



Sikalieh (Suing as the Chairman of Karen Langata District Association) v Kamenwa & 2 others (Environment & Land Petition E056 of 2022) [2023] KEELC 15713 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E056 OF 2022
EK WABWOTO, J
FEBRUARY 16, 2023**

BETWEEN

SAMORA SIKALIEH (SUING AS THE CHAIRMAN OF KAREN LANGATA DISTRICT ASSOCIATION) PETITIONER

AND

FREDRICK CHEGE KAMENWA 1ST RESPONDENT

WATER RESOURCES AUTHORITY 2ND RESPONDENT

WATER SERVICES REGULATORY BOARD 3RD RESPONDENT

RULING

1. This ruling is in respect to the Petitioner’s application dated 28th November 2022 and the 1st Respondent’s preliminary objection dated 19th December 2022.
2. The Application was made vide a Notice of Motion seeking the following orders: -
 1. Spent..
 2. Pending the hearing and determination of the application herein the court be pleased to issue the following orders.
 - a. An order of injunction be issued restraining the 1st Respondent, his servants, agents or otherwise howsoever from selling water on a commercial basis, allowing any water bowsers/trucks access his borehole located on his property located along Acacia Avenue in Karen contrary to the domestic permit on WRMA/30/NRB/3AA/15040/G issued by Water Resources Authority on 29th June 2019 that restricted domestic water allocation of 20.00 m3/day and be restricted to abstract only 20.00 m3/per day



for domestic use only pending the determination of the petition and further orders of the court.

- b. The 1st Respondent do forthwith file under oath the quantity of water used between 29th June 2021 and the date of filing the petition within 7 days of service of the court order in respect of domestic permit no. WRMA/30/NRB/3AA/15040/G in accordance with Regulation 87 of the Water Resources Regulations, 2021 and submit records showing the number of water bowers collecting water on a daily basis since 29th June 2021 to date and the total income derived from the sale of water on a commercial basis.
 - c. The 1st Respondent to file under oath a copy of the Borehole Completion Report and certificate regarding the borehole construction.
 - d. The 1st Respondent do file under oath all the readings from the measuring device submitted to the 2nd Respondent in respect of the domestic permit No. WRMA/30/NRB/3AA/15040/G in accordance with form WRA 015 set out in the Thirteenth Schedule of the Water Resources Regulations, 2021.
 - e. The 2nd Respondent do forthwith take readings of the quantity water used by the 1st Respondent in respect of the domestic permit no. WRMA/30/NRB/3AA/15040/G between 29th June 2021 and the date of filing the petition and file the report in court within 7 days of taking the readings in accordance with Regulation 87 (3) of the Water Resources Regulations, 2021 and verify that the 1st Respondent's measuring device is accurate.
3. Pending the determination of the petition the 2nd and 3rd Respondents be restrained from issuing the 1st Respondent with a water permit or licence to sell water abstracted from his borehole on a commercial basis and in the event any such license was issued since 18th October 2022 the same be withdrawn forthwith for lack technical assessment with public participation.
 4. The 2nd and 3rd Respondents be ordered to undertake and complete within 14 days of the order of the court the following actions:
 - a. Provide the Hydrogeological Assessment/Survey Report and Borehole Completion Report that formed the basis for the original application for water permit no. WRMA/30/NRB/3AA/15040/G issued by Water Resources Authority on 29th June 2019.
 - b. Establish the revenue lost by the illegal sale of water on a commercial basis and impose penalties and backdated water charges with interest from 29th June 2019 to date against the 1st Respondent and file and serve the report of revenue loss in court within 7 days of assessment.
 - c. Provide daily water meter readings and records of verifiable bowser water sales covering the period from 29th June 2021 to the date of the order of the court establishing the total water illegally abstracted over and above 20 cu m (cubic meters) per day allowed by the domestic water permit no. WRMA/30/NRB/3AA/15040/G issued by Water Resources Authority on 29th June 2019 to the 1st Respondent and file and serve the report within 7 days of completion.



- d. Assess the total water sold on a commercial basis since June 2019 and compare it with the life span of the water permit when the water was to be abstracted on a domestic basis only and provide a percentage of the excess water abstracted if the quota has been exceeded.
 5. Any other relief that the court may deem in the interests of justice.
 6. Costs be awarded to the Petitioner.
3. The application was supported by the following grounds:

1st Respondent selling borehole water commercially contrary to domestic permit.

1. The 1st Respondent has infringed the Petitioner's member's economic and social rights under Article 42(1) (d) of the *Constitution* to clean and safe water in adequate quantities and acted inequitably and in contravention of the Karengata Local Physical Development Plan 2016 (LPDP) by illegally selling water on a commercial basis contrary to the express terms of his domestic permit No. WRMA/30/NRB/3AA/15040/G issued by Water Resources Authority on 29th June 2019 and negatively impacting on the adequacy of groundwater resources.
2. The 1st Respondent by illegally selling water on a commercial basis is guilty of over - abstraction of water from the aquifer that exacerbates the decline in the aquifer's water level to the detriment of all those legally abstracting ground water.
3. Soon after obtaining his water permit in June 2019 the 1st Respondent illegally begun selling water on a commercial basis.

Particulars of Illegality

- a. Various residents in the vicinity of his property have confirmed that up to 30 water trucks continued to collect water from his private borehole during the day and night.
- b. Contrary to his permit for 20 cu m (cubic metres) per day his borehole is estimated to abstract about 300,000 litres of water on a daily basis for sale on a commercial basis.
- c. On average about 30 water bowsers collect water from his borehole.

WRA & WARMA have confirmed 1st Respondent is illegally selling water

4. Sometime in 2021 a complaint was made to the 3rd Respondent (WARMA) about the illegal use of the borehole and in mid- 2021, officials from WARMA visited the site and threatened to cap the borehole if the illegal abstraction persisted. As no action was taken to implement the threat, the 1st Respondent continues to conduct this illegal action with impunity and contravened the express order of WARMA.
5. By a letter dated 11th October 2022 WRA, following an onsite inspection and investigation, informed the 1st Respondent that:



Particulars

- a. He was issued with a domestic permit no. WRMA/30/NRB/3AA/15040/G issued by Water Resources Authority on 29th June 2019 that only granted domestic water allocation of 20.00 m³/day with a validity of 5 years up to 29th June 2024.
 - b. The sale of water on a commercial basis was contrary to the license.
6. The water Act in clause 34(4) of WRR 2021 requires that in the event of a change in the category of water use, the borehole owner is to apply for a new permit, and that any such new permit application is to be accompanied by an up-to-date Hydrogeological Survey/Assessment Report including the proper environmental impact assessment that includes consultations with all neighbouring license holders and stakeholders and that the NEMA EIA license shall be attached to the new permit application. The 1st Respondent has not complied with this mandatory statutory requirement.
 7. In utter contempt of WRA's letter of 11th October 2022, the 1st Respondent has continued to sell water on a commercial basis during the day and night.

Court has jurisdiction to grant orders to safeguard environment.

8. The court has jurisdiction under Article 70 of the Constitution and Sections 13, 18 and 19 of the Environment and land Court Act to grant injunctive orders to safeguard the environment, order discovery and production of documents and requisitioning document and make the following orders;

Respondents required to engage petitioner under the Karengata Local Physical Development Plan 2016 (LPDP)
9. The Petitioner is mandated under the Karengata Local Physical Development Plan 2016 (LPDP) to ensure the better management of Karengata's terrestrial and wetland biological diversity and ecosystems, ground and surface water resources.
10. The court in Professor Albert Mumma V County Government of Nairobi (2021) eKLR confirmed that KLDA must be consulted and involved in all matters covered by the LPDP. Hon Justice Komingoi held, inter alia:

“47. As the residents of Karen and Langata District Association are entitled to a clean and healthy environment as provided under Article 42 of the Constitution. The Respondent's disregard of the physical planning, legal framework has adversely affected the environment. I agree with the Petitioner's submission that by failing to give effect to the Recognition Agreement, this has hindered the Petitioner's members from effectively participating in the management and conservation of the



environment as provided for under Article 69(1) of the Constitution.”

Serious environmental degradation of water resource occurring due to 1st Respondents illegal sale of water.

11. Unless the 1st Respondent is enjoined, he blatantly continues to disregard the law and continues in the unlawful abstraction of ground water in a manner that is harmful to the environment and accelerating the depletion of the aquifer.
 12. No party should profit from his own illegality to the detriment of the public.
4. The Preliminary Objection was premised on the grounds that by dint of Section 11, 13(2) b, 55(1), 121 and 124 of the Water Act, the Petitioner had not utilized the mandatory dispute resolution mechanism.
 5. The facts of the case are that the 1st Respondent who resides along Acacia Avenue in Zone 2 Mbagathi Area dug a borehole and was issued with a domestic permit No. WRMA/30/NRB/3AA/15040/G by the 2nd Respondent on 29th June 2019. The 1st Respondent proceeded to sell water on a commercial basis for which the Petitioner and the respective residents association lodged several complaints with the 2nd Respondent and have now filed this Petition to remedy an alleged infringement of their rights.
 6. On 20th December 2022 the Court granted an interim injunction restraining the 1st Respondent, his servants and agents from selling water on a commercial basis contrary to the domestic permit issued by the Water Resources Authority. The orders were set to apply until 16th February 2023 when the matter was reserved for delivery of the ruling on the Application and the Preliminary Objection.
 7. The 1st Respondent filed submissions dated 20th December 2022 in which three issues for determination were set out as follows:
 - a. Whether the dispute herein emanates from a decision of the Authority or Regulatory Board as envisaged under Section 121 (1) of the Water Act, 2016?
 - b. Whether this Honourable Court has the jurisdiction to hear and determine the dispute herein?
 - c. Who bears the costs of the proceedings herein?
 8. It was posited that the dispute emanated from a decision of the Water Resources Authority as captured in the dated 11th October 2022. Therefore, in accordance with Section 121(1) of the Water Act, the Court would be devoid of jurisdiction.
 9. In the oral submissions and their Affidavit, the Petitioner averred that the remedies sought in the Petition are declarations and injunctive orders which are within the jurisdiction of this Court.
 10. I have carefully considered the preliminary objection, the application filed by the Petitioner and written and oral submissions filed by the parties and the authorities cited and the two main issues for determination is whether the preliminary objection filed herein is merited and whether the Petitioner is entitled to the orders sought in application dated 28th November 2022.
 11. In respect to the preliminary objection filed, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary



objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

12. The Supreme Court stated in the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others* [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection –against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [Emphasis added].

13. With regard to the issue of jurisdiction to hear and determine the Petition, the Supreme Court Kenya in *Communications Commission of Kenya and 5 Others Vs. Royal Medical Services & 5 Others* [2014] held that the principle of constitutional avoidance ensures that a Court will not determine a constitutional issue when a matter may properly be determined on another basis.

14. Paragraph 32 of the Petition enumerates the crux of the matter as follows:

- a) The 1st Respondent had infringed on the Petitioners’ members economic and social rights under Article 42 to clean and safe water in adequate quantities and in contravention of the Karengata Local Physical Development Plan 2016(LPDP) by illegally selling water on a commercial basis....”
- b) The 2nd and 3rd Respondents have failed in their constitutional and statutory duty to protect the environment and natural resources with a view to establishing a durable and sustainable system of water protection...”

15. On the issue of jurisdiction, Section 12 of the *Water Act* includes functions of the Water Resources Authority as follows:

- (a) formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood mitigation;
- (b) regulate the management and use of water resources;
- (c) enforce Regulations made under this Act;
- (d) receive water permit applications for water abstraction, water use and recharge and determine, issue, vary water permits; and enforce the conditions of those permits;
- (e) collect water permit fees and water use charges;
- (f) determine and set permit and water use fees;
- (g) provide information and advice to the Cabinet Secretary for formulation of policy on national water resource management, water storage and flood control strategies;



- (h) coordinate with other regional, national and international bodies for the better regulation of the management and use of water resources; and
 - (i) advise the Cabinet Secretary generally on the management and use of water resources. [Emphasis Mine]
16. Section 119 of the *Water Act* establishes the Water Tribunal as the dispute resolution forum of first instance. This jurisdiction of the Tribunal is well laid out under Section 121 as follows;
- “The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
- In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism”
17. In the present circumstances, the issue for determination is whether the dispute herein falls under the ambit of the Water Tribunal or the Environment and Land Court. In my view and contrary to the averments made by the 1st Respondent, the dispute herein is not linked to a decision or order made by the Authority but is actually the use of the 1st Respondent’s permit and its resultant impact on the environment. Moreover, the parties have not presented evidence of any business contract or an otherwise agreed dispute resolution forum.
18. In the case of *Embakasi East Court Company Limited & Another v Nairobi City Water & Sewerage Company*, where it was held that:
- “Do I need say more? The matters in dispute in this suit do not fall either under subsection (1) or under subsection (2) of section 121 of the *Water Act*, 2016...Referring the matter to the Water Tribunal would be engaging in futility. The Water Tribunal does not have the jurisdiction to entertain the issues in this case. This Court’s finding is that it is properly vested with the jurisdiction to hear and determine this matter.”
19. As a result, this Court finds that the contention that the Petition is filed contrary to the doctrine of exhaustion fails. In view of the foregoing, I hereby issue the following orders:
- a. That the Preliminary Objection dated 19th December 2022 is not merited and the same is dismissed.
 - b. The Notice of Motion Application dated 28th November 2022 is partially allowed under the following terms:
 - i. That pending the determination of the Petition, the 2nd and 3rd Respondents are hereby restrained from issuing the 1st Respondent with a water permit or license to sell water abstracted from his borehole on a commercial basis.
 - ii. The 2nd and 3rd Respondents are hereby ordered to undertake a Hydrogeological Assessment within 30 days of delivery of this ruling and further assess the impact



of the 1st Respondent's actions following the issuance of permit no WRMA/30/ NRB/3AA/15040/G issued on 29th June 2019.

iii. Following the Hydrogeological Assessment, the 2nd and 3rd Respondent will provide the consequent report to this court.

c. Costs will abide the determination of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Allen Gachuhi for the Petitioner.

Mr. Rono and Mr.Mburu for the 1st Respondent.

N/A for 2nd Respondent.

Ms. Chidzayo for the 3rd Respondent.

Court Assistant; Caroline Nafuna

