



**Chega (Suing on their Own Behalf and as the Registered Official of Active Environment Team) v Kenya Forest Service & another; Kiambu Sawmillers & 10 others (Interested Parties) (Constitutional Petition E053 of 2021) [2022] KEELC 13738 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13738 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CONSTITUTIONAL PETITION E053 OF 2021**

**EK WABWOTO, J**

**OCTOBER 21, 2022**

**IN THE MATTER OF ENFORCEMENT OF ENVIRONMENTAL RIGHTS UNDER ARTICLE 70 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF VIOLATION OF EXTENSION OF THE MORATORIUM OF LOGGING ACTIVITIES IN PUBLIC AND COMMUNITY FORESTS**

**AND**

**IN THE MATTER OF ARTICLES 10,22(1) & (2), 23(3) (A), (C) & (F), 42, 43(1) (D), 69, 70, 232 AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**SECTIONS 31, 44, 48, AND 61 OF THE FOREST CONSERVATION AND MANAGEMENT ACT, 2016**

**BETWEEN**

**JAPHET KITHI CHEGA ..... PETITIONER  
SUING ON THEIR OWN BEHALF AND AS THE REGISTERED OFFICIAL OF ACTIVE ENVIRONMENT TEAM**

**AND**

**KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT  
KENYA FOREST BOARD ..... 2<sup>ND</sup> RESPONDENT**

**AND**



KIAMBU SAWMILLERS .....	INTERESTED PARTY
COUNTY GOVERNMENT OF BARINGO .....	INTERESTED PARTY
CONY GOVERNMENT OF ELGEYO MARAKWET .....	INTERESTED PARTY
COUNTY GOVERNMENT OF KERICHO .....	INTERESTED PARTY
COUNTY GOVERNMENT OF EMBU .....	INTERESTED PARTY
COUNTY GOVERNMENT OF KIAMBU .....	INTERESTED PARTY
COUNTY GOVERNMENT OF MERU .....	INTERESTED PARTY
COUNTY GOVERNMENT OF NAKURU .....	INTERESTED PARTY
COUNTY GOVERNMENT OF NYANDARUA .....	INTERESTED PARTY
COUNTY GOVERNMENT OF NYERI .....	INTERESTED PARTY
COUNTY GOVERNMENT OF UASIN GISHU .....	INTERESTED PARTY

**Decisions by the Kenya Forest Service and the Kenya Forest Board lifting the logging moratorium of 2018 declared unconstitutional.**

*The Kenya Forest Service and the Kenya Forest Board (1st and 2nd respondents) issued notices through a public notice, that invited eligible forest industry investors to bid for the sale of forest materials. The legality of the notices was challenged in court where the Environmental and Land Court held that the notices were in violation of the Constitution for want of public participation and for threatening to violate the right to a clean and healthy environment.*

Reported by John Ribia

**Jurisdiction** – jurisdiction of the Environment and Land Court – jurisdiction of the ELC vis-à-vis jurisdiction of the Public Procurement Administrative Review Board – where the dispute revolved around a decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium – where the Kenya Forest Service and the Kenya Forest Board issued notices inviting members of the public to tender for sale of forest plantation materials – whether the Public Procurement Administrative Review Board had the jurisdiction to handle disputes on the invitation to tender to bid for forest plantation materials – whether the ELC had jurisdiction to determine the dispute – article 162(2)(b); section 13.

**Constitutional Law** – fundamental rights and freedoms – right to a clean and healthy environment - where the dispute revolved around a decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium - whether the decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium of 2018 violated the petitioner’s right to a clean and healthy environment – whether the decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium of 2018 was subjected to an environmental impact assessment - articles 1(3)(a), 2(1) and (2), 3(1),10, 21(1),(2) and (3), 24(4) and (5), 42, 47(1) and (2), 69,71,73 and 232; of the sections 36,44(2)(a) and (d),46(1)(c) and 75(3)

**Constitutional Law** – national values and principles of governance – public participation - where the dispute revolved around a decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium - whether the decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium of 2018 was subjected to public participation - articles 10(1) and (2), 69(1)(d) and 232(1)(d)

**Brief facts**

The Kenya Forest Service and the Kenya Forest Board (1<sup>st</sup> and 2<sup>nd</sup> respondents) issued notices through a public notice, that invited eligible forest industry investors to bid for the sale of forest materials. The petitioner contended that the notices were in violation of the law as new projects, according to and the , had to be



subjected to an Environmental Impact Assessment (EIA). The petitioner also contended that the notices and actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent were not subjected to public participation and were a violation of the petitioner's right to a clean and healthy environment.

### Issues

- i. Whether the Public Procurement Administrative Review Board had the jurisdiction to handle disputes on the invitation to tender to bid for forest plantation materials.
- ii. Whether the decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium of 2018 was subjected to public participation.
- iii. Whether the decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium of 2018 violated the petitioner's right to a clean and healthy environment.
- iv. Whether the decision by the Kenya Forest Service and the Kenya Forest Board to lift the logging moratorium of 2018 was subjected to an Environmental Impact Assessment.

### Held

1. Issues of jurisdiction should be determined at the earliest possible opportunity. Jurisdiction was the lifeline of a case, without jurisdiction, a court would down its tools. Article 162(2)(b) of the and section 13 of the gave the Environmental and Land Court (ELC) jurisdiction over disputes relating to the environment and the use and occupation of and title to land. While the court's jurisprudential policy was to encourage parties to exhaust and honour alternative forums of dispute resolution where they were provided for by statute, the exhaustion doctrine was only applicable where the alternative forum was accessible, affordable, timely and effective.
2. The gravamen of the petition related to the extension of the moratorium on logging activities in public and community forests and the alleged violations of the provisions of the and the . The Public Procurement Administrative Review Board (the Board) had no jurisdiction to enforce those provisions. The Board was not a suitable forum for the purpose of settling environmental disputes as disclosed in the instant petition. The ELC had powers to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the . Only the ELC was clothed with the jurisdiction to hear and determine the issues raised in the instant petition.
3. Section 58(1) and (2) of the , the second schedule to the (EMCA) and regulation 17 of the (EMCA Regulations) all provided that the activities of timber harvesting in plantation forest required the undertaking of an Environmental Impact Assessment (EIA) prior to their commencement. The position that no fresh EIA was to be undertaken prior to the harvesting of forest materials since there already existed one that had been done was not palatable. Assuming an EIA had been conducted, an EIA licence once issued was only valid for 24 months prior to the commencement of the proposed project. No EIA was conducted prior to the commencement of the tenders for sale of the forest material. An EIA ought to have been conducted prior to the commencement of the impugned tenders.
4. The principle of public participation was not new and did not come with the promulgation of the . It was always recognized as an element of the common law doctrine of natural justice. The and statute law had imposed the obligation of public participation in most spheres of governance. It would be contrary to the to be denied public participation. The respondents ought to take on board the views and values on environmental management held by communities likely to be affected by decisions affecting environmental resources that were close to them or in which they lived such as decisions on forest issues.
5. A notice calling for public participation for persons affected by the 2018 Moratorium on logging in public and community forest issued on the November 30, 2021 in Standard Newspaper appeared in the press on the same day when the invitation to tender was published. That contention did not justify that public participation had been undertaken prior to the invitation for the bidders. The respondents



- contravened the and various statute laws for want of public participation prior to invitation of the impugned tenders.
6. The embodied elaborate provisions with considerable implications for sustainable development. Article 42 of the provided that every person had the right to a clean and healthy environment. That right included the right to have the environment protected for the benefit of present and future generations through legislative and other measures. Article 70 of the conferred standing upon a person who alleged violation of rights to a clean and healthy environment. Protection of the environment was an urgent responsibility to which Kenya's legal system responded to inadequately.
  7. Article 69 of the imposed obligations on the State in respect of the environment. Among other obligations imposed on the State included the duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. The State was also obligated to ensure equitable sharing of the accruing benefits. It was also required to encourage public participation in the management, protection and conservation of the environment. Courts had a solemn duty to enforce the right to a clean and healthy environment.
  8. The impugned tenders could not be undertaken unless an Environmental Impact Assessment had been concluded and approved in accordance with the provisions of No 9 of 1999 (EMCA) and the made thereunder. There was uncontroverted evidence that the tender process was to commence without the undertaking of an Environmental Impact Assessment.
  9. Although predated the, gave effect to the constitutional provisions in respect to environmental rights. Section 3 of directed that the High Court was to be guided by the principles of sustainable development. The principle of sustainable development had both substantive and procedural elements. From the substantive perspective one way of ensuring that development decisions did not disregard environmental considerations was for the legislature to provide for EIA for all development projects.
  10. An EIA was a systematic examination conducted to determine whether or not a programme, activity or project would have any adverse impacts on the environment. Considering the lack of public participation in commencement of the impugned tender, the petitioner's rights to a clean and healthy environment was under threat and at risk of being violated.

*Petition allowed.*

### **Orders**

- i. *Declaration issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted in contravention of sections 6(1), 55, 59, 61, 72(5), 73(2) of the (FCM Act, 2016) in purporting to set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests (Logging Moratorium) issued by the Cabinet Secretary, Ministry of Environment and Forestry violated articles 1(3)(a), 2(1) and (2), 3(1), 10, 21(1),(2) and (3), 24(4) and (5), 42, 47(1) and (2), 69, 71, 73 and 232 of the.*
- ii. *Declaration issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not overhaul, set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests issued by the Cabinet Secretary, Ministry of Environment and Forestry and allow logging and sale of forest material without undertaking an environmental impact assessment as envisioned under sections 36, 44(2)(a) and (d), 46(1)(c) and 75(3) of the (FCM Act, 2016).*
- iii. *A conservatory order was issued directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents staying further implementation of the Notices titled; "Invitation to tender (being: Tender Ref Nos: KFS/DISP/02/2021-2022, KFS/DISP/03/2021-2022, KFS/DISP/04/2021-2022 and KFS/DISP/05/2021-2022)" (impugned tenders) purporting to invite eligible Forest Industry investors to submit bids for the sale of forest materials and another notice titled "Public notice on the status of inquiry into claims on forest material under KFS affected by the 2018 moratorium on logging in public and community forest" (hereinafter "Public Inquiry Notice") calling for public participation for persons affected by 2018 issued on the November 30, 2021 in Standard Newspapers.*



iv. *Each party was to bear their own costs.*

## Citations

### Cases

1. In The Matter of the Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] eKLR) — Explained
2. Kamau, Moffat & 9 others v Aelous Kenya Limited & 9 others (Constitutional Petition 13 of 2015; [2016] eKLR) — Mentioned
3. Kasing'a, Ken v David Kiplagat & 5 others (Petition 50 of 2013; [2015] KEHC 1181 (KLR)) — Mentioned
4. Kiambu County Tenants Welfare Association v Attorney General & another (Constitutional Petition 392 of 2013; [2017] eKLR) — Mentioned
5. Kibwezi Water Resources Uses Association & 4 others v Attorney General & 5 others (Environment & Land Case 4 of 2018; [2019] KEELC 1639 (KLR)) — Mentioned
6. Leboo, & Joseph 2 others v Director Kenya Forest Services & another (Environment & Land Case 273 of 2013; [2013] KEELC 41 (KLR)) — Explained
7. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199) — Explained
8. Maraba Lwatingu Residents Association & 2 others v National Environment Management Authority & 3 others (Tribunal Appeal 113 of 2013; [2019] KENET 109 (KLR)) — Explained
9. Moi, Daniel Toroitich Arap v Mwangi Stephen Muriithi & Raymark Limited (Civil Appeal 240 of 2011; [2014] KECA 642 (KLR)) — Mentioned
10. Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others (Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR)) — Explained
11. Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
12. Nairobi Metropolitan Psv Saccos Union Limited & 25; others v County Of Nairobi Government & 3 others (Petition 486 of 2013; [2013] eKLR) — Explained
13. Nzioka, & Rodgers Muema 2 others v Tiomin Kenya Limited (Civil Case 97 of 2001; [2001] eKLR) — Mentioned
14. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1) — Explained
15. Owour, Richard & 2 others (Suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fishers & Cooperative & others (Petition E263 of 2020; [2020] KEHC 1736 (KLR)) — Explained
16. Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others (Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR)) — Explained
17. Republic v Karisa Chengo & 2 others (Petition 5 of 2015; [2017] KESC 15 (KLR)) — Mentioned
18. Speaker of the National Assembly v Karume (Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22) — Mentioned
19. Wabwire, v Christian Juma Attorney General (Petition 50 of 2013; [2019] KEHC 1049 (KLR)) — Mentioned
20. Doctors for Life International v Speaker of the National Assembly and Others ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)) — Explained
21. Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others ((CCT 59/2004) [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC)) — Explained
22. Dawda K Jawara v Gambia (ACmHPR 147/95-149/96) — Explained
23. Cohens v Virginia (19 U.S. 264 (1821)) — Explained



## Statutes

1. Constitution of Kenya, 2010 — Preamble ; Article 1(3) (a); 2(1); 10; 21 (1), (2), (3); 22(1), (2); 23 (3) (a), (c), (f); 24, (4), (5); 42; 43(1) (d); 42; 47(1), (2); 69; 70; 71; 73; 187; 232; 260; Chapter 5 — Interpreted
2. Environmental (Impact Assessment and Audit) Regulations, 2003 (Act No 8 of 1999 Sub Leg) — Regulation 4(1), 17, 28 — Interpreted
3. Environmental Management And Co-Ordination Act, 1999 (Act No 8 of 1999) — Section 2, 3, 58; Schedule 2 — Interpreted
4. Environment And Land Court Act, 2011 (Act No 19 of 2011) — Section 4, 13 — Interpreted
5. Forest Conservation And Management Act, 2016 (Act No 34 of 2016) — Section 4(b), 6(1), 22, 31, 36, 44, 46, 48, 55, 59, 61, 72(5), 73(2), 75(3) — Interpreted
6. Forests (Community Participation in Sustainable Forest Management) Rules, 2020 — Part II, III — Interpreted
7. Public Procurement And Asset Disposal Act, 2015 (Act No 33 of 2015) — Section 3, 27(1), 28, 70(4) — Interpreted
8. Statutory Instruments Act, 2013 (Act No 23 of 2013) — Section 5(2), (3); 7(2), (3); 8 (1); 22 (2) — Interpreted

## Texts

1. Currie, I., De Waal J., (Eds) (2005), The Bill of Rights Handbook (Johannesburg: Juta Law 5th Edn p 527)

## International Instruments

1. Espoo convention on Environmental Impact Assessment in a Transboundary Context, 1991 — Article 2(6)
2. Rio Declaration on Environment and Development, 1992 — Principle 1, 10, 15

## Advocates

*Mr. Ogonji* for Petitioner

*Mr. Allan Kamau b/b for Mr. Eredi* for 1st and 2nd Respondent

*Ms. Kinyua* for 1st Interested party

## JUDGMENT

### Introduction

1. The petitioner in the amended petition dated January 21, 2022 seeks for the following reliefs: -
  - a. A declaration be and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted in contravention of sections 6(1), 55, 59, 61, 72(5), 73(2) of the *Forest Conservation and Management Act, 2016* (FCM Act, 2016) in purporting to set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests (hereinafter Logging Moratorium) issued by the Cabinet Secretary, Ministry of Environment and Forestry and thereby violated articles 1(3)(a), 2(1) and (2), 3(1),10,21(1),(2) and (3), 24, (4) and (5), 42,47(1) and (2), 69,71,73 and 232 of the *Constitution of Kenya*.
  - b. A declaration be and is hereby made that the holders of the State Office of the 1<sup>st</sup> respondent are contravention of sections 6(1), 55,59,61,72(5), 73(2)



of the *Forest Conservation and Management Act, 2016* (FCM Act, 2016) in purporting to set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests issued by the Cabinet Secretary, Ministry of Environment and Forestry and thereby violated articles 1(3) (a), 2(1) and (2), 3(1),10,21(1),(2) and (3),24,(4) and (5), 42, 47(1) and (2), 69,71,73 and 232 of the *Constitution of Kenya* namely the 2<sup>nd</sup> Respondent herein respectively are unsuitable to hold public office.

- c. A declaration be and is hereby made that the holders of the State Office of the 1<sup>st</sup> Respondent are contravention of the principles of public procurement envisaged under Section 3 of the *Public Procurement and Asset Disposal Act* and the *Constitution of Kenya, 2010*, the terms and conditions outlined on the tendering documents are unfair and do not amount to a fair, equitable, transparent competitive and cost effective process.
- d. A declaration be and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot overhaul, set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests issued by the Cabinet Secretary, Ministry of Environment and Forestry and allow logging and sale of Forest Material without proper carrying environmental impact assessment as envisioned under Sections 36,44(2) (a) and (d),46(1)(c) and 75(3) of the *Forest Conservation and Management Act, 2016* (FCM Act, 2016) is unlawful, null and void.
- e. A conservatory order be and is hereby issued directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents staying further implementation of the Notices titled  

“Invitation to tender (being: Tender Ref Nos: KFS/DISP/02/2021-2022, KFS/DISP/03/2021-2022, KFS/DISP/04/2021-2022 and KFS/DISP/05/2021-2022)”

(hereinafter ‘Impugned Tenders’) purporting to invite eligible Forest Industry investors to submit bids for the sale of forest materials and another notice titled  

“Public notice on the status of inquiry into claims on forest material under KFS affected by the 2018 moratorium on logging in public and community forest”

(hereinafter ‘Public Inquiry Notice’) calling for public participation for persons affected by 2018 issued on the November 30, 2021 in Standard Newspapers.
- f. Any other relief as the court may deem fit to grant.
- g. Costs.

2. The subject petition is premised on the various grounds alluded to and or enumerated in the body thereof and the same is supported by the affidavit sworn by Japhet Kithi Chega the petitioner herein on January 21, 2022.
3. Upon being served with the petition, the respondents filed a replying affidavit sworn on December 17, 2021 by Julius Kamau, Chief Conservator of Forest in opposition to the petition. The 1<sup>st</sup> Interested party herein filed an affidavit sworn by Joseph Mburu, its Chairperson sworn on December 17, 2021



in opposition to the Petition. The 2<sup>nd</sup> to 11<sup>th</sup> interested parties herein despite being served never entered appearance nor filed any response to the Petition.

### **The Parties**

4. The petitioner is a Kenyan Citizen and Chairman of Active Environment Team a community Based Organization that focus on community empowerment and environmental conservation in Kenya.
5. The 1<sup>st</sup> Respondent is a state corporation established under Section 7 of the [Forest Conservation and Management Act](#) No 34 of 2016 with an inter alia mandate of conserving, protecting and managing all public forests in Kenya in accordance with the provisions of the Act. The 2<sup>nd</sup> Respondent is a Board established under Section 9 of the [Forest Conservation and Management Act](#) No 34 of 2016 to oversee the operations of the service.
6. The 1<sup>st</sup> Interested party is described itself as a group comprising of twenty six (26) business carrying out the business of timber trade, while the 2<sup>nd</sup> to 11<sup>th</sup> Interested parties are County Governments of Kenya established pursuant to article 187 of the [Constitution](#) and are charged with the responsibility of implementing forestry functions of county government and also implementing national policies on forest management and conservation within their respective areas of jurisdiction as set out under schedule four of the [Constitution](#) the [Forest Conservation and Management Act, 2016](#).

### **The Petitioner's Case**

7. The petitioner's case as presented in the amended petition and the supporting affidavit sworn by Japhet Kithi Chega is that in the year 2018, the Cabinet Secretary Ministry of Environment and Forestry Constituted a Task force to inquire into Forest Resources Management and Logging Activities in Kenya appointed through Gazette Notice No 28 dated February 26, 2018.
8. The Petitioner also averred that according to Section 58 of [EMCA](#) and [Environmental \(Impact Assessment and Audit\) Regulation, 2003](#), new projects as listed under the 2<sup>nd</sup> schedule must undertake an Environmental Impact Assessment (EIA). The Environmental Impact Assessment Report (EIAR) and Environmental Audit Report (EAR) are then submitted for review by National Environment Management Authority (NEMA) which then approves or disapproves a project.
9. It was also stated that as provided for under regulation 17 of Legal Notice No 101, the [Environmental \(Impact Assessment & Audit\) Regulations 2003](#) when conducting an Environmental Impact Assessment study, the proponent must, in consultation with NEMA seek the views of persons who may be affected by the project. The proponent must:
  - a. Publicize the project and its anticipated effects and benefits by: posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project: publishing a notice of the proposed project for two consecutive weeks in a newspaper that has a nationwide circulation; and making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks.
  - b. Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;



- c. Ensure that appropriate notices are sent out atleast one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties and
  - d. Ensure, in consultation with the authority, that a suitably qualified coordinator is appointed to received and record both oral and written comments and any translations thereof received during all.
10. The petitioner contended that an Environmental Impact Assessment has not been done by the project proponents, KFS and KFS Board and that the EIA must precede impugned Tenders. That failure to carry out EIA before the impugned tenders was carried out renders the impugned tenders Illegal- null and void.
  11. It was also averred that the plain reading of the statute clearly states that an EIA must be done before “financing, commencing, proceeding with, carrying out, executing or conducting or causing to be finances, commenced, proceeded with, carried out, executed or conducted by another person” undertaking any project specified in the Second Schedule to the Act.
  12. It was also stated that the impugned tenders go far beyond the threshold provided by EMCA and should not have happened without an EIA being carried out.
  13. According to the Petitioner, the purpose of EIA is to enable resolution to be made on known facts regarding environmental consequences since an EIA is an obviously important component to this entire process as it is vanguard of the principles of sustainable development. It is from this assessment that we are guided as to the potential or lack of adverse effects of the project on the environment and where the decision will be made as to whether the project should continue or not.
  14. The petitioner further pleaded that failure to conduct an EIA before the commencement of the impugned tenders offends the terms of Section 58 of EMCA, regulation 28 of the EIA Regulations (The Environmental (Impact Assessment and Audit) Regulations, 2003, sections 22,36,44,(2) (a) and (d), 46(1) (c) and 75 (3) of Forest Conservation and Management Act, 2016; and the Honourable Court ought to nullify the impugned tenders so that it starts afresh.
  15. It was also pleaded that the decision by the 1<sup>st</sup> Respondent to Invite Impugned Tenders contravenes the Constitution of Kenya and Statute Laws for want of public participation, stakeholder consultations and administratively fair procedures; Public participation is one national values and principles of governance under article 10(2) (a) of the Constitution of Kenya required in enacting, applying or interpreting any law or making or implementing any public policy decisions. Article 69(1) (d) of the Constitution of Kenya obligates state organs to: -
    - “(d) encourage public participation in the management, protection and conservation of the environment.”
  16. The Petitioner further pleaded that section 4(b) of the Forest Conservation and Management Act, 2016 is to the effect that one of the principles of the Act shall be-
    - “(b) public participation and community involvement in the management of forests.”



17. It was also pleaded that international law and comparative law have contextualized environmental rights, principle 10 of the [Rio Declaration on Environment and Development, 1992](#) defines public participation as follows;
- “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”
18. According to the petitioner, Principle 1 of [Rio Declaration on Environment and Development, 1992](#), require human beings to be at the center of concerns for sustainable development.
19. The petitioner also stated that article 2 (6) of the [Espoo convention on Environmental Impact Assessment in a Transboundary Context](#), on public participation states that,
- “The party of origin shall provide, in accordance with the provisions of this convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the party of origin.”
20. Part II of the *Forests (Community Participation in Sustainable Forest Management) Rules, 2020* encourage communities to participate in sustainable forest management and Part III requires the respondents to collaborate with local communities in development of participatory forest management plans.
21. It was also the petitioner’s case that the Respondents have violated the [Constitution](#) and the law by failing to establish the impact of the said notices and also by failing to protect the environment since no Environmental Impact Assessment has been conducted as provided for under section 36 of the [Forest Conservation and Management Act, 2016](#). The petitioner also pointed out that the other violations including; failure to conduct an EIA as required by section 44(2) (a) and (d) of the [Forest Conservation and Management Act, 2016](#), failure and or refusal to conduct an independent Environmental Impact Assessment as required by section 46(1) (c) of the [Forest Conservation and Management Act, 2016](#) and also failure to conduct an independent Social Impact Assessment as required by section 75(3) of the [Forest Conservation and Management Act, 2016](#).
22. It was also contended that the respondents contravened or threatened to contravene the [Constitution of Kenya](#) in so far as the Right to a clean and healthy environment is applicable by failing to implement specific recommendations on them from Taskforce to inquire into Forest Resources Management and Logging Activities in Kenya, 2018 in the following ways:-
- a. Failure and or refusal to discontinue the procedure for disposal of forest plantation material that provides for direct allocation of forest stocks and failed to strictly adhere to the current forest (participation in sustainable Forest Management) Rules 2009 with respect to issuance of timber licences.



- b. Failure and or refusal to issue timber licence as per the Act, clearly communicate the timber licence terms and conditions to all saw millers upon issuance and forest officer must be made aware of the same.
- c. Failure and or refusal to establish an elaborate framework and procedure to monitor, verify and audit the compliance with the licencing conditions by the saw millers.
- d. Failure and or refusal to establish a clear condition framework for the agencies working in the environmental and forestry section to ensure that NEMA and Kenya Water Towers Agency effectively deliver their mandate.
- e. Failure and or refusal to put in place a clear framework for collaboration in forestry functions between the National and County Government.

23. In the premises, the petitioner implored the court to intervene and grant the reliefs sought.

**The Case of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

- 24. The respondents opposed the petition vide a replying affidavit sworn by Julius Kamau Chief Conservator of Forest on December 17, 2021.
- 25. The respondents contends that this court lacks the requisite jurisdiction to entertain this petition. the petition is challenging the invitation to tender to bid for forest plantation materials which ought to comply with the provisions of the Public Procurement and Asset Disposal Act, 2015.
- 26. Julius Kamau averred that the moratorium on logging was put in place in 2018. On November 23, 2020, the Cabinet Secretary Ministry of Environment and Forestry publically communicated through a press statement that the Government has decided that the moratorium on logging in public and community forest,
 

“shall continue but varied and or modified to allow for harvesting and disposal by KFS for mature and over mature forest plantations for an area not exceeding 500 hectares.”
- 27. The deponent averred that the public announcement was made in 2020 and the petitioner never challenged the partial lifting of the moratorium. The justification for partial lifting of the moratorium was to put into place an open and transparent mechanism for disposal of the forest material because previously the system was opaque and therefore led to plundering of the forest through unlawful logging forcing the government to put in place the taskforce on logging which came up with a report on forest resources management and logging activities in Kenya, April 2018.
- 28. It was also the respondents case that the purpose of lifting the moratorium partially was to allow KFS to test the contemplated reforms in the disposal process and it was found that a tender process for disposal of forest material was the most appropriate as it allows for those interested to inspect the materials and submit their bid.
- 29. According to the respondents, the petitioner cannot be allowed to say that the partial lifting of the moratorium will in any way affect their rights.
- 30. On the aspect of public participation, the respondent’s faulted the petitioner for saying that there was no public participation yet when the taskforce report was being compiled, the views of the forest industry investors and the petitioner were taken into consideration.



31. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contended that the petition ought to be dismissed.

### **The Case of the 1<sup>st</sup> Interested Party and its Submissions**

32. The 1<sup>st</sup> interested party associated themselves with the position taken by the 1<sup>st</sup> and 2<sup>nd</sup> respondent's in opposition to the petition.
33. In its submissions dated March 19, 2022 it submitted that the court lacked jurisdiction to determine the petition since it is a dispute arising out of the tendering process and the same ought to be dealt with by the Public Procurement Administrative Review Board as provided for under section 28 of the Public Procurement and Asset Disposal Act, 2015. The case of Samwel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR was cited in support of this position.
34. It was also the 1<sup>st</sup> Interested party's position that the issue that the 1<sup>st</sup> respondent failed to conduct public participation before advertising the tenders was premature and misplaced since there was no law that requires a procuring entity to conduct public participation while preparing a tender document.
35. The 1<sup>st</sup> Interested party also contended that the petitioner had not proved any violation of his rights by the Respondents and as such the petitioner was not entitled to any of the orders sought and the same ought to be dismissed with costs.

### **The Case of the 2<sup>nd</sup> to the 11<sup>th</sup> Interested party**

36. The 2<sup>nd</sup> to 11<sup>th</sup> interested party despite being served never filed any response to the petition neither did they participate in these proceedings.

### **The Petitioner's Submissions**

37. The petitioner filed his written submission dated March 10, 2022. Counsel for the petitioner outlined five issues for determination. These were: -
- a. Whether this honourable court has jurisdiction to hear and determine this petition.
  - b. Whether this court can interfere with decision of an institution like Public Procurement Administrative Review Board for non-compliance with sustainable environmental exploitation principles.
  - c. Whether the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to invite Bidders in presence of a Logging Moratorium is arbitrary and contravenes the Constitution and Statute Laws.
  - d. Whether the fact that EIA having not been conducted renders the impugned tenders illegal.
  - e. Whether the decision by the Respondents to invite impugned Tenders Contravenes the Constitution of Kenya and Statute Laws for want of public participation, stakeholder consultations and administratively fair procedure
  - f. Whether the intended harvesting of trees without Management Plan and falling of unmarked trees contravenes the principles of sustainable environmental Management and further possess danger to Flora and Fauna.



38. On the issue of jurisdiction, Counsel cited the case of *Republic v Karisa Chengo & 2 others* (2017) eKLR, *Samwel Kamau Macharia v Kenya Commercial Bank* (2012) eKLR and the *Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Ltd* (1989) KLR 1 and submitted that pursuant to articles 22,23,69,70 and 162(2) (6) of the *Constitution* and sections 4 and 13 of the *Environment and Land Court Act, 2011* the court has jurisdiction to hear and determine the Petition since the same concerns violation of the right to a clean and healthy environment.
39. Counsel also argued that the Public Procurement Administrative Review Board (PPARB) address itself on the soundness of the procurement process on the impugned invitation to tender; it does not have jurisdiction to adjudicate upon environmental conservation and sustainable environmental exploitation issues on the basis of the provisions of articles 22,23,42,69,70 and 162 (2) (6) of the *Constitution* and also Sections 4 and 13 of the *Environment and Land Court Act, 2011*.
40. On whether the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to invite bidders in presence of a logging moratorium is arbitrary and contravenes the *Constitution of Kenya* and statute laws, counsel submitted that the Moratorium is equivalent to a statutory instrument as defined by the *Statutory Instruments Act* No 23 of 2013 and that the invitation of bidders by the impugned tenders violated sections 5(2) and (3), 7(2) and (3), 8(1) and 22 (2) of the *Statutory Instruments Act* No 23 of 2013 and as such the same ought to be declared illegal.
41. Counsel further submitted that the nature of the present moratorium especially its impact on sustainable environmental exploitation does not enjoy the exemption of section 9 of the Statutory Instrument Act where the regulatory impact assessment is unnecessary.
42. Counsel reiterated that the lifting (partially or fully) or any form of interference with the logging moratorium of 2018 must be proceeded with publication of the statutory regulatory statement to enable public participation, gazettement of relevant committee with specific terms of reference through a gazette notice and newspaper publication, consultation and public participation and then issuance of a report thereof. Counsel cited the case of *Richard Owour & 2 others (Suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fishers & Cooperative & others* (2020) eKLR where the court was faced with a similar situation (of prohibiting importation of raw sugarcane without consultation) and quashed the decision of the relevant cabinet secretary and held as follows:
- “98. The claim that the decision to ban the importation of raw cane into Kenya is in violation of articles 10 and 47 of the *Constitution* for want of public participation, stakeholders engagement and administrative fair procedure succeeds. This court declares the said decision constitutionally infirm. Therefore, the decision by the cabinet secretary for Agriculture, Livestock, Fishers and Irrigation to unilaterally ban importation of raw cane into Kenya made on July 2, 2020 is hereby quashed”
43. On the issue of not conducting the EIA, Counsel submitted that under articles 42 and article 69 1(a) of the *Constitution* everyone is entitled to a clean and healthy environment and that the state is mandated to ensure sustainable exploitation, utilization and conservation of the environment and natural resources and ensure sharing of the accruing benefits. Counsel also cited Principle 15 of the *Rio Declarations on Environment and Development, 1992*. Counsel further made reference to section 22(3), section 36, 44(2) (a) and (d), 46(1) (c) and 75(3) of the *Forest Conservation and Management Act, 2016* which requires the respondents to conduct an Environmental Impact Assessment. Reference was also made to section 58 of *EMCA* and regulation 17 of Legal Notice No 101 of the *Environmental*



*(Impact Assessment and Audit) Regulations, 2003*. Counsel reiterated and maintained that none had been undertaken by the respondents herein and that EIA must precede the impugned tenders. Counsel cited the cases of *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* Civil Case No 97 of 2001, *Kibwezi Water Resources Uses Association & 4 others v Attorney General & 5 others* (2019) eKLR, *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others* (2010) eKLR and *Ken Kasinga v David Kiplagat & 5 others* Petition No 50 of 2013.

44. On whether the decision by the 1<sup>st</sup> respondent to invite impugned Tenders contravenes the *Constitution* and statute laws of Kenya for want of public participation, stakeholder consultations and administratively fair procedures, Counsel submitted that pursuant to article 10(2) (a) and article 69 (1) (d) of the *Constitution*, public participation is required in the management, protection and conservation of the environment. Counsel also argued that this is also a requirement provided for by section 4 (6) of the *Forest Conservation and Management Act, 2016* and principle 10 of the *Rio Declaration on Environment and Development*. Counsel also referred to article 2(6) of the *Espoo Convention on Environmental Impact Assessment in a Transboundary Context* and also the Part 11 of the *Forests (Community Participation in Sustainable Forest) Management Rules, 2020* encourages communities to participate in sustainable forest management and Part 111 requires the respondents to collaborate with local communities in development of participatory forest management plans.
45. Counsel also cited the cases of *Mui Coal Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (2015) eKLR and *National Environment Management Authority & 3 others v Maraba Lwatingu Residents Association & 505 others* (2019) eKLR, where courts were emphatic that adequate public participation must be conducted before commencing any project that may have any impact on the environment.
46. The petitioner contended that the respondent ought to follow the law and the procedure set down in Statutes, Contentions and own rules before allowing timber harvesting by actively engaging the public through properly conducted public participation and consultation forums and he urged the court to declare that the proposed harvesting of forest materials be declared void for want of public participation and stakeholder consultation.
47. On whether the intended harvesting of trees without management plan and falling of unmarked trees contravenes the principle of sustainable environmental management and further possess danger to Flora and Fauna, Counsel argued that section 42(1) and (2) of the *Forest Conservation and Management Act* directs the respondents to ensure the sustainability, Management, protection and conservation of the indigenous forests and woodlands in consultation with the forest conservation committees. Counsel cited the case of *Joseph Leboo & 2 others v Director Kenya Forest Service & another* (2013) eKLR where Munyao, J held that a Management plan is necessary before felling of any trees.
48. Counsel for the petitioner reiterated that failure to put in place a Management plan and marking trees to be felled as required by statute law and the relevant subsidiary guidelines and rules on the subject contravenes the principle of sustainable environmental management and further possess danger to flora and fauna and thus the impugned tenders should be cancelled.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions**

49. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed the written submission dated March 22, 2022. In their submissions, counsel addressed himself to the following issues:-
  - i. The jurisdiction of the court to hear and determine the petition.



- ii. Whether the partial lifting of the moratorium infringed on the rights of the petitioner.
  - iii. Whether the constitutional rights and fundamental freedom of the petitioner has been breached, violated and or infringed upon either as alleged or at all.
  - iv. Whether the decision to dispose of forest plantation was done without adhering to the principles of public participation, good governance, transparency and accountability in the management of natural resources.
  - v. Whether or not the terms and conditions outlines in the invitation of bid for forest material contravenes the petitioner members' rights as enshrined in the [Constitution](#) .
50. On the issue of jurisdiction, counsel argued that the court lacks jurisdiction to hear the petition in view of the fact that the petition is challenging the invitation to tender to bid for forest plantation material wherein the disposal of forest plantation materials falls within the mandate of the Kenya Forest Service and since the service is a creature of statute the same ought to comply with the provisions of the Public Procurement and Asset Disposal Act,. Counsel also submitted that the petition violates the doctrine of constitutional avoidance and the statutory dispute resolution process under the [Public Procurement and Asset Disposal Act](#) and the decisions of [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) (2012) eKLR and [Speaker of National Assembly v Karume](#) (1992) KLR were cited in support of the said position.
51. On whether the partial lifting of moratorium infringed on the rights of the petitioner, counsel submitted that no evidence of such violation had been tendered. Counsel further submitted that the purpose of partially lifting the moratorium was to allow the service to test the reforms that have been initiated in the disposal of forest materials process and that one of the contemplated reforms include the disposal of forest materials in public forest through a competitive process and in this regard through a competitive tender process.
52. On whether the constitutional rights and fundamental freedom of the petitioner has been breached, violated and or infringed upon, counsel argued that none of the petitioner's rights has been breached, violated and or infringed upon. Counsel argued that the petitioner has not stated in what manner his constitutional rights have been violated. Counsel cited the case of [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) (2013) eKLR and [Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & another](#) (2014) eKLR in support of his submissions on the said issue.
53. On whether the decision to dispose of forest plantation was done without adhering to the principles of public participation, good governance, transparency and accountability in the management of natural resources, counsel argued that there were consultations on logging there was consultation during the prequalification of those eligible to tender and eventually when the invitation to tender was published. Counsel urged the court to find that there was public participation which was sufficient in the circumstances. Secondly this being a public procurement issue there is no requirement for public participation.
54. It was also submitted that a procurement entity has absolute discretion to design terms and conditions of the tender so long as the provisions of the [Public Procurement and Asset Disposal Act](#) are observed. Counsel concluded his submissions by urging the court to dismiss the said petition.



### **The submissions by the 1<sup>st</sup> Interested Party**

55. In their brief submissions dated March 19, 2022, counsel associated themselves with the written Submissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It was contended that the court lacks jurisdiction to entertain the suit in view of the fact that the issues raised in the petition relate to the tendering process.
56. Counsel also submitted that the petitioner was not deserving of the reliefs sought since no violation had been proved by the petitioner. Counsel relied on the cases of *Kiambu County Tenants Welfare Association v Attorney General & another* (2017) eKLR and *Christian Juma Wabwire v Attorney General* (2019) eKLR.

### **The 2<sup>nd</sup> to 11<sup>th</sup> Interested Parties' Submissions**

57. The 2<sup>nd</sup> to 11<sup>th</sup> Interested parties despite being served never participated in the proceedings neither did they file any written submissions.

### **Analysis and Determination**

58. The court has considered the case put forward by the petitioner, the respondents and the 1<sup>st</sup> interested party, the written submissions filed and the authorities referred upon and is of the view that the following are the main issues for determination: -
- i. Whether this court has jurisdiction to hear this petition.
  - ii. Whether it was necessary for the Respondents to undertake an Environmental Impact Assessment prior to commencement of invitation of bidders in respect to the sale of forest plantation materials.
  - iii. Whether the decision by the Respondents to invite bidders in presence of a logging moratorium is arbitrary and contravenes the Constitution and statute laws
  - iv. Whether there was any violation to the Petitioner's rights in respect to the actions undertaken by the respondents.
  - v. Whether the petitioner is entitled to any remedies.
59. The respondents objected to the petition on the grounds that the court lacks jurisdiction to entertain the petition due to the fact that the petitioner is challenging the invitation to bid for the forest plantation materials. The respondents argued that disposal of forest plantation material falls within the mandate of the Kenya Forest Service and since the Service is a creature of statute the same ought to comply with the provisions of the Public Procurement and Asset Disposal Act, 2015. It was also argued that the petition violates the doctrine of constitutional avoidance and the statutory dispute resolution process under the Public Procurement and Asset Disposal Act, 2015 is sufficient to address the issues raised by the petitioner and this honourable court does not have jurisdiction as held by the Supreme Court in the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others* (2012) eKLR and Speaker of *National Assembly v Njenga Karume* (1992) KLR 21.
60. Responding to the issue of jurisdiction, counsel for the petitioner contended that the jurisdiction of the court to handle the instant petition is derived from article 162 (2) (6) of the Constitution as well as sections 4 and 13 of the Environment and Land Court Act.



61. The issue of jurisdiction having been raised by a party should be determined at the earliest possible opportunity. This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See *Owners of the Motor Vessel "Lillian SS" vs Caltex Oil Kenya Limited* (1989) KLR 1. A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court *In The Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011 discussed the issue of jurisdiction in the following manner:

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution ; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the court, is to apply the same with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by the Constitution ”.

62. In the words of Chief Justice Marshall of the US Supreme Court in *Cobens v Virginia* 19 U.S. 264 (1821):-

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution . We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution . Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

63. Article 162(2)(b) of the Constitution states that this court shall have jurisdiction over disputes relating to the environment and the use and occupation of and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this court as follows:

- “(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution , the court shall have power to hear and determine disputes—
  - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - (b) relating to compulsory acquisition of land;
  - (c) relating to land administration and management;



- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

64. While the court’s jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K Jawara v Gambia* ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples’ Rights it was held that:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

65. The Petition as filed by the petitioner cites violations of certain constitutional and statutory provisions. The mandate of Public Procurement Administrative Review Board as set up under section 27(1) the *Public Procurement and Asset Disposal Act, 2015* relates to reviewing, hearing and determining tendering and asset disposal disputes and to perform any other functions conferred to the Review Board, regulations or any other written law. The Board cannot grant any constitutional reliefs. In the case of *R v Independent Electoral and Boundaries Commission (IEBC) & others Ex Parte The National Super Alliance (NASA) Kenya* [2017]eKLR after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the court held:-

“[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it.

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

66. Upon careful consideration of the petition before this court and the partial submissions, I find that the gravamen of the petition herein relates to the extension of the moratorium on logging activities in public and community forests and the alleged violations of the provisions of the *Constitution* and the *Forest Conservation and Management Act*. In my view the Board has no jurisdiction to enforce those provisions. In my considered opinion, the Board is not a suitable forum for the purpose of settling environmental disputes as disclosed in this petition. The Environment and Land Court has powers to hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of



the Constitution . It is therefore clear that only the Environment and land Court is clothed with the jurisdiction to hear and determine the issues raised in the petition. To hold otherwise will not only be watering down the constitutional rights of parties but acting contrary to the Constitution .

67. The respondents sought reliance in the case of Speaker of the National Assembly v James Njenga Karume (1992) eKLR. The same can be distinguished as it was decided before the promulgation of the Constitution of Kenya, 2010 which has since recognized environmental rights which must not only be respected but enforced through the intervention of this court. In reference to the provisions of Article 22, 23, 42 and 70 of the Constitution of Kenya, 2010 and considering the petitioner’s prayers in the petition, I am satisfied that this court has jurisdiction to hear and determine this petition.

**Issue No 2: Whether It Was Necessary For The Respondents To Undertake An Environmental Impact Assessment Prior To Commencement Of Invitation Of Bidders In Respect To The Sale Of Forest Plantation Materials.**

68. The petitioner contends that respondents were required to undertake an Independent Environmental Impact Assessment before invitation of bidders for harvesting of the forest materials. Counsel cited several provisions of the Environmental Management and Coordination Act, the Constitution and Forest conservation and Management Act.
69. The respondent’s filed a replying affidavit sworn by Dr Julius Kamau and averred at paragraph 10 thereof that:

“That the allegation that the Service has shifted the onus of conducting an environmental impact assessment to the respective tenders yet the responsibility lies with the Service as it is the procuring entity is misunderstood.

The Petitioner misinterpreted clause 10 on obligations of the licensee paragraph h (iv) of the Timber Harvesting Licence that is part of the tender document and stipulates “The licensee shall comply with the applicable environmental standards, including laws relating to environmental impact assessment. This therefore does not mean that the tenders will conduct a fresh EIA but comply with already existing EIA”

70. Section 58(1) and (2) of Environmental Management and Coordination Act (EMCA) provides as follows:
- (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.
  - (2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority; Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.



71. Regulation 17 of the *Environmental (Impact Assessment and Audit) Regulations, 2003* (EMCA Regulations) provides for public participation as follows:
- “During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project”
72. The second schedule of *EMCA* gives a list of activities which require environmental impact assessment prior to commencement. Pursuant to legal Notice No 31 of 2019 which led to the amendment of the second schedule of *EMCA*, and listed forest related activities including
- a. Timber harvesting in plantation forest.
  - b. Reforestation and afforestation and
  - c. Wood preservation or treatment facilities
73. It therefore follows that it is not in doubt the activities of timber harvesting in plantation forest required the undertaking of an Environmental Impact Assessment prior to its commencement.
74. The respondents also raised the argument that no fresh EIA was to be undertaken prior to the harvesting of forest materials since there already existed one that had been done. I am unable to concede to that argument since assuming there is one that had been done, in any event the EIA licence once issued it is only valid for 24 months prior to the commencement of the proposed project.
75. I have keenly read the material relating to the tenders for sale of the forest material as was placed by the respondents and it is evident that no EIA was conducted prior to the commencement of the same. In the circumstances it is the finding of this court that an EIA ought to have been conducted prior to the commencement of the impugned tenders.

**Issue No 3: Whether The Decision By The Respondents To Invite Bidders In Presence Of A Logging Moratorium Is Arbitrary And Contravenes The *Constitution* And Statute Laws**

76. The petitioner contended that no public participation was conducted prior to invitation of bidders for the impugned tenders and hence therefore the same was in contravention of the *Constitution* and the law.
77. Article 10 (1) and (2) of the *Constitution* provides as follows:
1. The national values and principles of governance in this article bind all state organs, state officers, public officers and all persons whenever any of them--
    - a. applies or interprets this Constitution;
    - b. enacts, applies or interprets any law; or
    - c. makes or implements public policy decisions.
  2. The national values and principles of governance include--
    - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
    - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;



- c. good governance, integrity, transparency and accountability; and
- d. sustainable development

78. Article 69(1)(d) of the Constitution provides as follows:

- (1) The State shall—
- (d) encourage public participation in the management, protection and conservation of the environment;

79. Article 232(1)(d) of the Constitution provides as follows:

- (1) The values and principles of public service include—
- (d) involvement of the people in the process of policy making;

80. The principle of public participation is not new. It did not come with the promulgation of the Constitution. It was always recognised as an element of the common law doctrine of natural justice. The parties cited a number of authorities before in support of their rival positions on the issue.

81. In the South African case of Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC11;2006 (12) BCLR 1399(CC); 2006(6) SA 416(CC) that was cited by the 1<sup>st</sup> petitioner, the court stated that:

“According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore means taking steps to ensure that the public participate in the legislative process.”

82. In the other South African case of Minister of Health and another v New Clicks South Africa(Pty) Ltd and others [2006](2)SA 311(CC) that was also cited by the 1<sup>st</sup> petitioner, the court stated that:

“The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

83. In the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County of Nairobi Government & 3 others [2013] eKLR, the court stated that:

“The preamble of the Constitution sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at article 10(1) of the Constitution by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of the Constitution establishes the founding values of the State and includes as part of those values, transparency, accountability and participation of the people. It is thus clear to me that the Constitution contemplates a participatory democracy that is accountable and transparent and makes provisions for public involvement. Consistent with this, article 174 (c) of the Constitution



provides for the principles of devolved government and has given powers to the people to enhance self-governance and enhance their participation in decisions that affect them. Clearly, the making of county laws by members of County Assembly is, in my view, an essential part of public participation.”

84. [\*In the Matter of the Mui Coal Basin Local Community\*](#) [2015] eKLR, the court that:

“.....the petitioners only response was that public participation and due diligence undertaken were not adequate. As the cases before us have noted, it is not possible to come up with arithmetic formula or litmus test for categorically determining when a court can conclude there was adequate public participation. However as we have alluded above, the courts look at the bona fides of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible.”

85. The respondents contended that there was public participation which was sufficient in the circumstances. It was also stated that this being a public procurement issue there is no requirement for public participation since section 70(4) of the [\*Public Procurement and Asset Disposal Act, 2015\*](#) does not require any public participation to be undertaken prior to the preparation of a tender document.

86. I have no doubt that our local jurisprudence deals at length with why the [\*Constitution\*](#) and statute law have imposed the obligation of public participation in most spheres of governance and I generally take the view that it would be contrary to the [\*Constitution\*](#) to be denied this constitutional and statutory right of public participation. The Respondents ought to take on board the views and values on environmental management held by communities likely to be affected by decisions affecting environmental resources that are close to them or in which they live such as decisions on forest issues.

87. I also keenly perused the materials relating to the impugned tender that was placed before this court and it is evident that a notice calling for public participation for persons affected by the 2018 Moratorium on logging in public and community forest issued on the November 30, 2021 in Standard Newspaper appeared in the press on the same day when the invitation to tender was published. This contention does not justify that indeed public participation had been undertaken prior to the invitation for the bidders. In the circumstances, it is the finding of this court that respondents contravened the [\*Constitution\*](#) and various statute laws for want of public participation prior to invitation of the impugned tenders.

**Issue No 4: Whether There Was Any Violation Of The Petitioner’s Right In Respect To The Actions Undertaken By The Respondent.**

88. The petitioner contended that his constitutional rights had been violated and or infringed upon. The respondents on the other hand maintained that the petitioner had not stipulated in what manner the same had been violated.

89. The [\*Constitution\*](#) embodies elaborate provisions with considerable implications for sustainable development. These range from environmental principles to the right to a clean and healthy environment as enshrined in the Bill of Rights. Chapter V of the [\*Constitution\*](#) is entirely dedicated to land and environment.



90. The Constitution begins by acknowledging the need for cautionary dealing with the environment by a provision in its preamble which, as is relevant, provides that

"We, the People of Kenya ... Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations..."

These words of the Constitution in its preamble clearly suggest reverence to sustainable development.

91. It is undisputed that the Constitution contains an explicit environmental right in article 42 which provides that every person has the right to a clean and healthy environment. This right 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.

92. Article 70 of the Constitution confers standing upon a person who alleges violation of rights to a clean and healthy environment. This means that

"the environmental right is sufficiently comprehensive and all-encompassing to provide 'everyone' with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived there from is infringed."

From the foregoing, it is clear that protection of the environment has now become an urgent responsibility to which our legal system responds to inadequately. It is undisputed that environmental protection in Kenya has constitutional protection.

93. Article 69 of the Constitution imposes obligations on the State in respect of the environment. Among other obligations imposed on the State include the duty to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources. The State is also obligated to ensure equitable sharing of the accruing benefits. It is also required to encourage public participation in the management, protection and conservation of the environment.

94. It is clear, our legal system provides an express, justiciable constitutional right to a clean and healthy environment. Kenyans secured this powerful right to the environment through the promulgation of the Constitution and courts have a solemn duty to enforce this right in the context of environmental harms.

95. The impugned tenders could not be undertaken unless an Environmental Impact Assessment had been concluded and approved in accordance with the provisions of Environmental Management and Coordination Act No 9 of 1999 (EMCA) and the Regulations made thereunder. There was uncontroverted evidence that the same was to commence without the undertaking of an environmental impact assessment.

96. Section 58 of EMCA and regulation 4(1) of The Environmental (Impact Assessment and Audit) Regulations 2003 which provides that:-

"4.

(1) No proponent shall implement a project-

a. Likely to have a negative environmental impact, or



- b. For which an environmental impact assessment is required under the Act or these regulations, unless an environmental impact assessment has been concluded and approved in accordance with these regulations.”

97. Article 42 of the Constitution provides:

“ 42. 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.”

98. Although EMCA is a pre-Constitution 2010 statute it gives effect to the constitutional provisions in respect to Environmental Rights. In dealing with matters on Environmental Rights, section 3 of EMCA directs that the High Court shall be guided by the principles of Sustainable Development. Some of those principles are:-

“(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

.....

(d) the principles of intergenerational and intragenerational equity;

.....

(f) the pre-cautionary principle.”

99. This court refers to the following passage from “The Bill of Rights Handbook (5<sup>th</sup> Edition) at page 527”.

“The principle of “sustainable development” has both substantive and procedural elements. From the substantive perspective one way of ensuring that development decisions do not disregard environmental considerations is for the legislature to provide for Environmental Impact Assessment (EIA) for all development projects.”

100. The definition and core purpose of an Environmental Impact Assessment is set out in section 2 of EMCA. It states that an EIA is:-

“A systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment”

101. Having held earlier that the commencement of the impugned tender relating to the harvesting of the forest materials without an environmental impact assessment and without the undertaking of adequate public participation was contrary to the Constitution and the applicable statutes, it is the finding of this court that the petitioner’s rights to a clean and healthy environment was under threat and at risk of being violated.



## Issue No 5: Whether The Petitioner Is Entitled To Any Remedies

102. The petitioner sought for various reliefs as was pleaded in his amended petition. The petitioner having succeeded in the issues raised in its petition, it is the finding of this court that he is entitled to the reliefs sought.

103. Before I conclude, I would like to borrow the words of Munyao, J as cited in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* (2013) eKLR where he stated: -

“In any event, trees ought not to be considered purely on the basis of their commercial value. That is a narrow way of looking at an important resource such as trees. Trees sustain biodiversity and are important carbon sinks. Their value to the environment, far surpasses the narrow view of trees as being purely commercial in nature, and that applies for plantation forests as well.”

104. I also wish to express my sincere gratitude to each and every counsel for their industry and able presentation of their respective client's cases.

## Disposition

105. In the end the amended petition dated January 21, 2022 is disposed as follows:

a. A declaration be and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted in contravention of sections 6(1), 55, 59, 61, 72(5), 73(2) of the *Forest Conservation and Management Act, 2016* (FCM Act, 2016) in purporting to set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests (hereinafter Logging Moratorium) issued by the Cabinet Secretary, Ministry of Environment and Forestry and thereby violated articles 1(3)(a), 2(1) and (2), 3(1), 10, 21(1), (2) and (3), 24, (4) and (5), 42, 47(1) and (2), 69, 71, 73 and 232 of the *Constitution of Kenya*.

b. A declaration be and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot overhaul, set aside, lift or replace the November 2018 Extension of the Moratorium on Logging Activities in Public and Community Forests issued by the Cabinet Secretary, Ministry of Environment and Forestry and allow logging and sale of forest material without undertaking an environmental impact assessment as envisioned under sections 36, 44(2)(a) and (d), 46(1)(c) and 75(3) of the *Forest Conservation and Management Act, 2016* (FCM Act, 2016).

c. A conservatory order be and is hereby issued directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents staying further implementation of the Notices titled

“Invitation to tender (being: Tender Ref Nos: KFS/DISP/02/2021-2022, KFS/DISP/03/2021-2022, KFS/DISP/04/2021-2022 and KFS/DISP/05/2021-2022)”

(hereinafter ‘Impugned Tenders’) purporting to invite eligible Forest Industry investors to submit bids for the sale of forest materials and another notice titled

“Public notice on the status of inquiry into claims on forest material under KFS affected by the 2018 moratorium on logging in public and community forest”

(hereinafter “Public Inquiry Notice”) calling for public participation for persons affected by 2018 issued on the November 30, 2021 in Standard Newspapers.

d. Each party to bear own costs of the Petition.



Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF OCTOBER 2022**

**E.K. WABWOTO**

**JUDGE**

**In The Presence Of:**

Mr. Ogonji for the Petitioner.

Mr. Allan Kamau h/b for Mr. Eredi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms. Kinyua for the 1<sup>st</sup> Interested party.

N/A for the 2<sup>nd</sup> Interested party.

N/A for the 3<sup>rd</sup> Interested party.

N/A for the 4<sup>th</sup> Interested party.

N/A for the 5<sup>th</sup> Interested party.

N/A for the 6<sup>th</sup> Interested party.

N/A for the 7<sup>th</sup> interested party.

N/A for the 8<sup>th</sup> Interested party.

N/A for the 9<sup>th</sup> Interested party.

N/A for the 10<sup>th</sup> Interested party.

N/A for the 11<sup>th</sup> Interested party.

Court Assistant; Caroline Nafuna.

**E.K. WABWOTO**

**JUDGE**

