



**M'Rinjiru v National Land Commission & 3 others (Petition
E005 of 2024) [2024] KEELC 13775 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E005 OF 2024**

CK NZILI, J

DECEMBER 4, 2024

**IN THE MATTER OF THE PROVISIONS OF THE CONSTITUTION
OF KENYA 2010 ARTICLES 21, 22, 23, 42, 60, 69, 70 AND 71**

AND

**IN THE MATTER OF PROTECTION OF IMENTI FOREST IN THE COUNTY
OF MERU AND ENFORCEMENT OF ENVIRONMENTAL RIGHTS**

AND

IN THE MATTER OF SECTION 58 OF THE FOREST ACT 2005

BETWEEN

AMOS THURANIRA M'RINJIRU PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA FOREST SERVICE 2ND RESPONDENT

MINISTRY OF ENVIRONMENT AND FORESTRY 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. Before the court is a petition dated 6.5.2024 that was brought by Bernard Gituma M'Rimberia, a resident of Imenti North sub-county, who stepped in vide an order dated 14.11.2024, to replace the initial petitioner, the late Amos Thurania M'Injuri following his demise during the subsistence of this petition. The petition is brought in the private and public interest as an aggrieved and concerned citizen or resident of Imenti North subcounty Meru county.



2. The petitioner averred that he discovered that the respondents had illegally authorized the interested party to operate a quarry within Imenti Forest Meru County, otherwise known as Gitoro Forest, contrary to Section 42 of the Forest Conservation Management Act and in breach of his rights under Articles 42 & 70 of *the Constitution*. It was averred that the forest is a water catchment area, a source of water springs and rivers for the residents and a gazetted public forest, where rare, endangered trees and wild animals live.
3. Again, the petitioner averred that there was no public participation or any environmental impact assessment undertaken before the establishment of the said quarry, more so when it has a tremendous cultural significance to the local community.
4. The petitioner averred that a visit to the quarry established that there was excavation of stones from the underground, which had started to damage not only the trees forming part of the forest but also was destroying both the wildlife and water catchment area, hence affecting the water supply which the people of North Imenti Sub-County rely upon.
5. The petitioner averred that the respondent's authorization or licensing of excavation had destroyed the environment generally and, in particular, the forest in breach of the petitioner's constitutional rights and invited the court to visit the site and make the necessary amendments. He termed the acts of omission and commission by the respondents as arbitrary, wrongful and unconstitutional.
6. The petitioner prayed for:
 - i. The declaration that the actions of the respondents through their officers, agents or servants were unlawful, unconstitutional, arbitrary, and illegal in allowing, licensing, or authorizing the establishment and operation of a quarry within Imenti Forest, Meru County, where the excavation is being or about to be undertaken in a water catchment area.
 - ii. Declaration that the excavation of stones for quarrying business and damage of the forest and a water catchment area was environmental damage and amounted to pollution and thus unconstitutional.
 - iii. Prohibition orders to restrain the respondents, their officers and any government agency from allowing, licensing, or authorizing the establishment and operation of a quarry within Imenti Forest, which is an environmental danger and source of pollution.
 - iv. Order canceling any licenses or authorization of any kind to establish a quarry business within Imenti Forest Meru County.
7. The petition was supported by an affidavit sworn by Amos Thurania M'Rinyiru, reiterating the contents of the petition. Further, the petitioner averred that the Imenti Forest was a government facility required for protection by the respondents. Despite the mandate to conserve, manage and protect it, it was averred that the respondents have illegally allowed such quarry to be operated since 2014 contrary to Section 2 of the Forest Conservation & Management (FCMA), threatening endangered and rare species, which include sacred trees.
8. The petitioner averred that the special user license (herein SUL) required approval and ratification by parliament since a water catchment and the environment which is intergeneration equity supersedes or overrides personal benefits.



9. Additionally, the petitioner averred that the respondents had abdicated their statutory & constitutional responsibility to conserve and manage the forest and have abused their duties, thus violating his right and that of others to a clean and healthy environment.
10. The petitioner averred that his rights and those of other residents of the Imenti sub-county have been denied and or were likely to be denied, violated, infringed and or threatened, unless the orders sought are granted. The petitioner attached copies of photographs as anenxture ATM "1".
11. The petition was served upon the respondents on 13.5.2024. Hosea Mutembei Peter joined the petition as an interested party. The 2nd – 4th respondents opposed the petition through an affidavit sworn by Wellington Ndata, a County Forest Conservator. He confirmed that the 2nd respondent issued a SUL to the interested party dated 22.8.2019. It was averred, however, that since the issuance of the SUL, the government policy on conservation has changed, inclining towards environmental conservation.
12. The 2nd - 4th respondents averred that the interested party was in breach of Clause No. 11 (a) & xiii of the SUL on the obligations of the license in regard to pollution, given that he was manufacturing asphaltic concrete on the site, which had caused smoke pollution as per annexure marked WN "1" a bundle of photographs showing manufactured asphaltic concrete on the site.
13. Further, the 2nd – 4th respondents averred that the general conditions of the Environmental Impact Assessment license No. 1.5 state that the license should not be taken as a statutory defense against charges of environmental degradation or pollution in respect of any manner of degradation or pollution.
14. According to the 2nd – 4th respondents, the manufacturing of asphaltic concrete on site had led to the degradation of the environment and was a disturbance to wildlife. The 2nd – 4th respondents averred that the interested party had not adhered to the restoration program, which required him to continue quarrying while restoring the environment simultaneously, with the 2nd respondent continually evaluating the impact on the environment under obligation No. 11 (a) XXII.
15. Similarly, the 2nd – 4th respondents attached photographs showing that there had been no restoration on the site, causing stagnant water during the rainy season, which had led to the breeding of mosquitoes, which was a health risk. The 2nd – 4th respondents averred that the quarrying activities were contrary to the current mandate of the state organ which requires an increase of forest cover to ten percent. The 2nd – 4th respondents averred that due to the violations of the SUL, the 2nd respondent constituted a task force on 18.6.2024 to review the compliance of the condition in the SUL who visited the site of the quarry on 21.6.2024, who evaluated the activities of the interested party in the forest and recommended the cancellation of the particular user license among other measures. The attached report was marked as WN "3". There is no evidence that the interested party challenged the Environmental Management Coordination Act recommendations for the cancellation in line with (EMCA) or FCMA.
16. The 2nd – 4th respondents averred that the interested party had installed an asphalt production plant outside the licensed area, hence allocating himself more space in the forest on top of failing to deposit the cash bank guarantee of surety bond amounting to Kshs.1,000,000/=, which was to act as security for the due fulfillment of the terms and conditions of the license agreement; hence he was in breach of clause No. 11 (a) xxiii of the SUL.



17. In addition, the 2nd – 4th respondents averred that the interested party had equally not carried out any annual environmental audit together with undertaking the recommended mitigation measures. The respondents urged the court to grant the reliefs sought in the petition.
18. The interested party in his affidavits sworn on 24.5.2024 & 1.8.2024 and that of Dorothy Naitore, a secretary to the Meru Forest Environmental Conservation and Protection Association, sworn on 21.5.2024, it was averred that in May 2019, the interested party applied for a particular user license with 2nd respondents to be allocated a portion of Meru Forest in a site initially operated as a quarry by H- Young K Co Ltd for several years and whose lease had lapsed. He said that his application was approved by the board of directors of the 2nd respondent in its meeting held on 27.6.2019 for a quarry of 2.471 acres as per a communication letter dated 8.8.2019 attached as HMP "1".
19. According to the interested party, the SUL was prepared for execution by the 2nd respondent and himself, which was forwarded to him by a letter dated 23.8.2019 attached as annexure HMP "2" & "3".
20. Again, the interested party averred that according to clause No. 5, he was supposed to make several payments, among other things, licenses and fees of Kshs.7,500/= per annum and annual forest and rent of Kshs.24710/=, and he made the payment of Kshs.99,710/= as per invoice attached as HMP "4".
21. The interested party averred that before he was granted the license, H-Young E. A (K) Co. Ltd had leased the quarry from 2014 – 2019 as per copies of letters dated 17.9.2019, 26.9.2019, 14.11.2019, and 20.5.2020 attached as HMPS a – d, respectively.
22. The interested party averred that upon being granted the SUL dated 22.8.22019, he had an Environmental Impact Assessment (EIA) done on the quarry, and on 8.10.2019, he was granted an EIA license to operate the quarry by the National Environment Management Authority (NEMA) a copy annexed as HMP "6".
23. The interested party averred that after commencing operations, he continued to make annual payments to the 2nd respondent on top of paying levies for crushed stone materials at the rate of Kshs.200/= per tonne as per copies of receipts attached as HMP 7 (a) – t.
24. In addition, the interested party averred that he was surprised when the county forest conservator served him with a letter dated 14.5.2024 suspending the quarrying attached to it a court order made on 9.5.2024 marked as HMP 8 (a) & (b). The petitioner's allegations in his affidavits are full of untrue, misleading, baseless allegations and full of material non-disclosures. Quarrying activities commenced from 2014 to 2019 through H Young Co. EA Ltd before he took over the quarry.
25. In addition, the interested party averred that there was no new quarrying being established where the quarry had been zoned by the 2nd respondent, as a zone best used for quarrying since it was a rocky and barren area where no trees could grow unless rocks were excavated and after rehabilitation trees could be planted.
26. Moreso, the interested party averred that the area was a bedrock that could not grow any vegetation, and in fact, it was upon removal of such stones that the area could be rehabilitated as per a bundle of photos of the bedrock and ongoing activities marked HMP "9".
27. Further, the interested party averred that there was no water catchment in the quarry, as shown by a geological and hydrological risk assessment survey report dated 20.5.2024 annexed as HMP "10".
28. The interested party averred that NEMA, the 2nd respondent, and any government body tasked with such licensing had carried out suitability tasks and confirmed that the area was only suitable for



- quarrying and in compliance with Section 46 of the FCMA as per attached E.I.A report for the quarry annexed and marked HMP "1".
29. Again, the interested party averred that he had no problem with any of his neighbors in the quarry, for most of them were happy with his activities as he makes roads for them and does not interfere with their daily activities otherwise it was surprising that the quarry had now generated or become a center of interest after H-Young Co. EA Ltd left, yet he had been in operation for almost 5 years.
 30. The interested party averred that the petitioner had provided to the court no expert opinion to show that any harm had occurred to the forest out of his activities yet every feeder road in Meru County was constructed by H-Young E.A Co. Ltd sourced materials from the quarry.
 31. Again, the interested party averred that to mitigate the effects of quarrying or excavation, it was a condition precedent with the SUL signed with 2nd respondent to restore and rehabilitate the quarry area upon completion of the period, which was yet to lapse.
 32. The interested party averred that he has not only paid the levy of the 2nd respondent but has also invested in heavy machines worthy of millions of money, on bank loans which he was serviced by the same quarry and was likely to suffer irreparable and monumental damages and loss.
 33. The interested party averred that the area has operated as a quarry for the last ten years. It was proper to proceed with the licensed activities, more so since the petitioner has no capacity has no capacity to bring the petition; he has not disclosed what personal constitutional rights had been violated by the business that has been running for ten years; there was no explanation shown on how a dry area only designated for quarrying due to lack of vegetation could be a water catchment area prior to the grant of a lease; the 2nd respondent had to undertake vigorous exercises and tasks and that there were also other activities on the forest including a workshop and a hotel, unlike in the bedrock area with no vegetation where he was quarrying as per photos marked HMP "12".
 34. Dorothy Naitore, on her part confirmed that her organization had been licensed to co-manage and conserve public forests under Part V of the FCMA together with the 2nd respondent and in particular had an agreement under Sections 48 – 52 thereof as per annexed copy of the registration certificate and an agreement marked DN "1" & "2" for Kithoka area to Kithirune area and was therefore aware of the quarrying activities, following information and consultation with the 2nd respondent and more so, after they prepared a participatory forest management plan forwarded to the 2nd respondent marked DN "3".
 35. Again, The deponent confirmed that H.Y Young Co. E. A had equally been operating the quarry between 2014 and 2019 at the upper Imenti forest known as Gitoro forest, with their knowledge after public participation was conducted before approval of the quarry to be operated by the interested party. It was averred that before the establishment of the quarry, the process was done with the knowledge, consultation, and consent of the community represented by her association with other stakeholders, and upon the expiry of the H Young Co. EA Ltd, lease the 2nd respondent notified them of the interested party's application to take over the quarry which the community did not object to and since there was no change of user there was no need for fresh public participation in regard to the interested party leasing the quarry.
 36. The deponent denied the existence of rare or endangered tree species in the area. To the contrary, she said that there was a cypress plantation that had been planted in the neighborhood of the quarry by her association in conjunction with the 2nd respondent and that the quarry area is barren and rocky and could not grow trees and was zoned as such to be used or a suitable for use as a quarry after which it could be rehabilitated by backfilling of soil to plant trees. Similarly, the deponent denied that the rock



- area was a water catchment; otherwise, the 2nd respondent would not have authorized any quarrying to take place, which activity, in any event, is allowed under Section 46 of FCMA, 2016.
37. Consequently, the deponent averred that since the site was rocky and trees could not grow there, the activity of quarrying the rocks and then rehabilitating the area would assist in increasing the forest cover by planting trees; hence, the interested party's activities were beneficial to the forest. The interested party with leave filed supplementary affidavits refuting the averments by the respondents and the petitioner and attached documents to show compliance with the terms and conditions of the SUL. One of the annexures was a cash bank guarantee dated August 2024.
38. Following directions, the petition was canvassed by way of written submissions. The petitioner relied on a written submission dated 19.8.2024. The petitioner took the view that the 2nd – 4th respondents supported his petition. It was submitted that although the interested party was licensed to operate the quarry in the forest, no public participation was undertaken or an EIA report was done before the issuance of the license for quarrying. The petitioner termed the same as against the rights of the locals since the forest, which hosted rare, threatened species and was of great cultural importance now threatened by destruction due to acts of the interested party of excavation of stones in the underground, causing damage to trees destroying wildlife, water catchment area hence adversely affecting the people of North Imenti Sub-County in breach of their constitutional rights to clean and healthy environment. Reliance was placed on *Crete Quarries and others vs County Government of Machakos & others* KPLC & another (IP) cited in *Andrian Kamotho Njenga vs COG & others* (2020) eKLR and *Martin Nyanyonyi CEO Center for Human Right Organization & another vs County Government of Bungoma & others* (2019) eKLR.
39. The 2nd – 4th respondents relied on written submissions dated 16.9.2024 in support of the petition. It was submitted that this court has jurisdiction pursuant to Article 70 of *the Constitution* to redress claim for infringement of the right to a clean and healthy environment recognized and protected under Article 42 thereof and make any order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment, to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment and to provide any compensation to any victim of a violation of the right to a clean and healthy environment.
40. In this case, the 2nd – 4th respondents submitted that it was confirmed that the interested party has been engaging in activities that are injurious to the environment, to the detriment of future generations, including producing asphaltic concrete in the forest, which is contrary to the SUL issued to him. The 2nd – 4th respondents submitted that the production of asphaltic concrete has led to pollution in the forest and the interested party was also yet to pay Kshs.1,000,000/= bank guarantee as security for the license.
41. The 2nd – 4th respondents submitted that the interested party had not taken any restorative measures on the areas quarried contrary to the license agreement, yet the forest as public land needed the protection of this court since the license provided for rehabilitation to be done alongside the ongoing quarrying and to date no restoration has ever happened since August 2019. Reliance was placed on an Article by Prof. Kameri Mbote titled.

“The use of Public Trust Doctrine in Environmental Law Published in Environment and Development Journal 2007, pp 195 (<http://www.lwad.journal.org/content/07195>).

42. The 2nd – 4th respondent submitted that *the Constitution* embodies the doctrine of public trust under Articles 61 & 62, while Articles 42, 69, and 71 incorporate the precautionary principle as well as the principle of public participation in regard to all matters that affect the public. Reliance was placed on



Peter Waweru vs Republic (2006) 1 KLR 677, where the court held that in the case of land resources, forests, waterways, wetlands, the government and its agencies were under a public trust to manage them in a way that maintains a proper balance between the economic benefits of developments with the need of a clean environment.

43. In this instance, the 2nd – 4th respondents pointed to the averment by the 2nd respondent, whose mandate is to protect the environment, forest and national heritage and to manage the property in trust and has expressly noted the challenges that the interested party has in fulfilling the terms and conditions set out in the license and therefore submitted that the license should be canceled for breach of the said terms whose implications on the environmental issue raised by the residents cannot be ignored by this court as a public interest issue. Reliance was placed on Republic vs Kenya National Commission on Human Rights *ex parte*; Uhuru Kenyatta Misc Application No. 86 of 2009, on the onerous responsibility that the court has to maintain the delicate balance between individual rights and those of the public after putting all matters and facts in a particular case to a scale.
44. Subsequently, the 2nd – 4th respondents submitted that the interested party's rights cannot override public interest, especially given the central role the environment plays and is recognized right from the preamble of our Constitution. Article 69 thereof, Section 3 (5) and 69 of EMCA, and Section 18 of the (*Environment and Land Court Act* (ELC)). Reliance was placed on Maritime Electric Co. Ltd vs. General Dairies (1937) AC on the need for the court to uphold the public good even where it may cause some injustice or unfairness to the private individual.
45. The interested party relied on written submissions dated 30.8.2024 and isolated four issues or complaints which the petitioner has to prove namely; if the quarry operations were;
 - a. Against Section 42 of the FCMA, 2016.
 - b. A violation of Article 70 of *the Constitution*.
 - c. Located within a water catchment area.
 - d. Established in a home of rare, threatened, and endangered species of great cultural significance.
46. The interested party submitted that the replying affidavit of the 2nd respondent negates all the above complaints by the petition since it has annexed a report which confirms that the establishment of the quarry was done on a rocky forest area for extraction of rock and after that, the tree planting will commence after backfilling the site with soil.
47. The interested party submitted that he had filed a general experts report showing that there was an evaluation by NEMA before the quarry commenced operations in 2019, which raised no issues over an alleged degradation of the environment.
48. Further, the interested party submitted that the hydrological report attached to his replying affidavit was clear that there was no water catchment area where the quarry is located.
49. Similarly, the interested party submitted that in the report produced by the 2nd – 4th respondents, it was clear that an area measuring around 10 acres was allocated to H Young Co. EA Ltd in 2014 and that the interested party was only given a license for an area adjacent measuring 2.37 acres for a period of 10 years. The logical conclusion, as submitted by the interested party, is that there has been extraction of quarry rock since 2014 for a period of ten years without a complaint, especially from the local community, as confirmed by an affidavit of Dorothy Naitore sworn on 21.5.2024. The interested party submitted that the petitioner(s) have not to date filed any report that negates the expert reports by NEMA, which clearly shows that there is no degradation of the environment; hence, the petitioner



- has failed to prove a breach of a right to clean and healthy environment. Reliance was placed on *Mumo Matemvu vs Trusted Society of Human Rights Alliance and others* (2013) eKLR.
50. Moreso, the interested party submitted that the petitioner was relying on a repealed Forest Act 2005, yet Section 46 of the FMCA 2016 allows for the establishment of the quarry in forests; hence his allegations are not factual or anchored in any law.
 51. On the prayers sought the interested party submitted that they presuppose that the 2nd respondent has no power to issue a license to operate a quarry. Yet, under section 46 of FCMA, it is expressed that the 2nd respondent can license the operation of a quarry in a forest, making the prayers untenable, more so when the affidavit of the county forest conservator has admitted that issuance of the license was lawfully and procedurally done.
 52. The interested party submitted that the 2nd – 4th respondents in the replying affidavit have concentrated on trying to show that the interested party is in breach of the terms of the unique SUL, yet, there is no evidence that they have ever issued a letter or communication warning of any alleged breach of the terms and conditions of the license.
 53. Subsequently, the interested party submitted that the 2nd – 4th respondent had a pre-determined mind to terminate the license upon the delivery of the court ruling without hearing the interested party, which led credence to the contention that the respondent and the petitioner have colluded to kick him out from the quarry at all costs. The interested party submitted that in the absence of enough material and evidence to prove that there is a threat to a clean & healthy environment, the petition ought to be dismissed.
 54. The issues calling for my determination are:
 - i. If the petitioner has the capacity to bring the petition.
 - ii. If the petition raises a constitutional question.
 - iii. If the petitioner has pleaded and proved a breach of any constitutional rights and freedoms against the respondents.
 - iv. If the petitioner is entitled to any constitutional reliefs for the alleged breach.
 - v. What appropriate orders should the court make?
 - vi. What is the order as to costs?
 55. In *Mumo Matemvu vs. Trusted Sevent vs Human Rights Alliance* (supra), the court observed that the evaluation of locus ought to be based upon the constitutional consideration of capacity set out in Articles 3, 22, and 258 of *the Constitution*.
 56. Locus standi signifies the right to be heard. A person must demonstrate sufficient interest to sustain his standing in court. See *Law Society of Kenya vs Commissioner of Lands & others NKRHCC NO. 464 of 2000*, *Alfred Njau & others vs City Court of NRB* (1982) KAR 229 and *Amin Akberali Manji & others vs Altaf Abdurasul Dadani & another* (2015) eKLR.
 57. Article 22 of *the Constitution* provides that every person has the right to institute court proceedings claiming that a right or constitutional freedom in the Bill of Rights has been violated, denied, infringed, or threatened with violation, infringement, or breach.
 58. Article 20 (1) of *the Constitution* provides that the Bill of Rights applies to all laws and binds all state organs and all persons or enterprises, whether private or public. The petitioner brings the petition on



his behalf and that of the residents of the Imenti North Sub-county said to be affected or with interest in Imenti North Forest, otherwise known as Gitoro forest. The forest is described as a public land whose protection management and benefit is for the environmental sustainability of the residents. The petition avers that the activities that the respondents have authorized the interested party to undertake in the forest shall have a profound effect or impact on him as part of the residents of the sub-county who have an interest in the protection and management of the national resource for the present and future generation. In *Odando and another suing on their own behalf and as the registered officials of Ufanisi Centre vs National Environmental Management Authority and 2 others, County Government of Nairobi & 5 others (I.P) (2021) KEELC 2235 (KLR)* to cause a condition that is hazardous or potentially hazardous to public health, safety or welfare or to animal, birds, wildlife, fish or aquatic life to plants or to contravene any condition limitation or restriction which is subject to a license under EMCA.

59. Article 69(1)(g) of *the Constitution* obligates the state to eliminate processes and activities that are likely to endanger the environment. Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment which includes the right to have the benefit of present and future generations through legislation and other measures as contemplated in Articles 67 and 69 of *the Constitution*.
60. Every person under section 3 of the EMCA has a right to safeguard and enhance the environment. It equally gives anyone the right to sue before an ELC court for breach threats or infringement of the right to a clean and healthy environment. The *Climate Change Act* 2023 equally grants the petitioner rights to pursue a claim even if he cannot demonstrate individual loss or damage. My finding is, therefore, that the petitioner, as a resident and member of the Imenti North Sub-county, has a demonstrable interest in bringing the petition on his behalf and that of the residents directly or indirectly likely to be affected by the manner in which the respondents carry out their statutory and constitutional duties to safeguard, protect and manage forest resources in Gitoro forest in Meru County and enforce government policies relating to the environment as provided under the *Climate Change Act* (pg 37) see *Martin Osano Rabira and another vs municipal council of Nakuru and others (2018) eKLR*.
61. In *Serra Club vs Morton, 405 US 727* service entrusted with the maintenance and administration of national freight began to give a site for recreational development to private developers for the construction and operation of Ski Resort. Serra club sought a public hearing on a proposed development objecting to Disney's plan as contravening federal laws and regulations governing the preservation of the national park, forest, and game reserves. It sought in court an injunction restraining any federal officials from granting the approval or issuing permits in connection with the Mineral King project. The petitioner Serra club sued as a membership corporation with a particular interest in the conservation and sound management of the national park, game reserves and forest of the county.
62. Douglas J gave a dissenting judgment and took the view that contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental groups to sue for their preservation. He referred to "Stone, Should Trees Have to Standing Toward the Legal Right for Natural Objects 45 (1972) Cal L. Rev 450. See also *Oposa vs Factoran G.R No. 101083, 224 S.C R.A 792*.
63. The next issue is whether the petition raises constitutional questions seeking answers from *the Constitution* and not on statutes or policies. The primary purpose of a constitutional remedy is to vindicate the rights violated and to prevent and deter any future infringements. See *Gitobu Imanyara and others vs AG (2016) eKLR* for a constitutional petition to meet the constitutional threshold set in *Anarita Karimi Njeru vs AG (1979) eKLR*, *Mumo Matemu vs Trusted (supra)*. It has to be pleaded with precision and clarity. See *Communications Commission of Kenya vs Royal Media Services & 7*



- others (2014) eKLR. A constitutional issue arises where what the court is called upon to resolve cannot be resolved in some other fashion, except through the interpretation of *the Constitution*.
64. In *Uhuru Muigai Kenyatta vs Nairobi Star Publications Ltd* (2013) eKLR, the court said that where there is a remedy in civil law, a party should pursue that remedy since not every ill in the society should attract a constitutional sanction. In *John Harum Mwau vs. Peter Gastrow & others* (2014) eKLR, the court said that the court would not normally consider a constitutional question unless the existence of the remedy depends on it and that if the remedy is available to an applicant under some other legislative provision or some other basis whether legal or factual a court will usually decline to determine whether in addition to breach of the other declaration of rights if a matter can be disposed of without its course to *the Constitution the Constitution* should not be invoked at all.
 65. In *James Kinyatti Nderitu vs AG & others* (2019) eKLR, the court said that a constitutional petition should not be used to circumvent primary legislation for enforcement of a given right to violation and that it was not open to the appellant to argue that there can be no wrong without a remedy.
 66. In *NGO's Coordination Board vs. EG & 4 others Katiba Institute (Amicus Curiae) Petition 16 of 2019* (2023) KESC 17 (KLR0 29th February 2023) Judgment, the court said that it should not be the first port of call but rather a final resort, though they have a duty to intervene where the exhaustion doctrine would not serve the values enshrined in *the constitution* or law. The court said that it would not escape from asking whether a public body in a similar situation on material before it could have reached the same decision as that impugned and that an administrative decision under article 47 of *the Constitution* of Kenya would be struck down on account of illegality, irrationality, procedural, impropriety, violation of fundamental rights or for lack of proportionality or for being unreasonable being supervisory powers of the High Court under Article 23 of *the Constitution*.
 67. The court observed that the right to administrative actions was a constitutional imperative or what could be called the constitutionalization of administrative justice in standardizing, reasonableness, lawfulness, procedural, and fairness as correct measures of judicial scrutiny of administrative decisions.
 68. The question posed by the petitioner is whether the respondents' decision to license the interested party to undertake quarrying activities in a public forest and the carrying out of the quarrying activities infringes, threatens, or violates the petitioner's right to a clean and healthy environment as enshrined in Articles 42, 69 and 70 of *the Constitution*. In answering the above questions, obviously, the court will have to determine whether the respondent's action decisions and activities adhered to the constitutional test on public participation and sustainable developments in licensing activities likely to affect the environment in general. Aligned to that question is whether the petition is pleaded with clarity and precision for the opposite side to respond to the issues raised.
 69. The respondents were able to answer to the charges or allegations brought against them without seeking better particulars. My finding is that the petition has not only raised constitutional questions but also been pleaded with precision and clarity, such that the issues for determination have been defined to call for responses by the opposite parties. See *Anarita Karimi Njeru vs. AG* (supra) and *Mumo Matemu vs Trusted* (supra).
 70. The next issue is whether the petitioner had an alternative remedy or recourse for redress other than by way of a constitutional petition. The interested party has raised the issue that his license has not been recalled, suspended, or withdrawn on account of the alleged breach as pleaded by the 2nd – 4th respondents, who are supportive of the petition, and therefore, this court lacks jurisdiction to hear and determine the issues raised. On the other hand, the 2nd – 4th respondents have pleaded and submitted that this court, in furtherance of public trust doctrine and invoking its jurisdiction under Articles 42,



60, 69, 70, 159, and 232(1) of *the Constitution* Section 18 of ELC Act, EMCA and *Climate Change Act* has jurisdiction. It is not disputed that there is already a recommendation by the 2nd respondent that the interested party has breached the SUL and engaged in activities beyond what was initially licensed, that are polluting the environment. The interested party has not challenged the recommendations before the instruments established under EMCA and FCMA and the *Climate Change Act*. The SUL has a clause on the manner of arbitrating over issues regarding the SUL and not the constitutionality of the exercise and activities.

71. In *Nicholas vs AG and others National Environmental Compliant Committee and other interested Parties* Petition E007 of 2023 (2023) KESC 113 (KLR) (28th December 2023) (Judgment), at issue was the originating jurisdiction of the ELC to determine whether the dispute involving the management of the environment or issues of petroleum and energy said to be ousted by statutes laws. The court said that under Article 165 1 (c) of *the Constitution*, the High Court has jurisdiction to determine whether a right or fundamental right outlined in the Bill of Rights had been denied, violated, infringed upon, or was under threat and therefore, under Section 13 (2) ELC Acts Article 162 2 (b) of *the Constitution* the provisions must be read in contrast to those of EMCA as to instances where disputes pertaining to compliance with a breach or and or violations of the provisions of EMCA and which dispute ought to be lodged with and or addressed by NET under section 125 of EMCA prescribed or restrained from providing constitutional reliefs. The court went on to say that a court scrutinizes the purpose for which a party was seeking constitutional reliefs court went on to say that a court must scrutinize the purpose for which a party was seeking constitutional relief in determining whether a constitutional relief was the appropriate one in the circumstances or whether the alternative relief remedy or mechanism would be adequate, specific, efficient or effective so as to safeguard the litigants right to access justice.
72. The court emphasized that Section 3 (3) of EMCA provides that due to a right to a clean and healthy environment, a party who claims such a right as violated, denied infringed, or threatened has the right to apply to the ELC court for redress.
73. In this petition, the 2nd – 4th respondents have admitted that though the 2nd respondent issued the interested party with an SUL in 2019 for ten years, the interested party has breached its terms and conditions and engaged in activities that were not included in SUL and which pose a threat to the right to clean and health environment. One of the admissions made by the interested party is that the asphalt plant and its operations within the quarry were not covered by the SUL. Equally, the interested party admitted that by the time the petition was filed in May 2024, there had been no compliance with the bank bond for over five years which was paid in August 2024.
74. Article 70 (1) of *the Constitution* grants the petitioner locus standi in the enforcement of environmental rights by way of a constitutional petition before this court. He could not have obtained efficacious remedies elsewhere. Section 72(9) of EMCA bars NET from handling or granting remedies for constitutional breaches of rights and freedoms.
75. The issuance of the license is not disputed. The SUL may be part of the petition. However, the main issue is whether the issuance of the license met the constitutional test of public participation in sustainable developments and whether the continued quarrying despite the existence of the license infringements or threats to the petitioner's right to a clean and healthy environment. My finding is that the petitioner is not guilty of the non-exhaustion doctrine.
76. The next issue is whether the petitioner has proved a breach of the right to a clean and healthy environment. There is no dispute that the petitioner is a resident of the Imenti North Subcounty who alleges that a legal loss or injury has been caused or threaded due to infringement or threatened right to a clean and healthy environment. He invokes Article 22 (2) & 258 of *the Constitution* as a member



of the public or community and benefits from the forest directly and indirectly for his livelihood. He blames the 2nd – 4th respondents for acts of omission and commission in issuing a license for quarrying activities without public participation and in total disregard for the community's right to a clean and healthy environment by failing to enforce, protect, manage, and ensure compliance by the interested party with *the constitution* and statute law to prevent pollution and adverse effects to the environment arising out of the quarrying activities. He terms the decision by the 2nd – 4th respondents as contrary to *the Constitution* & Law. He challenges the constitutionality of the process and the manner of the issuance of the license as unconstitutional, wrong, unprocedural, and illegal.

77. A constitutional petition must be supported by evidence to sustain it. See *Washington Jakoyo Midiwo vs Minister Internal security& others* (2013) eKLR. The burden was upon the petitioner to bring tangible and cogent evidence to prove the allegations of violation of constitutional rights and freedoms to a clean and healthy environment. The petitioner claims that the 2nd respondent issued the SUL to the interested party to undertake quarrying actions in contravention of the law on public participation and breach of the right to clean and a healthy environment.
78. In *Republic vs County Government of Mombasa Exparte Outdoor Advertising Association of Kenya* (2014) eKLR, the court said that there could never be public interest where a party acts contrary to and his action does not accord to *the Constitution* and the law since the rule of law was one of the national values.
79. In *Migori County Government and another vs Migori County Transport Sacco* (Civil Appeal 110 of 2017) (2021) KECA 7 (KLR) (23rd September 2021), it was alleged that a bus park was closed without the involvement of the stakeholders contrary to Articles 10 & 257 of *the Constitution*. A Sacco's license that had met all the requirements was withdrawn and awarded to a rival Sacco without any explanation. The question was whether the county owed a legal duty to the respondent and if there as discrimination in the withdrawal and issuance of a rival sacco without an explanation.
80. The court observed that the national values and principles of governance under Article 10 of Constitution bind all state organs officers and all persons whenever any of them makes or implements public policy decisions. The court termed the respondent's complaint or allegations as justified as there ought to have been some input from those likely to be affected by the decision.
81. The court held that anyone alleging a breach of Constitutional rights and freedoms had a right to institute such a petition against the state or its organs but also against individuals or natural or individual persons as per Article 3 (1), 19 & 20 (1) of *the Constitution* as held in *Rose Wangui Mambo & others vs Limuru County Club and others* (2014) eKLR.
82. The court observed that a party alleging the violation has the evidential burden by a preponderance of the evidence to prove the violation as held in *Mumo Matemu vs Trusted* (supra). The court held that the appellant county owed the respondent a legal duty of providing it with a certificate, and in withholding it with no plausible reason for failure to act on its request and issuing a rival sacco with one, the said act was discriminatory and in flagrant disregard of the law. Further, the court said that although the 1st appellant had a constitutional and statutory duty over parking and public transport within the county, the mandate had to be exercised in accordance with the laid down constitutional and statutory norms, which include the participation of people, the respondent included integrity transparency and accountability.
83. The court found that there was no consultation and public participation in the decision-making process as required by *the Constitution* and adherence to the values and principles of public service as laid out in Article 232 (1) of *the Constitution* of Kenya, which include involvement of the people



- in the process of policy-making and accountability for administrative acts. The court said that the involvement of the public decision-making process was the cornerstone of *the Constitution* of Kenya 2010, in order to promote the legitimacy and greater acceptance of the decision before it is arrived at.
84. In *Muhayimana & another vs Mwachugha and others* Petition E002 of 2022 (2022) KEHC 475 (KLR) 6th May 2022, the court said the burden of proof was a term used to assign evidentiary responsibilities to parties in litigation and if a party who carries the burden fails to produce evidence to meet a threshold or standard to prove his claim, his claim will fail.
 85. The court said that the doctrines of openness and Constitutional avoidance seek to avoid elevating every dispute to a constitutional issue, primarily where there exists another legal course that can give the litigant the relief he seeks except where the constitutional violation is clear and of direct relevance to the matter, there is the absence of an alternative remedy and where it would be a waste of time to seek a non-constitutional resolution of the dispute.
 86. The court warned that the doctrines are invoked to prevent litigants from trivializing the constitutional court by constitutionalizing every dispute and to ensure that not every dispute is filed in a constitutional court, unless it raises constitutional issues, as held in *Fredrick and others vs. MEC for Education and Training East Cape & others* (2002) 28 1LJ 133 (CC).
 87. In *Andrew Laird White vs DCI & others Betty Tett & another* (interested party) (2019) eKLR, the court observed that it is not enough to cite a violation of *the Constitution* without concrete proof of the alleged breaches and direct loss, damage or injury arising out of the violation.
 88. In *CCK & others vs Royal Media* (supra), the court observed that the right said to have been infringed must be shown on the basis of violation or governance and the link between the aggrieved party and the provisions of *the Constitution* alleged to have been contravened and the manifestation of the contravention. In *Leonard Otieno vs Airtel (K) Ltd* (2018) eKLR, the court observed that claims of violation of constitutional rights should not and must not be made in a factual vacuum and must be accompanied by clear evidence of and not based upon unsupported hypothesis. In *Karithi and another vs. AG & another* (2021) KEHC 308 KLR, the court said that there must be sufficient facts to justify a finding that a party's rights were violated. See *Bernard Murage vs Fine Serve Africa Ltd* (2015) eKLR.
 89. The facts, as pleaded by the petitioner, are that a SUL was issued to the interested party to undertake quarrying activities on a public forest, which are not disputed. The petitioner avers that the SUL issuance and the activities undertaken by the interested party in a public forest violate the rights to a clean and healthy environment, for there is pollution due to the asphalt production plant being run by the interested party.
 90. The 2nd – 4th respondents have admitted that though they licensed the quarrying activities under statutory powers under Section 46 of the F.C.M Act, the interested party has violated the SUL by failing to adhere to it, restore the environment to the required standard and has resorted to unregulated activities outside the SUL which have resulted in adverse or harmful effects to the environment. The 2nd – 4th respondents have invoked the public trust doctrine and called upon the court to discontinue, stop and issue appropriate reliefs to stop pollution of the environment.
 91. The right to a clean and healthy environment for present and future generations is sacrosanct. Every person must conserve and protect the environment. Environment refers to and includes physical factors of the surroundings of human beings, including land, water, atmosphere, climate, biodiversity, animals, plants, and social factors of aesthetics. See Section 3 of EMCA. Article 69 (g) of *the Constitution* obligates the state to eliminate processes and activities that are likely to endanger the environment.



92. An aggrieved party under Article 70 of *the Constitution*, EMCA, and the *Climate Change Act* may apply to the court for redress in addition to any other legal remedies available in respect of the matter without the necessity of demonstrating any individual loss or injury he has suffered. The court has the power to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment.
93. In *Adrian Kamothe vs Council of Governors & others* (2020) eKLR, the court compelled the respondent to formulate and implement a policy of the toilets and other sanitary facilities along the Kenyan road network to give effect to Articles 42 and 43 of *the Constitution* on the right to clean and healthy environment with reasonable standard of sanitation.
94. In *M'Ithiki vs. County Government of Meru and another* ELC Petition E011 of 2021 (2022) KEELC 14956 (23rd November 2022) Judgment, the court observed that Article 69 of *the Constitution* provides that the state shall establish systems of EIA, Environmental audit, and monitoring and Article 69 (3) thereof imposes a duty on every person to cooperate with state organs so as to protect and conserve the environment.
95. The 2nd – 4th respondents have pleaded that the interested party has breached or ignored to adhere to the terms and conditions of the SUL, including a bank guarantee annual audits and restorative measures. They relied on a status report dated 21.6.2024 in which a recommendation was made to cancel the SUL for gross violation of its terms and conditions. The interested party in a supplementary affidavit sworn on 1.8.2024 admitted the existence and operation of an asphalt concrete maker outside the authorized area but within the forest. The interested party has not attached any license for it. A petitioner must bring credible, tangible, admissible corroborative evidence to sustain a constitutional petition. Facts in issue may be proved through admission by the respondents and the interested party. The framers of our Constitution left no doubt that environmental justice in the exercise of sovereign power, international treaties, devolution, national values, and principles of governance, among them sustainable development, precautional principle, polluter pays principle, and the bill of rights as part of body public.
96. The constitutional and statutory mandate to implement, manage, promote and protect the environmental rights under Articles 12, 21, 42 & 69 (2) of *the Constitution* rests with the 1st – 4th respondents. Article 69 of *the Constitution* places a positive obligation on the 1st – 4th respondents as state organs to ensure sustainable developments, management, and conservation of the environment to encourage public participation to establish systems of environmental impact assessment, audit and monitor the environment and to take measures to eliminate processes and activities likely to endanger the environment.
97. From the listed statutes, there exists no doubt that the respondents owe both a constitutional and statutory duty to the petitioner as far as the right to a clean and healthy environment is concerned. See *Greenbelt Movement and others vs. NEMA and KENHA* (2-p) (2020) eKLR. Section 12 of EMCA grants NEMA the powers to control, supervise, and issue notices to lead agencies that have not complied with the Act and to take appropriate actions against them. Section 41B of EMCA grants NEMA powers to monitor compliance with national and county environmental action plans. Section 57-69 of EMCA grants NEMA powers, duties, and functions, including to take court actions for noncompliance and stoppage of any project or revocation of licenses to project proponents who have breached the terms and conditions of an EIA license.
98. The petitioner and the 2nd – 4th respondents have attached expert or counter reports showing that the interested party is undertaking activities that are injurious to the environment and which were not



- licensed in the first instance, such as an operation of an asphalt plant. The interested party has admitted that he is operating an asphalt plant, which he says was previously among the licensed quarrying activities of the former licensee.
99. Two wrongs do not make a right. Evidence of annual restoration activities for the last five years to the site has not been availed by the interested party to counter the evidence by the petitioner and the 2nd-4th respondents. The interested party pleads that the petitioner has not substantiated his allegations with scientific or expert reports. It is the interested party who has admitted that he is undertaking operations that were not licensed. Further, the bank guarantee had not been submitted until this petition was filed. There are no annual EIA reports to show that an asphalt plant was equally authorized in the EIA report, which the interested party has availed in the matter to this court. In environmental matters, a project proponent must fully comply with the requirements of the regulator and only engage in activities that have been subjected to prior environmental impact assessment or audit.
100. The precautionary principle is one of the tools aimed at the prevention of the carrying out of activities that may have irreversible harm, even in situations of scientific uncertainty. See *Isaiah Luyara Olando & another vs NEMA & others* (2021) eKLR. The interested party has not availed any licenses or permits from NEMA, and the 2nd respondent authorizing him to undertake an asphalt production on the site.
101. In *Rutere and 11 others vs Reynold Construction Co (NIG) Ltd ELC 28 of 2013 (2024) KEELC 5369 (KLR)* (10th July 2024) Judgment, the court observed that environmental law is principally concerned with ensuring the sustainable utilization of natural resources in adherence to the principles of sustainability, intergenerational equity, prevention precautionary, polluter pay principles and public participation. The court observed that *the Constitution* expects it to be broad-based in exercising its adjudicatory or normative framework on constitutional rights and freedoms. The court observed that an asphalt plant emits fumes, vibrations, smell, dust, noise, waste water or liquid, smoke and steam, all of which are potential pollutants capable of causing health hazards to humans and the environment and, therefore, require precautionary and mitigation measures.
102. The petitioner and the 2nd-4th respondents have pleaded that Gitoro Forest is a gazetted national asset by virtue of Article 62(1) (g) of *the Constitution* and Section 30 of the FCMA vested in the national government to be held in trust for the people of Kenya generally, the people of Meru county, in particular the 2nd respondent under FCMA & *Climate Change Act*, is required to ensure the protection, the development and sustainable management including conservation and rational utilization of all forest resources for the socio-economic development of the county and connected purposes.
103. Public land, including forest, under Article 62 (3) and (4) shall not be used or disposed of except as per the Act specifying the nature and terms of that disposal or use. In *Ledidi Ole Tauta & others vs AG and others* (2015) eKLR, the court said that Section 46 of FCMA has no mechanism for individualized ownership of forest.
104. In *Joseph Letuya and others vs. AG and others* (2014) eKLR, the court observed that FCMA governs the process of allocation of forest under section 62 thereof; the chief conservator of forests has powers to account for one being found in the forest and has powers to take reasonable steps to prevent commission of an offense under Section 64 thereof. Further, Sections 8 © (b), 44, 45, and 46 of the FCMA grants the 2nd respondent powers to receive and consider applications for licenses or permits in relation to forest resources or management of forests or any other related matters in accordance with the Act. It is mandated to establish and implement benefit-sharing agreements, concession or public forest management agreements, and consents for quarrying and to allow a member of a forest community, subject to such conditions, to take such forest produce, other than for sale as it has been the custom of



- that community to take from such forest. See Chongoigwo and others suing as Representatives of the Ndorobo/Ogiek community of Chep Kital Mt Elgon vs AG and others (2022) KEELC 13783 (KLR) (19th October (2022) (Judgment) and Kiarie & another vs Fujian Shixin Investors and Developers (K) Ltd & others (2022) KEELC 4765 (KLR) (7th September 2022) (ruling).
105. What the petitioner is complaining about is aimed at protecting the environment. See Joseph Leboo & others vs Director Kenya Forest Service and another (2013) eKLR. He does not need to demonstrate personal loss or injury. The constitutional and statutory framework cited above shows that the respondents have, under the public trust doctrine, a duty to comply with all the environmental policies and regulations to guarantee the petitioner's right to a clean and healthy environment. See Agricultural Development Corporation vs Harjit Pandhal Singh & another (2019) eKLR and George Karisa Fondo & others vs Said Ali Omari and others (2021) eKLR.
 106. The respondents have supported the petition and urged the court to issue appropriate orders. As much as the interested party has filed a response to the petition, an interested party in law is neither a plaintiff nor a defendant. The issues for determination remain those of the principal parties in this petition. The interested party failed to file a cross-claim against either the petitioner or the respondents. See Francis Muruatetu and others vs AG (2016) eKLR. Rule 2 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules (2013) Mutunga Rules defines an interested party as a person who has an indefeasible stake or legal interest or duty in proceedings before the court, but is not a party to the proceedings. See JSC vs Speaker of National Assembly (2013) eKLR.
 107. Rule 15 (3) of Mutunga rules defines who a respondent is and provides that a respondent can file a cross-petition. In Jasper Ndeke Shadrack vs DPP and others (2021) eKLR, the court said that an interested party's reply did not amount to a cross-petition. The court observed that the Rules have no provision for a cross-petition by an interested parties. However, the court said that an interested party is not barred from filing an individual petition without necessarily seeking to join as an interested party in an existing petition.
 108. In MCK vs. Mohamad Fugicha and others (2019), eKLR, a cross-petition was brought through a replying affidavit. The court affirmed Francis Muruateru and others vs Republic (supra) that the primary impact and issues remain those of the main parties, and an interested party may not frame its fresh issues or introduce new issues for determination.
 109. In Mumo Matemtu vs Trusted Society (supra), the court observed that a suit in court is a solemn process owned solely by the parties, which are governed by rules of procedure, and that an interested party cannot be heard to seek to strike out the suit on the basis of defective pleadings. In Okello & another vs. Assembly and two others shop and deliver Ltd t/a Constitutional Petition E010 of 2021 (2021) KEHC 94 KLR (20th September 2021 ruling, the court cited Raila Odinga and others vs. IEBC (2017) eKLR and Republic vs. PPARB IP Rhombus Construction Co. Ltd exparte KPA and another (2021) eKLR and Japhet Muroko & another vs. IEBC and another (2017) eKLR that an interested party is a peripheral party in a suit who cannot introduce new issues for determination or purport to seek of have its issues determined as the primary issue.
 110. Applying the preceding case law, I find that there is no evidence that the expert reports attached to the replying affidavit by the interested party were shared with and or involved the participation of the 1st – 4th respondents so as to comply with the terms and conditions of the SUL since its execution in August 2019 to present.
 111. The evidence by the 1st – 4th respondents, therefore, remains unconverted to the extent that the annexure by the interested party was not deposited with the 2nd respondent as per the SUL license.



- Parties have the freedom to contract and reduce the contract in writing as per the Law of the Contract Act. Extrinsic evidence may not be used to vary the terms and conditions of the contract, which is in unambiguous terms. A project proponent in environmental matters gives a performance bond to ensure the timely performance of a contract. Failure to comply with the terms and conditions of a contract amounts to a breach of the same. See *Concord Insurance Co. Ltd vs Kewal Contractors Co. Ltd & others* (2009) eKLR. A performance bond was not filed on time, and it stands on a similar footing with a letter of credit. It was to act as a guarantee to the terms and conditions of the SUL. Failure to do so amounted to non-performance of a contractual obligation. See *Edward Owen Engineering Ltd vs Barclays Bank International Ltd* (1978) 1 ALL ER (1975) LOYD 166.
112. The filing of a performance bond dated August 2024 during the pendency of the petition only confirmed that the petitioner and the 2nd – 4th respondents' assertion that the interested party failed to honor the terms and conditions of the SUL and decided to act outside the law and *the Constitution*. The court cannot sanction an illegality or unconstitutionality. The interested party cannot be allowed to circumvent the law and *the Constitution* by failing to perform his side of the contract. See *Mea Ltd vs Echuka Farm Ltd & others* (2007) eKLR.
 113. From the fore preceding, it is evidence that the petitioner has succeeded in proving that his constitutional right to a clean and healthy environment was breached by the 2nd – 4th respondents in issuing the SUL without involving the 1st respondent, who are constitutionally mandated to hold, manage and deal with public land in trust and on behalf of national and county governments. The input of the 1st respondent in the issuance of the SUL is lacking. Secondly, the 2nd – 4th respondents failed in exercising eminent domain and public trust doctrine in ensuring that the interested party fully complied with the terms and conditions of the SUL, undertook restorative and mitigation measures and above all, ensure that he did not undertake any activities outside the SUL and which are injurious to the environment.
 114. As to the appropriate reliefs, there is no dispute that the interested party was allowed to operate for over five years without a performance bond or license to undertake an asphalt plant in a forest. Having proved default and the 2nd – 4th respondent conceding to the same, I find the court should issue appropriate orders in terms of declaring the SUL as invalidated by operation of law. Readiness and willingness to comply despite the breach by the interested party is lacking especially on engaging in matters injurious to the environment. See *Gurdev Singh Birdi & another vs Abubakar Madhbut and Nabro Properties Ltd vs Sky Structures Ltd & others* (2002) 2 KLR 300.
 115. A court of law cannot re-write contracts for the parties. It must enforce such contracts if they are lawful. Parties failed to honor the terms and conditions of the SUL. An illegality is an illegality. A nullity is a nullity. See *Macfoy vs United Africa Co. Ltd* (1961) 3 All E.R 1169.
 116. The interested party has operated without a performance bond. It cannot be cured after the filing of the petition. The obligations in clause No. 11 have not been adhered to. Clause No. 5 (c) requires payment within 30 days from the date of issuance of the license, otherwise it would become void. Clause No. (9) (a) related to the licensed activities, clause No. 11 (a) (xii) – (xv) outlawed pollution and disturbance of land or water nuisance, interference with the land, Clause No. 11 (a) (xxiii) required the interested party to prepare a restoration plan for approval by the chief conservator of forest and the undertaking of rehabilitation on an area equal to the licensed area during the first year of license.
 117. Clause 11 (a) xxiii required immediate payment of a cash bank guarantee of Kshs.1,000,000/= as security for due fulfillment of the terms and conditions of the license. The NEMA license was for the proposed stone crusher. The water report dated 23.5.2024 shows that the interested party has fenced 2.4 ha inside the forest, and that there spillage of used fuel and tar to the environment at the crusher



- are noted. It was established that the interested party had no approved effluent discharge management plan EDMP or effluent discharge permit for the existing project.
118. The interested party was to prepare a quarry restoration plan for approval prior to the commencement of the quarry operations under Clause 11 (a) xxvi under Clause 11 xxvii. The interested party was to submit a progress report on permitted activities on the 1st anniversary of the license Clause 11 (b) outlawed any right to mining, logging, timber extraction, or other activities. The first schedule of the SUL only authorized the interested party to carry out quarrying activities on the 1.6 acres of land in the Lower Imenti forest in the Meru forest zone.
 119. Forests are part of Kenya's environment. Kenya has been a party to the Convention on International Trade in Endangered Species of Flora and Fauna, since its ratification in 1978. The Upper Imenti Forest is home to endangered and threatened species such as antelopes, three-honed Chameleon, prunes, Africana Newtonia Buchananii, and Osyris Lanceolate. Kenya ratified the Paris Agreement under United Nations Framework Convention on Climate Change NFCCC in 2016 to combat climate change.
 120. Sustainable Development Goals (SDG) No. 13 and 15 call upon Kenya to take urgent measures to combat climate change and its impacts, protect, restore, and promote sustainable use of forest resources, combat desertification halt, and reverse land degradation and biodiversity loss. Forests play a crucial role in combating climate change and protecting biodiversity. Climate change poses a significant challenge for sustainable development. The protection of the Upper Imenti Forest is critical in shielding the adjacent community from the adverse impacts of climate change.
 121. The Global Forest Board and the targets of the UNCCFFCC include the reversal of the loss of forest cover, sustainable forest management enhancement of forest-based economic activities sought and environmental benefits, increased protection of forest area zones, unproved governance structures on forests and enhanced cooperation and coordinating synergies on forest-related issues.
 122. Vision 2030 and the National Forest Program 2016 – 2030 align with the SDGs and the Paris Agreement targets.
 123. The Bottom-up Economic Transformation Agenda focuses on environmental preservation, sustainability and the commitments outlined in the Nationality-Determined Contributions (NDCs) as outlined in the Paris Agreement. Kenya has committed to a substantial 22% reduction in Greenhouse Gas Emissions (GHGE) by the year 2030. The goal is to raise the tree cover to 30% by planting 15 billion trees by 2032.
 124. This court is called upon by the petitioner to protect the forest from illegal and unconstitutional use at the issuance of an SUL by 2nd -4th respondents who have a significant global role in reducing carbon footprint under the [Climate Change Act](#). In *Pati Ltd vs Funzi Island Development Ltd & others Civil Applications 4 of 2015 (2019) KESC 23 (KLR) (Civ) 6th August 2019 (Ruling)*, the court emphasized the need to balance between private interest vis a vis public interest and that the process of conversion of the public land to private land must be clean or beyond reproach.
 125. In *Narok County Government vs Livingstone Kunini Ntutu & others (2018) eKLR*, the court said that public policy goes to the protection of the public interest which is safeguarded by the national values and principles of governance in Article 10 of [the Constitution](#) of Kenya.
 126. Forests play a critical role in maintaining our planet's health, providing clean air, purifying water and soils, and acting as the natural break on the rate of the existential climate crisis by sequestering and storing carbon of forests to other land use, whether human-induced or not at this age and time by the



- 2nd – 4th respondents poses a threat to the climate in that it enhances the capacity of the ecosystem to store carbon and contributes to greenhouse gas emissions.
127. The principles of sustainable development precautionary principle of public trust doctrine, intergenerational equity, and polluter pays are part of our jurisprudence Countries have been sued for inaction in implementing Paris Agreement domesticated policies. See Leghari vs. Federation of Pakistan (2015) WP NO.2550/2015 Order Sheet (4th September 2015) Judgment sheet (25th January 2015) Nenbaner et al vs. Germany (20210 Bor 2665/18/BVR 78/20/1, BVR 96/26/1, BVR 288/20, Juliana vs USA 217 F Supp 3d 1224 (Dor 2016).
 128. In PSB et al. vs Amazon Deforestation, the federal supreme court of Brazil held that the sovereign action and omission in relation to the protection of forests in the Amazon, including within Indigenous land and federal conservation units, violated the constitutional rights and prevented Brazil from fulfilling its climate targets under the Paris Agreement a transposed into national laws. It held that noncompliance with commitments under international environmental treaties amounted to a violation of the environmental duties emanating from *the Constitution*. It ordered the government to present a detailed plan relating to the Amazon forest within 30 days from the date of the decision.
 129. Climate stability has been termed as a new social need essential to the preservation of human life and ecological balance. See IEA vs Brazil (Complaint at 45 filed on October 2020. In Juliana vs US (supra), the petition was for recognition of a right to a healthy climate as an extension of other established constitutional rights. All these results from the synergy between (anthropocentric) fundamental rights and a generation of global environmental problems related to climate change due to the magnitudes of the climate crisis and its negative repercussions on fundamental rights and freedoms.
 130. The prayer by the petitioner is for this court to rise to the occasion and to protect the community good of the citizens of North Imenti Sub-county who benefit from the North Imenti forest now under threat by harmful quarrying and mining activities. The petitioner invokes the court's climate constitutionalism to consolidate global environmental development and national constitutional systems.
 131. The 2nd – 4th respondents rely on Professor Patricia Kameri Mbote's seminar paper "The Use of the Republic Trust Doctrine in Environmental Law (supra) to settle the tension between the private rights of the interested party which should not override the res communes the common to mankind as held in Waweru vs Republic H.C (NRB) Misc No. 118 of 2004 to stop the anomalies of the 2nd respondent in deciding to issue the SUL and to recover the public resource through pro-active measures under *the Constitution*.
 132. In future generations, versus the Ministry of the Environment and others, the Columbia Supreme Court had been called upon by youth aged between 7-26 years to enforce their rights to a healthy environment, life, food, and water based on the government's failure to reduce deforestation and economic compliance with the target of zero net deforestation in the Colombia amazon by the year 2020 as agreed under the Paris Agreement and its national development plan, which was termed as a threat to the plaintiff's fundamental rights. The court held that the rights described above were substantially linked and determined by the environment and the ecosystem. The court declared that the Colombia Amazon was entitled to protection, conservation, and restoration. It ordered the government to formulate and implement action plans to address deforestation in the Amazon.
 133. The court said, "We are all obligated to stop exclusively thinking about self-interest. We must consider the way in which our daily actions and behaviors affect society and nature. We must shift from private



- ethics focused on private good to public ethics, understood as the implementation of moral values that aim to achieve a particular action of social justice”.
134. The court ordered the government to come up with short, medium, and long-term action plans within 4 months to counteract the rate of deforestation in the Amazon tacking climate change impacts, to mitigate the early deforestation warnings as issued.
 135. In R (on the applicant of finch on behalf of the Wealdh Action Group (Appellant) vs Survey County Council & Others Respondents (2024) UK SC 20, the court took the view that the purpose of an EIA report is to ensure that the environmental impact of a project is exposed to public debate and considered in the decision-making process and that the Act does not prevent the competent authority from giving the development consent for projects which will cause significant harm to the environment, so long as there is full knowledge of the environmental cost.
 136. The NEMA license was issued on 8.10.2019 to the interested party and was valid for 24 months. He was to prepare and present an environmental management plan for the project cycle. It was subject to compliance with environment management and coordination water qualify noise and excessive vibrations pollution control water management regulations 2006 – 2009, county government developed plans or laws and mitigation pollution measures during the project cycle.
 137. There is no evidence of the renewal of the NEMA license after it expired on 8.10.2021. Without a NEMA license between 2021 and 2024, the court find that the operation of the quarry was equally unlawful. It is through both an EIA report, environmental plans and audits that the petitioner and members of the neighborhood of the forest would have undertaken public participation to access and give input on the potential adverse effects of the quarry on the environment. Public participation is a constitutional imperative in environmental decisions. See Mui Coal Basin local community & others vs. P.S Ministry of energy & others (2017) eKLR. Article 69 (1) (d) of *the Constitution* obligates the state to encourage public participation in the management, protection, and conservation of the environment. Other than the MECAP, there is no evidence that the community was involved in giving views, while the interested party was undertaking an EIA report between 2019 and 2024.
 138. Conferences, meetings, structural questions, and the involvement of area chiefs, political leaders, vulnerable groups, women, and marginalized groups in the E.I.A.-making process were not availed by the interested party. See IEBC vs NASA (K) & others (2017) eKLR under Section 3 (5) of EMCA. Public participation is critical in ensuring the legitimacy of the law, decisions or policy reached in issuing an SUL and allowing quarrying activities in the forest. See Mohamed Ali Baadi and others vs. AG and others (2018) eKLR and Matatiele Municipality vs President of the Republic of South Africa (2) CT 73/05A.
 139. Regulation 17 of the Environmental Impact Assessment and Audit Regulation 2003 was therefore not fully complied with by the interested party in consultation with NEMA to seek views of the people of Imenti North who may be affected by the quarrying project between 2019 and 2024. See also LSK vs AG & others Katiba Institute and others (IP) EL Petition E001 of 2023 (2023) KEELC 205 83 (KLR) (12th October 2023) Judgment, where the court cited Mohamed Baadi (supra) that environmental democracy requires environmental issues to be addressed by all and at least majority of those affected by their outcome but not the minority comprising the government but must include among other things community groups and professionals involved in environmental governance.
 140. In this petition, there is no evidence whether the 2nd – 4th respondents under Section 58 of EMCA published information for the intended bids for the issuance of the SUL in the forest for quarrying purposes in 2019 and whether after the interested party became the successful bidder and was issued



- with license members of the community were made aware that their vital natural resource, had been allocated to the interested party, for quarrying purposes only subject to FCMA 2016.
141. An EIA was a condition precedent under Section 36, 44 2 (a) and (d), 46 (I-K) and 75 (3) of the *Forest Conservation and Management Act* 2016. Public participation is an environmental concept drawn from the Aarhus Convention adopted by Kenya in 1998 to secure a right to public participation in decision-making and a right to access justice in environmental matters in order to contribute to the right to the protection of the right to live in an environment, which is adequate for personal health and wellbeing as provided under Article 19 thereof.
 142. From the above analysis, it is clear that the issuance of a license by the 2nd respondent was not in compliance with the law. Under the *Climate Change Act*, the 2nd respondent is defined as a climate change duty holder alongside NEMA who has obligations to implement climate change action consistent with the national goal of low carbon climate resilient development and to mainstream the integration of climate change actions into decision making and the implementation of functions by the sector ministries.
 143. The 2nd and 3rd respondents have a statutory obligation to undertake mitigation measures to prevent or slow down the increase of GHC. Equally, the 2nd & 3rd respondents owed the local community of Imenti North near the forest nature-based solutions to protect, sustainably manage or restore nature. The natural forest and its ecosystems near the local community are the ones that address the social challenges of climate change, human health, food and water security while providing them with biodiversity benefits under the *Climate Change Act*.
 144. The interested party under the *Climate Change Act* is equally covered as a project proponent. Reduced emissions from deforestation and forest degradation under the *Climate Change Act* include activities in the forest sector that may reduce or increase GHC, as well as those aimed at the sustainable management of forest conservation and the enhancement of forest carbon sinks at both national and subnational levels.
 145. The petitioner under the *Climate Change Act* is defined as a stakeholder who has an interest as an individual or community or who is affected by the activities of carbon projects and the results those actions may produce. Section 2 of the *Climate Change Act* provides that the Act shall be applied for the development, management, implementation and regulation of mechanisms to enhance climate change resilience and low carbon development for the sustainability of Kenya. The 2nd & 3rd respondents like all sectors of the economy forming part of the national and county governments must mainstream climate change responses into developmental, planning, decision making and implementation. They must mainstream the principles of sustainable development and integrate climate change into the exercise of their powers and functions at all levels of governance.
 146. Section 4 of the *Climate Change Act* provides that in discharging its functions, as a state office or organ, the 2nd -4th respondents shall be guided by Articles 10, 42, 69, and 232 of *the Constitution* to promote sustainable development under changing climatic conditions, to ensure equity and social inclusion, integrity, transparency, participation and must do so in consultation with all stakeholders. Part III of the *Climate Change Act* deals with the coordination and preparation for climate change and action plans, strategies, and policies to cater inter alia, for adaptation, mitigation, mainstreaming, awareness creation, research, and development. Part IV of the Act relates to the duties of the public and public sector to implement the Act. The 2nd & 3rd respondents are covered by the section.



147. Section 23 of the Act provides for the mechanism of enforcing the right to climate change under Article 70 of *the Constitution* before the ELC against any person who has acted in a manner that has or is likely to adversely affect all efforts toward mitigation and adoption to the effects of the climate change.
148. The court, under Section 23 of the *Climate Change Act*, can make an order or give appropriate directions to prevent, stop, or discontinue an act or omission that is harmful to the environment. The court can compel a public officer to take measures to prevent or discontinue the harmful act and to provide for compensation to a victim of the violation of rights to climate change duties.
149. In this petition, I am of the considered view that the petitioner has, despite the contents of Section 23 (3) of the *Climate Change Act*, demonstrated the loss or injury suffered or likely to arise in the manner in which the 2nd & 3rd respondents breached both his Constitutional and statutory rights to clean and health environment as set out under the *Climate Change Act* as read together with EMCA and *the Constitution*. Section 24 of the *Climate Change Act* relates to public participation and access to information. The 2nd and 3rd respondents failed to comply with the law in the bidding, approving, awarding and issuance of the SUL to the interested party, to undertake quarrying activities in a public forest. Above all, the report dated 21.6.2024 confirms that the asphalt plant operation in the forest is unlicensed.
150. There is no evidence that the request calling for interested bids to which the interested party, complied with the provisions of Schedule 4 (2) (f) of the *Climate Change Act* and or with the EMCA. Equally, there is no evidence that the 2nd & 3rd respondents complied with Section 4 (2) (f) on public participation, Articles 10 & 232 of *the Constitution* of Kenya, Sections 5 & 6, 13-15 of the current Public Forest Policy and Strategy, consulted the County Government of Meru under Section 21 of the *Climate Change Act*, undertook an EIA under Sections 44, 45, 46 (10) (a) (b), (c) (d) and (e), (2), (3), (4), (5), and 47 of the *Forest Conservation and Management Act*. Sections 66 and 67 outlaw illegal quarrying and any breach of the Act 2016. Section 71 thereof requires the cabinet secretary in charge of the 3rd respondent to formulate guidelines on inter-alia on the issuance of licenses, leases, concessions, or permits for community participation in conservation while ensuring compliance with international obligations.
151. Section 73 of the FCMA provides that the provisions of the Act shall be carried out in accordance with any treaties, conventions conservation, or international agreements concerning forest or forest resources as provided for under *the Constitution* of Kenya.
152. Section 75 thereof provides that as regards the conservation or protection of the environment, EMCA shall apply and that a user permit or license granted under the Act shall not exempt a person from complying with EMCA or any other written law, concerning the conservation and protection of the environment.
153. The SUL issued to the interested party was subject to the provisions of FCMA and any other relevant law, including the *Climate Change Act* and *the constitution*. There is evidence that the interested party and the 2nd & 3rd respondents flouted all the cited laws and *the Constitution*, including the *Climate Change Act*, which incorporates international treaties. The report dated 21.6.2024 confirms that the allegations by the petitioner are not hollow.
154. My finding, therefore, is that the petitioner has proved a breach of his right to a clean and healthy environment to be entitled to the relief sought in the petition dated 6.5.2024.
155. In the absence of the alignment of Section 46 of the FCMA with the *Climate Change Act* and *the constitution*, I find that any quarrying activities in public forests, such as Imenti North Forest licensed



under Section 46 of FCMA were unconstitutional. Had there been a gazetted national council under the *Climate Change Act* by the 3rd respondent, there would not have been this uncoordinated manner of approving projects in protected and ecologically sensitive ecosystems such as forests, which fly against Kenya's international commitments, among other things, under the Paris Agreement. The court makes a recommendation that Section 7 of the *Climate Change Act* be operationalized as a matter of urgency. The Cabinet Secretary in charge of the 3rd respondent must equally execute his duties, mandate, powers and functions under Sections 13-16, 17-21 of the *Climate Change Act* on licensing, quarrying and other related activities in gazette forests that may be hazardous to the environment. There is equally the need to review existing licenses or permits to align them with the new realities such as faced by the parties in this petition, including auditing of the activities by those who have been issued with permits to undertake activities in gazette forests.

156. The upshot is that the court issues the following reliefs:

- a. A declaration is hereby issued that the actions or decisions of the 2nd and 3rd respondents through their officers, agents or servants in allowing, licensing or authorizing the establishment and operation of a quarry and an asphalt concrete maker within Imenti North Forest, County of Meru, where excavation has been going on was and is arbitrarily unreasonable, unprocedural and contrary to the sectoral laws on forests and climate change and was in breach of the petitioner's constitutional right to clean and healthy environment, as set out in Articles 42 and 70 of *the Constitution*.
- b. A declaration is hereby issued that the excavation of stones and the quarrying licensing running and the operating of an asphalt concrete maker within Imenti North Forest, County of Meru, by the 2nd & 3rd respondents was and amounted to the undertaking of activities likely to cause environmental damage and pollution, contrary to the petitioner's right to clean and healthy environment, under the *Climate Change Act*, *Forest Conservation and Management Act*, Environment Management & Coordination Act and *the Constitution* of Kenya.
- c. An order of prohibition is hereby issued prohibiting the respondents, their officers and any other government agent from allowing, licensing or authorizing the establishment of and operation of a quarrying activity and an asphalt concrete maker within Imenti North forest County of Meru, which are inconsistent with and in breach of the petitioner's right to clean and healthy environment as to amount to environmental damage or pollution.
- d. An order be and is hereby issued canceling, suspending or authorizing any issuance of licenses, permits of any kind by the 2nd & 3rd respondents to establish or run quarrying or asphalt concrete maker business within Imenti Forest, otherwise than in compliance with the petitioner's right to clean and healthy environment as set out under the *Forest Conservation and Management Act*, the Environmental Management and Coordination Act, *Climate Change Act* and Constitution of Kenya.
- e. Costs to the petitioner.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4TH DECEMBER, 2024

In presence of

C.A Kananu

Kaburu for the interested party

Mr. Mugambi for 2nd – 4th respondents



Anampiu for the petitioner

HON. C K NZILI

JUDGE

