REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 9 OF 2017

IN THE MATTER OF ENFORCEMENT & INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 2, 2(5), 2(6), 3, 10 21, 22, 23, 35, 42, 43, 47, 69, 70, 156, 165(3), 174, 176, 258, 259 OF THE CONSTITUTION OF KENYA AND FOURTH SCHEDULE ARTICLE 185(2), 186(1), AND 187(2)

AND

IN THE MATTER OF: THE CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: THE PROVISIONS OF ENVIRONMENTAL MANAGEMENT AND CORDINATION ACT

AND

IN THE MATTER OF: THE CONSTITUTIONAL RIGHT OF ACCESS TO WATER AND NATURAL RESOURCES

AND

IN THE MATTER OF: WORLD COMMISSION ON DAMS AND THE INTERNATIONAL LAW

AND

IN THE MATTER OF: ITARE DAM WATER SUPPLY PROJECT

LUO COUNCIL OF ELDERS…….....1ST PETITIONER

WILLIS OPIYO OTONDI…….....…...…2ND PETITIONER

EPHRAIM AMWAI…….....……...3RD PETITIONER

THE KURIA COUNCIL OF ELDERS …….....……4TH PETITIONER

SAMUEL KARIABE…….....……...5TH PETITIONER

THE ABAGUSII CULTURAL AND

DEVELOPMENT COUNCIL…….....……6TH PETITIONER

JAMES MATUNDURA…….....……...7TH PETITIONER

THE OGIEK COMMUNITY…….....……...8TH PETITIONER

VERSUS

THE CABINET SECRETARY

WATER & IRRIGATION…….....1ST RESPONDENT

THE CABINET SECRETARY ENVIRONMENT

AND NATURAL RESOURCES…….....…… 2ND RESPONDENT

THE RIFT VALLEY WATER

SERVICES BOARD……..….....3RD RESPONDENT

THE NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY…….....4TH RESPONDENT

THE ATTORNEY GENERAL…….....….5TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF BOMET….....1ST INTERESTED PARTY

THE COUNTY GOVERNMENT OF NAROK….....2ND INTERESTED PARTY

THE COUNTY GOVERNMENT OF KISUMU …….....3RD INTERESTED PARTY

THE COUNTY GOVERNMENT OF MIGORI…….....4TH INTERESTED PARTY

THE COUNTY GOVERNMENT OF KERICHO ….....5TH INTERESTED PARTY

THE COUNTY GOVERNMENT OF NYAMIRA .....6TH INTERESTED PARTY

THE COUNTY GOVERNMENT OF HOMABAY.....7TH INTERESTED PARTY

THE COUNTY GOVERNMENT OF KISII….....…8TH INTERESTED PARTY

RIFT VALLEY COUNCIL OF ELDERS ……....9TH INTERESTED PARTY

RULING

Introduction

1. This ruling is in respect of Amended Notice of Motion dated 2nd March 2017 and amended on 2nd May

2017. The main prayer sought in the application is:

> *4. THAT the court be pleased to direct that the matter be placed before the Honorable Chief Justice of the Republic of Kenya to make orders constituting a three [Judge] bench to hear this matter in Kisii High Court.*

2. The application is supported by the affidavit of Willis OpiyoOtondi and Edwin Kimeto and is based on the following grounds:

> *1. The 1st, 2nd and 3rd Respondents have begun construction of Itare Dam Water Supply Project without a licence being given out to the 3rd Respondent by the 4th Respondent on the verification and otherwise approval of the said dam.*
>
> *2. That there has never been any public participation by stakeholders and communities likely to be affected by the construction.*
>
> *3. THAT the Mau Forest is the largest Water Tower in Kenya and the source of several rivers that pour fresh water into Lake Victoria, Lake Natron, Baringo and the residents living around or near these Rivers and Lakes have not been consulted.*
>
> *4. THAT the activities taking place at Itare Dam Water supply Project are going to affect the SonduMiriu Hydro Electric power project which currently as a result of the lower water levels caused by the works at Itare Dam Water Supply project is currently running on 1 turbine instead of 5.*
>
> *5. The diversion of water from Lake Victoria and several other rivers means that most parts in Kericho, Bomet, Nyamira, Kisii, Kisumu, Migori, Homabay and Kisumu counties would experience acute water shortages leading to them becoming arid and semi-arid areas.*
>
> *6. The Itare Dam water supply project has not adhered to the International standards laid down by World Commission on Dams, World Bank and the United Nations.*
>
> *7. THAT this matter has serious waiting [sic] issues that should be canvassed by a three Judge Bench for determination.*

Background

3. To better appreciate the issues raised by the application, it is necessary to sketch a background of the petition herein and other related matters. The petition herein was filed on 16th February 2017 at the Environment and Land Court in Kisii. It was subsequently transferred to this court on 6th March 2017 pursuant to the order of the Hon. Justice J. Mutungi made on 6th March 2017. The petition concerns a project known as Itare Dam Water Supply Project and the petitioners allege, among others, that the project violates the constitutional provisions on public participation, equality before the law, national values and devolution as well as right of access to water and natural resources. The petitioners thus seek the following orders in the petition:

> *a. A Declaration that the procurement, tendering and securing the two Environmental and social impact assessment reports was done unprocedurally, violated the law and therefore null and void.*
>
> *b. A Declaration that the construction of Itare Dam Water Supply project is against public policy, is a breach of the rules of natural justice and violated constitutional principles of public participation.*
>
> *c. A declaration that the construction of Itare Dam Water Supply Project is against international standards contained in the UNDP report, World Commission on Dams Report and World Bank*

guidelines on dams.

d. A declaration that the construction of Itare Dam Water Supply project violates the East Africa Community Treaty and Specifically Protocol for sustaining development of Lake Victoria Basin.

e. A declaration that the 5th Respondent breached Article 156 in failing to promote, protect the rule of Law and defend public interest by failing to give proper legal representation on the violating [sic] of the Law by the 1st and 2nd Respondents.

f. A declaration that the 1st, 2nd and 3rd Respondents as the authority to construct are subject to the provisions of Article 10, 201 and 225 in thelawful discharge of its constitutional mandate.

g. A declaration that the 1st and 2nd Respondents as a state entity is subject to the provisions of Articles 2, 2(5), 2(6), 3, 10, 21, 22, 23, 35, 42, 43, 47, 69, 70, 174, 176, 258, 259 of the Constitution of and fourth schedule Article 185(2), 186(1) and 187(2) of the Constitution of the Republic of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013.

h. A declaration and an order directing the 1st, 2nd and 3rd Respondents to take all the necessary steps to address the gross violation of the Petitioners Constitutional Rights.

i. A declaration that whoever made the mistakes should be made to pay for the mistakes.

j. An order of certiorari to remove to the High Court and quash the decision of the 1st, 2nd and 3rd Respondents to construct the Itare Dam Water Supply Project.

k. An order directing 1st, 2nd and 3rd Respondents to stop the construction of the Itare Dam Water Supply Project until the issues and concerns of the petitioners are addressed.

l. The Respondents to pay the petitioner costs of the petition in any event.

4. Earlier on, another petition had been filed on 25th August 2016 in Mombasa, during the judges' annual colloquium, as Mombasa ELC Petition No. 240 of 2016. Being essentially a Nakuru matter, the petition was later transferred to this court and became ELC petition No. 45 of 2016 (Nakuru). The petition also concerned the construction of Itare Dam and the petitioners therein allege that there was no proper public participation and that articles 10, 27, 47 and 67 of the constitution of Kenya 2010 were violated, among other allegations. The petitioners in ELC petition No. 45 of 2016 (Nakuru) therefore sought the following reliefs:

i. A declaration that the Itare Dam Water Supply Project is borne out of bias and discrimination and hence unconstitutional and the same violates the riparian water rights of all the Kenya communities settled at the western part of the Mau water towers.

ii. A permanent injunction be issued barring and/or prohibiting the 1st, 2nd and 3rd Respondents by themselves, agents and/or servants or officials from continuing with the construction of ITARE DAM WATER SUPPLY PROJECT.

iii. A mandatory injunction be issued against the 1st, 2nd, 3rd Respondents compelling them to carry out restoration programme at the site of the Itare Water Dam.

iv. Further and/or other orders that this Honourable Court deem fit to grant.

5. Last but not least, another petition being ELC petition No. 44 of 2016 (Nakuru) was filed on 15th September 2016. The petition also concerns Itare Dam Water supply Project. The petitioners in this last petition allege, inter alia, that the government of Kenya has not compensated the local community after

acquiring their land, that there has been no public participation in the execution of the project and that articles 10, 35 and 40 of the Constitution of Kenya 2010 have been violated. The petitioners in ELC petition No. 44 of 2016 (Nakuru) seek the following reliefs:

> *a. A temporary and permanent conservatory [sic] restraining the Respondents by themselves, their agents, employees and/ or servants from further initiating, clearing, cultivating, or whatsoever developing, extracting, conveying or in any way carrying on with Itare Water Dam Project until the natives are compensated and an order of mandamus to compel the government to compensate the locals whose land within Tinet/Kabongoi/Ndoinet/Kiptororo Settlement Scheme was taken by the government;*
>
> *b. An order that the Environment Impact Assessment Report in relation to Itare Dam Project be made public and in the alternative an Enviromental Impact Assessment be carried out in relation to the project;*
>
> *c. A declaration that the petitioners and the residents of Nakuru County and especially the residents of Kiptororo within Kuresoi ought to be consulted and involved in Itare dam project.*

6. It is useful to note that the order made by Hon. Justice J. Mutungi on 6th March 2017 in petition No.9 of 2017 states in part as follows:

> *1. THAT it is clear that there are diverse interests and issues raised in this matter.*
>
> *2. THAT the court has also become aware that there are two petitions filed in Nakuru being Petition Nos.44 and 45 which have been ongoing since last year. The petitions revolve on the same "Itare Dam" and prudence dictates that one court deals with all issues and matters arising from the Itare Dam Project to obviate conflicting decisions.*
>
> *3. THAT the petitioner has also filed an application to have the matter referred to the Hon. Chief Justice to constitute a 3 Judge Bench to hear and determine the matter owing to its significance and public interest.*
>
> *4. THAT application ought to be canvassed having regard to all the matters arising on the said Itare Dam. The Nakuru Environment and Land Court would be best placed to consider and determine the application for reference to the Hon. Chief Justice.*
>
> *5. THAT accordingly, I order and direct that this petition be transferred to Nakuru Environment and Land Court for hearing and/or further directions.*
>
> *6. THAT I direct the matter to be mentioned before the Nakuru Environment and Land Court Judge before who the petitions 44 and 45 of the 2016 will be mentioned on 31st March 2017.*

7. Though not consolidated, the three petitions are as it were, joined at the hip. They all address various aspects of whether or not the Itare Dam project infringes on various constitutional and other legal provisions. Indeed, by agreement of all the parties all the three petitions have always been listed together.

The Application

8. The application before the court is grounded on the supporting affidavits of Edwin Kiprotich Kimetto and Willis Opiyo Otondi. Mr. Kimetto describes himself as the Secretary of the Council of Kipsigis Elders while Mr. Otondi describes himself as the Chairman of the Luo Council of Elders. Mr. Kimetto deposes that Itare Dam will tap water from Mau Water Tower with negative consequences on rivers such as Nyando, Sogol, Sondu, Cheptemok, Kuja among others. That these rivers in turn feed Lakes Victoria, Nakuru, Baringo and Natron in Tanzania. Further that the construction of the dam will affect communities in the counties listed as interested parties. He also deposes that communities in the counties listed as interested parties were not consulted and hence there was no proper public participation.

9. The 3rd respondent opposed the application through grounds of opposition dated 9th May 2017 and filed in court on the same date. Save for the 4th respondent and 4th interested party who have indicated through their counsels that they do not oppose the application, none of the remaining respondents and interested parties responded to the application.

Submissions

10. Parties agreed to dispose of the application by way of written submissions. In that regard, the petitioners/applicants' written submissions dated 2nd May 2017 were filed on 2nd May 2017 while the 3rd Respondents' written submissions dated 16th May 2017 were filed on 17th May 2017.

11. Citing Article 165(4) of the Constitution, counsel for the petitioners/applicants urged the court to certify all the petitions herein as raising substantial questions of law as well as matters of great public interest. Some of the said issues as identified by the applicants are whether the 1st to 4th Respondents complied with Article 69 and 70 that require that in all aspects of Environment of the Republic of Kenya there shall be openness and accountability, including public participation in Environmental matters; whether the 1st to 4th Respondents observed the national values and principles of governance as set out in Article 10 of the Constitution in the manner the Itare Dam water Project has been handled; whether the 1st and 2nd Respondents conduct in conducting and consulting the residents upstream to the exclusion of the downstream residents amounts to public participation; the meaning extent and scope of public participation in Environmental matters with regard to Environment as set out under Article 69 and 70 of the Constitution; whether the 1 – 9th interested parties were consulted in terms of Article 174 and Article 175 and whether they gave their consent.

12. Counsel argued that these issues are serious complex and sensitive since they affect millions of Kenyans who reside in ten (10) counties. It was further submitted that the petitions raise issues of the relationship between county governments and the national government in terms of sharing of a natural resources and whether or not it is acceptable within the constitutional framework to construct the dam without consulting and carrying out public participation in the other 9 counties besides Nakuru County. That the issue of public participation under articles 69 and 70 as regards environmental matters is a substantial issue.

13. Further, it was argued that in view of the scope and sensitivity of the project it would be better to shield the court from undue pressure by having the matter heard by a bench of three judges as opposed to single judge. In this regard, counsel cited the authority of **Kamau Kibunja –vs- Attorney General and 12 others [2002] eKLR.** Counsel thus urged the court to allow the application.

14. Opposing the application, counsel for the 3rd respondent argued that the application has not met the threshold for the petition to be referred to the Chief Justice under Article 165(4); that referral of routine matters to the Chief Justice for empaneling of an uneven number of judges is a threat to prudent and efficient use of judicial resources and is a violation of Article 159(2) of the Constitution; that the single judge has authority under Article 165 of the Constitution to determine any matter falling within the jurisdiction of the court and with equal persuasive force as a bench of uneven number of judges; that the issues raised in the petition are not so complex as to constitute a substantial question of law to warrant referral to the Chief Justice to set up a bench; that there are ample decisions on the issue of public participation in environmental disputes; and finally that the application is incompetent for being brought under the wrong provision of law. In conclusion, counsel argued the court to dismiss the application with costs.

Analysis and Determination

15. I have considered the application, the responses to it, the submissions by all sides and the authorities cited. Though the Amended Notice of Motion is stated on the face of it to have been brought under Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, there is no dispute that what is sought from the court is an order that the petition

herein raises a substantial question of law as contemplated by article 165(4) of the constitution and that the same be referred to the Chief Justice to empanel a bench of an uneven number of judges, being not less than three, to hear and determine the petition.

16. I am aware that the third respondent submitted that the application is fatally defective for being brought under the wrong provision of law. Nevertheless, the focus of the application as well as submissions by all parties including the third respondent was in respect of an application under article 165(4). Consequently, and in view of the obligation of the court under article 159 (2) (d) of the constitution to administer justice without undue regard to procedural technicalities, I will proceed to consider the application as one brought under article 165(4) and also under the relevant provisions of the Environment and Land Court Act No. 19 of 2011. Consequently, the objection that the application is incompetent for being brought under the wrong provision of law is dismissed.

17. Jurisdiction of the Environment and Land Court in regard to the issue presently before the court is founded on section 21 of the Environment and Land Court Act No. 19 of 2011 which states:

> **21. Quorum of the Court**
>
> **(1) The Court shall be properly constituted for the purposes of its proceedings under this Act by a single judge.**
>
> **(2) Notwithstanding subsection (1), any matter certified by the Court as raising a substantial question of law**
>
> **(a) under Article 165(3)(b) or (d) of the Constitution; or**
>
> **(b) concerning impact on the environment and land, shall be heard by an uneven number of judges, as determined by the Chief Justice.**

18. From the foregoing, it is clear that the substantial question of law must be one that arises either under Article 165(3) (b) or (d) of the Constitution or one which concerns impact on the environment and land. The above provisions of the Environment and Land Court Act No. 19 of 2011 refer to Article 165(3) (b) or (d) of the Constitution which states as follows:

> **(3) Subject to clause (5), the High Court shall have—**
>
> **(a) unlimited original jurisdiction in criminal and civil matters;**
>
> **(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
>
> **(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
>
> **(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**
>
> **(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
>
> **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
>
> **(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**

(iv) a question relating to conflict of laws under Article 191; and ...

19. A reading of the above twin provisions of the Constitution and the Environment and Land Court Act reveals that whereas the High Court can only certify a matter arising under Article 165(3) (b) or (d) of the Constitution, the Environment and Land Court can certify a matter arising under Article 165(3) (b) or (d) of the Constitution or a matter raising a substantial question of law concerning impact on the environment and land. Owing to the use of the word 'or' immediately after section 21(2) (a) of the Environment and Land Court Act, it is clear that the substantial question of law contemplated under the Environment and Land Court Act need not be limited to those enumerated under Article 165(3) (b) or (d) of the Constitution, it could even arise outside those constitutional confines so long as it concerns impact on the environment and land. In a sense therefore, jurisdiction to certify a matter as raising a substantial question of law under section 21 of the Environment and Land Court Act is wider than that of the High Court under Article 165(4) of the Constitution.

20. Regarding the question of what constitutes a substantial question of law that merits certification, I do not have to reinvent the wheel to define it. There is ample case law in that regard. Examples include ***Judicial Service Commission v Speaker of the National Assembly and Five Others,*** **[2013] eKLR*****; Bidco Oil Refineries Limited v The Attorney General and Three Others [2013] eKLR; Intoil Limited and Another v The PS, Ministry of Energy and Others,*** **[2012] eKLR*****; Community Advocacy and Awareness Trust & Others v The Attorney General, Nairobi Petition No. 243 of 2011 (Unreported); J. Harrison Kinyanjui v The Attorney General and Another,*** **[2012] eKLR** and ***Gilbert Mwangi Njuguna v The Attorney General,*** **Nairobi Petition No. 267 of 2009 [2012] eKLR**.

21. In **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** Majanja J. stated as follows:

> **the meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.**

22. Odunga J. in **Philip K Tunoi& another v Judicial Service Commission & another [2015] eKLR** cited the Indian case of **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314** where substantial question of law was defined as follows:

> **a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.**

23. From the foregoing, a substantial question of law could be one which is of general public importance. It is therefore necessary to define the phrase "of general public importance". In this regard, the Supreme Court stated as follows in **Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] eKLR:**

> **[41] The term *"general public importance"* has not been defined in the Constitution or the Supreme Court Act. Black's Law Dictionary links *"general importance"* to *"public interest"*. It goes further to define public interest as:**
>
> ***"…the general welfare of the public that warrants recognition and protection, something in***

which the public as a whole has stakes, especially that justifies Governmental regulation".

In litigating on matters of "*general public importance*", an understanding of what amounts to '*public*' or '*public interest*' is necessary. "*Public*" is thus defined*: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.*

[42] As de Smith, Woolf and Jowell have written in Judicial Review of Administrative Action:

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest".

[43] The pertinent concept, in most jurisdictions, is "*a point of law of general public importance*"; but hardly is a definition of that concept given. What is given is no more than some criterion on how to ascertain that a matter is of great public importance.

24. At the end of the day, all these principles have to be applied to the facts and circumstances of each case. In **Wycliffe Ambetsa Oparanya & 2 others v Director Of Public Prosecutions & another [2016] eKLR** Odunga J. summarized Indian test for determining whether a matter raises substantial question of law as follows:

(1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

25. I would therefore summarize that a substantial point of law of general public importance in the context of the matter before the court is one that affects the general welfare of the public or which concerns all members of the community.

26. In **County Government Of Meru v Ethics And Anti-Corruption Commission [2014] eKLR** Majanja J. distilled the principles that ought to govern the exercise of the Court's discretion in an application such as the present one as follows:

a. The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.

b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

c. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.

d. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter upto the Supreme Court.

27. Applying the above broad principles to the present case, I note that the petition herein concerns Itare Dam Water Supply Project; a project that both sides of the matter before the court agree will cost a sum of roughly KShs 34 billion. It is by no means a small project.

28. The petitioners allege that the dam will negatively affect the flow of various rivers that run through the eight counties that are listed as interested parties and which rivers in turn pour into such lakes as Lake Victoria; that in turn the communities living in the eight counties that are listed as interested parties will suffer adverse environmental consequences and infringement of their riparian rights; and that conception and execution of the project has been carried out without public participation in the affected communities contrary to Article 10 of the Constitution.

29. The petitioners also allege that the right of the communities to a clean and healthy environment under Article 42 of the Constitution is threatened; that the respondents have failed to honour their obligation to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources under Article 69 owing to the manner in which the project has been conceived and the manner of its execution; that in view of the fact that the effects of the project will be felt on the environment in several other counties, there has been a breach of objects of devolution under Article 174 and the Principles of devolved government under Article 175. Needless to state, all these remain allegations which will only be tested at the hearing of the petition.

30. I have read the replying affidavit of Eng. Japheth Mutai, the Chief Executive Officer of the 3rd respondent sworn on 1st March 2017 in response to the petition herein and I note that while referring to the Environment and Social Impact Assessment (ESIA) study report dated December 2015 and which is annexed to his affidavit, he deposes that major floods have been experienced in low-lying parts of the Lake Victoria Basin in the years 1937, 1947, 1951 and 1957 to 1958 and that therefore, the project will be a significant positive impact since it will regulate the flow of rivers for both low flows and high ones in Lake Victoria Basin. I also note that at point 7.4.1 of the ESIA study report, it is noted that there will be cross basin transfer of water from Lake Victoria catchment to Lake Nakuru Basin.

31. All the foregoing shows some connection between the project and the environment in Lake Victoria Basin counties generally. Whether the connection results in a negative impact as alleged by the petitioners is not for determination now. Suffice it to say that the project and the legal issues around it are of great public interest to the communities living in the eight counties that are listed as interested parties as well as to the communities living in Nakuru County. I therefore find and hold that the petition raises substantial questions of law of general public importance and which directly and substantially affect the rights of the parties and the communities living in the nine counties including Nakuru County. The substantial questions are the nature and extent of public participation on Environmental and Social Impact Assessment required under Article 10 of the Constitution in a project whose effects will be felt on the environment and by communities in several other counties; and the impact of such a project on the right of the affected communities to clean and healthy environment under Article 42 of the Constitution.

32. I further find and hold that the petition raises a substantial question of law under section 21 of the Environment and Land Court Act concerning the impact of Itare Dam water Supply Project on the environment in the nine counties including Nakuru County.

33. Existence of a substantial question of law *per se* is not a guarantee that the matter be certified for appointment by the Chief Justice of a bench of an uneven number of judges. As was stated in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** every judge has authority under Article 165 of the Constitution, to determine any matter that is within the court's jurisdiction and that the decision of a three judge bench is of equal force to that of a single judge exercising the same jurisdiction.

34. Yet there must be a reason why both section 21 of the Environment and Land Court Act and Article 165(4) of the Constitution make provision for the determination of such matters by an uneven number of judges. It may well be that in such cases, the decision making process and development of jurisprudence may be better aided by the enriched input of more than one judicial mind. I am of course very much alive

to the fact that in terms of precedence the value of the decision is the same whether made by one or more judges of the High Court or Environment and Land Court.

35. Citing **Kamau Kibunja –vs- Attorney General and 12 others [2002] eKLR,** counsel for the petitioners also argued that in view of the scope and sensitivity of the project, it would be better to shield the court from undue pressure by having the matter heard by a bench of three judges as opposed to a single judge. In the said case, the then Chief Justice B. Chunga stated as follows:

> **As the application is under section 84 of the Constitution, the number of judges to hear it remains in my discretion. In exercising that discretion, I have said repeatedly in the past, I take into account several factors which include, but are not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them if any. Several of these factors are obtainable in this application. Thus, all considered, I am persuaded that this is a proper case that should go for a full hearing before a bench of two judges to be appointed by me in due course.**

36. It will be noted that the circumstances obtaining as at the date when Chief Justice B. Chunga delivered the above ruling are quite different from the present. We are in a new constitutional dispensation. In this day and age, any judge who takes his oath of office seriously should be able to deal with any case which falls within the court's jurisdiction, regardless of any pressure, be it real or perceived. Thus sensitivity of a case is no reason to have a matter heard by a bench of uneven number of judges as opposed to a single judge.

37. I have found that the petition raises substantial questions of law of general public importance and which directly and substantially affect the rights of the parties and the communities living in the nine counties including Nakuru County. I have also found that the petition raises a substantial question of law under section 21 of the Environment and Land Court Act concerning the impact of Itare Dam Water Supply Project on the environment in the nine counties including Nakuru County. Should I therefore refer the matter to the Chief Justice to constitute a bench of an uneven number of judges to hear the petitions? In making the decision I remind myself that a substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. I have also taken into account the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter up to the Supreme Court.

38. With all the foregoing in mind, I believe the substantial questions of law of general public importance herein and the substantial question of law under section 21 of the Environment and Land Court Act will benefit from the enriched input of more than one judicial mind right from the onset of the litigation. Those substantial questions cut across this petition and the other related petitions being ELC petition No. 44 of 2016 (Nakuru) and ELC petition No. 45 of 2016 (Nakuru).

39. In the end, I make the following orders:

> a) I order that this petition as well as ELC petition No. 44 of 2016 (Nakuru) and ELC petition No. 45 of 2016 (Nakuru) be placed before the Hon. Chief Justice for His Lordship to consider constituting an uneven number of judges, being not less than three, to hear and determine the petitions.
>
> b) Costs in the cause.

40. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of July 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kipkoech and Mr. Langat for the petitioners

Ms. Cheruiyot for the 1st, 2nd and 5th respondents

Mr. Akango for the 3rd respondent

Mr. Akango for holding brief for Mr. Gitonga the 4th respondent

No appearance for interested parties

Court Assistant: Gichaba