



Sikalieh (Being Chairman of and Suing in Public Interest and on behalf of the Members of Karen Langata District Assoc) v Kenya Railways Corporation & 5 others; National Environment Management Authority & another (Interested Parties) (Environment and Planning Petition E028 of 2024) [2025] KEELC 4927 (KLR) (1 July 2025) (Judgment)

Neutral citation: [2025] KEELC 4927 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E028 OF 2024**

**AA OMOLLO, J
JULY 1, 2025**

BETWEEN

SAMORA SIKALIEH (BEING CHAIRMAN OF AND SUING IN PUBLIC INTEREST AND ON BEHALF OF THE MEMBERS OF KAREN LANGATA DISTRICT ASSOC) PETITIONER

AND

**KENYA RAILWAYS CORPORATION 1ST RESPONDENT
CHINA RAILWAY DESIGN CORPORATION 2ND RESPONDENT
APEC CONSORTIUM CO. LIMITED 3RD RESPONDENT
MINISTRY OF ROADS & TRANSPORT 4TH RESPONDENT
MINISTRY OF ROADS & TRANSPORT 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY
KENYA FORESTS SERVICE INTERESTED PARTY**

JUDGMENT

1. The Petitioners brought this suit against the 1st-6th Respondent vide a petition dated 24th July 2024 supported by the affidavit sworn by Samora Sikalieh on 23rd July 2024, further affidavit sworn on 4th



October 2024 and supplementary affidavit sworn on 5th March 2025. The Petitioner is seeking the following orders;

1. A declaration do hereby issue that the Respondents undertaking of financing and construction of the proposed Ngong -Riruta Meter Gauge Railway Commuter Railway Line passing through Riruta-Karen-Bulbul-Ngong in Kajiado and Nairobi County without prior public participation of the Petitioners and or compliance with legislative measures in EMCA and provisions of Articles 10, 42, 69, 153, 201 and 232 of the Constitution is illegal, unlawful, unconstitutional, null and void.
 2. An order of Permanent Injunction do hereby issue against the Respondents whether by themselves, their agents and servants or any one acting under their instructions to prevent, stop, discontinue or restrain the said Respondent and or anyone claiming under them from proceeding with, carrying out, financing or undertaking the construction of the proposed Ngong -Riruta Meter Gauge Railway Commuter Railway Line passing through Riruta-Karen-Bulbul-Ngong in Kajiado and Nairobi County without prior compliance with public participation and other legislative measures under Articles 10, 42,69, 153, 201 and 232 of the Constitution of Kenya.
 3. A prerogative Order of Certiorari be and is hereby issued to call, remove, deliver up to this Honourable Court and quash or revoke any decisions by the 1st, 4th, 5th and 6th Respondents and contracts between the 1st, 2nd and 3rd Respondents for financing, construction, undertaking and progress of works in respect of the proposed Ngong -Riruta Meter Gauge Railway Commuter Railway Line passing through Riruta-Karen-Bulbul-Ngong in Kajiado and Nairobi County without prior public participation of the Petitioners and or compliance with legislative measures in EMCA and provisions of Articles 10, 42, 69, 153, 201 and 232 of the Constitution of Kenya.
 4. An order of Mandamus directed on the 1st, 4th, 5th and 6th Respondents whether by themselves or anyone acting under them compelling them to review policy decisions relating to transport and infrastructure as well as allocation and utilization of public funds towards improvement of transport and infrastructure of Riruta-Karen-BulbulNgong in Kajiado and Nairobi County from the said proposed Ngong -Riruta Meter Gauge Railway Commuter Railway Line to improvement and expansion of NgongKaren Road and the existing feeder and connecting roads in the said Riruta-Karen Bulbul-Ngong in Kajiado and Nairobi County or less cost effective and environmentally sound project in compliance with Articles 10, 42,69, 153, 201 and 18 232 of the Constitution of Kenya through inter-alia public participation of the Petitioners and other affected members of the Republic of Kenya.
 5. Costs of the Petition
 6. Any other relief that the Court may deem fit to grant in the circumstances of the Petition.
2. The petition is grounded on the multiple provisions of the Constitution of Kenya, including Articles 2(1) and 2(5) which affirm the Constitution as the supreme law and incorporate ratified conventions and treaties, and Article 3 which obligates all individuals to uphold it. The Petitioner invokes Articles 10(1) and (2) on national values such as public participation and accountability; Article 20(2) on the interpretation of the Bill of Rights; and Article 42, which grants the right to a clean and healthy environment.
 3. The Petitioners aver that on 15th December 2023, they learnt of the commissioning of the Riruta-Ngong Meter Gauge Railway (MGR) Project by the President and Respondents. That the project



was to be constructed at an estimated cost of KES 8.7 billion and traverse through Riruta, Karen, Bulbul, and Ngong. They stated that the project began on government land allocated to the Directorate of Veterinary Services in Ngong. That no environmental impact assessments (EIA) nor public participation, as required by law, were undertaken prior to the project's commencement.

4. They further pleaded that a stakeholders' meeting was held on 12th April 2024 at St. Christopher International School in Karen, where on invitation, the 1st Respondent visited and introduced the project to the Petitioners and together with 3rd Respondent admitted that there was no EIA that had been conducted. During this meeting, the Petitioners raised concerns over air, noise and water pollution, adverse impact of the project on climate change and other environmental risks, citing non-compliance with obligations set under Articles 42, 60(1) (c & e), and 69(1) (a, b, d, e, g) of the constitution elaborated in EMCA and other enabling regulations.
5. The Petitioners contend that despite promises for future engagement by the 1st Respondent, no stakeholder consultations occurred thereafter, and the project proceeded without addressing their concerns or supplying requested documentation which included feasibility study report for the project, engineering plan and profile drawings, Operational report, EIA Project and or study report with an EIA License, Social Impact Assessment Report, and Resettlement Action Plan for the affected Petitioner members.
6. The Petitioners argue that the Karen area consists of ecologically sensitive forest land and private residential areas with significant tree cover and biodiversity. They claim that the proposed railway project threatens this environment and that the Respondents failed to consider alternative, less destructive routes. They assert, that this contravenes Articles 10, 69(1) (d & g), and 70 of the Constitution and EMCA provisions which require sustainable development, conservation, and procedural environmental safeguards.
7. The Petitioners further contend that there was no public engagement in the planning or budgeting for the project, in breach of Articles 201(a) and 232(1) (d & f) concerning public finance management and transparency. They allege the project is wasteful and poses an irreparable risk to public resources and the environment and that despite offering viable alternatives such as utilizing existing road reserves, the Respondents did not respond or engage meaningfully with the Petitioners.
8. The Petitioners also argue that the project violates Kenya's obligations under international environmental treaties, including Article 8 of the Convention on Biological Diversity, Article 2 of the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, both ratified under Article 2(5) of the Constitution. Therefore, they urge the Court to grant the reliefs sought.
9. In opposition to the Petition, the 1st Respondents filed a replying affidavit sworn on 19th December 2024 by Engineer John Maina, its Planning, Design and Environment Manager while the 2nd and 3rd Respondents filed a replying affidavit sworn on 23rd August 2024 by Eng. Misheck Waititu, and the 5th Respondent filed a replying affidavit sworn on 14th October 2024 by Mohamed Daghar, the principal secretary in charge of the State Department of Transport under the Ministry of Roads and Transport.
10. The 1st Respondent argues that the Petition is riddled with falsehoods, material omissions, and misrepresentations designed to halt a public infrastructure project meant to benefit the wider public, including the Petitioners. That the proposed 12.5 km Ngong-Riruta Meter Gauge Railway (MGR) forms part of the Nairobi Metropolitan Mass Transit Plan and aligns with Kenya's Vision 2030 and is set to run parallel to Ngong Road to minimize environmental disruption. That it is developed under the Nairobi 2030 Commuter Rail Master Plan.



11. The deponent stated that the 1st Respondent engaged the 2nd and 3rd Respondents for consultancy services, specifically for conducting the Environmental and Social Impact Assessment (ESIA) and preparing a Resettlement Action Plan, not for construction as alleged in the Petition. They assert that stakeholder and public consultations occurred before construction began, proved by several engagement meetings held on 29th Nov 2023 (at Ngong), 17th Jan 2024 (at Vet Farm Offices), 2nd Feb 2024 (at Ngong), 27th and 28th Feb 2024 (at Lenana), 1st April 2024 (at Karen St. Christopher International School), 15th April 2024 (at Embulbul), 24th April 2024 (at KENHA/KURA/KERRA), and 26th April 2024 (Karen business owners at Chiefs Office).
12. That these meetings covered every 1.6 km along the route and formed the basis of Chapter 6 of the ESIA report. Further that public notices were published in MyGov (23rd and 30th July 2024) and broadcasted on KBC in English and Kiswahili on 23rd July 2024. Consequently, the National Environment Management Authority (NEMA) issued an EIA license on 19th September 2024.
13. The 1st Respondent stated that the ESIA report, dated 17th May 2024, addresses potential environmental, socio-economic, and land-use impacts and includes an Environmental and Social Management Plan (ESMP) to mitigate negative effects, such as habitat regeneration and controlled vegetation clearance. Also that the Resettlement Action Plan identified affected persons and provided for compensation.
14. Further, that of the total land affected (18.32 hectares), only 4.12 hectares are private, showing minimal private disruption and the project's core justification is to relieve severe traffic congestion, reduce pollution, and improve transport efficiency in a sustainable, inclusive manner. In response to the Petitioners' alternative route proposal through Dagoretti and Kibiku Forest, the Respondent argues it is flawed and ecologically unsound, affecting sensitive forest areas and increasing construction costs by 3.7 km due to topography.
15. They assert that the Petitioners are primarily concerned with protecting the exclusivity of Karen rather than genuine environmental interests and argue that issues around public finance, feasibility, and budget policy fall outside the Environment and Land Court's jurisdiction, being instead governed by the *Public Finance Management Act* and Public Investment Management Regulations, 2022. The 1st Respondent warn that granting the Petition would interfere with executive functions and result in public financial loss, undermining the doctrine of separation of powers.
16. The 2nd and 3rd Respondents, China Railways Design Corporation and APEC Consortium Ltd stated they were contracted only to conduct the Environmental and Social Impact Assessment (ESIA) for the project, and not for any construction works.
17. The deponent emphasizes that their involvement was limited to reviewing project designs, assessing baseline environmental and social conditions, identifying potential impacts, recommending mitigation measures, and preparing a comprehensive ESIA report, which was submitted to the National Environment Management Authority (NEMA) in May 2024.
18. Mr. Waititu refutes the Petitioner's allegations that the project began without public participation and details a series of public engagement sessions conducted between January and April 2024 across affected areas, including Vet Farm, Ngong Town, Karen, Embulbul, and Lenana.
19. He argues that the Petitioner's concerns about environmental degradation and lack of stakeholder involvement are unfounded, and highlights that stakeholders, including KLDA members, were well-informed, offered feedback, and even proposed alternative routes. He also criticizes the Petitioner's



- alternative route suggestion through Kibiku Forest as hypocritical and environmentally more damaging due to increased elevation and route length.
20. Further, the deponent challenges the Petition's claims regarding misuse of public funds and lack of financial transparency, asserting that such issues fall outside the jurisdiction of the Environment and Land Court.
 21. He contends that public participation was adequate and that the Petition lacks evidence to support claims of constitutional or environmental violations thus the Petition against them should be dismissed noting that their role had concluded.
 22. The 5th Respondent stated that public participation was duly undertaken, refuting the Petitioner's claim that the project commenced without it. Mr. Mohamed Daghar referenced a public notice inviting public input on the Environmental Impact Assessment (EIA) study, published on 23rd July 2024, and argues that environmental concerns raised by the Petitioners are unfounded, as the project includes mitigation measures such as minimizing vegetation clearance and replanting indigenous species.
 23. Further, he stated that a key public participation meeting took place on 12th April 2024 at St. Christopher International School in Karen, involving Kenya Railways, KLDA, and project consultants and a further stakeholder engagement was held on 26th April 2024, specifically for Karen area business owners and residents.
 24. Mr. Daghar emphasizes that stakeholders with both direct and indirect interest, including non-state and government actors, were consulted with the attendance lists and minutes from these engagements annexed to support the claim that proper procedures were followed.
 25. Additionally, the deponent outlined that a series of eight structured public engagements conducted along the proposed railway route between January and May 2024, including at Vet Farm (17th Jan), Ngong Town (2nd Feb), Lenana area (27th–28th Feb), and Embulbul (15th April), among others, which involved key government stakeholders, affected landowners, and residents. That the said engagements were consolidated in the final ESIA report dated May 2024, which documents both environmental assessments and stakeholder feedback.
 26. In response to the opposing Respondent's replying affidavits, the Petitioner filed a further affidavit and a supplementary affidavit, both sworn by Samora Sikalieh on 4th October 2024 and 5th March 2025 respectively. He posited that the project was unlawfully commenced and continued even after a conservatory court order had been issued and without obtaining the legally required Environmental Impact Assessment (EIA) license.
 27. The Petitioners cited Photographic and video evidence, along with site visits to prove that significant construction was already 85–95% complete before the EIA license was issued. That the claims by the Respondents that the works were merely preparatory are false, as the activities undertaken were clearly substantive.
 28. Further, the Petitioner stated that the Respondents violated Articles 42, 69, and 70 of [the Constitution](#) of Kenya and Section 58 of the Environmental Management and Coordination Act (EMCA) by proceeding with the project without proper environmental compliance.
 29. They stated that the purported public participation and stakeholder engagement are falsified, inadequate, and misleading because they were not properly informed or consulted, and documents crucial to informed engagement were never provided.



30. The Petitioner contests the legitimacy of the EIA Report and the Resettlement Action Plan, alleging they were created after using fabricated minutes and without genuine participation. It is their plea that the issuance of the EIA license was rushed, lacking meaningful input from the public or lead agencies and also the land, including sections of Ngong Forest, was unlawfully surveyed and later gazetted for the project, contradicting initial disclosures.

Submissions.

31. The Petitioner filed submissions dated 10th March 2025, 4th, 5th, 6th Respondents and 2nd interested party filed submissions dated 17th March 2025 while the 2nd and 3rd respondents filed submissions and supplementary submissions dated 24th February 2025 and 14th April 2025 respectively.
32. The Petitioner submitted on three issues; whether the Respondents have complied with the relevant laws in acquiring the various requisite licenses and approvals, whether the Petitioner's right to clean and a healthy environment has been infringed/violated by the Respondents and whether the Orders sought in the Petition should issue.
33. They contend that the Respondents initiated the railway construction project without adhering to the mandatory environmental legal framework, particularly failing to obtain the Environmental Impact Assessment (EIA) license prior to the commencement of the project, as required under Section 58 of the *Environmental Management and Co-ordination Act* (EMCA) and Article 69(1)(f) of *the Constitution* of Kenya.
34. That the belated acquisition of an EIA license on 19/09/2024, after the commissioning of the project on 15/12/2023 and after substantial work having been done renders the process fatally flawed.
35. In support, they cited the case of *Tiara Villas Management Ltd & 4 others v Joe Mutambu & 3 others* [2022] KEELC 941 where a similar failure to obtain EIA approval prior to project execution was held to violate the right to a clean and healthy environment under Article 42 of *the Constitution*.
36. The Petitioners argue that the constitutional and statutory duty to conduct effective, inclusive, and timely public participation was never fulfilled. That the alleged stakeholder meeting held on 12/04/2024 was not a genuine public participation forum but an initial information session requested by the Petitioners themselves thus no prior notice, agenda, or documentation was provided by the Respondents.
37. The Petitioners also contend that their refusal to sign any attendance list and the absence of any signed minutes or records from stakeholders further discredits the Respondents' claim of compliance.
38. They submitted that courts have held public participation to be a substantive constitutional obligation, not a perfunctory formality, as emphasized in *Mary Waithira Njoroge v Muwasco* [2022] eKLR and *Mugo & 14 others v Matiang'i* [2022] KEHC 158, which articulated the qualitative and quantitative benchmarks for lawful participation.
39. That the Respondents' belated attempts to sanitize the legal defects through retrospective compliance including the ESIA report dated 17/05/2024 and the EIA license issued on 19/09/2024 are legally insufficient and urged this court to consider precedent in *Save Lamu & 5 others v NEMA & another* [2019] eKLR, where the National Environmental Tribunal held that public participation is "the oxygen" of the EIA process and that absence of such renders the process stillborn.
40. They argue that the Respondents' failure to comply with Articles 10, 42, 69, and 70 of *the Constitution*, Section 58 of EMCA, and Rule 9 of the EIA Regulations of 2003 results in a void license and an unconstitutional project.



41. Consequently, invited this court to issue declaratory relief invalidating the project and the purported license relying on *KM & 9 others v AG & 7 others* [2020] eKLR and *British American Tobacco v CS Ministry of Health* [2019] KESC 15, among others.
42. That also, the Respondents failed to engage the Nairobi City County Government, Kajiado County Government, and other crucial lead agencies in violation of Articles 10, 42, and 69(2) of *the Constitution* and the Environmental (Impact Assessment and Audit) Regulations, 2003 citing the case of *Mohamed Ali Baadi & Others v Attorney General & 11 Others* [2018] eKLR, where the court affirmed the need for consultation with county governments in projects affecting their jurisdiction, pursuant to the principle of subsidiarity.
43. The Petitioner further argue that the EIA Report dated 19/09/2024 was deliberately silent on the near-completion status of the project, circumventing the mandatory legal process of public engagement.
44. That this omission deprived both the public and relevant agencies of an opportunity to raise environmental concerns and ensure they were addressed through a proper EIA study, in breach of the principles affirmed in *Communist Party of Kenya v Nairobi Metropolitan Services & 3 others* [2022] eKLR.
45. The Petitioner, relying on *Ken Kasing'a v Daniel Kiplagat Kirui & 5 others* [2015] eKLR, submit that failure to follow environmental protection procedures presumes harm to the environment.
46. Consequently, they seek judicial intervention to declare the project illegal and void ab initio, and to halt further works.
47. They invoke the precautionary principle under Section 3(5)(d) of EMCA and Article 70(2)(a) of *the Constitution*, emphasizing that irreversible environmental harm must be preemptively averted and urge the Court to cancel all contracts and decisions flowing from the flawed process, citing *Macfoy v United Africa Co. Ltd* [1961] EA 1169, where Lord Denning held that actions based on a nullity are themselves nullity.
48. Further, the petitioner seek for an order of mandamus to compel the Respondents to redirect resources to sustainable, environmentally sound alternatives, grounded in transparency and public accountability as required by Articles 10, 42, 69, 153, 201, and 232 of *the Constitution*.
49. The 2nd and 3rd Respondents argue that an Environmental and Social Impact Assessment (ESIA) was conducted, with mitigation measures documented, and a public forum held on 12th April 2024 at St. Christopher International School, allowing affected residents to express their concerns.
50. They submitted that the legal principles established in *Mui Coal Basin Local Community & 15 Others v Permanent Secretary, Ministry of Energy & Others* [2015] Eklr underscore that public participation is context specific and not a mechanical or one size fits all process.
51. That courts only assess whether a reasonable opportunity for public input was provided not whether every individual was consulted, thus the Respondents maintain that they met the constitutional threshold for meaningful participation and compliance with EMCA.
52. On the question of whether prerogative orders of Certiorari and Mandamus should issue, the Respondents cited *Republic v Principal Kadhi, Mombasa, Ex parte Alibhai Adamali Dar & Others* [2022] eKLR, where the court clarified that Mandamus compels a public authority to fulfill a clear statutory duty, while Certiorari quashes decisions tainted with illegality or procedural impropriety.



53. That the Petitioners have not demonstrated that the Respondents acted in breach of any clear legal duty or that no other legal remedies are available, as required under *Republic v Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants* [2007] 2 EA 441.
54. Further, the project is shown to serve significant public interest, especially for low-income communities along the railway corridor relying in the case of *Satrose Ayuma & Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others* [2013] eKLR which emphasized that courts must strike a balance between individual rights and public interest in infrastructure projects.
55. The 4th, 5th, 6th Respondents and 2nd interested party submitted that they conducted extensive and inclusive public participation in accordance with the constitutional and legal framework established under Articles 10, 69, and 94 of *the Constitution* of Kenya. That the Sessional Paper No. 3 of 2023 defines public participation as a process where citizens and groups engage in decision making affecting governance and public interest.
56. They stated that courts have emphasized the centrality of this process in cases such as *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR, where it was held that participation is a core component of governance at both national and county levels.
57. That similarly, in *Mui Coal Basin Local Community & 15 Others v Ministry of Energy & 17 Others* [2015] eKLR, the court outlined minimum standards for effective public engagement, as providing relevant information, demonstrating inclusivity, and genuinely considering stakeholder input.
58. The Respondents submitted that in the present case, they organized eight strategic public engagement sessions between January and May 2024 across various locations, including Karen, Ngong, and Lenana.
59. That these meetings involved key stakeholders such as residents' associations, government agencies, and directly affected communities. Also, supplementary to these sessions, public notices were disseminated through newspaper pull outs and radio broadcasts in both English and Kiswahili.
60. They argued that the breadth and documentation of these engagements, including pictorial evidence in the EIA report, reflect full compliance with the effectiveness test as laid out in *Mui Coal*.
61. That courts have also upheld such methods of engagement in *IEBC v NASA Kenya & 6 Others* [2017] eKLR, cited in *Legal Advice Centre*, confirming that public participation was sufficiently and effectively carried out, thus the Respondents have met and exceeded the constitutional threshold, rendering the Petitioners' claims of insufficient engagement legally unsubstantiated.

Analysis and Determination:

62. I have read the Petition together with the supporting affidavits, the respondents replying affidavits and all the documentary evidence annexed by both parties as well as considered the parties' respective submissions. Hence, the following questions fall for determination:
 - i. Whether the Respondents conducted adequate public participation;
 - ii. Whether or not to issue orders of permanent injunction and certiorari;
 - iii. Whether the Petitioner's right to clean and a healthy environment has been infringed/violated by the Respondents;
 - iv. Whether the orders sought should be granted.
 - v. Who bears the costs of the Petition?



Whether or not adequate public participation was conducted.

63. The Petitioners stated that Section 58 of the EMCA which is in line with the provisions of Article 69(1) (f) of *the Constitution* of Kenya provides for the mandatory application of an Environmental Impact Assessment (EIA) license for any proponent of a project falling under the 2nd Schedule of the Act before financing, commencing, proceeding with or carrying out such a project.
64. There is no doubt that the Respondents' project is classified as High-Risk as it involves the construction of transportation and related infrastructure. Since such projects pose high environmental risks one of the requirements prior compliance and approvals under Part VI of the EMCA that public participation be conducted before coming up with EIA Report and issuance of EIA Licence. The Petitioner avers the Respondents have not complied with the law in the manner in which the project commenced and how the EIA license was acquired.
65. In rebuttal, the 2nd and 3rd Respondents stated that they procedurally prepared the EIA Study Report which was presented by the 1st Respondent after engaging the project affected persons through a series of stakeholders' meetings. That the Respondents provided a reasonable opportunity to members of the public and all interested parties to be informed about the project, air their views and further provided mitigation measures for all concerns raised. The dates and place of public participation are highlighted in the EIA study report annexed to the replying affidavit.
66. The role of this court now is to determine whether due process was followed particularly with respect to stakeholder engagement before the EIA license was issued and or the commencement of the project. The case of *Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 Others* [2015] eKLR, has been cited which set out the minimum basics for adequate public participation as follows: -

“From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“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, a reasonable opportunity is offered to members of the public



and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”

- c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

In the instant case, environmental information sharing depends on availability of information. Hence, public participation is on-going obligation on the state through the processes of Environmental Impact Assessment – as we will point out below.

- d) Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional Box.
- f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

67. The Petitioner challenges the public participation conducted by the Respondent the ground that the same was not adequate in the sense that their views were not considered and that the persons directly affected were not consulted. This Petition was filed on 24th July, 2024 by which time the 1st Respondent



- had not obtained an E.I.A License from the 1st Interested party since the E.I.A licence was issued on 19th September 2024.
68. In particular, the petitioner pleads that the Ngong Substation commenced immediately after the commissioning by the President on 19th December, 2023 and that by 19th September, 2024, the substation was 85% complete. In support of these averments, the petitioner produced photographs taken on 16th August, 2024, 21st August, 2024, 26th August, 2024 and 5th September, 2024.
69. From the foregoing arguments presented by both sides, there are two issues that emerge. First whether there was sufficient public participation and secondly, whether or not the construction of the Meter Gange Railways (MGR) commenced before the E.I.A licence was granted on 19th September, 2025 hence illegal, null and void.
70. In their effort to discharge the burden that there was no adequate public participation, the Petitioner pleads that they are the ones who invited the 1st Respondent to the meeting of 12th April, 2024 held at St. Christopher's International School, Karen for a stakeholder engagement. They affirm to sharing their concerns with the 1st Respondent who took notes during this meeting and agreed to revert back to them on their financial and environmental concerns raised. However, they are concerned that no feedback was given and yet the construction of the Ngong substation is almost complete.
71. They were also concerned that they had not been provided with any documentation relating to the project despite requests hence they were not in a position to make an informed decision or raise further concerns. The petitioner listed the documents they expected to be supplied with to include;
- a. a feasibility study Report for the project
 - b. Engineering plan & Profile drawings
 - c. Operational Report
 - d. E.I.A study report with an E.I.A License
 - e. Social Impact Assessment Report
 - f. Resettlement Action Plan for the affected petitioners' members.
72. The 1st Respondent vide its replying affidavit deposed that the membership of the Petitioner and other members of the public were engaged before the license was issued. The details of the stakeholder engagement through meetings and questionnaires is set out in ESIA study report annexed to the replying affidavit. According to the 1st Respondent and evidenced by the list of names in the ESIA report, they had also conducted stakeholder engagement on 29th November, 2023 before the launch of the project in December of 2023. Some of the attendees listed included the P. A to the area MP, the MCA and persons who signed as residents. The phone numbers and the email address of the participants in all the meetings held were listed.
73. The report also enclosed a letter dated 19th October, 2023 (page 145 of the 1st Resp R/A) from the 1st Respondent to the secretary of the Petitioner. This letter indicates that it was a response to the Petitioner's letters dated 30th June, 2023 and 30th August, 2023(copies of which were annexed to the affidavit in support of the petition). This letter (by the 1st Respondent) read in part thus;
- “As earlier briefed by Kenya Railways, the Project is still at Preliminary design stage where route alignment options are being analysed. We are keen to involve you with other



stakeholders once as part of the design development. Also, KR is commencing on studies for ESIA and Resettlement Action Plan for the project starting the month of November, 2023”

74. Although the Petitioner expressed that the ESIA study report dated 17th May, 2024 was an after-thought, it appears from the contents of the above quoted letter that they were made aware that ESIA study was yet to commence and indeed the Respondents averred the same was carried out between January and April 2024. Further, it is noteworthy that besides the meeting of 12.4. 2024, the Petitioner themselves refer to a meeting held on 26.1.2024 between them, the 1st Respondent and their membership.
75. There are also several correspondences by the Petitioner with the one of 29th February, 2024 proposing a design for alternative route. Would they design an alternative route without knowledge of the proposed route of the 1st Respondent? Other than holding a meeting with the Petitioner, there were other stakeholder meetings from copies of the name list of meetings held in the dates stated that representatives of the 3rd Respondent were always present. They affirm through their pleadings that they raised concerns which they expected to be addressed. Further, the 2nd and 3rd Respondents depose to receiving an alternative route design proposed by the Petitioner. The 2nd and 3rd Respondents said that the proposed route design from the Petitioner would pass through Kibiku forest with more negative impacts on the environment.
76. The Petitioner also posited that the 1st Respondent’s replying affidavit is full of falsehoods and misrepresentations casting doubt that the 1st Respondent had provided necessary documentation to the public they alleged to have engaged and the burden of proof lies on the party who makes such allegations. In this case, the meeting lists (pages 92-132 of the replying affidavit) as per the Study report gave names and phone numbers of persons who attended. Thus, the Petitioner would have contacted these persons to swear affidavits alongside his supplementary affidavit to corroborate the assertion that no such meetings took place or if they did, the participants were not supplied with adequate materials to make informed opinion.
77. Further, they also challenged the authenticity of the questionnaires filed. On face of the questionnaires, it shows they are not dated and some are not signed. The 1st Respondent stated that the program put in place for the public participation was to engage the public every 1.6km on the route of the project. The report shows that persons consulted/engaged were also diverse as discernable from the lists, for example, the area MCA, the Lenana school, business persons et al.
78. In the case of *Marshall vs Canada*, Communication No. 205/1986, UN Doc CCPR/C/43/d/205/1986(1991), the United Nations Human Rights Committee expressed itself as follows:
- “ 5. 4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.
5. 5 ...Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation



in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).”

79. In this petition, taking all the evidence presented in to consideration, I hold that the Respondents held adequate public participation before the ESIA study report dated 17th May, 2024 was prepared and submitted to the 1st Interested party. Thus, the E.I.A license cannot be declared null and void for want of compliance with the requirement of public participation.

Whether there is merit in granting order of permanent injunction or Certiorari:

80. Once the 1st Interested party received the Study report and as required under section 59 of the EMCA published the notice in the Star Newspaper of 23rd July, 2024 and 30th July, 2024 inviting views from the public. Copies of the newspaper cuttings were produced as JM-3b and from the dates, the first advertisement was published a day before the filing of this petition. The petition was not amended to include the activities post the date of publication of the project by the 1st Interested Party.
81. The petitioner raised issues with this process as deponed in the supplementary affidavit that the invitation of public views by the Interested Party through advertisement in newspaper and the radio cannot cure or legalize the already illegal project. They also argued that the time for submission of comments lapsed on 22nd August 2024 yet the license was issued on 19th September, 2024 (27 days after) and despite a letter from the 1st Interested Party indicating the time would lapse on 16.9.2024.
82. On the later question on when time for submitting views was to lapse, the notice placed in the Star Newspaper was self-explanatory setting timelines of 30 days from the date of publication for receiving of views. Section 59 provides thus;
- “(1) Upon receipt of an environmental impact assessment study report from any proponent under section 58(2), the Authority shall cause to be published for two successive weeks in the Gazette and in a newspaper circulating in the area or proposed area of the project a notice which shall state—
- (d) a time limit of not exceeding sixty days for the submission of oral or written comments environmental impact assessment study, evaluation or review report.
- (2) The Authority may, on application by any person extend the period stipulated in sub-paragraph (d) so as to afford reasonable opportunity for such person to submit oral or written comments on the environmental impact assessment report.
83. The Act set time limit provided for receiving opinions as 60 days with liberty to extend upon request. The Petitioner said they gave their submissions on 19th August, 2024 in response to the notice publication. They have not indicated if they made an application to the 1st interested party to extend time. The advertisement had put a timeline of 30 days either from 23rd July and 30th July 2024 so it is untrue to say the 1st Interested Party had only seven (7) days to review comments received from the public. Further, the dissemination of the Study Report to other lead agencies is upon receipt of the same by the 1st Interested Party not from the date of publication on the newspaper.
84. Now to the more contested matter of whether the construction of the MGR had commenced before the granting of the E.I.A license on 19th September, 2024. Although the 1st Respondent denied they



had commenced the project, photographs presented by the Petitioner stated otherwise. The photos showed machinery already on the site levelling the ground as well as a building already up (incomplete) before 19th September, 2024. The letter of Statute (Section 58 of EMCA) provides that a project shall not commence until an E.I.A license is issued.

85. It is possible that the actions of the Respondents commencing the project before the 1st Interested Party decided on the application for the EIA license that drove the Petitioner to this court. The 1st Respondent as a government body should be on the fore front of following due process and should not have broken grounds before obtaining the EIA license. Therefore, I fault them for rushing the ground-breaking and commencement of the project before obtaining the E.I.A license.
86. However, for the purposes of this project, I will not nullify any works that may have been undertaken prior to 19th September 2024 because the procedural requirements had been commenced (the date when actual construction began is not provided by the Petitioner). Secondly, the nature and purpose of the project is for the public good and the EIA report provides mitigating measures to ensure it is environmentally sound. On account of these, I decline to issue order of certiorari quashing or revoking any decision of the Respondents for constructing and or undertaking progress works in respect to the impugned project.
87. The 1st Respondent questioned the jurisdiction of this court which I objection I find to be without merit. This is because, as at July 2024, there was no decision of the 1st Interested Party to be appealed before the National Environment Tribunal (NET). For the 1st Respondent to submit that this Petition offends the doctrine of exhaustion is misunderstanding the cause of action brought by the Petitioner. The Petitioner could not remove their claim from this court challenging that the project was commenced without the license to the NET for a license issued post the filing of their proceedings.

Whether the Petitioner’s right to clean and a healthy environment was infringed/violated by the Respondents:

88. The next question is whether this court ought to grant orders of permanent injunction stopping the project for violating the Petitioner’s right to a clean and healthy environment. The Respondents argued that the petition did not set out specifics of the violations complained of hence it falls short of a constitutional petition. Inter alia at paragraph 45 of the petition, it is pleaded thus; -

“Kenya is a party to the convention for Protection Management and Development of the Marine and Coastal Environment of Eastern African Region and ratified and Protocol Concerning Protections Areas and Wild Fauna and Flora in Eastern African Region. The project violates Articles 2 of the said Protocol requiring protection and preservation of rare, fragile ecosystems besides rare, depleted, threatened or endangered species of wild fauna and flora in their habitants. The tree and vegetation cover within Karen comprise of indigenous trees planted and maintained by residents which have also attracted endangered species and risk destruction by the Project.

89. Paragraph 36 of the petition states thus;

“The Petitioner state that Karen area comprises of residential single-family homesteads each with a minimum of a half an acre each with great tree and vegetation cover, Ngong Forest whose reserve along Ngong Road which is earmarked for destruction to create way for the proposed project which are not only under threat of destruction of the forest by the proposal



project but also risk the destruction of biodiversity therein in breach of *the Constitution* of the Republic of Kenya.”

90. At paragraph 37, it is pleaded that;

“...this is because the environmental effects of the said project have tremendous irreparable destruction which can only be mitigated by strict compliance of the constitutional & legislature measures to protect and conserve the environment which the Respondents have disregarded.”

91. Having laid a basis on the rights that were violated or likely to be violated by the implementation of the project, the law places a duty on the Petitioner to demonstrate sufficiently the truth in their allegations. It is pleaded that the MGR project will be constructed to run parallel to the existing Ngong Road and is given to affect 14.2 ha of public land and 4.12 ha private land. The Respondents therefore argued that there will be minimal disruption on private property/person although this argument is subject for the reasons that impacts on the environment such as noise pollution have no boundaries.

92. Be that as it may, I have perused the ESIA report versus the issues raised by the Petitioner during the meeting of 12.4.2024 and their letter/objection to NEMA dated 19.8.2024. The report has proposed measures to mitigate the impact of the project on the environment. It is my considered opinion that some of the proposals made addressed some of the concerns raised by the Petitioner as contained in the recommendations in the report. For instance;

- i. That the contractor should adopt the ESMP in the ESIA report and prepare a construction Environmental and Social Management Plan (C-ESMP) reflecting realities of the project implementation to form the main compliance reference document.
- ii. All material sites should have an E.I.A undertaken and approved by NEMA and the resultant management plans integrated.
- iii. Limited vegetation clearance and felling of trees should be observed and confirmed only along the railway line corridor. Appropriate tree count and records should be done in order to undertake tree planting in identified locations as replacement initiatives.

93. The Petitioner alluded to the project adversely impacting on climate change which assertion the Respondent rebutted by submitting the proposed route by the Petitioner was not supported by empirical data. The EIA study report acknowledges that the implementation of the project had potential need to vegetation removal hence reduction of carbon storage. The report also acknowledged emissions from construction equipment will contribute to carbon into the atmosphere adding to climate change effects. Therefore, the report recommends a comprehensive approach for addressing the vulnerabilities and risks that are associated with climate variability and change.

94. The recommendation to minimize the effect itemized in paragraph 99(iii) hereinabove of taking records of trees felled and adopting replacement initiatives in identified locations address the concern of cutting of trees along Ngong road as raised in meeting of 12.4. 2024. There were also concerns of noise and dust pollution likely to occur during the project implementation and in that meeting, the 2nd and 3rd Respondents gave proposed mitigating measure.

95. Thus, the ESIA study report has put a duty on the Respondents of what is required of them during the implementation process to take to reduce and mitigate any negative impacts the project may have on its surroundings. This court and the law required of the Petitioner having received a copy of the ESIA report either from the 1st Interested Party or through the reply by the 1st Respondent to elaborate



why they formed the opinion the mitigating measures stated were not sufficient to protect them and the environment.

96. Instead, they only criticized the report for want of public participation. It is my view that the apprehension that the project will cause environmentally adverse effects is not a self-defining reason because as the Respondents argue, the project is aimed at benefitting the broader public thus serves the greater public good. There is a need to balance, on the one hand, protection of clean and healthy environment rights and on the other hand, protection of public interest which in this instance is infrastructural growth to ease transport congestion. I so hold that the Petitioner has not proved any harm or threatened harm for the court to fashion an appropriate remedy.
97. In any event, environmental issues are often dealt with through constant monitoring and appropriate intervention that include improvement and restoration orders as was held in *African Centre for Rights and Governance (ACRAG) & 3 others v Municipal Council of Naivasha* [2017] KEELC 2781 (KLR) citing the USA Supreme Court dicta in the case of *New Jersey – v- New York* 283 U.S. 473; see also *Tapesh Bhardwaj Sharma – v- UP State Pollution Control Board, Mathura Cantonment Board District Magistrate Mathura and Central Pollution Control Board Original Application No. 596 of 2016*).
98. Hence the Petitioner reserves the right to move the court for the entire period of the construction of the Meter Gauge Railway project whenever either of the Respondents fail to adhere to the recommendation on mitigating measures resulting into any harm.
100. Lastly, the prayer/relief under paragraph number 4 of the petition seeking for orders of mandamus directed at the 1st, 4th, 5th and 6th Respondents to review transport and infrastructure policy as well as allocation of public funds towards improvement of transport in Riruta-Karen-Bulbul Ngong was not dealt with in this determination. The reason being this court lacked jurisdiction to hear and determine it. The Petitioner is at liberty to pick up the matter in a court clothed with jurisdiction if they so choose to pursue.

Conclusion:

101. In the upshot and following the above outlined analysis of the case, I find the Petition to be without and dismiss it. No costs are awarded due to the evident public nature of the case.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF JULY, 2025

A. OMOLLO

JUDGE

