



REPUBLIC OF KENYA



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**M’ithilai v County Government of Meru & another (Environment & Land Petition  
E011 of 2021) [2022] KEELC 14956 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14956 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND PETITION E011 OF 2021  
CK NZILI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**M’IMAANA M’ITHILAI ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MERU ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

1. By a petition dated March 16, 2021, the petitioner as the registered owner of LR No Igembe/Akirangonde/B/1659 (hereinafter the suit property) sued the respondents, the 1<sup>st</sup> respondent through its agents, servants or employees for encroachment into approximately 0.0792 hectares of his land and for illegally and unprocedurally putting up a culvert while murraming a public road crossing his land, hence directing water into his homestead. As a consequence, during the rainy seasons the water from the culvert floods into the petitioner’s compound, farm and surroundings.
2. As a result, the petitioner averred that he had been subjected to untold suffering as he has been unable to enjoy his bill of rights as to clean and healthy environment as enshrined in Sections 3 & 9 of the *Environment Management Coordination Act*, Articles 10, 40(3) & 42, 47 of the *Constitution* as read together with Part VII of the *Land Act*.
3. The petitioner sought for the court to grant orders directing the respondents to remove the culvert adjacent to his land in default leave to remove it, attendant cost to be met by the respondent’s; declaration that the respondents actions were null, void and unconstitutional; reinstatement of 0.0792 ha of the land unlawfully taken away; special damages of Kshs 3.2 million and general damages.
4. Alongside the petition, the petitioner filed a notice of motion dated March 16, 2022 supported by an affidavit sworn on the even date by M’Imana M’Ithilai in which he annexed a copy of his title deed,



photographs showing the damage, copy of the valuation report for the damage and a demand letter to the respondents.

5. The 1<sup>st</sup> respondent filed a response dated April 14, 2022. It stated that the culvert was installed at a natural course where flood water had been flowing across as the established practice. That the flood water used to run into the petitioner's land as it was located on a depression and the petitioner dug the trenches directing flood water towards his home in a scheme to extort money from it. That the culvert was installed on public interest basis. That the petition raised unconstitutional issues and was founded on misinterpretation/misapplication of the law. That the claim if any was civil in nature requiring experts to testify and a site visit by the court.
6. The 1<sup>st</sup> respondent relied on a witness statement and a replying affidavit by Erick Muriuki dated April 14, 2021 & May 12, 2021, list of documents dated May 31, 2022 attaching photos accompanied by a certificate of electronic evidence pursuant to Sections 106B of the Evidence Act made by Ikioo Mutungi.
7. The 2<sup>nd</sup> respondent entered appearance and made a replying affidavit sworn by Mark Angwenyi on September 13, 2021. He averred that the 2<sup>nd</sup> respondent as established under Section 7 of EMCA had the mandate to exercise the general supervision and coordination of overall matters relating environment and the issuance of EIA licenses. That prior to the institution of the suit, the petitioner had not notified them of on the alleged violation of his rights as to clean and healthy environment occasioned by the construction of a murrum access road and the placement of a culvert adjacent to his farm by the 1<sup>st</sup> respondent. That the failure to inform them impeded their action but nevertheless they conducted an inspection of the project on 4.5.2021 as per the attached report marked MA '1'. That since the matter was in court, the 2<sup>nd</sup> respondent had refrained from the matter unless the court directs otherwise given the petitioner had a duty to inform them since the first avenue of seeking redress rested with them.
8. The 2<sup>nd</sup> respondent averred that the petitioner had not furnished the court with any evidence to prove that he alerted the 2<sup>nd</sup> respondent on the degradation of the environment and malicious damage to his property.
9. That had the petitioner acted in good faith and sought its audience, his property would have been preserved and the 1<sup>st</sup> respondent compelled by them to conduct a Comprehensive Project Report [CPR] or Summary Project Report [SPR] prior to commencement of the project. That the 2<sup>nd</sup> respondent demanded committed to ensure that that petitioner enjoys his environmental rights though any claims of compensation should fail since the petitioner had not satisfactorily proved negligence on the part of the 2<sup>nd</sup> respondent.
10. With leave of court parties opted to canvass the petition through written submissions dated August 23, 2022, August 27, 2022 and September 19, 2022 respectively.
11. The petitioner submitted that the issues for determination are: whether the court has jurisdiction; if the acts of the respondents violated his rights; and if he was entitled to the orders sought together with costs.
12. On the first issue the petitioner submitted the court under Articles 22 (1), & 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act has the jurisdiction to hear and determine the petition.
13. On the 2<sup>nd</sup> issue, the petitioner submitted that he was a registered owner of the suitland which was encroached by the road and destroyed by the flood waters flowing from the culvert making him incur



- loss and damages which under Articles 27(4), 40(3), 42 & 47 of the Constitution amounted to breach of his constitutional rights.
14. The petitioner submitted the extent of the damage and loss was captured in the valuation report and confirmed by the 2<sup>nd</sup> respondent's report marked MA '1'. The petitioner submitted that under Section 9 (2) and 59 of Environment Management and Coordination Act, the 1<sup>st</sup> respondent should not have carried out the project of murraming the road before involving the 2<sup>nd</sup> respondents in so far as the carrying out of a prior Environmental Impact Assessment [EIA] report to access the impact the project was likely to have on the surroundings.
  15. The petitioner submitted that the 2<sup>nd</sup> respondent's mandate in law was to ensure his rights under Article 47 (1) of the Constitution were not violated but unfortunately it failed to do so leading to the petitioner incurring loss and environmental damage under Articles 42, 69 & 70 of the Constitution.
  16. The petitioner averred that despite the above acts of breach by the respondents, nothing was tendered in this petition to justify the need for limitation of those rights under Article 24 (1) of the Constitution as regards public purpose or public interest.
  17. Therefore, the petitioner urged the court to find he was entitled to damages. Reliance was placed on Gitobu Imanyara & 2 others vs AG (2016) eKLR, Mohammed Feisal & 19 others vs Henry Kandie Chief Inspector of Police OCS, Ongata Rongai PS & 7 others (2018) eKLR, Dendy vs University of Witwatersrand (2016) ILRC 291, Emma Muthoni Njeri vs Nairobi Womens Hospital (2021) eKLR, Daniel Waweru Njoroge & 17 others vs AG (2015) eKLR.
  18. Regarding the respondent's responses, the petitioner submitted paragraph 17 of the replying affidavit dated September 13, 2021 confirmed that the 1<sup>st</sup> respondent ought to have conducted a comprehensive project report prior to commencement of the project. Similarly, the 2<sup>nd</sup> respondent also confirmed the culvert was discharging water into the petitioner's land with visible gullies and silt deposits. In that regard, the petitioner urged the court to find he has established that the action of the 1<sup>st</sup> respondent amounted to violation of his rights leading to damage hence is entitled to compensation.
  19. The 1<sup>st</sup> respondent submitted that after receiving complaints from the residents of Kiwanja area about an impassable road during the rainy seasons due to flooding of water, it conducted an inspection of the road through its department in charge of roads and allocated a road inspector who identified the culvert in question for the maximum benefit of the general public. The 1<sup>st</sup> respondent submitted that the said culvert was installed at a natural course where flood water crosses the road to prevent flooding of the road as was the procedure in road construction.
  20. Further the 1<sup>st</sup> respondent submitted that even before the culvert was installed, flood water used to run off from the upper side of the said land, which is located in a hilly place where natural water flows downwards as can be seen from the petitioner's photographs and map.
  21. The 1<sup>st</sup> respondent urged the court to find the petitioner did not meet the threshold of a constitutional petition going by the holding in Anarita Karimi Njeru vs Republic (1979) KLR, Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, since the petition has failed to lay out the actions by the respondents which he believes were wrong and or unconstitutional. The 1<sup>st</sup> respondent urged the court to find the petition was a private civil claim masquerading itself as a constitutional claim.
  22. The 1<sup>st</sup> respondent further submitted that the petitioner's land extend on both sides of the road. Therefore, water used to collect on the elevated side and run off into the lower side of his land across the road as per the use of braces by the surveyors, hence the loss the petitioner was claiming was



- wholly attributable to him since he has failed to control water in his parcel on the high side and it was completely wrong and illegal for someone to negligently cause a damage and then proceed to seek damages for it.
23. Relying on *Amani Kazungu Karema vs Jackmash Auto Ltd & another (2021) eKLR* which cited with approval *Clerk & Lindsell on Torts 18<sup>th</sup> Edition*, on the four requirements of tort
  24. The 1<sup>st</sup> respondent submitted that the petitioner's careless conduct in not restricting water from one side of his parcel of land to the other side resulted to the alleged damage and that the 1<sup>st</sup> respondent only came in to alleviate the suffering of thousands of citizens of the area in their day to day struggle to access various social amenities out a failure of the petitioner to restrict water flow. Therefore, the 1<sup>st</sup> respondent that submitted the installation of the culvert was to improve the lives of citizens on speedy transport.
  25. The 1<sup>st</sup> respondent relying on the witness statement by the chief inspector for roads, urged the court to find the evidence credible and if as requested by the petitioner the culvert was closed, the road will become inaccessible and impassable to the detriment of thousands of citizens of Kiwanja area. The 1<sup>st</sup> respondent submitted that if that was to happen, it would boil down to improper service delivery that is proper road construction vis a vis easy unjust enrichment of one individual under the guise of culvert construction directing flood water to his land.
  26. The 1<sup>st</sup> respondent urged the court to find that a proper inspection was always done in order to determine where the culvert would be installed and in this instance, it was installed on a natural course where flood water crosses.
  27. The 2<sup>nd</sup> respondent submitted that the issues for determination were:
    - a. Whether the mandate of the 2<sup>nd</sup> respondent was exercised judiciously.
    - b. If the 1<sup>st</sup> respondent was solely responsible and liable for the damages.
    - c. If the petitioner was entitled to the special and general damages.
  28. On the 1<sup>st</sup> issue, the 2<sup>nd</sup> respondent submitted that Section 7 of EMCA establishes NEMA pursuant to Article 72 of the *Constitution* whose mandate under Section 9 thereof is to exercise general supervision and co-ordination of all matters relating to the environment since Article 42 thereof grants every person a right to clean and healthy environment.
  29. The 2<sup>nd</sup> respondent submitted that the 1<sup>st</sup> respondent failed to invoke its mandate when it proceeded to construct a murram access road and placed a culvert adjacent to the property of the petitioner, hence violating Section 9 of EMCA by undertaking the project without engaging in its mandate which involves inter alia, assessing the 1<sup>st</sup> respondent's activities to prevent any foreseeable environmental degradation.
  30. Further, the 2<sup>nd</sup> respondent submitted that Section 12 of the EMCA grants powers to it in respect of lead agencies such as the 1<sup>st</sup> respondent and since the murram access Kiwanja road would qualify as a medium risk project as per the 2<sup>nd</sup> schedule of EMCA it required the 1<sup>st</sup> respondent to have submitted an Environmental Impact Assessment Study Report prior to the construction of the subject road.
  31. Consequently it was submitted that the 2<sup>nd</sup> respondent would have undertaken an integrated environmental impact assessment on the project area and assessed the environmental impact likely to have happened to the petitioner and in the alternative, if the petitioner would have notified the 2<sup>nd</sup> respondent on the alleged degradation, to his land by the building of the culvert, either the NEMA



- committee or officer or agent of NEMA as per Section 15 thereof would have been able to carry out an investigation in relation to the condition of the area in question.
32. The 2<sup>nd</sup> respondent submitted that there was also no record of the submission of either a Comprehensive Subject Report (CPR) or a Summary Project Report (SPR) in relation to the marram access road project by the 1<sup>st</sup> respondent, or a complaint/notification by the petitioner to the 2<sup>nd</sup> respondent.
  33. Therefore the 2<sup>nd</sup> respondent could not exercise its mandate but nevertheless, an inspection/ investigation of the subject property was efficiently conducted to identify the severity of the situation under Section 9 (2) of the EMCA and hence any redress by the 2<sup>nd</sup> respondent under Section 108 & 109 of the EMCA was limited due to the present suit.
  34. The 2<sup>nd</sup> respondent submitted that ideally a restoration order under Section 108 (2) of the EMCA would have been issued by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent requiring it to restore the environment as near as it may be to the state in which it was before the taking of the action and or an award of compensation.
  35. As to the liability for the damage on the part of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent submitted under Section 109 (1) & (2) of the Evidence that the burden of proof was on the petitioner and since he failed to seek reprieve from it, his indolence exacerbated the damages he has allegedly sustained, which would have been averted had the 1<sup>st</sup> respondent conducted a (CPR) or (SPR) prior to the commencement of the works for review and or supervision by the 2<sup>nd</sup> respondent.
  36. The 2<sup>nd</sup> respondent submitted there was no evidence that the 1<sup>st</sup> respondent committed the pleaded acts in the petition as per Section 129 of the *Evidence Act*, hence the 2<sup>nd</sup> respondent could not be held accountable unless the two relevant facts were proved to exist, hence urged the court to appreciate the principle of causation in arriving at its decision as held in *Elijah Ole Kool vs George Ikonya Thuo (2001) eKLR, (HLR) supra*.
  37. As to the reliefs sought, the 2<sup>nd</sup> respondent submitted that the special damages in law must not only be pleaded but must be proved as held in *Hahn vs Singh (1985) KLR 716, Christine Mwigina Akonya vs Samuel Kairu Chege (2017) eKLR*.
  38. Regarding general damages the 2<sup>nd</sup> respondent submitted that they were discretionary in nature and urged the court to be guided by the principles set out in *Southern Engineering Co Ltd vs Musingi Mutia (1985) KLR, Nzuki Isaac Muveke vs Francis Njogu Njehia (2021) eKLR*.
  39. On whether the culvert should be removed the 2<sup>nd</sup> respondent submitted, it was opposed to it since one of its mandate under Section 9 (2) & (69) of the EMCA is to monitor the projects or activities with a view of determining its immediate and long term effects on the environment and make the necessary recommendations to the relevant authorities regarding land use planning which relief if granted would go beyond the scope of the 2<sup>nd</sup> respondent supervisory mandate.
  40. The issues commending themselves for the court's determination are:
    - i. If the petition raises a constitutional controversy and has met the constitutional threshold.
    - ii. If the petitioner has exhausted the alternative dispute mechanism provided under the law before invoking court's jurisdiction.



- iii. If the petitioner has proved breach of his constitutional rights as set out in the petition against the 1<sup>st</sup> & 2<sup>nd</sup> respondents jointly and severally.
  - iv. What reliefs is the petitioner entitled to under the circumstances.
41. A party seeking constitutional reliefs based on infringement of constitutional rights and freedoms is supposed to comply with the procedure under the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, by setting out his capacity, name and address, facts relied upon, rights or freedoms violated, nature of injury caused, details of pending proceedings, signature and the reliefs sought.
  42. The promulgation of the Rules in line with Article 22 (3) of the Constitution were informed by Kenya's history and in particular the caselaw of Anarita Karimi Njeru, supra, Stanley Munga Gitbunguri v Republic [1985] eKLR, Mumo Matemu (supra).
  43. In the petition before court, the petitioner has set out the description of the parties, the constitutional foundation, facts relied upon, injury and damages caused, grounds upon which the violation is alleged and the reliefs sought. My finding therefore is that the petition is brought in line with the law.
  44. Turning to whether the petition raises a constitutional controversy for the court's determination, the complaint is that the 1<sup>st</sup> respondent in the process of undertaking a construction of a murram access road trespassed into the petitioner's Parcel No LR Igembe/Akirangondu B/1659 to the extent of 0.0792 ha without notice or prompt compensation, erected a culvert adjacent to the land, whereof flood waters were directed to the farm hence making both the farm and the homestead impassable, inaccessible, flooded and uninhabitable.
  45. The petitioner averred the actions of the 1<sup>st</sup> respondent were done without the involvement of the 2<sup>nd</sup> respondent a body which is constitutionally and statutorily required to oversee the right to clean and healthy environment generally and in particular approve such projects and mitigation measures in case of unintended adverse effects. The petitioner therefore pleaded he was entitled to move to this court for constitutional protection.
  46. A constitutional question is one whose solution is derived from the constitutional interpretation, the determination of the constitutional role of state organs, the legality of a legislation and the interplay between governments' departments.
  47. In this petition the 1<sup>st</sup> respondent takes the view that the petitioner's claim, if any is a mere civil dispute masquerading as a constitutional controversy. On the other hand, the 2<sup>nd</sup> respondent has pleaded and submitted that the petitioner failed to invoke its mandate before resorting to court where it would have acted against the 1<sup>st</sup> respondent as required under Section 9 of the EMCA but nevertheless, it initiated the investigations and established that the 1<sup>st</sup> respondent undertook the project without a (CPR) and [SRP] reports.
  48. In Okoiti vs the Cabinet Secretary Industry & Trade Cooperative Societies and 2 others E & L Petition E052 of 2021 (2022) KEELI3728 (KLR) 28<sup>th</sup> July (2022) (Ruling) the court held that Article 162 2(b) provides the court with the powers to hear and determine disputes over environmental planning and in particular disputes for redress of a denial to constitutional rights and freedoms as well as right to clean and healthy environment under Articles 42, 69 & 70 of the Constitution.
  49. The question before the court therefore is whether in the first instance the 1<sup>st</sup> respondent followed the law in undertaking the road project so as to be mindful of the environmental rights & freedoms of the public in general and in particular, the petitioner and if not so whether in undertaking the



- project in which it infringed the rights of the petitioner such breach is justifiable in the name of public interest. The second limb is whether despite the non-compliance with the law, the 2<sup>nd</sup> respondent lack of vigilance while the project was being undertake compromised the environmental rights of the petitioner and if so, should there be a wrong without a remedy?
50. The respondents have taken the view that even if there was breach the same was justified in public interest and that the petitioner did not exhaust the available alternative dispute mechanisms before resorting to a constitutional court.
  51. The general rule is a party must exhaust any such available alternative dispute mechanism as held in [\*Geoffrey Muthinja & another vs Samuel Muguna & 1756 others \(2015\) eKLR\*](#). In *William Odhiambo Ramogi & 3 others vs AG & 4 others (2020) eKLR*, the court was dealing with a case where a party opted to move to court without exhausting the set statutory mechanisms and the exceptions thereto among them, the suitability of the mechanisms and adequate audience before the said forum. The court held that any statutory provisions ousting the jurisdiction of the court must be construed restrictively.
  52. In this petition, the 2<sup>nd</sup> respondent has not only admitted but also confirmed that the project was undertaken by the 1<sup>st</sup> respondent without any attempted compliance with the EMCA and the rules made thereunder. There was no environmental impact assessment done or availed before the court. The 1<sup>st</sup> respondent has not denied that fact but invokes the wider public interest and urges this court to make a finding that such public interest should supersede the constitutional rights of the petitioner.
  53. To my mind, this court is the one with the mandate to enforce and protect the rights to clean and healthy environment. Therefore, the petitioner is properly before the court for answers to his constitutional questions which can only be answered through the [\*Constitution\*](#) and not the statutes.
  54. Article 42 of the [\*Constitution\*](#) provides that every person has the right to clean and healthy environment which includes protection through legislative and other measures contemplated in Articles 69 and 70 of the [\*Constitution\*](#). Article 69 provides that the state shall establish systems of environmental impact assessment, environmental audit and monitoring. Article 69 (3) imposes upon every person the duty to cooperate with state organs so as to protect and conserve the environment.
  55. Article 70 provides that every person alleging breach of Article 42 may apply for redress in court in addition to other legal remedies that are available in respect of the same matter. Under Article 70 (2), the court is empowered to make any order and give such directions as it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment.
  56. The petitioner has averred and submitted that the 1<sup>st</sup> respondent undertook the construction of the murrum road without an Environmental Impact Assessment, trespassed into his land to the extent of 0.0792 ha. without consent, approval or compensation, put up a culvert directing water to his land which water during the rainy seasons destroyed and continues to destroy his developments therein subjecting him to loss and damages.
  57. In support of his complaints, the petitioner produced a copy of his title deed, photographic evidence accompanied by a certificate pursuant to Section 106 (4) B of the [\*Evidence Act\*](#) developed by David Njenga as per certificate dated March 16, 2021 a demand letter dated September 7, 2020, and lastly a report and valuation dated January 5, 2021 by Nicholas Nganga Mbugua a land economist and a registered valuer under the [\*Valuers Act\*](#) Cap 532) Laws of Kenya as his evidence.
  58. In the said valuation report, the valuer confirmed that the access road was expanded from the original meters to standard 12 meters width on both sides of the petitioner's land hence making a total 0.173



acres and due to the road inclination again, 66 meters by 12 meters wide of land translating to 0.196 acre was taken up.

59. The valuer remarked the destruction was due to the negative effects of water draining to the suitland, the major factor being a culvert drainage directed into the suitland. The valuer stated there was evidence of the rain water from the culvert creating a gully leading to the subject property which water has deposited silt, murrum and rocks on the property, the end result affecting the developments on the parcel.
60. In response, Erick Muriuki Muthomi swore a replying affidavit for the 1<sup>st</sup> respondent on May 12, 2021. His evidence was also included in the witness statement dated April 14, 2021 in support of the response to the petition and a list of documents dated May 31, 2022 among them photographs and a certificate of electronic record dated May 31, 2022.
61. The 1<sup>st</sup> respondent's witness admitted that he was the one who did the setting out for the specific murrum road and the culvert at Kiwanja. He insisted however that the culvert was installed at the natural course where the flood water ought to cross as was the practice so as to make the road passable during heavy rains since prior to this, water used to run off into the petitioner's land.
62. Further, the witness stated that the petitioner's land was located on a hilly area where water naturally would flow downwards, which land extends both sides of the road. The witness said that the flood water was currently flowing beneath the road as opposed to the surface of the road making the road usable by thousands of people.
63. The deponent stated that when they made a site visit on May 12, 2021, they found out that the petitioner had dug trenches directing flood water to his home so as to extort money and that the culvert was dug in 2019 where the petitioner lived to date. That after building on a hilly area the petitioner should have taken measures to redirect any flood water from flowing to his home.
64. The 2<sup>nd</sup> respondent's evidence is contained in the affidavit of Mark Angwenyi who confirmed being aware of the alleged violations under Article 42 of the Constitution as per the inspection report dated 04.05.2021. He denied any negligence on the part of the 2<sup>nd</sup> respondent. In the said report the 2<sup>nd</sup> respondent confirmed the locality of the subject land through GPS coordinates as LR Igembe/Akirangondu B/1659 at Kathelwa village on the slopes of Nyambene Hills which land is accessed through Kiwanja murrum off Kangeta-Laare tarmac road. The report confirmed that the murrum road was constructed in March 2020, with two culverts in the 500-meter road, terminating at the gate of the ward member of county assembly one Richard Gitaare Kiome. The report stated that the culvert discharged water to the petitioner's land and had left behind a visible gully, silt deposits in the bungalow under construction. Further, the report stated there were cut tree trunks to pave way for the road expansion. It also confirmed that there was no record of a complaint by the petitioner or compliance with CPR/SPR submissions reports with the NEMA Meru office on the part of the 1<sup>st</sup> respondent. Further, the report stated that the IMM '4' was never brought to its attention. The report noted that the NEMA office Meru had not failed, neglected or refused to act on its mandate as regards the matter and stood guided by NEMA/SOP/C&E/01-11 step 2.7.1, speaking to the notification of incidence.
65. The quality and the sufficiency of evidence in a constitutional petition so as to prove the assertion thereto rests with the petitioner. In *Leonard Otieno vs Airtel (K) Ltd (2015) eKLR*, the court held a party has to present clear evidence in support of an alleged violation. The evidence must be credible, admissible, cumulative, and corroborative, so as to persuade a court to reach a decision favourable to the petitioner.





66. Article 69 (3) of the [Constitution](#) provides that for purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury. The 1<sup>st</sup> respondent has pleaded and submitted that the loss the petitioner is claiming was attributable to him for his failure to control water to his parcel of land on the higher side and should therefore not benefit out of his own negligence. Further the 1<sup>st</sup> respondent relying on Amani Kazungu Karema (supra) submitted that there exists no duty of care, which has been breached and that the 1<sup>st</sup> respondent merely came in to alleviate the suffering of the residents of the area so as to access social amenities.
67. On the other hand, the 2<sup>nd</sup> respondent relying on Elijah Ole Kool (supra), on causation urged the court to find there was no nexus between the acts of the respondents with the petitioner's alleged breach, loss and or damage.
68. The framers of Kenya's Constitution left no doubt that environmental justice, the exercise of sovereign power international treaties, devolution and access to services, national values and principles among them sustainable development, expanded bill of rights, among them third generation rights and freedoms, are the general rule but not an exception in the life of Kenyans.
69. Articles 174 & 175, 183, 186, 187 of the [Constitution](#) went further to define the powers, roles, functions, duties and the parameters of the devolved units. In line with Articles 185 (2), 186 (1) and 187 (2) of the [Constitution](#), distributed functions between the National Government and the County Government. Rule 22 of Schedule IV thereof places the protection of the environment on the national government where the 2<sup>nd</sup> respondent falls while county transport, county planning and development, county public works including storm water management systems, water and sanitization services, implementation of specific national government policies on environment and conservation falls under the County Government, the 1<sup>st</sup> respondent.
70. The 1<sup>st</sup> respondent therefore has not only a constitutional but also a statutory duty under Article 69 (2) of the [Constitution](#) to cooperate with any state organs and other persons so as to protect and conserve the environment and ensure sustainable development.
71. Article 21 places a constitutional duty on the respondents to observe, respect, protect, promote and fulfil the Bill of Rights for citizens. Further, Article 69 places obligations on the state and its organs to ensure sustainable development, management and conservation of the environment, to encourage public participation, to establish systems of environmental impact assessment, audit and monitoring of the environment and to eliminate processes and activities likely to endanger the environment.
72. Given this constitutional mandate, edict and duty, there cannot be any doubt that the petitioner is owed a constitutional duty by the respondents in so far as the right to clean and healthy environment is concerned. Our Constitution is exhaustive on causation and the said duty and therefore one does not require to resort to the common law tort on either causation, standing and the like. Kenyans in their own wisdom while following the Wangari Mathai case [Greenbelt Movement & 5 others vs National Environmental Management Authority & another; Kenya Highways Authority \(2-P\) 2020 eKLR](#), left no doubt on the right to the protection to clean and health environment. Similarly, Kenya as the seat of UNEP and signatory to various treaties on clean and safe environment had to live to both the letter and spirit of those binding international instruments. Article 72 of the [Constitution](#) went to an extent of stating that parliament should enact a legislation to give full effect to the right to clean and safe environment. As a consequence, EMCA was revised in 2019 and aligned with the [Constitution](#).
73. Section 3 of the EMCA entitles the petitioner to a clean and healthy environment in line with the [Constitution](#) and redress before Environment & Land with the mandate to grant powers and directives in line with the principle of public participation in development policies, plans and processes, cultural



& social principles, international cooperation, intergenerational and intragenerational equity, polluter pays principle and the precautionary principle.

74. The 2<sup>nd</sup> respondent under Section 3 of the EMCA has the mandate to coordinate and incorporate any environmental concerns in development plans, programmes and projects, make recommendations, investigate complaints, demand environmental impact reports for projects, advise and make such reports.
75. Under Section 12 of the EMCA, the 2<sup>nd</sup> respondent has powers to control, supervise, issue notices to lead agencies which have not complied with the Act and take appropriate actions. Therefore, the failure to act in this petition does not relieve the 2<sup>nd</sup> respondent any liability for damages under Sections 18 & 19 of the EMCA. Under Section 30 thereof, the 2<sup>nd</sup> respondent sits at the County Environment Committee while under Section 41 B of the EMCA, the 2<sup>nd</sup> respondent has been granted power to monitor the compliance with National and County environment action plans. As to hilly and mountainous areas, Section 45 thereof, bestows upon the County Environment Committee to identify land use or activity likely to lead to some environmental degradation.
76. Regarding environmental impact assessment, license audits and monitoring, Sections 57 A-69 EMCA bestows powers, duties and functions solely upon the 2<sup>nd</sup> respondent including powers to take court action for non-compliance with the law by stopping the project and or revoking licenses. Pursuant to Section 58 & the 2<sup>nd</sup> schedule of the EMCA, projects requiring EIA have been listed among them the construction and rehabilitation of roads, construction of tunnels and channels, water abstraction works, and flood control schemes. Legal Notice No 101 of 2003, the Environmental Impact Assessment and Audit regulations 2003 sets out the manner, procedure and role of EIA, audits and monitoring. It includes inter alia sanctions for non-compliance and covers matters including drainage patterns and systems.
77. The petitioner has averred that the project was conducted in breach of due process and in total disregard of his rights to land, clean and safe environment.
78. The law as set out above has laid the duty upon the 2<sup>nd</sup> respondent to ensure compliance with the right to clean and safe environment for proponents of projects such as the 1<sup>st</sup> respondent to undertake public participation through an environmental impact assessment prior to the commencement of the project on the 2<sup>nd</sup> respondent to ensure remedial action on environmental impact has been undertaken to ensure there is sustainable development. The 2<sup>nd</sup> respondent has made an admission that no CPR and SPR reports were undertaken by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent has deliberately kept silent on whether or not it undertook an environmental impact assessment prior to the project implementation in March 2020 and if so, what were the likely impacts on land owners such as the petitioner and other residents thereto.
79. The 2<sup>nd</sup> respondent is the one under the law with the mandate to monitor those who do not comply with the EMCA. Such powers, duties and functions are not shared with any other agency in Kenya. See [\*Mohamed Sharif Ali and 10 others vs Safaricom Ltd \(2018\) eKLR\*](#).
80. The petitioner has brought evidence of ownership of land, the negative impact of the project on his land and which the 2<sup>nd</sup> respondent investigative report has confirmed to be true. The 2<sup>nd</sup> respondent has also attached photographic evidence to its response confirming the said negative impact on the petitioner's land. See [\*Hosea Kiplagat & 6 others vs NEMA \(2018\) eKLR\*](#).
81. The 1<sup>st</sup> respondent has stated the petitioner was the author of his own misfortune and that public interest supersedes the private interest. Unfortunately, it has not supported its allegations by way of



- an expert report or counter evidence that there has been minimal impact if any after the culvert was constructed.
82. The 1<sup>st</sup> respondent has admitted it undertook the project without following the law and in total disregard of the rights to clean and safe environment. The 1<sup>st</sup> respondent knew or is deemed to have known the obligation to conduct an EIA prior to the commencement of the project and the involvement of the 2<sup>nd</sup> respondent in the whole process.
  83. Even after the issue was raised, the 1<sup>st</sup> respondent did not take any remedial action and or invite the 2<sup>nd</sup> respondent to work out a solution to the issue. Instead, the 1<sup>st</sup> respondent told the court the petitioner is the one who directed the water to his land so as to unjustly enrich himself. With respect, the behavior of the 1<sup>st</sup> respondent is inimical to an entity which still thinks it can run roughshod and is more in benevolence as far as service delivery is concerned such that the so-called development is more superior to the rights and freedoms as to clean and safe environment.
  84. Kenya has moved on and as a member comity of nations is bound by not only the constitutional duties but also international obligations as to the right to safe and clean environment. Therefore, my finding is that the evidence in support of breach of constitutional rights and obligations by the respondents have been substantiated to the required standard.
  85. The respondents have not challenged the authenticity, credibility and legality of the valuation report by a registered valuer. Similarly, the investigative report by the 2<sup>nd</sup> respondent has confirmed the particulars of injury and damage as pleaded in the petition.
  86. In *Jane Wagathuitu Gitthinji & 2 others vs Sojanmi Springfields Ltd & 2 others (2019) eKLR*, the court was dealing with water which raged downhill resulting to damage to the respondents parcel of land alleged to have been caused by a natural channel but not through upstream spills out of the bursting of the dam. There was an argument as in the instant case that the water would naturally drain downwards hence the respondent was not liable for the damage.
  87. The court held that once the channel was formed, water found a path and the continuous flow of water led to the formation of the gully leading to the 1<sup>st</sup> plaintiffs land hence there was a direct connection to the bursting of the dam. The court found it was not the natural flow of the water from upstream as alleged hence it could not be the natural drainage system.
  88. The court held that the direct cause and the effect between the bursting of the dam and the increased volume and the continuous flow flooded the plaintiff's farms. Therefore, the court made a finding that it was not the natural flow but an intervening human activity which exacerbated the incident. The court applied the case law of *Ryland vs Fletcher (1861-73) ALL ER 1* hence found the defendants liable.
  89. As to the nature of reliefs, the petitioner is entitled to, the 1<sup>st</sup> respondent undertook the project leading to the diversion of the storm water without prior authorization or scientific report from any expert in liaison with the 2<sup>nd</sup> respondent. As much as the road engineer designed the project on behalf of the 1<sup>st</sup> respondent, he ought to have consulted the petitioner through the 2<sup>nd</sup> respondent by way of an environmental impact assessment report. The 1<sup>st</sup> respondent knew and foresaw that the petitioner would be directly affected by any diversion of the flood water from the road since he owns the land on both sides of the road.
  90. The 1<sup>st</sup> respondent knew the topography of the area and therefore if at all the natural cause of the drainage would lead to the petitioner's land, obviously it was the 1<sup>st</sup> respondent who directly influenced the water course and led it to the petitioner's land, this time now under the road but through a channel, the culvert.



91. In *Tim Mwai & 2 others vs Extra Mile Ltd (2018) eKLR*, the court was faced with a situation where a parallel drainage tunnel from its premises was erected cutting across the plaintiffs drive way and into the plaintiff's front garden without authorization and consultation hence exposing the defendant to hazard.
92. The court found the reversion to the original storm water drainage would cause more problems and that a more holistic approach would be for the defendant to obtain approval to undertake remedial works involving bigger enclosed culverts stretching from the point of diversion all the way to river Kibarage. The court also granted Kshs 1.5 million general damages for undertaking the unauthorized works and disrupting the plaintiff's peaceful enjoyment of their properties.
93. In this petition the 1<sup>st</sup> respondent threw caution to the wind and failed to exercise any precaution as it embarked on the road construction and specifically the erection of the culvert.
94. The precautionary principle which has been said as a commonsense statement as held by Steinz in the Australian case of *Leatch vs National Parks and Wildlife Service and Shoalhaven City Council 8 1 LG ERA 270* is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty.
95. In *Isaiiah Luyara Odando & another vs NEMA (2021) eKLR*, the claim was over an alleged rampant pollution of Nairobi & Athi River by slum dwellers in Korogocho & Mukuru Kwa Reuben. The petitioner faulted the respondents for failing to apply the precautionary principle to stop the pollution which pollution the respondents did not dispute. Under Article 69 (1) of the *Constitution* the court held that elimination as used under Article 69 (1) (g) denotes remove or get rid of something. The court cited with approval *Martin Osano Rabera & another vs Municipal Council of Nakuru and 2 others (2018) eKLR* where it was held that NEMA was not just an investigator or prosecutor but rather the principal instrument of government with a bigger mandate to Kenyan people including advisory, coordination and technical support functions to ensure the citizens realize the right to clean and safe environment. The court held NEMA has to be pro-active and take lead in enforcing the law and assist the counties.
96. Further, the court held that NEMA had failed in its mandate regarding the said slums and the blame by NEMA on the petitioners was invalid in view of Sections 3 (1), 2(A) of the EMCA. Based on the precautionary principle the court guided by Article 70 and Section 86 of the EMCA directed the respondents to prescribe measures as it is obligated by law.
97. In *Jane Ngonyo Mubia vs Director General NEMA & another (2017) eKLR*, the issue was about the commencement of a building without an EIA license. The court held that the purpose of an EIA is to assess the possible substantial impacts of a proposed project on the environment. The court cited with approval *Tim Busienei & 2 others vs Director General NEMA and another (2007) eKLR*. In order to protect public interest under Section 13 (7) ELC Act the court ordered that the two floors constructed without NEMA not to be occupied, the appellant to apply for approvals and certification of the two floors by the relevant agencies before occupation in default demolition to occur.
98. In this petition there is no doubt that the culvert has been in existence since 2019. The 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent have not taken any remedial action to mitigate the loss and or regularize the project. The petitioner continues to suffer due to a project undertaken in total disregard of the law and whose attention to the 2<sup>nd</sup> respondent only elicited an investigative report yet the 2<sup>nd</sup> respondent has all the mandate under the law to flex its muscles and safeguard the rights of the petitioner.



99. Therefore, given the foregoing admissions and in absence of an offer from the respondents, I find the petitioner entitled to special damages of Kshs 3,250,000/= as pleaded and proved.
100. As concerns general damages, the law is that the same are discretionary. In Meru ELC Petition No E004 of 2021, this court held citing with approval *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, that the same must be a reminder to the respondents that constitutional edicts are not mere words but have implications.
101. Therefore, based on comparative jurisprudence of *Gitobu Imanyara & 2 others vs AG* (supra), *Mohamed Feisal & 19 others vs Henry Kandie Chief Inspector of Police, OCS Ongata Rongai & 2 others* (2018) eKLR, *Edward Akongo Oyugi & 2 others vs AG* (2019) eKLR, *Kooba Kenya Ltd vs County Government of Mombasa (2022) eKLR* and *Meru Petition No E004 of 2021 Evangeline Gikono vs Joyce Nkuene & 4 others*, I award Kshs 2.5 million as general damages.
102. As to the orders of restoration, the murrum road and the culvert serves not only the petitioner but also to the members of public. Instead of removing it to resort to uncertainty, the best course of action is to direct the 1<sup>st</sup> respondent in conjunction with the 2<sup>nd</sup> respondent to redesign and re-do the culvert taking into consideration the rights and interests of the petitioner within 3 months from the date hereof and to report to court.
103. Costs to the petitioner to be met by the 1<sup>st</sup> respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022**

**In presence of:**

C/A: Zamzam

Ngugi for petitioner

Ikioo for 1<sup>st</sup> respondent

Maina for 2<sup>nd</sup> respondent

**HON. C.K. NZILI**

**ELC JUDGE**

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