the public climate finance that the country receives." (Emphasis mine)

81. With such kind of funding as has been exemplified herein before being available, it behoves devolved units to wake up and take the necessary climate resilience action not just for the environment or the residents, but also for the added advantage of the great economic boom to be derived from agrarian and other developments unaffected by floods. Indeed, as indicated in the afore cited report,

> "increased finance for mitigation and adaptation in Kenya, particularly in the transport, forestry, water, land use, and waste sectors could create jobs for millions of people and lead the way to a greener, more resilient future."

82. It is for citizens to acquaint themselves with this state of affairs and avail their participation through the legal and institutional framework in place. When a member of parliament seeks redress in a climate change petition like the present one against a party other than a government agency, I think it behoves him, for the pursuit of transparency and accountability purposes for which he has been elected, to disclose the prior efforts he has exerted to compel his county or national government to address climate change impacts on his constituents. Climate resilience action by both elected and statutory governance systems should be preceded by in depth research and consultation with the public in line with their constitutional right of public participation in identifying where and how the adverse climate change effects are manifested and on what scale, and on the planning and implementation of solutions necessary.

Conclusion

83. Back to the present case, this court has found that the respondent did not deliberately, or even accidentally release excess water from its dams. The court has also found that the notice that the respondent gave was adequate. The loss claimed can not be attributed to the respondent in the circumstances. The upshot of the foregoing is that the flooding that occurred on 24/4/2018 and

its effects were not as a result of the respondent's negligence or malice and thus the petition dated 25/1/2022 lacks merit and it is hereby dismissed with no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 15TH DAY OF JANUARY, 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI