



Law Society of Kenya v Attorney General & 3 others; Katiba Institute & 6 others (Interested Parties) (All Suing as the Members of Rift Valley & Western Kenya Timber Investor) (Environment and Land Petition E001 of 2023) [2024] KEELC 6532 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND PETITION E001 OF 2023
OA ANGOTE, J
OCTOBER 3, 2024**

BETWEEN

THE LAW SOCIETY OF KENYA PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF ENVIRONMENT CLIMATE CHANGE
AND FORESTRY 2ND RESPONDENT**

KENYA FOREST SERVICE 3RD RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
RESPONDENT**

AND

KATIBA INSTITUTE INTERESTED PARTY

NATURAL JUSTICE INTERESTED PARTY

THE GREENBELT MOVEMENT INTERESTED PARTY

TIMBER MANUFACTURERS ASSOCIATION INTERESTED PARTY

MULTYTOUCH INTERNATIONAL LTD INTERESTED PARTY

NYERI TIMBER MANUFACTURERS ASSOCIATION INTERESTED PARTY

**EMMANUEL KATUMI, PATRICK KOSGEI, DAVID MENYIECH, DAVID
N. KACHERU, MORGAN KENNEDY, BENJAMIN KUTIOT, THOMAS
CHERUYIOT, CHRISTOPHER CHEBII, HENDRICKS TOWEET'T, PAULO
C. KANO, DAVID KOSKEI, P. K. ROTICH, HARRUN CHENGWONY,
JOHNATHAN AMAWU, PAULINA TUWEI, CYNTHIA SARGUTA, PHYLIS
KIPRONO, JULIUS MALIT, JUDY KEMEI, WILSON CHIRCHIR, JAMES**



CHEBII, KIPROTICH AMDANY, HENRY K. BIWOT, BIWOT ARAP KOSGEI, LACHARIA KOMN, JOHN KORIR, PETER KOSKEI, AYUB KIPROMOI, DAVID NJOROGI, ELIMA KOSGEI, YATOR KOROS, JOHNATHAN KIPROTIEN, OSKAIMO COMPANY LIMITED, MOLOI S. MILLS, PEMANDI INVESTMENTS LIMITED, ANTHONY KOROS, PETER WAWERU, KONWANIS TIMBER LIMITED, ELIJAH SAWMILL, KINGKEM ENTERPRISES LIMITED, VENSERS ENTERPRISES LIMITED, KIONERA SAWMILLS, DAVID K. LANGAT, HILLARY KOSKEI HIKOMA, KIPSANG TARUS NEKITO, WILLIAM M. MANJIHIA, PASILISA ISAGI TIMBER, PHYLIS KIPRONO CHEBET, PETER K. YATICH, TIMOTHY CHIMO TOLILO, JOEL NGERU, LEONARD W. NDEGUA & SAMMY KIPLAGAT INTERESTED PARTY

ALL SUING AS THE MEMBERS OF RIFT VALLEY & WESTERN KENYA
TIMBER INVESTOR

The people of Kenya were entitled to participate in the making of law to govern logging activities.

The judgment addressed the Kenya Forest Service's (KFS) compliance with a logging moratorium and recommendations for sustainable forest management. The court found KFS had achieved substantive compliance but identified significant gaps in transparency, particularly concerning the implementation matrix, timelines, and public participation in policy reviews like PELIS. The court emphasized the need for KFS to adopt an eco-centric management model, prevent illegal logging, and adhere to procurement laws. While acknowledging judicial restraint, the court issued declarations affirming public participation rights and directed KFS to establish an online repository for proactive information sharing, ensuring sustainable forest resource utilization.

Reported by John Ribia

Environmental Law – forests – sustainable development - moratorium banning logging – role of the executive in moratorium – role of state agencies in moratorium – whether the executive's imposition of a logging moratorium, aimed at reassessing and rationalizing the forest sector due to rampant illegal logging and poor management, aligned with its policy-making mandate while upholding environmental safeguards - whether state organs, in developing and implementing environmental policies such as the Plantation Establishment and Livelihood System (PELIS), fulfilled the constitutional imperative for meaningful and qualitative public participation - whether the judiciary, while upholding its constitutional mandate to protect environmental and land rights, could practicably maintain continuous supervision over complex, long-term legislative, policy, and organizational reforms undertaken by the executive and state agencies in the realm of natural resource management - whether state agencies responsible for natural resources, consistent with their constitutional duties and principles of sustainable development, effectively transitioned towards sustainable, eco-centric forest management models, including the prevention of illegal logging, adherence to public procurement laws, and promoting mandatory re-planting policies - Constitution of Kenya, articles 135 and 69.

Constitutional Law – national values and principles of governance – public participation – moratorium banning logging in forests - whether state organs, in developing and implementing environmental policies such as the Plantation Establishment and Livelihood System (PELIS), fulfilled the constitutional imperative for meaningful and qualitative public participation – Constitution of Kenya, article 10.

Brief facts

The dispute arose from an executive-imposed moratorium on logging, prompted by findings of a 2018 Taskforce Report that revealed rampant illegal logging, irregular licensing, and poor forest management. The circumstances necessitated urgent remedial measures by the Kenya Forest Service (3rd respondent). The court had been overseeing the implementation of the Taskforce's recommendations. However, concerns emerged regarding the transparency and effectiveness of the implementation matrix, particularly the absence of clear



timelines and verifiable actions for various recommendations. Additional issues included the lack of a strategy to combat illegal sandalwood logging, deficiencies in auditing Community Forest Associations, and inadequate public participation in critical policy reviews, such as the continuation of the Plantation Establishment and Livelihood System (PELIS). The petitioner sought judicial intervention to ensure compliance and adherence to constitutional duties of environmental protection and public involvement in forestry governance.

Issues

- i. Whether the executive's imposition of a logging moratorium, aimed at reassessing and rationalizing the forest sector due to rampant illegal logging and poor management, aligned with its policy-making mandate while upholding environmental safeguards.
- ii. Whether state agencies, particularly the Kenya Forest Service (3rd respondent), achieved substantive compliance with court orders and national policy recommendations regarding forest management, and if their implementation and monitoring frameworks demonstrated sufficient transparency, accountability, and effectiveness, including proper timelines, strategic steps, and milestones.
- iii. Whether state organs, in developing and implementing environmental policies such as the Plantation Establishment and Livelihood System (PELIS), fulfilled the constitutional imperative for meaningful and qualitative public participation.
- iv. Whether state agencies responsible for natural resources, consistent with their constitutional duties and principles of sustainable development, effectively transitioned towards sustainable, eco-centric forest management models, including the prevention of illegal logging, adherence to public procurement laws, and promoting mandatory re-planting policies.
- v. Whether the Judiciary, while upholding its constitutional mandate to protect environmental and land rights, could practicably maintain continuous supervision over complex, long-term legislative, policy, and organizational reforms undertaken by the executive and state agencies in the realm of natural resource management.

Held

1. The purpose of the moratorium on logging which was imposed by the executive was to allow for the reassessment and rationalization of the entire forest sector in the country. In its interim judgment, the court noted that the findings of the 2018 Task force Report on Forest Resources Management and Logging Activities in Kenya were that there was rampant illegal logging of indigenous and plantation forests, irregular licensing, poor forest management and negative impacts under the Plantation Establishment and Livelihood System (PELIS). Therefore, there was an urgent need for remedial measures to be undertaken by the Kenya Forest Service, the 3rd respondent, in order to curb the unsustainable utilization of forests in the country.
2. The court was cognizant of the risk of judicial overreach on its part, noting that the doctrine of separation of powers vested the mandate of making and implementing policy on the executive arm of the government. The role of the court was to interpret the law, and while doing so, bear in mind that it had a constitutional mandate of protecting and safeguarding the environmental and land rights of all citizens, including upholding the principle of sustainable development.
3. There had been substantive compliance with the orders of this court by the 3rd respondent. The submitted matrix of the implementation of the Taskforce Report on Forest Resources Management and Logging Activities in Kenya was an important document because it was not only a tool to track compliance, but it also ensured that there was sustainable logging of the identified mature exotic tree plantations.
4. The 3rd respondent was in the process of implementing several Taskforce recommendations, some of which were long term in nature. A number of the actions began being implemented after the Taskforce gave its recommendation in 2018. That included eviction of illegal settlers on public and community land, development of capacity within Kenya Forestry Service (KFS), recruitment of 2664 forest rangers and deployment to various stations countrywide, issuance of special use license to Meru County for



- Bongo Rhino Sanctuary, which hosted the endangered Mountain Bongo, executing a contract for provision of services for integration of KFS Systems in 2021 and development of an e-registration system for saw millers data, which also classified saw millers into small, medium and large enterprises.
5. To enhance the actionability and monitoring of the 3rd respondent, it was critical for the matrix to give an indication as to the period within which each recommendation was to be implemented, as well as the strategic steps to be made and the milestones to be achieved.
 6. In the absence of timelines, the current measures of the level of implementation were opaque and inefficient, because they only confirmed if a recommendation had been implemented, was in the progress of being implemented or had not been implemented. Rather, the 3rd respondent, in addition to the column on actions and status of achievements, should have a column for the next steps and the estimated timelines. Reasons for any delays should be indicated accordingly.
 7. The 3rd respondent must review the Implementation Matrix and ensure that it reflected the actual actions undertaken. Some recommendations in the submitted Implementation Matrix were indicated as done, yet the purported actions taken in the face of it were questionable in their effectiveness.
 8. No plan to combat illegal sandalwood logging had been made under the structure, presented to the court, developed, or implemented. While the 3rd respondent indicated that it had done an audit on existing Community Forest Associations (CFAs), its explanatory note stated that what had been achieved was automation of the CFA register and not audit of the CFAs.
 9. The 3rd Respondent indicates that a Multi-Agency Team was constituted in 2019 to review, audit and provide recommendations on PELIS. The report however did not indicate that any public participation was undertaken on the same nor did it indicate that a validation process was undertaken. The 3rd respondent should therefore undertake public participation of that report, before overturning the Taskforce's recommendation on PELIS.
 10. Such public participation must be meaningful and qualitative. Meaningful public participation ought to have the following components:
 1. clarity of the subject matter for the public to understand;
 2. structures and processes (medium of engagement) of participation that were clear and simple;
 3. opportunity for balanced influence from the public in general;
 4. commitment to the process;
 5. inclusive and effective representation;
 6. integrity and transparency of the process;
 7. capacity to engage on the part of the public, including that the
 8. public must be first sensitized on the subject matter.
 11. The KFS-KEFRI Policy and Technical Liaison Committee, mandated to review the 1996 Technical Orders and oversee the ban on cedar logging, had neither reviewed the orders nor provided progress reports. While the 3rd respondent claimed to have developed a long-term rotational felling plan, only an annual plan for 2023/2024 had been submitted. The purported program for public participation was, in fact, a Forest Management Plantation Cycle and was not included in the implementation matrix. The court found that a significant omission, underscoring the constitutional duty to ensure public access to information and participation in forestry governance. It directed the 3rd respondent to create an online repository to freely share all relevant documents with the public.
 12. The identified gaps must be addressed by the 3rd respondent but it was acknowledged that many recommendations were long-term and would require years to implement, making continuous judicial supervision impractical. The Kenya Forest Service was transitioning toward sustainable forest management consistent with the Taskforce recommendations, a process involving legislative, policy, and organizational reforms. For sustainable logging of mature exotic trees, the Service's values needed an immediate shift from extractive, human-centered management to a sustainable, eco-centric model, since that failure to do so would deplete Kenya's limited forest resources.



Petition allowed.

Orders

- i. *Declaration issued that the petitioner and the people of Kenya were entitled to be involved and participate in making, formulating, developing and legislating of laws, rules, regulations and guidelines to govern logging activities.*
- ii. *Declaration issued that the lifting of the moratorium on logging activities was not by the President, but by the purported consent of the parties in Nyeri and Meru ELC (which had since been dismissed).*
- iii. *Declaration made that the recommendations made by the Taskforce Report on Forest Resources Management and Logging Activities in Kenya, ought to be upheld by the respondents and implemented in furtherance to the protection of the environment and natural resources pursuant to article 69 of the Constitution of Kenya.*
- iv. *The 3rd respondent was to develop an online website and platform accessible to the public within three months of delivery of the instant Judgement, and shall proactively publish all its strategic documents and reports, which will include:*
 1. *the Strategic Plan of the Kenya Forest Service.*
 2. *Bi-annual reports on the progress of the Kenya Forest Service on its implementation of the 2018 Taskforce Report on Forest Resources Management and Logging Activities in Kenya, which shall include the actions and steps undertaken and timelines and challenges faced, if any. The 3rd respondent shall publish detailed annexures to support the report.*
 3. *All forest management plans developed.*
 4. *Quarterly reports published by the KFS-KEFRI Policy and Technical Liaison Committee.*
 5. *A report on the harvesting of the 5,000 Ha of the mature and over mature forest plantation trees identified by the Multi-Agency Oversight Team, which was undertaken pursuant to the interim orders of this court on October 12, 2023.*
 6. *The felling plans in respect of the identified mature trees.*
 7. *Public participation reports on the Multi-Agency Team's recommendation for the continuation of PELIS.*
 8. *Annual Audits of Community Forest Associations.*
 9. *Guidelines on best practices in silviculture and environmental safeguards.*
- v. *The 3rd respondent shall ensure sustainable forest management was observed in all public, community and private forests and shall ensure:*
 1. *That only plantations that had achieved the sustainable rotation age as advised by the KFS-KEFRI Policy and Technical Liaison Committee, shall be harvested.*
 2. *Not more than 5000Ha of plantations shall be harvested annually, with a maturity age of not less than 20 years.*
 3. *The prevention of illegal logging of indigenous trees, particularly, cedar, and destruction of indigenous forests.*
 4. *Adherence to the Public Procurement Act and regulations in the award of forest materials to saw millers, and discontinuation of direct allocation of forest stocks.*
 5. *Promotion and expansion of professional commercial forests on private land.*
 6. *Mandatory re-planting policy by saw millers and Community Forest Associations.*
 7. *The establishment of a robust monitoring program to ensure the survival of trees after pre-planting.*
- vi. *Each party shall bear its own costs.*

Citations

Cases

Kenya



1. *Benl Development Limited v First Community Bank Limited* Civil Suit 406 of 2019; [2021] KEHC 7136 (KLR) - (Applied)
2. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Applied)
3. *County Government of Kitui v Ethics & Anti-Corruption Commission* Petition 3 of 2019; [2019] KEHC 7424 (KLR) - (Applied)
4. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Applied)
5. *Ochola Kamili Holdings Limited v Guardian Bank Limited* Civil Case 547 of 2014; [2018] KEHC 3199 (KLR) - (Applied)
6. *Republic v Attorney General & 2 others ex-parte Associated Architects & 2 others* Judicial Review 238 of 2015; [2018] KEHC 7691 (KLR) - (Applied)
7. *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* Civil Case 7 of 2017; [2018] KEHC 4886 (KLR) - (Applied)
8. *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* Civil Appeal 126 of 1995; [1995] KECA 168 (KLR) - (Applied)

Statutes

Kenya

1. Access to Information Act, 2016 (Act No 31 of 2016) section 5 (1) - (Interpreted)
2. Constitution article 35(3); 69(d); 135 - (Interpreted)
3. Forest (Participation in Sustainable Forest Management) Rules, 2009 (cap 385 Sub Leg) In general - (Cited)
4. Forest Conservation And Management Act (cap 385) In general - (Cited)

Advocates

- Mr. Waweru* for Petitioner
Ms Kinama for 1st Interested Party
Mr. Nelson Havi for 3rd Respondent
Mr. Allan Kamau for Attorney General

JUDGMENT

1. Through an amended petition dated August 18, 2023, the petitioner sought for the following orders:
 - a. A declaration that the petitioner and the people of Kenya are entitled to be involved and participate in making, formulating, developing and legislating of laws, rules, regulations and guidelines to govern logging activities, and that if such laws, regulations and guidelines are enacted, passed or issued by the 1st to 4th respondents without involvement and participation of the Petitioners and the people of Kenya, the same shall be unconstitutional, null and void.
 - b. In the alternative or in addition to prayer (a), a declaration that the public participation, procedures and policies developed to govern the lifting of the moratorium on logging activities, in Kenya was neither meaningful, extensive, qualitative nor quantitative as provided for under article 69 (d) and therefore, unconstitutional, null and void.
 - c. A declaration that the 1st to 4th respondents have infringed and violated constitutional rights of Kenyans by failing to provide information within the province of article 35(3) and section



5(1) of the *access to information act*, relied upon and the basis of which the decision to lift the moratorium on logging activities.

- d. A declaration that the pronouncements by the Head of State, the Cabinet Secretary and in respect of the logging activities, without any/or meaningful public participation, is unconstitutional, null and void.
 - e. In alternative to or in addition to prayer (d), a declaration be issued that the pronouncements by the Head of State on July 2, 2023 were in exercise of his constitutional function within the province of article 135 of *the Constitution* of Kenya.
 - f. An order of certiorari to remove into this honourable court for the purposes of being quashed the policy directions communicated by the President of the Republic of Kenya lifting the moratorium on logging activities implemented in Kenya in 2018 for being in violation of article 135 of *the Constitution*.
 - g. A permanent injunction restraining the respondents either by themselves or through their agent, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources from forest areas until such time as there shall be laid, enacted and legislated laws, regulations or guidelines, duly passed and with the force of law for purposes of governing and regulating forest harvesting activities within the country.
 - h. A declaration that the moratorium on logging activities throughout the territory of Kenya implemented in 2018 is still in force; until and unless the same is reviewed through the laid down provisions under *the Constitution* of Kenya, the Forest Management and Conservation Act and the *Environmental Management and Coordination Act* and nay other relevant laws.
 - i. A declaration that the recommendations made by Taskforce Report and Forest Resources Management and Logging Activities in Kenya, having been developed by members constituted vide Gazette Notice No 28 of February 26, 2023 ought to be upheld by the respondents and implemented in furtherance to the protection of the environment and natural resources pursuant to article 69 of *the Constitution* of Kenya.
 - j. An order of mandamus be issued compelling the respondents jointly and severally immediately implement the recommendations of the taskforce in (f) and a report of the same be filed in court not later than a year after the date of the judgment of the court.
 - k. The petitioner be paid costs of the petition.
2. Upon consideration of the petition, responses and evidence presented by the parties, this court found the petition to be partially merited and delivered an Interim Judgment dated October 12, 2023 on the following terms :-
- a. A declaration be and is hereby issued that the petitioner and the people of Kenya are entitled to be involved and participate in making, formulating, developing and legislating of laws, rules, regulations and guidelines to govern logging activities.
 - b. A declaration be and is hereby issued that the lifting of the moratorium on logging activities was not by the President, but by the purported consent of the parties in Nyeri and Meru ELC (which has since been dismissed).
 - c. A declaration that the Recommendations made by the Taskforce Report on Forest Resources Management and Logging Activities in Kenya, ought to be upheld by the Respondents and



implemented in furtherance to the protection of the environment and natural resources pursuant to article 69 of *the Constitution* of Kenya.

- d. An order of mandamus be and is hereby issued compelling the respondents to implement the recommendations of the Taskforce and a comprehensive implementation matrix of the same to be filed in Court not later than three months after the date of the judgement of the Court.
 - e. An order be and is hereby issued that the implementation framework shall include a program for proactive dissemination of information and public participation in the management of forest resources, including but not limited to the 3rd respondent's Strategic Plan, Forest Management Plan and Felling Plan.
 - f. The 5,000 Ha of the mature and over mature forest plantation trees identified by the Multi-Agency Oversight Team to be harvested under the supervision of the 3rd respondent and the Multi-Agency Oversight Team.
 - g. The harvesting of the 5,000 Ha of the mature and over mature trees to be done in strict compliance with the provisions of the law, including the Environmental Management and Coordination Act, the Forest Conservation and Management Act, the *Forest (Participation in Sustainable Forest Management) Rules*, 2009 and the Forest (Harvesting) Rules, 2009.
 - h. SAVE for the 5,000 Ha trees of mature and over mature trees to be harvested, this court hereby issues conservatory orders restraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources from forest areas until the final Judgment of this court.
 - i. The parties shall bear their own costs.
3. It is in compliance with the said Interim Judgment that the 3rd respondent filed an affidavit of compliance sworn by Alex Lemarkoko, the Chief Conservator of Forests and Chief Executive Officer of Kenya Forest Service, dated January 24, 2024. The deponent also sought that the conservatory orders issued by this court be set aside.
 4. The Chief Conservator of Forests, who is also the Chief Executive Officer of Kenya Forest Service, the 3rd respondent, deponed that in the interim judgment of this court, the 3rd respondent was directed to file the following documents:
 - a. A Comprehensive Implementation Matrix in respect of the Taskforce Resources Management and Logging Activities in Kenya published in April 2018.
 - b. Program for Proactive Dissemination of Information and Public Participation in the Management of Forest Resources.
 - c. The Strategic Plan for Kenya Forest Service; and
 - d. A Felling Plan for Kenya Forest Service.
 5. Mr Lemarkoko deponed that he has lodged with the court and supplied to the parties' advocates a disc containing the indicated documents, including 4 public participation reports for the program; that he has also annexed a Draft Strategic Plan for Kenya Forest Service; Minutes of the Board of Kenya Forest Service approving the Plan; and an invitation for public participation on the plan.
 6. The deponent asserted that the disc contains the Forest Management Plan for Kenya Forest Service comprised of 99 Forest Management Plans and 7 Participatory Forest Management Plans.



7. The petitioner rebutted the averments of the Chief Conservator of Forests vide a replying affidavit sworn by Florence Wairimu Muturi, its Secretary/CEO, who deposed that the orders of the court have not been vacated, stayed or appealed, and the Respondents are bound to comply with them.
8. Ms Florence Muturi deponed that there has not been any compliance with the court orders and that what has been presented vide the affidavit by the 3rd respondent cannot pass the test of the weight the court has taken in furtherance to article 69 of *the Constitution*, which guarantees the petitioner's the right to a clean and healthy environment and to the sustainable management of forests for inter and intragenerational equity.
9. The deponent averred that the 3rd respondent has not provided any information in response to what has been done by the 3rd respondent pursuant to article 69 of *the Constitution* on the right to a clean and healthy environment; that the taskforce recommendations still remain in paper and that the implementation matrix indicates the annexures such as the Draft Charcoal Rules, Draft Amendments to the FCMA, and Draft KFS Strategic Plan, with no indication of how much time is needed to complete the same.
10. According to the petitioner's CEO, the draft legislation cannot be relied upon as the basis of any enforcement action as it lacks the force of law; that some bills date back to 2022 and there is nothing that has stopped the 3rd respondent from passing the bills and that the non-passage of the bills negatively impacts recommendations number 2, 12, 16, 35, 4176, 81, 85, 86, 97, 98, 99, 102, 108, 113 140, 141, and 145.
11. According to the petitioner, the documentation provided in draft precipitates the need for more time to be granted to the respondents to comply with the orders and recommendations of the taskforce, failure to which the taskforce would be an academic exercise and that the implementation matrix is replete with recommendations which are half done, not done or that have been referred to other state agencies for implementation.
12. The petitioner's Chief Executive Officer (CEO) deponed that save for the meeting which was convened by the 3rd Respondent in Embu towards the end of 2023, the petitioner is not aware of any other public participation that has been done after the interim judgement of the court, and that the 3rd respondent ought to have shown how the logging of trees on 5000 Ha was done.
13. Christine Nkonge, the Executive Director of Katiba Institute, the 1st interested party, deponed that while the annexure marked 'AL 2' is marked as 'program for proactive dissemination of information', the document is titled 'Forest Plantation Management Cycle' and does not contain information on how proactive dissemination of information will take place.
14. The Executive Director of the 1st interested party deponed those seven reports in respect of public participation have not been submitted; that the Strategic Plan for Kenya Forest Service 2023-2027 is still in draft form; that the Minutes of the 59th Board of Directors Meeting held on September 28, 2023 are missing pages 2-7 and 9-17 and that the said Board minutes are similar to those titled "Board Approval for the Felling Plan for Kenya Forest Service.
15. It is the 1st interested party's case that there is no evidence of public participation other than one letter of invitation for public participation to the CEO of Nature Kenya, and that the 3rd respondent has not complied with the court orders.
16. The 2nd interested party also opposed the depositions of the 3rd respondent's Chief Executive Officer. In her replying affidavit, the Executive Director of Natural Justice, the 2nd interested party, deposed



that the 3rd respondent electronically served them with the documents filed in compliance with the orders of this court and that these documents are not reflective of the directions of the court.

17. The Executive Director of Natural Justice, the 2nd interested party, deponed that the Program for Proactive Disclosure of Information exhibited by the 3rd respondent does not outline any program or mechanisms that the 3rd respondents will use in the disclosure of information; that the public participation reports have not been shared with the 2nd interested party and that the Draft Strategic Plan is not a final document and can therefore be amended and revised, defeating the purpose of the court's directions.
18. It was deposed that while the 3rd respondent attached an invitation notice for public participation, the 3rd respondent has not attached any evidence of occurrence of the zoom meeting; that despite the 2nd interested party having a great interest in these proceedings, they were not invited to any public participation meeting nor did they see invites in any public forum spaces and that the Minutes of the Board of Directors of Kenya Forest Service on the strategic plan reveals that there are missing pages, specifically Resolution 4 to 6 which appear to have been deliberately obscured.
19. The 2nd interested party's Executive Director deposed that the minutes and the Board approval for the felling plans by Kenya Forest Service shows glaring discrepancies from missing pages to similarity in contents; and that they have not been served with any Forest Management Plans and Participatory Management Plans.

Submissions

20. Counsel for the 3rd respondent submitted that the affidavit of compliance and the letter dated January 24, 2024 satisfactorily demonstrates compliance with the directives of the court in the Interlocutory Judgment delivered on October 12, 2023 by the 3rd respondent and that the conservatory order being interlocutory in nature is the only outstanding issue.
21. It was counsel's submission that the duration of interlocutory orders and the principles upon which they may be discharged has been underscored in several decisions including *St Patricks Hill School Ltd v Bank of Kenya Ltd* [2018] eKLR, *Ochola Kamili Holdings Limited v Guardian Bank Limited* [2018] eKLR, *Benl Development Limited v First Community Bank Limited* [2021] eKLR and *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* [1996] eKLR.
22. Counsel for the petitioner submitted that compliance with court orders is grounded on the principles of the rule of law, respect for judicial authority and administration of justice.
23. Counsel for the petitioner submitted that the respondents have not complied with the orders of this court; that the petitioner's affidavit shows that the 3rd respondent has selectively implemented some of the Taskforce's recommendations and not others; that in some cases, the actions taken and recommendations given do not correspond and that the petitioner is not aware of any public participation that has taken place following the interim judgement of this court.
24. It is the petitioner's counsel's submission that the lifting of the moratorium without public participation and lack of compliance with the court orders by the respondents poses significant environmental and social risks and that lifting the ban on logging without public input risks reversing the gains made in forest conservation.
25. Counsel for the 1st interested party submitted that the 3rd respondent has failed to provide the documents ordered by the court. Further, that there are discrepancies in the annexed documents with contradicting minutes of the same date and failure to annex relevant documents.



26. The 1st respondent relied on the Supreme Court’s determination in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others: Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR), where the court held that when a court issues an interim judgement, the final judgement will await certain actions being conducted by those who violated rights.
27. Counsel also relied on the case of *Republic v Cabinet Secretary Ministry of Agriculture, Livestock & Fisheries & 4 others ex parte Council of County Governors & another* [2017] eKLR on the five elements of structural interdicts.

Analysis and Determination

28. The question for this court’s consideration is whether the 3rd respondent has complied with the orders of this court issued on October 12, 2023, and whether this court should dispense with the conservatory orders it issued, restraining the respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources from forest areas.
29. The meaning and purpose of a “structural interdict” was elaborated by Odunga J in *County Government of Kitui v Ethics & Anti-Corruption Commission* [2019] eKLR as follows:

“One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issues a declaration identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the conditional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several ‘check in’ hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of ‘poorest of the poor,’ who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government’s failure to adhere to its plan (or any associated requirements) essentially amount(s) to contempt of court.”



30. This court is also guided by the Supreme Court in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, which stated as follows:

“Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.”

31. This court is aware that the purpose of the moratorium on logging which was imposed by the executive was to allow for the reassessment and rationalization of the entire forest sector in the country. In its Interim Judgment, this court noted that the findings of the 2018 Task force Report on Forest Resources Management and Logging Activities in Kenya were that there was rampant illegal logging of indigenous and plantation forests, irregular licensing, poor forest management and negative impacts under the Plantation Establishment and Livelihood System (PELIS).
32. There was therefore an urgent need for remedial measures to be undertaken by the Kenya Forest Service, the 3rd respondent, in order to curb the unsustainable utilization of forests in the country.
33. This court is also cognizant of the risk of judicial overreach on its part, noting that the doctrine of separation of powers vests the mandate of making and implementing policy on the executive arm of the government. The role of this court is therefore to interpret the law, and while doing so, bear in mind that it has a constitutional mandate of protecting and safeguarding the environmental and land rights of all citizens, including upholding the principle of Sustainable Development.
34. In compliance with the Interim Judgement of this court, the 3rd respondent has submitted multiple documents including the Draft Strategic Plan 2023-2027; a Comprehensive Implementation Matrix in respect of the Taskforce Resources Management and Logging Activities in Kenya published in April 2018 and its annexures; several public participation reports; Participatory Forest Management Plans; a Felling Plan for Kenya Forest Service, among others.
35. This court notes that there has been substantive compliance with the orders of this court by the 3rd respondent. The submitted matrix of the implementation of the Taskforce Report on Forest Resources Management and Logging Activities in Kenya is an important document because it is not only a tool to track compliance, but it also ensures that there is sustainable logging of the identified mature exotic tree plantations.
36. It is apparent that the 3rd respondent is in the process of implementing several Taskforce recommendations, some of which are long term in nature. A number of the actions began being implemented after the Taskforce gave its recommendation in 2018.
37. This includes eviction of illegal settlers on public and community land; development of capacity within KFS; recruitment of 2664 forest rangers and deployment to various stations countrywide; issuance of special use license to Meru County for Bongo Rhino Sanctuary, which hosts the endangered Mountain Bongo; executing a contract for provision of services for integration of KFS Systems in 2021 and



development of an e-registration system for sawmillers data, which also classifies sawmillers into small, medium and large enterprises etc.

38. To enhance the actionability and monitoring of the 3rd respondent, it is critical that the matrix gives an indication as to the period within which each recommendation is to be implemented, as well as the strategic steps to be made and the milestones to be achieved.
39. In the absence of timelines, the current measures of the level of implementation are opaque and inefficient, because they only confirm if a recommendation has been done, is in the progress or has not been done. Rather, the 3rd respondent, in addition to the column on actions and status of achievements, should have a column for the next steps and the estimated timelines. Reasons for any delays should be indicated accordingly.
40. The 3rd respondent must review the Implementation Matrix and ensure that it reflects the actual actions undertaken. Some recommendations in the submitted Implementation Matrix are indicated as done, yet the purported actions taken are on their face questionable in their effectiveness.
41. For instance, the 3rd respondent indicates that it has implemented the recommendation to address illegal logging of sandalwood through developing and implementing a joint law enforcement approach. Its action on the same, however, is that this has been implemented under the Presidential Executive Order No 1 of January 21, 2019, where the Ministry of Interior coordinates all security agencies on matters to do with environmental protection.
42. If indeed a plan to combat illegal sandalwood logging has been made under this structure, this court has no proof of the same, and can only conclude that no such plan has been developed or implemented.
43. Similarly, while the 3rd respondent indicates that it has done an audit on existing Community Forest Associations (CFAs), its explanatory note states that what has been achieved is automation of the CFA register and not audit of the CFAs.
44. Another issue arising from the matrix is on the way forward with the PELIS program. While the Taskforce recommended the gradual phasing out of the PELIS program, the 3rd respondent indicates that a Multi-Agency Team was constituted in 2019 to review, audit and provide recommendations on PELIS. The Committee recommended continuation of Pelis. The 3rd respondent has presented a copy of this report.
45. The report however does not indicate that any public participation was undertaken on the same nor does it indicate that a validation process was undertaken. The 3rd respondent should therefore undertake public participation of this report, before overturning the Taskforce's recommendation on PELIS.
46. Such public participation must be meaningful and qualitative. Further, as prescribed by the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR, meaningful public participation ought to have the following components:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;



- d. commitment to the process;
- e. inclusive and effective representation;
- f. integrity and transparency of the process;
- g. capacity to engage on the part of the public, including that the
- h. public must be first sensitized on the subject matter.”

47. Lastly, this court notes that the KFS-KEFRI Policy and Technical and Liaison Committee, which was constituted in August 2019 and reconstituted in 2020 is vested with the mandate to review the 1996 Technical Orders by the KFS-KEFRI Policy and Technical Liaison Committee, to ensure that the most economical rotation age regime is determined and applied.
48. The Committee is also referenced in the matrix as being the multi-agency body constituted to ensure the total ban on logging of cedar trees in public, private and community forests and the ban on cedar products. However, these orders have neither been reviewed nor have any progress reports by the Liaison committee been presented.
49. It is also not lost to this court that while the 3rd respondent indicates that it has developed a full long-term rotational felling plan, they have only submitted an annual plan for 2023/2024. A detailed long-term felling plan needs to be prepared and shared with the general public
50. Furthermore, while the 3rd respondent claims to have submitted a program for proactive dissemination of information and public participation in the management of forest resources, the document it presented to this court was not in fact such a plan, but was instead the Forest Management Plantation Cycle. Such a program was also not included in the implementation matrix, as ordered by this court.
51. This is a significant omission by the 3rd respondent’s part because it was a distinct finding of the court that the 3rd respondent had failed to proactively provide information on planting and harvesting of tress. This court also emphasized the constitutional imperative of involving the public in the making, formulating, developing and legislating of laws, rules, regulations and guidelines governing logging activities in the country.
52. Lastly, the 3rd respondent has presented several critical documents to this court, which ought to be accessible to the public, as part of their right to environmental democracy, which includes the right to access information, participation in decision making and access to justice.
53. This court therefore directs the 3rd respondent to establish an online platform with a repository for all these documents, which must be shared and made available to the public at no cost at all.
54. The gaps that this court has identified must be reviewed by the 3rd respondent. However, noting that some of the recommendations made are long term in nature, it would not be feasible nor reasonable for this court to monitor the full compliance with the Taskforce recommendations, because some of the tasks will take several years for full compliance to be achieved.
55. At this point in time, the court is satisfied that the Kenya Forest Service, the 3rd respondent, is an institution transitioning towards sustainable forest management, in accordance with the Taskforce recommendations. This is a short, mid and long-term endeavor that will involve legislative change, policy shifts and critically, organizational change within the institution.
56. However, for now, and for sustainable logging of mature exotic trees, the values of the Kenya Forest Service must be immediately appraised and shift from an extractive and anthropomorphic approach in



management of forest resources to a more sustainable and eco-centric approach. The failure to make this changes successfully will surely result in the depletion and exhaustion of Kenya's limited forest resources.

57. In conclusion, and considering that we have mature exotic trees which are ready for harvesting in accordance with the existing Felling Plan, this court finds it appropriate to lift the conservatory orders it had issued in its Interim Judgement and issue the following final orders in this matter:

- a. A declaration be and is hereby issued that the petitioner and the people of Kenya are entitled to be involved and participate in making, formulating, developing and legislating of laws, rules, regulations and guidelines to govern logging activities.
- b. A declaration be and is hereby issued that the lifting of the moratorium on logging activities was not by the President, but by the purported consent of the parties in Nyeri and Meru ELC (which has since been dismissed).
- c. A declaration be and is hereby made that the Recommendations made by the Taskforce Report on Forest Resources Management and Logging Activities in Kenya, ought to be upheld by the Respondents and implemented in furtherance to the protection of the environment and natural resources pursuant to article 69 of *the Constitution* of Kenya.
- d. The 3rd respondent shall develop an online website and platform accessible to the public within three months of delivery of this Judgement, and shall proactively publish all its strategic documents and reports, which will include:
 - i. The Strategic Plan of the Kenya Forest Service.
 - ii. Bi-annual reports on the progress of the Kenya Forest Service on its implementation of the 2018 Taskforce Report on Forest Resources Management and Logging Activities in Kenya, which shall include the actions and steps undertaken and timelines and challenges faced, if any. The 3rd respondent shall publish detailed annexures to support this report.
 - iii. All forest management plans developed.
 - iv. Quarterly reports published by the KFS-KEFRI Policy and Technical Liaison Committee.
 - v. A report on the harvesting of the 5,000 Ha of the mature and over mature forest plantation trees identified by the Multi-Agency Oversight Team, which was undertaken pursuant to the interim orders of this court on October 12, 2023.
 - vi. The felling plans in respect of the identified mature trees.
 - vii. Public participation reports on the Multi-Agency Team's recommendation for the continuation of PELIS.
 - viii. Annual Audits of Community Forest Associations.
 - ix. Guidelines on best practices in silviculture and environmental safeguards.
- e. The 3rd respondent shall ensure sustainable forest management is observed in all public, community and private forests and shall ensure:
 - i. That only plantations that have achieved the sustainable rotation age as advised by the KFS-KEFRI Policy and Technical Liaison Committee, shall be harvested.



- ii. Not more than 5000Ha of plantations shall be harvested annually, with a maturity age of not less than 20 years.
 - iii. The prevention of illegal logging of indigenous trees, particularly, cedar, and destruction of indigenous forests.
 - iv. Adherence to the Public Procurement Act and regulations in the award of forest materials to saw millers, and discontinuation of direct allocation of forest stocks.
 - v. Promotion and expansion of professional commercial forests on private land.
 - vi. Mandatory re-planting policy by saw millers and Community Forest Associations.
 - vii. The establishment of a robust monitoring program to ensure the survival of trees after pre-planting.
- f. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Waweru for Petitioner

Ms Kinama for 1st Interested Party

Mr. Nelson Havi for 3rd Respondent

Mr. Allan Kamau for the Attorney General

Court Assistant - Tracy

