Justice v National Environmental Management Authority & 4 others (Environment and Planning Petition E027 of 2025) [2026] KEELC 345 (KLR) (22 January 2026) (Judgment)

Neutral citation: [2026] KEELC 345 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND PLANNING PETITION E027 OF 2025

AA OMOLLO, J

JANUARY 22, 2026

BETWEEN

NATURAL JUSTICE ..... PETITIONER

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 1ST RESPONDENT

NATIONAL ASSEMBLY ..... 2ND RESPONDENT

KENYA LAW REFORM COMMISSION ..... 3RD RESPONDENT

THE HONORABLE ATTORNEY GENERAL ..... 4TH RESPONDENT

CS MINISTRY OF ENVIRONMENT, CLIMATE CHANGE AND FORESTRY ..... 5TH RESPONDENT

JUDGMENT

1. Natural justice who is the Petitioner herein seeks the following reliefs:

    a. A declaration that Regulation 23(4) of the Environmental Management (Impact Assessment and Audit) Regulations, 2003 is inconsistent with Section 129 (2) of EMCA Act as read together with Rule 3 and 4 of the National Environmental Tribunal procedure Rules to the extent that it does not disclose a mandatory obligation on the 1st Respondent to communicate its Environmental Impact Assessment licensing decisions to the public.

    b. A declaration that a lack of a mandatory obligation on the part of 1st Respondent to disclose its Environmental Impact Assessment licensing decisions to the public infringes on Articles 35, 48 and 69 (1)(d) of *the Constitution* of Kenya, 2010.

c. The Honorable Court be pleased to issue a directive in the nature of a structural interdict directed to the 2nd Respondent, within a stipulated timeframe, to initiate the amendment of Regulation 23(4) of the Environmental Management (Impact Assessment and Audit) Regulations, 2003 to wit that there be a mandatory requirement on the 1st Respondent to publish its Environmental Impact Assessment decisions to the public.

d. The Honorable Court be pleased to issue a directive to the 1st Respondent to provide a clear prescriptive framework for communication to the public on decisions regarding the issuance of Environmental Impact Assessment licenses.

e. That this Honorable Court be pleased to issue any such orders deemed fit to preserve justice.

2. The Petitioner pleads section 129 of the EMCA Act provides for 60 days period under which an aggrieved person may seek to appeal to the Tribunal on NEMA's decision to grant a license.

3. Section 129 (2) of the Environmental Management and Coordination Act (EMCA), read together with Rules 3 and 4 of the NET Procedure Rules, allows an aggrieved person to file an appeal to the Tribunal within 60 days from the date the contested decision was issued or served to them.

4. Regulation 23(4) of the Environmental Management (Impact Assessment and Audit) Regulation, 2003 states that;

'... (4) The decision of the Authority under this regulation shall be communicated to the proponent within fourteen days from the date of the decision and a copy thereof shall be made available for inspection at the Authority's offices..'"

5. In as much as that regulation provides that a copy of the decision shall be made available for inspection at the authority's office, the Petitioner avers there is no express mandatory obligation for this information to be published for the publics' access. That lack of access to this information freely and without facing undue hurdles by the public infringes on access to information, thereby infringing on access to environmental justice and the participation of the public in environmental management. They contend that accessing such information on the 1st Respondent's website is also restrictive.

6. As such, the Petitioner is apprehensive that clause 23 (4) of the Regulations imply that NEMA only needs to inform the project proponent about the decision to grant an Environmental Impact Assessment (EIA) license with no requirement for NEMA or the proponent to notify the public, despite the public potentially being directly affected by such decisions. This lack of disclosure limits the public's right to access information and makes it difficult to appeal NEMA's decisions within the sixty-day period allowed by that regulation.

7. They pleaded that without the publication of this information, the public's rights under Article 35, 48 and Article 69(1) (d) (f) of *the Constitution* of Kenya, 2010 as well as sections 4 and 5 of the *Access to Information Act*, are often infringed by the lack of obligation to communicate such information to them.

8. Consequently, they brought this Petition aiming to clarify and resolve the ambiguity in the Environmental Management and Coordination Act (EMCA) and the regulations thereof regarding the 1st Respondent's duty to inform the public about its decisions.

9. That this Petition therefore seeks to identify the ambiguity in Regulation 23(4) of the Environmental Management (Impact Assessment and Audit) Regulation, 2003 as read together with Rule 3 and 4 of NET procedure Rules, emphasizing the need for a mandatory requirement and clear guidelines on NEMA's duty to communicate its decisions to the public.

10. The 1st Respondent filed a replying affidavit sworn by David Ongáre, its director compliance on 30th June 2025. He affirms that the 1st Respondent has received letters from the Petitioner on various occasions seeking information on various projects which information they have always provided.

11. Mr Ongare deposes that the Authority on average processes and issues 12000 Environmental Impact Assessment Licenses countrywide. This translates to 1000 licences per month and the cost of publication of adverts ranges at Kshs.80,000 in the Star newspaper (the cheapest) and Kshs.30,000 in the Kenya Gazette.

12. The 1st Respondent avers that in light of the above, the average cost of publication of licences only would be approximately Kshs.80 million in the cheapest newspaper per month and Kshs.30,000 per month in the Kenya Gazette.

13. This cost must consider the Authority's total budget per year which is approximately Kshs 1.2 billion. Hence, the total expenditure for such publication through other means, not on the Authority's website, would be unattainable, as it roughly amounts to Kshs. One (1) billion.

14. The 1st Respondent deposes that in recognition of the challenge posted by Section 129 of EMCA, the Authority has for the last three years been uploading licenses issued to various high risk projects on its website.

15. However due to minimal hosting capacity of the Authority's servers, it has not been possible to upload all licenses issued. It is on this basis that the 1st Respondent has now embarked on the procurement of extra servers and development of a website capable of handling large volumes of Environmental Impact Assessment applications online and shall have a provision for uploading the issued licenses.

16. Additionally, the 1st Respondent said it would not be opposed to the proposed amendment so long as the same does not create an unattainable financial burden on it and the public in general.

17. The 2nd Respondent also filed a replying affidavit sworn by Samuel Njoroge who is the clerk to the National Assembly on 22nd May 2025. He deposed that Parliament in exercise of this Constitutional power enacted the Environmental Management and Coordination Act (EMCA) which at Section 148 delegates to the Cabinet Secretary (CS) for Environment and Forestry the power to make regulations for better carrying into effect the purpose and provisions of the Act.

18. He avers that the impugned Regulation 23(4) was lawfully made by the Cabinet Secretary in exercise of the delegated legislative authority under Section 148 of the parent Act. Once the legislative authority is delegated by the Parliament to a specified body/person, the National Assembly does not retain the power itself to make or amend subsidiary legislation.

19. Contrary to the Petitioner's allegations, the National Assembly deposes that it received and acknowledged a Petition of 18th January 2024 via a letter dated 9th February 2025 (A copy of the letter from the Clerk of the National Assembly dated 9th February 2025 appears as exhibit "SN-1").

20. The 2nd Respondent stated that the Parliament's consideration of this matter as well as the judicial consideration cannot run concurrently. Thus, the Petitioner's petition already submitted to Parliament is currently under consideration by the Directorate of Legislative Procedural Services. He asserts that this Honourable Court ought to exercise judicial restraint and decline to entertain the instant Petition, as doing so would amount to usurping the constitutional mandate of the Legislature and Executive and should refrain from intervening in a matter that is actively under consideration by Parliament, in accordance with the procedures established by law.

21. It is the 2nd Respondent's position that there exists a well-defined legal and institutional framework for the reform of subsidiary legislation, including mechanisms for public participation and stakeholder engagement. That the Petitioner has not shown that they have exhausted these avenues before seeking redress from the Court, rendering the Petition premature and in breach of the doctrine of exhaustion of administrative remedies.

22. They conclude by asserting that unless the Petitioner demonstrates that Parliament or the Executive acted irrationally or unconstitutionally, the Court ought not to interfere with internal legislative or regulatory functions.

23. The 4th and 5th Respondents filed grounds of opposition dated 24/3/2025 which pleaded thus:

    1. That the Petition is frivolous, does not disclose any justiciable claim, is a grope in the dark is the speculative and is devoid of merits.

    2. That the Petition is hinged on obiter dictum in Simba Corporation Limited v Director General, National Environmental Management Authority & another (2017) eKLR in which Regulation 23(4) of Environmental (Impact Assessment 6,1. Audit) Regulations (herein the IAA Regulations was neither in issue nor brought to the Court's attention.

    3. That there is no inconsistency between Regulation 23(4) of the IAA Regulations and section 129 of the Environmental Management and Coordination Act (the EMCA):

        i. Regulation 23(1), (2) and (3) of the IAA Regulations provides the manner in which a decision on environmental impact assessment licence shall be made.

        ii. Regulation 23(4) requires NEMA to not only communicate its decision on environmental impact assessment licence to the proponent within 14 days of the decision but also mandatorily make the decision available for inspection at its offices.

        iii. On the other hand, section 129 of EMCA provides the limitation period for instituting appeals against all decisions of NEMA including decision made under Regulation 230) of IAA Regulations.

    4. That in context the decision made under Regulation 23(1) of the IAA Regulations is a result of elaborate mechanisms under Regulations 11 to 22 of the IAA Regulations which fortify public participation and access to information.

    5. That by dint of the principle of harmonious reading of laws, the decisions on environmental impact assessment licence made and held by NEMA are subject to Article 35 of *the Constitution* and section 4(3) of the *Access to information Act*.

    6. That the Petitioner did not demonstrate when its decision made under Regulation 23(1) of the IAA Regulations was never made available for inspection to the public under Regulation 23(4) of the IAA Regulations.

    7. That 'making information available for inspection' under Regulation 23(3) simply means making the information easily accessible for inspection by the public.

    8. That in the upshot there exist sufficient legal framework to guide the disclosure of the decision made under Regulation 23(1) of the IAA Regulations.

Submissions:

24. The Petitioner filed submissions dated 15th September 2025, while only the 2nd Respondent filed written submissions dated 9th September 2025.

25. The Petitioner submits that Article 35(1) guarantees every citizen the right of access to information held by the state and requires the state to publish and publicize any important information affecting the nation. They argue that Regulation 23(4) is inconsistent with constitutional and statutory requirements.

26. The Petitioner submits that Regulation 23(4) does not impose an obligation on the 1st Respondent to disseminate their decision to the public. It is their submission that the 1st Respondent interprets Regulation 29 on publication to mean "in-office" inspection.

27. Consequently, they aver that without a mandatory requirement for disclosure of these decisions, affected citizens will be kept in the dark and unable to seek redress within the statutory timelines.

28. The 2nd Respondent submits that the Petitioner has not demonstrated that the contested Regulation has so seriously contravened *the Constitution* to warrant such exceptional judicial involvement. Further, they argue that the Petitioner already moved Parliament on 18/1/2024 and 22/7/2024, requesting changes to the contested regulation. That the National Assembly started review through the Directorate of Legislative and Procedural Services.

29. Instead, the Petitioner disregarded this process and now ran to Court. That their action contravenes the doctrine of exhaustion principle. In support of their argument, they cited the case of Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry and 1756 others (2015) eKLR.

Analysis and Determination:

30. Following analysis of the petition and the supporting documents as well as the responses thereto, I find the question due for determination is:

    i. Whether or not the Regulation 23(4) violates the constitutional rights guaranteed in Articles 35, 42, 69 and 70 and Section 3 of EMCA,

    ii. If the answer is yes, whether the Court can grant the reliefs sought.

31. The Petitioner quoted Eboso J in the case of Simba Corporation Ltd vs Director General, NEMA & Another (2017) eKLR which highlighted the need for an obligation mandating the 1st Respondent to disclose information to the public. It is on this premise that the Petitioner seeks an amendment requiring the 1st Respondent to publish its decisions on Environmental Impact Assessment licenses.

32. The Supreme Court of Kenya stated that the principles for consideration in construing whether a statute or statutory provision offends *the Constitution* have been laid down in a long line of cases. For example, in the Law Society of Kenya v Attorney General & another, Sup Ct. Petition 4 of 2019; [2019] eKLR they said that;

    "

    "(37) ... In construing whether statutory provisions offend *the Constitution*, courts must therefore subject the same to an objective inquiry as to whether they conform with *the Constitution*. That is why in Hamdarddawa Khana vs Union of India and Others 1960 AIR 554 it was stated thus;

"Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

(38) In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself..."

33. The impugned Regulation 23(4) of the Environmental (Impact Assessment and Audit) Regulations 2003 and subsequently amended in 2022 is anchored on the provisions of part VI of the Environmental Management and Coordination Act (EMCA). Therefore, this court called to consider whether the purpose and effect of the contested Regulation promote the Petitioner's environmental rights or otherwise.

34. Before a decision on E.I.A license is made, the Petitioner affirms that there is an elaborate process leading up to such decision-making. For instance, the requirement to conduct an Environmental Impact Assessment for every project is provided for in Section 58 of EMCA:

"(7) Environmental Impact Assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months."

35. One of the processes that must be complied with is Regulation 16(2) which states thus:

"In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall: -

a. Publicise the project and its anticipated effects and benefits by

i. .....

ii. Publishing a notice on the proposed project for two consecutive weeks in a newspaper that has a nation-wide circulation and

iii. Making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks."

36. The publication of the report in the daily newspaper and on the radio is to inform other people, including the immediate neighbours, especially those who may not be consulted during the public meetings.

37. The Attorney General pleaded that, in context, the decision made under Regulation 23(4) is the result of an elaborate mechanism set out in Regulations 11-22 of the Impact Assessment and Audit Regulations of 2003. Hence, by dint of the principle of harmonious reading of laws, the decision on the Environmental Impact Assessment licence made and held by the 1st Respondent is subject to Article 35 and Section 4(3) of the *Access to Information Act*.

38. Further, the Regulation leading to the decision set time limits within which the 1st Respondent is to render its decision upon receipt of the project/study report. The inference drawn is that from the date of publication in the daily newspaper of the project report, the public is put on notice that a decision will be made on the application by a project proponent to be issued with an EIA license.

39. During this process, it is within the Petitioner's right to seek information from the 1st Respondent on details of the project. In addition, they (Petitioner) can then ask the 1st Respondent to be notified when the decision is made. The Petitioner did not speak to the ineffectiveness of the public being informed of the project reports and or change of use notices through publishing the EIA report in the newspaper.

40. So that, if the public becomes aware of the ongoing application for the EIA licence through the publication of the project report by the project proponent, there would be no issue with the constitutionality or otherwise of Regulation 23(4). This is because the publication of the project report in a newspaper usually sets timelines for raising objections before the 1st Respondent renders its decision. It is at this point when the cause of action arises not necessarily after the decision is made.

41. I take the same position in the persuasive case of William Odhiambo Abok versus the Attorney General and 2 Others; Petition 529 of 2014, Mwita J. held thus,

> "It is not every provision which appears on the face to be unconstitutional that must be declared so. The court has a duty to read a provision to conform with *the Constitution* and only declare unconstitutional that which it must. The court must also take into account public policy; safety and well-being in considering whether or not to declare a provision unconstitutional."

42. In the present case, one of the public policy issues is the cost to be incurred by the 1st Respondent in publishing their EIA decisions in the daily newspapers from the public coffers. There would be justification for making declarations that would result in incurring such costs if the measures already in place did not provide access to the desired information. However, the Petitioner affirms that, on written request, the 1st Respondent always provides such information, in addition to publishing it on their websites.

43. It is my considered opinion and I so hold that if the Petitioner has no issue with publication of the project report as sufficing for public information, then even publication of the decision of the 1st Respondent in a daily newspaper would not cure the lacuna on the time for filing appeals under Section 129 of EMCA. This is because the audience/public are made aware of the project before the decision-making stage.

44. I hold the opinion that the Petitioner's step of petitioning the 2nd Respondent seeking amendment to Section 129 to give power to the National Environment Tribunal (NET) to extend time within which an appeal can be lodged depending on the reasons for the delay is more useful than petitioning this court with intent of amending Regulation 23(4) to make it mandatory on the 1st Respondent to publish their E.I.A licensing decisions in the daily newspaper.

45. For the purposes of this petition, I am persuaded by the reasoning of the 4th and 5th Respondents that if the Environmental (Impact Assessment and Audit) Regulations, 2003 are read as a whole, it does indeed make provisions respecting the right of access to information. The problem in my view lies in strict compliance by the concerned parties such as the project proponents.

46. In light of the foregoing, I conclude that the petition lacks merit and I decline to grant any of the reliefs sought. It is dismissed with no order as to costs.

DATED, SIGNED & DELIVERED AT NAIROBI VIRTUALLY, THIS 22ND DAY OF JANUARY 2026.

A. OMOLLO

JUDGE