



Omariba (Acting for and in Public Interest) v CS, Ministry of Environment and Forestry & 6 others (Environment and Land Petition E007 of 2022) [2025] KEELC 8391 (KLR) (12 November 2025) (Judgment)

Neutral citation: [2025] KEELC 8391 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND PETITION E007 OF 2022

JM KAMAU, J

NOVEMBER 12, 2025

IN THE MATTER OF THE PREAMBLE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 22 (1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 42, 43(D), 69(A), (D), (G) AND (2), AND 70 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES, 2013.

BETWEEN

WILFRED MOSETI OMARIBA (ACTING FOR AND IN PUBLIC INTEREST) PETITIONER

AND

**CS, MINISTRY OF ENVIRONMENT AND FORESTRY 1ST RESPONDENT
DIRECTOR, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND RESPONDENT**

**CS, MINISTRY OF WATER SANITATION & IRRIGATION . 3RD RESPONDENT
ATTORNEY GENENERAL 4TH RESPONDENT**

THE KENYA NATIONAL LAND COMMISSION 5TH RESPONDENT



KENYA FOREST SERVICE 6TH RESPONDENT

KENYA FOREST RESEARCH INSTITUTE. 7TH RESPONDENT

JUDGMENT

1. This is a Constitutional Petition instituted by Wilfred Moseti Omariba against the Cabinet Secretary, Ministry of Environment and Forestry, Director, National Environment Management Authority, Cabinet Secretary, Ministry of Water Sanitation & Irrigation, The Honourable Attorney General, The Kenya National Land Commission, Kenya Forest Service and Kenya Forest Research for what the Petitioner called their failure to plan, control and regulate the cultivation of eucalyptus trees in the country for the simple reason that the trees are a serious threat to the environment as the Petitioner puts it, the 1st Respondent was sued for its dismal failure to regulate, control and properly supervise the cultivation of eucalyptus trees in the country despite being fully aware of the massive damage the trees have caused to the environment.
2. The 2nd Respondent, an authority created by the 1st Respondent to oversee implementation and supervision of policies and regulations put in place by the 1st Respondent to protect the environment. It is the 1st Respondent's implementation agency and is partly to blame for its failure to implement the 1st Respondent's existing policies on environmental issues.
3. The 3rd Respondent is in charge of managing the country's water resources. It is supposed to control and regulate activities or developments that may have adverse effects on water resources. The 3rd Respondent was sued for watching as Kenyans plant eucalyptus trees on, along or around the country's water sources thereby depleting the water resource.
4. The 4th Respondent is the Honourable Attorney General and the Government of Kenya's Chief Legal Advisor. Like the 1st, 2nd and 3rd Respondents, the 4th Respondent was sued for equally failing to advise the other Respondents on matters protection of the environment and in particular legal issues relating to the effects of eucalyptus trees on the environment.
5. The 5th Respondent is a constitutional commission charged with the administration of public land on behalf of national and county Governments. Wetlands are public lands and hence fall within the province of the 5th Respondent. She is blamed for having failed to protect wetlands by;
 1. not putting in place permanent beacons to separate wetlands from private lands, just like what Kenya Highways Authority has done to road reserves.
 2. not ensuring that there are no human settlements on wetlands, and
 3. not controlling human activities that endanger the environment.
6. The 6th Respondent is a creature of the Kenya Forest Conservation Act, 2016 to protect forest boundaries and any action that may put rare, threatened and endangered species at risk. The Act creates Kenya Forest Service (KFS) to, among other functions, manage water catchment areas in relation to soil and water conservation in collaboration with relevant stakeholders.
7. The 7th Respondent is created under the *Science, Technology and Innovation Act* to carry out research on matters forestry, biodiversity and environmental management for and on behalf of the Government of Kenya. It is supposed to have advised the Government on the effects of eucalyptus trees on the



environment. The Petitioner claims that like the rest of the Respondents, the 7th Respondent has failed to do its work and if it has done, it is sleeping on such a Report, if any.

8. The Petitioner prays for Judgment against the Respondents jointly and severally as follows: -:
- A. A Declaration that the Petitioner's fundamental right to a clean and healthy environment as envisaged in Article 42 of the Constitution of Kenya has been violated.
 - B. A Declaration that a right to a clean and healthy environment is a fundamental attribute of the people and that aggression to the environment occasioned by unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees in Kenya amounts to a breach of this right, which this honorable court is empowered to address and provide remedy.
 - C. A Declaration that unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees in Kenya amounts to a breach of the Petitioner's right to sustainable development as envisaged and set out in the Environmental Management and Coordination Act, 1999.
 - D. A Declaration that unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees, illegal human settlement and human activities in the country's wetlands amounts to a breach of the Petitioner's right to sustainable development as envisaged and set out in the Constitution of Kenya, 2010 and the Environmental Management and Coordination Act, 1999.
 - E. A Declaration that the Petitioner's right to life as set out in Article 26 of the Constitution of Kenya, 2010 is being threatened by the Respondents' failure not only to control, plan and supervise the cultivation of eucalyptus but also to control human activities in the country's wetlands, and that same warrants an urgent intervention by this honorable court.
 - F. A Declaration that the unplanned, uncontrolled and unsupervised cultivation of eucalyptus and trees with similar characteristics have caused and continue to cause more harm than good to the environment and that their harmful effects and damage far surpasses any reasonable and beneficial use the trees are being put to and hence, their cultivation should be planned, controlled and supervised by the Respondents.
 - G. A Declaration that uncontrolled, unregulated and unsupervised cultivation of eucalyptus trees in Kenya has adversely affected both the surface and in particular the ground water table, and the net effect is that other tree species, weeds and food crops near those trees do not get enough water, nutrients and moisture to thrive on.
 - H. A Declaration that unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees in Kenya has led to depletion of soil nutrients thus denying other tree species and food crops the much-needed nutrients, thus adversely affecting the country's food security;
 - I. A Declaration that unless immediate steps are taken to supervise, control and plan on not only the cultivation of eucalyptus trees in the country's wetlands but also removal of farmers who have settled on the wetlands and ban of any human activist thereon, it would compromise the existence of future generations' ability to meet their own needs, in particular water and food;
 - J. An order do issue directing the Respondents to, as a matter of utmost urgency, enact appropriate policies and laws on the control and supervision of cultivation of eucalyptus and any other trees of similar characteristics, and provide that:
 - i. Cultivation of eucalyptus trees and any other trees of similar characteristics be subjected to Environmental Impact Assessment (EIA), just like any other development project;



- ii. Eucalyptus trees and other trees of similar characteristics be planted not less than 500 metres away from any water source, swamp or marshland, whether permanent or seasonal; and
 - iii. Eucalyptus trees and any other trees of similar characteristics be planted not less than 20 metres away from any common/shared boundaries.
- K. An order do issue directing the Respondents to collectively supervise and ensure that all eucalyptus trees growing and standing within a distance of 500 metres from any water source, swamp and/or marshland, whether permanent or seasonal and 20 metres from any common/shared boundaries be uprooted within 12 months of the date of the honorable court's orders or within any such period the honorable court may deem reasonable.
- L. A Declaration that unless immediate steps are taken to stop all human activities on the country's wetlands, future generations would suffer irreparably.
- M. In the alternative, and without prejudice to prayers I.(i), (ii), (iii) above, and for the avoidance of doubt, an order do issue directing the Respondents to, within 30 days of the court's orders or any other period the honorable Court may deem reasonable, or any constitute a committee of environmental and social experts at the Respondents' own cost and on terms and references to be set out by this honorable court, inter alia:
- a. To provide scientific advice on appropriate distance within which eucalyptus trees should be planted from existing water sources i.e. swamps, marshlands, rivers, springs and streams or any other water point, whether permanent or seasonal;
 - b. To provide scientific advice on appropriate distance within which eucalyptus trees should be grown from any common/shared boundaries;
 - c. To provide scientific advice on the best, fast and appropriate methods of uprooting eucalyptus trees growing within the distances recommended in I. (ii) and) above;
 - d. Advice or give a scientific recommendation on the period within which farmers should be allowed to uproot all eucalyptus trees growing within the distances recommended in I. (ii) and (iii) above;
 - e. Provide Scientific advice and recommendations on restoration of any lands that might have been degraded by the unplanned cultivation of eucalyptus trees or any other tree or crop, and recommend environmental friendly trees to replace eucalyptus and trees with similar characteristics, if any;
 - f. Advice on the availability of seedlings for appropriate/suitable trees recommended in K(v) above and how they can be accessed by farmers who may be affected by the court's orders.
 - g. To provide scientific advice on any other tree(s) that may have characteristics similar to those of eucalyptus trees and whose cultivation needs to be planned, controlled and supervised, just like eucalyptus.
 - h. To advice on how best the services of Kenya Forest Service Rangers and Chiefs can be incorporated and utilized for purposes of protecting the country's wetlands. In the alternative, and without prejudice to the foregoing, provide alternatives on how best and who should protect the country's wetlands, small or big.



- i. To advice on how and when persons who are already settled on wetlands should vacate.
 - j. To advice on the period within which persons already carrying out human/economic activities on wetlands should stop such activities.
- N. An order do issue directing the Respondents to jointly and severally avail seedlings referred to in paragraph K(v) above free or at minimal cost to all farmers who may be affected by the honorable court's orders.
- O. An order do issue directing the Respondents to work with other Government agencies and ensure that Kenyans who have occupied and are carrying economic activities on wetlands are physically removed.
- P. Orders do issue directing the Respondents to ensure that any other trees, crops or otherwise artificially planted and growing on wetlands are uprooted.
- Q. An order do issue directing the Respondents to liaise with other relevant ministries and cause amendment to the Forest and the Chief's Acts in order to empower the Kenya Forest Service Rangers (KFSR) and all Chiefs in the country to legally participate in the protection of wetlands, just like they do to forests. In the alternative, and without prejudice to the foregoing, an order do issue directing the Respondents to come up with ways of ensuring that all wetlands located in all parts of the country are properly protected.
- R. An order do issue directing the Respondents to ensure that upon amendment of the Kenya Forest Conservation and Management Act, and the Chief's Act, all officers affected are properly trained on matters protection of the environment.
- S. An order do issue directing the Respondents to ensure that the committee referred to in paragraph (K) above completes its task and files its Report in court within 6 months of the date of appointment or within such other period the honorable court may deem reasonable.
- T. No orders as to costs, this being a public interest litigation.
9. To support the Petition, the Petitioner says that some few years ago, the Government evicted people then occupying the Mau Forest and appealed to Kenyans to donate tree seedlings to replace those felled. International Centre for Research in Agroforestry (ICRAF) advised the Government not to receive and not to plant eucalyptus seedlings because of its adverse effects on the environment. Kenyans expected the 7th Respondent to comment on the matter but she kept mum. It is not clear whether or not ICRAF's advice to the Government was affirmed.
10. Just like the rest of the Respondents, the Petitioner urges that the 5th, 6th and 7th Respondents are equally to blame for the reduced water level, in the country's rivers and they shall jointly be held liable.

The Petition.

11. The Petitioner seeks to demonstrate the adverse environmental effects the unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees have brought about in the country. He draws examples from Nyamira and Kisii Counties as representatives of the hazard in the country. All food basket counties in Kenya are facing the same problem and if nothing is done and done urgently, the affected counties are not likely to have water, surface or ground by the year 2082 or thereabout, the Petitioner predicts.
12. Residents of Nyamira and Kisii counties, for example, are suffering silently due to unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees. The trees have been planted on



wetlands i.e. marshlands, swamps, water catchment areas, along rivers and streams, around springs and in all permanent or seasonal water points. Cultivation of these ‘water thirsty’ trees has been going on for the last 40 years or so under the watchful eyes and knowledge of the Respondents.

13. The end result of the unplanned cultivation of eucalyptus trees is reduced volume of waters in our rivers, streams and springs, disappearance of swamps and marshlands and above all, causes communal disputes and conflicts. Unfortunately, the disputes emanating from eucalyptus farming are unique and the country’s current laws have no provisions for resolution.
14. Under the Constitution of Kenya, 2010 and the municipal laws, urges the Petitioner, it is the responsibility of the Respondents to protect the environment and to ensure that our wetlands, all water sources, soils and indigenous trees are preserved and properly protected for the benefit of the present and future generations.
15. Despite the huge constitutional and legal responsibilities bestowed upon the Respondents, our rivers, springs, swamps, marshlands as well as seasonal water points have either dried up or their water volumes drastically reduced due to the unsupervised cultivation of eucalyptus trees, and the Petitioner blames the Respondents for the unfortunate happenings.
16. To illustrate how serious the situation is, the Petitioner uses river Kuja as an example and says that during heavy rains in those good days, it used to roar, and this roaring could be heard some 15-20 kms away. Today, the river barely makes a sound, however much it rains.
17. And in the months of March through June each year in those days, it used to rain heavily in Kisii and Nyamira Counties as a result of which so many people used to drown in the river. It used to be ‘harvest’ period for the river. It no longer does it, thanks to reduced volume of water resulting from the unplanned, unsupervised and uncontrolled cultivation of eucalyptus trees along its banks.
18. In the early eighties the volume of waters of river Kuja and its tributaries started reducing. Today, the river’s water has reduced so much such that it now exposes the rocks that used to be buried deep in its belly. However much it rains, nowadays people walk on the river bed of river Kuja with ease.
19. Eucalyptus love water. Those planted near water points grow faster and may reach a height of 120 feet compared to those grown far away from water points.
20. For the first time in the history of Nyamira and Kisii Counties, people, including the county Governments have started drilling boreholes ‘chasing’ the fast disappearing ground water to meet locals’ demand. The question the Respondents are not asking themselves is what will happen when the underground water points finally and completely dry up.
21. The people of Nyamira and Kisii, the Petitioner laments, used to grow enough food for their own use and could even sell some to others outside the county. Today, they buy those foodstuffs from other areas outside the two counties. According to the Petitioner, eucalyptus is to blame for what is happening in the two counties.
22. The Petitioner, a 62-year old, is able to tell what the situation was like on matters environment in the sixties, seventies and early eighties. As a young boy he could swim and fish in the rivers and streams near his home, but ever since local farmers started planting eucalyptus trees along the rivers, on swamps and around springs, the story has completely changed. The water volume in the rivers and streams has greatly reduced. Some springs have dried up while others have become seasonal. There is not a single swamp or marshland in the two counties.
23. In his own estimation, the Petitioner observes that if nothing is done and done urgently to control the unplanned cultivation of eucalyptus trees in the country, then in another 50-60 years, by 2082 to be



exact, many rivers, streams and springs will be no more. If this happens, the next generation is likely to pay heavily for the present generation's sins of omission and commission. Thus, this Petition is meant to avert this scenario.

24. Historically, the Eucalyptus tree commonly known as blue gums in Kenya was introduced in the country in 1902 by the Europeans to provide firewood for the Kenya-Uganda Railway. Currently, Eucalyptus trees are grown in almost every homestead in all food basket counties of this country.
25. Today, Kenyans love cultivating eucalyptus for firewood, timber, plywood, electricity transmission poles, fencing posts etc. They are preferred because of their fast maturity, especially when planted near water sources. Their water intake is extremely high. Plant them on a swamp and within three years the swamp will be no more.
26. Unknown to many Kenyans, eucalyptus trees have adverse environmental effects leading to scarcity of water and food. Additionally, the tree has brought about new disputes which never existed. For example, as the Petitioner pens this Petition, a good number of Kenyans who own and live on small parcels of land hardly access sunlight and cannot even plant vegetables because of the tree. If the trees happen to be near homesteads, the owners of those homesteads hardly access sunlight 8 hours a day because of the shade the trees create. Sunlight is a natural resource meant to be enjoyed by all human beings, animals and plants. Specifically, in Nyamira and Kisii counties, most residents because of small land holdings hardly enjoy sunlight 8 hours a day as they ought to.
27. The Respondents are yet to come up with clear guidelines and policies on how, when and where eucalyptus trees should be grown and where not. The present generation may somehow survive the pain brought about by the unplanned cultivation of eucalyptus trees but if nothing is done and done urgently and as the Petitioner observes, if like the Respondents, this court looks the other way, then the next generation, the generation that comes after 2082, may not survive.
28. The Petitioner therefore files this Petition for and on behalf of the generation of 2082 who are likely to bear the blunt of the adverse effects expected from the unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees.
29. The Petitioner says he has brought this Petition from a point of knowledge having been a eucalyptus farmer for the last 30 years or so. The Petition also seeks to protect vulnerable Kenyans from the adverse effects of unregulated and uncontrolled cultivation of eucalyptus trees along or close to common/shared boundaries.
30. Wetlands in densely populated counties of Nyamira, Kisii, Homa Bay, Migori, Kisumu, Siaya, Kakamega, Vihiga, Busia, Bungoma, Kericho, Bomet, Nakuru, Uasin Gishu, Kiambu, Nyeri, Embu, Kirinyaga etc. are threatened with extinction as a result of the unplanned cultivation of eucalyptus trees. If wetlands become extinct and if Kenyans in the abovenamed counties continue with the cultivation of eucalyptus trees without controls, regulation or supervision, 99.9% chances are that the counties are likely to turn into deserts by the end of 60 years from today, the Petitioner observes and predicts.
31. Mr. Omariba advises that wetlands provide critical habitats for a wide range of flora and fauna and whether big or small they are a critical part of our natural environment because they reduce the impact of floods, absorb pollutants and improve water quality downstream. The Petitioner is aware that it is the responsibility of the Respondents to protect wetlands. He is also aware that there are a number of laws and policies Kenyans put in place to guide and aid the Respondents in the protection of the environment. However, in the opinion of the Petitioner, the Respondents have failed to do what they are employed to do and it is for this reason the Petitioner has come to court praying that the



Respondents be summoned to explain why they look the other way as the state of the health of the country's environment goes to the dogs.

32. If the Petitioner's concerns are not addressed immediately, chances are that future generations in Kenya's food basket counties will not access that precious commodity called water. Unplanned cultivation of eucalyptus is injurious to the environment.
33. Eucalyptus trees grow up to 100 feet in height. The trees have massive roots which go deep into the soils in search of water and nutrients, thus rendering the surrounding soils dry, infertile and incapable of supporting any crops, weeds or any other plant within a radius of approximately 20 metres. Likewise, the rooting system of eucalyptus trees growing near or close to homesteads cause houses to crack resulting in increased communal conflicts between and among neighbours.
34. Another hazard brought by mature eucalyptus trees is due to their massive branches. The branches form huge canopies capable of shading the ground below, thus suppressing undergrowth within a radius of approximately 20 metres, of course depending on the age and size of the tree.
35. Eucalyptus trees also produce and shed lots of leaves throughout the year, which leaves have toxic substances known as allelopathic (i.e. chemical influence of eucalyptus on other plants) which when they fall on the ground they poison the soils and make them incapable of supporting any crop or vegetation within a distance of approximately 20 metres radius. Allelopathic substance found in eucalyptus leaves kills crops, weed and make them stunted.
36. Above all and most important, the Petitioner has firsthand information that Eucalyptus trees cause underground water table move deeper into the ground thus causing serious water shortages and the tree has negative impacts on biodiversity.
37. The sum total of all these is that unsupervised, uncontrolled and unplanned cultivation of eucalyptus trees is a threat to sustainable exploitation, utilization, management and conservation of the environment and natural resources. By all means the Respondents should be ordered to plan for its cultivation. Thus, unplanned cultivation of eucalyptus trees in Nyamira and Kisii counties among others unless checked is one economic activity that has serious adverse environmental consequences.
38. The Petitioner blames and holds the Respondents liable for the injuries/damage and loss that have been brought about by the uncontrolled cultivation of eucalyptus in Kenya and other unplanned human activities and settlement on wetlands.
39. Particulars of blame against the Respondents:
 - a. Allowing the importation into the country, propagation and cultivation of eucalyptus trees when they knew or ought to have known their adverse environmental effects and introducing the tree into the country without proper research and/or analysis on their consequences to the environment;
 - b. Allowing Kenyans to cultivate/grow eucalyptus trees without proper planning, guidelines, supervision and/or control;
 - c. Failure to come up with adequate policy guidelines on the cultivation of eucalyptus trees in Kenya;
 - d. Allowing the cultivation of eucalyptus trees along river banks, around springs, on swamps and marshlands while they know or ought to have known their adverse effects on the soils and underground water;



- e. Knowingly allowing the cultivation of eucalyptus trees on or along common/shared boundaries while knowing their adverse effects on adjacent parcels of land;
- f. Failure to take measures to safeguard water sources and wetlands from the damage caused by eucalyptus trees;
- g. Failure to take measures at policy level to guide farmers on where and how to plant eucalyptus trees so as to protect the country's water sources;
- h. Failure to monitor and regularly check the adverse effects of eucalyptus on the environment;
- i. Allowing famers to cultivate eucalyptus trees without carrying out proper Environmental Impact Assessment;
- j. Keeping quiet over the adverse environmental effects caused by eucalyptus trees, even after it has been clearly demonstrated that eucalyptus trees are dangerous to the environment;
- k. Failure by the Respondents to map out and physically demarcate and put in place permanent beacons to define and separate wetlands as public land as opposed to private land.
- l. Failure by the Respondents to stop human activities, farming, mining or otherwise on wetlands;
- m. Failure by the Respondents to come up with clear rules and regulations on the use and access to wetlands by members of the public to ensure protection of the environment.
- n. Failure by the Respondents to enforce existing rules and regulations, if any, on the use and access to wetlands by the public to ensure protection of the environment.
- o. Allowing Kenyans to settle on wetlands
- p. Failure to properly manage water catchment areas in relation to soils and water.
- q. The Respondents have failed to research, monitor and/or highlight the adverse effects of growing eucalyptus near or close to water sources;
- r. Failure to recognize and/or appreciate the importance of swamps and marshlands, whether small or large, whether permanent or;
- s. The 5th Respondent has since failed to ensure that farmers who have settled on wetlands move out;
- t. The 5th Respondent has since failed to stop human activities on the country's wetlands;

As a result of this statutory failure by the 2nd, 5th and 6th Respondents, the plight of the present and future generations, the Petitioner included, is in danger and shall suffer irreparably. Environmental issues are core to the survival of mankind and hence failure to address them as and when they occur spells disaster. The rate at which our waters and wetlands are disappearing is worrying. Protecting forests without protecting wetlands, in the opinion of the Petitioner amounts to zero work since the two are interrelated.

40. The Petitioner shall seek an order directing that all wetlands in Kenya, large or small be gazetted and protected. Further, that the 6th Respondent mobilizes and is legally empowered to protect wetlands countrywide.



41. The Petitioner warns that the Respondents have breached and continue to breach all regional and international conventions on the environment, and unless this court intervenes, the future of this country on matters environment is bleak.
42. Despite numerous admissions and acknowledgements by the Respondents and/or their agents that unplanned cultivation of eucalyptus trees, illegal human settlements as well as illegal human activities on wetlands in Kenya have had adverse environmental effects in the country, the Petitioner is concerned that the Respondents have refused, declined and/or ignored to address the issues.
43. Unless action is taken and taken quickly, Kenyans living in counties that grow eucalyptus trees are likely to start 'importing' water from neighboring counties or countries by the year 2082.
44. Further, the Respondents' studious silence on the effects of unplanned cultivation of eucalyptus trees, illegal human settlements and illegal human activities in the country's wetlands are detrimental to the present and future generations.
45. Present and future generations have a constitutional right to a balanced and healthful ecology and are entitled to protection by the state in its capacity as *paren patriae* and failure to do so amounts to a violation of their constitutional rights.
46. The Petitioner is of the humble view that this is a suitable Petition for the court to invoke the principle of precautionary approach.

Respondents' Response:

47. Dr. John Millan Otuoma, the 7th Respondent's (i.e. Kenya Forestry Research Institute (KEFRI)) Regional Director (RD) in charge of Lake Victoria Basin Eco-Region Research Programme (LVBERP) – which includes Maseno, Kakamega & Migori sub-centres, a specialist in Plant Ecology and having been authorized by the KEFRI Acting Director/CEO made a written statement to the Court in response to the Petition as hereunder:

He said that he had cumulative experience of 19 years working as a plant ecologist, he holds a Ph.D. in Plant Ecology awarded by Jaramogi Oginga Odinga University of Science & Technology (JOOST) in 2015. He also holds a Master of Science degree in Plant Ecology which he was awarded by the University of Nairobi in 2005 and a Bachelor of Science Degree in Biological Sciences awarded by the University of Nairobi in 1999. He previously worked as the Deputy Regional Director (DRD), Maseno Regional Research Centre from 13th May to 15th October 2020. Dr. Otuoma previously worked as the Assistant Regional Director (ARD), Migori Forestry Research Sub-Centre from 1st October 2015 to 12th May 2019 and that he joined KEFRI as Assistant Research Scientist (ARS) on 10th August 2004 and was deployed to Maseno Regional Research Centre. In his statement he told the Court that Ecology in general is one of the most important disciplines in the realm of environmental science.

48. Dr. Otuoma said it is their role to promote a healthy ecosystem through the proper application of vegetation. He opined that the issues raised in the Petition are matters of serious ecological concern. He observed that a pertinent question that requires answers is, Why is Eucalyptus only a problem in high potential agricultural zones with the highest human population density? The answer to this question, according to Dr. Otuoma, is that farmers/landowners understand land use dynamics and their knowledge has evolved with socio-economic parameters that trigger survival instincts as household land holdings become smaller and smaller. Thus, households end up choosing a single tree species such



as eucalyptus that provides multiple functions (round poles for local roofing at year 3, firewood at year 4, fencing posts at year 5, electricity transmission poles at year 8, and industrial timber and pulp and paper at years 12 to 15) with a view of lifting them out of poverty, as opposed to spreading several tree species on a very small parcel of land. He said that the 7th Respondent (KEFRI) did not allow the importation of Eucalyptus into Kenya nor did it promote its subsequent propagation and cultivation. It is his testimony that Eucalyptus trees were introduced to Kenya in 1902 (during the colonial era). And that by the time KEFRI was established in 1986 under the Science & Technology Act Cap 250 (now repealed), Eucalyptus trees had been grown in Kenya for 84 years. It is therefore reasonable to state that the 7th Respondent (KEFRI) did not participate in the introduction, propagation and cultivation of Eucalyptus trees in Kenya for eight decades. However, given its mandate of forestry research, KEFRI has participated in various aspects of Eucalyptus research since its establishment. He was quick to admit that KEFRI is well cognizant of the controversy surrounding water use by Eucalyptus trees and their impact on surface and ground water resources. This was first flagged, after the Permanent Presidential Commission on Soil Conservation and Afforestation (PPCSCA) discouraged planting of Eucalyptus in wetlands, springs, and stream/river banks in the 1980s. This was compounded in the reduced planting of Eucalyptus in state forests. As a response to this development, KEFRI published a booklet on facts on growing and using Eucalyptus in Kenya in 2010 in order to guide farmers regarding where and how to grow the tree species. The guide discourages landowners from planting Eucalyptus trees in wetlands, springs, and stream/river banks. Given the foregoing, the 7th Respondent (KEFRI) is of the considered opinion that Eucalyptus trees are harmful to wetlands, springs, and stream/river banks and published research studies indicate that water flow in springs and wetlands returns to normal level within 5 to 10 years after clearing Eucalyptus trees. When the Eucalyptus trees are uprooted, they should be replaced by indigenous trees (the farmer's choice). KEFRI has developed guidelines to direct farmers regarding where and how to grow Eucalyptus in Kenya. The guide, is a booklet titled "Facts on Growing and Using Eucalyptus in Kenya, published in 2010". It is therefore erroneous to claim that the 7th Respondent (KEFRI) has allowed Kenyans to grow eucalyptus trees without proper planning, guidelines, supervision and/or control, leading to adverse environmental effects which is likely to cause complete loss of surface and ground water by the year 2082. The Regional Director held that KEFRI's publication on facts about growing and using Eucalyptus in Kenya (2010) indicates that Eucalyptus trees are likely to lead to reduced surface water levels. However, it is worth noting that low water levels in major rivers in Kenya is attributable largely to loss of forest cover in the country's water towers (e.g., the Mau Forest Complex) and climate change, rather than the planting of Eucalyptus trees and whereas it is generally accepted that Eucalyptus trees are likely to affect surface water levels, the Petitioner has not demonstrated the quantities of water lost so far. Moreover, proposing that Eucalyptus trees be planted 500 metres (half a kilometre) from rivers and wetlands appears alarmist and whilst Eucalyptus trees have little effect on water flowing in rivers and streams, hence can be planted 30 metres away without affecting the water level and Eucalyptus trees are more dangerous to standing water e.g., wetlands and swamps, hence should be planted about 30 metres away, provided that there is a significant variation in gradient and natural vegetation in the distance between the edge of the wetland and the Eucalyptus tree. The Director admitted that it is true that Eucalyptus trees have allelopathic effect on other plants, particularly those planted when the Eucalyptus trees are already existing. The recommended distance is 20 to 30 metres away from a mature Eucalyptus tree. It is therefore recommended to grow Eucalyptus trees 20 metres away from other plants/crops. He was of the view that disputes between neighbours sharing common boundaries are a common feature of most tree species and not unique to Eucalyptus trees and that only Eucalyptus trees in environmentally sensitive sites, e.g., wetlands, springs and river banks, should be removed. They can be removed at maturity (12 to 15 years) so long as new ones (Eucalyptus) are not planted.



49. Dr. Otuoma concluded his written statement by urging the Court to consider his advice as a Plant Ecologist to reach a Decision that will be of the greatest benefit to the public and that there should be no order as to costs because this is presented as a public interest Petition. The statement of Dr. Otuoma was also followed by another witness statement of one Philip M. Gichana also on behalf of the 7th Respondent. He is the Corporate Secretary and Legal Officer of the 7th Respondent. This was also adopted as 7th Respondent's further Evidence. He averred that the mandate of the 7th Respondent is set out in Section 22(1) of the Forest Conservation & Management Act No. 34 of 2016. Section 22(1) provides that the 7th Respondent shall be the agency in forestry research and development. In compliance with the aforesaid mandate the 7th Respondent published two (2) publications giving advice on the planting and growing of eucalyptus trees in Kenya. The publications are P.O Oballa, PKA Konuche, M.N Muchiri & B.N Kigomo (2010); 'Facts on Growing and Using Eucalyptus Trees in Kenya' and O. Nyambati P. Oballa (2002); 'Effects of Eucalyptus on Farmlands in Western Kenya'. Mr. Gichana says the 7th Respondent has been diligent in carrying out its mandate and is not in any way responsible for alleged damage or loss by the Petitioner since it is not the mandate of the 7th Respondent to protect the environment as the duty to do so is assigned by statute to a different state agency. He prayed to the court to exonerate the 7th Respondent from alleged failure to advise the Government on growing of eucalyptus in Kenya.

Petitioner's Evidence:

50. In support to his Petition, the Petitioner took to the witness stand and after being sworn, the 63-year-old Advocate of the High Court of Kenya practicing as such in the name and style of Moseti & Associates, and who also doubles as a small-scale farmer in Nyamira County adopted his 2 Affidavits as his evidence in chief. Both Affidavits are a replica of the contents of the Petition. The first one was sworn on 16th December 2022 and filed in court on 30th December 2022 as follows:
51. He depones that the unsupervised cultivation of eucalyptus trees in the country has not only adversely affected the environment but also affected the country's food security. The unsupervised cultivation of eucalyptus trees has also brought about new communal conflicts which never existed and whose solutions are not captured by the country's existing laws. He admits that he is not an expert on matters environment and eucalyptus by training but that he has a long practical experience of close to three decades now on matters to do with cultivation of eucalyptus and he knows how they affect the environment. He urges the court that if nothing is done urgently to arrest the situation, this country is not likely to have water and may not be able to produce its own food by the year 2082. He testifies that he was born in 1962 in Nyamira County and found rivers and springs overflowing with water, fish and other aquatic animals and so were swamps and marshlands. All these are no more. Things started worsening when farmers started cultivating eucalyptus trees along river banks, on swamps and around springs in the late seventies and early eighties. The process of defiling the environment by replacing indigenous trees with eucalyptus has taken us 60 years. With over 60 years' experience, he is able to estimate that in another 60 years from now, the process of defiling the environment with eucalyptus trees is likely to complete its circle by the year 2082. Year in, year out, the Respondents have been pleading with Kenyans to stop cultivating eucalyptus trees along river banks, on swamps and marshlands as if there are no laws in this country that empower them to act and bring the menace to a stop. He did annex to the Affidavit a bundle of copies of newspaper cuttings with stories, some from the Respondents or their agents on the adverse environmental effects caused by uncontrolled cultivation of eucalyptus such as:



- i Mr. Perminus Muchira, who has been cultivating eucalyptus trees in Kirinyaga County for the last 30 years. His experience is that the trees locally known as minyua mae (water drinkers) have high water consumption traits and have led to drying up of wetlands, springs and rivers.

In the same annexure Mr. Elias Mugo from the same County says he used to harvest 35 bags of maize from his parcel of land until he started planting eucalyptus. Nowadays, he hardly harvests 10 bags.

In the same annexure WMO1(a), a Kenya Forestry Institute (KEFRI) Chief researcher, Dr. Robert Nyambati says many Kenyan farmers plant eucalyptus trees at wrong places such as water catchment areas, and along rivers and springs. He says the trees are deep rooted and tap into the soil water. He says eucalyptus trees should not be planted near water catchment areas because they can have devastating effects on the environment.

Further, Dr. Robert Nyambati of KEFRI states that performance of crops planted close to eucalyptus trees will have low yields or no yields at all, reason being that the trees tap all the moisture from the surrounding soils leaving the crops dry and the Petitioner confirms that he experienced the same problem during his 30 years of cultivating eucalyptus.

52. To demonstrate his point, Mr. Omariba says that in 2009 or thereabout, he abandoned tea farming and planted eucalyptus trees on the two Acres. He was happy until something happened which also made him abandon eucalyptus farming 8 years later. On the upper portion of his two-Acre parcel, there used to be a seasonal spring which formed only during heavy rains between March and June each year. The spring is about 1Km away from the main river. He planted eucalyptus trees on the spot where the spring used to form. Three years into planting the eucalyptus, in 2013 to be exact, the seasonal spring failed to show up. In 2014 through 2016, there was no water coming out of the spot. With this incident, he confirmed his long-held fears that eucalyptus trees are but 'water guzzlers.' He had always noticed how soils dried up on sites he had planted the trees but he had no explanation until the seasonal spring disappeared. In 2017, he decided to harvest and uproot all the eucalyptus trees growing on the farm including those that were growing on the spot where the seasonal spring used to form. He wanted to know whether the trees were the cause of disappearance of the seasonal spring. In the course of uprooting the stumps at the spot, he noticed that the roots of those trees were massive and seemed to grow deeper into the soils. The trees he was uprooting were only 8 years old but they were able to make the seasonal spring completely dry up. To his shock, in 2019, two years after uprooting the trees, the seasonal spring bounced back at the very spot it used to be, albeit with little water. This incident left him dumbfounded and he completely changed his perception about eucalyptus trees. Since then he completely abandoned the cultivation of eucalyptus. He depones that this is the reason he is in court, because he did not want to keep this vital information to himself. He summarises this case study by advising:

“..... listening to me, Kenyans must choose between water and eucalyptus. It is a question of survival and if eucalyptus can enable Kenyans survive, so be it...”

53. It is the Petitioner's observation that eucalyptus trees are strong and well spread sideways as well as straight into the ground. This set-up is meant to help the trees extract as much water and nutrients as they could to feed the huge stems and massive branches. The strong roots are also meant to help the trees which grow up to 100 feet in height to withstand the weight. The massive and strong roots of eucalyptus trees aid the trees in the extraction of massive water and nutrients from the soils thus making the surrounding soils dry and spare nothing for other undergrowth. This may explain why no plants, crops or weeds can thrive within a radius of 20 metres from where eucalyptus trees are growing. It may also confirm why the other name for eucalyptus is 'water thirsty tree'. If eucalyptus can turn a swamp



into dry land, what can it not do to springs, permanent or seasonal? This might explain why so many springs in Nyamira and Kisii Counties have dried up or are in the process of drying up. The Petitioner depones that Swamps help clean water for use by people downstream. Ideally, rivers are supposed to flow through some swamp for this to happen. In Nyamira and Kisii Counties, it is no longer possible to find a river flowing through a swamp because eucalyptus trees have cleared all swamps. Not that they were not there. They have been destroyed by eucalyptus trees.

54. There is no law governing the planting of eucalyptus and many Kenyans are suffering silently. The Petitioner also opines that most of the findings in “Effects of Eucalyptus on Farmlands in Western Kenya” are basically ‘similar to those contained in his Petition’.
55. Having cultivated the trees for close to 30 years Mr. Omariba is quick to say that he is not seeking complete ban of eucalyptus cultivation in Kenya because he also knows its good side. Regulation of cultivation of trees is not bad and is not new in this world. In the state of Karnataka in India, the state Government enacted ‘The Karnataka Preservation of Trees Act, 1976.’ The object of the Act was to regulate the felling of trees, planting the right number of trees and above all, to ensure ecological balance. This is exactly what his Petition is seeking. Section 3 of ‘The Karnataka Preservation of Trees Act, 1976.’ establishes a ‘Tree Authority’ and one of the duties of the authority according to Section 7(c) of the Act is to specify standards regarding the number and kind of trees each locality should plant. He is therefore craving for something akin to this in his Petition. In 2014 or thereabout, the Karnataka High Court banned cultivation of eucalyptus trees in the state of Karnataka for being a ‘water guzzler.’ The Petitioner says that he does not have to be an expert on eucalyptus for this court to believe him and that this court should not dismiss this Petition on the ground that the Petitioner has not demonstrated that he is an expert on matters to do with eucalyptus cultivation and the environment. If for any reason, this court is of the opinion that he is not competent enough to bring this Petition, then his humble request could be to give him some benefit of doubt and resort to the principle of precautionary approach in an effort to save future generations from the pain of having to go without water and food or resorting to buying/importing very expensive water and food by the year 2082.
56. In urging the court to grant him the orders sought, the Petitioner finally says that he acknowledges the vital place of science in addressing challenges like the one before us.
57. In his Further Affidavit, he says his Petition seeks to bar farmers from planting eucalyptus trees on swamps, along river banks, marshy lands and around springs and that is exactly what the ‘Guide to On-Farm Eucalyptus Growing in Kenya’ provides. And that all prayers in his Petition seem to agree with what is contained in the ‘Guide to On-Farm Eucalyptus Growing in Kenya’. After reading ‘the Guide to On-Farm Eucalyptus Growing in Kenya’ the Petitioner comes to the conclusion that the Government might be having some very useful policies gathering dust somewhere while the beneficiaries to be are suffering, the case in point is ‘the Guide to On-Farm Eucalyptus Growing in Kenya’. Until a week or so before deponing to this Affidavit, the deponent did not know such policy existed and ever since he filed this Petition in December 2022, nobody among the Respondents had come out to inform the court about the existence of this policy.
58. On 26th October 2023, the honourable court directed that he produces expert witnesses in court during the hearing of this Petition but having visited a number of universities in Kenya in search of an expert on matters eucalyptus the Petitioner has not been successful.
59. After hearing the Petitioner’s Evidence, the Court directed that it was necessary to hear the Experts in this field and that the Cabinet Secretary of Environment , Forest and Climate change, the Cabinet Secretary Water and Sanitation through the respective state agencies , KEFRI, Kenya Forest Services and any other relevant state agencies to undertake a study and provide a technical opinion on the effects



of eucalyptus trees on wetlands , riparian zones and on common boundaries which was done but took quite some time necessitating in the delay in concluding this matter. Dr. Otuoma testified and adopted his witness statement.

Respondents' Evidence:

60. On behalf of the 7th Respondent Dr Otuoma gave his evidence, adopted his statement as his evidence in chief and produced a number of documents in Court. He produced a technical advisory on the farming of eucalyptus trees in Kenya prepared by the Ministry of Environment, Forestry and Climate Change. The same was done under the leadership of the Principal Secretary for the State Department of Forestry which is a multi-agency Report. The same was contributed to by the following: -
1. The state Department of Forestry. Kenya.
 2. The Kenya Forest Services.
 3. Kenya Forest Research Institute (KEFRI).
 4. The National Environment Management Authority (N.E.M.A.)
 5. The office of the Honourable Attorney General and the Department of Justice.
 6. Water Research Authority.
 7. Ministry of water, sanitation and irrigation.
61. Dr. Otuoma admitted that the Report was prepared in response to the Petition before the Court on the uncontrolled planting of eucalyptus trees at the expense of the environment. He said that the Government has provided leadership on where to plant eucalyptus trees in the Country but that in spite of this, the public has remained adamant and unswayed on the planting of the trees in the Country. Dr Otuoma welcomed the filing of the Petition and hoped that the Judgment that will come out of it will help guide the country in terms of policing and legislation on eucalyptus trees.
62. The Director said that trees grow naturally in Australia, Philippines, Papua New Guinea, Indonesia and Timor and that it has over 900 species with China as the largest grower with over 170 million Hectares under the eucalyptus trees. The tree was introduced in the county in the year 1902 with 100 species but only 71 survived. The same was introduced during the construction of the Kenya Uganda railway to provide fuel for the steam locomotive but has now found other uses with time with the most useful (positive) impact being the authoritative source of wood.
63. Under all the documents, in an effort to plant trees in Kenya particularly the Government's policy on 15 billion trees by 2032, the tree is not mentioned but it has not escaped observation that whereas there is a state planting of trees this tree is normally not among the trees planted. Eucalyptus tree takes 12 years to mature, cedar takes 50 years, pine 30 years and cypress takes 25 years. This is the reason many Kenyans take solace in the tree for quick money and use including employment, but if the tree is removed and replaced with indigenous trees within 9 years there will be more water flowing and Dr. Otuoma is quick to say that guidelines such as the ones they have derailed in the papers produced in the papers and produced in this Court, are unfortunately just guidelines and not Law. Therefore, we need a legal framework on eucalyptus tree and policy soonest. He is also of the view that it is not true that the tree is the singular reason for the reduction of water levels in the rivers. There are other factors such as reduction in the forest cover and that matters environment should be given priority.
64. Dr. Otuoma then produced in Court an Advisory prepared with contributions from the abovementioned Agencies christened, the Technical Advisory on Growing of Eucalyptus Trees in



Kenya by the Ministry of Environment, Climate Change and Forestry allegedly accusing certain Government departments & agencies of professional negligence leading to uncontrolled growing of Eucalyptus trees for commercial purposes at the expense of the environment. The advisory Report demonstrated that the Government has provided leadership regarding where and how to plant Eucalyptus trees and that The Government has also provided advice & guidelines (Agricultural rules 2009, KFS 2009, KEFRI 2010 and NEMA 2011) but that the professional & technical advice have generally not swayed public action.

65. In the Report it is stated that: Eucalyptus trees grow naturally in Australia, Philippines, Papua New Guinea, Indonesia and Timor. They belong to the plant family Myrtaceae. They comprise over 900 species of trees.
66. The Report shows that: The trees were introduced to many countries – China (170 million hectares), Brazil (3.7 million hectares) and India (2.5 million hectares). In Africa, South Africa has the largest area under Eucalyptus – approx. 0.5 million hectares.
67. The reasons for introducing Eucalyptus trees in Kenya were: It is a fast-growing tree which would supply wood fuel for the steam locomotive. And the Current uses are transmission poles, veneer, timber, pulp, fencing posts, round poles and fuel wood.
68. The impact of the tree on natural forests is that it eases pressure on natural forests as an alternative source of wood and wood products.
69. The Report gave the Current distribution of Eucalyptus trees in Kenya as follows:

Eucalyptus tree formation	Estimated area in 2008 (ha)	Estimated area in 2024 (ha)
Gazetted forests	15,000	16,947
Private companies	35,000	35,000
Small-holder farms	50,000	100,000
Total (ha)	100,000	151,947

70. And the Regional distribution of Eucalyptus trees in Kenya (% cover) is as below: Rift Valley – 32, Central – 30, Western – 12, Nyanza – 8.5, Eastern – 8, Coast – 3.5, Other areas – 6
71. The Report then went ahead to show the contribution of Eucalyptus trees to Kenya’s economy:
 1. Fuel wood – 25 million m³ used annually – Kshs. 62 billion**
 2. Transmission poles – 480,000 poles annually – Kshs. 5.76 billion**
 3. Tea processing – 65 KTDA tea factories – 1.5 million m³ of wood annually – Kshs. 3.541 billion.
 4. Tobacco curing – 80,665 m³ of wood annually – Kshs. 242 million.**
 5. Reconstituted boards – MDF, Block boards, plywood, etc – Rai Ply, Comply, Timsales, etc. – 250,000 m³ wood annually – Kshs. 780 million.
 6. Timber – Over 70% of the market demand created by the logging ban on Cypress and Pine in gazetted forests is met by Eucalyptus.



72. It gave the employment creation as 70,000 directly and 500,000 indirectly in the Eucalyptus value chain (Nurseries, timber yards, tea estates, KTDA factories, wood processing, construction, transportation, Government of Kenya & farmers).

73. The document went further to explain Eucalyptus root architecture, rooting depth and water use:

Eucalyptus trees have both lateral roots and tap roots. The lateral roots can extend up to 33 metres outwards while the Tap root can extend up to 20 metres into the soil.

74. It compares water uptake by Eucalyptus against some indigenous trees as follows:

Tree species (10 to 20 yr old tree)	Daily water use (lts/yr)	Yearly water use (litres/yr)	Biomass per yr (kg/yr)	Biomass produced per litre (g/ltr)	Water use efficiency (lts/g)
Acacia auriculiformis	3.37	1,231.50	1.713	1.39	0.72
Albizzia lebbek	3.52	1,283.90	2.355	1.83	0.55
Dalbergia sissoo	4.2	1,534.05	2.005	1.31	0.77
Eucalyptus hybrid	6.92	2,526.35	5.209	2.06	0.48

75. And also, water infiltration under Eucalyptus vis a vis other land use:

Land use/land cover	Infiltration of water in soil (cm/hr)
Bare land	46.95
Grassland	52.0
Bamboo (1.5 years old)	54.6
Eucalyptus urophylla (3.5 years)	55.07
Eucalyptus camaidulensis (15 – 30 yr tree stand)	66.96
Gmelina arborea (9 years)	109.34
Indigeneouys forest (30 years)	171.45
Bamboo (30 years)	216.44



76. The Report could not be complete without demonstrating the effect of Eucalyptus on biodiversity – Allelopathic effects on crops and plants; Phenolic compounds form litter and fresh leaves of Eucalyptus trees inhibit the germination of crops. Phenolic compounds form a layer on the soil surface, which reduces the ability of water to infiltrate into the soil, hence being unavailable for crops and other plants.
78. And on the suitability of Eucalyptus species in Wetlands and Riparian zones the Report states that: Given the root architecture, rooting depth and lateral spread of Eucalyptus roots, it is not advisable to plant Eucalyptus trees at a distance less than 30 metres from a wetland, riparian zone or water catchment. It is also not advisable to grow Eucalyptus trees in an area where the water table is less than 20 metres in depth.
79. The Experts further give the Current policy guidelines on Eucalyptus as:
1. Agriculture (Farm Forestry) Rules of 2009 – 4(2) No agricultural landowner or occupier shall grow or maintain any Eucalyptus species in wetlands and riparian areas.
 2. Kenya Forest Services Rules (2009) – Guide to on-farm Eucalyptus growing – Eucalyptus trees should NOT be planted in:
 - a. Wetlands and marshy areas.
 - b. Riparian zones – Not less than 30 metres from rivers, lakes and ponds.
 - c. Irrigated farmlands.
 - d. Areas with less than 400mm of annual rainfall; and,
 - e. In farms next to water sources – Planting should be mixed with indigenous tree species to minimize the effect of Eucalyptus.

Further,
Eucalyptus trees are not recommended for land sizes less than quarter (1/4) of an Acre. Planting near buildings is not recommended as branches/stems of some Eucalyptus species break off easily. Each eucalyptus tree can consume over 20 litres of water per day. Root systems reach up to 30 metres, tapping underground aquifers. Studies (e.g., KEFRI 2017) report up to 25% reduction in river base flow in areas densely planted with eucalyptus. Studies (e.g., KEFRI 2017) report up to 25% reduction in river base flow in areas densely planted with eucalyptus.

Suitability of Eucalyptus trees for common boundaries- Considering the rooting structure of Eucalyptus trees, it is advisable that:
Eucalyptus trees be planted at least 10 metres away from common boundaries and infrastructure utilities – buildings, driveways, sidewalks and roadways.
 3. NEMA guidelines (2011) – Discourage the planting of Eucalyptus and invasive species in wetlands and riparian areas.
80. It is advisable to erect a physical barrier to prevent the outward spread of the lateral roots of Eucalyptus trees.
81. There are alternative tree species to Eucalyptus for different agro- ecological zones
82. The experts concluded the Report by recommending to the Court in this Petition that:
1. The Ministry of Environment, Climate Change and Forestry should develop a policy to guide the planting of Eucalyptus trees in Kenya within a period of 5 years.



2. Parliament should enact laws governing the cultivation of Eucalyptus trees in Kenya, and define offences and penalties for contravention of the laws.

Additionally, the laws should indicate that:

Eucalyptus trees shall not be planted less than 30 metres from the highest flood point of a wetland, river, ocean or riparian area. Eucalyptus trees shall not be planted less than 10 metres on either side of a common boundary. Eucalyptus trees shall not be planted in irrigated farmlands.

3. Further Research is necessary on the suitability of Eucalyptus species for regions that receive an average of less than 400mm of annual rainfall.
 4. The legal and policy framework developed shall provide a phase out period for the removal of Eucalyptus from the areas mentioned above.
83. However, it is not right to demonize the tree wholesale. Dr. Otuoma produced a document by KEFRI (2010) - Facts on Growing and Use of Eucalyptus in Kenya which provides that Eucalyptus provides multiple benefits ranging from industrial wood, poles, timber, fuelwood, charcoal, essential oils and many environmental services such as windbreaks, erosion control, buffer to natural forests, flood control and climate change mitigation. They are also widely used in construction, joinery and furniture.

Roadside planting of Eucalyptus

84. Given the potential of Eucalyptus trees to damage infrastructure utilities, such as buildings, driveways and sidewalks through their lateral roots, it is advisable to plant Eucalyptus trees at a safe distance from the tarmac. A minimum distance of 30 metres may be safe for roadside planting. If the distance is shorter than 30 metres, a physical barrier should be erected to prevent the trees' lateral roots from damaging the road.
85. After hearing the witness for the 7th Respondent, I invited Counsel to make oral submissions. The Petitioner told the Court that he wished to rely on his exhaustive written statements and Affidavits.
86. In his Submissions, Mr Wabwire for the state made opening remarks on behalf of the 7th Respondent. He said that the Petitioner's research was not documented, that he did not seek any expert services and that the scope of his investigations was limited to his experience alone. There has also been no communication between the Petitioner and the Respondents on this issue. Mr Omariba never laid any expert evidence on record.
87. On matters of law, Mr Wabwire said that the Petitioner never brought a certificate to accompany the photographs he laid in Court and that the documents from the Respondents that the Petitioner produced were not properly obtained, contrary to the [Access to Information Act](#), 2016 and that therefore the same are inadmissible.
88. The Senior State Counsel summarized his submissions by acknowledging that the EMCA Act provides solution of the challenge in Court and without naming which body Mr. Wabwire said that the matter should have been taken to the body with authority to deal with such a matter since not every violation should be subject to Court for remedy.
89. Whilst writing this Judgment, I considered that the Jurisdiction of the Court to decide this Petition was raised by the 7th Respondent but not canvassed and the said Respondent proceeded to address the Court on the merits of the case. I therefore believe this objection must have been dropped before the Hearing of the Petition.



90. I now wish to address the legal position of the Petition before deciding whether the prayers herein ought or ought not to be granted.

Constitutional Provisions Violated:

91. The Petitioner brings this Petition to protect the rights of the present and future generations as provided for under Articles 42 and 43 of the Constitution of Kenya, 2010. Article 42 states,

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

- 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 of the Constitution. and
- b.) to have obligations related to the environment fulfilled under Article 70. of the Constitution'

92. The Petitioner brings this Petition for and on behalf of future generations referred to in Article 42 of the Constitution of Kenya, 2010. The Petitioner strongly believes that water available in the counties under reference may not last beyond 2082, unless the Respondents are ordered to act and act quickly to protect and preserve the available water sources. If not, the generation that comes after 2082 is doomed.

93. Article 67 of the Constitution of Kenya, 2010 creates the National Land Commission, the 5th Respondent herein. One of the functions of the commission as provided for in sub-article 2(a) is to manage public land on behalf of the National and County Governments. Sub-article 2(d) requires the commission to conduct research related to land and the use of natural resources.

94. Article 69 of the Constitution of Kenya 2010, provides that the state shall:

“.....encourage public participation in the management and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment; environmental audit and monitoring of the environment;

eliminate processes and activities that are likely to endanger the environment and utilize the environment and natural resources for the benefit of the people of Kenya.

95. One of the activities to be eliminated or controlled referred to in Article 69 is cultivation of eucalyptus trees and any other trees that may have some adverse characteristics like eucalyptus. The Petitioner rightly gave Notice that during the hearing of this Petition, he was going to pray that a committee of environmental experts be formed to advise the court on how best to deal with the problem and whether there are other trees with characteristics similar to those of eucalyptus and whose cultivation also needs to be controlled, just like eucalyptus. The Petitioner brought the Petition to protect and conserve the country's wetlands which shall go towards ensuring that water is available to the present and future generations. One of the major threats to protection and conservation of the country's wetlands is the haphazard and unplanned cultivation of eucalyptus trees among others.

96. Eucalyptus trees are Kenya's wetlands' enemy. In order to protect and conserve the wetlands, the Petitioner has sought orders compelling the Respondents to regulate, control and supervise the cultivation of eucalyptus trees in the country and orders to compel the Respondents to subject all farmers interested in the cultivation of eucalyptus trees to Environmental Impact Assessment so as to ensure that people do not plant the trees near water sources or along or on common/shared boundaries.



97. By bringing this Petition, the Petitioner is responding to the provisions of Article 69 of the Constitution of Kenya, 2010.
98. Article 70 of the Constitution of Kenya, 2010 provides,
- If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated or infringed or threatened, the person may apply to a court for redress ”
- The court may make any order or give any directions it considers appropriate-
- a. to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b. to compel any public officers to take measures to prevent or discontinue any act or omission that is harmful to the environment ’
99. In the present Petition, the Petitioner has identified the unsupervised, uncontrolled and unplanned cultivation of eucalyptus trees in the country as being harmful to the environment. To put things in order, the Petitioner seeks orders compelling the Respondents who are public officers to correct the situation.
100. Article 260 of the Constitution of Kenya, 2010 defines natural resources thus,
-the physical non-human factors and components, whether renewable or non-renewable, including-
- a. sunlight;
 - b. surface and ground water;
 - c. forests, biodiversity and genetic resources....’
101. The Petitioner’s case is that the Respondents have allowed Kenyans to plant eucalyptus trees close to other people’s homesteads thus denying them the much-needed natural resource, sunlight. Some Kenyans access sunlight for one or two hours a day and only when it is overhead, reason being that the eucalyptus tree grows up to 100 feet tall depending on the type, soils and availability of water. At such height, definitely the trees would obstruct sunlight from reaching some homesteads and hence the owners of such homesteads cannot access and/or enjoy this important natural resource called sunlight.
102. In regard to the Preamble to the Constitution of Kenya, 2010 the constitution reads as follows,
- We the people of Kenya Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations... ’.
103. Under Article 11 of the Constitution, sub-Article (2) of the Constitution of Kenya, 2010 the State shall —
- (b) recognise the role of science and indigenous technologies in the development of the nation;
104. Article. 42 of the Constitution provides that, 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.
105. On obligations in respect of the environment, Article 69 of the *Constitution* provides that:
1. The State shall—
 - a. ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - d. encourage public participation in the management, protection and conservation of the environment;
 - e. protect genetic resources and biological diversity;
 - f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - g. eliminate processes and activities that are likely to endanger the environment; and
 - h. utilise the environment and natural resources for the benefit of the people of Kenya.
 2. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
106. On the enforcement of environmental rights, Article 70 of the *Constitution* provides that:
1. If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
 2. On Application under Sub-Article (1), the court may make any order, or give any directions, it considers appropriate—
 - a. to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - c. to provide compensation for any victim of a violation of the right to a clean and healthy environment.
 3. For the purposes of this Article, an Applicant does not have to demonstrate that any person has incurred loss or suffered injury.
107. The manner in which wetlands are disappearing and the manner in which water is dwindling in Kenya demonstrates nothing but disrespect for the environment and therefore the preamble to the *Constitution* of Kenya, 2010 applies.



108. To restore respect for the Constitution of Kenya and its preamble, to ensure availability of water to our future generations, to ensure enough food for our people, we must protect our wetlands and to do so, we must control, regulate and supervise the cultivation of eucalyptus and any other trees harmful to the environment.

Under the Environment and Land Court Act

109. This is mainly administrative, giving the Court the manner in which to navigate and address any grievances on land and environmental issues.

110. Under Section 13 (1) of the Environment and Land Act, CAP 8D Laws of Kenya,

1. This Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes——
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. ;
 - c. ;
 - d. ;and
 - e. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining Applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
4.
5. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
 - a. interim or permanent preservation orders including injunctions;
 - b. prerogative orders;
 - c. award of damages;
 - d. compensation;
 - e. specific performance;
 - f. restitution;
 - g. Declaration; or
 - h. costs.



111. Under Section 18 on Guiding principles,

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—

- a. the principles of sustainable development, including—
 - i. the principle of public participation in the development of policies, plans and processes for the management of the environment and land;
 - ii. the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;
 - iii. the principle of international co-operation in the management of environmental resources shared by two or more states;
 - iv. the principles of intergenerational and intragenerational equity;
 - v. the polluter-pays principle; and
 - vi. the pre-cautionary principle;
 - a. the principles of land policy under Article 60(1) of the *Constitution*;
 - b. the principles of judicial authority under Article 159 of the *Constitution*;
 - c. the national values and principles of governance under Article 10(2) of the *Constitution*; and
 - d. the values and principles of public service under Article 232(1) of the *Constitution*.

Provisions of Municipal Laws violated:

112. The existing legal and policy framework does not explicitly mention Eucalyptus trees. However, the role of Eucalyptus in the landscape and its interactions with the environment have a bearing on the prevailing legal, policy and institutional framework.

113. And further, in support of his Petition, the Petitioner humbly Petitions the court to look at the provisions of the various municipal laws put in place to protect the environment.

114. Section 3 of the Environmental Management and Coordination Act states,

Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.....if a person alleges that the entitlement conferred under sub-section (1) above has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress... ’



115. The unregulated, uncontrolled and unsupervised cultivation of eucalyptus trees in the country's wetlands has led to the drying up of the wetlands violating not only the Petitioner's right to a clean and healthy environment but will have far reaching negative effects on our future generations' right of access to water. The Petitioner's Petition is aimed at correcting the situation by asking the court to order the Respondents to urgently control, supervise and regulate the cultivation of eucalyptus trees in the country by subjecting the activity to Environmental Impact Assessment (EIA).
116. Section 3 of the *Environmental Management and Co-ordination Act* (EMCA) (1999) of Kenya (NEMA) Act The Environmental Management and Coordination Act, 1999 (revised 2015)EMCA 1999 (revised 2025) does not mention Eucalyptus explicitly, but it provides for the sustainable management of wetlands and riparian areas. It gives the court the power to stop any act or omission deleterious to the environment. In the Petitioner's case, the act or omission is the unplanned, unsupervised and uncontrolled cultivation of eucalyptus trees, which trees extract a lot of water from the ground thereby draining our wetlands leading to adverse environmental consequences. Section 3 gives the court the power to compel any public officer to take measures to prevent or discontinue any act or omission injurious to the environment and/or subject the activity to environmental audit. The court can also order the persons responsible for environmental degradation to restore it to its immediate condition prior to the damage.
117. Section 50 of the EMCA Act requires that the authority identifies threats to biological diversity and devise measures to remove or arrest their effects. In his Petition, the Petitioner identifies the unplanned, unsupervised and uncontrolled cultivation of eucalyptus trees as one such threat and seeks orders to compel the Respondents to act.
118. Section 54 of the EMCA Act requires that the 1st Respondent in consultation with lead agencies and by notice in the Gazette declare any area of land, sea, lake or river to be a protected natural environment.
119. The Petitioner brings this Petition seeking orders to compel the 1st Respondent to comply with the requirements of this Section and declare all wetlands, small or big, seasonal or permanent to be protected natural environment areas.
120. Section 108 of the EMCA Act provides that NEMA may issue an environmental restoration order to any individual, group of individuals or organization to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order. In this regard, the Petitioner seeks to compel the Respondents to issue orders to persons who have illegally cultivated eucalyptus trees on wetlands to uproot them and cease any economic activities thereon forthwith.
121. Section 112 of the EMCA Act gives the court the power to issue environmental easements and environmental conservation orders to further the principles of environmental management, and the Petition before court is therefore suitable for environmental conservation orders.
122. Section 11 of the *Water Act*, 2016 establishes the Water Resources Authority to regulate the management and use of water resources. Section 23 of the Act provides thus,

Where the Authority is satisfied that in any area, special measures for the conservation of ground water are necessary in the public interest..... the Authority may impose such requirements or prohibit such conduct or activities... '.
123. The Water Resources Authority is yet to implement this provision. It is the reason the Petitioner has brought this Petition.



124. Section 8(j) of the Kenya *Forest Conservation and Management Act*, 2016 provides that the Kenya Forest Service shall manage water catchment areas in relation to soil and water conservation in collaboration with relevant stakeholders.

The *Forest Conservation and Management Act*, 2016

125. The *Forest Conservation and Management Act*, 2016 covers forest conservation and management as well as tree growing on farms. The Act does not mention Eucalyptus explicitly, but it mentions exotic tree species and their management.

The *Water Act*, 2016

126. Section 22(2) of the *Water Act* 2016 regulates activities that may harm water catchments and water resources. Section 23(2) regulates activities that may harm ground water resources.
127. The Water Resources Act recommends 30 metres setback from water bodies. But this is advisory only.

Policy and institutional framework

128. Different Government agencies have developed guidelines that guide the growing of Eucalyptus species in Kenya. These include: Kenya Forest Services Rules (2009) - A Guide to On-Farm Eucalyptus Growing in Kenya The KFS guideline notes that Eucalyptus trees are becoming the species of choice for most private tree growers. The guideline recommends that Eucalyptus trees should not be planted in:
- a. Wetlands and marshy areas
 - b. Riparian areas.
 - c. Along rivers - reserve not less than 30 metres as stipulated in the *Survey Act* Cap 299 of the Laws of Kenya.
 - d. Areas around lakes, ponds, swamps, estuary and any other body of standing water.
 - e. Irrigated farm lands.
 - f. Areas with less than 400mm of rainfall.
 - g. In farms next to water sources, unless inter-planted with indigenous tree species with the latter occupying a greater percentage.

KFS (2009) – Recommends buffer zones and discourages eucalyptus near water sources. NEMA (2011) - Integrated National Land Use Guidelines of 2011 The National Environment Management Authority in its Integrated National Land Use Guidelines of 2011 (Chapter 3 on the Protection of Ground Water, Rivers, Lakes and Wetlands) discourages the planting of Eucalyptus and invasive species in wetlands and riparian areas while giving preference to alternative species such as bamboo in Kenya. EMCA 1999 – CAP 387 – revised 2015 – Regulates the management of wetlands and riparian areas.- Section 42 (1) (d) – No person shall introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake or wetland. KEFRI Forestry research highlights environmental risks of eucalyptus and suggests alternatives. NEMA’s Integrated National Land Use Guidelines of 2011 (Chapter 3, page 7) on Protection of Ground Water, Rivers, Lakes and Wetlands – Discourage the planting of Eucalyptus and invasive species in wetlands and riparian areas while giving preference to alternative species such as bamboo. County Governments also have local regulations. Some have by-laws on eucalyptus; enforcement inconsistent.



Agriculture Rules of 2009

129. The rules state that:

Every person who owns or occupies agricultural land shall establish and maintain a minimum of 10 per cent of the cropland in any suitable configurations; may include trees on soil conservation structures or rangeland.

Provided that the species of trees or varieties planted shall not have adverse effects on water sources, crops, livestock, soil fertility and the neighbourhood and should not be of invasive nature.

(2) No agricultural landowner or occupier shall grow or maintain any Eucalyptus species in wetlands and riparian areas.

International Provisions on Environmental Protection:

130. Principle 1 of the Rio Declaration on Environment and Development states,

Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.’

131. Principle 3 of the of the Rio Declaration on Environment and Development further states,

“The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”

132. I would agree with the Petitioner that in the present case, principle 3 of the Rio Declaration cannot be realized until and unless, in the case of Kenya, the issue of eucalyptus trees is addressed.

133. Principle 4 of the Rio Declaration on Environment and Development states,

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

134. Principle 15 of the Rio Declaration on Environment and Development states,

“In order to protect the environment, the precautionary approach shall be widely applied by the states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost effective measures to prevent environmental degradation.”

On matters Equity:

135. Under Intergenerational Equity the principle focuses on fairness across time, ensuring that future generations have the same or better opportunities to meet their needs as the current generation.

136. The present generation acts as a trustee or custodian of the Earth's resources, with the duty to protect them for future inhabitants. This involves managing resources sustainably, conserving biodiversity, and preventing long-term damage like pollution or climate change that could harm those who come after us. Future generations should inherit an environment with comparable options and a similar quality of life. The principle is reflected in international agreements like the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity which



addresses fairness among different people within the present generation, particularly concerning the distribution of environmental benefits and the impacts of environmental degradation. It calls for equitable access to natural resources and ecosystem services, especially in a world with limited resources.

137. Global Justice recognizes that different people and communities, particularly in the present day, may bear disproportionate environmental burdens or enjoy unequal benefits. It aims to correct injustices and ensure that the costs and benefits of environmental management are distributed fairly among contemporary populations.

Relationship and Importance

138. Intergenerational equity ensures long-term environmental health, while intragenerational equity promotes social justice within the current generation. Together, they guide responsible environmental decision-making for a sustainable future for all. The principles of intra-generational and inter-generational equity aim to promote fairness within and across generations in terms of access to resources and opportunities.

On the process of law- making:

139. Article 258 of the *Constitution* of Kenya, 2010.

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— (
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.

Construing this Constitution.

140. Article 259 of the *Constitution* provides that:

1. This Constitution shall be interpreted in a manner that—
 - a. promotes its purposes, values and principles;
 - b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. permits the development of the law; and
 - d. contributes to good governance.

Analysis and Determination:

141. Having made the above observations based on scientific researches of a couple of years, what is the way forward? Having been availed all this very important information and years of scientific research what do I do with it? Do I throw the baby with the bathwater and conclude that it is not the business of the Court to make law?



142. This is a very important case and I commend the Petitioner, Mr Wilfred Moseti Omariba for his passion to have the environment safeguarded not only for the benefit of the current generation but also for generations to come. It is a matter that the Court can't afford to look the other side.
143. Although from the pleadings the matter appeared to be a contested one with the Respondents joining issue with the Petitioner, when case came up for Hearing, the Respondents and especially the 7th Respondent appeared to have metamorphosized from Saul to Paul. The Respondents were even more overzealous with the case and when asked why the Recommendations in their researches had not been implemented, they passed the buck to other departments and arms of the Government. For the work the Government agencies have done, I do give a big thumbs up. But not for the failure to have the same implemented.
144. What the 7th Respondent has done and from the testimony of her representative, Dr. Otuoma, who I feel has devoted a good percentage of his lifetime together with his colleagues to research on a very important area covering our environment. This is highly commendable and this generation together with several future generations owe them a lot.
145. To summarize the parties' evidence: -
1. Eucalyptus trees ease pressure on our forests as an alternative source of wood and wood products and the tree contributes to the economy of the country through provision of:-
 - a. Firewood.
 - b. Transmission poles.
 - c. Tea processing.
 - d. Tobacco canning.
 - e. Reconstituted boards.
 - f. Timber
 - g. Charcoal
 - h. Essential oil.
 - i. Industrial wood
 - j. Serves as a wind break.
 - k. Soil erosion.
 - l. Buffer to natural forests.
 - m. Flood control climate change mitigation.
 - n. Construction, joinery and furniture.
146. The lateral roots of the tree can extend up to a radius of 33 metres and the tap roots can extend up to 20 metres into the soil.
147. Given the root architecture, rooting depth and lateral spread of the roots, it should not be planted at a distance of less than 30 metres from a wetland, riparian zone, water catchment area, marshy areas, rivers, lakes or ponds.
148. It should not be planted in an area where the water table is less than 20 metres in depth.



149. Likewise, no agricultural land owner or occupier shall grow or maintain any eucalyptus species in wetlands, riparian areas and marshy areas.
150. The eucalyptus tree should not be planted on irrigated farmlands.
151. It should not be grown in areas with less than 400mm of annual rainfall. The tree should not be planted within 10 metres from common boundaries, infrastructure utilities such as buildings, driveways and sidewalks.
152. It should not be planted at a distance of less than 30 metres from roads. As for roads, although this is beyond the scope of this Petition, I would recommend that no tree or even shrub should be planted within 30 metres from public roads. This is not only to avoid the effects of the roots and falling branches but also to ensure that the road sideways are clear in order to avoid accidents.
153. Although this is hard to achieve, if one has to plant the tree near boundary or buildings, then it is advisable to dig a trench as deep as 5 metres, but this is not a sure cure.
154. Eucalyptus trees should not be planted in land whose sizes are less than a quarter ($\frac{1}{4}$) of an Acre.
155. Planting of trees near buildings is not to be recommended as its branches, and stems of some species of eucalyptus break off easily.
156. The decrease in water discharge and stream flow is linked to high water use by the eucalyptus trees.
157. These recommendations would help this Country achieve the intended purpose of this Petition and the 7th Respondent recommends that further research in this area is necessary and particularly on the suitability of eucalyptus species for regions that receive an average less than 400mm of annual rainfall.
158. And there are still many aspects of eucalyptus tree relating to the psychological development and environment interactions that are characterized with uncertainty and which need further research
159. It is also necessary that a legal policy framework should be developed and which should provide a phase out period for the removal of the trees from the areas mentioned above.
160. Having made the above observations based on specific researches of many years, what is the way forward. Do I proceed and announce the recommendations as binding on the Kenyan citizenry? The Constitution of Kenya has provided different powers to different institutions and the 3 main arms of the Government viz. the executive, the legislature and the judiciary have each been vested with specific powers. As for parliament, both chambers the main responsibility is to make laws, the executive is to implement the said laws and the judiciary is to arbitrate over disputes.
161. Having said as above, it is my considered opinion that since it has not been shown by the Respondents that the National Assembly was given the above recommendations but failed to work on them. Is it safe to pronounce the recommendations as law?
162. Separation of powers is a constitutional principle that divides government into distinct legislative, executive, and judicial branches to prevent any single branch from becoming too powerful. This division is designed to ensure a system of checks and balances, where each branch can limit the powers of the others. Key figures like Montesquieu are associated with the theory, which requires a formal distinction between the branches and a separation of their functions.
163. The Judiciary interprets the Constitution and laws and administers justice. A formal distinction must be made between the three branches of government. Each branch should perform its distinct functions without interfering with the roles of the others.



164. Chapter 8 of the *Constitution* of Kenya, 2010 deals with the Legislature which derives its legitimacy from the people. And the *Constitution* is very categorical and it solely places the law-making function in the legislative arm.
165. Role of the National Assembly: Under Article 94 of the *Constitution*:
- (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.
 - (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
166. Under Article 95 of the *Constitution*:
- The National Assembly deliberates on and resolves issues of concern to the people.

Exercise of legislative powers.

167. Article 109. (1) of the *Constitution* of Kenya, 2010, Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.
168. That notwithstanding, Article 118(1)(b) of the *Constitution* requires Parliament to facilitate public participation and involvement in legislative and other business of the Assembly and its committees. It further provides that Parliament conducts its business in an open manner.
169. On the other hand, Judicial authority refers to the powers vested in a Court or a tribunal to decide authoritatively and conclusively disputes between subjects of the State, or between the State and its subjects.
170. This judicial authority is derived from the people and is vested in the courts and tribunals established by the court. Article 2 of the constitution declares it to be the supreme law of the land and binds all persons and organs of the state. Further, no person may exercise state authority unless authorized by the *Constitution*. Constitutional supremacy then places a special role on the Judiciary in checking the constitutionality of all acts carried out by the other organs of the government as well as private actors. In exercising judicial authority, the courts are to be guided by the principle of protecting and promoting the purpose and principles of the *Constitution*. In the land-mark case of *Doctors for Life*, the constitutional court of South Africa wrestled with the question whether the control of parliamentary internal arrangements, proceedings and procedures which are areas of legislative competence, are subject to evaluation by the court.
171. The court stated;
- “.....under our constitutional democracy, the *Constitution* is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of the *Constitution*; and the supremacy of the *Constitution* requires that ‘the obligations imposed by it must be fulfilled. Courts are required by the *Constitution* ‘to ensure that all branches of Government fulfill their constitutional obligations.”
172. However, the Judiciary must also function with caution, and respect the political boundaries so as to maintain public trust. But Case law concerning the role of judges in law-making highlights their dual function: upholding justice and shaping law through interpretation and precedent. The landmark case *Donoghue v Stevenson* is cited as a prime example of judges creating law through their decisions, which



establish binding precedents for future cases. In interpreting statutes, judges develop law by applying general principles to specific circumstances. Judges' Decisions must be impartial and free from personal bias. The ethical standards for Judges require them to avoid any appearance of impropriety and to uphold the integrity of the Judiciary.

173. Judge Jack G. Day in a paper titled "Why Judges Must Make Law" reported in Case Western Reserve Law Review Volume 26 Spring 1976 Number 3, 8th District Court of Appeals Ohio. B.Sc., Ohio State University, 1935; L.L.B., Ohio State University 1938; M.A. Ohio State University, 1940 had the following to say on law-making by Judges.

".....there is another view of judicial lawmaking that responds to these questions. This approach begins with the proposition that law always has been, is, and always will be:

"Largely vague and variable. And how could this well be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting, helter-skelter of life parades before it-more confused than ever, in our kaleidoscopic age. Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance.

Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times... "

174. It follows that judges applying law under such circumstances are going to "make" law, indeed cannot avoid making it. But the making of new law should not be overemphasized. Creativity is not the factor in every case that it is in the novel case or the hiatus or reform decision. When novelty, a gap in the law, or reformation becomes involved, then inevitably "creation" occurs. The facts, moreover, tend to shape every Decision. And even the law emerging from the application of an existing rule may alter the contours of the precedent. Valid queries remain: When is judicial lawmaking inappropriate and when not only appropriate, but essential? In its simplest delineation judges' work is the settling of disputes. This can be dull, but it is no mean function. At the very least it prevents fighting in the street. However, each Decision may do much more. It may have an impact far beyond the case it decides. For each judicial Decision is a potential element in the settlement, or even the prevention, of future controversies. Temporarily, a Decision may have an unsettling effect on the law... "

175. He also quotes *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 249, 22 Cal. Rptr. 309, 314 (1962) (dictum, emphasis supplied) (tenant affirmatively defending against the termination of his tenancy solely because of race). 10. See Professor Corbin on this subject:

"It is the function of our courts to keep the doctrine up to date with the mores by continual restatement and by giving them a continually new content. This is judicial legislation, and the judge legislates at his peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor; and no brave and honest judge shirks the duty or fears the peril."



176. He proceeded:

“A judge with an imaginative personality supplies "an increment of vitality that is . . . desirable . . . and truly necessary in order to put" the legislative "message across."

177. What, beyond the judge's personal sense of responsibility keeps the courts within bounds? Restraint is the key to keeping judicial lawmaking nonusurpatory. And it has been suggested that consciousness of the inevitability of judicial lawmaking will tend to confine that function rather than expand it. For awareness provides a controlling influence of its own.

178. *Rylands v. Fletcher*, 1868) LR 3 HL 330 is a leading Decision by the House of Lords which established a new area of English tort law. It established the rule that one's use of their land, which leads to another's land being damaged as a result of dangerous substances or material emanating from the land, the owner of the discharging land is strictly liable. In the case, the Plaintiff sued in connection with the flooding of his mine. The trial court found in his favour by holding that a person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. The Plaintiff owned and operated a mine adjacent to which the Defendant constructed an artificial pond. The latter caused a mine shaft collapse, which resulted in a flood, and damaged the Plaintiff's operations. The plaintiff sued, the matter was brought before an arbitrator to independently establish the facts. The trial court found for the Plaintiff; the Appellate court affirmed this position and the Defendant appealed to the House of Lords, which also upheld the Decision. The Court of Appeal stated in essence that the Defendant's use of the land was unreasonable, engaged in without proper caution, and resulted in harm to the Plaintiff. The concurrence states more clearly the rule to be applied noting also that more than the due care which was owed to the Plaintiff, at issue was the factual determination of damage: When one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should compensate the Defendant for the loss. The *Rylands* court considered the manner in which the Defendant used the land and concluded such use was "non-natural" what modern courts have described as inconsistent land use, i.e., when a party inflicts non-reciprocal risks on another.

179. Through this common law precedent and as Equity maintains, offended parties are not without a remedy, particularly persons whose neighbours plant trees in the neighbourhood disregarding the latter's rights to a clean and healthy environment.

180. In the case of *Charles Lukeyen Nabori & 9 others V Attorney General & 3 others* [2007] KeHC 1430 (Klr) commonly known as the mathenge plant case, the facts of the case were that Food & Agricultural Organization (FAO) in conjunction with other partners introduced two species of acacia-like plants *prosopis juliflora* and *prosopis Braziliansis* at Lake Baringo basin, herein referred to as "the weed") to provide fuel wood and also for the purpose of afforestation, inter alia. Over the years the plants grew and spread thereby turning out to be major weeds which colonized an expansive piece of land known as Ng'ambo Location of Baringo District (now County). The plants caused extensive damage to the lake basin ecosystem compelling the Petitioners to lodge in to the Court a Petition in form of a Constitutional Reference on behalf of residents of Ng'ambo Location, Marigat Division Baringo District (now County) within what was then Rift Valley Province of the Republic of Kenya. Their complaints in respect to this dispute were that they and their ancestors had been enjoying an uninterrupted occupation of the said land for years. The Petitioners, like other residents of the area, were pastoralists who also engaged in small scale farming for subsistence and livelihood. They averred that the Government of Kenya sanctioned and authorized the introduction of the weed *prosopis juliflora* in Ng'ambo Location by F.A.O. in conjunction with the 2nd Respondent and/or its



predecessor ostensibly to curb desertification. Save as labourers who were to plant the new trees under Government supervision, the local people and/or their leaders were neither consulted nor involved during the introduction of the weed through a joint project between the Government of Kenya and the Food and Agricultural Organization (F.A.O.) under a partnership agreement. Its invasiveness in nature easily caused it to get out of control and spread at an alarming rate and that twenty (20) years after its introduction, it had completely overgrown in the entire landscape of Marigat and Mugutani Divisions of Baringo District and it spread at such an alarming rate. The introduction of the weed had had adverse effects on the environment and the socio-economic wellbeing of the Petitioners and other occupants of the affected areas throughout the Republic of Kenya.

181. Particulars of injurious harm of the plant on the environment and the associated losses were specified in the Petition as its first spreading nature, the weed does not allow other grasses to grow, loss of livestock due to the poisonous thorn of the shrub, its thorns pose a big problem to human movement, livestock and machinery and blockage of rivers causing flooding and destruction of the economic base of the pastoralists' community and particularly the Petitioners bringing about massive poverty. Because of the failure or negligence of the Government, the Petitioners held it liable for the loss, suffering and massive damage to the environment and their livelihood and thus the Petitioners had been caused to suffer irreparably. The Petitioners stated that the land is the core of their culture which provided for their material needs and economic base and that since the devastating invasion of the weed they had been reduced to paupers and they and the generations to come were threatened with eviction from their ancestral land by the weed. And unless the Respondents swiftly acted on the problems associated with the invasion of the weed the Petitioners saw a bleak future in the affected areas of the Republic. Further, that the Respondents were likely to continue with their studious silence on the effects of the weed to the detriment of the Petitioners and that the adverse effects, disastrous consequences, serious injury and irreparable damage occasioned by the weed to the Petitioners and to the generations yet unborn were evident and incontrovertible. The Petitioners claimed they had a clear and constitutional right to a balanced and healthy ecology and were entitled to protection by the state in its capacity as the *Parens Patriae*. The Petitioners then prayed for Judgment against the Respondents and also sought awards as advanced in the Stockholm Declaration on human environment 1972 and the Rio Declaration 1992 including total eradication of the weed and Plantation of indigenous and environmentally friendly plants.
182. Though the Petitioners were not successful due to the Petitioners not laying enough material in Court to establish who between the partners in the cooperative programme introduced the plant (Mathenge), his Lordship, Mr. Justice Aganyanya nevertheless held:
- “.....I am sure this Report reached relevant authorities including the Government. With the force with which the Professor (Michieka) wrote his report, it was only prudent that necessary action be taken as fast as possible to arrest the further spread of the plant but this was not done leading the community teaming up on its own as was gathered from minutes of meetings as seen in the reports dated 16th March 2004 and 29th December 2004.....But that notwithstanding, having filed the case in court, sufficient material was to be laid before it to establish who between the partners in the cooperative programme introduced the plant Mathenge, as it has been nicknamed, in Ng'ambo Location Baringo District? Whose lands were acquired compulsorily or who has lost his/her life as a result of the plant. None of these has been established... ”
183. As is the case here where Mr. Dr. Otuoma admitted that there was a problem that needed to be addressed, Counsel for the Respondents, Mr. Mr. Njoroge Mwangi conceded that the plant posed a



danger due to its expansive occupation of space but added that if it could be confined and controlled, its advantages outweigh the dangers.

184. We need to isolate the challenges that cause urgent threats and those which can await comprehensive legislation. It is important to have a comprehensive piece of legislation limiting the growth of this tree and others whose growth, if not regulated, controlled and/or planned, is likely to be hazardous to our environment. Parliament should enact laws governing the cultivation of Eucalyptus trees in Kenya, and define offences and penalties for contravention of the laws. It is therefore important to allow and give the National Assembly a chance to do its work as ordered hereinbelow.
185. Should the National Assembly fail to adhere to this, still the Petitioner has one other Avenue, the Right to petition Parliament under Article 119 of the Constitution of Kenya, 2010:
1. Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
 2. Parliament shall make provision for the procedure for the exercise of this right.
186. On the other hand, this Court can mitigate this serious problem under Section 18 of the Environment and Land Act, (a) the principles of sustainable development, including—
- i. the principles of intergenerational and intragenerational equity;
 - ii. the polluter-pays principle; and
 - iii. the pre-cautionary principle;
187. The Environmental Management and Co-ordination Act (EMCA) (1999) defines the precautionary principle as the principle which postulates that where there were threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The precautionary principle recognizes the limitations of science in being able to accurately predict the likely environmental impacts and thus calls for precaution in making environmental decisions where there was uncertainty. That principle requires that all reasonable measures be taken to prevent the possible deleterious environmental consequences of development activities. The principle has three central parameters namely;
- a. taking preventive action in the face of uncertainty;
 - b. shifting the burden of proof to the proponents of an activity;
 - c. exploring a wide range of alternatives to possible harmful actions; and
- Precautionary Principle is a widely accepted doctrine in environmental protection. It suggests that when there is a risk of significant harm to the environment or human health, precautionary measures should be taken, even if science is not yet definitive. The doctrine encourages Decision-makers to prioritize environmental protection even if it means taking costly or inconvenient measures. It guides Decision-making to prevent harm to the environment even if science is not yet definitive. As shown above, the Doctrine is enshrined under Articles 69 (1), (2) and the EMCA Act.
188. It is however important to state that in this case, although Dr. Otuoma admits that there are still many aspects of eucalyptus tree relating to the psychological development and environment interactions that are characterized with uncertainty and which need further research, the hazards of the eucalyptus cannot be overemphasized.



189. Guided by the Precautionary Principle, it must be borne in mind that tough times require tough and bold Decisions. And for a tree that has so many economic advantages and few but very costly adverse effects to our environment not only to be suffered by ourselves but also by future generations and bearing in mind that we owe our environment to generations to come to which we must bequeath this precious gem as was done by our fore fathers, a Decision has to be made today and not tomorrow. Consequently, as we await comprehensive legislation by the National Assembly, which may not be immediate due to Parliament's workload and tight calendar, this Court shall put in place some few limitations in respect to the places of the growth of the eucalyptus tree as recommended by the Respondents' scientists. Accordingly, the eucalyptus tree shall not be planted: -

- a. at a distance of less than 30 metres from a wetland, riparian zone, water catchment area, marshy areas, rivers, lakes or ponds.
- b. where the water table is less than 20 metres in depth.
- c. on irrigated farmlands.
- d. in areas with less than 400mm of actual rainfall.
- e. within 10 metres from common boundaries infrastructure utilities such as buildings, driveways, sidewalks, and
- f. within 30 metres of roads.

These are of course the bare minimum.

190. Once again, I wish to thank the parties herein who decided to give the rule of law and this Court the opportunity to solve this problem. This could not have become a reality without the sobriety of their respective parties.

191. This Court therefore makes the following Declarations and Orders as the upshot of this Petition: -

1. A Declaration be and is hereby issued that a right to a clean and healthy environment is a fundamental attribute of the people and that aggression to the environment occasioned by unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees in Kenya amounts to a breach of this right, which this honorable court is empowered to address and to provide a remedy to.
2. A Declaration be and is hereby issued that the Petitioner's fundamental right to a clean and healthy environment as envisaged in Article 42 of the Constitution of Kenya has been violated.
3. A Declaration be and is hereby issued that unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees in Kenya amounts to a breach of the Petitioner's right to a sustainable development as envisaged and set out in the Environmental Management and Coordination Act, 1999.
4. A Declaration be and is hereby issued that unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees, illegal human settlement and human activities in the country's wetlands amounts to a breach of the Petitioner's right to sustainable development as envisaged and set out in the Constitution of Kenya, 2010 and the Environmental Management and Coordination Act, 1999.
5. A Declaration be and is hereby issued that the unplanned, uncontrolled and unsupervised cultivation of eucalyptus and trees with similar characteristics have caused and continue to



cause harm to the environment and hence, their cultivation should be planned, controlled and supervised by the Respondents.

6. A Declaration be and is hereby issued that uncontrolled, unregulated and unsupervised cultivation of eucalyptus trees in Kenya has adversely affected both the surface and in particular the ground water table, and the net effect is that other tree species, weeds and food crops near those trees do not get enough water, nutrients and moisture to thrive on.
7. A Declaration be and is hereby issued that unplanned, uncontrolled and unsupervised cultivation of eucalyptus trees in Kenya has led to depletion of soil nutrients thus denying other tree species and food crops the much-needed nutrients, thus adversely affecting the country's food security;
8. An order do hereby issue directing the 1st, 3rd, 4th, 6th and 7th Respondents to, as a matter of utmost urgency and within the next 30 days, make available a copy of this Judgment together with their recommendations on the growth of eucalyptus trees to the Speaker of the National Assembly and the respective Leaders of Majority and Minority in the National Assembly of Kenya to enable them enact appropriate and comprehensive policies and laws on the control and supervision of cultivation of eucalyptus and any other trees of similar characteristics, providing the distances such trees should be vis a vis:
 - i. water source, swamp or marshland, whether permanent or seasonal;
 - ii. roads.
 - iii. common/shared boundaries.
 - iv. buildings.

The aforesaid State officers are to act on the recommendations within the next 12 months.

9. The Government is hereby ordered to declare eucalyptus a "high- impact species" requiring regulated planting zones and come up with a framework on limitations on the growing of the eucalyptus tree either through a substantive Act of parliament or through subsidiary legislation vide the various legislations which may even give specific Cabinet Secretaries and Heads of Government Agencies power to do so.
10. As we await the all-inclusive, all-embracing comprehensive legislation by the National Assembly, this Court puts in place the following limitations in respect to the planting of eucalyptus trees, that is to say that eucalyptus trees shall not be planted and if already planted the same shall be uprooted in the following areas:-
 - a. at a distance of less than 30 metres from a wetland, riparian zone, water catchment areas, rivers, streams or ponds and the immediate surrounding of lakes, ocean, ponds, dams and other bodies of standing water.
 - b. in marshy areas unless authorised and allowed in writing by the Cabinet Secretary, Ministry of Environment, Climate Change and Forestry.
 - c. where the water table is less than 20 metres in depth.
 - d. on irrigated farmlands.
 - e. in areas that receive on average less than 400mm of of annual rainfall.



- f. Eucalyptus trees shall not be planted less than 30 metres from the highest flood point of a wetland, river, ocean or riparian area.
- g. Eucalyptus trees shall not be planted less than 10 metres on either side of a common boundary,
- h. Eucalyptus trees shall not be planted less 10 metres from the infrastructure utilities such as buildings, driveways, sidewalks and roadways
- j. Eucalyptus trees shall not be planted in irrigated farmlands.
- k. Eucalyptus trees shall not be planted on land whose sizes are less than a quarter (1/4) of an Acre.
- l. Eucalyptus trees shall not be planted less than 30 metres on either side of a public road.

And for the avoidance of doubt, this order shall apply throughout the country and the Respondents are hereby ordered to ensure compliance.

11. This being a public interest litigation there shall be no orders as to costs.

JUDGMENT DATED AND DELIVERED AT NYANDARUA THIS 12TH DAY OF NOVEMBER 2025.

MUGO KAMAU JUDGE

