



Kariuki & 3 others (Suing as Chairman, Vice Chairlady, Secretary and Treasurer of members on their behalf and of) Lake Naivasha Riparian Association) v National Land Commission & 5 others (Environment & Land Petition 17 of 2021) [2023] KEELC 15962 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15962 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION 17 OF 2021**

A OMBWAYO, J

FEBRUARY 23, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(2), 10, 20(2), 21, 22(1), 23(3), 27(1), (2), (5), 40(6), 47, 50(1), 60(1), 62(1), (N), 67, 69, 70, 162(2) AND 258 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

**MARK KARIUKI 1ST PETITIONER
ALEXANDRA BELL 2ND PETITIONER
MAIRO RETIEF 3RD PETITIONER
GARY HOPSCRAFT 4TH PETITIONER
SUING AS CHAIRMAN, VICE CHAIRLADY, SECRETARY AND TREASURER
OF MEMBERS ON THEIR BEHALF AND OF) LAKE NAIVASHA RIPARIAN
ASSOCIATION**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
NIXON KARIUKI THUO 3RD RESPONDENT
HASSAN ALIOW ROBA 4TH RESPONDENT
DIRECTOR OF SURVEYS 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**



JUDGMENT

The Petitioners' Case

1. The petitioners are the chairman, Vice Chairman, Secretary and treasurer of Lake Naivasha Riparian Association which is a non-governmental association of owners of land around Lake Naivasha.
2. The said association was founded in 1929 with the purpose of safe guarding riparian land around the lake. The petitioners aver that the Lake Naivasha Catchment Area Protection Order 2012 gazetted by Legal Notice No. 8 of 2002 published in the Kenya Gazette Supplement No. 8 of 16th January 2013 defines Lake Naivasha riparian land as all that land and water enclosed within Moi North Road and South Lake Road of Naivasha District which falls below 1892.8 metres above sea level or 6,210 feet above sea level contour.
3. On or about 10th August 2021, Grema S.A one of the petitioners and the registered owners of land parcel No. Naivasha/Municipality Block 5/203 and 204 each measuring 4.06 Hectares adjoining Lake Naivasha reported trespass on the Lake Naivasha riparian land adjoining his land by persons who declined to identify themselves.
4. They reported the said trespass on diverse dates including 10th, 23rd and 24th August 2021 to the 1st Respondent, the Cabinet Secretary of the Ministry of Lands and Physical Planning, the County Government of Nakuru and the Directorate of Criminal Investigations Naivasha who stopped the invasions and commenced investigations on the matter.
5. On 14th September 2021, the petitioners allege that they discovered from the investigations that the 1st and 2nd Respondents unlawfully and in breach of the law allocated the 3rd respondent about 23.28 hectares of the Lake Naivasha riparian land adjoining land parcels No's Naivasha/Municipality Block 5/203 and 204 encroaching onto Grema S.A properties.
6. On 6th May 2003, the 1st and 2nd respondent allegedly opened a land register and registered the riparian land to the 3rd respondent as Title No. Naivasha Municipality Block 5/372 and a certificate of lease issued for 99 years from 1st June 1994.
7. The petitioners also aver that they discovered that the 1st and 2nd respondents by themselves, the commissioner of lands and the 5th respondent illegally created a Survey Map registered on 2nd November 1998 registered as F/R No. 168/75, Folio 352 and Registration No. 4 creating the impugned land.
8. The petitioners further aver that the alleged Survey Map purporting to create parcel 372 encroached into parcels known as Title No. Naivasha/Municipality Block 5/203 and 204. That the original map of the area, Survey Map dated 25th May 1984, Register No. 75 and Folio No. 168 with RIM SA. 37/A III D 3 registered as F/R No. CT/67/3818 does not have plot No. 372 but has parcels known as Title No. Naivasha/Municipality Block 5/203 and 204 with the now grabbed riparian land in between the petitioners parcels and the lake.
9. That they also discovered that on or about 2nd September 2009, the land was transferred to the 4th Respondent under unclear circumstances and a Certificate of Lease recorded in the said Land Register. That the 1st and 2nd Respondents did not at any time publish a notice of intent of allocation of the public land to the 3rd and 4th respondents.
10. The petitioners aver that the parcel of land comprising of Title No. Naivasha Municipality Block 5/372 is not only riparian land but also ecologically sensitive public land comprising of wetlands, endangered



or endemic species of flora and fauna and therefore its allocation to the 3rd and 4th respondents was unlawful, illegal and irregular.

11. The petitioners further aver that the alienation of public land was not as per the provisions of the law more specifically Sections 12 to 19 of the Land Act, Article 40(6) and 60(1) of the Constitution of Kenya and Section 109 of the Land Registration Act 2012.
12. That despite the complaints, the 1st respondent has failed to discharge its mandate under Article 67(2), (a), (e), (h), 68 (v) of the Constitution of Kenya and Sections 14 and 15 of the National Land Commission Act particularly to manage public land on behalf of the national and county governments.
13. The petitioner seeks for the following prayers:
 - a. A declaration that the alienation, demarcation and allocation of all that land within Moi North Road and South Lake Road of, Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd and 4th Respondent's by way of a Certificate of Lease, Deed Plans and any other document of title thereto including Survey Map registered as F/R No. 168/75, Folio 352 and Registration No. 4 on 23.11.1998 is illegal, unlawful, un procedural, irregularly, contrary to the Constitution of Kenya, 2010 hence null and void.
 - b. An Order of judicial review by way of certiorari do issue to call, remove, deliver up to this Honourable Court and quash the decision of the 1st Respondent particularly the decision by the 1st Respondent and or its predecessor to demarcate, alienate and allocate all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 23.28 acres/hectares comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd Respondent and transferred to 4th Respondent's by or evidence by a Certificate of Lease dated 2/09/2009, Deed Plans and. 'any other document of or creating such title thereto including Survey Map registered as F/R No. 168/75, Folio 352 with RIM SA. 37/A III D 3/133/2 and Registration No. 4 on 23.11.1998.
 - c. An order of permanent injunction and or prohibition to restrain the 3rd and 4th Respondent and herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, alienating, allocating, selling, leasing, transferring to anyone, trespassing, remaining on, wasting away, damaging, removing, cutting trees or any vegetation thereon, draining the water thereon, charging, encumbering and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 23.28 acres/ hectares comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd and 4th Respondent's by way of a Certificate of Lease, Deed Plans and any other document of or creating such title thereto including Survey Map registered as F/R No. 168/75, Folio 352 with RIM SA. 37/A III D 3/133/2 and Registration No. 4 on 23.11.1998 or otherwise.
 - d. An Order of permanent injunction and or prohibition to restrain the 1st, 2nd and 5th Respondents herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, demarcating, alienating, allocating,



transferring to the 3rd and 4th Respondents or any other private person and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6.210 feet above sea level contour or with the High and lower water mark of Lake Naivasha whether identified as measuring 23.28 acres/hectares comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd and 4th Respondent's by way of a Certificate of Lease. Deed Plans and any other document of or creating such title thereto including Survey Map registered as F/R No. 168/75, Folio 352 with RIM SA. 37/A III D 3/133/2 and Registration No. 4 on 23.11.1998 or otherwise in contravention of National Land Commission Act, the Land Act, 2012 and the Constitution of Kenya, 2010.

- e. Any other relief that the Court may deem fit to grant in the circumstances of the Petition.
 - f. Costs of the Petition.
14. The petition was supported by the affidavit of Mark Kariuki sworn on 18th November 2021. He reiterated the contents of the petition and stated that Kenya is a signatory and a member of RAMSER Convention on Wetlands of International importance especially as a Waterflow Habitat and that in 1995, the Republic of Kenya designated Lake Naivasha as a wetland of significant importance requiring special protection measures by the Government of Kenya and stakeholders including the petitioners.
 15. He deposed that the RAMSER Convention on Wetlands of International importance requires member states to identify and protect wetlands as prescribed in the convention which forms part of the laws of Kenya by virtue of Article 2(6) of the Constitution and therefore the allocation of riparian land for private use is contrary to the RAMSER convention.
 16. He further deposed that on 5th July 1998, the petitioner published a Caveat Emptor notice to the public in the local dailies of the above date warning the public that the riparian land at Lake Naivasha is public land and a wetland which ought to be protected and not available for alienation.
 17. He also deposed that after the complaints by the petitioners, the 1st respondent published a report acknowledging that the suit property is public land but failed to discharge its public duty under the Constitution and Sections 14 and 15 of the National Land Commission Act.
 18. He deposes that the 4th Respondent has threatened to commence personal developments unless restrained by this court.

2nd, 5th and 6th Respondent's Response to the petition

19. The 2nd, 5th and 6th Respondents filed a Replying Affidavit sworn by Roussos Ritho Mwangi sworn on 27th April 2022 and filed on the same date in response to the petition.
20. He deposed that he is a Land Registrar at Naivasha and that land parcel No. Naivasha/Municipality Block 5/372 measures an approximate area of 23.28 Ha.
21. He also deposed that the Green Card indicates that the suit property is registered under the Government of Kenya as Entry 1 and no other person has been registered thereafter but an encumbrance has been placed.
22. He further deposed that there is also a White Card which was opened on 6 May 2003 that indicates that the suit property was first leased to Nixon Kariuki Thuo and a Certificate of Lease issued on 6th May 2003 and that the property is currently leased to Hassan Aliow Roba I.D No. 24422259 as Entry No. 3.



23. He deposed that the lessee has a term of 99 years and the annual rent is Kshs 40,000 (revisable). That there is a restriction that was placed on 31st August 2021 indicating that no dealings are to be undertaken pending authenticity of the lease currently held by Hassan Aliow Roba I.D No. 24422259.
24. He also deposed that as per the Court Order issued on 22nd November 2021 a restriction was placed pending the hearing and determination of the present suit.
25. He further deposed that for the Lease to be registered, an allotment letter has to be issued by the National Land Commission together with an approval plan from the Director of Physical Planning. The said documents are all issued after the requisite applications have been made and after which a survey plan is issued and later the Registry Index Map. Afterwards, a lease is issued and registered.
26. He concluded by stating that the responsibility of the Land Registrar is registration and he cannot authenticate the lease documents as this is the duty of the National Land Commission and the Land Administration Department.

1st Respondent's Response

27. In response to the petition, the 1st respondent filed a replying affidavit sworn on 4th July 2022 and filed on 6th July 2022 sworn by Benard Opa.
28. He deposed that the 1st respondent is an independent commission established under Article 67(1) of *the Constitution* and is operationalized by the *National Land Commission Act* No. 5 of 2012 which provides for its functions including the management of public land on behalf of the National and County Governments.
29. He also deposed that the suit property falls within the constitutional and various statutory definitions of public land and as a manager of public land, it is opposed to any alleged allocation of the said land and that it played no role whatsoever in the alleged allocation.
30. He further deposed that it did not allocate the 3rd respondent the suit property and further that the petitioner alleges that the said allocation was done in 1994 which was before the existence of the commission and therefore they did not participate in the alleged allocation of the suit property.
31. That despite it being a successor of the Commissioner of Lands, the 1st respondent is not the custodian of the records related to the alleged allocation and therefore the only party who could produce the documents is the 2nd Respondent.
32. That the Chief Land Registrar has the statutory authority to investigate the validity of any lease or registration document and is therefore best placed to explain the circumstances under which the alleged allocation happened.
33. That the Water Resource Authority is the statutory manager of riparian land and since Lake Naivasha riparian land is gazetted as such, the authority should be enjoined to the proceedings since it has a vested interest given its direct responsibility regarding the subject matter.
34. That the commission received a complaint by way of a letter dated 18th August 2021 regarding the alleged allocation of the suit land and the subsequent activities of the 3rd and 4th respondent on both the suit land and the neighbouring properties.
35. That upon receipt of the complaint, it conducted a field visit and stakeholder engagement with the community at Naivasha from 6th to 8th October 2021 and published a report and so it did not abdicate its constitutional and statutory obligations regarding the complaints raised by the petitioners.



36. The 1st respondent states that the petition alleges violation of constitutional rights by the commission but adduces no proof of any of the alleged violations. That the order of certiorari sought for by the petitioners cannot be issued as the said allocation occurred in the year 1994 and a period of over six months has lapsed as provided for under Order 53 Rule 2 of the Civil Procedure Rules.
37. That the court should summon and compel the concerned officials from the 2nd, 5th and 6th respondents to shed light on the process of allocation of the suit land to the 3rd and 4th respondents as well as provide all the necessary documents in their custody regarding the suit land in order to assist the court in determining the validity and allocation of the suit land.
38. He concludes by stating that the petition raises no reasonable cause of action against the 1st respondent.

Petitioner's Response to the Respondent's Replying Affidavit

39. The petitioners filed a supplementary affidavit sworn on 9th December 2022 and filed on 17th January 2023 sworn by the 1st petitioner.
40. He deposed that the 1st respondent acknowledges that the subject property is government land that was not available for alienation. That the 2nd respondent failed to illustrate that the registration of the public land was procedural or lawful. That it is trite law that public land cannot be disposed off to private individuals without prior allotment illustrated by an allotment letter by either the commissioner of lands or the 1st respondent.
41. He also deposed that the absence of the allotment letter as admitted by the respondents is prima facie evidence that the suit property was illegally and procedurally alienated.
42. That the purported second file or green-card opened for the subject property and the same registered to the 3rd respondent without proof of an application for the said land by the latter, allotment letter by the Commissioner of Lands, subsequent payments by the 3rd respondent with corresponding approvals of deed plan and a survey plan ultimately culminating into a certificate of lease is clear evidence of illegal and irregular alienation of public land.
43. That the functions and powers of the Commissioner of Lands under the repealed Governments [Land Act](#) were taken up by the National Land Commission by reason of clause 7 of the 6th Schedule of [the Constitution](#) of Kenya, 2010 and the above position was restated by the Supreme Court of Kenya in the Advisory Opinion Reference No. 2/2014 in the Matter of the National Land Commission [2015] eKLR.
44. That the 1st Respondent is the custodian of public land and its failure to remedy the above irregularities and illegality in allocation or disposal of the subject property despite having acknowledged the said illegalities is a breach of Article 67(2)(e) of [the Constitution](#) of Kenya.
45. That there is no evidence that the 1st Respondent initiated a review of the grant relating to the subject land herein since its establishment through the [National Land Commission Act](#) on 2nd May 2012 or any time with the statutory 5 years it was required to do so.
46. That the allegations that the 1st Respondent's mandate to review the grant herein lapsed under [National Land Commission Act](#) and/or purporting to dissociate with the improprieties of the demised Commissioner of Lands office is in the circumstances inexcusable abdication of its constitutional duty as a custodian and manager of public land.
47. That the 1st respondent did not take any step to try and recover the suit property upon learning that the allocation was irregular. That section 158 of the [Land Act](#) and Article 40(6) of [the Constitution](#) affords



no protection to any land or property acquired illegally hence the same must be revoked by the court as the 1st Respondent conceded that it has no statutory power to review the Grant.

48. That it is not disputed that the subject property is part of the protected area of lake Naivasha by the Lake Naivasha Catchment Area Protection Order 2012 by Gazette Notice No. 8 of 16/01/2013 and public land by Article 62(1)(i) of *the Constitution* of Kenya.

Submissions

49. The Petitioners filed their submissions dated 16th January 2023 and filed on 17th January 2023. The 2nd, 5th and 6th respondents filed their submissions dated 13th January 2023 and filed 18th January 2023.
50. The petitioners identified the following issues for determination;
- a. Whether the constitutional rights of the petitioners have been violated by the actions of the respondents
 - b. Whether the petitioners have demonstrated constitutional violations of threats thereof of their right to public participation and healthy sustainable environment.
 - c. Whether the petitioner should be awarded costs of the application.
51. On the first issue, the petitioners submitted that Article 42 of *the Constitution* grants them a right to a clean and healthy environment. They further submitted that Article 22(1) of *the Constitution* guarantees the right of every person to initiate court proceedings claiming that a right or fundamental freedom has been violated.
52. That Article 70 of *the Constitution* grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment. The petitioners submitted that therefore one does not need to have a personal interest before filing a petition alleging infringement of the right to a clean and healthy environment. They relied on the case of Joseph Leboo & 2 Others vs Director Kenya Forest Services & another [2013] eKLR in support of their arguments.
53. The petitioners submitted that Section 18 of the *Environment and Land Court Act* and Section 3(5) of the *Environmental Management and Co-ordination Act* provides that the court should be guided by the principle of intergenerational equity while resolving environmental disputes.
54. The petitioners also submitted that the suit property is riparian land and that Part IX of the Water Resources Management Rules 2006 provides for the conservation of riparian and catchment areas.
55. On the second issue, the petitioners submitted that they discovered that the suit property which is riparian land had been alienated and allocated to the 3rd respondent. That since the suit property is public land, it was not available for allocation to the 3rd and 4th respondents. Therefore the allocation was a breach of *the Constitution* and they cited the decision in the case of Kenya Anti-corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR among other cases in support of their arguments.
56. The petitioners also relied on the cases of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR, Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443, Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005 and submitted that the 2nd, 5th and 6th respondents failed to demonstrate how the public land was allocated to the 3rd and later the 4th respondents for a private purpose.



57. The petitioners relied on the cases of Adrian Kamotho Njenga vs Council of Governors & 3 Others [2020] eKLR, Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia), 1997 WL 1168556 (ICJ) and submitted that the 1st respondent failed to discharge its duty under *the Constitution* as well as Sections 14 and 15 of the *National Land Commission Act* to review the legality of the said allocation of riparian land or take necessary steps to recover the same and therefore it is a violation of the petitioners right to a clean and healthy environment.
58. They concluded their submissions by seeking that it is in the interest of justice that the orders sought in the petition dated 18th November 2021 be granted.
59. The 2nd, 5th and 6th Respondents in their submissions identified the following issues for determination;
- a. Whether the 2nd, 5th and 6th Respondents have contravened the lease acquisition process.
 - b. Whether there were any acts of illegality, fraud or corrupt dealings by the 2nd, 5th and 6th respondents
 - c. Whether the petitioners are entitled to the reliefs sought.
60. On the first issue, it was submitted that that the petitioners failed to state with reasonable precision how the outlined constitutional provisions were violated. They relied on the cases of Anarita Karimi Njeru vs Republic [1979]eKLR, Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR and submitted that the petitioners have only outlined constitutional provisions without showing how the same was violated.
61. On the second issues, the 2nd, 5th and 6th respondents relied on the case of Council of Civil Service Unions vs Minister for the Civil Service [1984] and submitted that the Certificate of Title issued by the Registrar upon registration shall be taken as prima facie evidence that the person named as proprietor of the land is the absolute owner can only be challenged on the grounds of fraud or misrepresentation. They further submitted that the petitioners did not tender any evidence to prove the particulars of illegality as the burden of proof is upon them as provided for by Sections 109 and 112 of the *Evidence Act*.
62. On the third issue, the 2nd, 5th and 6th Respondents submitted that the petitioners are seeking judicial review orders and yet the course of action arose over twenty years ago which cannot be granted because of inordinate delay. They relied on the cases of Joccinta Wanjiru Raphael vs William Nangulu-Divisional Criminal Investigations Officer Makadara & 2 Others [2014] eKLR and Commissioner of Lands vs Kunste Hotel Limited [1997]eKLR among other cases and sought that the petition be dismissed with costs.

Analysis and Determination

63. After considering the petition, the replying affidavits and the submissions the following issues arise for determination;
- a. Whether the Petition meets the threshold of a Constitutional petition.
 - b. Whether the petitioners are entitled to the orders sought.
64. The court in the case of Anarita Karimi -vs- Republic 1976-1980 KLR held as follows:

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

65. The court in the case of *Ostenah Ogero Taracha v Ethics & Anti-Corruption Commission & Attorney General* [2017] eKLR held as follows:

It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107 (1) of the *Evidence Act* Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The letter and spirit of the above provision has been captured in several decisions of the superior courts including but not limited to the cases of *Anarita Karimi Njeru –vs- Republic* [1979] eKLR and *Mumo Matemtu –vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. Ancillary to the foregoing is the requirement that any prospective petitioner ought to set out his or her complaint with precision and clarity to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed.

66. In the present petition, the petitioners claim that the 1st and 2nd respondents unlawfully allocated the 3rd petitioner land parcel No. Naivasha/Municipality Block 5/203 measuring about 23.28 hectares which is part of Lake Naivasha Riparian Land. The petitioners further alleged that in 2009 the said property was transferred to the 4th respondent and a certificate of lease issued. They claim that the said alienation of the suit property did not comply with Article 10 of *the Constitution* of Kenya as no public participation was conducted and set out the various provisions of the law that they allege was infringed.
67. The petitioners further claim that the 1st respondent failed to discharge its duty of managing public land on behalf of the national and county governments and did not take any step to recover the riparian land. The petitioners therefore claim that the said allocation to the 3rd respondent and later the 4th respondents of the riparian land may result in an unhealthy environment and therefore their right to a clean environment is threatened.
68. The 1st respondent admits that it received a complaint with regards to the said property and conducted a stakeholder’s forum and published a report. The 1st respondent concurs with the petitioners that the suit property is public land which was irregularly allocated.
69. The 2nd, 5th and 6th respondents on the other hand indicate that land parcel No. land parcel No. Naivasha/Municipality Block 5/203 is registered in the name of Hassan Aliow Roba, the 4th respondent. They state that the duty of the Land Registrar is to conduct registration and that it cannot authenticate lease documents which is the duty of the National Land Commission and the Land Administration Department.
70. The 2nd, 5th and 6th respondents also argue that the petitioners have not demonstrated with reasonable precision how the outlined constitutional provisions have been violated.
71. It is not disputed that land parcel No. Naivasha/Municipality Block 5/203 is public land. Both the petitioners and the 1st respondent affirm that fact that while the 2nd, 5th and 6th Respondents confirm that a certificate of lease was issued to the 3rd respondent before it was transferred to the 4th respondent.



72. The court in the case of Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR held as follows:

A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial or violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.

73. It is my view that the petition under consideration raises issues of violation of constitutional provisions under the bill of rights and therefore a recourse is available to the petitioners in this court where the petitioners are invoking this court's constitutional jurisdiction.

74. The court in the case of Bernard Murage -vs- Fine Serve Africa Ltd & others (2015) eKLR held as follows:

Not each and every violation of the Law must be raised before the High Court as a Constitutional issue. Where there exists alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.

75. It is my view that the petitioners have demonstrated how their rights with regards to the suit property have been infringed by demonstrating that the suitland is public land and more so riparian land that is protected by law and therefore the petition satisfies the threshold of what constitutes a constitutional petition.

76. This court finds that Article 42 of *the Constitution* grants the petitioners a right to a clean and healthy environment and therefore by allocating the 3rd respondent the suit property, the 1st and 2nd respondent violated the petitioner's right to a clean and healthy environment. Article 42 provides:-

42. Environment

Every person has the right to a clean and healthy environment, which includes the right—

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.

77. The Petition is in tandem with the provisions of Article 22(1) of *the Constitution* that guarantees the right of every person to initiate court proceedings claiming that a right or fundamental freedom has been violated which is *pari materia* Article 70 of *the Constitution* of Kenya 2010 that grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment. Article 70 provides:-

Enforcement of environmental rights

- (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—



- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

78. The petitioners submitted that therefore one does not need to have a personal interest before filing a petition alleging infringement of the right to a clean and healthy environment. They relied on the case of Joseph Leboo & 2 Others vs Director Kenya Forest Services & another [2013] eKLR in support of their arguments.

79. This court finds that the petitioners have demonstrated that the suit property is riparian land and that Part IX of the Water Resources Management Rules 2006 provides for the conservation of riparian and catchment areas and therefore should be protected by law.

80. The suit property is public land, it was not available for allocation to the 3rd and 4th respondents and therefore the allocation was a breach of *the Constitution* and that the same was in breach of Article 62(3) and (4) retrospectively.

81. *The Constitution* of Kenya 2010 (COK) provides for three classifications of land and they include public, private and community land. Public land includes all land that is used, held and occupied by any state organ, this also includes all forests, game reserves, water catchment areas, national parks and specially protected areas, as well as all natural water bodies that can be defined by an Act of Parliament. Based on this detailed definition on the composition of public land, riparian land is considered to form part and parcel of public land given the government's vast control of all areas that encompass public land including watercourses. Private land on the other hand consists of any land held under either freehold or leasehold tenure by any person and any other land that is declared private by an Act of Parliament. Community land consists of any land that is vested and held by a group of persons identified on the basis of ethnicity, culture or community of interest. In both cases, that is private and community land, should the land be traversed by a watercourse, that land is considered to be riparian land and owned under the respective tenures.

82. In *Milimani Splendor Management Limited v National Environment Management Authority & 4 others* [2019] eKLR the court observed as follows;

"40. Section 9 of EMCA enjoins the 1st Respondent to co-ordinate the various environmental management activities being undertaken by lead agencies and to promote the integration of environmental considerations into development policies, plans, projects and programmes to ensure the proper management and use of environmental resources. Sections 108 and 111 of EMCA empower NEMA and the court respectively to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment. This places the court and NEMA on the forefront in the protection of the environment and lends credence to the preamble to *the Constitution* which states that the people of Kenya are respectful of the environment and are determined to sustain it for the benefit of future generations.



.....

53. It now behoves every person to play an active role in environmental protection in light of the Article 69 (2) of *the Constitution* which places the duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development. Construction of buildings on a riparian reserve would have a deleterious effect on the flow of the river with serious consequences for the ecology and the court is enjoined to apply the prevention principle in preventing activities that may cause damage or harm to River Kirichwa.”
83. The respondent are found to be in clear violation of articles 42 and 62 (3) and (4) of *the constitution* of Kenya 2010 and therefore the court grants a declaration that the alienation, demarcation and allocation of all that land within Moi North Road and South Lake Road of, Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd and 4th Respondent's by way of a Certificate of Lease, Deed Plans and any other document of title thereto including Survey Map registered as F/R No. 168/75, Folio 352 and Registration No. 4 on 23.11.1998 is illegal, unlawful, un procedural, irregularly, contrary to *the Constitution* of Kenya, 2010 hence null and void.
84. Secondly, this court grants an Order of judicial review by way of certiorari do issue to call, remove, deliver up to this Honourable Court and quash the decision of the 1st Respondent particularly the decision by the 1st Respondent and or its predecessor to demarcate, alienate and allocate all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha or measuring 23.28 acres/hectares comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd Respondent and transferred to 4th Respondent's by or evidence by a Certificate of Lease dated 2/09/2009, Deed Plans and. ‘any other document of or creating such title thereto including Survey Map registered as F/R No. 168/75, Folio 352 with RIM SA. 37/A III D 3/133/2 and Registration No. 4 on 23.11.1998.
85. The petitioners prayed for an order of permanent injunction and or prohibition to restrain the 3rd and 4th Respondent and herein either by themselves, through their servants and or officers or anyone whatsoever acting on their instructions from surveying, alienating, allocating, selling, leasing, transferring to anyone, trespassing. remaining on, wasting away, damaging, removing, cutting trees or any vegetation thereon, draining the water thereon, charging, encumbering and or in any way dealing or interfering with all that portion of land within Moi North Road and South Lake Road of Naivasha District which falls below the 1892.8 metres above sea level or 6,210 feet above sea level contour or within the High and lower water mark of Lake Naivasha whether identified as measuring 23.28 acres/ hectares comprised in or referred as Title No. Naivasha Municipality Block 5/372 allocated to the 3rd and 4th Respondent's by way of a Certificate of Lease, Deed Plans and any other document of or creating such title thereto including Survey Map registered as F/R No. 168/75, Folio 352 with RIM SA. 37/A III D 3/133/2 and Registration No. 4 on 23.11.1998 or otherwise but this court finds that having granted an order of certiorari above it would be superfluous to grant a permanent injunction. Each party is ordered to bear own costs of the petition.

DATED, SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 23RD DAY OF FEBRUARY, 2023.

A O OMBWAYO



JUDGE

