



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ITEN**

**ELC PETITION NO. E001 OF 2025**

**IN THE MATTER OF: ARTICLES 3(1), 22(1), 23, 258, 259  
AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND  
INFRINGEMENT OF THE RULE OF LAW UNDER ARTICLES  
2(1), 3(2), 10, 27, 35, 47 AND 69 OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THE MATTER OF LAW AS GUARANTEED AND PROTECTED  
UNDER THE STATUTES; THE ENVIRONMENTAL  
MANAGEMENT & COORDINATION ACT (EMCA), FOREST  
CONSERVATION AND MANAGEMENT ACT, 2016, ACCESS TO  
INFORMATION ACT AND FAIR ADMINISTRATIVE ACTION  
ACT, NO.4 OF 2015**

**AND**

**IN THE MATTER OF TENDER; SALE OF FOREST PLANTATION  
MATERIALS IN ELGEYO MARAKWET COUNTY (SALVAGE) BID  
NO. KFS/DISP/108/2024-2025**

**AND**

**IN THE MATTER OF ARTICLES 22(2) & 3 AND 258 OF THE  
CONSTITUTION AND THE RULES MADE THEREUNDER, THE  
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND**

**FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE  
RULES, 2013-THE MUTUNGA RULES**

**BETWEEN**

**EMMANUEL CHERUIYOIT KATAM**

**(Suing on his behalf and on behalf of the**

**Members of ELMARA FOREST INVESTROS &**

**TIMBER MILLERS .....**

**PETITIONER/APPLICANT**

**= VERSUS =**

**KENYA FOREST**

**SERVICE .....**

**RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY (NEMA) .....**

**INTERESTED**

**PARTY**

**R U L I N G**

**Introduction**

1. Vide notice of motion application dated 23<sup>rd</sup> April, 2025 the petitioner/Applicant seeks the following orders: -

**i) Spent**

**ii) Spent**

**iii) An order of injunction to restrain the Respondent by themselves, their agents or**

**servants and or more specifically the Chief Conservator of forests from signing, witnessing, sealing, authorizing or in any other way completing the tender process of the disposal of the forest plantation contained in the tender documents namely; Sale of Forest Plantation Materials in Elgeyo Marakwet County (Salvage) Bid No.KFS/DISP/108/2024-2025 pending the hearing and determination of the petition.**

**iv) Costs be in cause.**

2. The application is premised on the grounds on its face and supported by the affidavit of the petitioner/ Applicant, Emmanuel Cheruiyot Katam, sworn on 23<sup>rd</sup> April, 2025 in which he adopts the averments in the affidavit he swore in support of the petition. The averments/contentions in the affidavit sworn in support of the petition are more or less the same as the grounds taken up in support of the application, which are as follows: -

- a) The members of ELMARA FOREST INVESTORS & TIMBER MILLERS are bidders registered under the category of 'Small';
- b) In the month of April, the Respondent issued out a tender bid by the name: Sale of Forest Plantation Materials in Elgeyo Marakwet County (Salvage) Bid No.KFS/DISP/108/2024-2025;
- c) That among tenders qualified for the said bid include;
  - i) KFS Forest Investors registered under timber in 2024 but limited to materials reserved for respective categories in the said bid;
  - ii) Bidders located in the County;
  - iii) Registered Forest Industry Investors located outside the County as per their category of registration;
  - iv) Bidders registered under category of 'Large'.
- d) The members of ELMARA FOREST INVESTORS & TIMBER MILLERS are registered under the category of 'Medium' for purposes of timber harvest;

- e) The Respondent violated the petitioner's right by not providing a system of public participation and involvement when it unilaterally decided to invite tenders to bid for forest materials which are part of natural resources;
- f) The tendering in respect of bid No. KFS/DISP/108/2024-2025 for Elgeyo station is flawed for failure of disclosure of material facts and/or crucial information of the tender and in the instant case the estimated area of harvest of the plantation for volume 473.32 is not disclosed and as such the entire tendering process of the forest stated tender is null and void;
- g) The reserve price for the impugned tender in respect of Elgeyo station herein for portions 1 and 4 is Kshs.3, 552,678.50 and 2, 121, 596.10 of which the bidders registered under category of "Small" are qualified to bid yet they are locked out and those registered under category 'Large' are permitted;

h) That the Respondent unfairly permitted the bidders registered under category 'Large' to bid for the tender that is basically for bidders registered under category 'Small' and as such locking them out.

3. In reply and opposition to the petition and the application, the Respondent filed the affidavit (replying) of its Ag. Principal Supply Chain Officer one John Mburu, sworn on 14<sup>th</sup> July, 2024 in which it contends/depones as follows: -

“.....

**3. The tender advertisement and the date of the tender documents were uploaded on our website on 8<sup>th</sup> April, 2025 and the same was shared to the County Forest Conservator Elgeyo Marakwet for local advertisement;**

**4. That the County Forest Conservator Elgeyo Marakwet published his advertisement by affixing posters on our premises at Elgeyo Marakwet County.**

- 5. That the advertisement targeted large millers because in the previous times we had published advertisements targeting medium and small millers and hence for the sake of fairness and equity we published this to target large millers;**
- 6. That the tender document contained sub compartments that were earmarked for disposal, Elgeyo 4(F) which was subdivided into two portions which are 1 and 4. The area and the volume of the reserve for each portion had been shared in that document;**
- 7. That during bid opening, no bid was received in respect to the tender and we proceeded to close.**
- 8. That the trees are still intact and we are not about to enter into any contract because the tender was unresponsive as subsequence the application and the petition are of no consequence and should be dismissed.**

**9. ....”**

4. Pursuant to directions given on 22<sup>nd</sup> July, 2025 the application was disposed of by way of written submissions.

**SUBMISSIONS**

**Applicants submissions**

5. In their submissions received by the Court on 8<sup>th</sup> October, 2025 the Applicants has given an overview of their case and submitted that the Applicants who are registered under category of ‘Small’ were locked out from the bidding process for timber harvest yet they are qualified; that it is in the interest of justice that the Court issues a conservatory order to preserve the subject matter pending the hearing and determination of the instant petition; that the principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time; that the Applicants herein have demonstrated a prima facie case and hence it is apparent that failure to grant an injunction or rather a conservatory order will render the instant petition nugatory bearing in

mind that matters regarding deforestation are matters of public interest.

6. The Applicants have further stated that the Respondent discriminated them from the timber harvest bid. That whereas the Respondent in its response has stated that the trees are still intact and that the impugned tender was unresponsive, given the fact that the Respondent has not formally withdrawn the said tender, it is apparent that the same is still active and it may be implemented at any given time.
7. It is the Applicants case that the Respondent has conceded that the petitioners who are small millers were locked out of the impugned tender and has failed to justify the lock out.
8. The Applicants further submit that there was no public participation leading to issuance of the impugned tender.
9. Maintaining that they have established a prima facie case warranting grant of the order sought, the Applicants submit that unless the order is granted, the Respondent may

implement the impugned tender thereby rendering the petition nugatory.

10. It is further submitted that whilst the Respondent in his response has deponed that the impugned tender was unresponsive, because the Respondent has not formally communicated cancellation or withdrawal of the tender in question, the Applicant submits that it is in interest of justice that the tender be legally suspended by this Court.
11. Claiming that the petition has been filed for the benefit of the public, with the aim of ensuring that harvesting of forest products is done in accordance with the provisions of established law and the constitution, the Applicants reiterate that the impugned tender was issued without public participation and that it discriminates them hence the need to have it suspended.

### **Respondent's submissions**

12. In its submissions received on 4<sup>th</sup> November 2024, the Respondent makes reference to its response to the effect that the impugned tender was unresponsive and maintains that the tender did not proceed to award or contract signing.

It is submitted that the application is moot and ought to be dismissed as it is based on a tender process which has effectively failed.

13. The Respondent further submits that the Applicants have not demonstrated that unless the order sought is granted, they stand to suffer irreparable harm. Based on the decision in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others (2014)e KLR**, where the Court of Appeal held/stated that the foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and prevention of multiplicity of suits, the Respondent submits that, in the circumstances of this case, where there is no tender award to challenge, no loss of contract to claim and where the alleged commercial loss is quantifiable, no imminent or irreversible harm has been shown.
14. In conclusion, the Respondent submits that the Applicant has failed to establish a prima facie case; that the application has been overtaken by events and that no irreparable harm has been demonstrated.

15. The Respondent urges this Court to dismiss the application with costs.

**Analysis and determination**

16. I have carefully read and considered the circumstances leading to filing of this application which is alleged discrimination in award of a tender for harvesting of forest products vis-à-vis the provisions of **Section 70** of the Forest and Management Act. I note that under that section of the law, this Court has no original jurisdiction on disputes arising from matters regulated under the Act, which matters include the dispute brought by the petitioner/Applicant before this Court. In that regard, see the said section which provides as follows: -

**“70(1) Any dispute that may arise in respect of forest conservation, management, utilization or conservation shall in the first instance be referred to the lowest possible structure under the devolved**

**system of government as set out in the County Government Act, 2012.**

**(2) Any matter that may remain un-resolved in the manner prescribed above, shall be referred to the National Environment Tribunal for determination, pursuant to which an appeal subsequent thereto shall, where applicable, lie in the Environment and Land Court as established under the Environment and Land Court Act, 2011.**

17. It is clear from the above cited provision of the law, that this Court lacks original jurisdiction to hear and determine the dispute presented before it.
18. It is trite law that where a statute establishes a dispute resolution mechanism, that mechanism should be exhausted before resort is had to Courts. In that regard, see the case of **Speaker of the National Assembly v. Karume (1992) KLR 21** where the Court of Appeal held: -

**“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”**

19. In **Geoffrey Muthiga Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others (2015) e KLR**, the Court of Appeal re-stated the above legal position thus: -

**“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...”**

20. The inescapable conclusion from the above quoted section of the law and the authorities, is that this Court lacks jurisdiction to entertain this suit as a Court of first instant. That being the case, I decline to entertain the petition and the accompanying notice of motion dated 23<sup>rd</sup> April, 2025 and proceed to dismiss it, together with the accompanying application with costs to the Respondent.

21. Orders accordingly.

**Dated, signed and delivered virtually at Busia this 10<sup>th</sup> day  
of February, 2026**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of;-**

Mr Nabasenge for the Petitioner

Ms Adeyo for the Respondent

N/A for the Interested Party

Court Assistant; Ian