



**Timber Manufacturers Association v Kenya Forest Service & 2 others;  
Kiambu Saw Mills (Interested Party) (Environment & Land Petition  
1 of 2022) [2022] KEELC 13820 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13820 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND PETITION 1 OF 2022**  
**EK WABWOTO, J**  
**OCTOBER 21, 2022**  
**(FORMERLY NAKURU ELC PETITION NO. E19 OF 2021 )**  
**IN THE MATTER OF DISPOSAL OF NATURAL RESOURCES**  
**BY THE KENYA FOREST SERVICES**  
**AND**  
**IN THE MATTER OF ARTICLES 2,**  
**3,10,19,20,21,22,23,27,29(D),**  
**47,69,159,162,165,232,258,259 AND 260 OF THE**  
**CONSTITUTION OF KENYA**  
**AND**  
**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE**  
**CONSTITUTION AND IN THE MATTER OF VIOLATION OF**  
**THE RIGHT TO PUBLIC PARTICIPATION AND IN THE**  
**MATTER OF CONTRAVENTION OF ARTICLES**  
**10,27,29(D),42,47,69,70,227 AND 232 OF THE**  
**CONSTITUTION OF KENYA (2010)**

**BETWEEN**  
**TIMBER MANUFACTURERS ASSOCIATION ..... PETITIONER**  
**AND**  
**KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT**



**PRINCIPAL SECRETARY MINISTRY OF ENVIRONMENT AND  
FORESTRY ..... 2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**  
**AND**  
**KIAMBU SAW MILLS ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner in the Petition dated December 8, 2021 seeks for the following reliefs: -
  - a. A declaration that the actions and/or inactions of the respondents of not allowing the public participate in the management of natural resources by way of disposing natural resources is in contravention with national values under article 10, principles of public procurement under article 227 and sustainable management of natural resources under article 69 of the Constitution of Kenya 2010.
  - b. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 initiated by the service is unconstitutional to the extent that it contravenes Constitutional principles of good governance, transparency, accountability and public participation.
  - c. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 initiated by the service is discriminatory against members of the Association in favour of dominant players in the sector.
  - d. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 initiated by service violates the Petitioner's members' legitimate expectation of fair administrative action on the part of the service.
  - e. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 violates the constitutional dictate on equitable and fair access to exploitation of natural resources.
  - f. A declaration that the Petitioner members' fundamental rights and freedoms as enshrined under Articles 27,29(d) 42, and 47 of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondents.
  - g. An order awarding costs of the Petition to the Petitioner.
  - h. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner Members fundamental rights and freedoms; the enforcement and defence of the Constitution pursuant to Article 23(3) of the Constitution.
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 Bernard Gitau on December 8, 2021.
3. Upon being served with the Petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn by Julius Kamau Chief Conservator of Forest on December 16, 2021. The Interested party herein filed



an affidavit sworn by Joseph Mburu, its Chairperson sworn on December 17, 2021 in opposition to the Petition.

### **The Parties**

4. The Petitioner is an association registered under Section 10 of the *Societies Act* of Kenya under Certificate of Registration No 11429 comprised of various forestry investors who have come together to form the association.
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.
6. The 2<sup>nd</sup> Respondent is the state officer whose office is established under Article 155 of the *Constitution* and is the accounting officer of the Ministry of Environment and Forestry.
7. The 3<sup>rd</sup> Respondent is the principal legal advisor of the government of Kenya and is made a party to this Petition on behalf of the Government of Kenya.

### **The Petitioner's case**

8. The Petitioner's case as presented in the Petition and the Supporting Affidavit sworn by Bernard Gitau the 1<sup>st</sup> Respondent violated their rights by not providing a system of public participation and or involvement when it unilaterally decided to invite tenderers to bid for forest materials which are part of the natural resources.
9. The Petitioner also averred that there was a moratorium issued in 2018 to halt all activities including the harvesting of forest materials and it is unreasonable that the invitation to tender only exists for 60 days and further no notice and or reasons were issued by the Service indicating that the moratorium had been lifted.
10. It was also contended that since the process was flawed ab initio, the entire tendering process of Tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2021 becomes null and void.
11. The Petitioner further contended that the 1<sup>st</sup> Respondent shifts the onus of conducting an environmental impact assessment to the prospective tenderers yet it is a responsibility that lies with them as the procuring entity.
12. It was also stated that the tender has been fashioned to favour the dominant players in the sector and thus defeating transparency.
13. It was further stated that the entire process was in breach of Article 47 of the *Constitution*. The Petitioner contended that there was no public participation on the disposal of the natural resources which is within the purview of the management of natural resources and hence the same being in violation of Articles 10, 69, 227 and 232 of *Constitution*.
14. It was Pleaded that the 1<sup>st</sup> Respondent having shifted the onus of conducting an environmental impact assessment to the prospective tenderers, the same was in violation of Article 42 of the *Constitution*.
15. In the premises, the Petitioner implored the court to intervene and grant the reliefs sought.

The case of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.



16. The Respondents opposed the petition vide a Replying Affidavit sworn by Dr Julius Kamau Chief Conservator of Forest on December 17, 2021.
17. 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 Assets Disposal Act 2015.
18. 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 publicly 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.'
19. 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.
20. 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.
21. 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.
22. 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.
23. Accordingly, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the Petition ought to be dismissed.

#### **The case of the 1<sup>st</sup> Interested party and its submission.**

24. The 1<sup>st</sup> Interested party associated themselves with the position taken by the Respondents in opposition to the Petition.
25. 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* of 2015. The case of *Samwel Kamau Macharia & Another -Vs- Kenya Commercial Bank Limited & 2 others (2012) eKLR* was cited in support of this position.
26. 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.
27. 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 Petitioner' submissions

28. The Petitioner filed his written submission dated March 7, 2022. Counsel for the Petitioner outlined five issues for determination. These were:
- i. Whether this Court has jurisdiction to hear the matter.
  - ii. Whether or not, by not allowing the public to participate in the management of natural resources is in contravention with the Constitution of Kenya 2010.
  - iii. Whether or not the process undertaken in deciding to dispose off the same by the Respondents is unconstitutional.
  - iv. Whether or not the terms and conditions outlined in the invitations to bid for forest material contravene the Petitioner member's rights as enshrined in the Constitution of Kenya.
  - v. Whether or not the Petitioner is entitled to the orders sought.
29. On the issue of jurisdiction, Counsel cited the case of Christopher Ngusu Mulwa & 28 Others vs The County Government of Kitui & Another and 162(2) (6) of the Constitution and sections 4 and 13 of the Environment and Land Court Act, 2011 and submitted that the Environment and Land Court has jurisdiction to hear and determine the Petition since the same concerns several constitutional violations.
30. 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 tenders and it does not have jurisdiction to adjudicate upon constitutional violations and other environmental matters.
31. On the issue 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 was not conducted herein as was during the Environmental Impact Assessment and Forest Plantation Management Plan. Counsel cited the cases of Mui Coal Local Community & 15 others -Vs- Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR, Joseph Leboo & 2 Others -Vs- Director Kenya Forest Service & Another (2013) eKLR and Save Lamu & 5 Others vs NEMA & Others [2019] eKLR.
32. On whether the decision by the 1<sup>st</sup> Respondent to invite impugned Tenders contravenes the Constitution and statute laws of Kenya, Counsel submitted that the Respondents had violated Articles 47 of the Constitution on the Petitioner's rights to fair administrative action.
33. Counsel also submitted that the terms and conditions outlined in the invitation to tender contravenes its members rights as enshrined in the Constitution of Kenya. In demonstration of this, Counsel submitted as follows:-

' An evaluation of the terms and conditions outlined in the invitation to tender would reveal that:

- i. There are clauses that provide for the disposal of trees on an 'where-is-as-is' and/or 'as-is-where-is' basis without considering situations where this may not be applicable as the subject matter of disposal (trees) is a natural resource and is highly susceptible to changes.

Secondly, the invitation to bid for tenders was set for only 14 days where the invitation was announced on 30<sup>th</sup> November, set to expire on 14<sup>th</sup> December.



There was only 14 days available for inspection, yet the materials set to be disposed were in different counties all over the country.

- ii. There are clauses that indemnify the service from liability in the instant where items sold are defective and/or unmerchantable. This is contrary to Article 46 of the Constitution of Kenya.
- iii. There are clauses requiring the tenderers to pay all the amount due before acquiring the items where, given the indemnity clauses, the unreasonably limited timeframe for inspection of the forest materials set to be sold on 'where-is-as-is' and/or 'as-is-where-is' basis and without any assurance of quality, the tenderer is likely to suffer severe loss where items bought are defective.

More so, owing to the hard economic times brought by the COVID pandemic and the 4 year moratorium that had halted all the activities involving logging of forest materials, this particular condition is oppressive to the investors in the forest sector as it does not reflect the principles of fair, equitable, transparent, and cost-effective system in the public procurement and disposal of the forest materials.

- iv. The given time for inspection of items and tendering are unreasonably too short for prospective tenderers to make well-informed decisions and acquire the necessary resources required to acquire the items.
- v. It is ambiguous whether the volume of the trees provided in the itemized compartments includes treetops and branches. More so, the number of trees in each category has not been given which makes it difficult to decipher the estimate market price of the items.
- vi. The service shifts of the onus of conducting and environmental impact assessment to the prospective tenderers, yet the responsibility lies with the service as it is the procuring entity (proponent of the project) as provided for in Part VI of the Environmental Management and Coordination Act (EMCA).'

34. Counsel concluded his submissions by urging the Court to grant the reliefs sought in the Petition as stipulated under Article 23 (3) of the Constitution and Sections 13(7) of the Environment and Land Court Act.

#### **The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents submissions.**

35. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed the written submission dated March 22, 2022. In their submissions, Counsel addressed himself to the followings 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](#).
36. 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 Assets 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 –Vs- Kenya Commercial Bank Ltd & 2 others (2012) eKLR and Speaker of National Assembly –Vs- Karume (1992) KLR were cited in support of the said position.
37. 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.
38. 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 –Vs- Trusted Society of Human Rights Alliance & 5 others \(2013\) eKLR](#) and [Daniel Toroitich Arap Moi- Vs- Mwangi Stephen Murithi & Another \(2014\) eKLR](#) in support of his submissions on the said issue.
39. 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.
40. 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 Interested Party**

41. 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.
42. 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-Vs- Attorney General & Another \(2017\) eKLR](#) and [Christian Juma Wabwire –Vs- Attorney General \(2019\) eKLR](#).



## Analysis and Determination.

43. 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.
44. 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 Assets 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 –VS- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR and Speaker of National Assembly –Vs- Njenga Karume (1992) KLR 21
45. 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.
46. 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'.



47. In the words of Chief Justice Marshall of the US Supreme Court in *Cobens vs Virginia 19 US 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.'

48. 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.'

49. 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 vs 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.'

50. 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 Assets 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 vs 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.'

51. Upon careful consideration of the petition before this court and the parties submissions, it is 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.
52. The Respondents sought reliance in the case of Speaker of the National Assembly –Vs- 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.

53. The Petitioner contends that Respondents were required to undertake an Independent Environmental Impact Assessment before invitation of bidders for harvesting of the forest materials and they were not supposed to pass the said responsibility to the tenderers.
54. The Respondents' filed a Replying Affidavit sworn by 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'

55. 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.

56. 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'

57. 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

58. 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.

59. 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 is only valid for 24 months prior to the commencement of the proposed project.

60. 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

61. 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.
62. 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.
63. 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;
64. 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;
65. The principle of public participation is not new. It did not come with 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.
66. 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.'

67. 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.'

68. 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.'

69. In the Matter of the Mui Coal Basin Local Community (2017) 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.'

70. 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.

71. 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.



72. 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 the 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.

73. 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.
74. 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.
75. 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.
76. 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.
77. 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.
78. 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.
79. 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.



80. 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.
81. 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.'
82. The Petitioner also contended that the Respondents violated its right to fair administrative action as provided for under Article 47 of the Constitution of Kenya 2010 which provides;
- ' (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.'
83. Fair administrative action, as per Article 47 of the Constitution of Kenya 2010, broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and the right to a fair administrative action. Article 47 of the Constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. I have no doubt in finding, that the Respondents infringed Article 47 of the Constitution of Kenya 2010 as they failed to state whether or not the invitation to tender was lifting the moratorium or not or whether it was extending the same. This was also in furtherance of the Petitioner's right to legitimate expectation. I find that the Respondents' action was unjust, unfair, inefficient, unlawful, unreasonable and procedurally unfair and amounts to infringement of Article 47(1) and (2) of the Constitution of Kenya 2010.
84. 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 were infringed upon.

## Issue No 5

Whether the Petitioner is entitled to any remedies.

85. The Petitioner sought for various reliefs as was pleaded in its Petition. The Petitioner having succeeded in the issues raised in its petition, it is the finding of this court that it is entitled to the reliefs sought.
86. On costs, the Petitioner prayed for the same to be awarded. On this issue, it is clear that costs are awarded at the unfettered discretion of the court, subject to such conditions and limitations as may prescribed



and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise. In the instant petition, though the petition has been successful, the same was brought in the public interest and in the circumstances, I will direct that each party bears their own costs of the petition.

### **Disposition**

87. In the end the Petition dated December 8, 2021 is disposed as follows:-

- a. A declaration that the actions and/or inactions of the Respondents of not allowing the public participate in the management of natural resources by way of disposing natural resources is in contravention with national values under Article 10, principles of public procurement under Article 227 and sustainable management of natural resources under Article 69 of the Constitution of Kenya 2010.
- b. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 initiated by the 1<sup>st</sup> Respondent is unconstitutional to the extent that it contravenes Constitutional principles of good governance, transparency, accountability and public participation.
- c. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 initiated by the 1<sup>st</sup> Respondent violates the Petitioner's members' legitimate expectation of fair administrative action on the part of the service.
- d. A declaration that the tender process for tender Nos KFS/02/2021-2022, KFS/03/2021-2022, KFS/04/2021-2022, KFS/05/2021-2022 violates the constitutional dictates on equitable and fair access to exploitation of natural resources.
- e. A declaration that the Petitioner members' fundamental rights and freedoms as enshrined under Articles 27,29(d) 42, and 47 of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondents.
- f. Each party to bear own costs of the Petition.

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

**E.K. WABWOTO**

**JUDGE**

**In the presence of:-**

Ms. Mwangi h/b for Mr. Kisilah for the Petitioner.

Mr. Alan Kamau h/b for Mr. Eredi for the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> Respondents.

Ms. Kinyua for the Interested party.

Court Assistant; Caroline Nafuna.

E.K. WABWOTO

JUDGE

