



**Itabari & another v Water Resources Authority & 3 others (Environment and Planning  
Petition E035 of 2024) [2025] KEELC 398 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 398 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND PLANNING PETITION E035 OF 2024**

**AA OMOLLO, J  
JANUARY 30, 2025**

**BETWEEN**

**ABRAHAM KARUTI ITABARI ..... 1<sup>ST</sup> PETITIONER**

**SUN STAR HOTEL LIMITED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**WATER RESOURCES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY WATER & SEWERAGE CO LTD ..... 2<sup>ND</sup> RESPONDENT**

**THE MINISTRY OF WATER AND IRRIGATION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**The Petition:**

1. The Petitioners filed a Petition dated 30<sup>th</sup> September 2024 seeking for the following orders;
  - a. A declaration that the Respondents’ failure to provide the Petitioners with reliable water in adequate quantities constitutes a violation of the Petitioners’ right to clean and safe water in adequate quantities and the right to reasonable standards of sanitation under Article 43(1)(d) and (b) of the *Constitution* respectively.
  - b. A declaration that the Respondents’ disconnection of the Petitioners’ access to water without prior written notice and reasons constitutes a violation of Article 47 of the *Constitution* and sections 4 and 5 of the *Fair Administrative Action Act*, 2015, which guarantee the right to fair administrative action that is lawful, reasonable, and procedurally fair.
  - c. A declaration that the Respondents’ action of disconnecting the Petitioners’ access to water and suspending their water permits is illegal, unlawful and constitutes a violation of the



Petitioners' constitutional rights and fundamental freedoms, specifically the right to clean and safe water in adequate quantities contrary to Article 21(2) as read with Article 43(1)(d) of the Constitution.

- d. A declaration that the Respondents' action of disconnecting the Petitioners' access to water violated their right to human dignity contrary to Article 28 of the Constitution.
- e. A declaration that Regulation 89 of the Water Resources Regulations, 2016, which allows for an open-ended and indefinite levying of water use charges without a time limitation on arrears, is unconstitutional as it contravenes Article 21(2) of the Constitution by failing to further the progressive realisation of the right to water as envisioned under Article 43(1)(d) of the Constitution.
- f. A declaration that Regulation 85 and the Second Schedule of the Water Resources Regulations, 2016 are unconstitutional to the extent that they put access to water even further beyond the reach of the public by imposing additional levies on abstracted water in a manner that makes it unreasonably expensive and discourages private persons to abstract water for their own use, even when the State has failed in its obligations to provide the much-needed water.
- g. An Order of mandatory injunction compelling the Respondents to reconnect the Petitioners' access to water abstracted on LR 13330/504 and LR 13330/503 without imposing any charges or penalties.
- h. An Order of permanent injunction restraining the Respondents from interfering with the Petitioners' use, access and enjoyment of water abstracted on LR 13330/504 and LR 13330/503 respectively.

SUBPARA i.

An Order compelling the Respondents to revise and limit the Petitioners' water use arrears to a maximum period of twelve (12) months, in accordance with the principle of progressive realisation of rights, and to align the water use charges with the previous legal regime under the Water Resources Management Rules, 2007.

- j. An Order prohibiting the Respondents from charging further arrears or levying additional charges based on Regulation 89 of the Water Resources Regulations, 2016, until a new and constitutionally compliant legal framework is put in place.
  - k. Any other orders or reliefs that this Honourable Court may deem just and fit to grant in the circumstances of this case.
  - l. Costs of the Petition to be borne by the Respondents.
2. The petition was supported by an affidavit sworn on 30<sup>th</sup> September 2024 by Abraham Karuti Itabari, the 1<sup>st</sup> Petitioner and one of the directors of the 2<sup>nd</sup> Petitioner. The Petition is based on several articles of the Constitution of Kenya 2010, inter alia, article 2(1) which provides for the supremacy of the Constitution and providing that the Constitution binds all persons and all State organs at all levels of government.
  3. They pleaded that article 2(4) of the Constitution provides that any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.
  4. They plead on the provisions of article 19(1) of the Constitution that recognizes the Bill of Rights as an integral part of Kenya's democratic state and is the framework for social, economic, and cultural



- policies. Therefore, article 19(2) of the Constitution gives the purpose of recognizing and protecting human rights and fundamental freedoms to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
5. That Article 20(1) states that the Bill of Rights applies to all law and binds all State organs and all persons and in Article 20(2) makes provision that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Further, Article 20(3) requires that Courts shall develop the law to give effect to a right or fundamental freedom and adopt an interpretation that most favours the enforcement of a right or fundamental freedom. While, Article 20(4) courts must promote the values that underlie an open and democratic society, based on human dignity, equality, equity, and freedom.
  6. The Petitioners impleaded that Article 20(5) deals with the duty of the where the State claims that it does not have the resources to implement the right it is the responsibility of the State to show that the resources are not available and in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.
  7. The Petitioners continued to rely on Article 21(1) of the Constitution which provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights and Article 21(2) that provides 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 (Economic and Social Rights).
  8. On locus standi to bring the Petition, they cited on Article 22(1) which give every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened plus. That also, Article 23(2) of the Constitution states that the High Court may grant appropriate relief, including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity, an order for compensation, or an order for judicial review and Article 28 which provides that every person has inherent dignity and the right to have that dignity respected and protected.
  9. Further, the Petitioners averred that Article 43(1)(b) and (d) bestow on every person the right to reasonable standards of sanitation and to clean and safe water in adequate quantities. The Petition is also premised on Article 46(1)(c) of the Constitution which provides that consumers have the right to the protection of their health, safety, and economic interests; Article 47 - that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair and where their right or fundamental freedom is likely to be adversely affected by administrative action.
  10. The 1<sup>st</sup> Petitioner explained that the 2<sup>nd</sup> Respondent initially connected water supply to his home on LR 13330/504 and the 2<sup>nd</sup> Petitioner's hotel business on LR 13330/503. They said the water supply was unreliable, sometimes available only once a week, denying their access to this essential resource, thereby infringing on their right to clean and safe water in adequate quantities, as well as their right to reasonable standards of sanitation.
  11. That despite numerous follow-ups and attempts to resolve the issue, nothing was forthcoming from the 2<sup>nd</sup> Respondent and all their efforts amounting to nought, prompting the Petitioners to apply to the 1<sup>st</sup> Respondent for the necessary approvals and permits to abstract groundwater by drilling boreholes.
  12. They stated that they obtained an approval from the 1<sup>st</sup> Respondent to abstract groundwater by drilling boreholes on their properties known as LR 13330/504 and LR 13330/503 respectively and



- also obtained a letter of no objection from the 2<sup>nd</sup> Respondent and a license from the National Environmental Management Authority (NEMA) before they commenced drilling.
13. Thereafter, they contracted Horn Africa Drilling Company Limited to drill two boreholes on the said properties, incurring an expense of over Kshs. 11,158,000.00, an investment that would have been entirely avoidable had the Respondents fulfilled their legal obligation to provide clean and safe water in adequate quantities.
  14. The Petitioners averred that before commissioning the boreholes, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents installed water metres at both boreholes and began levying water use charges. However, on or about 23<sup>rd</sup> August 2024, the Respondents disconnected their intake or their abstraction equipment to water from their boreholes without explanation or any proper notice.
  15. It is their contention that the Respondents arbitrarily, illegally, and unlawfully suspended the Petitioners' water permits which were legally obtained, a decision taken without due, proper and adequate notice to the Petitioners notwithstanding that Regulation 97(2) requires that the Respondents give 14 days' notice prior to such suspension and/or disconnection.
  16. They averred that upon follow up with the 1<sup>st</sup> Respondent, they were issued with an invoice amounting to Kshs. 288,419.00 for an assessment for the period commencing from 2019 up to 14<sup>th</sup> March 2023. That given the considerable financial burden the Petitioners incurred in constructing the boreholes and equipping them, it has become challenging to meet the additional charges levied by the Respondents, as they had incurred an extra Kshs. 1,050,000.00 on or about 30<sup>th</sup> May 2024 for the installation of a water treatment plant at the 2<sup>nd</sup> Petitioner's Hotel premises.
  17. The Petitioners stated that as a result of the said disconnection and suspension of their water permits, they have been forced to incur extra expenses as they have to purchase water for their daily needs. That the disconnection has also left them in the exact position they were in and which they sought to avoid by drilling the boreholes, without access to water.
  18. The Petitioners contended that the actions of the Respondents are in clear violation of the Constitution of Kenya, and fail to uphold their fundamental rights and freedoms. That by failing to provide them with clean and safe water in adequate quantities, compelling them to abstract groundwater that falls below the constitutional threshold of "clean and safe water in adequate quantities" and "reasonable standards of sanitation" violating the provisions of Article 43(1)(b) and (d) of the Constitution.
  19. Further, that equally the Respondents violated the provisions of Article 21(1) of the Constitution, which mandate the State to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.
  20. The Petitioners contended that the Respondents' decision to disconnect the Petitioners' access to water without prior notice violates the right to fair administrative action as guaranteed under Article 47 of the Constitution and Sections 4 and 5 of the Fair Administrative Action Act, 2015 which requires when a person's rights or fundamental freedoms are adversely affected by an administrative action, they must be provided with written reasons for that action.
  21. The Petitioners challenged the constitutionality of Section 89, Water Resources Regulations No. 43 of 2016, the legal framework that purports to justify the disconnection in subject. It reads;

“ 89. Time Limitation on arrears

89.



- (1) Where the Authority discovers that a permit holder, or a person who is required to have a water permit, has not paid water use charges, the Authority may charge arrears.
  - (2) Where the Authority discovers that a permit holder has tampered with or has caused such metre to be tampered with and under declared his or her water use, the Authority shall be entitled to charge for the under declared water use in arrears.
22. They argued that whereas the title of the above legal provision reads “Time limitation on arrears”, the contents are different, vague and confusing in contrast with the previous legal regime—the Water Resources Management Rules, 2007—Regulation 107 “Time limitation on arrears”, which established a clear limitation period for water use arrears, restricting the levying of charges to a maximum of twelve (12) months.
23. That this provision provided permit holders with certainty regarding their financial obligations and ensured they would not be burdened by longstanding debts going back to several years and by capping the arrears period, the regulation balanced the Respondents’ right to revenue collection with the public’s legitimate right to access water without the fear of undue financial hardship.
24. The former regime read;
- “Water Resources Management Rules, 2007
107. Time limitation on arrears
- 107.
- (1) Where the Authority discovers that a permit holder or a person who is required to have a water permit, or who is obliged to pay water use charges from the entry into force of these Rules has not done so, the Authority shall be entitled to charge arrears, for a period not exceeding twelve months.
  - (2) Where the Authority discovers that a permit holder has under-declared the water quantity used, from the commencement of these Rules, the Authority shall be entitled to charge for the under declared water quantity used in arrears for a period not exceeding twelve months.”
25. Additionally, that unlike the Water Management Rules, 2007, the 2016 Regulations removed the 12-month limitation on arrears, creating an open-ended period which change exposes permit holders, including the Petitioners, to potentially limitless liabilities for water use charges that could date back indefinitely. That as a post-2010 legislative enactment, the 2016 Regulations reverse the progress previously achieved under the Water Management Rules, 2007 and contradicts the State’s obligation under Article 21(2) of the *Constitution* to take legislative and policy measures to progressively realize the right to clean and safe water in adequate quantities and the right to reasonable standards of sanitation.
26. They stated that the indefinite nature of Regulation 89 disregards the socio-economic realities of water users, many of whom lack the financial capacity to pay for arrears stretching back several years, imposing a regressive measure that unfairly shifts the financial burden onto citizens, failing to align with the constitutional mandate of progressively enhancing access to water.



27. The Petitioners said that the Regulation is a direct violation of Article 43(1)(b)(d) of the Constitution, because it ignores principles of fairness and reasonable and/or legitimate expectations by imposing indefinite liabilities on water users, which could result in permanent disconnection from water services providers.
28. Further, the Petitioners stated that Regulation 85 of the Water Resources Regulations, 2016 together with the Second Schedule of the said Regulations impose an undue burden and amount to a fetter to the right to clean and safe water in adequate quantities and the right to reasonable standards of sanitation to the extent that they require private persons who abstract groundwater to pay water use charges on the abstracted water, notwithstanding that the said persons have been compelled to abstract such water due to the State's inability to provide reliable, clean and healthy water in adequate quantities. That they are merely stepping in, using their own resources to alleviate their suffering due to the State's continued denial of their right to water.
29. That the impact of Regulation 85 and the Second Schedule is to put access to water even further beyond the reach of the public by imposing additional levies on abstracted water in a manner that makes it unreasonably expensive and discourages private persons to abstract water for their own use, even when the State has failed in its obligations to provide the much-needed water. Thus, they are unfair, oppressive, unjust, extortionate and inconsistent with Article 21(2) of the Constitution and Article 43(1)(b) and (d) of the Constitution and are therefore void to the extent of the inconsistency.

#### **1<sup>st</sup> Respondent replying affidavit**

30. The 1<sup>st</sup> Respondent filed a replying affidavit in opposition of the motion dated 30<sup>th</sup> September 2024 and subsequently, the Court on 14<sup>th</sup> November 2024 gave directions that parties proceed with the petition making the said motion abandoned. The 1<sup>st</sup> Respondent was granted 14 days to file a reply to the Petition and thereafter proceed to file written submission. None has been filed.

#### **2<sup>nd</sup> Respondent's Replying affidavit**

31. In opposition to the Petition, the 2<sup>nd</sup> Respondent filed an affidavit sworn by Rose Omollo, its zonal officer on 25<sup>th</sup>, October 2024. She deposed that the claim by the Petitioners relates to the permits issued to the 1<sup>st</sup> Petitioner to facilitate abstraction of ground water, and the consequences arising from the apparent non-compliance with the attendant conditions following the lapse of the said permits, a statutory function of the 1<sup>st</sup> Respondent as set out in the Water Act.
32. She contended that the 2<sup>nd</sup> Respondent's functions are spelt out in the Water Act and the enabling regulations, and that the actions complained off do not fall within the statutory functions of the 2<sup>nd</sup> Respondent. It is asserted for the 2<sup>nd</sup> Respondent that the Petitioners have sought a blanket order of permanent injunction to restrain disconnection of water in the future, the consequence of which would equally impact on their statutory functions.
33. The deponent explained that the mandate of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is drawn from Water Act, Cap. 372 of the Laws of Kenya where it provides under Section 5 that every water resource is vested in the National Government which holds the resources in trust for the people of Kenya.. That the 1<sup>st</sup> Respondent established in line with Section 11 of the Act is then vested with powers to regulate the use and management of water resources as an agent of the Government. Section 36 of the Act then makes it a requirement for the acquisition of a permit by any party intending to use water from a water resource, the exemptions thereof being set out at Section 37 of the Act which do not apply in this case.



34. That Section 40 of the Act on the other hand sets out the process for application of the permit, with Section 41 permitting the Authority to impose such conditions as may be prescribed by the regulations and Section 42 again makes provision for levying of charges for the water use. It is deponed that the County Government is then by virtue of Section 77 of the Act authorized to establish water works development agencies as water services providers and it pursuant thereto that the 2<sup>nd</sup> Respondent in whose jurisdiction the subject water resource is situated was established, with powers as stipulated by the Act.
35. In addition, they averred that section 56 of the Act provides that abstraction of ground water shall be in accordance with the Fourth Schedule, with regulation 2 providing that any person seeking to abstract ground water shall be required to obtain a permit and be required to comply with any conditions imposed. Therefore, any persons seeking to abstract ground water must not only obtain a permit but also comply with the conditions imposed by the permit.
36. The 2<sup>nd</sup> Respondent stated that it is not disputed that the 1<sup>st</sup> Petitioner was issued with a water permit No. WARMA/30/NRB/3BA/15684/G as communicated vide the letter dated 11<sup>th</sup> September 2019. That the permit expressly sets out the conditions attaching to the access and use of the water, and that the 1<sup>st</sup> Petitioner was obligated to pay for the water usage. The permit would lapse on 16<sup>th</sup> August 2024, where after the 1<sup>st</sup> Petitioner was expected to renew the same.
37. That also it is not disputed that the 1<sup>st</sup> Petitioner was issued with another Water Permit No. WARMA/30/NRB/3BA/16531/G as communicated vide the letter dated 24<sup>th</sup> May 2019 which bore the same conditions as set in the former with the permit lapsing on 23<sup>rd</sup> May 2024. She argued that the Petitioners were well aware of the dates the permits were issued and when they would expire thus what they were required to do was to simply apply for a renewal thereof and no application for renewal has been exhibited, neither has a new permit been exhibited.
38. The 2<sup>nd</sup> Respondent contended that the Petitioners' entitlement to the use of the abstracted water, in the absence of a renewal ended with the lapse of the permit. That the Petitioners, just as is the case of any other water consumer, were obligated to pay for any consumption, and to comply with any other conditions pertaining the use of water, failing which such use can be curtailed. That the Petitioners equally failed to comply with the first condition, exhibited as invoice dated 14<sup>th</sup> March 2023 issued by the 1<sup>st</sup> Respondent, which confirms non-payment of the required outgoings. That the 2<sup>nd</sup> Petitioner being a business entity operating for gain would seek to abstract and use ground water for commercial gain but not want to pay for the same.
39. Consequently, as regards the claim that the action of denial of water has infringed upon their, rights to access water under Article 43, it is evident from the foregoing that the said right is not absolute, the right is dependent upon compliance with the applicable conditions, which the Respondents are by law allowed to impose. The deponent stated that as long as the Act and Regulations have not been declared unconstitutional, each of the Respondents is by law entitled to enforce its statutory functions. .... and in any case Petitioners can always source for water from other legally available sources, and their right to life is therefore not threatened as sought to be portrayed.

#### **Analysis and Determination:**

40. This Petition is filed against the Respondents and It is notable that the description of facts is not contested. The gist of it is that the Petitioners' premises was initially connected with the water supply from the 2<sup>nd</sup> Respondent and the water supply being unreliable, they opted to obtain permits to abstract their own water from the Respondents.



41. Two sets of permits were issued to Petitioners allowing them to abstract water for a period of five years on the terms and conditions set therein. Upon the expiry of the said permits, on the face of the pleadings, the Petitioner did not apply for a renewal, resulting to disconnection of the abstract water supply by the Respondents without issuing any notice. It is the action of the disconnection which prompted the filing of this petition. The Petitioners have sought several declarations stating that there is breach of their fundamental rights and freedoms and that Regulation 89 of Water Resources Regulations No. 43 of 2016 is unconstitutional.
42. They accuse the Respondents of failing to provide them with clean and safe water in adequate quantities, which failure compelled them to abstract groundwater that falls below the constitutional threshold of “clean and safe water in adequate quantities” and “reasonable standards of sanitation” violated the provisions of Article 43(1)(b) and (d) of the *Constitution*. Further, the Respondents’ decision to disconnect their water without prior notice violates the right to a fair administrative action as guaranteed under Article 47 of the *Constitution* and Sections 4 and 5 of the *Fair Administrative Action Act*, 2015.
43. Flowing from this summary, I frame the following questions for determination;
- a. Whether the Petitioners right to clean and safe water in adequate quantities” and “reasonable standards of sanitation” was breached?
  - b. Whether the Petitioners right to fair administrative action was violated?
  - c. Unconstitutionality of Regulation 89 of the Water Resources Regulations of 2016.
  - d. Costs

**a. Whether the Petitioners right to clean and safe water in adequate quantities” and “reasonable standards of sanitation” was violated?**

44. It is the Petitioners contention, that the failure of the Respondents to supply them with sufficient water contravenes their right to clean and safe water in adequate quantities and reasonable standards of sanitation as enshrined under Article 43 of the *Constitution* of Kenya 2010.
45. Article 43(1)b & d provides that: -
- (1) Every person has the right-
    - (b) ....;
    - (d) To clean and safe water in adequate quantities

46. The Petitioners admit that they were connect to the supply of the 2<sup>nd</sup> Respondent except that it was unreliable and inadequate. The connection to the 1<sup>st</sup> Petitioner was to his home while for the 2<sup>nd</sup> Petitioner was for hotel business without details provided when the connection was done, what quantities the Petitioners received and whether the unreliability was from the start of the connection. In the case of Anarita Karimi versus Republic (...), it was held that;

“We would however, again stress that if a person in seeking redress from the High Court on a matter which involves a reference to the *Constitution* it is important that (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision



that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

46. The 2<sup>nd</sup> Respondent contended that it is statutorily provided that abstraction of ground water shall be in accordance with the Fourth Schedule of the Water Act with regulation 2 providing that any person seeking to abstract ground water shall be required to obtain a permit and be required to comply with any conditions imposed. On their part, the Petitioners stated that Regulation 85 of the Water Resources Regulations, 2016 together with the Second Schedule of the said Regulations impose an undue burden and amount to a fetter to the right to clean and safe water in adequate quantities and the right to reasonable standards of sanitation to the extent that they require private persons who abstract groundwater to pay water use charges on the abstracted water.
47. Article 69 of the Constitution puts obligation on the State to ensure sustainable utilization of the natural resources and one way of doing so in my considered opinion is through the Regulations. The Petition pleaded on the limitation of the bill of rights under article 24 inferring that they are aware that the right to clean and safe water in adequate quantities is not open-ended. The court takes judicial notice that even water that is not abstracted (supplied by the 2<sup>nd</sup> Respondent into the taps of consumers) is paid for.
48. Hence, the Petitioners needed to explain why in their view, no levies should be imposed on the abstracted water. Secondly, they did not plead that what was charged was unreasonably expensive and discourages private persons to abstract water for their own use. Yet they still have the option of accessing water supplied to their premises by the 2<sup>nd</sup> Respondent. I find that the Petitioners have not been denied this right as they have access to water either directly from the 2<sup>nd</sup> Respondent’s line and or by application of renewal of their permit for abstraction.
49. Having failed to comply with the conditions set for abstraction of water, enforcement action taken by the 2<sup>nd</sup> Respondent do not amount to breaching the Petitioners’ right to clean and safe water in adequate quantities” and “reasonable standards of sanitation. Rather the Respondent’s conduct is a legislative measure to achieve realization of Article 69 of the Constitution on state obligation to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources to wit water in this case.

**b. Whether the Petitioners right to fair administrative action was violated?**

50. The Petitioners state that the 2<sup>nd</sup> Respondent arbitrarily suspended their water permits without due, proper and adequate notice to them notwithstanding that Section 97(2) of Water Act which requires that the Respondents give 14 days’ notice prior to such suspension and/or disconnection. Hence the decision was made in contravention of their right to fair administrative action as provided under article 47(1) of the Constitution. Article 47 provides in mandatory terms that  

“every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”
51. This provision binds all persons and all state organs in the course of performing their duties so as to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. The failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the values of article 19(1) of the Constitution which states that the Bill of Rights is an integral part of Kenya’s democratic state as the framework for social, economic and cultural policies.



52. The importance of this right to fair administrative action as a constitutional right in Article 47 was emphasized by the Court of Appeal in the case of *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR that;

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

53. In response to the claim by the Petitioners that the disconnection of water supply was done before issuance of notice, the 1<sup>st</sup> Respondent stated that the Petitioners were well aware of the dates the permits were issued and when they would expire and what they were required to do was to simply apply for a renewal thereof.

54. The question arising is whether there was need to issue notice to the Petitioners before disconnecting their water supply. A copy of the letter approving the application for and the actual Permit issued by the 1<sup>st</sup> Respondent was annexed to the Petition. There are two letters dated 11<sup>th</sup> September, 2019, and 23<sup>rd</sup> May 2019 by the 1<sup>st</sup> Respondent enclosing the two permits issued. The contents of the two letters are similar save for dates and the 1<sup>st</sup> Respondent writes to the 1<sup>st</sup> Petitioner thus;

“In this connection, your attention is drawn to the special condition which is indicated on the attached form WRMA 010 under reference which includes:

- i. Payment of water use charges on monthly or quarterly basis
- ii. This permit will lapse on 16<sup>th</sup> August 2024 after which you will be needed to renew the same failure to which a penalty of kshs 500 per month will apply over the period the permit is not renewed.”

55. Under paragraph (d) of the permit (WRA 010), it provided that where the permit holder does not apply for renewal of the permit, the Authority (read 1<sup>st</sup> Respondent) shall on expiry initiate cancellation in accordance with section 38 of the Act. Section 38(2) provides that a notice be served on the permit holder but that is only applicable where the cancellation or variation of the permit is due to failure to observe conditions and terms thereof. In this instance, the Permit had expired so there is nothing to cancel and Black’s Law dictionary defines expiration as, “the ending of a fixed period of time, formal termination or closing date.”

56. Both letters drawn by the 1<sup>st</sup> Respondent spelt out the expiry dates of the permits and the consequences of not applying for the renewal. The Petitioners did not plead that they had applied for renewal of the permit and that the application was not considered. Neither was there a copy of any such application annexed to the affidavit sworn in support of the Petition. From the letters annexed, it clear that the Petitioners were given a water permit that was running for a period of five (5) years.

57. Despite being aware of the date of expiry of their license, the Petitioners did not take steps to apply for its renewal. Their complaint that their water was disconnected on 23<sup>rd</sup> of August 2024 which is after the expiry of the licenses for both boreholes cannot be deemed as a violation of article 47 of the



Constitution. There was reasonable and sufficient notice provided in the permit document and the Respondents cannot be blamed for Petitioners inaction towards the expiry dates of their licenses.

58. They have referred to Regulation 97 (2) which in my view is inapplicable to the Petitioners' case where the permit had already expired. The Regulation as quoted by the Petition states that the 1<sup>st</sup> Respondent may within fourteen days following notice to a permit holder suspend, initiate the cancellation process and or vary in whole or in part the permit if the permit holder fails to pay the water uses charges for any one payment period or for a period of four months after the due date.

**c. Unconstitutionality of Section 89 of the Water Act?**

59. The Petitioners challenged the constitutionality of Section 89, Water Resources Regulations No. 43 of 2016, the legal framework that justified the disconnection in subject. The Petitioners argued that whereas the title of the above legal provision reads "Time limitation on arrears", the contents are different, vague and confusing in contrast with the previous legal regime—the Water Resources Management Rules, 2007—Regulation 107 "Time limitation on arrears", which established a clear limitation period for water use arrears, restricting the levying of charges to a maximum of twelve (12) months.

60. This complaint arose following the Respondents' decision to levy water charges and disconnect water supply. The impugned invoice is dated 14.03.2023 for amount of Kshs 288,419.00. The charges are broken down as follows;

G/water use charges quantity 22,906 rate 10.00 amount 229060

WR conservation charge 229060 rate 0.10 amount 22906

Water Conservancy levy 229060 rate 0.05 amount 114

G/Water permit fee 22500

61. The other document the Petitioners have annexed is a statement which gave the charges for the start date as 11<sup>th</sup> Sept 2019 and stop date as 14<sup>th</sup> March 2023. They did not indicate any document to show how much they were paying per month/quarter. The permit also required them to submit to the 1<sup>st</sup> Respondent water use self-assessment forms WRMA 015 which would corroborate their assertion that the sum invoiced was arrears charged. It is not clear from the pleadings why the sum of Kshs 288,419.00 was demanded.

62. The disconnection on 23<sup>rd</sup> August 2024 was pursuant to the expiry of the permit which the Petitioners chose to say nothing about instead asking this court to declare Rule 89 unconstitutional. The Petitioners have not produced any letter written to the Respondents to complain that the invoice dated 14<sup>th</sup> March 2023 was irregular. When they applied for the permit, the Petitioners were aware that they were to pay for the water consumed and in the absence of payment of water consumed for the period invoice, the Petitioners can not use the law to run away from its obligations.

63. They correctly submitted that rights come with obligations as set out under article 24 of the Constitution. Their obligation in this case was to pay for the water used and to apply for renewal of the permit before expiry. In default of this, they exposed themselves to being denied the social right to abstract water under article 43 of the Constitution. I find they are not entitled to the declaratory order on the constitutionality of section 89 or Regulation 89 of the Water Act.

64. In regard to prayer (a), (g), and (h) of the Petition, I find the same were premature. Let the Petitioners comply with the provisions of the relevant Statute (Water Act) by making an application for a permit just like they previously did and not use this court to by-pass the process under the guise of violations



of rights. There was no proof made as already stated herein above for the prayers under paragraphs (b) to (e) of the Petition. There was no evidence made that the Respondents intended to charge any further arrears as prayed under prayer (j).

65. In summary, I find no merit in any of the reliefs sought in the Petition. On the issue of costs, the Respondents are government agencies who have used tax payer's money including the Petitioners to defend this case. Therefore, I find no justifiable cause to penalise the Petitioners to pay them costs. The Petition is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2025.**

A. OMOLLO\*\*

JUDGE\*\*

