



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CONSTITUTION PETITION NO. 12 OF 2019

AS CONSOLIDATED WITH JUDICIAL REVIEW MISC. APPLN. NO. 192 OF 2018

IN THE MATTER OF THE PROTECTION OF THE RIGHT TO PROPERTY AS

ENSHRINED UNDER 40 OF THE CONSTITUTION OF KENYA, 2010

AND.

IN THE MATTER OF ENFORCEMENT ORDERS ISSUED ON 31ST MAY 2018 BY THE WATER

RESOURCES MANAGEMENT AUTHORITY IN RESPECT OF HOUSES NO. TB 023A, FB 024A,

TB 025A, FB 026A, FB 027A, FB 028A, FB 029A AND FB 030A SITUATE ON

GREEN PARK ESTATE, MACHAKOS

AND

IN THE MATTER OF ARTICLES 22, 23, & 40(3), 47, 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE INTERPRETATION AND APPLICATION OF REGULATION 116(2)

OF THE WATER RESOURCES MANAGEMENT REGULATIONS (2007)

BETWEEN

SUPERIOR HOMES (KENYA) PLC.....PETITIONER

AND

THE WATER RESOURCES AUTHORITY (WRA)..... RESPONDENT

INTERESTED PARTIES

1. GEMS MANAGEMENT LIMITED

2. MICHAEL ANTHONY NYABUTI

3. ROSALIND KATUMBI KOTI

4. NANCY NTHAMBI KATINGIMA

5. JAMES MAINGI MBITHI & EMMA MBINYA MUTIO

6. DANIEL GICHUKI KARIUKI & EMILY NJERI KAROKI

7. FAITH WANGUI THIONGO & ALLAN NJUGI MURIMI

8. STELLA BONARERI MOGERE & KEPHA NYAMONGO OENGA

9. ANTHONY MAGANDA CHACHA & RUTH MUTHONI NJIHIA

JUDGMENT

Introduction

1. The Petitioner, Superior Homes Limited, is a Limited Liability Company registered in the Republic of Kenya and is the registered proprietor of all that parcel of land known as L.R No. 27409 I.R No 103926/1 measuring sixty one decimal eight four (61.84) Hectares, also known as Green Park Estate (*hereinafter "the suit property"*).

2. The Respondent, Water Resources Authority, is a body corporate with perpetual succession established as such pursuant to the provisions of Section 11 of the Water Act, 2016. Its powers and functions are exercised and performed under the direction of a Management Board.

3. The 2nd to 9th Interested Parties are lessees and home owners of houses NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on the suit property while the 1st Interested Party is a Management Company incorporated in the Republic of Kenya to manage the suit property.

4. In these consolidated causes, the Petitioner's and the Interested Parties' case is that on 31st May, 2018, the Respondent issued Enforcement Orders requiring the demolition and removal within 21 days of Houses Nos. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A (*the houses*) that are situate on part of the suit property.

5. According to the Petitioner, the eight (8) houses were marked for demolition, an act that the Petitioner deems unlawful and illegal and contravenes the Petitioner's and the Interested Parties' right to ownership of property under Article 40 of the Constitution; that the Respondent had carried out its own survey on the property and the houses and that by way of a letter dated 3rd September, 2013, the Respondent expressly confirmed and ascertained that the entire boundaries of the suit property are in fact compliant and outside the minimum and maximum distance allowed in respect of riparian land.

6. It is the Petitioner's case that in view of the letter dated 3rd September, 2013 by the Respondent, none of the houses is within 20 meters of the Stoney Athi River, meaning that the Enforcement Orders issued by the Respondent are unlawful and illegal; and that the earlier position of the Respondent as indicated in its letter dated 3rd September, 2013 could not be changed without any justification and/ or due process.

7. The Petitioner pleaded that upon receipt of the Enforcement Orders, it engaged an independent surveyor who prepared a report; that the report confirmed that the letter dated 3rd September, 2013 by the Respondent stating that the distance of the masonry boundary wall on the Petitioner's property from the Stoney Athi River bank is 25 meters upstream and 30 meters downstream was the correct and accurate position and that the Surveyor confirmed that there was no encroachment at all by the Petitioner and the Interested Parties' property on the riparian land of Stoney Athi River.

8. The Petitioner averred that the survey conducted on 11th June, 2018 was a confirmation of the findings of the Respondent contained in the letter of 3rd September, 2013, and in line with the provisions of Regulation 116(2) of the Water Resources Management Rules (2006), which stipulate that riparian land is defined by a minimum of 6 metres or equal to the full width of the water course up to a maximum of 30 metres on either side of the bank.

9. The Petitioner pleaded that it applied for and obtained an Environmental Impact Assessment License from NEMA to construct the impugned houses; that the said licence has never been revoked by NEMA and that neither the Petitioner nor the Interested Parties were involved or consulted before the Respondent arrived at its decision of 16th April, 2018.

10. Vide a Further Affidavit filed on 18th February, 2019, Judith Maroko for the Petitioner deponed that the Petitioner purchased 163 acres of land from East Africa Portland Cement Company Limited in the year 2006; that the Petitioner constructed the houses in the year 2008 and not 2013 and that the section bordering the river was developed in the year 2008 after obtaining the requisite permits from the authorities that mapped out the riparian reserve and that the unprecedented heavy rainfall of March 2018 caused the seasonal Stoney Athi River to swell and burst its banks causing the floods to spill over to areas adjacent to the river, which areas were well beyond the riparian reserve.

11. According to the Petitioner, the flooding in the year 2018 was occasioned by the ongoing works by a Chinese company that left scaffolds in the river that blocked the river's path and thereby altered it; that the Petitioner sought to build a dyke after the said flooding and that the Respondent informed the Petitioner to stop the construction of the dyke after the County Government of Machakos had approved the same.

12. The Petitioner averred that after the Respondent marked some houses for demolition, that action led to a dip in sales of the Petitioner's houses and that the Petitioner incurred extra costs as well as bad publicity costing the Petitioner Kshs. 466,955,673.

13. In response to the Petition, the Respondent's Regional Manager, Athi Catchment Area, deponed that on 1st August, 2013, the Petitioner approached the Respondent and sought guidance and applicable regulations with a view of constructing a dyke along the banks of Stoney

Athi River.

14. The Respondent's Regional Manager deponed that on 3rd September, 2013, the Respondent duly informed the Petitioner that: the distance from the river bank to the existing masonry wall was 25 meters upstream and 30 meters downstream; that the entire distance between the river bank and the masonry wall is a flood plain which experiences floods during high flows and that the Petitioner was to liaise with the Respondent for authorization of the construction of the dyke.

15. It is the Respondent's case that the Petitioner was directed to submit a Hydrological Assessment Report and Technical Designs for the proposed dykes, a directive it ignored; that the Petitioner did not seek the Respondent's guidance on construction of the dyke until 11th April, 2018 and that the Petitioner proceeded to construct the eight (8) houses on the flood plain whilst aware that the area is prone to flooding due to its proximity to Stoney Athi River, thus breaching the Water Management Rules, 2006.

16. The Respondent's Regional Manager deponed that the Respondent declined to approve the Petitioner's Application of 11th April, 2018 for the construction of a dyke because the proposed position of the protective dyke was to be within the river channel and would induce flooding of similar magnitude on the left bank of the river.

17. The Respondent's Regional Manager finally deponed that the riparian reserve for the river was 20 meters; that some developments on Green Park Estate had encroached the riparian land; that the Report of the Petitioner's Surveyor erroneously excluded the highest water points in its definition of a riparian land and that the said Report does not take into account the mandate of the Authority as contemplated under Rule 116 of the Water Resources Management Rules, 2006.

18. There is on record two Affidavits sworn by Simon Gichomo, the Acting Senior Assistant Director, Business Support Services, Kenya Meteorological Department, Ministry of Environment and Forestry, where he tendered evidence of rainfall data for the period 1990 to 2018 for the Athi River Area.

19. The Petitioner relied on the evidence of several experts who were: Peter Kahi, a duly registered certified public accountant and practicing at PKF Consulting Limited; Noel Mghenyi, a surveyor with a diploma in Survey and Photogrammetry and working in the firm of JRR Aganyo and associates; and Dr. Samuel Mureithi Kioni, a registered Hydrologist. All these experts were examined and cross-examined at length by the parties.

The Petitioner's case:

20. The consolidated Petition and Judicial Review proceeded by way of *viva voce evidence*. Dr. Samuel Mureithi, PW1, testified that he is a Hydrologist by profession; that he was instructed by the Petitioner to conduct a study of Stoney Athi River to determine the veracity of the Respondent's orders of 31st May, 2018 with respect to the riparian reserve, flood plain and the highest water mark of the said river; that he was required to give his expert opinion on the implications of the developments on the Petitioner's property and that he came up with a report.

21. According to PW1, the flooding of the Stoney Athi River in the year 2018 happened because of the backwater caused by flow obstruction at Mombasa Road bridge during the construction of the road and bridge; that no part of the suit property is within the riparian reserve of Stoney Athi River and that a dyke should be put up to prevent future flooding of the Estate.

22. PW1 informed the court that if the flow of water is constricted by an object or construction, the flow changes from sub-critical to critical; that when the flow changes from sub-critical to critical, the height of water level is lower and the velocity increases and that the velocity of Stoney Athi River was higher at the exit due to the obstruction of the flow of the River by the construction of the nearby new bridge.

23. On cross-examination, PW1 testified that there were no flood indicators in respect of Stoney Athi River; that the Respondent ought to have data on the flow of the river on a daily basis; that Stoney Athi River is a seasonal river; that the flood of a river may extend beyond its banks and that as such, a dyke will assist to prevent the overflow when the river bursts its banks. PW 1 testified that a catchment management plan will lead to reforestation of the riparian reserve of the River.

24. On further cross-examination, PW1 testified that prior to preparing his report, he obtained a history of flooding in the area which showed that there was *el Nino* in the year 2008 which caused flooding; that there were unprecedented floods in the country in the year 2018 and that he was not aware of any floods in the year 2013. PW1 testified that he was not aware if the Petitioner had applied for the construction of a dyke in the year 2013 and that Rule 116(2) of the Water Management Rules, 2006 applies and that flood flows can be outside a river bank or within a river bank.

25. The Petitioner's Operational Manager, PW2, informed the court that there was abnormal flooding of Stoney Athi River on 15th March, 2018 that was alleged to have been occasioned because the property is on riparian land; that it is not true that the suit property is on riparian reserve and that due to the demolition notices issued by the Respondent, Kenya Commercial Bank denied five (5) customers mortgages in respect of the suit properties leading to the loss of business. PW2 told the court that the auditors computed the loss and prepared a report to that effect.

26. On cross-examination, PW2 testified that the floods referred to in the letter dated 11th August, 2013 were in respect of floods touching the perimeter wall and not the estate; that an EIA license was issued by NEMA on 8th March, 2006 and that the Petitioner was required to comply with the guidelines issued by the Respondent.

27. PW2 told the court that the Petitioner did not engage the Respondent because it was not on riparian land and that the riparian reserve next to the suit property was mapped out by their surveyor. It was her testimony that on 11th April, 2018, the Petitioner engaged the Respondent

with a view of allowing it to construct a dyke and that the Respondent refused to allow the construction.

28. On cross-examination, PW2 testified that it was the Petitioner's responsibility to procure all the approvals; that there was no flooding in the estate before the year 2018 and that during flooding, the water would flow up to the perimeter fence. However, PW 2 stated that in the year 2018, the floods got to the houses of the Interested Parties and that the said houses were marked for demolition by the Respondent.

29. A Surveyor, PW3, testified that JRR Aganyo associates were retained to confirm if the suit land was on a riparian reserve; that he visited the suit property and compiled a report dated 11th June, 2018 and that the updated report of 20th March, 2019 was necessary because of the different flows of the water during the two periods.

30. The conclusion of the evidence of PW3 was that the Petitioner's security wall was not on riparian land as defined in Section 116(2) of the Water Resources Management Rules, 2006 and that none of the portion of the suit property is within riparian land as defined by law. On cross-examination PW3 testified that he did not see the EIA report which was issued to the Petitioner and that the E.I.A Report may have been done when the river flow was very low.

31. PW3 told the court that the flood levels of rivers vary and that when he did his survey report in 2018, he did not address the highest flood level because he could not access the river for purposes of picking the data. PW3 told the court that when he was picking the data in March, 2018, the level of the water was not up to House 28 and that the boundary wall and the houses are not on riparian land.

32. PW4 testified that he conducted an audit of the projected loss of the Petitioner which was occasioned by the Respondent's demolition notices of 31st May, 2018 and prepared a report dated 15th May, 2019: that he used the documents that were supplied to him by the Petitioner and thus did not forensically audit the Petitioner and that he quantified the loss of the Petitioner which was Kshs 466, 955, 672. PW4 told the court that opinions are usually expressed in financial reports and not in forensic audits.

The Respondent's case:

33. The Respondent's Regional Manager, DW1, relied on the two Affidavits already on record. According to DW1, the Meteorological Reports submitted by the Meteorological Department cannot be relied upon because it was for the JKIA Meteorological Station and not the larger Kajiado Area where Stoney Athi River is situated; that the report of Dr. Samuel Mureithi, the Hydrologist, dated 3rd April, 2019, ignores Rule 116 of the Water Resources Management Rules, 2006 in its definition of a riparian land and that the Report admits that the suit properties are within a flood plain.

34. It was the evidence of DW1 that there was flooding within the suit property in March and May, 2018 and that he went on site during the floods and did a cross-section drawing of the river to determine the highest water level; that he was with other officers who did the actual measurements of the cross-section of the river and that a portion of the suit land is on a flood zone.

35. According to DW1, from the edge of the first house, the flood zone extends almost 40 meters inside the suit land; that the proposed dyke is inside the flood zone and that the riparian area should be marked from the edge of the flood zone. It was the evidence of DW1 that they visited the suit property when the river was flooded and that Mombasa Road was closed temporarily due to the said floods.

36. DW1 concluded that a riparian area should be measured from the flood flow and not the normal flow of a river and that there should be no buildings in a flood zone of a river.

37. In cross-examination, DW1 stated that they were required to compile a Report to show what happened during the flooding in the year 2018; that the first report was done in June, 2018 and that a second Report on their findings was done on 20th August, 2018 after the Petition herein had been filed.

38. DW1 testified that under Rule 116 and 117 of the Water Resources Management Rules, 2006, it is the Water Resource Inspector who can mark the riparian area; that he did not have the data that he used to prepare the cross-section of the River and that the Petitioner never fulfilled the conditions that it was required to fulfil in 2013 before they could be allowed to build dykes. According to DW1, they would have allowed the Petitioner to build dykes in the year 2013 after evaluating the documents that they asked the Petitioner to produce.

39. In conclusion, DW1 stated that riparian reserve and flood plains are one and the same thing; that you start with a flood plain before moving to a riparian reserve and that the riparian reserve in respect of the suit land is 40 meters inside house number 29; that they have since marked the riparian reserve of the Stoney Athi River and that the said marking/pegging of the riparian reserve was done after the flooding of the year 2018.

40. According to DW1, the Respondent had never marked the riparian reserve of the Stoney Athi River before the floods of the year 2018 and that all the eight (8) houses are within 54 meters of the riparian reserve, which is the last point where the floods of 2018 reached.

The interested Parties' case:

41. DW2, an Interested Party, informed the court that their houses were submerged in the water during the flooding of Stoney River in the years 2018, 2013 and 2014; that they are distressed with the said flooding and that they need to be protected from the said floods.

Submissions:

42. The parties' advocates filed written submissions which they highlighted on 31st July, 2019. The learned counsel for the Petitioner

submitted that *locus* is present in the instant case; that the Petitioner is duty bound to guarantee quiet possession of the suit premises, and that special damages have been particularized in the affidavit of Judith Maroko.

43. The learned counsel for the Petitioner submitted that at the time of filing the Petition, the Petitioner did not have any other forum to address its complaints, save for the High Court; that there is no binding decision with regard to the highest water mark of a river, its applicability and its relevance; that the enforcement orders were issued by the Respondent pursuant to the said Water Resources Management Rules, and that any definition of the term riparian land ought to be made pursuant to the said Rules.

44. The Petitioner's learned counsel placed reliance on the provision of Rule 116(1) and 116(2) of the Water Resources Management Rules, 2006, which defines riparian land. Counsel submitted that the subject houses are beyond the maximum limit of 30 metres stipulated under Rule 116; that the Petitioner has all along been aware that no portion of its property is on riparian land and that the letter dated 3rd September, 2013 by the Respondent only indicated that the area between the river bank and the masonry wall is prone to flooding during high flows.

45. Learned counsel for the Petitioner submitted that the survey conducted by JRR Aganyo Associates on 31st May, 2018 and updated on 20th March, 2019 was not controverted, challenged or contested by the Respondent; that the findings of the Hydrologist was that the suit land was not on riparian land; that the findings of DW1 do not meet the threshold of a report contemplated by the Rules and that the evidence of DW1 does not address the issue of whether the subject houses are on riparian land or not.

46. The Petitioner's counsel submitted that DW1 did not adduce evidence to show that he was a Water Resources Inspector within the meaning of the Rules; that Rule 116 (2), (3) and (4) of the Water Resources Management Rules do not make reference to the highest water mark or flood plain and that Rule 116(5) does not apply to rivers. According to the Petitioner's counsel, the report by DW1 is unreliable and unmeritorious and that the Respondent's refusal to allow the Petitioner construct a dyke was malicious.

47. Learned counsel submitted that the EIA license that was issued by NEMA specifying in condition 9 the retaining of a riparian reserve of 6 metres has not been revoked; that the legitimate expectation of the Petitioner was that its clients would enjoy quiet possession of the property and that the action of the Respondent in issuing demolition notices was irrational.

48. Counsel relied on the case of ***Republic vs. Kenya Revenue Authority Ex-parte Aberdare Freight Services Ltd & 2 Others (2004)2 KLR*** and added that the irrational decision of the Respondent is contrary to Article 40 and 47 of the Constitution; that the Respondent has no mandate to alter the definition of riparian land; that the enforcement orders issued by the Respondent were illegal and that DW1 was not an authorized inspector of the Respondent.

49. The Petitioner's counsel submitted that the Petitioner relied on experts to quantify the loss it suffered due to the Respondent's action. Counsel cited the case of ***Peter Kariuki Njenga vs. Gabriel P. Muchira & Another (2017) eKLR*** which quoted with approval the case of ***Mutonyi vs Republic (1982) KLR 203***. Counsel implored the court to rely on the reports of the financial expert as evidence of losses occasioned by the enforcement orders as well as the evidence of PW4 on the payable damages.

50. The learned counsel for the Respondent submitted that there is a contention on the starting point of the riparian land; that the EIA license showed that the Petitioner was to maintain a six (6) meters riparian reserve from the highest flood level; that the Water Management Rules provide for a minimum of 6 meters and a maximum of 30 meters riparian reserve on either side of the banks of a River and that the Rules define what a "river bank" is.

51. Counsel submitted that Regulation 116 of the Water Management Rules uses the term "water course" and that the riparian reserve ought to be measured from the point where water touches the land. On the issue of the Petitioner's claim for damages, counsel submitted that there is no prayer in respect of the same in the Petition and that the precautionary principle is applicable in this case.

52. The Respondent's learned counsel relied on the Environmental Management and Coordination Act (*Water Quality*) Regulations, 2006, that prohibits any development activity within the full width of a river or stream to a minimum of 6 metres and a maximum of 30 metres on either side based on the highest recorded flood level; that when NEMA issued to the Petitioner the EIA license, the Petitioner was directed to establish a 6 metres riparian reserve from the highest flood level; that the EMCA (*Wetlands, River Banks*) Regulations, 2009 define a river bank to include a flood plain; that the subject properties sit on a flood plain and that the definition of a river bank should be looked at in the context of these Regulations.

53. It was the Respondent's counsel's submissions that PW1 used a method, other than frequency analysis method, to identify the riparian reserve; that the site visit of PW1 was during the dry season; that PW3 did not refer to the highest water mark when taking measurements and that DW1's report was not controverted. The Respondent's counsel relied on numerous authorities which I have considered.

Analysis and findings:

54. It is not in dispute that the Petitioner is the registered proprietor of land known as L.R. No. 27409 situated in Machakos County along Nairobi-Mombasa Highway. On the said land, there is an Estate comprising several houses, otherwise known as "Green Park Estate". The construction of houses on the suit land commenced in the year 2007.

55. Among the first houses to be constructed on the suit land are eight houses known as Nos. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A which the Petitioner sold to the Interested Parties. The Interested Parties purchased the said eight (8) houses between the years 2009- 2010.

56. The eight (8) houses mentioned hereinabove form the houses abutting the Stoney Athi River, with the boundary of the suit land being

between the said river and the eight (8) houses.

57. The evidence before me shows that in March, 2018, the entire country experienced heavy rainfall that caused flooding in many parts of the country. Indeed, the evidence produced in this court shows that the bridge along Mombasa Road, and which is a few meters from where the suit land is situated, flooded during the heavy rains of March- May, 2018.

58. To support the assertion that heavy rainfall was experienced in the month of March, 2018, the Petitioner produced in evidence the recordings of the rainfall data from the Meteorological Department. In his report dated 18th February, 2018, the Director of Meteorological Services stated as follows:

“REVIEW OF RAINFALL PERFORMANCE FROM MARCH TO MAY 2018

Very heavy rainfall pounded most parts of the country during March-April-May (MAM) 2018 rainfall season. The rainfall was associated with massive flooding and other severe impacts including loss of several lives. It also led to displacement of thousands of families as well as massive destruction of property and infrastructure.

Analyses of the MAM 2018 seasonal rainfall indicates that most Meteorological stations in the country had received above normal rainfall by mid-May, well ahead of the cessation of the long rain season. Further analyses indicate that the MAM 2018 seasonal rainfall totals recorded at some stations were the highest ever recorded since the stations were opened.

The onset of the long rains season was well within the predicted period of the 3rd week of March, though several parts of the country started receiving rainfall as early as the beginning of March, with most parts of the country recording highly enhanced rainfall that was characterized by heavy storms.”

59. It is not in dispute that during the March –May, 2018 rains, the houses occupied by the Interested Parties flooded. According to the Petitioner, the flooding of the eight (8) houses abutting Stoney Athi River was due to unprecedented heavy rains in that period; that no such magnitude of rainfall had been experienced since the year 2007 when the construction of *Green Park Estate* started and that the construction of a nearby bridge along Mombasa-Nairobi Highway obstructed the flow of the water within the channel of Stoney Athi River forcing the said river to burst its banks.

60. The flooding of a portion of the Petitioner’s Estate in the year 2018 made the Petitioner to apply to the Respondent for permission to construct a dyke along its boundary wall. This request was made by way of a letter dated 11th March, 2018. The pertinent portions of the letter read as follows:

“We hereby submit our application for authorization for the construction of a dyke along Stoney Athi River on the section touching Green Park Estate... kindly give the necessary authorization to facilitate the construction of the dyke.”

61. The Respondent responded to the Petitioner’s letter dated 11th March, 2018 vide its letter dated 16th March, 2018 as follows:

“A site visit was conducted, and a cross-section survey conducted. The survey revealed the following facts that have been put into consideration in determining our application.

1. The highest water mark was at 42 meters from the right bank of the Stoney Athi River.

2. The position of the protective dyke is within the river channel and construction of the same at the proposed site will induce flooding of a similar magnitude on the left bank of the river. The riparian reserve for the river should be 20 meters based on guidelines produced for in Water Resources Management Rules Part 1X Section 116 (3), (4) and (5). Green Park Estate has seriously encroached on the riparian and all structures within the 20 meters riparian reserve should be demolished and the riparian restored to its original state.”

62. After declining the Petitioner’s application to put up dykes, the Respondent issued to the Interested Parties Enforcement Notices dated 31st May, 2018 requiring them to “remove their house on the riparian reserve and restore the riparian to its original state within twenty one (21) days from the date of this letters.”

63. After being served with the said Enforcement Orders, the Petitioner filed the Chamber Summons dated 19th June, 2018 in Judicial Review Application Number 192 of 2018 in which they sought for the following orders:

“2. That the Applicant be granted leave to apply for Judicial Review Orders as follows:

a. An order of certiorari to remove to the High Court and quash the decisions and findings of the Respondent as contained in its letter dated 16th April, 2018 (erroneously indicated as 16th March, 2018 as well as its Enforcement Orders issued on 31st May, 2018 in respect of Houses Nos. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situated on LR. No. 27409 I.R No. 103926/1 known as “Green Park Estate”.

b. An order of prohibition to issue to prohibit the Respondent from enforcing its orders issued on 31st May, 2018 in respect of Houses Nos. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on

L.R. No. 27409 I.R. No. 103926/1 known as “Green Park Estate”.

c. Any other and/or further relief that this Honourable Court may deem just and expedient to grant in the circumstances.

3. That the grant of leave herein do operate as a stay of all further action and/or proceedings by the Respondent and particularly on the enforcement of the Respondent’s Orders issued on 31st May, 2018 in respect of Houses Nos. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR. No. 27409 I.R. No. 103926/1 known as “Green Park Estate” or in respect of any other and/or further Enforcement Orders to be issued on Green Park Estate.

4. That the costs of the Application be provided for.”

64. The said Chamber Summons Application was allowed by the High Court on 3rd July, 2018. On 22nd June, 2018, the Petitioner filed a substantive Notice of Motion pursuant to the provisions of Order 53 Civil Procedure Rules for orders of Certiorari and Prohibition.

65. While the Notice of Motion in Judicial Review Application was pending, the Petitioner filed the current Petition. In the Petition, the Petitioner is seeking for the following orders:

a. A declaration be and hereby be issued that the Respondent’s decision as contained in its letter dated 16th April, 2018 (erroneously indicated as 16th March, 2018) as well as its enforcement orders issued on 31st May, 2018 in respect of No. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR no 27409 IR NO 103926/1 known as green park estate is contrary to Articles 50 of the Constitution of Kenya.

b. A declaration be and hereby be issued that the Respondent’s decision as contained in its letter dated 16th April, 2018 (erroneously indicated as 16th March, 2018) as well as its enforcement orders issued on 31st May, 2018 in respect of NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR no 27409 IR NO 103926/1 known as green park estate is contrary to Articles 40 of the Constitution of Kenya and violates the petitioners rights to property and is therefore unlawful, illegal, unconstitutional and therefore null and void.

c. A declaration be and hereby issued that the Petitioners Property LR NO 27409 IR NO 103926/1 measuring Sixty one Decimal Eight Four (61.84) Hectares or thereabout as delineated on Land Survey Plan Number 266370 deposited in the Survey Records office at Nairobi and known as Green Park Estate does not encroach on Riparian Reserve as Defined under Regulation 116(2) of the Water Resources Management Regulations (2007) or at all.

d. A permanent injunction be and hereby issued restraining the respondent from enforcing its enforcement orders issued on 31st May, 2018 in respect of NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR no 27409 IR NO 103926/1 known as green park estate and in any other manner whatsoever interfering with the petitioners and Interested Parties quiet possession and the said houses on LR no 27409 IR NO 103926/1.

e. Special damages (to be particularized and quantified).

f. General damages.

g. An order of certiorari to remove to the high court to quash the decisions and findings of the respondent as contained in its letter dated 16th April, 2018 (erroneously indicated as 16th March, 2018) as well as the enforcement orders issued on 31st May, 2018 in respect of Houses NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situated on LR no 27409 IR NO 103926/1 known as green park estate.

h. An order of Prohibition to issue to prohibit the Respondent from enforcing its orders issued on 31st May, 2018 in respect of Houses NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situated on LR no 27409 IR NO 103926/1 known as green park estate.

66. The Petition was consolidated with the Judicial Review Application Number 192 of 2018 vide a Ruling of the court dated 6th July, 2018. The issues that arise from the pleadings and the evidence in the two consolidated matters are as follows:

a. Whether this court has jurisdiction to determine the dispute.

b. Whether the Petitioner’s property, Green Park Estate, as well as houses Nos. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A (“the houses”) are on riparian land;

c. Whether the demolition orders issued by the Respondent on 31st May, 2018 regarding the said house was lawful and valid;

d. Whether the Petitioner has suffered loss on account of the Respondent’s Enforcement Orders issued on 31st May, 2018.

e. Whether the Petitioner is entitled to the reliefs sought in the Petition and the Judicial Review Application.

67. The Petitioner herein is challenging the demolition notices issued by the Respondent dated 31st May, 2018. According to the said

notices, the Respondent directed the Petitioner and the Interested Parties to demolish the eight houses that had “*encroached on the riparian land and the riparian restored to its original state.*”

68. Section 119(1) of the Water Act, 2016 establishes a Water Tribunal, whose Chairman shall be appointed by the Judicial Service Commission. The powers of the Tribunal are set out under Section 121 (1) and (2) which provides as follows:

“(1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

“(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”

69. Section 122 of the Water Act obligates the Tribunal to make Rules governing its procedures.

70. As correctly argued by the Respondent’s counsel, where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably, indicates the means of legal redress otherwise available would not be adequate (*See Damian Delfonte vs. The Attorney General of Trinidad and Tobago CA 84 of 2004*).

71. Indeed, it has been held by the courts that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. In the case of the *Speaker of the National Assembly vs. Karume (1992) eKLR*, the Court of Appeal held as follows:

“... where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed....”

72. In the case of *Mutanga Tea & Coffee Company Limited vs. Shikara Limited & Another (2015) eKLR*, the Court of Appeal restated the holding in the *Speaker of National Assembly case (supra)*. In the case of *Kones vs. Republic & Another, Ex-parte Kimani wa Nyoike & 4 Others (2008) 3 KLR (ER) 296*, the Court of Appeal held as follows:

“... However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective.... We are therefore satisfied that the learned Judge did not err by striking out the Appellant’s suit which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the Appellant the right to access the High Court by way of Appeal, which mechanism he had refused to invoke.”

73. Considering that the Petitioner herein is contesting the decision of the Respondent requiring it to demolish the eight (8) houses allegedly for being on riparian land, the correct forum for ventilating the dispute was the Water Tribunal, with the Appeal from the decision of the Tribunal being filed in this court.

74. However, the Petitioner argued that as at the time the Respondent issued it with the notices of demolition dated 31st May, 2018, the members of the Water Tribunal had not been appointed. Indeed, on cross-examination, the Respondent’s witness stated that the Tribunal had not been constituted as at the time the current suits were filed by the Petitioner. Other than the non-composition of the members of the Tribunal, there are no Rules in place contemplated under Section 121 of the Act to guide the Tribunal and the litigants on how to move the Tribunal.

75. Considering that the Water Tribunal had not been constituted as at the time the Judicial Review Application and the Petition were filed, the Petitioner’s only recourse was to file the Judicial Review Application and the Petition in this court. Indeed, this court has both the original and appellate jurisdiction to handle the current dispute (*See Section 13(1) of the Environment and Land Court Act*). A litigant who cannot move a Tribunal due to structural and legal bottlenecks cannot go without a recourse, especially in a situation where urgent interim orders are to be issued.

76. In the circumstances of the dispute herein, and on the grounds that I have given above, the Petitioner was entitled to institute the Petition and the Judicial Review Application in this court. This court therefore has the requisite jurisdiction to hear and determine the dispute.

77. According to *encyclopedia.com, the environmental encyclopedia*, Riparian land refers to terrain that is adjacent to rivers and streams and is subject to periodic or occasional flooding. According to Wikipedia, A riparian zone or riparian area is the interface between land and a [river](#) or [stream](#).

78. Webster’s Ninth New Collegiate Dictionary defines riparian as “*relating to or living or located on the bank of a natural watercourse (as a river) or sometimes of a lake or a tidewater.*” The terms “*streamside areas,*” “*streambanks,*” and “*bottomlands*” are frequently used

interchangeably with “riparian areas.” The Black’s Law Dictionary has defined *riparian* to mean of *relating to, or located on the bank of a river or stream.*

79. It has been argued that there is no clear cut definition of what riparian land is. In an Article titled “*Riparian Areas: Functions and Strategies for Management,*” the Committee on Riparian Zone Functioning and Strategies for Management, National Research Council, National Academy Press, Washington DC, wrote as follows:

“As one might expect, the simple dictionary definition has been expanded or altered innumerable times by scientists and others, frequently for specific purposes or to reflect certain disciplinary preferences. Hydrology is the primary emphasis of most definitions of wetlands and is also used to define riparian areas. The lack of a consistent definition for “riparian” has been identified as a major problem of federal and state programs that might manage and protect these areas (Steiner et al., 1994). Riparian areas generally do not satisfy regulatory and other definitions of “wetland,” and thus are not encompassed by regulatory programs for wetland protection.”

80. The Article attempted to define a riparian area as follows:

“Riparian areas are transitional between terrestrial and aquatic ecosystems and are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect waterbodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., a zone of influence). Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine–marine shorelines.”

81. Part IX of the Water Resources Management Rules, 2006 provide for the conservation of Riparian and Catchment areas. Rule 116 of the said Part provides as follows:

“116. Determination of the Riparian Land

116.(1) “Riparian Land”, as defined in Part 1 of these rules does not imply a change of ownership but imposes management controls on land use for water resource quality as defined in these rules.

116.(2) Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse is defined as a minimum of six (6) meters or equal to the full width of the watercourse up to a maximum of thirty meters on either side of the bank.

116.(3) The width of the watercourse shall be equal to the distance between the top edges of its banks.

116.(4) The riparian land shall be measured from the top edge of the bank of the watercourse and this will apply to seasonal and perennial watercourses.”

82. The main contention in this matter is the meaning to be assigned to the words “*top edges of the bank of the water course*” while determining the riparian land of a particular river. According to the definition in the Water Resources Management Rules, 2006 (*the Rules*), “*riparian land*” is defined as “*land which by virtue of the proximity of that land to a water body, management obligations are imposed on the owner of the land by the Water Resources Authority.*”

83. On the other hand, the Environmental Management and Co-ordination (*Wetlands, River Banks*) Regulations, 2009, define “*a river bank*” as the rising ground from the highest normal water marks bordering or adjacent to a river in the form of rock, mud, gravel or sand and in cases of flood plains include the point where the water surface touches the land, that land not being the bed of the river.

84. Although the Environmental Management and Co-ordination (*Water Quality*) Regulations, 2006 do not define what riparian land is, the Regulations prohibit development activities within a minimum of 6 meters and a maximum of 30 meters from the highest ever recorded flood level, on either side of a river or stream, and as may be determined from time to time.

85. According to the evidence of PW3, a land surveyor, the average distance from the top edge of the bank of the Stoney Athi River on the eastern side to the Petitioner’s houses is approximately 75.7 meters; that the width of the river is approximately 33 meters and that the Petitioner’s security wall, the Interested Parties’ houses and any other development in Green Park Estate is not on the riparian land as defined by Rule 116(2) and (5) of the Water Resources Management Rules, 2006.

86. The evidence by the Surveyor, PW3, was not disputed by the Respondent, save for the fact that the said measurements did not take into consideration the distance from where the floods reached in March and May, 2018 to where the Interested Parties’ houses are.

87. A Hydrologist, PW1, informed the court that the narrowest distance from the river bank of Stoney Athi River to the Petitioner’s perimeter wall was 36M and that the reference to the highest water mark refers to the normal flow within the river banks, which are more or less permanently located. PW2 concluded as follows:

“Flooding on the property of Green Park Estate was most likely due to back water caused by flow obstruction at the Mombasa Road Bridge during the construction of the road and bridge as demonstrated by simulation in the foregoing hydraulic analysis. Even then, the flood would have to be of very high magnitude at about 100m³/s”

88. After analyzing the flow of the Stoney Athi River, Dr. Mureithi, PW1, concluded as follows:

“The first results of the hydraulic analysis that excludes the bridge show that flows up to 100 years return especially without any obstruction are too low to get to the Green Park Estate property. The water level for this magnitude of flood is 1509.5 m above sea level while the lowest parts of the Green Park Estate are about 1511 m above sea level. A rare flood of 100 m³/s that does not encounter obstruction would rise to 1509.77 m above sea level, still too low to get to Green Park Estate property. However, the same flood if obstructed at the bridge as in the analysis, would rise to 1511.29 m above sea level due to backwater and hence into and inundate the property of Green Park Estate.”

89. While the Water Resources Management Rules, 2006 provides that riparian land shall be measured from the *top edge* of the bank of the watercourse, it is the Respondent’s case that the top edge of the bank of the water course varies depending with the flood level of the river, and not during the normal flow of a river.

90. While arguing that the Petitioner’s eight (8) houses are on riparian land, the Respondent’s witness, DW 1, stated as follows in his report dated 20th August, 2018:

“3. From the bridge of approximately 75 meters downstream, the river channel is almost flat and is bound by raised grounds on the left bank while on the right bank, the land rises gently (1m in 88m). This places the first row of houses within the flood plains.”

91. The Respondent’s witness, DW1, informed the court that the words *river bank* refers to the point where the water of a river meets the land on either side and that the exact point is dependent on whether the river is in its normal or flood flow. According to DW 1, the “*top edge of the bank*” refers to the highest water mark that will be achieved when the river is flowing while flooded.

92. In his Report of 20th August, 2018, the Respondent’s witness wrote as follows:

“From the cross-section survey undertaken, the width of the river near House No. 29 was estimated at approximately 98 meters at the flood level. The survey indicated that the 2018 flood was about 0.93 meter higher than the highest water level ever recorded. This flood depth is what was observed as the inundation of the houses along the river which was estimated at 0.9 meters. The Right Bank was also marked at this point and it was found to be about 17 meters to the right of the dyke that was being constructed (indicating the proposed dyke is actually in the river channel). A masonry wall that had been built along the river bank collapsed due to water pressure. This is contrary to the assertion that the flooding in 2018 was due to the unusually heavy rains experience in March- May rainy season;

The proposed dyke (if constructed at the current location) will be expected to hold back at least 1-meter depth of flood water during a normal year and which may increase to over 2 meters during extreme years (such as 2018). This poses a risk as the dyke will constrain a substantial volume of flood water from its normal flood area resulting in raised water levels that will threaten Mombasa Road (as happened on more than 2 occasions during the recent rains) as well as the developments on the left bank and which has observed the riparian zone.”

93. To support the assertion that the measurement of a minimum of six (6) meters and maximum of 30 meters of a riparian reserve should commence from the highest flood level, the Respondent’s advocate relied on the provisions of the Environmental Management and Co-ordination (*Water Quality*) Regulations, 2006 which prohibits development activities within a minimum of 6 meters and a maximum of 30 meters from the highest ever recorded flood level, on either side of a river or stream, and as may be determined from time to time.

94. The Respondent has further argued that while granting the Petitioner the EIA Licence, the issuing authority, NEMA, indicated that the Petitioner should ensure the protection of Stoney Athi River by establishing six (6) meters riparian reserve from the highest flood level.

95. The Respondent’s advocate further submitted that under the Environmental Management and Co-ordination (*Wetlands, River Banks*) Regulations, 2009, “*a river bank*” has been defined as the rising ground from the highest normal water marks bordering or adjacent to a river in the form of rock, mud, gravel or sand and in cases of flood plains include the point where the water surface touches the land, that land not being the bed of the river. The Respondent’s counsel submitted that it is beyond doubt that the subject properties sit on the flood plains and that the definition of the river bank must be looked at in the context of the Regulation.

96. In cross-examination, the Respondent’s witness stated that he visited the suit property for the first time after the flooding of March and May, 2018, and that he prepared the Report that he relied on in August, 2018. According to DW1, the Respondent did not have any other report on the flood levels of Stoney Athi River, and that the Report of August, 2018 was prepared after this suit had been filed.

97. The Respondent’s witness informed the court that in the year 2013, which was way after the eight (8) houses on the suit property had been constructed, the Petitioner requested the Respondent to allow it construct dykes, and that the said permission was not granted by the Respondent because the Petitioner did not provide certain information. The letter that the Respondent issued to the Petitioner dated 3rd September, 2013 provided as follows:

“RE: CONSTRUCTION OF A DYKE ALONG THE BANK OF STONY ATHI RIVER

Following your request on the above through a letter reference No. WRMA/010813 dated 2nd August, 2013, the site was visited on 27th August, 2013 by officers from this office and it was noted that:

- *Your land is adjacent to Stoney Athi River on the right river bank.*
- *The river stretch adjacent to your property measured 337 meters.*
- *The distance from the river bank to the existing masonry boundary wall is twenty five (25) meters upstream and thirty (30) metres downstream.*
- *The entire distance between the river bank and the masonry boundary wall is a flood plain which normally gets flooded during high flows.*

Following our observations, the activity requires an authorization from this office. Please liaise with us so as to be guided on the process.

Attached is the list of the requirements.

Please take the necessary action accordingly.”

98. The above letter by the Respondent was in response to the Petitioner’s letter dated 1st August, 2013 in which the Petitioner had requested to be allowed to construct a dyke. The letter read as follows:

“RE: CONSTRUCTION OF A DYKE ALONG THE BANK OF STONEY ATHI RIVER

The above refers;

Superior Kenya Limited is a Real Estate Company developing Green Park Estate along Mombasa Road in Athi River. Our Development boards the Stoney Athi River. During the commencement of the construction, we protected the Stoney Athi River by establishing the 6 meters riparian reserve from the highest flood level. During the recent years due to a number of factors including the Global climatic change, we have experienced the river flooding to the estate fence when there are major heavy rains.

We would like to construct a dyke along the bank of Stoney Athi River neighboring our estate as risk management measure in case of floods. This is as a result of an observation that when it rains heavily the swollen river overflows to the wall of the estate.

We are humbly requesting for your advice on the guidelines and regulations that are applicable to construction of the dyke.”

99. The letter by the Petitioner dated 1st August, 2013 and addressed to the Respondent informed the Respondent that during the development of Green Park Estate, the Petitioner had “protected the Stoney Athi River by establishing the 6 meters riparian reserve from the highest flood level.”

100. In its response of 3rd September, 2013, the Respondent confirmed that the Petitioner’s land is adjacent to Stoney Athi River on the right bank; that the stretch adjacent to the Petitioner’s land measured 337 meters; that the distance from the river bank to the existing masonry boundary wall is 25 meters upstream and 30 meters downstream and that the entire distance between the river bank and the masonry boundary wall is a flood plain which normally gets flooded during high flows.

101. By their own letter of 3rd September, 2013, the Respondent used the word “river bank”, which is the terminology used under Rule 116 of the Water Resources Management Rules, 2006. Indeed, in the said letter, the Respondent confirmed that the distance between “the river bank” and the Petitioner’s masonry boundary wall was beyond the recommended distance of a minimum of 6 meters and a maximum of 30 meters.

102. Despite the Petitioner having constructed the eight (8) and sold them to the Interested Parties in the years 2009-2010, the Respondent never informed the Petitioner in the year 2013 that the eight (8) houses, or its boundary wall, were on riparian reserve.

103. Instead, the Respondent informed the Petitioner that the area between its boundary wall and the banks of Stoney Athi River was prone to flooding and requested for a hydrologist report before it could allow the Petitioner to build a dyke. The issue of the eight (8) being within the riparian land or a flood plain never arose between the year 2008, when the eight houses were constructed and the year 2018.

104. Although I am in agreement with the Respondent’s argument that pursuant to the provision of the EMCA (Water Quality) Regulations, 2006, any development activity within a minimum of 6 meters and a maximum of 30 meters from the highest ever recorded flood level, on either side of a river or stream is prohibited, the key words in that regulation is “highest ever recorded flood level.”

105. From the above definition of how a riparian reserve is supposed to be determined, it follows that a riparian reserve of a river is likely to be a moving target, depending with the amount of rains in any particular year. Indeed, it is because of the ambulatory nature of rivers, and the changing flood levels within flood plains, that the Respondent is required to record flood levels of rivers in the country.

106. The Respondent’s witness admitted that for the first time, they placed beacons showing the flood level that happened in March and May, 2018 inside the Petitioner’s property. However, despite having put up the eight (8) houses in the year 2008, the Respondent had never recorded the highest flood level of the Stoney Athi River vis-a-vis the Petitioner’s houses. Indeed, in the year 2013, the Respondent informed

the Petitioner that their masonry wall was “30 meters away from the “river bank” of Stoney Athi River, which was in line with the definition of a riparian reserve under Rule 116 of the WRM Rules of 2006.”

107. In the same way roads have “road reserves”, the reading of the law shows that the responsibility to demarcate the riparian reserves of rivers, and especially for seasonal rivers, whose flood levels keep on shifting, lies with the Respondent. Having not marked the highest flood level of Stoney Athi River before this suit was filed in July, 2018, or even before the eight (8) houses were constructed, and having admitted in the year 2013 that the maximum distance between the Petitioner’s masonry wall and the river banks of Stoney River was 30 meters, the Respondent did not have a legal basis of issuing the Enforcement Orders of 31st May, 2018.

108. Indeed, the Respondent did not inform the Petitioner in the year 2013 that it had constructed its eight (8) houses on the riparian reserve of Stoney Athi River. When the court visited the site, it observed the raised river banks of the river on both sides. Indeed, the court confirmed that from the raised banks of the Stoney Athi River to where the Petitioners collapsed wall was, the same was more than 20 meters. The measurements stipulated in the report of the Petitioner’s surveyor tallied with what the court observed while on site.

109. Rule 116(2) of the Water Resources Management Rules confines the definition of riparian land to the entire width of the water course plus an additional minimum distance of 6 meters up to a maximum of 30 meters on either side of the river bank.

110. The Stoney Athi River has raised water banks on either side which are clearly visible and ascertainable. The reading of Rule 116(2) of the WRM Rules shows that the minimum distance of 6 meters and maximum distance of 30 meters required as a riparian reserve can be increased by a Water Resource Inspector.

111. While Rule 116(2), (3) and (4), which deals with rivers, uses the words “top edges of its banks” in determining the riparian land, Rule 116(5) of the same Rules uses the term “the highest recorded water level” in determining the riparian land adjacent to a lake, reservoir or stagnant body of water. The question that arises in this, why is the term “the highest recorded water level” not used while determining the riparian land in respect of a river as contrasted with the riparian land for a lake?

112. The simple answer to the above question is found in the discourse that I have raised above, that is, unless a Water Resource Inspector has determined and marked the high water mark or flood level of a river and given a measurement of more than 30 meters from the top edge of a river in its normal flow, the riparian land of a river will be determined using the normal flow of the river and not when it bursts its banks.

113. The determinant distance of a minimum of 6 meters and a maximum of 30 meters is from the banks of a river, which actually represents the channel of a river in its normal flow. Until the Water Resources Inspector determines otherwise, the total area covered by riparian land remains relatively constant across a river.

114. Indeed, rivers have an intense and dynamic morphological life that requires free space above and beyond the current channel, otherwise known as “channel migration zone”. This is the part of the flood plain that the river needs, under natural conditions, in order to move laterally and achieve a good discharge.

115. To take care of the space above and beyond the channel of a river during floods, it is the responsibility of the Respondent to have verifiable data on all rivers every year, and mark the highest flooding levels of such rivers. From the evidence of DW1, the Respondent has never done that, either for Stoney Athi River or for any other river in the country.

116. Indeed, the evidence before me shows that even after the heavy rains of March-May, 2018, the Respondent never undertook a hydrological assessment of what could have caused the flooding of Stoney Athi River, and whether there had been any other previous flooding of the river of such a magnitude. Instead, it rushed to issue to the Interested Parties the demolition notices of 31st August, 2018, and only prepared a report after it was sued in this matter.

117. Unlike the detailed report of Dr. Samuel Mureithi, PW1, which provided the current meter gauging measurements; cross section locations of the River; frequency analysis of rainfall; maximum rainfall summary; summary of computed flood flows; numerical reference of cross sections; energy gradients; velocities, forces and stresses of the River, the back flows and back water of the River amongst other measurables, the Report of DW1 is bereft of any supporting statistics and cannot pass as a scientific objective report.

118. Taking into consideration the definition of what a riparian reserve is, and the expert evidence of PW1, PW3 and DW1, and the Respondent’s letter of 3rd September, 2013, I am of the view that as at the time the Petitioner acquired the suit property and constructed the eight (8) houses, the riparian reserve of Stoney Athi River to the Petitioner’s perimeter wall was and is beyond the minimum required distance of 6 meters and maximum required distance of 30 meters.

119. The Respondent having not marked any other high water mark or flood level of Stoney Athi River in the year 2008 (when the eight (8) houses were constructed) and in the year 2013 (when the Petitioner applied for the construction of dykes), and PW1 having explained that the floods of the year 2018 were due to back water caused by flow obstruction at the bridge during the construction of the Mombasa Road Bridge, the Respondent cannot use the unprecedented rains and floods of March, 2018 and May, 2018 to determine the “river bank” of the Stoney Athi River as being the last point where the floods reached.

120. Such a determination is not only an affront to the Petitioner’s and the Interested Parties’ right to own property but is also contrary to the definition of what riparian land is as contemplated under Rules 116(1) (2), (3) and 116(4) of the Water Resources Management Rules, 2006. Consequently, the Enforcement Notices dated 31st August, 2018 issued by the Respondent are illegal, null and void.

121. The Petitioner has claimed that it suffered loss to the tune of Kshs. 466,955,673 by virtue of the Enforcement Orders issued by the Respondent. The particulars of the alleged loss were particularized in the Further Affidavit of PW2. PW4, who is a forensic auditor, testified

on how the amount of Kshs. 466,955,673 was arrived at.

122. According to PW4, the unrecoverable costs incurred by the Petitioner was Kshs. 5,604,16 as at 15th May, 2019. This amount, according to PW4, was as a result of damage control, including costs for provision of security in view of the damaged wall that the Petitioner was prevented by the Respondent from putting up after the earlier one collapsed due to the heavy floods; painting costs; public relations payments as well as professional fees for the assessment of the Petitioner's claim.

123. PW4 also claimed, on behalf of the Petitioner, Kshs. 458,269,651 being the estimated loss of profits, from June, 2018 to December, 2018. According to PW4, although the Petitioner previously had an average of up to 104 potential buyers on site per month, after the eight (8) houses were marked by the Respondent for demolition, the number reduced drastically to an average of 42 potential buyers per month. The figure of Kshs. 458, 269, 651 was therefore the total loss of an average profit of Kshs. 9,350,000 per unit sold, which according to PW4, was a loss of 7 units per month between June, 2018 to December, 2018.

124. Due to bad publicity, PW4 stated that the Petitioner had suffered reputation and brand damages which he assessed at Kshs. 3,081,859. The total amount that the Petitioner is claiming under the three headings amounts to Kshs 466,955,673.

125. The evidence before me shows that the Petitioner's wall collapsed due to the flooding that occurred in March-May, 2018. It is true that the said flooding of a portion of the Petitioner's land could have contributed to the loss of business, reputation and unrecoverable costs. Considering that it is not the Respondent who caused the flooding of the suit land, and in view of the fact that the re-construction of the perimeter wall could not be done until the issue of whether the Petitioner's land is on riparian land or not has been determined by the court, I decline to award to the Petitioner the damages stipulated in its Further Affidavit.

126. For the reasons I have given hereinabove, the Petitioner's Petition dated 22nd July, 2018 and Judicial Review Application dated 22nd June, 2018 are allowed in the following terms:

a) A declaration be and hereby be issued that the Respondent's decision as contained in its letter dated 16th April, 2018(erroneously indicated as 16th March, 2018) as well as its enforcement orders issued on 31st May, 2018 in respect of No. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR no 27409 IR NO 103926/1 known as green park estate is contrary to Article 50 of the Constitution of Kenya.

b) A declaration be and hereby be issued that the Respondent's decision as contained in its letter dated 16th April, 2018(erroneously indicated as 16th March, 2018) as well as its enforcement orders issued on 31st May, 2018 in respect of NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR no 27409 IR NO 103926/1 known as green park estate is contrary to Articles 40 of the Constitution of Kenya and violates the petitioners rights to property and is therefore unlawful, illegal, unconstitutional and therefore null and void.

c) A declaration be and hereby issued that the Petitioner's property LR NO 27409 IR NO 103926/1 measuring Sixty one Decimal Eight Four (61.84) Hectares or thereabout as delineated on Land Survey Plan Number 266370 deposited in the Survey Records office at Nairobi and known as Green Park Estate does not encroach on Riparian Reserve as Defined under Regulation 116(2) of the Water Resources Management Regulations (2006) or at all.

d) A permanent injunction be and is hereby issued restraining the Respondent from enforcing its enforcement orders issued on 31st May, 2018 in respect of NO. TB 023A, FB 024A, TB 025A, FB 026A, FB 027A, FB 028A, FB 029A and FB 030A situate on LR no 27409 IR NO 103926/1 known as green park estate and in any other manner whatsoever interfering with the Petitioners and the Interested Parties quiet possession and the said houses on LR no 27409 IR NO 103926/1.

e) The Petitioner is hereby allowed to reconstruct its collapsed perimeter wall on LR NO 27409 IR NO 103926/1.

f) The Respondent to pay the costs of the Petition and the Judicial Review Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE