



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

ELC PETITION NO.4 OF 2018

(Formerly Nairobi ELC Petition No. 113 OF 2014)

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28,42,60 & 69 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT &

AND CO-ORDINATION ACT, 1999

BETWEEN

KIBWEZI WATER RESOURCES USERS ASSOCIATION.....1ST PETITIONER

KIBWEZI COMMUNITY FOREST OWNERS ASSOCIATION.....2ND PETITIONER

MBUI NZAU WATER RESOURCE USERS ASSOCIATION.....3RD PETITIONER

FRIENDS OF CHYULU.....4TH PETITIONER

NTHANGE WATER RESOURCE USERS ASSOCIATION.....5TH PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2ND RESPONDENT

WATER RESOURCES MANAGEMENT AUTHORITY.....3RD RESPONDENT

KENYA FOREST SERVICE.....4TH RESPONDENT

MAKUENI COUNTY.....5TH RESPONDENT

TANATHI WATER SERVICES BOARD.....6TH RESPONDENT

JUDGEMENT

1. The Petitioners' case revolves around the Mtito-Andei Water Project Phase 1 (*the project*) which was initiated and completed by the 6th Respondent. They contend that the project was not sanctioned by law and although it may have short term benefits to the area inhabitants, it will eventually cause damage to the Umani Springs/Kibwezi forest ecosystem (*the ecosystem*). The Respondents have been brought on board for various omissions/commissions, alleged by the Petitioners, with regard to the project.

2. For convenience, the 1st to 5th Petitioners will collectively be referred to as '*the Petitioners*' and the Respondents will be referred to as follows;

- a) The Hon. Attorney General (**AG**)
- b) National Environmental Management Authority (**NEMA**)
- c) Water Resource Management Authority (**WaRMA**)
- d) Kenya Forest Service (**KFS**)
- e) Makueni County
- f) TANATHI Water Services Board (**TANATHI**)

3. The amended petition is dated 27/11/2017 and seeks the following reliefs;

a) A declaration that the Respondents jointly and severally, by failing to develop a proper monitoring process to ensure sustainable management of water off-take, including fair distribution and accounting thereof for livelihoods and ecological protection for the Umani Springs/Kibwezi Forest ecosystem, has infringed the rights of the Petitioner and the people of the Umani Springs. Kibwezi Forest ecosystem locality as envisaged by Articles 28, 42 and 60 of the Constitution.

b) An order of prohibition under Article 23 of the Constitution directed at the Respondents jointly and severally prohibiting them and their agents, servants or employees from undertaking any further decision or action in respect of the project pending the hearing and determination of this cause or until such time as an independent peer review of the project is undertaken in accordance with the orders of this honorable Court.

c) An order of mandamus under Article 23 of the Constitution directed at the Respondents jointly and severally to conduct, in consultation with all the stakeholders and inhabitants of the Umani Springs/Kibwezi Forest ecosystem locality, an independent peer review of the project, development, livelihood and bio diversity ecological protection.

d) The Respondents do furnish the Petitioners with information as sought in the letters dated 26th March 2011, 1st October 2012 and 10th September 2013 in accordance with Article 35 of the Constitution.

e) The 6th Respondent by itself, its organs, agents, servants or employees be restrained from undertaking any further actions, constructions or decisions in respect of the project or undertaking any other project, actions or decisions within or in respect of the Umani Springs/Kibwezi Forest ecosystem pending the hearing and determination of this suit or until such time as an independent peer review of the project is undertaken in accordance with the orders of this honourable Court.

f) The 6th Respondent be compelled to reinstate the environment within the Umani Springs/Kibwezi Forest ecosystem under Article 70 of the Constitution.

g) Any other orders and/or directions that this honorable Court may deem fit to grant;

i. To prevent, stop or discontinue any act or omission that is harmful to the environment.

ii. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment and

h) That there be no costs to this application in view of its public interest nature.

4. The petition is supported by the affidavit of Andrew Mutuku Muindi and James Kavita Munyao sworn on 7th February, 2014. They aver that Umani springs which is in the Kibwezi forest reserve is an ecosystem that is rich in biodiversity with a ground water forest consisting of splendid trees, vulnerable plant species and endangered plant subspecies. That the Umani springs/Kibwezi forest ecosystem is part of a network of protected areas known as the Tsavo Conservation area and plays a key role as a dry season dispersal area. They also aver that the local people derive benefits in form of water, firewood and traditional medicine from the ecosystem.

5. They aver that the ecosystem provides water for 5 water projects with 'the project' being the latest and that it is now under strain and has begun showing signs of receding water levels, massive tree mortality and drying up of perennial wetlands.

6. Among the complaints they have about the project are; that the Environmental and Social Impact Assessment (ESIA) done in 2009 and revised in 2011 was flawed, that there was no public participation before implementation of the project, that there was no public access to detailed information and that TANATHI betrayed its Constitutional responsibility to the local community in regard to Trust land resources custodianship. They contend that the effect of the proposed project will be to negate the benefits of gazettment and recognition of the ecosystem as a forest reserve and conservation area.

7. The **AG** filed a notice of preliminary objection on 24/03/2014 but withdrew it on 28/05/2014.

8. **NEMA** alluded to a replying affidavit of Stephen Kimutu sworn on 03/06/2014 and filed at the Nairobi registry but I could not find it on record.

9. **WaRMA** opposed the petition through the affidavit of James Ambuso sworn on 26/05/2014. He deposed that WaRMA followed the law to the letter in issuing authorization for the project to TANATHI. He contends that the suit against WaRMA is premature as the authorization issued is subject to fulfillment of certain conditions before a permit can be issued and as such, WaRMA cannot be faulted for fulfilling its obligations as outlined in the law. He also contends that the effects of the project on the ecosystem alluded to by the Petitioners are not only misleading but unsubstantiated as no valid report has been tendered by the Petitioners exhibiting any form of ecosystem disaster.

10. **KFS** opposed the petition through the affidavit of Benedict Omondi sworn on 13/03/2014. She deposed that 'item (a)' in the Petitioners' bundle of documents illustrates that the Petitioners were engaged in the project. That KFS only granted access into the forest to its licensees on the strength of the Environmental Impact Assessment studies carried out and all requisite authorizations from the relevant bodies having been obtained by its licensees. Further, she deposed that the duty of KFS with regard to the ecosystem is to protect and conserve it and that having given a right of access after reassurance from an environmental Impact Assessment does not amount to abdication of its duties. She exhibited a letter dated 25/06/2012 from the Director of KFS banning new authorization for water abstraction from Kibwezi forest reserve.

11. Through a notice of preliminary objection dated 29/01/2015 and filed on 05/02/2015, **TANATHI** sought the dismissal of the petition on the following points;

a) That the Petitioners did not follow the procedure provided for under part VI of the Water Act, No. 8 of 2002, the Water Appeal Board Rules, 2007 and the Water Resources Management Rules 2007 and/or the procedure provided for under part XII of the Environmental Management & Coordination Act, No. 8 of 1999 and the Environment (Impact Assessment and Audit) Regulations 2003 in raising their objection to the project the subject matter of the petition.

b) That the prayers sought by the Petitioners in this petition have already been rendered nugatory since the project is already complete.

c) That the Petitioners are guilty of laches since they have waited for six years since the alleged cause of action arose.

d) That the petition is frivolous, vexatious and an abuse of the Court process.

12. There were no substantive responses from the AG, Makeni County and TANATHI.

13. The petition was canvassed by way of written submissions.

14. The Petitioners submit that their main dispute is the implementation of the project which did not follow the statutory procedure outlined in sections 42 and 58 of the Environmental Management & Coordination Act, No. 8 of 1999 (EMCA). That the project was commenced and completed without the requisite Environmental Impact Assessment (EIA) and without approval to proceed from the relevant authorities. That the effect of the project will be to negate the benefits of gazettement and recognition of the ecosystem as a forest reserve and conservation area.

15. They submit that the Respondents violated Article 10 of the Constitution by not formulating a programme of public participation in that there was no evidence of any mechanism used to achieve it. That the information of the project was not made accessible to the public and the views of major stakeholders and affected individuals were not aired out. That no evidence was adduced showing any consultations with the local people and communities and their responses to the project.

16. They also submit that TANATHI did not facilitate any information of the project to the public as provided by Article 35 of the Constitution.

17. With regard to Article 42, they submit that the project will be in violation of the principle of sustainable development which dictates that the environment needs of present generations should be addressed without compromising the ability of future generations to meet their own needs.

18. With regard to Article 69, they cite the case of **Abdalla Rhova Hiribae & 3 others –vs- the Hon. AG & 6 others** civil case No.14 of 2010 where the Court stated as follows;

“this provision, in my view, contemplates legislation that provides for comprehensive protection of the environment, land and natural resources, in effect, requiring the kind of multiple comprehensive plan that encompasses all elements that go into protection of the environment-use of forests, water, land and other resources- that the Petitioners appear to have in mind. The idea behind the provisions of Article 69 were, in my view, to have an all-encompassing legislative and policy framework to ensure full enjoyment of all the rights appurtenant to land and the environment Since such rights arise from different factors and are controlled by different state entities, the way to ensure their enjoyment is to have an agency that co-ordinates the various entities involved in their exploitation and management. Should the state fail to have such an agency, policy and legislation in place, then it can be said to be in breach of its constitutional obligations to the Petitioners.”

19. With regard to the above, they submit that the State is duty-bound to undertake these obligations through its Governmental agencies and corporations established by statute and legislative authority and that in the instant matter, such agencies and corporations are the 2nd -6th Respondents.

20. They submit that the EIA procedure was not complete and as such, issuance of a permit by WaRMA was reckless and without due regard to the laid down statutory procedure.

21. They also submit that from the relevant provisions of EMCA and regulations, an EIA report is a mandatory requirement before putting up a project and as such, TANATHI has contravened the law and its intentions are to deplete the Umani springs. They rely on **Friends of Lake Turkana Trust –vs- AG & 2 others (2014) eKLR** where Justice Nyamweya held that;

“Environmental impact assessments are also now a general principle in Customary international law arising from the obligation on states to cooperate with each other in good faith, in mitigating transboundary environmental risks. International instruments also now commonly provide that states should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects.”

22. With regard to Article 28, they submit that the state and Government agencies should recognize the benefits that the local communities derive from the ecosystem hence the need to protect it. They contend that the Respondents’ actions have deprived the local communities of their livelihoods hence violating their rights as enshrined in the Constitution.

23. They submit that the manner of implementing the project negates Kenya’s adherence to the obligations stipulated in international agreements to which Kenya is a party to. They cite **Article VIII of the African Convention on the Conservation of Nature and Natural Resources (1968)** which provides that;

“The parties shall manage their water resources so as to maintain them at the highest possible quantitative and qualitative levels. They shall, to that effect, take measures designed to: prevent excessive abstraction, to the benefit of downstream communities and States.”

24. According to the Petitioners, the project is not sustainable. They urge this Court to grant the prayers sought in the amended petition.

25. NEMA acknowledges that TANATHI’s actions may have occasioned great injustice to the communities and habitat around the project site but denies being privy to the facts and circumstances that allowed WaRMA to authorize the project. As such, it contends that it should not be held accountable for activities not authorized by it. It identifies the following as the issues for determination;

a) Is there an existing infringement on the Petitioners’ Constitutional right?

b) Are there new/additional authorizations in respect of the project?

c) Is there a requirement for independent peer review of the project?

d) Has the information as requested by the Petitioners in their letter dated 10/09/2013 been issued to them?

26. On the first issue, NEMA submits that TANATHI commenced the project without its approval, an act which constitutes an environmental offence according to section 137 (b) of EMCA. That it issued an improvement notice requiring immediate cessation of the project and in doing so, it was executing its duty to the public hence any alleged breach of trust is *malafides*. According to NEMA, TANATHI should be held solely liable for any alleged infringement of rights. It also reserved its right to prosecute TANATHI for violation of section 58 of EMCA upon determination of the petition. Further, it submits that the Petitioners have not satisfactorily demonstrated how it violated their rights or aided TANATHI in violating them.

27. On the second issue, it submits that it never issued an EIA license and none has been exhibited by the Petitioners. That the EIA process is still pending as it was halted due to the present proceedings.

28. On the third issue, it submits that it wrote to TANATHI and Government printers requesting them to publish for two successive weeks a public notice inviting the public to submit oral or written comments on the EIA study report. That TANATHI failed to adhere to the requirement and as such, no public notice was issued. It therefore contends that the Petitioners’ pleadings are misleading in so far as they allude to its failure to engage the public.

29. Further, it submits that peer review/complaints by aggrieved members of the public can only be addressed by TANATHI once it receives approval from NEMA. It contends that the prayer for an order of mandamus compelling the Respondents to conduct peer review is misinformed, premised on the wrong facts and is subject to the condition that TANATHI ought to have first issued a public notice. It relies on the case of **Republic –vs- Sacco Societies Regulatory Authority & others [2017] eKLR** where Justice Odunga observed that;

“It is my view that where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. In this case, the condition precedent had not been put into motion in order to trigger the action on the part of the commissioner.”

30. On the fourth issue, they submit that the Petitioners received a copy of the letter to the Government printers and TANATHI requiring them to place a public notice in the dailies and the Kenya gazette for purposes of inviting further public comments. That TANATHI failed to comply and as a result, it was not issued with an EIA licence.

31. NEMA submits that the Petitioners committed a misjoinder by having it as a Respondent instead of interested party.

32. WaRMA identifies the following as the issues for determination against it;

a) **Whether it acted within its mandate.**

b) **Whether it violated any of the Petitioner's Constitutional rights as alleged.**

c) **Whether a cause of action can be maintained against it.**

33. On the first issue, it submits that in granting the impugned authorization to TANATHI, it acted within the preamble of the Water Act and that receiving and determining applications for permits for water use is one of its functions as provided in the Water Act and Water Resource Management Rules, 2007.

34. It submits that TANATHI applied for a permit for water use in the prescribed form and supplied the information as required. That upon receiving the application, it had the discretion, as per the Water Act, to determine it as well as determine the level of public participation. Further, it submits that the rules should be construed in light of the provisions of the Water Act to the extent that where the Act gives it the discretion to determine the extent of public participation, then the rules should be interpreted *mutatis mutandis* to avoid the regulations being inconsistent with the parent Act.

35. WaRMA therefore submits that it had the jurisdiction to determine whether the conditions prescribed by the Act allowed for approval of an authorization without public participation. It however contends that there was public participation, in form of consultative meetings, in the impugned authorization and that its averments under oath have not been controverted by the Petitioners. It relies on **Tonui Kipyegon Fredrick –vs- Kenneth Kiprono Koech & Anor (2018) eKLR** where the Court stated;

“The affidavit filed by the defendant has not been controverted by filing a supplementary affidavit by the plaintiffs/applicants. The matters deponed upon in that affidavit having not been controverted are taken as true and correct.”

36. It further submits that upon taking part in the public participation, the Petitioners were required to file an objection in writing after which it would have exercised the jurisdiction to allow or reject the permit application. It contends that it was not afforded the opportunity to exercise that jurisdiction as no objection was lodged. That instead of lodging an objection, the Petitioners rushed to this Court in total abrogation of the procedure provided by the Act and regulations thereof. As such, it submits that the petition is premature as the process of evaluating TANATHI's application had not been completed. It relies on **Simon Otworu & 7 others –vs- Lake Victoria South Weather Service Board & 6 others (2018) eKLR** where the Court stated;

“The Petitioners suit therefore may in a sense be premature to the extent that the feasibility study for the project has not been completed and to that extent, the Court does not have the full information to enable it to make an appropriate evaluation respecting the proposed project to determine whether it is the benefits and/or the adverse impacts that outweigh the other.”

37. On the second issue, it submits that the Petitioners have not particularized their grievances with enough particularity as required in Constitutional petitions. It relies *inter alia* on **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** where the Court of Appeal held;

*“The petition before the High Court referred to Articles 1,2,3,4,10,19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements...we wish to re affirm the principle holding on this question in **Anarita Karimi Njeru (supra)**. In view of this, we find that the petition before the High Court did not meet the threshold established in that case..it is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act 2011. Accordingly, the petition did not meet the standard enunciated in the **Anarita Karimi Njeru (supra)**.*

38. On the third issue, it submits that a cause of action cannot be maintained against it because it acted within its mandate and the Petitioners have not shown how it infringed any of their rights.

39. KFS identifies the following as the issues for determination against it;

d) **Whether it has in any way abdicated its mandate under the Forest Conservation and Management Act 2016.**

e) **Whether the Petitioners are entitled to the reliefs sought.**

40. On the first issue, it submits that its mandate in relation to this matter is issuing of access into the gazetted forest to its licensees based on the strength and recommendation of an Environmental Impact Assessment carried out as well as all the requisite authorizations from the relevant bodies. It contends that issuing a right of access upon reassurance from an Environmental Impact Assessment does not amount to abdication or abandonment of its duties as alleged.

41. It also submits that no new authorization for water abstraction in respect of Kibwezi Forest Reserve has been issued since the year 2012.

42. On the second issue, it submits that the Petitioners have not furnished the Court with sufficient proof of the manner in which it has infringed their Constitutional rights. That the Petitioners are not only required to cite the Constitutional provisions they believe to be infringed but to also demonstrate the manner of infringement.

43. Makueni County has identified the following as the issue for determination;

a) Whether the petition was properly pleaded with reasonable precision as required in the Anarita Karimi Njeru case.

44. It submits that the amended petition does not disclose any cause of action against it. That apart from citing omnibus provisions of the Constitution, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the Court.

45. It also submits that the project belonged to the National government and not County government and contends that it should have been joined as an interested party and not Respondent.

46. TANATHI submits that the main purpose of the construction of the project was to better the lives of the communities living within Kibwezi District which is characterized by severe water shortage which is a common phenomenon in the entire Makueni County. That the objective of the project is well founded in the Constitution which provides that every person has the right to clean and safe water in adequate quantities.

47. TANATHI submits that it is a statutory body established pursuant to the Water Act and with the authority and duty to inter alia provide efficient and economical provision of water services. That its mandate is also within the developed legislative and policy guidelines to ensure access to water for all citizens.

48. On whether the Constitution was violated, TANATHI submits that with regard to public participation, it conducted multiple stakeholder engagements as follows; 01/07/2009 at the Divisional office-Kambu town, 07/07/2009 at Action Aid Hall Kibwezi town and 30/06/2009 at the Divisional office-Kambu town.

49. That it also issued a notice to the public to submit views on Environmental Impact Assessment *vide* a Daily Nation Newspaper advertisement on Friday June 27, 2014. It submits that the notice was issued pursuant to the administrative powers vested in the Cabinet Secretary, Ministry of Environment and Natural Resources. It relies inter alia on **Nairobi Metropolitan Psv Saccos Union Limited & 25 others –vs- County of Nairobi Government & 3 others (2013) eKLR** where the Court stated;

“Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some level of public participation and I must therefore agree with sentiments of Sachs J in Minister of Health –vs- New Clicks South Africa (PTY) Ltd where he expressed himself as follows;

“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of public and all interested parties to know about the issue and to have adequate say.”

50. On the right to human dignity (article 28), it submits that the project has strong environmental component in that it integrates Umanyi Springs and wildlife protection; conservation of the forest and the general ecosystem within the forest reserve. That the positive impacts and benefits to the community are immense and welcome. It contends that the allegations by the Petitioners have not been proved by any iota of evidence.

51. On the right to a clean and healthy environment (*article 42*), it submits that this right includes the right to have the environment protected for the benefit of present and future generations through legislative action and other measures. It contends that article 69 of the Constitution obligates the state to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and also enjoins the state to eliminate processes and activities that are likely to endanger the environment.

52. Further, that the article requires every person including the Petitioners to cooperate with the state in protecting, conserving the environment and ensuring ecologically sustainable development and use of natural resources.

53. It submits that this Court’s decision should be guided by Article 70 of the Constitution which enshrines the precautionary principle as part of Kenya’s environmental governance legal framework. The principle requires that where there are threats of damage to the environment, whether serious or irreversible, immediate, urgent and effective measures should be taken to prevent environmental degradation notwithstanding the absence of full scientific certainty on the threat to the environment.

54. It also submits that section 86 of EMCA gives NEMA the powers to identify materials and processes that are dangerous to human health and environment and to issue guidelines and prescribe measures for the management of the materials and processes so identified. It therefore contends that the project was undertaken within the framework of article 70 of the Constitution and sections 3 and 86 of EMCA.

55. It submits that article 21 of the Constitution requires the Government to progressively realize the rights therein and contends that it has been able to show the initiatives and policies it took in the realization of the right to clean and safe water in adequate quantities. It relies on the case of **Mitu-Bell Welfare Society –vs- Attorney General & 2 others (2013) eKLR** where Mumbi Ngugi J stated;

“The argument that social economic rights cannot be claimed at this point, two years after the promulgation of the Constitution, also ignores the fact that no provision of the Constitution is intended to wait until the state feels it is ready to meet its Constitutional obligations. Articles 21 and 43 require that there should be ‘progressive realization’ of social economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights.’

56. TANATHI also submits that the Petitioners are guilty of *laches* and that no explanation has been given for the delay in enforcing rights to warrant any favorable finding. That the project has been ongoing since 2009 yet the Petitioners did not raise any objection until June 2014 after a substantial amount of public funds had been pumped into the project. That it is inequitable, unreasonable and disproportionate to interfere with the project since it has been completed when the Petitioners slept on their alleged rights for five years.

57. Having looked at the petition, responses and the rival submissions, it is my considered view that the following issues arise for determination;

a) **Whether the initiation and completion of the project was sanctioned by the law.**

b) **Whether the Constitution has been violated.**

c) **Which orders should the Court issue?**

Whether the initiation and completion of the project was sanctioned by the law.

58. Section 9(1) of EMCA provides that the “the object and purpose for which NEMA is established is to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.”

59. The second schedule of EMCA gives a list of activities which require environmental impact assessment (EIA) prior to commencement. In paragraph 4, the following forestry related activities are listed; (a) any project located within a distance prescribed by a written law from a wetland, ocean, sea, lake, river, dams, barrages and piers (b) river diversions and water transfer between catchments (c) large scale flood control schemes (d) drilling for the purpose of utilizing ground water resources including geothermal energy.

60. According to the proponent-TANATHI, the project involved abstraction of water from Umani springs/Kibwezi forest ecosystem for domestic purposes by the area inhabitants. It is therefore a project envisaged by paragraph 4 of the second schedule of EMCA hence required an EIA license before commencement.

61. NEMA has categorically denied issuing the EIA license to TANATHI. Indeed, TANATHI has not exhibited any license from NEMA and it is therefore evident that TANATHI contravened the law by commencing the project without the EIA license.

62. WaRMA agrees that TANATHI applied for a water use permit in the prescribed form and supplied the required information. It however contends that it was not allowed the opportunity to either allow or reject the water permit application because the Petitioners rushed to Court instead of lodging an objection. It is also WaRMA’s position that the petition is premature because the process of evaluating TANATHI’s application had not been completed.

63. The affidavit of James Ambuso sworn on behalf of WaRMA acknowledges that an EIA licence is one of the documents required before issuing authorization and permits for water use. He exhibited the authorization issued to TANATHI as JA-3(b) and the conditions for authorization as JA-3(a). He also deposed that TANATHI was required to provide an EIA license as per the provisions of EMCA. According to Ambuso, WaRMA can only issue a permit for any proposed water use once the conditions of authorization have been met. I have however looked at the conditions alluded to and there is no mention of the EIA license.

64. The amended petition is dated 11/09/2014 and was filed on 17/09/2014. Paragraph 4.9 (h) acknowledges that at the time of filing it, the project was already complete. TANATHI’s notice of preliminary objection dated 29/01/2015 and filed on 05/02/2015 also acknowledges that as at that time, the project was already complete. Now, if at the time of filing the petition the project was already complete, which application was WaRMA still evaluating? is it logical to evaluate an application seeking permission yet the project, with regard to which permission is being sought, is already complete?

65. According to Section 8 of the Water Act, 2012, it is the mandate of WaRMA to receive and determine applications for permits for water use. The plain reading of this mandate is that permission of WaRMA is required before dealing with a water resource. Umani springs is indisputably a water resource and it is evident that TANATHI embarked on the project without the requisite permit from WaRMA in contravention of the law. In any case, TANATHI did not exhibit any permit from WaRMA.

66. Having determined that TANATHI did not have an EIA license from NEMA or a permit from WaRMA, it automatically follows that it’s access to Kibwezi forest to commence the project was unprocedural. There is no basis in KFS’s deposition that it granted TANATHI access on the strength of the environmental impact assessment carried out and all requisite authorizations obtained from the relevant bodies. It is therefore my considered view that KFS abdicated it’s duty of protecting and conserving the forest ecosystem.

67. The exhibit marked EK-1 attached to the affidavit of KFS is a letter dated 25/06/2012 addressed to the zonal forest manager, Makueni. It raised concerns about water over abstraction in the Umani springs. It also indicated that the position had been communicated to WaRMA requesting them to undertake a thorough study of the water resources potential of the springs. It directed the zonal forest manager to enforce a ban on the development of any new water project for water abstraction from Umani springs. According to TANATHI, the project had been ongoing since 2009 and this means that by the time KFS was writing the letter, TANATHI had unprocedurally accessed the forest four years earlier and commenced the project.

68. The upshot of the foregoing is that the initiation and completion of the project was not sanctioned by the law.

Whether the Constitution has been violated.

69. It is trite that where a Petitioner alleges violation of the Constitution, he/she must plead with reasonable precision, the provisions of the Constitution which have allegedly been violated, the manner in which they have been violated and the remedy sought for that violation.

70. The Constitutional provisions cited in the petition are Articles 10, 28, 35, 42, 60 and 69.

71. Article 10 is on National Values and principles of governance which includes *inter alia*, public participation. NEMA submitted that it wrote to TANATHI and Government printers requesting them to publish for two successive weeks a public notice inviting the public to submit oral or written comments on the EIA study report. That TANATHI failed to adhere to the requirement and as such, no public notice was issued. This is an acknowledgement by NEMA that it was in receipt of an Environmental Impact Study Report from TANATHI as per the provisions of **section 58(2) of EMCA** which provides that;

The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:

Provided that the Authority may direct that the proponent forego the submission of the environmental impact assessment study report in certain cases.

72. With regard to publication, section 59 (2) of EMCA provides as follows;

Upon receipt of an environmental impact assessment study report from any proponent under [section 58\(2\)](#), the Authority shall cause to be published in the Gazette, in at least two newspapers circulating in the area or proposed area of the project and over the radio a notice which shall state;

a) a summary description of the project.

b) the place where the project is to be carried out.

c) the place where the environmental impact assessment study, evaluation or review of the report may be inspected; and

d) a time limit not exceeding sixty days for the submission of oral or written comments on the environmental impact assessment study, evaluation or review report.

73. It is therefore evident that it was NEMA's mandate to publish the study report for purposes of public participation.

74. As for WaRMA, section 33 of the Water Act gives it discretion to determine whether an application for water use permit should be subjected to public participation. On the other hand, rule 29 requires all permit applications in categories C and D to be published monthly in a national newspaper of wide circulation. Section 31(b) of the Interpretation and General provisions Act provides that no subsidiary legislation shall be inconsistent with the provisions of the Act. Accordingly, I am in agreement with the submissions of Warma that rule 29 should be interpreted mutatis mutandis to avoid inconsistency with section 33. It is therefore my considered view that there is no wrongdoing on the part of WaRMA as far as public participation is concerned.

75. As for TANATHI, there was no evidence to show that it actually conducted various stakeholders engagements in 2009. Indeed, it did not file any substantive response where the said evidence could have been exhibited. Further, the fact that it proceeded with the project to completion without an EIA license abetted the non compliance with the requirement of public participation.

76. From the foregoing, it is my considered view that NEMA and TANATHI violated article 10 of the constitution with regard to public participation.

77. As for Article 69, **paragraph 1(a)** provides that the state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits. **Paragraph 1(g)** requires the state to eliminate processes and activities that are likely to endanger the environment.

78. The Petitioners concern is that the over abstraction of water from the umani springs will cause it to dry up eventually to the great detriment of the ecosystem and local inhabitants. They contend that despite lack of adequate water to supply the local population in the semi arid locality, drying up the umani springs is not the solution. This concern is also captured in the letter by KFS (*ek-1*) alluded to above. I have also looked at the Hydrological Assesment Review Report by Dr. Sean Avery dated October 2013(*attached to the petition*) and the same concerns are captured. Infact, a keen study of the report reveals that the activities at the umani springs are likely to endanger the environment.

79. All the Respondents are representatives and/or affiliates of the state in different capacities and it is my considered view that they are jointly and severally liable for violation of Article 69 of the Constitution. Article 42 is concerned with protection of the environment for present and future generations and is intricately connected to article 69. Accordingly, violation of article 69 amounts to violation of article 42 by extension.

80. As for Article 35, the letter dated 26/03/2011 was addressed to NEMA by Kibwezi WRUA (1st Petitioner) seeking NEMA's intervention with regard to the project. In my view, this letter did not seek any information. The letter dated 01/10/2012 was written by the Executive Director of the East African Wildlife Society and addressed to the Permanent Secretary, Ministry of water and irrigation by the. It sought information with regard to public participation, EIA license and access to the forest. The letter dated 10/09/2013 was written by the Executive Director of the East African Wildlife Society and addressed to the Principal Secretary, Ministry of Environment, Water & Natural Resources. It also sought information with regard to public participation, EIA license and access to the forest.

81. The AG being the representative of the ministries where the letters dated 01/10/2012 and 26/03/2011 were sent, did not participate in these proceedings. There is, therefore, no evidence that the information sought was ever supplied. In any case, this Court has already reached a determination that there was no public participation and the EIA license was never obtained. It is therefore quite obvious that the information was not available. Accordingly, the Petitioners have established that indeed article 35 of the Constitution was violated.

82. Most of the prayers sought have been overtaken by events. As for prayer g(i), my view is that the Petitioners have on a balance of probabilities demonstrated that there was lack of a proper monitoring process to ensure sustainable management of water off-take from the Umani springs.

83. As for the prayer for environmental restoration, it is not in dispute that the project is complete and there are other parties not represented herein who are benefiting from provision of water courtesy of the project. Granting this order will mean dismantling the project thus affecting parties who have not been heard. My view is that such action will not advance the rules of natural justice.

84. The most appropriate remedy in the circumstances is a prohibition of all future activities that would cause further water abstraction from the Umani springs and I proceed to issue the same.

Signed, dated and delivered at Makueni this 26th day of September, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Thuku holding brief for Mr. Thuga for the Petitioner present

No appearance for the Respondents

Mr. Kwemboi – Court Assistant

MBOGO C. G. (JUDGE),

26/09/2019.