



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 8 OF 2021

(FORMERLY HIGH COURT PETITION NO. E496 OF 2021)

IN THE MATTER OF ARTICLES 21, 22, 23, 165 & 258 B OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 10, 35, 42 69,174(c),

196 (1)(b),201 (a), & 232 (1) (f) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF PROVISIONS OF SECTIONS 125(2) OF THE

PUBLIC FINANCE MANAGEMENT ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF REGULATION 17

OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATION

(IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

BETWEEN

COMMUNIST PARTY OF KENYA.....PETITIONER

VERSUS

NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT

DIRECTOR -GENERAL OF NAIROBI METROPOLITAN SERVICES.....2ND RESPONDENT

COUNTY ASSEMBLY OF NAIROBI.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....1ST INTERESTED PARTY

NAIROBI CITY COUNTY.....2ND INTERESTED PARTY

JUDGEMENT

Introduction

1. Uhuru Park and Central Park are one of the significant Public Parks and Open Space in Nairobi City. The role of open space in densely populated cities cannot be gainsaid. The rehabilitation and improvement of Uhuru and central parks is the subject of this constitutional petition.
2. In the Ruling dated **7th December 2021**, this Court granted conservatory orders; restraining the 1st and 2nd Respondents from inter alia carrying out any works on **Uhuru Park** (hereinafter the “**Park**”) pending the hearing and determination of Petition.
3. The Petitioner was of the view that the commencement of the said rehabilitation and improvement works was in violation of the Constitution and several other provisions of the law.

The Parties

4. The Petitioner is a registered Political Party in Kenya, whose objectives include the defense of the progressive gains made under the Constitution of Kenya 2010 and mobilizing Kenyans towards a future that is based upon sustainable development. It brings this petition to enforce rights as stipulated in the Constitution of Kenya.
5. The 1st Respondent is The Nairobi Metropolitan Services, established under Article 187 of the Constitution of Kenya where part of the functions of the County Government of Nairobi were transferred to the National Government vide a deed of transfer dated 20th February 2020 and are effected through the Nairobi Metropolitan Services.
6. The 2nd Respondent is the Director General of the Nairobi Metropolitan Services and is mandated to oversee and manage the functions of the Nairobi Metropolitan Services.
7. The 3rd Respondent is the County Assembly of Nairobi established under Article 176 of the Constitution of Kenya and is mandated to legislate, appropriate budgets and oversight the County Executive of Nairobi. All its actions must abide by the Constitution and the laws of Kenya.
8. The 4th Respondent is the principal legal advisor of the government of Kenya and is made Party to this application on behalf of the Government of Kenya.
9. National Environment Management Authority (NEMA) which is the 1st Interested party is the Principal Government Agency on environmental matters. It exercises general supervision and co-ordination over all matters relating to the environment within the Republic of Kenya.
10. The 2nd Interested party is one of the County Governments established pursuant to Article 187 of the Constitution and is charged with the responsibility of providing a variety of services to residents within its area of jurisdiction.

The Petitioner’s case

11. It was pleaded that on or about the **29th September 2021**, the Park was closed from the public by the 1st Respondent who also failed in its constitutional mandate to involve the public in the making of such decision.
12. It was contended that the Park is the largest open green space and recreational park in Nairobi County and was opened to the general public in **1969**.
13. Additionally, it was contended that the Park is monumental and historic to Kenya as it symbolizes popular struggles against dictatorship, struggles for democracy, struggles for conservation of the environment among other historic events including being the venue where the **Constitution of Kenya 2010** was promulgated as the highest law of the Country.
14. According to the Petitioner, the Park is also used by Kenyans of all walks of life as a popular resting and recreation place and it also hosts many petty traders who earn their living from conducting their business in the Park.
15. The Petitioner also averred that there was interference and destruction of the flora and fauna at the Park, the historic pavilion had been demolished, the grass had been replaced with cement blocks and that there were massive excavation works currently being undertaken for the purposes of putting up a hotel. The Petitioner also rekindled the struggles and efforts that had been previously undertaken by the late **Prof. Wangari Maathai** in successful stopping the construction of a 60-storey Kenya Times Media Trust Complex at the Park.
16. It was also disclosed that the 3rd Respondent had on **23rd September 2021** moved a motion titled “*Renovation of Uhuru Park and Central Park*” which motion involved closing down the Park for renovations. The motion was subsequently adopted on **28th September 2021** without any public participation and contrary to **Regulation 17 of the Environment Management and Coordination (Impact Assessment and Audit) Regulations, 2003**.

17. The Petitioner also pleaded that the project did not adhere to the principles of public finance enshrined under **Article 201 (a) of the Constitution** and is contrary to the provisions under **Section 125 (2) of the Public Finance and Management Act** that requires the County Executive Committee member for finance to involve the public in all finance matters, which obviously includes expenditures such as the ones concerned with the project. Given that there was no public participation as anticipated by the above cited legal provisions, it was the Petitioner's case that the 1st, 2nd and 3rd Respondents actions were in total contravention of the Constitution and the Statute.

18. In the main, the petitioner sought for the following orders: -

i. A DECLARATION be and is hereby made that the 1st and 2nd Respondents violated the right to public participation for Nairobi residents by closing off Uhuru Park and embarking on the renovations of the Park without conducting any public participation exercise.

ii. A DECLARATION be and is hereby made that the 3rd Respondent violated the right to public participation for Nairobi residents by debating and adopting the motion to renovate and close off Uhuru Park without conducting any public participation exercise.

iii. AN ORDER of prohibition be and hereby issued restraining the 1st & 2nd Respondents from renovating, refurbishing, closing, or undertaking any other work in connection with and on Uhuru Park, save as and in accordance with the Constitution and the law.

iv. AN ORDER be and is hereby issued instructing the 1st Respondent to forthwith reinstate Uhuru Park to its position before the renovations, including opening the Park to the public, planting grass, planting trees and rebuilding the main pavilion.

v. A DECLARATION be and is hereby issued that the 1st and 2nd Respondents violated the Petitioner's right to access to information contrary to the provisions of Article 35 of the Constitution of Kenya.

vi. Any other order that this Honourable Court may deem fit.

vii. The costs of this Petition be provided for.

The 1st and 4th Respondent's case

19. In opposing the petition, the 1st and 4th Respondent filed a joint Replying Affidavit sworn on **28th December 2021** by **Maureen Njeri, the Director Environment, Water and Sanitation** at the 1st Respondent.

20. The case of the 1st and 4th Respondents is that Uhuru and Central Parks are currently in a deplorable state with no fence to provide demarcation and security. They are occupied by street families, with poor or no sanitation facilities, dilapidated walkways and unkept lawns. They are unsafe, unlit, insecure and a criminal hide out.

21. They averred that the process of rehabilitation of Uhuru Park started sometimes back in 2018, when Nairobi City County Government sought to secure Uhuru Park and Central Park by erecting a fence. The county also sought to rehabilitate and revitalize the Park to International Standards. Members of the public expressed interest and presented draft designs for consideration. However, this was not implemented due lack of funds.

22. It was also stated that sometimes in the year 2020, the Nairobi City County Government in collaboration with safer Nairobi Initiative conducted public participation on the need to rehabilitate Uhuru Park and Central Parks. The engagements centered on various areas including collecting views on what should be done in the Park, interventions and improvements required and the general look of the Park. During that session, the public noted the following as priority areas; improvement of the quality of the fence to improve security, the design to cater to the changing culture, make the park more vibrant and translocation of the marabou stork birds among others.

23. It was further stated that on 8th September 2021, a meeting was held with the Uhuru Park traders where it was stated that the traders had been granted a waiver for the year 2020 and 2021 to operate their businesses without a trade licence. This was meant to boost their business operation and also as a way to allow them operate on the grounds before the revitalization process of park begins. This was an amicable agreement that had been made to provide ample time frame for the traders to prepare and also look for possible alternative grounds for their trade operations.

24. The 1st and 4th Respondent maintained that public participation and stakeholder engagement process started way back in 2018 and had been ongoing to date.

25. It was stated that the Nairobi Metropolitan Services had also developed a master plan for rehabilitation of Uhuru Park to a modern recreational facility.

26. It was further stated that, no tress had been cut and none will be cut but instead the biodiversity will be enhanced.

27. It was also stated that an Environmental Impact Assessment (EIA) had been done and that this was a public interest project upon which the public at large stand to benefit more.

28. Accordingly, the 1st and 4th Respondents contended that the petition ought to be dismissed.

The 2nd Respondent's case.

29. The Petition was similarly opposed by the 2nd Respondent. In opposition to the same, a Replying Affidavit sworn by **Lieutenant General Mohammed Badi** sworn on **24th January 2022** was filed.

30. According to the 2nd Respondent, there was evidence that public participation was conducted and the same was meaningfully, extensively and qualitatively done. The said public participation had started way back in 2018 through the Nairobi City County.

31. It was disclosed that the ground breaking of the project had been done on 29th September 2021 and this necessitated the erecting of a temporary barrier as a standard safety requirement and it did not include the commencement of the main rehabilitation works.

32. In his view, a notice had been issued to the members of the public seeking for additional comments and informing them of the alternative sites which could be used during the entire period of rehabilitation works.

33. It was also deposed that there was no evidence that the petitioner had participated or even attempted to participate in the numerous public participation process that had been conducted and hence they could not sustain this petition on account of public participation.

34. According to the 2nd Respondent, there was compliance with the Environmental Management and Coordination Act No.8 of 1999. Towards this end, the 2nd Respondent deposed that an Environmental Impact Assessment report had been submitted to the 1st Interested party which was reviewed and subsequently an Environmental Impact Assessment Licence Number **NEMA/EIA/PLS/16386** issued on **14th January 2022**.

35. It was averred that even though there was a delay in the issuance of the EIA Licence, that by itself should not warrant the grant of the prayers sought in the petition.

36. It was further averred that this court should strive to grant the Respondent time to comply with other applicable provisions should it find otherwise.

37. The 2nd Respondent also denied the allegations made by the petitioner that several trees had been cut and vegetation had been cleared. It was also stated that no single tree had been cut and an emphasis was made that none will be cut.

38. In the views of the 2nd Respondent, Public interest lies in allowing the project to proceed since the public at large stands to immensely benefit from the same.

39. The 2nd Respondent posited that the 1st Respondent had also entered into various time bound contracts and leased machinery and if forced to cancel the project, there may be a higher risk of several cases being filed against them. The current condition of the Park is also one which could not be left as it is.

40. Accordingly, the court was urged to dismiss the Petition.

The 3rd Respondents case.

41. In opposing the Petition, the 3rd Respondent filed a replying affidavit sworn on **28th January 2022** by **Gavin R. Castro** its Acting Clerk.

42. It was stated that the 3rd Respondent had inquired from the 1st Respondent on the measures that had been put in place to manage and rehabilitate the Park. The same had been done vide a letter dated 12th August 2021.

43. In response to the said letter, the 1st Respondent responded vide their letter dated 22nd September 2021, outlining the steps it had taken to rehabilitate the Park and that it was evident from the said response that extensive public participation had been undertaken.

44. **Gavin R. Castro** deposed that, by the time the resolution for rehabilitation of Uhuru Park was being proposed to the County Assembly, public engagements had already been done and the role of the Assembly was strictly limited to approving the resolution taking into consideration the public view tabled before it. It was his contention that it was not for the County Assembly to re-open the floor for another round of public participation.

45. Regarding the cutting of trees, the 3rd Respondent deposed that it is not true that the same had happened and or was happening since the primary objective of the project was to ensure that trees are planted and the city is made greener.

46. Equally, the court was urged to find that there was nothing unconstitutional about the project and dismiss the petition.

The 1st Interested Party's case.

47. **Marrian Kioko**, the **Head of Environmental Impact Assessment (EIA) Unit** at NEMA swore a Replying Affidavit on **31st January 2022** on behalf of the 1st Interested party.

48. She outlined the mandate and role of the 1st Interested Party in respect to the EIA process and deposed that the 1st Interested party had received 10 copies of the Environmental Impact Assessment (EIA) Project Report which was submitted on 8th December 2021 under reference number *NEMA/NRB/PR/5/1/16568 (27889)*. The project report was in respect to the proposed rehabilitation and improvement of Uhuru and Central Parks.

49. She further deposed that relevant lead agencies were requested to submit their comments in respect to the proposed project and this was done vide their letter dated 8th December 2021.

50. She averred that after review of the EIA project report, the 1st Interested party wrote to the 1st Respondent seeking for clarification on various issues that had been raised in respect to the said project. The said issues included, the proof of public participation.

51. She further stated that, the 1st Respondent wrote back to them forwarding their stakeholders engagements.

52. It was disclosed that no feedback was received from any lead agencies in respect to the proposed project.

53. The 1st interested party further stated that they proceeded to review the EIA project report and putting into consideration all the concerns of public participation, they were satisfied that the report was adequate having outlined all the mitigation measures.

54. **Marrian Kioko** also deposed that the 1st Interested Party having been satisfied that the project did not pose any risks or threats to the environment, proceeded to issue an EIA license *No. NEMA/EIA/PSL/16386* dated 14th January 2022.

55. Lastly, the 1st Interested party too requested for dismissal of the Petition.

2nd Interested Party's case

56. The Petition was equally opposed by the 2nd Interested Party. their Replying Affidavit was sworn on **27th January 2022** by **Abwao Erick Odhiambo**, the Acting County Solicitor.

57. The said affidavit was generally in agreement with the Replying affidavits that were sworn by **Maureen Njeri for 1st and 4th Respondents Gavin R. Castro for 3rd Respondent, Lieutenant General Mohammed Badi for the 2nd Respondent and Marriam Kioko for the 1st Interested party.**

58. It was deposed that the Petitioner is un-deserving of the said orders sought in the petition since there are no violations and further that they had moved to court two months after the project had been launched. Towards this end, it was will be impractical and costly to return the project to the original state.

59. The 2nd Interested Party equally prayed for the dismissal of the petition.

The Petitioner's submissions.

60. **Mr. Benedict Wachira learned counsel** for the Petitioner submitted *inter-alia* that the petition was merited and deserving of the prayers sought. He identified three (3) issues for determination.

i. Whether the Respondents conducted meaningful public participation?

ii. Whether the Respondent violated the environmental rights and laws by closing the Park and carrying out the activities in the Park?

iii. Whether the Respondent violated the petitioner's right to information?

61. On the issue of public participation, it was submitted that the 3rd Respondent had adopted the motion to renovate the Park without any public participation on the 28th September 2021. It was also submitted that the Park had been closed from the public without any notification and hence there was no public participation.

62. Counsel further submitted that the case of ***Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR***, the Court had outlined six (6) principles of public participation which were not adhered to herein.

63. Counsel argued that NEMA had not conducted its own public participation before issuance of the EIA license and this was contrary to **Regulation 17 of the Environmental Impact Assessment and Audit Regulations of 2003.**

64. On the 2nd issue, the Petitioner submitted that the project commenced without an EIA license and the action of issuance of the license

post the event was unconstitutional. Counsel referred to the case of *Omega International Kenya Limited Vs Kenya Tourist Development Corporation Civil Appeal No. 59 of 1993*.

65. On the access to information, it was submitted that no information was ever provide even after the same had been requested from the Respondents. Counsel pointed out that, the Petitioner wrote a letter dated 8th October 2021 to the 1st and 2nd Respondents requesting for the following information.

- i. *Whether any public participation was conducted concerning the project?*
- ii. *How much was budgeted for the project?*
- iii. *Who won the tender to do the renovations and whether the due process of procuring their services was followed?*
- iv. *Whether the project was public owned or whether it was a public –private partnership project?*
- v. *Whether the park would be freely accessible to the public after the renovations are completed?*

66. According to the Petitioner, only a text message was received on 29th October 2021 from the 1st Respondent informing them that that the letter had been forwarded to their Environment Department and since then no response had been forthcoming.

67. Counsel concluded his submissions by referring to the case of *Nairobi Law Monthly Co. Ltd Kenya electricity Generating Company & 2 others (2013) eKLR* where the court dealt the issue of access to information and held that the state has a duty to publish and provide the information as and when requested.

1st and 4th Respondents submissions

68. **Learned Counsel, Motari Matunda** made oral submissions on behalf of the 1st and 4th Respondents. He began by submitting that the Petitioner had not understood what Uhuru Park issues were. It was submitted that Uhuru Park just like any other facility requires renovation and improvement.

69. It was contended that, the Petitioner ought to have understood that what was to be undertaken was merely renovations and improvement of the park and that this was necessary due to the fact that since the official opening of the park in 1969, no such renovations and or improvements had ever been undertaken.

70. **Mr. Motari** further submitted that the renovations were not meant to degrade the environment since the nature of the project was to protect, preserve and improve the environment at the park and that this had also been demonstrated in the Replying Affidavit sworn by **Maureen Njeri**.

71. Counsel concluded his submissions by referring to the cases of *Mohammed Ali Badi & Attorney General & 11 Others (2018) e KLR and Patrick Kamotho Giithinji & 4 others Vs Resjos Enterprises Ltd & 4 Others (2016) eKLR* where courts declined to stop the projects for non-compliance with EIA provisions but allowed them to proceed on condition that compliance was effected.

2nd Respondent's submissions.

72. **Learned counsel, Okatch Duncan** made oral submissions on behalf to the 2nd Respondent. He submitted that his client's replying affidavit had comprehensively responded to all the issues raised by the petitioner.

73. It was his submission that public participation was extensively done. It was done in collaboration with Safer Nairobi Limited and a report to the effect had been annexed.

74. Counsel also submitted that there was no requirement that any motion before the County Assembly should undergo fresh public participation. He contended that, the same could not have applied herein since public participation had been undertaken prior to tabling of the motion.

75. It was further submitted that the project had already been licensed by the 1st Interested party a process which had commenced earlier.

76. It was his submission that in the interest of justice and the public, the project ought to be allowed to proceed. Counsel made reference to the case of *Okiya Omtatah Okiiti Vs Nairobi Metropolitan Services & 3 Others[2020] eKLR* and *In the matter of principle of Gender Representation in the National Assembly and the Senate (2012) eKLR* where court can make an order to allow a competent authority to correct any defects. The case of *Mui Coal Basin (supra) and Doctors for life International or the Speaker National Assembly and Others CCT12/05 2006 ZACC11* were referred to in respect to the threshold and principles of public participation.

The 3rd Respondent's submissions

77. **Ms. Barbara Kwang'a learned counsel** submitted on behalf of the 3rd Respondent. In her submissions she attacked the Petitioner's case on two fronts. One based on the adequacy of public participation and the other on the alleged breach of **Article 42 of the Constitution**.

78. On public participation, she submitted that the same was extensively conducted. She urged the court to refer to paragraph 50-22 of the 3rd Respondent's Affidavit. She also associated herself with the submissions made on behalf of the 1st, 2nd and 4th Respondents on the nature and extend of public participation that had been undertaken,

79. She argued that the renovations were not in any way in violation of **Article 42 of the Constitution**. It was her contention that the petitioner ought to have understood the historical context of Uhuru park renovations which they had failed to appreciate before filing the instant petition.

80. She concluded her submissions by stating that the Petitioner had equally failed to demonstrate how the renovations of the Park amounted to an infringement of the right to a clean and health environment and she urged this court to dismiss the said Petition.

The submissions of the 1st Interested Party.

81. The oral submissions by the 1st Interested party were highlighted by Mr. **Ngararu Maina learned counsel**.

82. On a preliminary issue, Counsel pointed out to the court that there had initially opposed the petition because there was no EIA licence but in view of the fact that the same had been issued, they had every reason to oppose.

83. Counsel argued that there was evidence that there was evidence that the public participation which had been conducted was adequate. He submitted that 1st Interested Party had separately called for more information from the 1st Respondent with a view of confirming the extend of public participation that had been undertaken and on behalf of the 1st Interested party, there were satisfied that public participation was adequate and further that the project did not pose any adverse effects to the environment before they proceeded to approve and issue an EIA licence.

84. In his submissions, Counsel also distinguished the difference between a project report and a study report and how public participation would have applied in each case. In the instant case counsel faulted the Petitioner for imposing the requirements of public participation applicable in study report yet the licence herein was for a project report.

85. Counsel concluded his submission by equally praying for the dismissal of the Petition.

The 2nd Interested party's submissions

86. **Learned Counsel, Peter Kuria** was tasked with putting forth the augments for the 2nd Interested party. He supported and fully associated himself with the submissions made by Counsel for 1st, 2nd, 3rd, 4th Respondents and the 1st Interested party.

87. On public participation, he submitted that the government should be given a discretion to determine how best the same ought to be conducted. This is because public participation varies on case to case basis. He further stressed that in the instant case, public participation was adequate. The County Assembly's role in debating and approving the motion for renovation of Uhuru park was in itself an indirect and additional public participation exercise.

88. Citing the case of ***Charles Apudo Obare & Another v Clerk, County Assembly of Siaya & Another [2020] eKLR***, Counsel argued on the doctrine of exhaustion and submitted that the Petitioner had not exhausted all the avenues necessary before moving this court on the right to access for information.

89. Counsel also submitted that the court ought to look at the overall objectives of the project and whether if any rights were violated. He contended that the project has many benefits to the public and that the prayers sought in the Petition had been made late in the day thus undeserving.

Issues, Analysis and determination

90. The Court has considered the cases put forward by the Petitioner, the Respondents, interested parties, the submissions of counsels and the authorities referred to therein and is of the view that the following are the main issues for determination: -

i) Whether the Constitutional principle of the right to public participation was adhered to prior to the commencement of the Uhuru park renovation project?

ii) Whether the Respondents violated any environmental laws in undertaking the activities in the park?

iii) Whether there was any violation to the Petitioner's right to access to information as enshrined in Article 35 of the Constitution?

iv) Remedies if any?

Issue No. 1

Whether the Constitutional principle of the right to public participation was adhered to prior to the commencement of the Uhuru park

renovation project?

91. The Petitioner complained about lack of meaningful public participation as one of the grounds the Petition. The Respondents and the Interested parties disagreed with the Petitions and were in unanimity that indeed there was adequate public participation which met the Constitutional threshold.

92. **Article 10 (2) a of the Constitution** outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. **Article 69(1) (d) of the Constitution** provides that the State shall encourage public participation in the management, protection and conservation of the environment.

93. **Principle 10 of the Rio Declaration on Environment and Development (1992)** also states as follows:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant 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 process...”

94. In the case of Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 Others [2015] eKLR, the Court set out the minimum basis for adequate public participation as follows: -

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

a) First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC))”

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

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

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

d) Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government

agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional Box.

f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

95. This court accepts the principles set out in the *Mui Coal Basin case (supra)* as the applicable principles in examining the threshold of public participation that should be met in undertaking environmental projects.

96. **The Second Schedule of EMCA as amended vide Legal Notice No. 31 of 30th April 2019** lists activities for which an environmental impact assessment study is required unless exempted by the National Environment Management Authority (NEMA).

97. I have keenly perused the copy of the Environmental Impact Assessment report which was referred at paragraph 18 of the Replying Affidavit sworn by **Maureen Njeri** and annexed as annexure **MN9** and it is evident that what was prepared and submitted to NEMA was a project report captioned *‘Environmental Impact Assessment Project Report for the proposed rehabilitation and Improvement of Uhuru and Central Park on (unsurveyed land), along Uhuru Highway, Dagoretti North Sub County, Nairobi County.’*

98. **Section 58(1) and (2) of Environmental Management and Coordination Act (EMCA)** provides as follows:

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of any project specified in the Second Schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority; Provided that the Authority may direct that the proponent foregoes the submission of the environmental impact assessment study report in certain cases.

99. The extend of public participation varies depending with the nature of the project and further depending on whether the Environmental Impact Assessment report is processed as a **project report** or as a **study report**. In the instant case, what was submitted by the 1st Respondent was project report.

100. On public participation, the Petitioner had referred to **Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003 (EMCA Regulations)** and submitted that the same did not meet the threshold that was set out in that provision.

101. **Regulation 17** only applies to Environmental Impact Assessment reports that have been submitted as “**study reports**” and not “**project reports**”. The Petitioner totally misapprehend the law when they referred to the application of this provision to the 1st Respondent’s project herein. In a project report, NEMA is not mandated to conduct a separate public participation. The Court agrees with the submissions made by the 1st Interested party that there is no law requiring Environmental Impact Assessment (E.I.A) Project Reports to be published in the Kenya Gazette and in at least two Newspapers circulating in the area of the project. Project reports are governed by Part II of the Legal Notice No. 101 of 2003, while study reports are governed by Part III thereof as was further demonstrated in case of ***Douglas Onyancha Omboga & 3 others v Joseph Karanja Wamugi & 4 others [2019] eKLR, Environment and Land Case 102 of 2017.***

102. The South African Constitutional Court in ***Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5*** discussed the importance of public participation as follows: -

“...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision”

103. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR*** referred to ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** stated as follows: -

“the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances.

104. The EIA project report that was submitted contained a detailed stakeholder plan, photographs, public *baraza* and minutes meetings, signed attendance forms among other documents that indeed confirmed that public consultation was undertaken. The 1st respondent had the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public. The Court was not furnished by any evidence that discredited the entire public participation and consultation process.

105. Before I make my findings on this issue, I would also like to state that I have also keenly perused and evaluated the evidence from the

Affidavits sworn by **Marrian Kioko, the Head of EIA Section at NEMA** and **Maureen Njeri, the Director Environment, Water and Sanitation at the Nairobi Metropolitan Services** and have noted that the said officers have a greater expertise on the environmental matters and with specific reference as to how and to what extent the Environmental Impact Assessment process should be carried out. Towards this end, I have no reason to cast any doubt as to their sentiments. This Court is therefore satisfied that there was sufficient evidence that indeed public participation that was undertaken herein was adequate since members of the public were afforded an opportunity to air their views in respect to the proposed project.

Issue no. 2

Whether the Respondents violated any environmental laws in undertaking the activities in the park?

106. It is common cause that the implementation of the rehabilitation and improvement of Uhuru park could not be undertaken unless an Environmental Impact Assessment in respect to the project had been concluded and approved in accordance with the provisions of Environmental Management and Coordination Act No. 9 of 1999 (EMCA) and the Regulations made thereunder. There was uncontroverted evidence that the said project had commenced and/or was ongoing by 7th December 2021 when this Court issued conservatory orders. It is common ground that the E.I.A License in respect to the said project was issued on 14th January 2022. Clearly then the activities prior to the date of the license contravened the law and in particular **Section 58 of EMCA and Regulation 4(1) of The Environmental (Impact Assessment and Audit) Regulations 2003** which provides that:-

“4.(1) No proponent shall implement a project-

a) Likely to have a negative environmental impact, or

b) For which an environmental impact assessment is required under the Act or these Regulations, unless an environmental impact assessment has been concluded and approved in accordance with these Regulations.”

107. **Article 42 of the Constitution** provides:

“42. Every person has the right to a clean and healthy environment, which includes the right-

a) To have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

b) To have obligations relating to the environment fulfilled under Article 70.”

108. Although EMCA is a pre-constitution 2010 statute it gives effect to the Constitutional provisions in respect to Environmental Rights. In dealing with matters on Environmental Rights, Section 3 of EMCA directs that the High Court shall be guided by the principles of Sustainable Development. Some of those principles are:-

“(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

.....

.....

(d) the principles of intergenerational and intragenerational equity;

.....

(f) the pre-cautionary principle.”

109. This Court refers to the following passage from ***“The Bill of Rights Handbook (5th Edition) at page 527”***

“The principle of “sustainable development” has both substantive and procedural elements. From the substantive perspective one way of ensuring that development decisions do not disregard environmental considerations is for the legislature to provide for Environmental Impact Assessment (EIA) for all development projects.”

110. In Kenya, EMCA specifies projects that require E.I.A. Admittedly the Uhuru park project is one such project. It is from the perspective that E.I.A is an important tool for the management and protection of the Environment. The definition and core purpose of an Environmental Impact Assessment is set out in **Section 2 of EMCA**. It states that an E.I.A is:-

“A systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment”

111. As pointed out earlier the Uhuru park project required the conclusion and approval of an E.I.A before it was implemented. It was required that a determination be made whether the project would have any adverse impact on the environment before it was undertaken. Indeed, in the Environmental Impact Assessment Project Report that was submitted by the 1st Respondent to NEMA, its own consultants identified one main task under the report as the determination of the potential Impacts on various Environmental aspects of the proposed project.

112. To therefore proceed with the implementation of the project without the approval of the E.I.A report was to proceed without an approved determination as to the possible Environmental impacts of the project. The 1st Respondent's conduct did not have due regard to whether or not the project could possibly have an adverse impact on the Environment. It was also indifferent as to what decision NEMA might eventually make as to the project. Because of these, it is the finding of this Court that the implementation of the project in the pre-license period was contrary to the law and was a threat to a clean and healthy environment.

Issue no. 3

Whether there was any violation to the Petitioners right to access to information as enshrined in Article 35 of the Constitution?

113. **Article 35 (1) (b) of the Constitution** states that 'Every citizen has the right of access to information held by another person and required for the exercise or protection of any fundamental right or freedom.' In my view, in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right.

114. In this Petition, the petitioner alleges that its right to access to information held by the 1st respondent was violated. Access to information is a fundamental right enshrined at Article 35 of the Constitution of Kenya. In support of this position, the Petition relied on the **Nairobi Law Monthly case (supra)**. However, the said case is distinguishable since the Judgment of the said case was rendered on 13th May 2013 before the enactment of the Access to Information Act, Cap 31 of 2016. The modalities of accessing such information has now been set out in the Access to Information Act, Cap 31 of 2016.

115. The Petitioner herein had and still has an alternative dispute resolution mechanism which is available under **section 14 of the Access to Information Act**, which Act gives effect to **Article 35 of the Constitution**. **Section 14** stipulates as follows:-

Review of decisions by the Commission

(1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information:-

(a) a decision refusing to grant access to the information applied for;

(b) a decision granting access to information in edited form;

(c) a decision purporting to grant access, but not actually granting the access in accordance with an application;

(d) a decision to defer providing the access to information;

(e) a decision relating to imposition of a fee or the amount of the fee;

(f) a decision relating to the remission of a prescribed application fee;

(g) a decision to grant access to information only to a specified person; or

(h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

(2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

(3) The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

(4) The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.

116. The Petitioners should therefore have first and foremost resorted to that alternative dispute resolution mechanism which is recognized by **Article 159(2)(c) of the Constitution** which obliges the courts in exercising judicial authority, to be guided by the principles among others that alternative forms of dispute resolution including reconciliation, mediation, arbitration and reconciliation and traditional dispute resolution mechanisms shall be promoted.

117. In the case of ***Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR***,

the court held that,

“Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.”

118. The 2nd Interested party also attacked the Petition for failure to comply with the doctrine of exhaustion in respect to seeking a remedy for the violation of their right to access to information. The doctrine of exhaustion in Kenya traces its origin from **Article 159(2)(c)** of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution.

119. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR**. The Court stated 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR”

120. In applying the doctrine of exhaustion and its exceptions against the instant case, it’s clear that the exceptions did not apply in this case and the Petition was bound to comply with **Section 14 of the Access to Information Act**. As such it is the finding of this Court, that the Petitioner’s contention that their right to access to information was violated cannot hold.

Issue No. 4

Remedies if any?

121. What then is the appropriate relief to be granted, An E.I.A License was subsequently issued on 14th January 2022. That license is still valid. This Court has not been told that the implementation of the project post the license date will not be in conformity with the conditions of the license. Neither is the Court told that it will be implemented in a manner that is deleterious to the Environment. There may be no reasonable basis to cancel the license and or stop any further implementation of the project as requested by the Petitioners. I decline to make such orders.

122. Whereas the Petitioner has failed to prove the infringement of its right under Article 35 of the Constitution and the court having found that public participation was indeed adequate, it has nevertheless been proved that the 1st Respondents’ impugned project was commenced contrary to the applicable environmental laws and regulations.

123. It is therefore the duty of this Court to fashion what is referred to as appropriate reliefs. Speaking of appropriate reliefs, the Court of Appeal in **Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR** held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. As was also held in the case of **Simeon Kioko Kithaka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR**.

124. In the instant Petition, the appropriate remedy would be to allow the project to proceed albeit in compliance with the applicable laws and Environmental Impact Assessment license conditions. The Petition therefore partly succeeds only to the extent that the commencement of the project prior to the issuance of the EIA license was contrary to the applicable environmental laws.

125. On the issue of costs, its trite law that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice, having regard to all the relevant circumstances and considering the partial success of the Petition, it would be fair, if each of the parties herein bear their own costs. That is my order on costs.

Disposition.

126. In the end, the Petition dated 22nd November 2021, partially succeeds and is determined in the following manner: -

i) That it is hereby declared that the commencement of the impugned project before the issuance of the Environmental Impact Assessment licence was unconstitutional and contrary to the applicable environmental laws and regulations.

ii) That the 1st Interested party is hereby directed to monitor and ensure that the project is undertaken in compliance with the conditions of the Environmental Impact Assessment licence issued on 14th January 2022, the Environmental Management and Coordination Act, 1999 and the other applicable EMCA Regulations.

iii) That the rest of the prayers sought in the Petition are declined.

iv) Each party to bear their own costs of the Petition.

127. I wish to express my sincere gratitude to each and every counsel for their industry and able presentation of their respective client's cases.

128. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF MARCH 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Baraza h/b for Mr. Benedict Wachira for the Petitioner.

Mr. Motari Matunda for the 1st and 4th Respondent.

Mr. Duncan Okatch for the 2nd Respondent.

Ms. Muriranja for the 3rd Respondent.

N/A for the 1st Interested party.

Mr. Peter Kuria h/b for Mr. Mbulo and Mr. Ogeto for the 2nd Interested party.

Court Assistant; Caroline Nafuna.