



Mt. Kenya Network Forum & another v Attorney General & another; Kioli & another (Interested Parties) (Petition E049 of 2023) [2025] KEHC 5395 (KLR) (Constitutional and Human Rights) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E049 OF 2023

LN MUGAMBI, J

MAY 2, 2025

BETWEEN

**MT. KENYA NETWORK FORUM 1ST PETITIONER
INDIGENOUS PEOPLE NATIONAL STEERING COMMITTEE ON CLIMATE
CHANGE (IPNSCCC) SUING THROUGH EUNICE SINORE NKOPIO
PARSITAU 2ND PETITIONER**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
NATIONAL CLIMATE CHANGE COUNCIL 2ND RESPONDENT**

AND

**JOHN KIOLI INTERESTED PARTY
KENYA CLIMATE CHANGE WORKING GROUP INTERESTED PARTY**

JUDGMENT

Introduction

1. The petition dated 2nd January 2025 is supported by the 1st petitioner's Executive Director, Stephen Kariuki Kiboi affidavit in support of similar date.
2. The petition challenges the nomination and appointment of Emily Mwendu Waita, John Kioli, the 1st interested party herein, Umar Omar and Dr. George Odera Outa, to be members of the National Climate Change Council, the 2nd respondent.



3. The petitioners claim that their nomination and appointment was not done in conformity with the laid down process and applicable constitutional principles.
4. Consequently, the petitioners seek the following relief against the respondents:
 - a. A declaration that the respondents have failed in their duty to uphold the rule of law, *the Constitution* and to protect public interest in the nomination and recruitment of Ms Emily Mwende Waita, Mr. John Kioli, Ms. Umar Omar and Dr. George Odera Outa, to be members of the National Climate Change Council, without public participation, input of civil society and marginalized communities, competitive, transparent, meritorious, legal and seamless nomination and recruitment process.
 - b. A declaration be issued that the nomination and/or appointment of Ms Emily Mwende Waite, Mr. John Kioli, Ms. Umar Omar and Dr. George Odera Outa, to be members of the National Climate Change Council, was invalid, null and void ab initio.
 - c. An order be issued quashing the appointment of Mr. John Kioli, Umar Omar or any other person, to be a member of the National Climate Change Council, purporting to represent civil society organizations and marginalized communities.
 - d. A permanent injunction be issued to prevent Ms Emily Mwende Waita, Mr. John Kioli, Ms. Umar Omar and Dr. George Odera Outa, from assuming, occupying and or holding offices as members of the National Climate Change Council.
 - e. An order be issued authorizing new appointments of members of the National Climate Change Council, in strict compliance with Article 10 of *the Constitution* and Article 7(f)(h) of the *Climate Change Act*, 2016, embracing public participation, Civil society and marginalized communities/groups input, equity, transparency, merits and competitiveness.
 - f. Any other or further orders that this Court may deem fit and expedient to grant in the interest of justice and public interest.
 - g. The costs of this petition be provided for in any event.

Petitioners' Case

5. The petitioners aver that His Excellency, the President of Kenya through the Senate's Order Paper scheduled for debate on 14th February 2023, nominated Emily Mwende Waite, the 1st interested party, Umar Omar and Dr. George Odera Outa, to be members of the 2nd respondent.
6. The petitioners allege that the process of their nomination and intended appointment did not adhere to the principles of public participation, equity, transparency, merit and competitiveness. The petitioners claim that the candidates were handpicked contrary the law and these principles.
7. In addition, it is emphasized that this action violates Article 75 of *the Constitution* which requires state officers to refrain from conduct that stirs a conflict between their personal interest and official duties. Considering this, the respondents' conduct is argued to be in violation of the rules of natural justice, the law and *the Constitution*.
8. The petitioners aver as well that these positions were not advertised on the respondents' websites neither in any local daily newspaper. They further claim that the recruitment process was shielded from the restrictive job requirements from the stakeholders, civil society organizations and the marginalized and/or indigenous communities in the climate change sphere.



9. The recruitment process is also said to have failed to adhere to the provisions of the Mwongozo Code for State Corporations, 2015 and the selection criteria for members of the 2nd respondent as set out under Sections 5 and 7 of the *Climate Change Act*, 2016.
10. The petitioners additionally contend that the recruitment process was not subjected to the public participation exercise by the public and relevant stakeholders. They state that this is indicative from the fact that no list of names of the shortlisted candidates was advertised, neither their scheduled interview dates and also the opportunity by the public to give their views and comments on the candidates.
11. Failure to conduct public participation is said to be in violation of RIO Conventions being: the United Nations Framework Convention on Climate Change; the Convention on Biological Diversity and the Convention to Combat Desertification which emphasize the need for environmental matters to be dealt with, with the participation of the citizens.
12. The petitioners stress that the very nature of the climate change laws both locally and internationally are enacted through rigorous public participation, consultations which uphold transparency. On this premise, the petitioners emphasize the dire importance of the recruitment and appointment of members of the Council to be compliant with the national and international laws. This is because it has a great impact on Kenya's commitment to the implementation of the Paris Agreement and its Nationally Determined Contributions (NDCs), achievement of the national sustainable Development Blueprint, Vision 2030, and general livelihoods of millions of people who are victims of climate change impacts such as droughts and famine.
13. The petitioners accordingly assert that the respondents in conducting the recruitment process in secrecy and withholding crucial information in that regard, was against public interest and so violated the petitioners and public's rights.

Respondents' Case

14. The respondents in response to the petition filed their replying affidavit through the Chief of State and Head of Public Service, Felix K. Koskei sworn on 7th March 2023.
15. He states that the *Climate Change Act* under Section 5 provides that the 2nd respondent is chaired by His Excellency, the President of Kenya with the Deputy President being the vice chairperson.
16. Section 7 provides that the membership of the Council constitutes of persons, not more than 9 who will be appointed by the President.
17. He deponed that the composition of these persons is that 5 persons are to be selected from the public sector and the other 4 persons are to be selected from the various stakeholders.
18. He swore that the Ministry of Environment, Climate Change, and Forestry in view of this and pursuant to Section 7(2) (f),(g) and (i) of the Act, wrote to the Kenya Private Sector Alliance(KEPSA), the Kenya Climate Change Working Group(KCWWG), the Pan-African Climate Justice Alliance(PACJA) and the Commission for University Education (CUE) requesting that they nominate representatives for the 2nd respondent.
19. He depones that KEPSA nominated Emily Waita who chairs the Environment Water and Natural Resource Sector Board and Dr. John Wandaka who is her Vice. KCWWG and PACJA proposed the 1st interested party who is the Chair of the 2nd interested party. Anne Atek and Charles Mwangi were nominated by PACJA.



20. CUE proposed Prof. George Odera from Technical University of Kenya (also formerly from the University of Nairobi Institute for Climate Change), Dr. Rebecca Karanja from Jomo Kenyatta University of Agriculture and Technology and Daniel Nzengya from St. Paul's University.
21. He states that the *Climate Change Act* does not provide the procedure of selection and nomination of the representative from the marginalized communities. This is unlike the rest. Faced with this lacuna, the Ministry of Environment decided to consult extensively on the possible nominees based on gender and regional balance. This led to the nomination of Umra Omar, the Founder of the Safari Doctors and award-winning environmental champion for Lamu and Ikal Angelei, the Executive Director of Friends of Lake Turkana Trust.
22. He depones that upon consideration of the selected and proposed persons, His Excellency, the President nominated Emily Waita, Dr. George Outa, Umra Omar and John Kioli amongst the others, for parliamentary approval and if successful appointment. It is stated that all the nominees are Kenya citizens with the requisite experience in this field and requirements under Chapter 6 of *the Constitution*.
23. He contends that contrary to the petitioners' allegations, it was not demonstrated whether this information was sought and subsequently denied prior to filing of this suit. Equally, the respondents argue that the petition is premature as the petitioners failed to pay regard to the Parliament's mechanism for approval of the nominees.

Interested Parties Case

24. The interested parties through the 1st interested party filed their replying affidavit sworn 1st March 2024. The affidavit primarily denies the petitioners allegations.
25. He on the onset opposes the petitioners' allegations on his alleged unlawful appointment. He claims that similar petitions had also unsuccessfully tried to foil past appointments in 2016 and 2017.
26. It is asserted that as a result of this suit, the public interest on the right to a clean and healthy environment to the public is being curtailed as the petitioners are preventing him, from taking on his post in the 2nd respondent.
27. He depones that his nomination was approved by the Senate as can be gleaned in the correspondence dated 28th February 2023. This approval had been preceded by His Excellency, the President's nomination of the candidates on 14th February 2023. The matter was thereafter committed to the Departmental Committee on Environment, Forestry and Mining of the National Assembly and the Senate Standing Committee on Land, Environment and Natural Resources for consideration of the suitability of the nominees.
28. He contends that the petitioners failed to disclose this fact when they were seeking the interim orders. It is stated that they misled the Court leading to the suspension of the appointments to the 2nd respondent. The petitioners are also accused of seeking the orders without enjoining the affected parties in this matter, therefore their hands are not clean.
29. He as well claims that the petitioners despite their allegations, failed to demonstrate how the impugned nominees fail to meet the criteria set under the *Climate Change Act*. In his view, his nomination was in line with the Section 7(2)(g) of the *Climate Change Act* making the allegation of violation, unfounded. Additionally, it is noted that this nomination came after the Ministry of Environment Climate Change and Forestry made a call to the 2nd interested party seeking that it nominates a suitable candidate.



30. Moreover, Counsel submitted that the petitioners had failed to exhaust the mechanism during the Parliamentary approval process before institution of this suit.

Petitioners' Submissions

31. The petitioners through Kurauka and Company Advocates filed submissions dated 23rd October 2023 where the issues for discussion were highlighted as: whether the petitioners have locus standi and whether the petition discloses a cause of action, whether indigenous persons are entitled to their views, whether there was sufficient public participation, whether the respondents failed to uphold the rule of law and protect *the Constitution* and whether the petitioners are entitled to the reliefs sought.
32. On the first issue, Counsel relying in Article 258 of *the Constitution* submitted that petitioners had the requisite locus standi to institute this suit. This is because the suit revolves around upholding of the rule of law and *the Constitution* since the 2nd respondent allegedly failed to adhere to due process in the nomination process.
33. Reliance was placed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR where it was held that:

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

34. On the second issue, Counsel submitted that although *the Constitution* does not define who marginalized groups are, Article 260 categorizes them into four groups. Counsel contended that there is a difference between marginalized groups (one disadvantaged by the discriminative operation of law) and a marginalized community (one deprived of the national and economic resources because of its status) such as the petitioners. In Counsel's view the 2nd petitioner being such an indigenous body ought to have been entitled to participate and issue its comments regarding the appointment under Section 7(2)(h) of the *Climate Change Act*.
35. To buttress this point reliance was placed in *Rangal Iemeiguran & Others vs. Attorney General & Others* (2006) eKLR where the Court affirmed the existence of indigenous peoples in Kenya and held that:

“They have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. The High Court further observed that Representation is a clear constitutional recognition of a positive right of the minority.”

36. Comparable reliance was placed in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya*. 276/2003 and Articles 1, 8, 10, 26, 28, 42, 43 and 46 of the United Nations Declaration on the Rights of Indigenous Peoples.



37. Moving on to the third issue, Counsel submitted that public participation was not conducted. This is evident from the facts of the case as the petitioners who are key stakeholders were not consulted before the nominees were selected and considered. Reliance was placed in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (2018) eKLR where it was held that:

“The more discrete and identifiable the potentially affected section of the population and the more intense the possible effect on their interested, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.”

38. Like dependence was placed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR.

39. In the fourth issue, Counsel was certain that the respondents who are obliged to uphold the rule of law and *the Constitution* had failed to do so in carrying out the nomination and appointment of the impugned persons to the 2nd respondent. Consequently, the respondents are accused of violating Articles 1 (1), 2(1)(2)(4), 3(1),4(2),10(2), 19(3) (c), 21(1), 22(2) ,24, 48 and 50(1) of *the Constitution*. To this end, Counsel submitted that the petitioners were entitled to the relief sought.

Respondents' Submissions

40. On 15th January 2024, the 2nd respondent's Chief State Counsel, Emmanuel Bitta filed submissions for the respondents.

41. The 1st Respondent restated the provisions of Section 7 of the *Climate Change Act* on the composition of the National Climate Change Council as follows: the Cabinet Secretary responsible for Environment and Climate Change Affairs, the National Treasury, Economic Planning, Energy, the Chairperson of the Council of Governors, a representative of the private sector nominated by body representing the largest number of institutions in the private sector, a representative of the civil society nominated by the most representative registered national umbrella association of civil societies working on climate change, a representative of the marginalized community within the meaning of Article 260 of *the constitution* who has knowledge and experience in relating to indigenous knowledge and a representative of the academia nominated by the Commission for University Education.

42. Mr. Bita argued that once these persons are selected, their names are submitted to Parliament for approval. According to Counsel, the most important thing is to establish whether the nominated persons and bodies nominating them meet the criteria provided for under the Act.

43. It was submitted on behalf of the 2nd Respondent that the petition goes against policy considerations on the exercise of judicial jurisdiction which render the petition bad in law. This is because the nomination process had been tabled before Parliament when the instant suit was filed.

44. It is stressed that Parliament is mandated under Section 3 of the Public Appointments (Parliamentary Approvals) Act to approve or reject nominations as guided by the Act hence the petition is premature and offensive to the doctrine of separation of powers as concerns an incomplete Parliamentary process. In view of this, Counsel submitted that this Court ought to decline exercise of its jurisdiction over this matter.



45. Reliance was placed in *Coalition for Reform of Democracy (CRD) and 2 others vs Republic of Kenya & another* HCCCPC 628 of 2004 (2015) eKLR where the Supreme Court held that:

“In order for a claim to be justiciable as an article III matter, it must “present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.” In part, the extent to which there is a ‘real and substantial controversy is determined under the doctrine of standing’ by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself - an aspect of ‘the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of ‘ripeness’ which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of ‘mootness’ which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the ‘political question’ doctrine, barring decision of certain disputes best suited to resolution by other governmental actors.”

46. Like dependence was placed in *Wanjiru Gikonyo & 2 others vs National Assembly of Kenya & 4 others* (2016) eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
47. On the other hand, Counsel submitted that this matter lacks merit. Counsel argued that as was demonstrated in Felix Koskei’s affidavit, the impugned nominations were carried out in line with the procedure set out under Section 7(2)(f), (g), (i) of the *Climate Change Act*. In light of the marginalized community, there being a lacuna in law, the candidates were considered on a gender and regional balance basis. Considering the process undertaken, Counsel submitted that the process of nomination and the composition of the 2nd respondent are constitutional.

Interested Parties Submissions

48. The interested parties through James Oketch and Company Advocates filed submissions dated 22nd October 2024 where the issues for discussion were discussed as: whether the amendment to Section 7(2)(g) of the *Climate Change Act* may be applied retrospectively; whether the amendment to the *Climate Change Act* has rendered the petition moot and whether there was public participation in the nomination process 1st interested party.
49. It is submitted that Section 7(2)(g) of the *Climate Change Act* which provided that ‘a representative of the Civil Society nominated by the most representative registered national umbrella association of civil societies working on climate change’ was amended by deleting the words ‘nominated by the most representative registered national umbrella association of civil societies working on climate change’ appearing in paragraph (g). As such the amended Section provides that:

(2) The Council shall be constituted as follows:

...



(g) a representative of the civil society.

50. Counsel submitted that the law in this regard cannot be applied retrospectively as there is no such provision permitting such application in the Climate Change (Amendment) Act, 2023. Additionally, with regard to the [Climate Change Act](#) Counsel submitted that the makers did not intend for the said statute to be applied retrospectively as the statute was created in line with Article 42 of [the Constitution](#) of Kenya whereby the purpose was to ensure that the environment is protected for the benefit of the present and future generations.
51. Reliance was placed in Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 Others, [2012] eKLR where the Supreme Court held that:
- “As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature.”
52. Like dependence was placed in Commissioner of Income Tax v Pan African Paper Mills (E.A) Limited (2018) eKLR cited Municipality of Mombasa vs Nyali Limited [1963] EA 374, Daniel Shumari Njiroine v Naliaka Maroro [2014] eKLR, JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR), Nairobi Court of Appeal Civil Appeal No. 87 of 2018 Cooperative Bank of Kenya Limited v Yator [2021] KECA 95 (KLR), Lategan and Another v Director of Public Prosecutions, Western Cape and Another (314/2022) [2024] ZASCA 74 and United Kingdom’s Library House of Commons Article, Standard Note SN/PC/06454 by Oonagh Gay on Retrospective Legislation.
53. On the second issue, Counsel submitted that the amendment of the above sub-section now includes all civil societies. Counsel noted that prior to the amendment, the umbrella association which was the 2nd interested party, was tasked with identifying and nominating the appropriate individual for the position in the 2nd respondent. Counsel contended that in compliance with the law and Constitution, the 1st interested party was nominated under this category. This nomination was later on affirmed by the vetting exercise that took place before the Parliament as provided under the [Public Appointments \(Parliamentary Approval\) Act](#). In light of this, Counsel submitted that the petition had become moot.
54. On public participation, Counsel relied in Peter Makau Musyoka and Award of Mining Concessionary Rights to Mui Coal Basin Deposits [2015] eKLR where it was held that:
- “97. 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:
- 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.



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.”

55. Counsel submitted that the 2nd interested party had consulted with all its members prior to the nomination of the 1st interested party as its nominee. Counsel noted that this can be seen in the annexure marked ‘JK2’ in the interested party’s replying affidavit.
56. Counsel on the other hand submitted that the *Climate Change Act* does not provide any provision regarding public participation at the level of nomination of individuals for the membership positions in the 2nd respondent. According to Counsel this was a matter that was left to the nominating bodies under the various categories.
57. Counsel further argued that the public participation exercise is case specific and that the most appropriate means was adopted in the instant matter in line with Section 7(2)(g) of the *Climate Change Act*. That is the representative should be nominated by the relevant umbrella association which was done. To this end, Counsel emphasized that the 1st interested party’s nomination was lawfully done and thus the petition ought to be dismissed.

Analysis and Determination

58. It is my considered view that the issues that arise for determination in this matter are as follows:
 - i. Whether the petition offends the doctrine of ripeness and the doctrine of separation of powers.
 - ii. Whether the nomination and appointment of Emily Mwende Waita, the John Kioli, Umar Omar and Dr. George Odera Outa to the 2nd respondent complied with the constitutional principle of public participation and the applicable law .
 - iii. Whether the petitioners are entitled to the reliefs sought.

Whether the petition offends the doctrine of ripeness and the doctrine of separation of powers

59. The respondents argued that Parliament is mandated under Section 3 of the Public Appointments (Parliamentary Approvals) Act to approve or reject nominations as guided by the Act. They thus maintained that the petition offends the doctrine of separation of powers and also it was filed prematurely prior to completion of the vetting process by parliament hence offends the doctrine of ripeness.
60. This Court’s jurisdiction to entertain constitutional matters is as spelt out under Article 165(3) (d) (i) and (ii) of *the Constitution* as follows:
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;



- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

61. In opposing the Petition therefore, the Respondents assail it on two fronts that is, the doctrine of separation of powers and on the basis of doctrine of ripeness as the vetting process had not been completed.

62. The South Africa’s Constitutional Court discussing the relationship between arms of government stated as follows in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11:

“Courts have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of *the Constitution*.”

63. On the other hand, the doctrine of ripeness is invoked to prevent or deflect parties from seeking judicial resolution of disputes that have not sufficiently taken shape as to found a cause of action. The Supreme Court in *Attorney-General & 2 others v Ndii & 79 others*; *Prof. Rosalind Dixon & 7 others* [2022] KESC 8 (KLR) explained the essence of the doctrine as follows:

“61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.

63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized.”

64. In the same matter, it was later observed that:

“325. Justiciability was the quality or state of being appropriate or suitable for adjudication by a court. For a matter to be justiciable, it had to be ripe for it to be properly before the court. Ripeness was the state that a dispute had reached, but had not passed, when facts had developed sufficiently to permit an intelligent and useful decision to be made.”

65. To the extent that the Court must resist the temptation to meddle with the Parliamentary processes, I agree with respondents’ submissions, but it is also important to remember that the Court as the guardian of *the Constitution* has a cardinal constitutional duty to ensure that the processes undertaken pursuant to constitutional or legal obligations comply with the constitutional principles.

66. In the instant case, the petitioners assail the constitutionality of the respondents’ process in coming up with the nominees to the 2nd respondent. The Petitioner pointed out that the process was flawed because the respondents did not undertake public participation as required Article 10(2) (a) of *the*



Constitution. This is a threat to the Constitution hence is within the competence of this court to hear and determine.

67. The submission that the Petition is premature is thus legally unsustainable. This Court has jurisdiction to intervene where violation constitutional principles in undertaking a process has been demonstrated.

Whether the nomination and appointment of Emily Mwende Waita, John Kioli, Umar Omar and Dr. George Odera Outa to the 2nd respondent complied with the constitutional principle of public participation and the applicable law

68. Public participation is the process by which members of the public are provided the opportunity to make their contributions in matters of interest to them before decisions that have a bearing on the public are taken. This is a direct or primary exercise of sovereignty which the Constitution has reserved to ensure the people directly participate in governance of their affairs.

69. The Petitioners complained that the respondents failed to adhere to the public participation principle in nominating Emily Mwende Waita, Umar Omar and Dr. George Odera Outa and John Kioli, to be members of the 2nd respondent. They argued that there was no consultation that occurred among civil societies or the marginalized communities. They said the process was shrouded in secrecy as there was no public's and stakeholder's participation in that nomination process. They contended that this violated international legal standards that requires public's participation in environmental matters.

70. In opposition, the respondents maintained that they followed the procedure set out under Section 7 of the Climate Change Act in selecting the nominees.

71. That the only challenge highlighted was that the Act does not provide a clear procedure how to select the candidate for the marginalized community.

72. Article 10 of the Constitution provide for public participation as follows:

Article 10:

(2) The national values and principles of governance include –

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

73. The Court of Appeal underscored the fundamental role of public participation in Legal Advice Centre & 2 others (supra) as follows::

“The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.”

74. Equally in Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] KEHC 7642 (KLR) the Court held that:

“ 50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say.



It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that 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.”

75. The three-judge bench in *Institute of Social Accountability & another v National Assembly & 4 others* [2015] KEHC 6975 (KLR) underscored as follows:

“76. How public participation is given effect will vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para. 630, Sachs J., noted that;

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....

77. The issue as to whether there was public participation is not merely a matter of form but one of substance. The court must look at the process to determine whether it meets constitutional muster. In *Law Society of Kenya v Attorney General Nairobi* Petition No. 318 of 2012 [2013]eKLR the court observed that,

(51) In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute...”

76. The Supreme Court in *British American Tobacco Kenya, PLC formerly British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR) issued the key guidelines as follows:

“Guiding Principles for 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.”

77. The *Climate Change Act* (some of the provisions have since been amended) provides for composition of the Council under Section 7 as follows:

Members of the Council

- a. The Council shall comprise not more than nine members who shall be appointed by the President.
- b. The Council shall be constituted as follows—
 - i. the Cabinet Secretary responsible for environment and climate change affairs;
 - ii. the Cabinet Secretary responsible for the National Treasury;



- iii. deleted by [Act No. 9 of 2023](#), S. 5;
 - iv. the Cabinet Secretary responsible for energy;
 - v. the Chairperson of the Council of Governors;
 - vi. a representative of the private sector;
 - vii. a representative of the civil society;
- (ga) a representative of the youth;
- (h) a representative of the marginalised community within the meaning of Article 260 of [the Constitution](#) who has knowledge and experience in matters relating to indigenous knowledge; and
- (i) a representative of the academia.
- (3) A person shall be appointed under subsection (2)(f), (g), (h) and (i), if the person has expertise and experience in matters of climate change, economy, finance, law, environment and public administration.
- (4) The names of persons nominated for appointment under subsection (2)(f), (g), (h) and (i) shall be submitted to Parliament for approval.
- (5) Except for members appointed under subsection (2)(a), (b), (c), (d) and (e) each person shall be qualified for appointment as member of the Council if such person—
- i. is a citizen of Kenya;
 - ii. fulfils the requirements of Chapter 6 of [the Constitution](#); and
 - iii. has at least ten years' experience in the relevant field.
- (6) The President shall in the appointment of members ensure compliance with the two thirds gender principle.
78. Further, Section [24](#) of the [Climate Change Act](#) emphasizes public participation and public awareness in the implementation of the Act. Section 24- Public Participation
1. Public entities at each level of government shall, at all times when developing strategies, laws and policies relating to climate change, undertake public awareness and conduct public consultations.
 2. Public consultations shall be undertaken in a manner that ensures the public contribution makes an impact on the threshold of decision making.
 3. ...
 - (4) The Council and the Directorate shall publish and publicize all important information within their mandate.
79. As is manifest from the foregoing, [the Constitution](#) places a lot of emphasis on involvement of the public in any affairs affect the public that is why it forms part of the national values and principles of governance as envisaged under Article 10 of [the Constitution](#) any which [the Constitution](#) declares binds every State organ, State officer or Public Officer when making any policy decisions or discharging any mandate under the law or [the Constitution](#). A decision that affects the public cannot thus pass the



constitutional muster unless the public is involved and given a reasonable opportunity to participate in the process.

80. A review of the material on record shows that the respondents in compliance with Section 7(2) (g) of the *Climate Change Act* wrote to the 1st interested party allegedly because it is the national umbrella association of civil societies and PACJA being a continental organization to nominate a representative for the 2nd respondent. (it is important to highlight that the petition was filed prior to the amendment of this provision).
81. Initially it provided as follows:
- ‘a representative of the Civil Society nominated by the most representative registered national umbrella association of civil societies working on climate change.’
82. Following this, the 1st interested party on 25th October 2022 through its National Steering Committee convened a meeting to discuss who should be nominated to the 2nd respondent.
83. With reference to a representative for the marginalized communities under Section 7 (h) of the Act, the respondents argued that there is no procedure in the Act for making a selection hence it selected the nominees suo moto, based on the consideration of gender and regional balance.
84. It is my considered opinion there was apparent disregard for public participation in this matter.
85. Firstly, it is not disclosed which criteria the respondent used in concluding that the 1st interested party was the most representative national umbrella association of civil societies which opens room for arbitrariness.
86. Secondly, the criteria for the selection process of the nominee to represent the civil societies was evidently not widely consultative and participatory even within that organization itself. The Minutes of the meeting only show that that the process was conducted by the 1st interested party’s steering committee only.
87. Further after the names were identified, the respondents did not invite the public or the relevant stakeholders to submit memoranda and views with regard to the suitability of the persons recommended for nomination and appointment.
88. With regard to the marginalized groups, the Act under Section 7(h) provides for this as ‘a representative of the marginalised community within the meaning of Article 260 of *the Constitution* who has knowledge and experience in matters relating to indigenous knowledge’. *The Constitution* under Article 260 of *the Constitution* defines a marginalized community as follows:

“marginalised community” means--

- (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or



- (d) pastoral persons and communities, whether they are--
 - (i) nomadic; or
 - (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;

89. No criteria that guarantees fairness and merit-based identification of the representative of the marginalized communities was disclosed or shown to have been used by the respondent.

90. The exercise was carried out without any involvement of the public whatsoever.

91. In view of the foregoing, this Court finds that the public participation principle under Article 10 of *the Constitution* which is further reinforced by Section 24 of the *Climate Change Act*, Cap 387 A was overlooked by the 1st Respondent in carrying out this nomination process.

92. I find that the nominations were thus unlawful, unconstitutional, null and void.

93. The Court grants the following reliefs:

- a. A declaration is hereby issued that the nomination process of Ms. Emily Mwende Waita, Mr. John Kioli, Ms. Umar Omar and Dr. George Odera Outa to be members of the National Climate Change Council, did not comply principle of public participation as required under Article 10 (2) (a) of *the constitution* and Section 24 of *Climate Change Act*, Cap 387A.
- b. An order is hereby issued quashing the nomination and/or the appointment of Ms. Emily Mwende Waita, Dr. George Odera Outa, Mr. John Kioli, and Umar Omar to be members of the National Climate Change Council.
- c. A permanent injunction is hereby issued directing the 2nd Respondent to desist or refrain from accepting, allowing or permitting Ms. Emily Mwende Waita, Mr. John Kioli, Ms. Umar Omar and Dr. George Odera Outa from assuming or holding office as members of the National Climate Change Council.
- d. An order is hereby issued directing that the process of nominating and/or making appointments of the membership to the National Climate Change Council be undertaken within 90 days from the date of this order in strict compliance with Article 10 (2) (a) of *the Constitution* and all the relevant provisions of the *Climate Change Act*, 2016, in particular, comply with the principle of public participation, transparency, merit and competitiveness.
- e) The Court makes no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MAY, 2025.

.....

L N MUGAMBI

JUDGE

