Law Society of Kenya v Attorney General & 3 others; Katiba Institute & 6 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 20583 (KLR) (12 October 2023) (Interim Judgment)

Neutral citation: [2023] KEELC 20583 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E001 OF 2023

OA ANGOTE, J

OCTOBER 12, 2023

IN THE MATTER OF SECTION 3(2), 5, 8, 21, 34, 40, 42, 43, 44,45, 47, 56, 64, 71, 72, 73, SECOND SCHEDULE AND THE THIRD SCHEDULE, FOREST CONSERVATION AND MANAGEMENT ACT

AND

IN THE MATTER OF SECTION 3(2)(B), 4, 14, 23, 24(1) AND THE FIRST SCHEDULE OF THE CLIMATE CHANGE ACT, NO. 11 OF 2016

AND

IN THE MATTER OF ALLEGED VIOLATION OF SECTIONS 2, 3(1), 4, 5, 9, 44,46,48, 57A, 58, 59 AND SCHEDULE 2 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 10, 35(3), 42, 69, 135, 174(C), 196 (1)(B) & 232(1)(F) OF THE CONSTITUTION OF KENYA, 2010IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FORESTS (PARTICIPATION IN SUSTAINABLE FOREST MANAGEMENT) RULES 2009 AND THE FOREST (HARVESTING) RULES, 2009ANDIN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

THE LAW SOCIETY OF KENYA ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

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

KENYA FOREST SERVICE ..... 3RD RESPONDENT

NATIONAL ENVIRONEMNT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

AND

KATIBA INSTITUTE ..... INTERESTED PARTY

NATURAL JUSTICE ..... INTERESTED PARTY

THE GREENBELT MOVEMENT ..... INTERESTED PARTY

TIMBER MANUFACTURERES ASSOCIATION ..... INTERESTED PARTY

MULTYTOUCH INTERNATIONAL LIMITED ..... INTERESTED PARTY

FOREST SOCIETY OF KENYA ..... INTERESTED PARTY

NYERI TIMBER MANUFACTURERS ASSOCIATION ..... INTERESTED PARTY

INTERIM JUDGMENT

Introduction

1. In the Amended Petition dated 18th August 2023, the Petitioner has 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 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, 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 and the Cabinet Secretary in respect of logging activities without any/ or meaningful public participation is unconstitutional, null and void.

    e. In the alternative to or in addition to prayer (d), a declaration be and is hereby issued that the pronouncements by the Head of State on 2nd July 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 purpose 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.

g. A permanent injunction restraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any 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 the 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 any other relevant laws.

i. A declaration that the Recommendations made by the Taskforce Report on Forest Resources Management and Logging Activities in Kenya, having been developed by members constituted vide Gazette Notice No. 28 of 26th February 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 and is hereby issued compelling the Respondents jointly and severally immediately implement the recommendations of the Taskforce and a report of the same be filed in Court not later than a year after the date of the judgement of the Court.

k. The Petitioner be paid costs of the Petition.

The Petitioner's case

2. The Petition is supported by an affidavit sworn by Florence Wairimu Muturi, the Petitioner's Chief Executive Officer (CEO), who deposed that the suit was prompted when the 2nd Respondent informed the National Assembly Committee on Environment in February 2023, that the State was considering lifting the moratorium on logging, and was in the process of opening up harvesting of commercial plantations, to increase the revenue for the country through the timber industry.

3. The Petitioner's CEO deposed that the President of the Republic, H.E. William Ruto, while addressing a gathering in Molo, Nakuru County on 2nd July 2023, also communicated the government's directive to lift the 2018 moratorium on logging.

4. According to the Petitioner, the 3rd Respondent, who is legally mandated to conserve forests and to develop relevant regulations, has failed to provide the regulations that ought to guide the implementation of the logging activities which have been enabled by the President's pronouncements.

5. The Petitioner's CEO deponed that logging activities had begun across the country, despite the public not being fully appraised of the effect and impact thereto, and disregards the crucial role that forests play in mitigating climate change, preserving biodiversity and safeguarding vital ecosystems.

6. It was deposed by the Petitioner's CEO that by allowing logging, the government is endangering the delicate balance of nature, promoting deforestation and threatening the livelihood of communities that rely on forests for their sustenance.

7. The Petitioner asserts that everyone has the right to a clean and healthy environment under Article 42 of *the Constitution* and has the right to have it protected for the benefit of the present and future generations through legislative and other measures specified in Article 69, and to have such obligations fulfilled under Article 70 of *the Constitution*.

8. It was deponed that the Respondents have, contrary to Article 35(1) and (4) of *the Constitution*, denied the public the opportunity to engage with any guidelines, laws and regulations developed to facilitate government policies and that there has been no public participation or any research-based policies, concessions or any management reports published in support of the Presidential directive to lift the moratorium on logging.

9. According to the Petitioner, despite forest management being a devolved function, the counties do not appear to be involved, contrary to Articles 174(c), 196 (1)(b) and 232 (1) of *the Constitution* and that the Presidential proclamation lifting the moratorium of logging fails to meet the requirements under Article 135, which requires that the decisions of the President in the performance of his functions under *the Constitution* shall be in writing and shall bear the seal and signature of the President.

10. The Petitioner has sought to rely on Sections 44, 46, 48, 58 and 59 of the Environmental Management & Coordination Act (EMCA), under which the 3rd Respondent is required to implement regulations, procedures, guidelines and measures for the sustainable use of forests and control of harvesting of forests and to procure an Environmental Impact Assessment Licence for timber harvesting and clearance of forest areas.

11. Moreover, it was deposed, contrary to Regulations 13, 14, 15, 16, 18 and 20 of the Forests (Participation in Sustainable Forest Management) Rules 2009, the Respondents did not precede the prequalification procedure for persons harvesting timber with an invitation notice placed at conspicuous place at the Service Headquarters, in two newspapers of national circulation and on the website of the service or equivalent means available to the public.

12. It is the Petitioner's case that the Respondents have failed to show any management plans that may have been done in any of the forest areas pursuant to Rules 23, 24, 25,26, 27 of the Forest Rules, 2009 and that the Respondents also failed to adhere to Rules 41,42, 43, 44 and 45 which provide for community participation in the sustainable management of state forests.

13. The Petitioner avers that the government's policy position on logging offends Rules 4, 5 and 6 of Forests (Harvesting) Rules, 2009, which creates the framework for licensing of forest harvesting in Kenya. They aver that the Respondents have failed to demonstrate adherence to this rules, having not provided any license that may have been issued.

14. The Petitioner's CEO stated that sustainable forest management has a positive impact on a number of SDGs including SDG 1 (poverty eradication), SDG 2 (zero hunger), SDG 3 (good health and well-being), SDG 6 (clean water and sanitation) and SDG 15 through contribution to biodiversity.

15. It is the Petitioner's case that in 2018, the Government constituted the Taskforce on Forest Resource Management and Logging activities, pursuant to Gazette Notice No. 28 of 26th February 2018 and that the Taskforce's report was published in April 2018 with a raft of recommendations which have never been implemented, including the maintenance of the moratorium on logging.

16. It is the Petitioner's case that the move to fell and harvest 5,000 hectares per year to ensure Government profits from investments in forest plantations is being carried out by the state, notwithstanding the Taskforce report of 2018.

The 1st and 2nd Respondents' case

17. The 1st and 2nd Respondents opposed the Petition through a Replying Affidavit dated 11th August 2023 and sworn by Gitonga Mugambi, the Principal Secretary, State Department of Forestry in the Ministry of Environment, Climate change and Forestry.

18. The Principal Secretary deponed that this suit is misconceived, frivolous and an abuse of court process as it lacks precision and is pre-mature; that it is incompetent ab initio as it is presented before the wrong judicial entity and that the Petitioner has not exhausted the statutory dispute resolution mechanisms available under Section 70(1) of the *Forest Conservation and Management Act* 2016.

19. The Principal Secretary, State Department of Forestry, deponed that the matter ought to have been referred to the lowest possible structure under the devolved system of government as set out in the *County Governments Act*, 2012, with any un-resolved matter being referred to the National Environment Tribunal for determination, pursuant to which a subsequent appeal would lie to this court.

20. Mr. Mugambi deposed that the subject matter is res-judicata, having been deliberated upon in Nyeri High Court Constitutional Petition No. E011 of 2021, Nyeri Timber Manufacturers Association vs Kenya Forest Service and Meru High Court Constitutional Petition No. E002 of 2022, Great Meru Timber Manufacturers Association vs Kenya Forest Service, Chief Conservator of Forests, the Cabinet Secretary for Environment and Forests and the Attorney General.

21. In these cases, it was deposed, the parties, by consent, lifted the moratorium on logging and agreed that those who had been allocated forest materials prior to the 2018 moratorium be allowed priority to remove the said materials.

22. The Principal Secretary deposed that the Cabinet Secretary, Ministry of Environment and Forestry, imposed a Moratorium in 2018 on harvesting in all public and community forests; that on 26th February 2018, the Taskforce to Inquire into Forest Resources Management and Logging Activities in Kenya was appointed through Gazette Notice No. 28 to look into the forest resource management and logging activities in Kenya and that the Taskforce completed its mandate and prepared its report in April 2018.

23. According to the Principal Secretary, the Taskforce Report's recommendations have been and are being implemented progressively by the Ministry to meet its set objectives. He attached a Status Report on the Implementation of the Task Force Recommendations.

24. According to Mr. Mugambi, the moratorium was varied in November 2020 to allow for harvesting of mature and over mature plantations not exceeding 5,000 Ha and that the lifting of the ban on logging in gazetted public plantation forests was informed by an inventory of forest plantations that was undertaken by a Multi-Agency Taskforce between 2020-2022.

25. It was deposed that a Multi-Agency Taskforce revealed that there were 26,000 hectares of mature and over-mature forest plantation stocks, and that the ban was only lifted in respect of harvesting of Industrial Forest Plantations.

26. Further, he deposed, the government complied with the guidance from the Auditor General's Special Audit of the Auditor General on Allegation/Claims on Debts Arising from the sale of Forest Material by Kenya Forest Service which allowed harvesting of previously allocated mature and over-mature forest plantation.

27. The Principal Secretary argued that the lifting of the ban on logging in commercial forest plantations stands to improve the sector's performance by reducing wood supply deficit in the country and creating jobs along the value chain, raising incomes and increasing tax revenues.

28. He further stated that public participation was conducted during the Environmental Impact Assessment process for forest plantation management and that the KFS, the 3rd Respondent, undertook EIA for forest plantation management in nine forest ecosystems in 2014 (Mt. Kenya, Aberdare, Mau, Cherangany, Mt. Elgon, Kakamega, Machakos, Makueni and Kitui).

29. It was deposed that the EIA team of experts undertook a scoping exercise that generated a list of stakeholders for the forest plantation management project and that Parliament has put in place sufficient safeguards in law with respect to logging, including Section 43 of the *Forest Conservation and Management Act*, 2016, Rule 5(1), Part II and Paragraph 13 of Rule 12 of the Forests (Participation in Sustainable Forest Management) Rules, 2009, Rule 4(1) of the Forests (Harvesting) Rules 2009 and Section 58 of the Environmental Management and Coordination Act.

30. Mr. Mugambi stated that the Kenya Forest Service has in place additional measures to guide planting and harvesting of timber including the KFS Strategic Plans, Forest Management Plan, Technical orders, Felling Plans, Annual Work Plans and Budgets, and Performance Contracts and that the Felling Plans define the 'annual allowable cutting levels, which dictates that the number of trees to be removed annually should be equal to the number of trees to be planted annually.

31. The deponent stated that that the Kenya Forestry Service recently reviewed and issued out updated guidelines, PELIS Guidelines 2020 for the field officers which are in line with the Forests (Participation in Sustainable Forest) Rules, 2009.

32. Lastly, the Principal Secretary challenged the veracity of the Petition for relying on news reports and social media tweets which have no probative evidential value.

The 3rd Respondent's case

33. The 3rd Respondent filed a Replying Affidavit dated 18th August 2023 and sworn by Alexander Lemarkoko, Chief Conservator of Forests and the Chief Executive Officer of the 3rd Respondent.

34. Mr. Lemarkoko deponed that the 3rd Respondent has at all times licensed and authorized the logging of trees in forest plantations in compliance with the *Forest Conservation and Management Act*, the Forests (Participation in Sustainable Forest Management) Rules, 2009, the Forests (Harvesting) Rules, 2009 and the directives of the Cabinet Secretary responsible for matters relating of forestry.

35. Mr. Lemarkoko, the Chief Executive Officer of the 3rd Respondent, averred that on 24th February 2018, the Government imposed a moratorium on logging and timber harvesting in all public and community forests, and that the purpose of the moratorium was to allow for the reassessment and rationalization of the entire forest sector in the Country.

36. He added that the moratorium was extended for one year in a directive communicated in the press statement made on 16th November 2018 by the Cabinet Secretary, Ministry of Environment and Forestry. The moratorium was further extended for one year through a statement made on 21st November 2019 by the Cabinet Secretary.

37. It is Mr. Lemarkoko's case that in a press release made on 23rd November 2020, the Cabinet Secretary notified the public that the moratorium dated 24th February 2018 on logging would continue but with

a variation to allow for harvesting and disposal by the 3rd Respondent of mature and over mature forest plantation for an area not exceeding 5,000 hectares.

38. He averred that the harvesting and disposal by the 3rd Respondent of mature and over mature forest plantations for an area not exceeding 5,000 hectares has been undertaken and continues being undertaken in compliance with the law. He referred to the Final Report of the Multi-Agency Oversight Team which documents the implementation process.

39. The Chief Executive Officer of the 3rd Respondent deponed that the moratorium dated 24th February 2018 on logging was lifted by orders of the Court made on 24th January 2023 in Nyeri High Court Constitutional Petition No. E011 of 2021 and Meru High Court Constitutional Petition No. E002 of 2022. Consequently, it was deposed, there is no ban on logging that would have been lifted by the President or capable of enforcement in the manner claimed by the Petitioner.

40. According to the Chief Executive Officer of the 3rd Respondent., who is also the Chief Conservator of Forests, the Forests (Participation in Sustainable Forest Management) Rules, 2009 and Forests (Harvesting) Rules, 2009 are the operative rules governing the issuance of timber licenses and permits by the 3rd Respondent and the Petitioner's claim to the contrary are without a basis.

41. It was deposed that it is on that basis that the 2018 Taskforce report, recommended that the Forest Rules should remain in force until they are revoked in accordance with the provisions of the *Forest Conservation and Management Act* (FCMA); that the Report is indeed being implemented and that the broadcast by Citizen TV on 30th July 2023 and the tweet published by Sue Buku on 2nd July 2023 have no probative value.

42. The Chief Executive Officer of the 3rd Respondent averred that the pleas by the Petitioner are not supported by any or authentic evidence, as the averments in the Supporting Affidavit of Florence Wairimu Muturi sworn on 31st July 2023, are based on technical information which she cannot prove from her own knowledge.

43. Regarding public participation, the deponent argued that the Petitioner had not made any request to the 3rd Respondent to be provided with information on the reports, including the environmental impact assessment reports, concession reports, gazette notices, rules/regulations and policies developed showing the framework provided for the logging activities.

44. He further averred that the Petitioner has not identified and demonstrated any denial, violation or infringement of a right or fundamental freedom in the Bill of Rights by the 3rd Respondent and that the Petitioner has not particularized, substantiated and demonstrated the nature of injury caused or likely to be caused to it or the public and in respect of which it seeks relief.

The 1st, 7th Interested Parties' case

45. The 1st Interested Party supported the Petition by way of a Replying Affidavit sworn by Christine Nkonge, the Executive Director of Katiba Institute dated 25th August 2023. Ms. Nkonge set out the history of the moratorium against logging which has been laid out by the Petitioner and the Respondents above.

46. The Executive Director of Katiba Institute averred that the issuance of the moratorium on harvesting all timber in all public and community forests was for 90 days effective 24th February 2018 and that the terms of reference for the Taskforce, set out in the Gazette Notice dated 26th February 2018, included conducting public participation and interventions to ensure sustainable management, restoration and protection of forests and water catchment areas.

47. On the Petitioner's assertion of violation of the right of access to information, Ms. Nkonge averred that the Respondents' failure to disclose the guidelines on logging and concession agreements proactively or any gazette notice on lifting the moratorium on logging, violates Article 35 of *the Constitution* and that this is contrary to Section 3(b) and 5(1)(c) of the *Access to Information Act*.

48. She argued that under Principle 10 of the Rio Declaration on Environment and Development, which Kenya adheres to, each individual shall have appropriate information concerning the environment that is held by public authorities.

49. Ms. Nkonge further deponed that public participation was necessary before any guidelines or rules concerning logging are enacted; that the Respondents have a positive obligation to ensure that the public was involved in environmental decision-making and that once the Petitioner alleged that there was no public participation before issuance of the logging guidelines or the decision to lift the moratorium on logging, the onus then shifted onto the Respondents to prove that they undertook public participation.

50. The 1st Interested Party's deponent averred that the court is bound by the principles of sustainable development listed in Section 3(5) of EMCA, including principles of public participation, intergenerational and intragenerational equity, and the precautionary principle. Further, that the State must consider Principle 8 of the Rio Declaration on Environment 1992 on reduction and elimination of unsustainable production and consumption patterns and promotion of appropriate demographic policies.

51. The 2nd Interested Party supported the Petition by filing a Replying Affidavit dated 24th August 2023 and sworn by Ms. Nyaguthii Chege, the Hub Director of Natural Justice. Ms. Chege deponed that this court is clothed with jurisdiction and that the doctrine of exhaustion of local remedies does not apply in this instance due to the level of public interest involved, the polycentricity of the issue and the important constitutional value at stake.

52. Ms. Chege reiterated the facts as to the creation of the Taskforce and referenced the Taskforce report where it indicated that Kenya's forests have been depleted at the rate of about 5,000 hectares per annum and that this leads to an annual reduction in water availability of about 62 million cubic meters, translating to an economic loss to the economy of over USD 19 million.

53. The deponent highlighted that some of the recommendations which the Respondents have failed or ignored to implement include the formulation of regulations and rules to operationalize the *Forest Conservation and Management Act* and discontinuation of the 'Procedure for disposal of forest plantation material' that provides for direct allocation of forest stocks, and undertaking a complete overhaul and paradigm shifts in the way the commercial forest plantations are managed by KFS.

54. Ms. Chege deponed that there was no official communication of the policy directive lifting the moratorium on logging by either the 1st or 2nd Respondents following the roadside pronouncements made by the President on 2nd July 2023, and that such lifting of the moratorium without implementation of the 2018 Taskforce recommendations contravenes Article 69(1)(b) of *the Constitution*.

55. Lastly, Ms. Chege urged that in line with international commitments to the efforts of conserving forests and reducing the effects of climate change, the government ought to implement policies/directives and measures reflecting the commitment under the United Nations Framework Convention on Climate Change (UNFCCC), Convention on Biological Diversity, United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Paris Agreement.

56. The 3rd Interested Party supported the Petition by way of a Reply to the Petition dated 29th August 2023 and sworn by Boniface Nyamasyo Maithya, the Project Officer at Greenbelt Movement. Mr. Maithya deponed that while there is need for harvesting mature trees in commercial plantations to generate income to support government programs, and avoid further loss of revenue as a result of decaying over-mature trees, the Ministry needs to publicly inform all Kenyans the steps made so far in addressing the challenges that led to the ban in the first place.

57. The Project Officer of the Greenbelt Movement deposed that it is not clear whether the government has taken serious steps to implement the 2018 Taskforce Report recommendations and that the findings by the Taskforce were that the system used by the Kenya Forest Service was weak and prone to abuse by saw millers and other illegal logging offenders to the extent of encroaching into the natural forests meant for conservation.

58. Mr. Maithya, on behalf of the 3rd Interested Party's behalf, made the following recommendations:

    a. The old plantations of poor form and have wind falls that have decayed and have naturally regenerated with indigenous trees to be considered indigenous forests.

    b. Sub-compartments that are close to watersheds and those within a natural forest be reverted back to indigenous forests.

    c. KFS with CFAs come up with systems that will ensure that the survival of planted trees meets the set threshold of above 75% survival in the first year and subsequent years of several cultural practices.

    d. That as the rotation period for a short rotation timber is 25-30 years, KFS should come up with a plan for such working cycles with annual allowable cuts and establishments that ensures sustainability on the demand for timber industry. This is to avoid a scenario where the country's logs are exhausted, leaving high demands in the future, encouraging encroachment into the indigenous forests.

    e. KFS should increase its capacity in terms of security personnel that will guarantee the protection of forests against illegal logging.

    f. The government should liaise with private landowners to heavily invest in commercial plantations so as to reduce pressure on government forests on logging for timber into the future.

59. The 4th Interested Party, in a Replying Affidavit dated 25th August 2023 sworn by Bernard Gitau Kimani, the Chairperson of the Timber Manufacturers Association, averred that the Petition is res judicata and that this court is functus officio as the moratorium on logging was lifted in Nyeri High Court Petition No. E011 of 2021 and Meru High Court Petition No. E007 of 2022 and that any relief sought by the Petitioner squarely falls in joining these Petitions and should file an appeal or review against the decision.

60. Moreover, he stated, the timber license issued to entities by the 3rd Respondent are only with respect to exotic trees planted for commercial purposes, such as pine trees, cypress trees and eucalyptus trees; that these trees have a maturity span of 25 years to 30 years, after which they develop a condition known as heart rot which causes them to rot and fall off and that members of the 4th Respondent only harvest

the trees upon the lapse of the maturity years and therefore, the logging of these trees do not pose any menace to the environment.

61. It was his deposition that it would be unfair for this court to restrain the issuance of logging licenses to members of the 4th Interested Party, considering that their actions do not contravene the right to a clean and healthy environment or the duty to ensure the sustainable exploitation of natural resources in Kenya.

62. The Chairperson of the Timber Manufacturers Association deposed that a permanent injunction will adversely impact the livelihood of several Kenyans and members of the 4th Interested Party, hindering them from accessing the Economic and Social Rights guaranteed under *the Constitution*.

63. The 5th Interested Party's Replying Affidavit was sworn in support of the Petition by Christine Wangari Gachege, the Chief Executive Officer of Multytouch International Limited, who reiterated the Petitioner's claim and the benefits of environmental conservation of securing water towers, preventing soil erosion and conservation of biodiversity.

64. The 6th Interested Party opposed the Petition by way of an Affidavit sworn by Samuel Osee Ochieng,' the Secretary of the Forestry Society of Kenya. Mr. Ochieng' deponed that studies from KEFRI (Technical Report on Socio-Economic Impact of Forest Harvesting Moratorium in Kenya) have proved that the moratorium on logging is never a solution to commercial forestry management, and that lifting the ban on logging in public forests is in compliance with the legal and constitutional provisions in Kenya.

65. The Secretary of the Forestry Society of Kenya deponed that KEFRI studies have proved beyond reasonable doubt that Plantation Establishment and Livelihood Improvement Scheme (PELIS) is the better method of wood, fodder and food production for socioeconomic development; that FSK fully supports the government's intention to reintroduce PELIS, which was banned in 2002 and that forestry is a profession with its 'doctrine of absolute standards', having silvicultural regimes, thinning regimes and when to harvest specified in forest technical orders.

66. He stated that trees that have reached rotational age release carbon and when they are converted to timber, they store carbon; that young plantations sink more carbon and that Kenyans will reap enormous benefits in employment, foreign exchange savings and environmental gains by accelerated plantation developments efforts through resumption of forest tree harvests.

67. The 7th Interested Party opposed the Petition by filing a Replying Affidavit sworn on 24th August 2023 by Patrick Ngumi Githae, the Chairman of Nyeri Timber Manufacturers Association. Mr. Githae deponed that the 7th Interested Party filed Nyeri Constitutional Petition No. E011 of 2021 Nyeri Timber Manufacturers Association vs Kenya Forest Service based on the advertisement by the Kenya Forest Association inviting bids for the sale of forest material.

68. It is the 7th Interested Party's case that it felt aggrieved as the moratorium on logging was still in place and prior to the moratorium, members of the 7th interested parties had paid for and been allocated forest products and that there was concern that the invitation of fresh bids would lead to great financial loss to the 7th Interested party's members.

69. Mr. Githae deponed that the court in Nyeri Constitutional Petition Number E011 of 2021 finalised the Petition and lifted the moratorium dated 24th February 2018 by the consent of the parties; that the court also held that the Petitioners who had been allocated and paid in full be allowed in priority to harvest and remove the respective forest products as per their allocation letters and that the people who

had partially paid before the moratorium were to complete the payment within 30 days and be allowed to harvest and remove forest products as per their allocation.

70. It was Mr. Githae's deposition that following this Petition, the 3rd Respondent has ejected the Interested Party from the various forests in Nyeri County and that some of the orders sought in this Petition would be in direct conflict with the order issued in Nyeri Constitutional Petition No. E011 of 2021.

71. It was deposed by Mr. Githae that there would be great injustice to the 7th Interested Party if the orders herein are granted and that the members of the 7th Interested Party would suffer great loss and damage if the orders restraining the licensing and harvesting of forest produce are granted.

The Petitioner's Further Affidavit

72. In her Further Affidavit, Ms. Muturi, the Chief Executive Officer of the Petitioner, asserted that this Court has jurisdiction pursuant to Article 70 of *the Constitution* to determine the Petition and that the National Environment Tribunal (NET) lacks the capacity to handle constitutional matters within the province of Article 165 of *the Constitution*.

73. It was deposed that the process anticipated by the request for information held by the state and timelines thereto would have rendered this Petition an academic exercise since the logging activities had already begun following the pronouncements by the President, and that the only information available were newspaper cuttings.

74. It was deposed by the Chief Executive Officer of the Petitioner that the Multi Agency Team Report invited the 2nd Respondent to receive the report and issue such further directives as may be appropriate and that this has never been done nor has it been availed to the Petitioner, the public or the court.

75. According to the Petitioner, although the intention of the 2nd Respondent was to effect a variation to the moratorium, this was never achieved and that as noted in the Auditor General's report, as at May 2022, the moratorium was still in force.

76. The Chief Executive Officer of the Petitioner deponed that the Attorney General made findings that indicted the Respondents for non-compliance, including lack of standard operating procedures by the 3rd Respondent; unrecorded forest materials allocated to saw millers worth Kshs. 62,213,655.77; failure to maintain proper records; failure to harvest allocated forest materials within the stipulated timelines and illegal logging of forest material.

77. Thereafter, it was deposed, the Auditor General made recommendations which have not been fully implemented.

78. The Petitioner's CEO deponed that no adequate public participation had been conducted prior to lifting of the moratorium on logging; that the public participation was neither qualitative nor quantitative; that the sample EIA reports annexed are dated 2014, 2013 and 2017 and that the NEMA licenses attached thereto carry a condition that the licenses are only valid for 24 months.

Hearing and Evidence

79. The Petitioner and the 1st, 3rd, 5th, 6th and 7th Interested Parties did not call any witnesses or experts to give evidence and relied on their affidavits. The 1st, 2nd and 4th Respondents on their part, jointly adduced the evidence of two witnesses, while the 3rd Respondent adduced the testimony and evidence of one witness. I shall refer to the evidence of the three experts in the analysis section.

The Petitioner's submissions

80. Counsel for the Petitioner submitted that this Honourable Court is vested with the requisite jurisdiction to determine the issues raised in the Petition and that the questions presented for determination revolve around conservation of forests and the environment, more precisely, the government's directive on lifting of the moratorium on logging in order to open up the harvesting of trees in commercial plantations.

81. Counsel submitted that Section 70 of the Forests Conservation and Management Authority does not oust the jurisdiction of this court. Counsel relied on Articles 42 and 70 of *the Constitution* and Sections 4 and 13 (1) and (2) of the Environment Land Court Act on the jurisdiction of this court.

82. The Petitioner' s counsel submitted that if the Respondents actions are allowed to continue without safeguards, it would be contrary to Article 69(1) of *the Constitution*, and that this constitutional violation calls for a remedy by this court. Counsel relied on the case by South African Constitutional Court in Minister of health & others vs Treatment Action Campaign & Others, quoted by Odunga J. (as he was then) in Peter Solomon Gichira vs Independent Electoral and Boundaries Commission & Another [2017] eKLR.

83. The Petitioner's counsel submitted that the issues raised in the instant Petition are not directly or substantially similar to those in the former suit, as the latter involved a commercial agreement between the parties with no bearing on public interest and that the High Court was not invited to determine constitutional violations surrounding the lifting of the moratorium on logging.

84. It was submitted that as the jurisdiction of the High Court and the Environment and Land Court are different, those Petitions could not be fully determined as they were ventilated before a court with no jurisdiction on environmental matters and that it cannot thus be said that those Petitions were determined on merit and with finality. Counsel relied on the cases of Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission [2014] eKLR and Okiya Omtatah Okoiti & Another vs Attorney General & 6 Others (2014) eKLR.

85. The Petitioner's counsel submitted that the Petition satisfies the criteria as set out Anarita Karimi Njeru vs The Republic, [1979] eKLR and Musili Mwendwa vs Attorney General & 3 Others [2016] eKLR, which relaxed the rule set out in the former.

86. It was Counsel's submission that the Respondents are in violation of Article 35(1)(a) of *the Constitution* and Section 3 and 5 (1)(c) of the *Access to Information Act* for failure to disclose any guidelines on logging activities thus denying the public an opportunity to interrogate and engage with any such guidelines, laws and regulations that may have been developed to facilitate the government policies.

87. Counsel submitted that the Respondents must not wait for a notice to do so, which they have failed to uphold in their processes. he relied on the case of Timothy Njoya vs Attorney General & another [2014] eKLR and Mercy Nyawade vs Banking Fraud Investigations Department & 2 Others [2017] eKLR.

88. Counsel submitted that before the Presidential directive was issued on lifting the moratorium on logging, no Gazette Notice had been issued, nor had there been public participation nor any research-based policies, concessions or any management reports published in support of the same.

89. It was submitted that the recommendations by the Multi Agency Team established by the 2nd Respondent were ignored and the report was not made available to the public and that this was

unprocedural because the lifting of the moratorium could not be effected without any policy direction emanating from the Respondents.

The Respondents' Submissions

90. On behalf of the 1st and 2nd Respondents, the Attorney General submitted that this court is not vested with the jurisdiction to determine the matters herein; that there was sufficient public participation in the making of the decision to lift the ban on logging; that the Petition is based on unreliable evidence and that the decision to allow logging was made in line with constitutional and statutory dictates and proportional to the present circumstances.

91. The Honourable Attorney General submitted that this court is not clothed with jurisdiction, because the Petitioner's claim predominantly concerns administrative actions and decisions by the 3rd Respondent in the context of forest management and conservation and that Section 70 of the *Forest Conservation and Management Act*, provides a statutory mechanism for resolving disputes related to forest conservation, management and utilization.

92. It was submitted that the Act establishes a hierarchy of adjudicatory bodies for resolution of disputes, including the National Environment Tribunal, and subsequently, the Environment and Land Court and that the Petitioner had failed to exhaust the statutory dispute resolution mechanisms.

93. The Attorney General submitted that the evidence of newspapers and social media posts relied upon by the Petitioner lacks probative value and should not be relied upon to substantiate the Petitioner's claim. Counsel relied on the decision by the Indian Supreme Court in Laxmi Raj Shetty vs State of Tamil Nadu 1988 AIR 1274, 1988 SCR(3) 706. They also relied on Andrew Omtata Okoiti & 5 others vs Attorney General & 2 Others (2010) eKLR.

94. It was the Attorney General's submission that the Petitioner's claim of insufficient public participation lacks merit. They relied on the definition of public participation set out in Poverty Alleviation Network & Others vs President of the Republic of South Africa & 19 Others [2010] ZACC 5 and in Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others [2014] eKLR.

95. Counsel submitted that the 3rd Respondent undertook EIA for forest plantation management in seven forest ecosystem in 2014, in compliance with the provisions of Section 58 of EMCA 1999 and EIA/EA Regulations of 2003; that the EIA team of experts in consultation with KFS undertook a scoping exercise that generated a list of stakeholders of the project, who were identified and consulted during public participation of the EIA process.

96. Counsel's submission was that the decision to lift the ban on logging was in line with the principle of proportionality, which requires that any governmental action must be necessary, suitable and reasonable to achieve a legitimate aim and that this was based on the need to take into account the need to balance economic development with environmental conservation. Counsel relied on James Kaptipin & 3 Others vs the Director Forest & 2 others [2014] eKLR and Jacqueline Okuta & another vs Attorney General & 2 others [2017] eKLR.

97. Counsel for the 3rd Respondent, Kenya Forest Services, submitted that the Petitioner bears the burden and incidence of proof on the issues raised in the Petition. Counsel relied on Section 107 and 108 of the *Evidence Act* of Kenya and the Supreme Court case of Samson Gwer & 5 Others vs Kenya Medical Research Institute & 3 others [2020] eKLR.

98. Counsel submitted that the Petition ought to have been drafted with precision, specificity and particularization of the manner in which they claim their constitutional rights have been contravened and violated. Counsel relied on the case of Mumo Matemu vs Trusted Society of Human Rights

Alliance & 5 Others [2013] eKLR and Kenya Pharmaceutical Association & Another vs Nairobi City County and the 46 other County Governments & another [2017] eKLR.

99. Counsel submitted that there is no evidence of a decision on the ban of logging; that the evidence does not demonstrate the existence of the ban on logging; that even if the burden of proof were to shift to the 3rd Respondent, the claim for lifting the ban by the President on 2nd July 2023 would fail for the reasons that the moratorium was not intended to be eternal and that the moratorium was lifted by the orders of the court in Nyeri High Court Constitutional Petition No. E011 of 2021 and Meru High Court Constitutional Petition No. E002 of 2022.

100. Counsel for the 3rd Respondent submitted that the Petition is res judicata in terms of Section 7 of the *Civil Procedure Act*; that the lifting of the ban has been evidenced by articles by the People Daily of 24th September 2022 and the Washington Post of 3rd July 2023 and that these articles have no probative value. Counsel relied on the Court of Appeal case of Independent Electoral and Boundaries and Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.

101. Counsel submitted that the Petitioner's Supporting Affidavit sworn by Florence Wairimu Muturi is based on technical information which cannot be proved from her own knowledge; that the deponent is an Advocate who has not professed any expert knowledge in forestry and that she is not competent to depone to the contested matters without reliance on documented evidence or advice of an expert.

102. It was submitted that the Petition contains statements or information whose sources and grounds have not been disclosed. To buttress this argument, he relied on the Court of Appeal cases of Premchand Raichand & Another Ltd vs Quarry Services & Others [1969] EA 514 and East Africa Packaging Industries Limited vs Zoeb Alibhai [1997].

103. Counsel for the 3rd Respondent submitted that the evidence adduced by the Petitioner of illegal logging was hearsay evidence as stated in Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others and that the broadcast on Citizen TV and the tweets are electronic records which are inadmissible as they are not accompanied by certificates as required by Section 78A and 106B(4) of the *Evidence Act*.

104. Counsel relied on the case London Distillers (K) Limited v Mavoko Water & Sewarage Company & 2 Others [2019] eKLR and Commission of Human Rights & Justice (CHRJ) vs Victoria Mutuku, Chief Inspector of Police (Officer Commanding Station Kijipwa Police Station) & 5 Others [2021] eKLR.

105. Counsel's submission was that the Forests (Participation in Sustainable Forest Management) Rules, 2009 and the Forest (Harvesting) Rules 2009 are the operative rules governing the issuance of timber licenses and permits by the 3rd Respondent and that the Petitioner has not specified which recommendations in the Taskforce Report had not been taken into account in the rules alleged to have been published on 3rd July 2023.

106. Further, it was submitted, the Forest Rules 2009 preceded the Task Force Report and could not have been included in the Taskforce recommendations and that the 3rd Respondent is continuing with the implementation of the CS's directive to harvest and dispose of mature and over mature forests plantations for an area not exceeding 5000ha in compliance with the law.

Interested Parties' Submissions

107. Counsel for the 1st Interested Party, submitted that this suit deals with environmental justice as espoused in Principle 10 of the Rio Declaration on Environment and Development. Counsel

submitted that the procedural elements of the right to a clean and healthy environment under Article 42 of *the Constitution* are the rights to access to information, public participation and access to justice.

108. As to the Respondent's argument that the Petitioner should prove its allegation of lack of public participation, Counsel argued that the Petitioner cannot be required to prove a negative. They relied on the Court of Appeal case of Law Society of Kenya vs Attorney General & 2 others [2019] eKLR and several Supreme Court cases where the court examined the framework of public participation.

109. Counsel for the 1st Interested Party also relied on the case of Mohamed Ali Baadi and others vs Attorney General & 11 Others [2018] eKLR where the court emphasised the importance of public involvement in environmental decision and policy making. With respect to the Respondents' assertion that the attached EIAs show that there was public participation, Counsel argued that the ESIAs presented is dated 2014 before the moratorium was issued in 2018 and that the Respondents have failed to show in what way they notified the public of the decision to lift the moratorium.

110. It was Counsel's submission that this court is bound by the principles of sustainable development listed in Section 3(5) of the Environmental Conservation and Management Act. Counsel also relied on the definition of sustainable development in Section 2 of EMCA, Principle 10 of the Rio Declaration and the decision of the Supreme Court in Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014] eKLR.

111. In conclusion, Counsel submitted that according to the Supreme Court case of Communications Commission of Kenya & 5 Others & Others vs Royal Media Services & Others [2014] eKLR, the word 'including' in Article 23(3) of *the Constitution* means that the reliefs listed in that provision are not exhaustive.

112. It was submitted that the court can issue other appropriate reliefs outside those listed. Further, it was submitted, the word 'including' in Section 13(7) of the ELC Act empowers this court to fashion the most appropriate remedies in this case.

113. Counsel for the 2nd Interested Party submitted that the Petition complied with the cases of Anarita Karimi Njeru & The Republic (1976-1980) KLR 1272, and Samuel Tunoi vs Speaker Nakuru County Assembly & 2 Others [2019] eKLR, with the latter relaxing the strict approach adapted by the former decision.

114. Counsel submitted that under Article 70(3) of *the Constitution*, an applicant does not have to demonstrate that they have incurred a loss or suffered an injury.

115. Counsel's submission was that the doctrine of exhaustion of local remedies does not apply in this case due to the level of public interest involved, the polycentrity of the issue and the important constitutional values at stake and that in any case, this court is clothed with jurisdiction.

116. It was counsel's further submission that that the existing Forestry Rules were enacted under the Forest Act 2005 and do not align with the provisions of the FCMA as they do not adequately provide for community and public plantation forests and that these rules should not remain in force as they are inconsistent with the repealing Act. Counsel relied on Section 24 and 31(b) of the *Interpretation and General Provisions Act* as well as the case of Wavinya Ndeti vs Independent Electoral and Boundaries Commission & 4 others [2014] eKLR.

117. Counsel for the 3rd Interested party submitted that with respect to Article 35 of *the Constitution*, there is need for the government, through the 3rd Respondent to inform Kenyans on the steps that have been made in addressing the challenges that led to the ban of logging in the first place.

118. Counsel for the 4th Interested Party submitted that the moratorium on logging was lifted on 24th January 2023 by the orders of the High Court in Nyeri High Court Constitutional Petition No. E011 of 2021 and Meru High Court Constitutional Petition No. E002 of 2022 and that consequently the prayer 'j' of the Petition seeking a declaration that the moratorium is still in force, is res judicata and this court functus officio.

119. In respect to the prayer for a permanent injunction, counsel submitted that this would be economic sabotage for Kenyans and would contravene the Bill of Rights. Counsel argued that there is no imminent threat that the permanent injunction seeks to protect.

120. Counsel for the 5th Interested Party submitted that it is a matter of general and local notoriety, and an undisputed fact that the ban on logging was communicated to all Kenyans by the President in a gathering in Nakuru County on 2nd July 2023. Counsel argued that by dint of Section 60(1) (o) of the *Evidence Act*, the court is enjoined to take judicial notice of all matters of general or local notoriety. Counsel relied on the case of Isaac Aluoch Polo Aluochier vs the National Alliance and 542 others (2016) eKLR.

121. Counsel urged this court to apply the precautionary principle formulated based on Principle number 15 of the Rio Declaration and that waiting for scientific proof regarding the impact of logging into our gazetted forests could result in irreversible damage to the environment and human suffering. Counsel referred the court to the case of Halai Concrete Quarries & Others vs County Government of Machakos & others and John Muthui & 19 others vs County Government of Kitui & 7 Others.

Analysis and Determination

122. Having considered the Petition and the Affidavits sworn by the Respondents and the Interested Parties, the issues that arise for determination by this court are as follows:

    a. Whether this court has jurisdiction to hear and determine this suit.

    b. Whether the Respondents breached the Petitioner's right to access information.

    c. Whether the Respondents adequately undertook public participation.

    d. Whether the Respondents failed to implement the recommendations of the Taskforce.

    e. Whether the Petitioner's evidence met the standard of proof.

    f. The remedies that this court should issue.

123. The undisputed facts in this Petition are that on 24th February 2018, the Government, by an order of the Cabinet Secretary, Ministry of Environment and Forestry, imposed a moratorium on logging and timber harvesting in all public and community forests. The purpose of the moratorium was to allow for the reassessment and rationalization of the entire forest sector in the Country.

124. In Gazette Notice No. 28 of 26th February 2018, which is annexed as part of the Taskforce Report on Forest Resources Management and Logging Activities in Kenya, published in April 2018, the terms of reference of the Taskforce included to:

a. Determine the scale of illegal logging, destruction, degradation and encroachment of public and community forests, water towers and other catchment areas, as well as the associated impacts.

b. Review the procedures, qualifications and conditions for licensing of saw millers to determine their adequacy, fairness and appropriateness.

c. Review felling plans and associated programs including planting and replanting to determine their adequacy and effectiveness.

d. Review and determine the effectiveness of participatory forest management programmes including the operational and governance structures of Community Forest Associations.

e. Audit revenue generation from forests against the investment and operational costs.

f. Review the *Forest Conservation and Management Act*, 2016 and other related written laws to enhance penalties for contravening the provisions of the Act and related written laws.

g. Make recommendations to short-term, medium-term and long-term restoration and protection of forests and protection of forests and water catchment areas.

125. The Gazette Notice further stipulated that in the performance of its mandate, the Taskforce was to co-ordinate an inclusive stakeholder consultation process at all levels; undertake aerial and ground-based surveys and investigations; identify and co—opt technical experts or any other source; conduct public hearings and receive representations, memoranda and petitions from the public and to call for and subpoena any relevant documents and information in the possession, custody or control of any relevant institution or persons.

126. The Taskforce carried out its work and thereafter forwarded its recommendations to the Cabinet Secretary, Ministry of Environment and Forestry vide a letter dated 30th April 2018. The recommendations of the Task force were to be implemented immediately (0-1 years), in the short term (1-2 years) and in the long term (2+ years).

127. While the initial moratorium was for 90 days, it was initially extended for a 6-month period, to end on 24th November 2018. The Cabinet Secretary later extended the moratorium for a further one year to enable full implementation of the immediate and short-term recommendations of the TaskForce and the key recommendations of the National Assembly Committee on Environment, Land and Natural Resources adopted by the full house.

128. The Cabinet Secretary indicated in his press release of 16th November 2018 that the extension was to allow for the restoration and rehabilitation of the degraded water catchment and natural forest areas (estimated at 123,553 acres) and replanting of the backlog clear fell plantation areas (estimated at 76,603 acres) with indigenous tree species.

129. The second extension of the moratorium that was to expire on 24th November 2019 for a further twelve years was made on 21st November 2019. In a public statement, the Cabinet Secretary indicated that a Multi-Agency Team was to be constituted to, among others, undertake an independent mapping, verification and valuation of all mature and over mature forest plantations and submit the report to the government within four months.

130. On 23rd November 2020, the Cabinet Secretary varied the moratorium on the basis of recommendations of the Board of Management of the 3rd Respondent and the Multi Agency Team. The moratorium was modified so as to allow for harvesting and disposal by KFS of mature and over mature forest plantations for an area exceeding 5000 hectares. This process was to be oversighted by a Multi-Agency Team and done in a manner that is open, transparent, accountable and ensures value for money.

131. The 2022 Final Report by the Multi-Agency Oversight Team on Disposal of 5000 Hectares of Mature and Over Mature Forest Plantations however indicated that the disposal of the 5000Ha of mature and over mature forest plantations was not undertaken as envisaged due to court cases stopping the e-registration and tendering processes.

132. The Final Report further started that the harvesting of the 5,000 acres was not successful for lack of proper KFS systems that could be utilized for disposal; lack of adequate resources for procurement of the forest management integration system, which had not been foreseen and lastly, the sales inventory exercise was affected by the inaccessibility of some of the plantations due to the poor road network compounded by heavy rains.

133. The Parties herein have disputed as to whether indeed the moratorium has been lifted and if so, the manner and legality of how it was lifted. The Petitioner has averred that the moratorium was lifted by the President while addressing a gathering in Molo, Nakuru County on 2nd July 2023.

134. Conversely, the 3rd Respondent has deponed that the moratorium dated 24th February 2018 on logging was lifted by orders of the Court made on 24th January 2023 in Nyeri High Court Constitutional Petition No. E011 of 2021 and Meru High Court Constitutional Petition No. E002 of 2022. Consequently, the 3rd Respondent argued, there is no ban on logging that would have been lifted by the President or capable of enforcement in the manner claimed by the Petitioner.

135. The Petitioner has raised an issue with the manner in which the moratorium was lifted by the President, contrary to Article 135 of *the Constitution*, and avers that it was unlawful for lack of public participation.

136. The Petitioner further claims that the Respondents failed to provide the regulations that ought to guide the implementation of the logging activities and also failed to conduct an Environmental Impact Assessment prior to the lifting of the moratorium.

137. The Respondents on their part assert that this suit is res judicata as the subject matter was settled in Nyeri High Court Constitutional Petition No. E011 of 2021, Nyeri Timber Manufacturers Association vs Kenya Forest Service and Meru High Court Constitutional Petition No. E002 of 2022, Great Meru Timber Manufacturers Association vs Kenya Forest Service, Chief Conservator of Forests, the Cabinet Secretary for Environment and Forests and the Attorney General.

138. According to the Respondents, the moratorium on logging was lifted by the consent of the parties in these suits and that the Petition is unmerited as it is premature for failure to follow the statutory dispute resolution process set out in Section 70 of the *Forest Conservation and Management Act* and that the Petitioner's claim lacks probity as the Supporting Affidavit was sworn by an advocate, who has no expertise in forestry.

Whether this court has jurisdiction to hear and determine this suit

139. The Respondents have challenged this court's jurisdiction on two grounds: first, on the basis that this suit is res judicata as the subject matter herein was determined in Nyeri High Court Constitutional

Petition No. E011 of 2021, Nyeri Timber Manufacturers Association v Kenya Forest Service and Meru ELC Constitutional Petition No. E002 of 2022, Great Meru Timber Manufacturers Association v Kenya Forest Service, Chief Conservator of Forests, the Cabinet Secretary for Environment and Forests and the Attorney General.

140. According to the Petitioner, the parties agreed to lift the moratorium on logging, which consent the court adopted as its order. The second challenge is that this suit is premature for failure to exhaust the statutory dispute resolution mechanisms available under Section 70(1) of the *Forest Conservation and Management Act* 2016.

141. The legal framework of res judicata is set out Section 7 of the *Civil Procedure Act* as follows:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

142. In this matter, the Respondents have disputed that this suit is res judicata on the basis that this matter was determined in two earlier matters and by consent, the moratorium was lifted. These two matters are Meru ELC Constitutional Petition No. E002 of 2022, Great Meru Timber Manufacturers Association v Kenya Forests Service, the Chief Conservator of Forests, the Cabinet Secretary of Environment and Forests and the Attorney General, and Nyeri High Court Constitutional Petition No. E011 of 2021 Nyeri Timber Manufacturers Association vs Kenya Forest Service.

143. The parties in both cases above sought that the court adopt their consents, which included a term that the moratorium dated 24th February 2018 be lifted.

144. It was essential for the Respondents to present before this court the Petitions for the Meru and Nyeri High Court matters, to enable this court to comprehensively consider the nature of these suits and whether the case herein is indeed res judicata.

145. The Respondents however only presented the consents which were to be adopted by the court. Though they failed to adduce these documents, the 7th Interested Party, who filed the Nyeri matter, annexed to its Replying Affidavit the Petition it filed in Nyeri Constitutional Petition No. E011 of 2021.

146. First, it is evident that the actors in this Petition and the Nyeri and Meru matters are not identical. The Petitioner herein, the Law Society of Kenya, was not a party to the earlier suits. The 3rd Respondent, the Kenya Forest Service, is however the common denominator, as they were enjoined as Respondents in both the Nyeri and Meru cases. On their part, the Cabinet Secretary for Environment and Forestry and the Attorney General were enjoined in this case as well as the Meru matter.

147. The Nyeri and Meru Petitions were filed by Timber Manufacturer Associations, whose members are timber manufacturers and traders in Kenya. In Nyeri Petition E011 of 2021, the 7th Interested party's claim arose from the invitation by the Kenya Forest Service to interested and eligible forest industry investors to submit bids for sale of forest materials, which they assert, lifted the moratorium on logging.

148. While this court has not had the opportunity to consider the claim filed in the Meru matter, the consent entered into by the parties is informative as to the nature of the dispute. The terms of the consent, which are identical in both the Meru and Nyeri matters are as follows:

a. That the moratorium dated 24th February 2018 be and is hereby lifted.

b. That petitioners who had been allocated and paid in full, before the moratorium be allowed in priority to harvest and remove the respective forest products as per their allocation letters before any fresh allocations were made.

c. That petitioners who had been allocated and partially paid before the moratorium be allowed in priority, to complete the payment within 30 days, and subsequently be allowed to harvest and remove the respective forest products as per their allocation letters before any fresh allocations are made and in default of payment, remove the forest products equivalent to payment already made.

d. That petitioners who had been allocated and not paid during the moratorium be allowed to harvest and remove the respective forest products as per their allocation letters before any fresh allocations are made and in default of payment, the allocation is deemed to have lapsed.

e. That the priority terms given under clause b, c, and d above shall not apply to future disposal of forest products.

f. That the respondents to uphold principles of equity, transparency and fairness in the allocation of plantations to small, medium and large scale saw millers.

g. That the respondents ensure and conduct public participation in creation of any guidelines or rules in respect to allocation and harvest of forest products.

h. That the Kenya Forest Service to ensure the allocated forest plantations are accessible.

i. That the terms of this consent be enforced immediately but in any case on or before 90 days from the date of filing this consent.

149. It is apparent that the dispute before the High Court concerned commercial agreements between members of the Timber Associations and the Kenya Forest Service, triggered by an invitation to tender bids for allocation and harvest of forest products.

150. On the other hand, this Petition is predicated upon the right to a clean and healthy environment. The Petitioner has claimed that the moratorium on logging was lifted by the President, contrary to Article 135 of *the Constitution* and that the lifting of the moratorium was unlawful for lack of public participation.

151. The Petitioner has further claimed that the Respondents failed to provide the regulations that ought to guide the implementation of the logging activities and also failed to conduct an Environmental Impact Assessment prior to lifting the moratorium.

152. While the issues between these cases relate to the issue of the moratorium on logging, the Petition herein is largely based on the right to a clean and healthy environment, while the Nyeri and Meru matters are concerned with licenses for harvesting of the forest products, and contracts between the Kenya Forest Service and timber manufacturer associations.

153. Further, while the High Court and the Environment and Land Court are courts of equal status, the High Court does not have jurisdiction to render itself on matters concerning the right to a clean and healthy environment.

154. In any case, there is undoubted potential for substantial injustice if this court does not hear this constitutional matter on its merits. Indeed, the failure to determine this suit on its merits would occasion grave injustice to the public, which has the right to enjoy a clean and healthy environment under Article 42 of *the Constitution*, and which would be bound, unheard, by the decision in the Nyeri High Court.

155. As I have already stated, the High Court does not have the mandate to render itself on matters concerning the environment and environmental rights. Moreover, it is apparent that the consents to lift the moratorium did not take into account the environmental concerns or the circumstances under which the moratorium on logging was issued, which was to allow for the reassessment and rationalization of the entire forest sector in the Country.

156. Mr. Waweru for the Petitioner rightfully submitted that this suit concerns the question of environmental democracy. He quoted the case of Mohamed Ali Baadi and Others vs Attorney General & 11 Others[2018] eKLR, which defined environmental democracy as follows:

> " In the instant case, a key concept which this Court cannot ignore is environmental democracy, a term that reflects increasing recognition that environmental issues must be addressed by all, or at-least a majority of those affected by their outcome, not just by the minority comprising the governments and leading private-sector actors. [75] It captures the principle of equal rights for all including the public, community groups, advocates, industrial leaders, workers, governments, academics and other professionals to be involved in environmental governance.[76] It connotes the right of all whose daily lives are affected by the quality of the environment to participate in environmental decision-making as freely as they do in other public interest matters such as education, health care, finance and government.[77] Access to environmental information and justice for all those who choose to participate in such decision-making is integral to the concept of environmental democracy."

157. The court in the above case stated that the minimum requirements for existence of environmental democracy, are "the tripartite of the so-called access rights in environmental matters, namely, (a) access to information, (b) participation in decision-making, and (c) access to justice."

158. These three rights have also been defined as the procedural elements of the right to a clean and healthy environment in the Report of the United Nations Special Rapporteur on the Issue of Human Rights obligations relating to the enjoyment of a safe, clean and healthy environment

and sustainable development: the Right to a Healthy Environment; Good Practices A/H/HRC/43/53.

159. The elements of access to information and public participation in decision-making have been raised by the Petitioner and will be discussed more comprehensively below.

160. On this premise, this court is satisfied that the Petitioners have satisfied the requirements set out in Anarita Karimi Njeru vs The Republic, [1979] eKLR, for drafting their petition with precision, specificity and particularization of the manner in which they claim their Constitutional rights have been contravened and violated.

161. The parties brought to the attention of this court the decision in Japhet Kithi Chega (suing on their own behalf and as the registered official of Active Environment Team) vs Kenya Forest Service and Kenya Forest Board [2022] eKLR.

162. The court in this case found that contrary to Section 58 of EMCA, the Respondents had issued invitations to bid for forest plantation materials without conducting an EIA and the necessary public participation. The court found that the Petitioners' right to a clean and healthy environment was under threat and at risk of being violated.

163. The court issued a declaration that KFS could not overhaul, set aside, lift or replace the November 2018 extension of the moratorium on logging activities in public and community forests issued by the Cabinet Seceretary and allow logging and sale of forest materials without undertaking an environmental impact assessment as envisioned under Sections 36, 44(2)(a) and d, 46(1)(c) and 75(3) of the *Forest Conservation and Management Act*, 2016. This court takes due cognizance of this decision.

164. Having analysed the cases filed in different courts, it is the finding of the court that this Petition is not res judicata.

> Exhaustion of Statutory Dispute Resolution Process under Section 70 of the *Forest Conservation and Management Act*

165. The Respondents have asserted that this suit is barred for failure to exhaust the statutory dispute process set out under Section 70(1) of the *Forest Conservation and Management Act* 2016. This section provides that:

> "(1) Any dispute that may arise in respect of forest conservation, management, utilization or conservation shall in the first instance be referred to the lowest possible structure under the devolved system of government as set out in the *County Governments Act*, (No. 17 of 2012).
>
> (2) any matter that may remain un-resolved in the manner prescribed above, shall be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie in the Environment and Land Court as established under the *Environment and Land Court Act*, (No. 19 of 2011)."

166. The Petitioner has however asserted that this Court has jurisdiction pursuant to Article 70 of *the Constitution*, which provides that:

> "(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
>
> (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
>
> (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
>
> (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
>
> (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment."

167. It is trite that a court can only exercise the jurisdiction that flows to it from *the Constitution*, legislation or both. This was settled by Supreme Court in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, where it stated that:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

168. The doctrine of exhaustion stipulates that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. The Court of Appeal, in Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others [2015]eKLR, observed as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to

be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

169. The question of what invokes the doctrine of exhaustion before embarking on the court process was aptly dissected in the case of William Odhiambo Ramogi & 3 others vs Attorney General & 4 others: Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR by a five judge bench as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts..."

170. The Court additionally prescribed the exceptions to the rule as follows:

> " As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

171. The question for this court's determination is therefore whether the values of *the Constitution* would be served by the determination that the Petitioner failed to satisfy the exhaustion requirement.

172. As has been set out ad nauseum above, this Petition concerns the moratorium on logging that was issued by the Cabinet Secretary on 24th February 2018 and whether it was lifted in such a manner as to infringe on the public's right to a clean and healthy environment.

173. The Respondents assert that under Section 70 of the *Forest Conservation and Management Act*, the Petitioner ought to have sought redress from the lowest possible structure under the *County Governments Act*. This dispute resolution forum is however not suited to the nature of the Petitioner's claim, which challenges the laws, actions, and policy of the national government.

174. Further, the Petition primarily alleges violation of the right to a clean and healthy environment, with particular emphasis on the procedural rights of access to justice, access to information and public participation. As asserted by the Petitioner, Article 70 clothes this court with the jurisdiction to hear and determine disputes where the right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened.

175. This is restated under Section 13(2) of the *Environment and Land Court Act* which provides that the Court has power to hear and determine disputes relating to environmental planning and protection as well as those relating to climate issues. The jurisdiction of this court is therefore not barred by the doctrine of exhaustion.

The Right to a Clean and Healthy Environment

176. Having established that this court has jurisdiction to hear and determine this Petition, this court will proceed to consider the merits of the Petitioner.

177. As has been stated above, this suit concerns the moratorium on logging that was put in place in 2018, for the purpose of reassessment and rationalization of the entire forest sector in the country. The Petition is primarily concerned with sustainable forest management, which is described by the Food and Agriculture Organization as:

> "the stewardship and use of forests and forest lands in a way, and at a rate that maintains their biodiversity, productivity, regeneration capacity, vitality, and their potential to fulfill relevant ecological, economic and social functions, now and in the future, at local, national and global levels, without causing harm to other ecosystems."

178. Principle 10 of the 1992 Rio Declaration on Environment and Development, to which Kenya is a signatory, prescribes the procedural rights to the right to a clean and healthy environment to include the rights to access information, access justice and public participation. The principle provides as follows:

> "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

179. As has been pleaded by the parties, Kenya has more than two million hectares of gazetted forests. According to the National Forest Resources Assessment Report 2021, Kenya's tree cover now stands at 12.13% while forest cover is at 8.8% up from 5.9 % in 2018.

180. The dispute herein concerns the temporary ban of logging of about 150,000 hectares or about 5% of the total gazetted forest, which consists of forest plantations. The forest plantations are mostly the cyprus, pine and eucalyptus trees, otherwise known as exotic trees.

181. The Respondents informed the court that prior to the moratorium, out of the 150,000 hectares of gazetted forests, licenses to harvest 5,000 hectares were issued every year. Further, that the exotic tree species have a rotation period of 25 to 30 years after which if they are not harvested, they begin to rot and become hazardous to the environment.

182. The Respondents' witness, Mr. Ojwang, elaborately testified that plantations are managed with the sustainable rotation age of 30 years, which when divided by the 150,000 Ha, translates to 5,000 Ha to be harvested every year, and replanted; that 5,000 Ha can be harvested without interfering with the environment; that they replant every year an equivalent number of cut trees; and that if 5,000 Ha of mature trees are not cut every year, they will have nowhere to re plant and the nursery will overgrow.

183. Another witness, Mr. Ochieng, stated that trees that have reached rotational age release carbon and when they are converted into timber, they store carbon. Further, that young plantations sink more carbon, thus the basis of climate change agreements and need to fell and plant back.

184. Mr. Muthika for the Respondents averred that the country stands to benefit if these plantations are harvested without further delay as there is scientific evidence to deterioration of the majority of these over-mature plantations over time.

185. The 2018 Taskforce undertook a rigorous exercise in the review of the forest sector. The Taskforce made several findings regarding the scale of illegal logging, which was the basis of the recommendations that it made.

186. The Taskforce observed that although exploitation of indigenous tree species was banned in 1986, illegal harvesting of these tree species continues, affecting most forests, particularly the mountain forests that are the Water Towers of Kenya. The Taskforce further observed that there was over-exploitation of selective important timber trees with Cedar (Juniperus procera) appearing to be the single most targeted tree species, mostly for making fencing posts, and construction.

187. The Taskforce also found that illegal logging of Sandalwood is prevalent in the Mathews Range (Samburu County), Marsabit (Marsabit County), Chyullu Hills (Makueni/Kajiado County), and Loita Hills (Narok County) ecosystems, based on submissions by stakeholders. Moreover, the high dependency on the biomass energy, it was observed, was exerting high pressure on the remaining indigenous forests.

188. The Taskforce's findings with respect to forest plantations versus indigenous forests were as follows:

    a. Most forest plantation areas are located in critical water catchment areas;

    b. Some forest plantations are located deep inside the indigenous forests in high altitude areas;

    c. The zonation between the indigenous forests and forest plantation areas is not clear;

d. Many forest plantation compartments are not planted with trees; it was reported that some of the harvested compartments have not been replanted with trees for the last 20 years; and,

e. There is residential cultivation with semi-permanent settlements in some plantation areas.

f. The only Forest Management Plans available are Participatory Forest Management Plans prepared by CFAs through support by development partners and civil society organisations. Such plans are not detailed and no not have clear management actions for sustainable management of particular forest blocks. This results in KFS relying on short term felling programs with no clear replanting and management of young plantations.

g. KFS irregularly allocates trees to certain saw millers.

h. Poor record keeping and allocation of forest blocks in certain cases resulting in double allocation of trees by KFS.

i. That KFS staff collude with saw millers to undervalue trees in Kinale area (Aberdares) and in the Elgeyo Marakwet Forest Station.

j. Felling plans are not availed to the public for scrutiny, accordingly there is lack of transparency and accountability and,

k. There is a lack of an effective monitoring and verification procedure to ensure compliance with licence conditions for saw millers.

189. While the Taskforce noted that Kenya faces an annual sustainable wood supply deficit of approximately 16 million cubic meters, and acknowledged Kenya's potential to expand its commercial forestry sector, it recommended that such expansion should be delivered by the private sector on private land, due to the limited geographical area of the existing plantation forests.

190. With respect to destruction, degradation and encroachment of public gazette forests, the Taskforce found that in the past 25 years, there has been massive destruction of forests due to excision, settlements established without due process, encroachment, illegal logging and unsustainable grazing.

191. The Taskforce specifically mentioned the Mau Forest, Mount Elgon region, Kakamega forest, northern forests, Arabuko Sokoke, Mangrove forests, Enosupukia Forest and Marmanet Forest as those suffering from illegal logging. They also noted that some forests, such as Kitalale Forest, the Ol Pusimoru Forest Reserve and the Manzoni and Mautuma blocks of the Turbo Forest Reserves only exist on paper.

192. The Taskforce noted that illegal logging, destruction and degradation of forest resources has had an adverse impact on wildlife. For instance, the Taskforce noted that a 2016 intensive ground survey revealed that in the Mau Forest Complex, there was no sign of large mammals in 17 out of 22 forest blocks.

193. Further, it was noted, the two out of six groups of the critically endangered mountain bongo antelope had disappeared over the course of two years. They asserted that the wrong citing of forest plantation inside the indigenous forest impacted on wildlife corridors and movement.

194. Another adverse impact of logging was the drying up of rivers and streams such as the Sondu River which has become irregular making the Sondu-Miriu hydro-power plant running at lower capacity in

the dry season. Another affected water source is the Mawra River whose low level during the dry season threatens river dependent wildlife and associated wildlife in the Maasai Mara and Serengeti ecosystem.

195. The Taskforce additionally noted that proceeds from illegal logging have been used to fund illegal activities such as the Boni Forest, where proceeds have been used to fund terrorism activities. Moreover, that destruction of forests impact on the microclimate conditions that in turn affect food security and increases the vulnerability of the livelihoods of many Kenyans to climate change.

196. The Taskforce also made findings with respect to KFS, namely that its organizational structure is vulnerable to corruption by forest managers and rangers; that KFS is understaffed, and rangers are unequally distributed and that KFS is established as an extractive-focused entity in forestry with little focus on conservation and management, among others.

197. Therefore, while this court appreciates that the timber industry makes a significant contribution to the Kenyan economy, it has a duty to protect what remains of the forests in Kenya, having in mind the interests of this generation and those to come.

198. The findings of the 2018 Taskforce paint a stark picture of the realities of illegal logging of both indigenous and plantation forests, unlawful settlements and impacts of cultivation under the Plantation Establishment and Livelihood System (PELIS), irregular licensing and poor forest management by the 3rd Respondent.

199. It is therefore safe to say that the laws, policies and administrative mechanisms governing forests and the forestry sector have failed to curb the exploitation and unsustainable utilization of forests, which will only result in their depletion unless remedial measures are taken. Unless remedial measures are put in place, the Petitioner's right to a clean and healthy environment is likely to be infringed.

Whether the Respondents breached the public's right to access information

200. The Petitioner and the 1st Interested Party have claimed that the Respondents breached their right and the public's right to access information by failing to provide information within the province of Article 35 of *the Constitution* before the decision to lift the moratorium on logging activities. They further assert that the Respondents denied the public the opportunity to engage with any guidelines, laws and regulations developed to facilitate government policies.

201. The 1st Interested Party claimed that the Respondents' failure to disclose the guidelines on logging and concession agreements and gazette the lifting of the moratorium on logging violates Article 35 of *the Constitution* and that this is contrary to Section 3(b) and 5(1)(c) of the *Access to Information Act*, which mandates the Respondents to disclose information that they hold proactively and publish all relevant facts while formulating important policies to the general public or the persons likely to be affected thereby.

202. The Respondents' response is that the Petitioner has not made any request to the 3rd Respondent to be provided with information on the public participation reports, the environmental impact assessment reports, concession reports, gazette notices, rules/regulations and policies developed showing the framework that exists for the logging activities.

203. Article 35 of *the Constitution* prescribes the right to access information as follows:

> "(1) Every citizen has the right of access to-
>
> (a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation."

204. Section 3(b) of the *Access to Information Act* 2016 states that one of the objectives of the Act is to provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles. Section 5(1) (c) of the *Access to Information Act* also provides that:

> " Subject to section 6, a public entity shall:-
>
> ...
>
> (1)(c) publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles."

205. Section 6 of the Act sets out the limitations to the right to Access information as follows:

> " Pursuant to Article 24 of *the Constitution*, the right of access to information under Article 35 of *the Constitution* shall be limited in respect of information whose disclosure is likely to—

(a) undermine the national security of Kenya;

(b) impede the due process of law;

(c) endanger the safety, health or life of any person;

(d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

(f) cause substantial harm to the ability of the Government to manage the economy of Kenya;

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

(h) damage a public entity's position in any actual or contemplated legal proceedings; or

(i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession."

206. In Nairobi Law Monthly v Kenya Electricity Generating Company & 2 Others (2013) eKLR, the court considered Article 19 (2) International Covenant on Civil and Political Rights (ICCPR), Article

9 of the African Charter on Human and People's Rights (The (Banjul Charter) and Article 35 of the Kenyan Constitution, and held that the international standards on access to information include maximum disclosure:

> " The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of *the Constitution* of Kenya which imposes an obligation on the State to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the State.
>
> ...
>
> The recognized international standards or principles on freedom of information, which should be included in legislation on freedom of information, include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that 'Information' should include all information held by a public body, and it should be the obligation of the public body to prove that it is legitimate to deny access to information."

207. The court also relied on Iain Currie & Johan De Waal in the Bill of Rights Handbook, 5th Edition, which while commenting on Section 32(1)(a) of *the Constitution* of South Africa, which contains provisions similar to Article 35(1)(a) of *the Constitution*, observe at page 694 that the section:

> " makes public-sector information available on a 'right to know' basis, meaning that members of the public are entitled to it, unless there are good reasons for withholding it. Information in public hands is, after all, the public's information and should be accessible to the public, unless disclosure will cause harm to legitimate government interests or the rights of others."

208. In Mercy Nyawade vs Banking Fraud Investigations Department & 2 Others [2017] eKLR, the court held that the holder of information bears the evidentiary burden to establish whether information it holds is protected from disclosure:

> " The burden of establishing that the refusal of access to information is justified rests on the state or any other party refusing access. This position was clearly expressed by the Constitutional Court of South African in President of the Republic of South Africa & Others vs M & G Media Limited [23] where it was held that:-
>
> "The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of *the Constitution*. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions. Hence the evidentiary burden rests with the holder of information and not with the requester."

39. Thus, the Respondents have a burden and a duty to demonstrate that the information sought falls within the exceptions under section 6 of the act. It is not enough to allege it does, as has happened in this case, without discharging the evidential burden to the required standard."

209. From the precedents quoted above, it is clear that while Article 35 of *the Constitution* and the *Access to Information Act* places a dual duty upon the state, to proactively publish and make information available to the public and to respond to specific requests for information from persons.

210. As has been established, access to information is essential for people to be able to protect and defend their human rights from potential harmful environmental impacts. Having considered the Petitioner's and the Respondents' pleadings, this court notes that on 24th February 2018, the Government imposed a moratorium on logging and timber harvesting in all public and community forests. The purpose of the moratorium was to allow for the reassessment and rationalization of the entire forest sector in the Country.

211. The moratorium was extended for one year in a directive communicated in the press statement made on 16th November 2018 by the Cabinet Secretary, Ministry of Environment and Forestry. The moratorium was further extended for one year through a statement made on 21st November 2019 by the Cabinet Secretary.

212. It is not disputed that in a press release made on 23rd November 2020, the Cabinet Secretary notified the public that the moratorium dated 24th February 2018 on logging would continue but with a variation to allow for harvesting and disposal by the 3rd Respondent of mature and over mature forest plantations for an area not exceeding 5,000 hectares.

213. Up to that point, it is obvious that the extension of the moratorium, with the exception of the harvesting of 5,000 Ha of mature and over mature tress pursuant to the Final Report of the Multi-Agency Oversight Team was made public by way of press statements by the Cabinet Secretary.

214. However, it would appear that the entire moratorium dated 24th February 2018 on logging was lifted by the consent orders of the Court made on 24th January 2023 in Nyeri High Court Constitutional Petition No. E011 of 2021 and Meru High Court Constitutional Petition No. E002 of 2022. The consent orders, having been made by the parties, cannot in my view be subject of documents, plans, policies or laws that should have been published by the government.

215. The Petitioner has raised an issue with respect to the 3rd Respondent posting on twitter certain 'guidelines', which are titled as 'Information on Lifting of the Moratorium on Harvesting of Gazetted Forest Plantations'. This document annexed on the Petitioner's bundle does not in fact, contain any guidelines, but it does indicate that the moratorium on logging has been lifted.

216. The manner in which the moratorium was lifted is not indicated in the so called "guidelines." Moreover, the document is neither dated nor signed, and its source cannot be verified. This communication cannot therefore amount to a lifting order worthy publishing.

217. The only gap is with regard to the information that the 3rd Respondent has asserted it holds with respect to planting and harvesting timber. Mr. Mugambi for the 3rd Respondent asserted that the Kenya Forest Service has in place measures to guide planting and harvesting of timber including the KFS Strategic Plans, Forest Management Plan, Technical Orders, Felling Plans, Annual Work Plans and Budgets, and Performance Contracts.

218. He however failed to annex these plans before this court. He additionally did not present any evidence to show that this information had proactively been made available to the public. In any case, the

Respondents did not in any way claim that this information was barred under Article 24 or under Section 6 of the *Access to Information Act*. In respect to the non-publication of those documents, it is the finding of the court that the Petitioner was denied access to information.

Whether the Respondents adequately undertook public participation

219. The Petitioner has claimed that there has been no public participation nor any research-based policies, concessions or any management reports published in support of the presidential directive. The 1st Interested Party averred that once the Petitioner alleged that there was no public participation before issuance of the logging guidelines or the decision to lift the moratorium on logging, the onus then shifted to the Respondents to prove that they undertook public participation.

220. Conversely, the Respondents averred that public participation was conducted during the Environmental Impact Assessment process for forest plantation management and that the KFS undertook EIA for forest plantation management in nine forest ecosystems in 2014 (Mt. Kenya, Aberdare, Mau, Cherangany, Mt. Elgon, Kakamega, Machakos, Makueni and Kitui).

221. The Petitioner however countered that the sample EIA reports annexed are dated 2014, 2013 and 2017 and that the NEMA licenses carry a condition that the licenses are only valid for 24 months.

222. Public participation is delineated as a national value and principle of governance under Article 10(2)(a) of *the Constitution*, which is binding on the State and its officers. The State is also mandated under Article 69 (1)(d) to encourage public participation in the management, protection and conservation of the environment.

223. In British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & Another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019], the Supreme Court held that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It stated that it is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments.

224. The Supreme Court prescribed the following guiding principles with respect to public participation:

    i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.

    ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.

    iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.

    iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.

    v. Public participation is not an abstract notion; it must be purposive and meaningful.

vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

ix. Components of meaningful public participation include the following:

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 public must be first sensitized on the subject matter.

225. In addition, courts have consistently held that public participation should be meaningful and qualitative. In Doctors for Life International vs Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11, the South African Court identified the underlining standard and quality of public participation as follows:

> "Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement."

226. Guided by the above decisions, this court must first determine whether the 3rd Respondent had a public participation programme that was suitable for the review and rationalization of the forest sector; whether it was purposive and meaningful and had quantitative and qualitative elements; whether it had inclusive and effective representation and whether there was transparency and integrity in the public participation process.

227. The parties herein have illustrated that forests by themselves, and the forest industry, are vast and impact on several groups of people. According to the Conservator of Forests, the formal forest sector employs 18,000- 50,ooo people directly and 300,000-600,000 indirectly. Forest adjacent communities are also significant stakeholders.

228. The Petitioner, on its part, has asserted that the public will be impacted by the lifting of the moratorium on logging as the plantation forests tend to be located near water towers and the public will suffer the impacts of climate change as trees act as carbon sinks and provide essential environmental services. This includes conservation of biodiversity.

229. It is not in doubt that forest resources are a significant contributor to the country's Gross Domestic Product (GDP). The Respondents' witness, Mr. Muthika, deponed that forests contribute 3.6% of the Gross Domestic Product; that plantation forests support wood-based industry, consisting of over 600 primary wood industry investors (saw mills) in Kenya and hundreds more in the secondary processing (furniture, building and construction), which supports over 4 million families through direct and indirect employment.

230. Trees must however not just be considered for their commercial value. As ably articulated in the case of Joseph Leboo & 2 Others vs Director Kenya Forest Services & Another [2013] eKLR:

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

231. In considering the actual public participation that was undertaken, the Respondents have averred that the public participation was conducted during the Environmental Impact Assessment process for forest plantation management and that there was public participation conducted by the Multi-Agency Taskforce.

232. The Conservator of Forests asserted that KFS undertook EIA for forest plantation management in nine forest ecosystems in 2014 (Mt. Kenya, Aberdare, Mau, Cherangany, Mt. Elgon, Kakamega, Machakos, Makueni and Kitui) and that the EIA team of experts undertook a scoping exercise that generated a list of stakeholders for the Forest Plantation Management Project.

233. It was his evidence that the stakeholders included representatives from line Ministries, Departments and Agencies, foresters, businesspeople/ private sector, CBOs, NGOs, politicians and community members, who were identified and consulted during public participation. He annexed a sample EIA Report for the Mau Ecosystem.

234. Considering that the moratorium on logging was issued in 2018, the EIAs conducted by the 3rd Respondent in 2014, cannot be said to satisfy the requirements for public participation in the former process. By definition, under Section 2 of the Environmental Management and Coordination Act, Environmental Impact Assessments (EIAs) are prospective, and are for the purpose of determining whether or not a programme, activity or project will have any adverse impacts on the environment.

235. The second claim was that public participation was conducted by the Multi-Agency Team. This court has reviewed the report by the team. Under the title of methodology, the team indicates that it conducted public hearings and received and verified supporting documentary evidence on outstanding claims on forest materials sold by KFS, and also undertook field visits.

236. As to the 2018 Taskforce, its report offers a robust public participation framework conducted during the preparation of the report. The methodology undertaken by the Taskforce similarly included submissions and petitions from the public and public hearings in different parts of the country.

237. The report indicates that key agencies and stakeholders were interviewed, including the Ministries of Environment and Forestry, the Ministry of Lands and Physical Planning, Ministry of Interior and Coordination of National Government, National Land Commission, NEMA, KFS, KWS, Kenya Water Towers Agency, KEFRI, National Environmental Complaints Commission, Council of Governors, Kenya Private Sector Alliance, individual saw millers, a bamboo trading company, community groups, civil society organisations and the Kenya Climate Change Working Group, among others.

238. The report further indicates that the public hearings and submissions were undertaken in Eldoret, Isiolo, Kisumu, Mombasa, Nairobi, Nyeri, Nakuru, Kericho, Maralal, Kakamega, Marsabit and Makueni. It is also noted that the Senator of Garissa County made a presentation during the Nairobi Sessions.

239. Field visits were also made to Kilifi and Lamu Counties to inquire as to the status of the Arabuko Sokoke Forest Reserve and mangrove forests; and Loita Hills in Narok to assess the status of the Loita Community Forest. It is also indicated that various cultural groups made presentations to the Taskforce, including the Kaya Council of Elders, Urumwe Cultural Group from Kiambu and the Ogiek Community. The 2018 Taskforce indeed undertook sufficient public participation.

240. Between 2018 and 2023, however, the Respondents have not produced evidence of any public participation with their stakeholders in the last five years. They have neither indicated nor showed that they made available any information on the implementation of the Taskforce recommendations. However, it is noted that the Taskforce did not recommend for the total banning of logging of forest plantation, safe for "the logging of ceder trees."

241. To that extent, and considering that the partial lifting of the moratorium by the Cabinet Secretary on 23rd November 2020, was informed by the Taskforce report and the Multi Agency Oversight Team, it is the finding of the court that there was public participation in respect of the partial lifting of the moratorium, which was limited to harvesting of 5,000 Ha of mature and over mature trees.

242. As to whether the President did indeed involve the public before his pronouncement that was made in Molo, Nakuru, the court is not satisfied that the President lifted the moratorium. Neither the Petitioners, nor the Interested Parties alluded to any official document lifting the moratorium. The newspaper cuttings capturing the sentiments of the President lifting the logging in a public rally cannot be evidence of a lifting order.

243. Indeed, under Article 135 of *the Constitution*, the decision of the President in the performance of any function of the President must be in writing, sealed and signed. That is not what happened in this instance.

244. Indeed, the only directive that lifted the moratorium is the publication by the Cabinet Secretary (the partial lift) and the consent orders in Nyeri and Meru High Court. This court cannot therefore engage in a discussion as to whether there was any public participation before the President lifted the moratorium because there was none in the first place.

> Whether the Respondents failed to implement the recommendations in the Taskforce Reports.

245. The Petitioner has sought for a declaration that the recommendations made by the Taskforce 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.

246. The 2018 Taskforce made several recommendations which it divided into short-term, medium-term and long-term recommendations. Some of the key short-term recommendations included:

1. a total ban on the logging of cedar trees on public, private and community lands and a total ban on cedar products should be imposed immediately
2. development and review of forest management plans in line with the existing guidelines and the law.
3. KFS should discontinue the 'Procedure for disposal of forest plantation material' that provides for direct allocation of forest stocks.
4. In the meantime, KFS should strictly adhere to the current Forests (Participation in Sustainable Forest Management) Rules 2009 with respect to issuance of timber licenses and permits.
5. No administrative additions of saw millers to the prequalification list should be done before an appropriate forest stocks disposal procedure has been developed.
6. KFS should undertake an independent due diligence of all the prequalified sawmills.
7. Ministry of Environment and Forestry should undertake an independent audit of all saw millers who KFS should review and implement the procedure for removal of forest produce from public forest to enable tracking and monitoring to ease traceability.
8. County Governments, in consultation with KFS, should review and implement the procedure for removal of forest produce from private and community forests to enable, tracking, and monitoring to ease traceability.
9. KFS should establish clear framework for tracking and identifying imported timber to seal illegal logging loopholes on origin.
10. PELIS should be progressively phased out in the next four years. No further PELIS area should be opened. In parallel to the phase out of the PELIS, concessions of forest plantations should be established that provide a role for the CFA members in the establishment of the plantations

247. Some of the medium-term recommendations of the Taskforce include:

1. The penalties established under the FCMA should be enhanced.
2. The government should subsidise and lower the cost of LPG to ease pressure on forests.
3. Forest zonation should be reviewed to establish a multiple-uses buffer zone inside the forest along the forest boundary. The width of the buffer zone

should not exceed 500 meters. All forest plantations located outside the buffer zone should be converted back to indigenous forest.

4. The Cabinet Secretary should engage the relevant county governments to declare threatened community or private forests, in particular the Maasai Mau and Mt Kulal, as provisional forests.

5. No forest plantations should be established on riparian reserves. Existing plantations along riparian reserves should be reverted to indigenous forests.

6. Where a forest is under dual gazettement, a multi-agency committee, comprising of Ministries responsible for forestry, wildlife, water and lands; and the National Land Commission, should be established to interrogate the matter of due gazettement and make remedial recommendations.

7. Indigenous forest areas that host critically endangered species, such as the mountain bongo, should be properly demarcated and gazetted as nature reserves.

8. Any community residing in the forest or carrying out activities that do not align with forest conservation should be evacuated from the forest. In case of forest dwelling communities who have traditionally lived in the forest, they should be resettled in areas adjacent to the forest.

9. Valuation of ecosystem goods and services provided by forests should be carried out to guide the budgetary allocations as provided for under the Law. Whereas financial support can be secured from development partners, private sector and civil society organizations, the Government should take the lead as an investor in the conservation of the Forests. Adequate budgetary allocations should be made for forest management, commensurate with the contributions of forests – currently grossly undervalued – to the national economy.

10. The Ministry responsible for Forestry should develop policies and programmes for the diversification of fast-growing tree species and bamboo.

11. The multi-agency forestry and conservation committee should audit the existing CFA in terms of membership, implementation of the management plans, compliance with the forest management agreements, capacity to tap into their forest user rights as well as their management practices with regard to PELIS system.

248. The Taskforce also recommended the review of the *Forest Conservation and Management Act* as well as the development of subsidiary regulations to operationalize it. This was particularly with respect to Section 44 which provides for concession agreements. It also recommended the upward revisal of the penalties and fines prescribed under the Act.

249. As the Respondents have failed to tender any evidence establishing their progressive compliance with the taskforce recommendations, this court must find that they have failed to implement the same. With regard to the recommendations of the 2020 Multi Agency Oversight Team, the ones that have not been implemented include:

1. Development of a long-term in-house complete end-to-end integrated disposal system which should be integrated and regularly updated.

2. Proper record-keeping at KFS with regular reconciliation.

3. The Special Audit Report of the Auditor General on Forest Resource Management and Logging Activities at the Kenya Forest Service and Ministry of Environment and Forestry, August 2021, should be implemented immediately

4. Identification and mapping of all degraded natural forest areas under KFS

5. Identification and mapping of all unplanted (Backlog) forest Plantation areas under KFS

6. Mapping and determination of the actual acreage of 421 sub-compartments containing mature and over mature forest plantations which were not valued by the Multi-Agency Team on mapping, verification and valuation of mature and over mature forest plantations.

250. The recommendations made by the Auditor General in her report, which have not been implemented include:

1. development of policies and programmes for the diversification of fast-growing tree species and bamboo;

2. re-organisation of KFS's internal structure to separate the dual roles of conservation and commercial plantations management;

3. physical inspections and audits conducted by NEMA on licenses it has issued, tying license renewal to compliance; formulation of an interagency plan of action to enhance the synergy and highlight areas of collaboration and coordination;

4. an independent self-audit should be conducted by KFS of all saw millers who have been granted access to forest stocks by KFS through the allocation letters;

5. development of subsidiary legislations and guidelines to implement Section 44 of the FCMA 2016 on Concession Management and review of FCMA and all sectoral laws, rules and regulation relating to the management of forests and allied natural resources in Kenya with a view to harmonizing these legislations to remove ambiguity, conflict, duplications and enhancement of penalties.

251. It was incumbent upon the 3rd Respondent to indicate that since the moratorium was put in place and following the comprehensive recommendations by the 2018 Taskforce, the Multi-Agency Oversight Team and the Auditor General, it has put in place measures to address the rampant illegal logging and that it has made substantive efforts to rationalize the processes of harvesting forest products as per the findings of the Taskforce. The Respondents have failed to do so.

252. Although the Attorney General annexed a matrix on the progress of implementing the 2018 Taskforce's recommendation, the said matrix is not dated and was not made available to the public. Further, the annexed matrix is not complete and does not indicate the status of the recommendations with respect to illegal logging and the destruction of forests.

253. It is therefore not in doubt that the Respondents have failed to put in place measures to address the unsustainable excision of forests and to rationalize its systems of issuing licenses and curbing illegal

and irregular logging as recommended by the 2018 Taskforce. This court must therefore find that the country's forests continue to be at risk of irreversible overexploitation and depletion.

254. This court also finds that the complete lifting of the moratorium under the guise of a consent order by parties and resumption of logging in Kenya, without implementing the 2018 Taskforce recommendations, or showing a comprehensive implementation matrix infringes on the rights of the Petitioner and the public to a clean and healthy environment.

The remedies that this court should issue

255. The court has found that the context that preceded the issuance of a moratorium was one of wanton exploitation of the countries' forest resources, of both indigenous forests and plantation forests as well as mismanagement by the 3rd Respondent.

256. The court has also found that the moratorium on logging was lifted by the consent orders of the court in Nyeri and Meru High Court without the proper implementation of the 2018 and 2023 Taskforce recommendations and without publication to the public on any guidelines on the progress of addressing the Taskforce recommendations.

257. Having found that the Petition has partially succeeded, and considering that the continuous non harvesting of mature and over mature exotic trees, that is tress that are over 25 years old, has a deleterious effect on the environment as opposed to young tress, and in view of the Reports by the Taskforce on Forest Resource Management and Logging and the Multi-Agency Oversight Team on the Disposal of 5,000Ha of Mature and Over Mature trees, this court finds it necessary to impose a remedy of a structural interdict.

258. This court thereby makes the following declarations:

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.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF OCTOBER, 2023.

O. A. Angote

Judge

In the presence of;

Mr. Waweru for the Petitioner

Mr. Eredi for the 1st Respondent

Mr. Havi for the 2nd Respondent

Mr. Eredi for the 3rd Respondent

No appearance for 4th and 5th Respondents

Ms Kinama for the 1st Interested Party

Mr. Onyango for the 2nd Interested Party

Mr. Maraga for 4th Interested Party

Mr. Matwere for 5th Interested Party

Court Assistant - Tracy