



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**PETITION NO. 348 OF 2015**

**IN THE MATTER OF EQUALITY AND FREEDOM FROM DISCRIMINATION, IN THE  
MATTER OF ACCESS TO INFORMATION AND IN THE MATTER OF ECONOMIC AND  
SOCIAL RIGHTS CONTRARY TO ARTICLES 27, 35, 42, 43, 1, 2, 4, 5, AND 6 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF UNFAIR AND ARBITRARY DISTRIBUTION OF WATER RESOURCES**

**BETWEEN**

**ISAAC KIPYEGO CHEROP.....PETITIONER**

**VERSUS**

**THE STATE MINISTRY OF WATER.....1<sup>ST</sup> RESPONDENT**

**RIFT VALLEY WATER SERVICES BOARD.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**VINCENT KEMBOI & 139 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

**Isaac Kipyego Cherop** (*hereinafter referred to as the petitioner*) has petitioned this court against the State Ministry of Water, Rift Valley Water Services Board and the Attorney General (hereinafter referred to as respondent) stating that he is a Kenyan, a resident of Eldama Ravine, in one of the areas, that have been adversely affected by the decision of the 2<sup>nd</sup> respondent. According to the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have constructed Chemususu Dam which project is established to serve an estimated 300,000 people and livestock. That upon the completion of the dam, the 2<sup>nd</sup> respondent has invited tenders to express interest for the construction of Chemususu Water Supply distribution project. That tender documents have been made by the 2<sup>nd</sup> respondent and given to the tenderers.

The petitioner has come to learn that the said water project has excluded and/or does not cover such areas as Maji Mazuri, Mumberes, Torongo, Raddad, Majimoto, Mugaria and Kisanana which have always been earmarked for the water supply. That the residents of this areas have not been informed or at all why their areas have been left out in the water supply network. That even prior to the commencement of the water

distribution network, no information has been given to the affected areas, no reasons or at all have been given why the residents of the areas affected cannot receive the water or be covered by the project.

The actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents have been arbitrary and quite clearly intended to discriminate against the Petitioner and the Interested Parties hereof. That since the commencement of the Chemususu Dam up to date, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have never published and or publicized any information regarding the project or at all. That it is a public duty of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to supply to the Petitioner and the interested parties with clean and safe water in reasonable quantities which the defendants are showing signs of derogation from.

The Petitioner and the interested parties will be economically deprived if the respondents are allowed to continue with the water distribution project according to the current distribution network. The petitioner and the interested parties have had reasonable legitimate expectations especially on economic advancement upon the completion of the distribution network which expectation is being rendered remote.

That given that the petitioner and the interested parties have not been heard on this matter, the respondent's actions have been arbitrary and discriminative against their rights contrary to the provisions of Article 27 of the Constitution of Kenya. The petitioner and the interested parties are law abiding citizens of this Republic and tax payers who have heavily investments towards receiving water in order to start off their economic activities. That it is mete and fair that the petitioner and the interested parties be included in this project. The Petitioner further states that the constitution of Kenya provides that every person has a right to economic and social rights as provided for under Article 43 thereof as follows:

**(1) Every person has right:-**

***(a) To the highest attainable grounds of health care services, including reproductive health.***

***(b) To accessible and adequate housing and to reasonable standards of sanitation.***

***(c) To be free from hunger and to have adequate food of acceptable quality.***

***(d) To clean and safe water in adequate quantities.***

***(e) To social security and***

***(f) To education.***

**(2) A person shall not be derived emergency medical treatment.**

***(3) The state shall provide appropriate social security to persons who are unable to support themselves and their dependants.***

That pursuant to the above, the respondents have a public duty to provide the petitioner and the interested parties with clean and safe water from the Chemususu Dam. That as result of the respondents arbitrary and/or unilateral action of leaving out supply of water to the area of the petitioner and the interested parties, their hopes to leading better and improved lives as other Kenyans have been put to jeopardy and also their economic hopes have been dashed as a result of the respondents' arbitrary decisions.

I have considered the petition, grounds of opposition by the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the replying affidavit by the 2<sup>nd</sup> respondent and the rival submissions and do find that the first issue for determination is whether this court has jurisdiction to entertain the dispute. Jurisdiction is everything and the moment the issue is raised the same ought to be determined first. The 2<sup>nd</sup> respondent argues that this court lacks jurisdiction to entertain the Petition as the jurisdiction of the Environment and Land Court is to hear and determine disputes relating to the environment and the use and occupation of the title to, land. The

Petitioner argues that the dispute does not relate to title to land or right to land, does not relate to a claim and healthy environment. Moreover, that the petition relates to right to water, right of information and right to equal freedom and right to participate in governmental decision making. I have carefully considered these submissions and do find that the right to clean water is intertwined with the right to clean and healthy.

Moreover, **Article 260 of the Constitution of Kenya 2010** defines land to include the surface of the earth and the subsurface bedrock and any body of water on or under the surface and the marine waters under the territorial sea or in the exclusive economic zone and therefore land includes the water on the land. Article 162 of the constitution of Kenya gives this court jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. A spiritual interpretation of this Article is that use of land includes use of the water on the land. Furthermore Section 13 of the environment and land court act gives the court the original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the constitution of Kenya and with the provisions of the said act or any other law applicable in Kenya relating to environment and land. In exercise of its jurisdiction under Article 162(2)(b) of the constitution of Kenya the court has the power to hear and determine disputes relating to land use planning, land administration and management inter alia and any other dispute relating to environment and land. The upshot of the above is that the Environment and land court has the jurisdiction to hear and determine a dispute under Article 43 (d) thus touching on the right to clean and safe water in adequate quantities.

On the issue, as to whether the petition does meet the threshold of constitution petition as set out in **Anarita Karimi Njeru Vs Republic (1979) 1EKR** where it was held that a person seeking a redress from the High Court or an order which invokes a reference to the constitution should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed and amplified in **Mumo Matemu Vs Trusted Society for Human Rights Alliance & 3 Others (2013) eKLR**. Where the Court of Appeal held: -

**“It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting. Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap.21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap.9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M. R. said in 1876 in the case of Thorp V Holsworth (1876) 3 Ch. D. 637 holds true today: The whole object of pleadings is to bring the parties to an issue, and the meaning of the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”,**

I do find that though the Petitioner has right to clean and safe water in adequate quantities which the State is to endeavor to render progressively. I do agree with the 2<sup>nd</sup> respondent that the realization of the right to clean and safe water in adequate quantities require huge financial commitments and therefore, the same can be achieved progressively.

On the right to information, I do find that the Petitioner has not requested for the same and therefore he cannot claim that the same has been denied. Though the petitioners have a right to information as envisaged in the constitution of Kenya, 2010, they have a duty to request for the information. I have not seen any request by the Petitioners for information. The petitioners have not demonstrated how they have

been economically depressed by not being included in the water supply network.

I do find that the right to clean and safe water in adequate quantities under Article 43 of the Constitution is subject to progressive realization. Rights under Article 43 of the Constitution can only be realized progressively. The State cannot realize this right for every Kenyan in one investment. The right to clean and safe water in adequate quantities is not a final product for direct dispensation but is aspirational. **Article 20 of the Constitution of Kenya** provides for the application of Bill of Rights. **Article 20 (5) of the Constitution of Kenya** provides that in applying any right under Article 43, if the state claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by principles that that it is the responsibility of the state to show that the resources are not available and that the court may not interfere with the decision of the state organ concerning the allocation of the available resources solely on the basis that it would have reached a different conclusion and **Article 21(2) of the Constitution of Kenya** provides that the state shall take legislative policy and other measures including the setting of standards to achieve the progressive realization of the rights guaranteed under Article 43. The import of the above is that the rights under Article 43 of the constitution can be achieved progressively within the states available resources.

Ultimately, the petition is dismissed for reasons that the petitioners have not established the threshold for such constitutional petitions and have not established that their right to clean and safe water under Article 43 (d) of the Constitution has been violated. Each party to bear own costs.

**DATED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2017.**

**A. OMBWAYO**

**JUDGE**