

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E843 OF 2025

IN THE MATTER OF MOVING THE HONOURABLE COURT IN THE PUBLIC INTEREST
PURSUANT TO ARTICLES 3(1), 22, 23, 48, 50(1), 165(3), 159, 160(1), 162(2)(b),
AND 258 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 1(1) & (3), 2, 3(1), 4(2),
10, 19(1 & 2), 20(1, 2, 3 & 4), 21(1 & 2), 24, 73(1) & (2)(c), 129, 130, 153(4), 201,
204(3), 206(1)&(2) & (3), 209(1)&(2), 220, 221, 222, 223, 226, 227(1) 232(1) (a, b,
c, d, e & f) & (2)(a & b), 249(1 & 2), AND 259(1) OF THE CONSTITUTION OF
KENYA, 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 31, 35, 40, 42, 43,
46, 47 AND 48 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 8, 9, 11, 11A,
12, 13(2)(a), (3), (4), 14, 24, 25, 26 & 27 OF THE KENYA RAILWAYS CORPORATION
ACT (CAP 397 REVISED); SECTION 11 & 12 OF THE STATE CORPORATIONS ACT
(CAP 446); SECTIONS 3, 4, & 5 OF THE ACCESS TO INFORMATION ACT (CAP 7M);
SECTIONS 3, 4, & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT (CAP 7L); SECTION
44, 53, 55, 58, 60, 62, 66, 71(1),(2),(3),(4)(6), 72, 91 & 92 OF THE PUBLIC

PROCUREMENT AND ASSET DISPOSAL ACT (CAP 412C); SECTIONS 24(7), 68, 87, 88, & 89 OF THE PUBLIC FINANCE MANAGEMENT ACT (CAP 412A); AND SECTION 8(3) OF THE MISCELLANEOUS FEES AND LEVIES ACT CHAPTER 469C (REVISED EDITION 2023).

AND

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE DIVERSION OF FUNDS FROM THE RAILWAY DEVELOPMENT LEVY FUND (RDLF) TO CONSTRUCT THE RIRUTA-NGONG COMMUTER METER GAUGE RAILWAY PROJECT, AND THE THREATENED SIPHONING OF MONEY FROM THE CONSOLIDATED FUND THROUGH THE PROJECT AND OTHER FISCALLY UNVIABLE PROJECTS WORTH APPROXIMATELY KSH2.824 TRILLION TO BE UNDERTAKEN BY THE TECHNICALLY INSOLVENT KENYA RAILWAYS CORPORATION.

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF SECTION 8 OF THE MISCELLANEOUS FEES AND LEVIES ACT NO. 29 OF 2016 (REVISED EDITION 2023) AND THE CUSTOMS AND EXCISE (RAILWAY DEVELOPMENT LEVY FUND) REGULATIONS, 2013 (REVISED 2020).

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE RAILWAY DEVELOPMENT LEVY FUND.

AND

IN THE MATTER OF THE DOCTRINES OF RULE OF LAW, CONSTITUTIONALISM, AND LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER
BERNARD MUCHIRI MUCHERE.....2ND PETITIONER
NAOMI NYAKERARIO MISATI.....3RD PETITIONER

-VERSUS-

KENYA RAILWAYS CORPORATION.....1ST
RESPONDENT

THE BOARD OF DIRECTORS,

KENYA RAILWAYS CORPORATION..... 2ND RESPONDENT

THE NATIONAL EXECUTIVE OF THE REPUBLIC OF KENYA.....3RD
RESPONDENT

PRINCIPAL SECRETARY, NATIONAL TREASURY.....4TH RESPONDENT

PRINCIPAL SECRETARY,

STATE DEPARTMENT FOR TRANSPORT.....5TH
RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH
RESPONDENT

THE NATIONAL ASSEMBLY.....7TH RESPONDENT

THE AUDITOR GENERAL.....8TH RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION (CRBC).....9TH
RESPONDENT

THE APEC CONSORTIUM CO. LTD.....10TH
RESPONDENT

AFRICA STAR RAILWAY OPERATION COMPANY LIMITED.....11TH
RESPONDENT

AND

SAMORA SIKALIEH (Suing on behalf of KAREN LANGATA DISTRICT ASSOCIATION)1ST INTERESTED PARTY
KATIBA INSTITUTE.....2ND INTERESTED PARTY
LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

RULING

INTRODUCTION

1. What is before Court for determination is the Petitioners' Notice of Motion Application dated 19th December 2025. The Application seeks conservatory orders to restrain the implementation of the Riruta-Ngong Commuter Meter Gauge Railway Project (the Project) and also interlocutory orders for discovery and production of documents. The Application is brought under Articles 22, 23(3), and 258 of the Constitution, and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
2. The Petitioners/Applicants, acting in the public interest, contend that the Project, valued at Kshs.11,505,806,368/= and the wider project portfolio of the 1st Respondent valued at approximately Kshs.2.824 trillion, are being implemented in flagrant violation of the Constitution. The gravamen of their complaint is fourfold.

3. First, the Applicants contend that the Railway Development Levy Fund (RDLF) is being utilized to finance a metre-gauge commuter line contrary to its statutory purpose which is limited to the construction and operation of a standard gauge railway network.
4. Secondly, the Applicants contend that the impugned Project commenced without specific parliamentary appropriation; thereby violating Articles 206, 220, and 221 of the Constitution.
5. Thirdly, the Applicants contend that the identification and procurement of the 9th Respondent as the Project's Contractor and the 10th Respondent as the Project Consultant was by way of single-sourcing, contravening the constitutional dictates of fairness, equity, transparency, competitiveness, and cost-effectiveness under Article 227.
6. Lastly, the Applicants contend the Project was initiated without meaningful public participation and in defiance of the Petitioners' constitutional right of access to information under Article 35.
7. The Petitioners/Applicants' Notice of Motion Application dated 19th December 2025 is supported by the Affidavit of the 1st Petitioner sworn on 19th December 2025. Annexed to that Supporting Affidavit is a compendium of public documents, including the Auditor-General's Reports on the RDLF

and the Kenya Railways Corporation, extracts from national budget estimates, and correspondence demonstrating the Petitioners failed attempts to obtain information and documents from the Respondents.

8. The 1st Interested Party, supporting both the Petitioners' Application as well as the underlying Petition, filed a Replying Affidavit sworn on 30th December 2025. That Replying Affidavit in Support provides additional detail on the alleged absence of pre-feasibility and feasibility studies, alleged conflicting financial disclosures regarding the Project, and the unsuccessful pursuit of administrative remedies before the Commission on Administrative Justice.
9. The Applicants and the 1st Interest Party contend that the second limb of the Application, which seeks interlocutory orders for discovery and production of documents, was necessitated by and is merited for the reason of the above alleged intransigence by the Respondents in the face of requests for information and documentation.
10. The Application is opposed, and vehemently so. The 1st and 2nd Respondents filed a Replying Affidavit sworn by Stanley Gitari on 27th January 2026, together with a Replying Affidavit by Engineer John Maina of even date, and consolidated written submissions dated 7th February 2026.

11. The 9th Respondent filed a Replying Affidavit sworn by Liu Jian on 2nd February 2026, a Notice of Motion seeking discharge of interim orders, and written submissions dated 9th February 2026.
12. The 10th Respondent filed a Replying Affidavit sworn by Eng. Misheck Waititu on 8th January 2026 and written submissions dated 27th January 2026.
13. The 7th Respondent filed a Replying Affidavit sworn by Samuel J. Njoroge on 27th January 2026, a Further Affidavit of 8th February 2026, a Second Further Affidavit of 16th February 2026, and written submissions dated 4th February 2026.
14. The 11th Respondent filed a Replying Affidavit sworn by Mo Kun on 6th February 2026 and written submissions dated 12th February 2026.
15. The Petitioners, in turn, filed Further Affidavits and supplementary written submissions in reply. The 3rd Petitioner filed a Further Affidavit of 2nd February 2026 in response to the various replying affidavits filed in reply and opposition.
16. The 1st Petitioner filed a 2nd Further Affidavit on 10th January 2026 in response to the 10th Respondent, and a 3rd Further Affidavit on 20th February 2026 in response to the 7th Respondent's affidavits.

17. The 2nd Petitioner filed a Replying Affidavit of 1st February 2026, a 3rd Further Affidavit on 18th February 2026, and supplementary submissions on 1st February 2026. The 1st and 2nd Petitioners also filed further written submissions on 9th February 2026, rebutting the responses of the 1st, 2nd and 9th Respondents.
18. By orders issued on 20th January 2026, this Court granted interim conservatory orders restraining the Respondents from continuing, implementing, financing, or progressing the construction of the Project.
19. The factual matrix giving rise to this dispute is largely uncontested, though the legal characterization of those facts is hotly disputed. The Project is a proposed 12.5-kilometre metre-gauge railway line intended to run from Riruta in Nairobi County to Ngong in Kajiado County, with intermediate stations at Karen, and Embulbul. It forms part of a larger planned 30.5-kilometre loop extending to Kiserian and Ongata Rongai.
20. The Project was officially commissioned by His Excellency the President of the Republic of Kenya on 14th December 2023. Construction works commenced in earnest in early 2024. By the time this petition was filed on 19th December 2025, the Project had attained approximately 40.5% completion as per the progress report annexed to the 9th Respondent's Replying Affidavit; a statistic denied by the Petitioners.

21. The procurement history reveals that the 1st Respondent issued a Letter of Award to the 9th Respondent on 21st September 2022 for the construction of the Project at a negotiated contract sum of Kshs.8,212,028,998.68. A formal commencement order was issued on 16th January 2024, setting the official commencement date as 23rd January 2024. The 10th Respondent was contracted on or about November 2023 to provide consultancy services, including the preparation of the Environmental and Social Impact Assessment (ESIA) study and Resettlement Action Plan. The ESIA study report is dated 17th May 2024, and the National Environment Management Authority issued the requisite Environmental Impact Assessment licence on 19th September 2024.

22. The financing of the Project is a central point of contention. According to the 1st and 2nd Respondents, the Project is funded from the Railway Development Levy Fund. They rely on letters from the National Treasury dated 20th July 2022 granting approval for the 1st Respondent to commence project preparation and implementation, and a further letter dated 10th July 2024 approving the pre-feasibility study for the entire railway link. The 7th Respondent, in its further affidavit of 8th February 2026, provided a table showing parliamentary allocations to the Project, indicating Kshs.125 million in FY 2022/23 (classified as government allocation), Kshs.3.72 billion in FY 2024/25, and Kshs.3.27 billion in FY 2025/26 (both classified as Appropriations-in-Aid from the RDLF). The 7th Respondent confirmed that no amount was allocated in FY 2023/24.

23. The Petitioners, however, point to what they term "material discrepancies" in these financial disclosures. They note the absence of any allocation in FY 2023/24, a period during which they allege substantial construction works were already underway. They further contend that the classification of RDLF proceeds as "Appropriations-in-Aid" is a procedural device that cannot cure the substantive illegality of applying a fund established for standard gauge railway purposes to a metre-gauge commuter line.
24. The statutory framework governing the RDLF is derived from Section 8 of the Miscellaneous Fees and Levies Act, Cap 469C. The provision, in its original form, limited the purpose of the levy to providing funds for the construction of a standard gauge railway network. By the Tax Laws (Amendment) Act, No. 2 of 2020, Section 8(3) was amended to insert the words "and operation" immediately after the word "construction". The purpose of the fund thus became "the construction and operation of a standard gauge railway network". The Customs and Excise (Railway Development Levy Fund) (Amendment) Regulations, 2020 (Legal Notice No. 86 of 2020) similarly expanded the application of the fund to cover SGR operations.
25. The Petitioners contend that the Riruta-Ngong line is a metre-gauge railway, technically, functionally, and legally distinct from the standard gauge railway. They argue that applying RDLF proceeds to a metre-gauge project is

ultra vires the statute and violates the specific-purpose doctrine enshrined in Article 206(1)(a) of the Constitution. The Respondents counter that the Project is an integral operational component of the SGR system, designed to provide last-mile connectivity and enhance the commercial viability of the SGR. They argue for a purposive interpretation of the statutory purpose that would encompass feeder lines and complementary infrastructure.

26. On 12th February 2026, subsequent to the filing of this petition and after the issuance of interim conservatory orders, the Leader of the Majority Party introduced the Miscellaneous Fees and Levies (Amendment) Bill, 2025 (National Assembly Bills No. 57 of 2025). Clause 3(a) of the Bill seeks to amend Section 8(3) of the principal Act by expanding the purpose of the levy to include, inter alia, "financing the development and construction of railway infrastructure" and "rehabilitation of railway transport infrastructure". The Bill underwent first reading on 12th February 2026 and was committed to the Departmental Committee on Transport and Infrastructure for public participation, which closed on 20th February 2026. The Bill has not yet been enacted into law.

27. The 7th Respondent, by its second further affidavit sworn on 16th February 2026, contends that this legislative development has effectively collapsed the substratum of the petition. The Petitioners, in response through the 1st Petitioner's 3rd further affidavit sworn on 20th February 2026, argue that a pending Bill has no legal effect, cannot retrospectively validate past unconstitutional conduct, and does not address the numerous other

constitutional violations pleaded in the petition, including procurement irregularities, public participation deficits, and the insolvency of the 1st Respondent.

28. The issue of public participation with respect to the Project has been litigated previously. In ***Environment and Land Court Petition No. E028 of 2024, Samora Sikalieh (Being Chairman of and Suing in Public Interest and on behalf of the Members of Karen Langata District Association) v Kenya Railways Corporation & 5 others***, the Environment and Land Court delivered judgment on 1st July 2025. The learned judge, A. Omollo J, after considering extensive evidence of stakeholder meetings held between November 2023 and April 2024, held that the Respondents had conducted adequate public participation before the ESIA study report was prepared. The court further declined to nullify works undertaken prior to the issuance of the EIA licence, having regard to the public good served by the Project and the mitigation measures contained in the ESIA report.
29. The Respondents rely heavily on this judgment, invoking the doctrines of *res judicata* and issue estoppel. The Petitioners contend that the ELC petition addressed only environmental compliance issues, whereas the present petition raises distinct constitutional questions relating to public finance, procurement, and the validity of the RDLF, matters the ELC expressly declined to adjudicate.

THE PETITIONERS' LEGAL ARGUMENTS IN SUPPORT

30. The Petitioners' case, as articulated in their Notice of Motion dated 19th December 2025, their affidavits, the 1st Interested Party's replying affidavit, and their joint written submissions, is that the Project is being implemented in a manner that fundamentally subverts the constitutional architecture governing public finance, procurement, and public participation.
31. On the legal framework governing conservatory orders, the Petitioners submit that the threshold for grant of such orders is well settled in the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR***. They contend that conservatory orders are public law remedies distinct from private law injunctions, intended to preserve the subject matter of constitutional litigation and to uphold the adjudicatory authority of the court. They submit that the three-limb test requires demonstration of a prima facie case with a likelihood of success, a real danger that the petition will be rendered nugatory if orders are not granted, and consideration of public interest.
32. On the existence of a prima facie case, the Petitioners advance several grounds. First, they contend that the financing of the Project from the RDLF is ultra vires the statute. They draw attention to Section 8(3) of the Miscellaneous Fees and Levies Act, which limits the purpose of the fund to "construction and operation of a standard gauge railway network". They submit that a metre-gauge commuter line is technically, functionally, and legally distinct from a standard gauge railway, and that applying RDLF proceeds to such a project violates the specific-purpose doctrine under

Article 206(1)(a) of the Constitution. They rely on the principle of statutory interpretation, *expressio unius est exclusio alterius*, arguing that the express limitation to standard gauge excludes other gauges and purposes.

33. Second, the Petitioners submit that the Project was commenced without specific parliamentary appropriation. They point to the 7th Respondent's admission that no amount was allocated to the Project in FY 2023/24, a period during which construction works were already underway. They argue that internal Treasury approvals and the belated classification of funds as Appropriations-in-Aid in subsequent financial years cannot substitute for the exclusive constitutional power of Parliament to appropriate public funds under Articles 220 to 223. They rely on the principle that parliamentary approval must precede expenditure, and that post facto ratification cannot cure antecedent illegality.

34. Third, the Petitioners challenge the procurement process, contending that the single-sourcing of the 9th Respondent as contractor and the 10th Respondent as consultant violates Article 227 of the Constitution, which mandates a system that is fair, equitable, transparent, competitive, and cost-effective. They argue that the justification of "standardization and compatibility" under Section 103(2)(d) of the Public Procurement and Asset Disposal Act is facially implausible where the contract is for a metre-gauge line and the prior contract was for a standard gauge railway. They note the absence of any evidence of tender evaluations, market analyses, or compatibility studies.

35. Fourth, the Petitioners submit that the Project was initiated without meaningful public participation. They rely on the correspondence exhibited in the 1st Interested Party's affidavit, demonstrating repeated requests for information and engagement that were ignored or rebuffed. They argue that the stakeholder meetings relied upon by the respondents were information sessions conducted after the Project had already been commissioned and construction had commenced, rendering them retroactive box-ticking exercises rather than genuine consultation.
36. Fifth, the Petitioners raise the issue of the 1st Respondent's financial insolvency. They point to audited financial statements showing accumulated losses of approximately Kshs.197 billion and negative equity of approximately Kshs.72 billion. They argue that assigning a Kshs.2.824 trillion project portfolio to such an entity is irrational and violates Article 201(d) of the Constitution, which mandates intergenerational equity and prudent use of public resources.
37. On the question of irreparable harm and the petition being rendered nugatory, the Petitioners submit that the harm is not speculative but occurring daily. They contend that continued construction will result in irreversible dissipation of contested public funds, irreversible ecological damage to Ngong Road Forest, and the creation of *fait accompli* that would render any eventual judgment in their favour an academic exercise. They

argue that public funds, once unlawfully disbursed and expended, cannot practically be recovered.

38. On public interest, the Petitioners submit that the paramount public interest lies in upholding the Constitution, preventing unlawful use of public resources, and enforcing accountability before expenditure, not after. They argue that the Respondents' invocation of sunk costs and public benefits turns constitutional logic on its head, as it would mean the larger the alleged illegality and the more money spent, the more immune it becomes to judicial review.
39. The Petitioners further address the procedural objections raised by the respondents. On *res judicata*, they contend that ***ELC Petition No. E028 of 2024 (supra)*** addressed only environmental licensing issues, whereas the present petition concerns public finance constitutionality, which was neither pleaded nor determined in that case. They rely on the principle that *res judicata* requires strict identity of parties, cause of action, and subject matter, citing ***Uhuru Highway Development Ltd v Central Bank of Kenya [1997] eKLR***. They note that the ELC itself, at paragraph 107 of its judgment, acknowledged its lack of jurisdiction over financing matters and expressly recommended that the Petitioner seek recourse in the appropriate forum.
40. On jurisdiction and *locus standi* of the Petitioners, the Petitioners submit that statutory bodies such as the Public Procurement Administrative Review Board, the National Environment Tribunal, or the Commission on

Administrative Justice lack jurisdiction to interpret the Constitution, invalidate statutes, or determine the constitutionality of public funds. They rely on the Supreme Court decision in ***Petition Number 42 of 2019: Kenya Vision 2030 Delivery Board v The Commission on Administrative Justice, the Attorney General & Eng. Judah Abekah***, which stripped the CAJ of any binding adjudicative powers.

41. On the Miscellaneous Fees and Levies (Amendment) Bill, 2025, introduced after the filing of this petition, the Petitioners submit that a pending Bill has no legal force and cannot moot existing constitutional proceedings. They argue that the Bill, even if enacted, cannot retrospectively validate past unconstitutional expenditure or conduct, and that it does not address the numerous other constitutional violations pleaded in the petition. They contend that the timing of the Bill raises serious concerns of legislative interference with the judicial process, and that to permit such conduct would encourage constitutional violations followed by legislative whitewashing.
42. The Petitioners therefore pray that the conservatory orders issued on 20th January 2026 be confirmed and upheld pending the hearing and determination of the petition, and that the contempt application be set down for hearing with directions for filing of verified evidence of compliance.

THE 1ST INTERESTED PARTY'S CASE

43. The 1st Interested Party supports the application through his replying affidavit sworn on 30th December 2025 and his written submissions dated 8th January 2026.
44. The 1st Interested Party provides detailed evidence of the pre-feasibility and feasibility deficits in the Project. He annexes the Kenya Railways Corporation advertisement for consultancy services for feasibility studies, published in February 2025, which notably excludes Line 8 (the Riruta-Ngong corridor) from the scope of the proposed feasibility study. He argues that this omission, coupled with the lack of any pre-feasibility or feasibility studies conducted by the Respondents, raises serious concerns regarding prudent use of public funds and adherence to the Public Investment Management framework.
45. It was submitted that the Petitioners have demonstrated how the Respondents have violated the constitutional values and due legal process required to be followed prior to the commencement and implementation of the project thereby meeting the threshold for the grant of conservatory orders being sought.
46. On the financial aspects, the 1st Interested Party highlights the material discrepancies in the reported contract sums and sources of funding. He notes that the Auditor-General's Report indicates estimated costs of Kshs.11.5 billion from the RDLF, while the Estimates of Development Expenditure show allocations totalling approximately Kshs.5 billion over

three financial years, and the Senate Hansard records construction costs of Kshs.8.26 billion and land acquisition costs of Kshs.2.8 billion from the Government of Kenya. He argues that this lack of clarity undermines transparency and accountability.

47. On access to information, the 1st Interested Party details the extensive correspondence between KLDA and the respondents, spanning from June 2023 to August 2025, seeking information on feasibility studies, construction plans, budgetary approvals, and procurement documentation. He annexes copies of letters, meeting minutes, and the response from the Commission on Administrative Justice. He argues that the Respondents' persistent failure to disclose information violates Article 35 of the Constitution and Sections 5, 8, and 9 of the Access to Information Act.
48. On the doctrine of exhaustion, the 1st Interested Party submits that the administrative mechanism under Section 23 of the Access to Information Act proved ineffectual, as the Commission on Administrative Justice neither compelled disclosure nor issued binding directions. He argues that the issues raised in the petition transcend administrative disputes and involve systemic constitutional violations that the CAJ lacks jurisdiction to adjudicate. Reliance was placed on the decision in ***Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR*** and ***Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another (Interested Parties) [2022] eKLR*** in support of his arguments.

49. The court was urged to allow the Petitioners' Application dated 19th December 2025 as prayed to prevent imminent constitutional violations, to safeguard public resources and uphold public confidence in governance and lawful decision making.

THE 1ST AND 2ND RESPONDENTS' CASE

50. The 1st and 2nd Respondents oppose the application through the replying affidavit of Stanley Gitari, the replying affidavit of Engineer John Maina, and their consolidated written submissions.

51. On the legal principles governing conservatory orders, the 1st and 2nd Respondents rely on the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)*** and the decision in ***Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR***. They submit that the applicant must demonstrate an arguable *prima facie* case with a likelihood of success, that in the absence of the orders the petition will be rendered nugatory, and that public interest favours the grant of the orders.

52. The 1st and 2nd Respondents contend that the Petitioners have failed to demonstrate a *prima facie* case. They argue that the RDLF was lawfully established by Parliament and its application to the Project is within the statutory purpose. They annex a letter dated 25th November 2024 from the Principal Secretary, National Treasury, granting approval for the Project. They further annex a letter dated 20th July 2022 granting approval for Phase

1 implementation at a cost of Kshs.8.2 billion, and a letter dated 10th July 2024 approving the pre-feasibility study for Phases 2 and 3.

53. On the specific-purpose doctrine, the 1st and 2nd Respondents argue that the Project is an integral component of the SGR system, designed to provide last-mile connectivity and enhance the commercial viability of the SGR. They submit that the Project forms part of the Nairobi Metropolitan Mass Transit Plan and the Kenya Railways Strategic Plan 2022-2027, and that the inter-linkage between the MGR and SGR is essential for optimal operation of the national railway network.
54. On public participation, the 1st and 2nd Respondents rely on the judgment in ELC Petition No. E028 of 2024, wherein the court held that adequate public participation was conducted. They annex the ESIA study report, which documents stakeholder meetings held between November 2023 and April 2024, and the attendance lists evidencing participation by diverse groups including residents, business owners, and institutional representatives. They argue that the issue of public participation has been conclusively determined and cannot be re-litigated under the *doctrine of res judicata*.
55. On the question of parliamentary appropriation, the 1st and 2nd Respondents submit that the Project is funded through the RDLF, which is a public fund established by an Act of Parliament. They argue that the National Treasury approvals annexed to their affidavits constitute sufficient

authorization, and that the funds are disbursed through the Integrated Financial Information Management System, which ensures accountability and transparency.

56. On the balance of convenience and public interest, the 1st and 2nd Respondents submit that the Project is 40.5% complete, that substantial public funds have already been expended, and that halting the Project would occasion significant financial loss through contractual penalties and liquidated damages. They argue that the public interest lies in completion of the infrastructure, which will decongest Ngong Road, reduce transport costs, and create employment opportunities.
57. The 1st and 2nd Respondents further oppose the contempt application, contending that they have complied with the court orders by de-mobilising heavy construction machinery and securing the site. They argue that the activities observed post-order were limited to safety measures and site protection, which do not constitute continuation or progression of construction works.

THE 3RD, 4TH, 5TH AND 6TH RESPONDENTS' CASE

58. The 3rd, 4th, 5th and 6th Respondents opposed the application vide the replying affidavit of the 5th Respondent sworn by Mohamed Daghar, C.B.S and grounds of opposition dated 30th December 2025. They contend that the Application does not meet the test for grant of conservatory orders as set out in the Supreme Court decision in ***Gatirau Peter Munya v Dickson***

Mwenda Kithinji & 2 others (supra). They argue that in this interim stage, the Court should navigate a thin line by avoiding to delve onto the merits of the Petition prematurely before hearing the parties on merit but at the same time having an overview of the substance of the Petition itself and whether a case is made on a prima facie basis to warrant conservatory orders.

59. The Respondents asserts that the application is made on the basis of a misperception of a law since the Railway Development Levy Fund is not a novel establishment but it was put in place under Miscellaneous Levies Act, 2016. It is also argued that the provisions of this Act are entitled to enjoy a presumption of constitutionality, which can be affirmed only after a comprehensive hearing. Relying on the decision of the Supreme Court in **SC Petition Nos. E031, E032, and E033 of 2024**, the Respondents argue that the Applicants have not proven a prima facie case, and they have not established that the impugned Act presents an impending threat to life and limb, which would justify its suspension at such an interim stage. Further reliance was placed on the decision in **Attorney General & another v Coalition for Reform and Democracy & 7 others [2015] KECA 994 (KLR)** in support of their arguments.

60. It is the Respondents case that the public interest is against the granting of the conservatory orders. It is argued that the fund was established as a result of policy objectives as stipulated in the Integrated National Transport Policy, and its execution which has already attained high level has a great

purpose to the people. Stopping the fund at this point would also lead to fiscal constraints and cripple major projects to improve the railway infrastructure, which will cause the maximum harm to the largest number of people.

61. The Court was urged to allow the Petition to come to a full hearing, at which time the substratum of the case will be within the reach of the Court, by sustaining the presumption of regularity in government decisions. Therefore, they prayed that the Court should not grant the conservatory orders sought by the Petitioners.

THE 7TH RESPONDENT'S CASE

62. The 7th Respondent opposes the application through the replying affidavit of Samuel J. Njoroge sworn on 27th January 2026, a further affidavit sworn on 8th February 2026, a second further affidavit sworn on 16th February 2026, and written submissions dated 4th February 2026.
63. In its initial replying affidavit, the 7th Respondent raises objections to the petition. It contends that the petition is a "mixed-grill" pleading with multiple unrelated distinct causes of action against different parties, thereby violating its right to a fair hearing. It further argues that the Petitioners failed to exhaust mandatory statutory dispute-resolution mechanisms, including the Public Procurement Administrative Review Board for procurement issues, the National Environment Tribunal for environmental issues, the National Land Commission for land acquisition

issues, and the Commission on Administrative Justice for access to information issues.

64. On the constitutionality of the RDLF, the 7th Respondent traces the legislative history of the fund, from its establishment through Section 117A of the repealed Customs and Excise Act, to its current iteration under Section 8 of the Miscellaneous Fees and Levies Act. It relies on the Court of Appeal decision in ***Okoti & 2 Others v Attorney General & 7 Others [2020] KECA 589 (KLR)*** wherein the court acknowledged the National Assembly's mandate in enacting the RDL framework. It argues that the 2020 amendment expanding the fund to include operations was a legitimate legislative response to changed circumstances, ensuring the sustainability of the national railway system.
65. In its further affidavit of 8th February 2026, the 7th Respondent provides detailed information on the budgetary process and allocations for the Project. It explains that the budget estimates are prepared and tabled by the National Treasury in accordance with Article 220 of the Constitution and Section 38 of the Public Finance Management Act, scrutinised by departmental committees, and ultimately approved by the National Assembly. It annexes a table showing allocations to the Project: Kshs.125 million in FY 2022/23 (classified as government allocation from ordinary revenue), Kshs.3.72 billion in FY 2024/25, and Kshs.3.27 billion in FY 2025/26 (both classified as Appropriations-in-Aid from the RDLF). It confirms that no amount was allocated in FY 2023/24.

66. In its second further affidavit sworn on 16th February 2026, the 7th Respondent introduces the Miscellaneous Fees and Levies (Amendment) Bill, 2025, which was introduced on 12th February 2026. The Bill seeks to amend Section 8 of the principal Act to expand the purpose of the levy to include "financing the development and construction of railway infrastructure" and "rehabilitation of railway transport infrastructure". The 7th Respondent argues that this legislative development has collapsed the substratum of the petition, as it addresses the Petitioners' core allegation that the RDLF cannot lawfully be applied to a metre-gauge project. It submits that the Bill was introduced to clarify and supplement the existing legal framework in the public interest.

67. The 7th Respondent relies on the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)*** for the principles governing conservatory orders. It submits that the Petitioners have failed to establish a prima facie case, have not shown irreparable harm, and have not demonstrated that public interest supports the grant of conservatory orders. It argues that the balance of convenience favours continuation of the Project, given its advanced stage and the significant public resources already committed.

THE 9TH RESPONDENT'S CASE

68. The 9th Respondent opposes the application through the replying affidavit of Liu Jian sworn on 2nd February 2026, and its written submissions dated 9th

February 2026. It has also filed a notice of motion dated 2nd February 2026 seeking discharge of the interim conservatory orders.

69. The 9th Respondent's primary contention is that the Petitioners are guilty of material non-disclosure warranting immediate discharge of the interim orders. It argues that the Petitioners failed to disclose that the Project was commissioned in December 2023, that construction had progressed to approximately 39% completion by the time of filing, that over 400 Kenyans were employed on the Project, and that the issues of public participation and environmental compliance had already been litigated and determined in ELC Petition No. E028 of 2024. It submits that this failure to make full and frank disclosure violates the duty of *uberrima fides* applicable in *ex parte* proceedings, and that the orders ought to be discharged *ex debito justitiae*.
70. On the merits of the application, the 9th Respondent submits that the Petitioners have not established a *prima facie* case to grant the conservatory orders as was established by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)***. It argues that direct procurement is a lawful method of procurement provided for under the Public Procurement and Asset Disposal Act, and that the contract with the 9th Respondent enjoys a presumption of regularity.
71. The 9th Respondent further submits that the Project is an integral operational component of the SGR system, designed to provide last-mile connectivity and enhance the commercial viability of the SGR. It argues that

the Riruta-Ngong line, though metre-gauge, is a mixed-traffic corridor for both passenger and freight services, and that it falls within the statutory scope of the RDLF as a project that facilitates and operationalizes SGR services.

72. On the question of irreparable harm, the 9th Respondent submits that the Petitioners' grievances are purely speculative, whereas the 9th Respondent faces immediate and quantifiable prejudice if the orders remain in place, including daily standing charges for idle heavy machinery, contractual penalties, and potential claims from its workforce. It argues that the balance of convenience tilts overwhelmingly in favour of the Respondents and the public.
73. The 9th Respondent also invokes the doctrines of *res judicata* and laches. It argues that the issues raised in the petition are similar in substance to those determined in ELC Petition No. E028 of 2024. It further argues that the Petitioners delayed in bringing this challenge, waiting until the Project was nearly halfway complete before filing suit, thereby causing prejudice to the respondents who had mobilized substantial resources in reliance on the validity of the contracts.
74. This Court was thus urged to decline the Application for conservatory orders and proceed to discharge the Interim Conservatory Orders issued on 20th January 2026.

THE 10TH RESPONDENT'S CASE

75. The 10th Respondent opposes the application through the replying affidavit of Eng. Misheck Waititu sworn on 8th January 2026, and its written submissions dated 27th January 2026.
76. The 10th Respondent's primary contention is that its role in the Project was strictly limited to consultancy services, specifically the preparation of the Environmental and Social Impact Assessment study and the Resettlement Action Plan. It states that it has no role whatsoever in the financing, procurement, land acquisition, or construction of the Project, and that its involvement concluded upon submission of the ESIA report to the 1st Respondent.
77. The 10th Respondent submits that the Petitioners have failed to establish a prima facie case against it, as the constitutional violations alleged in the petition relate to matters entirely outside its mandate and control. It argues that it is an improper and unnecessary party to these proceedings and should be struck out.
78. On the issue of public participation, the 10th Respondent relies on the ESIA study report annexed to its affidavit, which documents a series of stakeholder engagement sessions conducted between January and April 2024 across various locations including Vet Farm, Ngong Town, Lenana, and Embulbul. It submits that adequate and meaningful public participation was

conducted, and that the Petitioners' allegations to the contrary are unfounded.

79. The 10th Respondent further relies on the judgment in ***ELC Petition No. E028 of 2024***, wherein the court held that the Respondents had conducted adequate public participation. It argues that the issue is *res judicata* and cannot be re-litigated in these proceedings.
80. On the application for discovery and production of documents, the 10th Respondent submits that the documents sought are not in its custody or control. It states that the ESIA report, which it prepared, is a public document accessible through the NEMA portal. It argues that the Petitioners have failed to demonstrate that they requested the documents from the 10th Respondent or that the documents are required for the exercise or protection of any right. It relied on the decisions in ***ABN Amro Bank N.V v Kenya Pipeline Company Ltd [2019] eKLR*** to buttress its arguments.
81. The court was thus urged to dismiss the Petitioners' Application with costs.

THE 11TH RESPONDENT'S CASE

82. The 11th Respondent opposes the application through the replying affidavit of Mo Kun sworn on 6th February 2026, and its written submissions dated 12th February 2026.

83. The 11th Respondent's primary contention is that it is not involved in the financing, construction, or any related works pertaining to the Project. It explains that it is a subsidiary of the 9th Respondent, incorporated to operate and maintain the Standard Gauge Railway. It states that its operations commenced on 1st January 2020 and continued until 31st December 2025, when SGR operations were handed back to the 1st Respondent. It submits that the Petitioners have failed to establish any cause of action against it, and that the application against it should be dismissed.

84. It was submitted that the Petitioners have not met the threshold for the grant of conservatory orders as premised in the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)***. Relying on the decision in ***Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR***, where the High Court emphasized that conservatory orders should not be issued lightly, but only where a clear and arguable constitutional violation is established to argue that the Petitioners have not established a prima facie case against it as it is not involved in the financing, construction, or any related works pertaining the project.

85. On the constitutionality of the RDLF, the 11th Respondent submits that the fund enjoys a presumption of constitutionality until proven otherwise. Relying on ***Commission for the Implementation of the Constitution v***

Parliament of Kenya & Another [2013] eKLR, it argues that taxation and levies are matters of legislative competence, and that the Petitioners' challenge to the RDLF is without basis.

86. It was further submitted that the Petitioners have not shown that the Petition will be rendered nugatory or that public interest favours the grant of conservatory orders and relied on the decision in *Trusted Society of Human Rights Alliance v AG & 2 Others [2012] eKLR* to argue that balance of convenience favours the continuation of the project.

87. The 11th Respondent further argued that the direct procurement of the 9th and 11th Respondents was lawful under Section 103(2)(d) of the Public Procurement and Asset Disposal Act, which permits procurement from a supplier or contractor for reasons of standardization or compatibility with existing goods or services. It argues that the tripartite agreement between the 1st, 9th, and 11th Respondents was valid and had parliamentary approval.

ANALYSIS AND DETERMINATION

88. From the application, affidavits, and submissions of the parties, the following issues fall for determination in this ruling:

- i. Whether the Petitioners have established a prima facie case with a likelihood of success to warrant the grant of conservatory orders;**

- ii. Whether the substratum of the petition will be rendered nugatory and the Petitioners will suffer irreparable harm if conservatory orders are not granted;
- iii. Whether the balance of convenience and public interest favour the grant or denial of conservatory orders; and
- iv. Whether the Petitioners are entitled to interim orders for discovery and production of documents.

Whether the Petitioners have established a prima facie case with a likelihood of success to warrant the grant of conservatory orders

89. The threshold for the grant of conservatory orders in constitutional litigation is now well settled. The Supreme Court in ***Munya v Kithinji & 2 others [2014] KESC 30 (KLR)***, while distinguishing conservatory orders from interlocutory injunctions, emphasised that such orders bear a decided public law connotation and should be granted on the inherent merit of a case, bearing in mind public interest, constitutional values, and proportionate magnitudes. The Court in ***Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR*** articulated the applicable standard, holding that at the interlocutory stage, a party seeking conservatory orders need only demonstrate a prima facie case with a likelihood of success and a real danger of prejudice if the orders are not granted. In arriving at the conclusion, the Court stated thus;

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the conservatory order is granted, there is real

danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution."

90. The concept of a *prima facie* case in constitutional litigation was further elaborated by this court in ***Mwenje & 18 others v Cabinet Secretary for Defence & 2 others [2025] KEHC 14491 (KLR)***, where it was held that an arguable *prima facie* case is one that discloses triable and arguable issues of a nature that calls for response or rebuttal, and which have a likelihood of success that is not remote or far removed from the natural progression of the petitioners' arguments. This court adopts that formulation.
91. Applying these principles to the present application, I am satisfied that the Petitioners have raised serious, non-frivolous constitutional questions that meet the threshold of a *prima facie* case. The core question relating to the application of the Railway Development Levy Fund to the Riruta-Ngong metre-gauge project is, in my view, a justiciable constitutional controversy of first impression that merits full adjudication.
92. Section 8(3) of the Miscellaneous Fees and Levies Act, in its current form, limits the purpose of the levy to providing funds for construction and operation of a standard gauge railway network. The Petitioners contend that this language is clear and unambiguous, and that a metre-gauge commuter line cannot, by any reasonable interpretation, be considered a "standard gauge railway". The Respondents counter that a purposive interpretation should be adopted, one that would encompass feeder lines

and complementary infrastructure necessary for the optimal operation of the SGR.

93. In resolving this contest, it is important to recall the canons of constitutional and statutory interpretation. The Supreme Court in ***In the Matter of Kenya National Commission on Human Rights [2014] KESC 33 (KLR)*** emphasised that statutory provisions must be interpreted in context, reading them alongside and against other provisions to maintain a rational explication of what the law must be taken to mean. However, as the Court of Appeal observed in ***County Government of Nyeri & another v Ndungu [2015] KECA 1011 (KLR)***, interpretation must ultimately be anchored on the precise words used, and the language of the provision must be taken as conclusive unless there is an express legislative intention to the contrary. It held as follows;

“Interpretation of any document ultimately involved identifying the intention of Parliament, the drafter or the parties. That intention ought to be determined by reference to the precise words used, their particular documentary and factual context, and where identifiable, their aim and purpose. To that extent, almost every issue of interpretation was unique in terms of the nature of the various factors involved. However, that did not mean that the Court had a completely free hand when it came to interpreting documents; that would be inconsistent with the rule of law and with the need for as much certainty and predictability as could be attained bearing in mind that each case was to be resolved by reference to its particular factors.”

94. Section 8(3) of the Miscellaneous Fees and Levies Act uses the specific term "standard gauge railway network". The term is not defined in the Act, but it bears a technical meaning in railway engineering. Standard gauge refers to a track gauge of 1,435 millimetres, while metre gauge refers to a track gauge of 1,000 millimetres. These are distinct rail systems with different engineering specifications, rolling stock requirements, and operational infrastructure. The distinction is one of kind, not degree. The Supreme Court of India in *Mineral Area Development Authority & Another v M/S Steel Authority of India & Another [2024 INSC 607]* cautioned against reading into statutes words that are not there, emphasising that courts must respect the language used by the legislature.
95. The Respondents' argument that the Project is an integral operational component of the SGR system may have policy appeal, but it does not answer the constitutional question whether the RDLF, as currently constituted, can lawfully be applied to a metre-gauge project. That question turns on the proper interpretation of the statute, not on the operational benefits of the Project.
96. The Petitioners' case is further strengthened by the timing and content of the Miscellaneous Fees and Levies (Amendment) Bill, 2025. While a pending Bill has no legal force, its introduction lends credence to the Petitioners' contention that the current statutory framework does not expressly authorise the application of RDLF proceeds to a metre-gauge

commuter line. If the existing law already permitted such application, there would be no need for amendment. The Bill, therefore, tacitly acknowledges a statutory gap that the Petitioners have identified.

97. The Respondents' reliance on the approvals from the National Treasury and the budgetary allocations evidenced by the 7th Respondent does not, at this *prima facie* stage, displace the Petitioners' case. Treasury approvals are executive authorisations; they are not a substitute for parliamentary appropriation. Article 206(2) of the Constitution is emphatic: money may be withdrawn from the Consolidated Fund or any other public fund only in accordance with an appropriation by an Act of Parliament. The fact that Parliament, in subsequent financial years, classified RDLF proceeds as Appropriations-in-Aid does not answer the antecedent question whether the RDLF could lawfully be applied to the Project in the first place. As the 2nd Petitioner aptly argued in his 3rd further affidavit, Appropriations-in-Aid are a budgetary mechanism, not a device to override the specific purpose limitation under which a public fund is established.

98. On the procurement front, the Petitioners have raised a *prima facie* case that the single-sourcing of the 9th Respondent for a metre-gauge project may not meet the constitutional standard of fair, equitable, transparent, competitive, and cost-effective procurement under Article 227. The justification of "standardization and compatibility" under Section 103(2)(d) of the Public Procurement and Asset Disposal Act is facially directed at situations where additional supplies are procured from an existing supplier

for reasons of compatibility with existing goods or technology. Whether this justification extends to a project of a different gauge and purpose is a question that merits full exploration at trial. The Respondents have not, at this stage, produced tender evaluations, market analyses, or compatibility studies to substantiate their claim.

99. The issue of public participation also raises arguable constitutional questions. The court in ***Kassam & 12 others v Shah & 16 others [2025] KEELC 5354 (KLR)*** addressed the adequacy of public participation in the context of environmental licensing. However, as the 3rd Petitioner submitted in her further affidavit, public participation under the Constitution extends beyond environmental consultation to include participation in project financing, prioritisation, and fiscal decision-making. The 1st Interested Party's evidence of repeated requests for information and engagement, met with silence or evasion, suggests that affected stakeholders were not afforded a meaningful opportunity to influence the decision-making process. The Supreme Court in ***British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR)*** underscored that public participation must be real and not illusory, purposive and meaningful, and not a mere formality undertaken to tick a constitutional box.

100. The Respondents' invocation of the doctrine of res judicata based on the ELC judgment is, at this stage, premature and appears misplaced. As the Court of Appeal in ***Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] KECA 102 (KLR)*** affirmed, res judicata requires strict identity of parties, cause of action, and subject matter. In the instant suit, the ELC Petition No. E028 of 2024 concerned environmental compliance under EMCA; the present petition raises distinct constitutional questions relating to public finance, procurement, and the validity of the RDLF. The ELC itself acknowledged its lack of jurisdiction over financing matters and expressly reserved the petitioner's liberty to pursue those issues in a court clothed with jurisdiction. It would be manifestly unjust to bar the Petitioners from litigating issues that a previous court expressly declined to adjudicate.

101. For these reasons, I find that the Petitioners have crossed the threshold required at this interlocutory stage. They have demonstrated an arguable *prima facie* case on several fronts: the possible ultra vires application of the RDLF to a metre-gauge project, the possible absence of specific parliamentary appropriation, the potential procurement irregularities, and the possible deficits in public participation and access to information. These are not speculative or frivolous grievances; they are serious constitutional questions that call for full adjudication.

Whether the substratum of the Petition will be rendered nugatory and the Petitioners will suffer irreparable harm if conservatory orders are not granted

102. The second limb of the ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra) test*** requires the court to assess whether the petition will be rendered nugatory if interim relief is denied. This inquiry is closely related to the question of irreparable harm, though in the context of public law remedies, the focus is on the preservation of the constitutional order and public resources rather than private-party interests.
103. The evidence before me indicates that the Project is at an advanced stage of construction, with approximately 40.5% completion. Significant public funds have already been committed and expended. If construction is allowed to continue unabated pending the hearing and determination of the petition, there is a real and imminent risk that the constitutional violations alleged by the Petitioners will become entrenched and irreversible.
104. The dissipation of public funds is perhaps the most acute form of irreparable harm in constitutional litigation. Any attempt at recovery would require further expenditure of public resources and would likely be met with legal obstacles, including the principle of restitution in favour of bona fide contractors who have performed work in good faith. The Petitioners' invocation of the precautionary principle under Article 70(2)(a) of the Constitution and Section 3(5)(d) of EMCA is apposite: the court must act to

prevent potential irreversible harm, not wait until the damage is complete and then fashion remedies that may be wholly inadequate.

105. The creation of irreversible facts on the ground compounds the problem. Construction activities have physically altered the environment along the Project corridor. Land has been acquired, trees have been felled, excavations have been made, and structures have been erected. These physical changes cannot be undone by a subsequent court order declaring the Project unconstitutional. As the National Environment Tribunal observed in *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another [2019] KENET 98 (KLR)*, public participation is the oxygen of the EIA process, and absence of genuine participation renders the process stillborn. The same can be said of constitutional compliance generally: if the Project proceeds to completion under a cloud of constitutional doubt, a favourable judgment for the Petitioners would be a hollow victory, incapable of restoring the *status quo ante*.

106. The Respondents argue that the Petitioners' prejudice, if any, can be remedied by damages or by subsequent parliamentary ratification. This argument, with respect, misses the point. The Petitioners are not seeking compensation for personal loss; they are seeking to vindicate constitutional principles and to prevent the unlawful use of public resources. As the Supreme Court held in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (supra)* conservatory orders in public law are not linked to prospects of irreparable harm in the private law sense; they are aimed at

facilitating ordered functioning within public agencies and upholding the adjudicatory authority of the court in the public interest. The irreparable harm in this context is the erosion of constitutional safeguards, the normalisation of illegality, and the entrenchment of *fait accompli* that render judicial oversight ineffective.

107. The Respondents' argument that sunk costs and contractual penalties justify continuing the Project is, with respect, constitutionally untenable. If accepted, it would create a perverse incentive: the larger the alleged illegality and the more money spent, the more immune the Project becomes to judicial review. No amount of expenditure can sanitize an unconstitutional action. The doctrine of legality requires that all state action, including expenditure of public funds, must conform to the Constitution from inception to completion.

108. The 9th Respondent's plea that it faces immediate and quantifiable prejudice from the halt in construction is not without sympathy. Contractors who have performed work in good faith should not lightly be prejudiced by disputes between the state and its citizens. However, the 9th Respondent entered into this contract with knowledge of the constitutional challenge that had been brewing in public discourse and, indeed, with knowledge of prior litigation relating to the SGR financing model. The risk of legal challenge is an inherent feature of public procurement in a constitutional democracy. To hold otherwise would be to immunize state contracts from constitutional scrutiny, a proposition this court cannot accept.

109. I am therefore satisfied that the substratum of the petition will be rendered nugatory if conservatory orders are not granted. The continued expenditure of contested public funds, the physical progression of construction, and the entrenchment of contractual obligations will all combine to make any eventual judgment in favour of the Petitioners an academic exercise, incapable of providing effective relief.

Whether the balance of convenience and public interest favour the grant or denial of conservatory orders

110. The third limb of the Munya test requires the court to weigh the competing public interests at stake. The Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (supra)*** directed that conservatory orders should be granted bearing in mind public interest, constitutional values, and proportionate magnitudes. This is not a simple balancing of convenience between private parties; it is a calibration of the constitutional stakes involved.

111. The Respondents have articulated a compelling public interest in the completion of the Project. They argue that the Riruta-Ngong line will decongest Ngong Road, reduce transport costs for thousands of commuters, create employment opportunities, and enhance the commercial viability of the SGR. These are legitimate and weighty considerations. The Project, as described in the ESIA report and the

Respondents' affidavits, holds the promise of significant socio-economic benefits for the residents of Nairobi's southern corridor and beyond.

112. However, as this court stated in ***Law Society of Kenya v Attorney General & another [2020] KEHC 1702 (KLR)***, there can be no greater public interest than upholding the Constitution and the law. The constitutional principles at stake in this petition transparency, accountability, parliamentary control over public finance, public participation, and intergenerational equity are not mere procedural formalities. They are the foundational pillars upon which Kenya's constitutional democracy rests. Development, however desirable, cannot be pursued at the expense of these foundational values.

113. The Constitutional Court of South Africa in ***National Treasury & 5 Others v Opposition to Urban Tolling Alliance & 4 Others [2012] ZACC 18***, while cautioning against undue judicial interference in policy matters, affirmed that courts have a duty to ensure that the exercise of public power complies with constitutional limits. The playing field for contestation of executive policy may be the political process, but the playing field for contestation of constitutionality is the judicial process. When a project is challenged on constitutional grounds, the court must examine not only its policy merits but, more fundamentally, its compliance with the supreme law.

114. In this case, the balance of convenience must account for the fact that the orders sought are purely preservative and temporary. They do not cancel

the Project; they merely pause it pending a full hearing on the merits. Any inconvenience to the respondents is temporary and, to a large extent, quantifiable. The Project can resume if the court ultimately upholds its constitutionality. Conversely, if the orders are denied and the Project proceeds to completion, the harm to the constitutional order and to public resources may be irreversible.

115. The Respondents' argument that the Project is 40.5% complete and that halting it would occasion financial loss is, in essence, an argument from fait accompli. It invites the court to treat advanced stage of construction as a reason to suspend constitutional scrutiny. This court cannot accept such an invitation.

116. The public interest also requires consideration of Kenya's current fiscal realities. The Petitioners have placed before the court evidence of the 1st Respondent's insolvency and the nation's mounting public debt, now exceeding Kshs.11 trillion. While I make no findings on the accuracy or implications of these figures at this stage, they underscore the gravity of the questions raised. The commitment of billions of shillings to a project of questionable constitutional foundation, by an entity that is itself technically insolvent, raises profound questions of intergenerational equity and prudent management of public resources, principles enshrined in Article 201 of the Constitution.

117. The 9th Respondent's invocation of the presumption of regularity and the doctrine of legitimate expectation, while relevant, cannot override the constitutional imperative of legality. The presumption of regularity, as articulated in ***Export Processing Zone Authority & 10 others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR)***, is a rebuttable presumption that official acts are lawful. The court stated as follows: -

“In general, the presumption of regularity presupposes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done. The doctrine provides a degree of deference to the actions or decisions made by government officials or institutions. It is grounded in the assumption that these officials act within the bounds of the law, follow established procedures, and operate in good faith when performing their duties. This presumption also relieves courts or reviewing bodies from conducting a deep, thorough review of every action or decision unless there is specific evidence to suggest wrongdoing, procedural lapses, or irrational behavior. (See The Presumption of Regularity In Judicial Review Of The Executive Branch Harvard Law Review pg. 2432). The idea is that, in the absence of clear evidence to the contrary, administrative actions should be presumed to be regular, lawful, and reasonable.”

118. The Petitioners have placed sufficient material before the court to rebut that presumption at this prima facie stage. As for legitimate expectation, the 9th Respondent, as a sophisticated commercial entity contracting with the state, is presumed to know that all state contracts are subject to constitutional challenge. The expectation that a contract will be performed cannot override the possibility that the contract may be declared unconstitutional.

119. Weighing all these factors, I am satisfied that the balance of convenience and public interest decisively favour the grant of conservatory orders. The public interest in preserving constitutional order, protecting public resources, and ensuring accountability before expenditure far outweighs the temporary inconvenience to the respondents. The orders sought are necessary to preserve the status quo ante and to enable this court to adjudicate the profound constitutional questions raised in this petition on a full and proper record.

Whether the Petitioners are entitled to interim orders for discovery and production of documents

120. The core issue for determination with regard to the second limb of the Petitioners' Application is whether the Petitioners are entitled to interim orders compelling the discovery and production of specified documents. The Petitioners seek disclosure of eight categories of documents, including feasibility studies, procurement records, parliamentary approvals and environmental reports, grounding their application principally on Article 35

of the Constitution and the enabling provisions of the Access to Information Act, 2016 (Cap. 7M).

121. Article 35(1) of the Constitution guarantees every citizen the right of access to information held by the State and information held by any other person that is required for the exercise or protection of any right or fundamental freedom. This right is not unfettered, but any limitation must satisfy the test of necessity and proportionality in an open and democratic society.

122. The Constitution further imposes a positive duty on the State under Article 35(3) to publish and publicize important information affecting the nation. These constitutional imperatives are operationalized by the Access to Information Act, which seeks to give full effect to Article 35, imposing duties on public entities to proactively disclose information and to respond to requests within a prescribed time frame, and to provide lawful reasons for any refusal.

123. It is not in dispute that the Petitioners have sought information from the State and various public entities dating back to June 2023. The extensive correspondence on record demonstrates repeated requests for the relevant documentation. Insofar as the record shows, Respondents' engagement was at best evasive, and at worst wholly non-compliant with both constitutional and statutory obligations. Having exhausted the non-judicial

remedies, including recourse to the Commission on Administrative Justice without securing meaningful disclosure, the Petitioners cannot be faulted for seeking judicial intervention to vindicate their rights.

124. The relevance of the documents sought to the constitutional questions framed in this petition is manifest. Feasibility studies bear directly on the rationality and viability of the Project; procurement records speak to compliance with Article 227 of the Constitution, entrenching public procurement principles; parliamentary approvals are germane to observance of Chapter Twelve and the doctrine of accountable governance; environmental and social impact assessments concern environmental compliance and the participatory rights of affected communities. These documents are not peripheral or tangential; they are material and central to the adjudication of the petition on its merits. The court's jurisdiction to order discovery of relevant material is well rooted in both procedural fairness and substantive rights discourse.

125. Respondents' objections to disclosure at this interlocutory juncture are unpersuasive. The 7th Respondent has already disclosed certain budgetary information, thereby acknowledging both the existence of responsive material and the feasibility of its production without prejudice. The 10th Respondent's assertion that it does not have custody of certain documents cannot justify blanket non-disclosure by others who indisputably do hold relevant records. Moreover, the invocation of confidentiality by the 1st and

2nd Respondents is vague and unsupported; no specific claim of privilege has been articulated, let alone demonstrated to be legally tenable.

126. Judicial pronouncements in this jurisdiction affirm that the right of access to information is foundational to transparency, accountability and meaningful public participation in governance. In ***Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 others; International Commission of Jurists (Kenya) Ltd & another (Interested Parties); Transparency International & another (Amicus Curiae) [2013] KEHC 6054 (KLR)***, this court recognised that citizens must follow prescribed procedures in seeking information, and State organs must respond timeously or provide lawful reasons for refusal. In the similar vein, the more recent decision in ***Katiba Institute v Attorney General & 2 others; Ndi & 20 others [2026] KEHC 258 (KLR)*** reaffirmed that Article 35 imposes on the State a constitutional obligation to publish and publicize information of national importance and to facilitate meaningful participation by ensuring that citizens can access such information.

127. The jurisprudence is clear that the right to access information cannot be rendered illusory by procedural inaction on the part of public entities. Courts have emphasized that where information is denied without lawful justification, the violation of Article 35 is complete and compensable by appropriate judicial orders. As this court recognized in ***Christopher Karitu v Veterinary Medicines Directorate & 2 others [2022] eKLR***, the

constitutional and statutory obligation on public bodies to disclose information in their possession is inviolable, and limitations must satisfy constitutional tests.

128. Discovery is a foundational aspect of the judicial process. It obliges persons in possession of documents relevant to the subject matter of litigation to disclose those documents when lawfully called upon. Its purpose is to enhance transparency, prevent surprise, and enable all parties, and the court, to have before them the full compass of material necessary for informed adjudication. The operation of discovery is governed by the twin criteria of relevance and necessity; only documents that materially bear on the issues under consideration fall within its ambit. Discovery is not intended to facilitate speculative or unfounded inquiries, nor to serve as a tool of harassment but exists to enable courts to reach decisions on the merits on a complete evidential canvas. Privileged communications and genuinely confidential materials remain exempt, but vague assertions of confidentiality do not suffice to displace the constitutional right to information.

129. In the circumstances of this petition, the Petitioners have demonstrated both the relevance of the documents sought and the necessity of their disclosure for the just determination of the constitutional issues before this court. Without access to the specified documents, the court would be constrained to resolve complex constitutional questions on an incomplete

record, which would be inimical to the interests of justice and the public interest. Accordingly, I find that the Petitioners are entitled to interim orders for discovery and production of the specified documents. Such orders are necessary to vindicate their constitutional rights under Article 35, to enable meaningful participation in the proceedings, and to ensure that this court is fully informed as it adjudicates the petition on its merits.

CONCLUSION

130. From the analysis above, it is clear that the Petitioners/Applicants' Notice of Motion Application dated 19/12/2026 must succeed on both limbs. For the avoidance of doubt, these orders on both limbs are purely facilitative, and/or preservatory and temporary. They do not determine the merits of the Petition nor does the success of the Petitioners/Applicants' Notice of Motion Application dated 19/12/2026 mean that the Petition of even date is predestined to succeed.

131. The Respondents will have a full opportunity to defend the Project's constitutionality in the forum of *inter partes* hearing and determination of the substantive Petition. The impugned Project, merely halted temporarily and for the short period of time it shall take to hear and determine the Petition, can resume if the Court ultimately upholds its legality.

132. Before embarking on the formal issuance of the orders, this Court underscores that in matters where a significant public project, programme,

or undertaking has been halted pending hearing and determination of the substantive Petition, it is incumbent on all Parties, but in particular the Applicants who have been successful at the interlocutory stage, to fully cooperate with the Court's directions that are geared towards the expedited hearing and determination of the main matter.

133. In that regard, if the Court were to detect a deliberate attempt to 'rest on court orders' or to slow the fast-tracked progression of the matter having already been granted conservatory orders, the Court retains the power and authority to lift the restraining orders issued vide this Ruling either upon application or by the Court acting on its own motion.

134. Therefore, after the delivery of this Ruling, the Court shall issue firm directions geared towards the expedited hearing and determination of this matter, and with a view of a judgment date on or before ninety days from the date of the delivery of this Ruling.

135. Returning now to the formalities, accordingly and for the foregoing reasons, I make the following orders:

- a. The Notice of Motion dated 19th December 2025 is hereby allowed in terms of prayers 2(a), 2(b), and 2(c).
- b. The interim conservatory orders issued on 20th January 2026 and subsequently extended are hereby confirmed and shall remain in force pending the hearing and determination of the Petition, up to end of day on the date of the delivery of judgment unless otherwise discharged, vacated, varied, extended, or confirmed permanent.

- c. A mandatory order be and is hereby issued compelling the 1st, 2nd, 3rd, 4th, 5th, and 6th Respondents to, within thirty (30) days of the date hereof, produce for inspection by the Petitioners and to file in court certified copies of the following documents:
- i. The complete Feasibility Study and Pre-Feasibility Study Reports for the Riruta-Ngong Commuter Meter Gauge Railway Project;
 - ii. The complete Engineering, Procurement, and Construction (EPC) Contract or any other contract between the 1st Respondent and the 9th Respondent and/or 10th Respondent for the said project, including all annexures, schedules, and financing agreements;
 - iii. All procurement records relating to the award of the contract for the said project, including minutes of tender committees, procurement plans, evaluation reports, and approvals from the Public Procurement Regulatory Authority (if any);
 - iv. All Parliamentary approvals, appropriation acts, or supplementary budgets specifically authorizing the expenditure for the Riruta-Ngong Project and the source of such funds;
 - v. All correspondence, minutes, media adverts, and reports evidencing public participation conducted for the Riruta-Ngong Project;

- vi. All Cabinet memoranda, Cabinet approvals, or policy decisions relating to the approval, financing, or implementation of the Riruta-Ngong Project;
 - vii. Any loan agreements, sovereign guarantees, letters of comfort, contingent liabilities, advance payment guarantees, escrow arrangements, or other financial instruments relating to the project; **and**
 - viii. All Environmental and Social Impact Assessment reports, NEMA licenses, environmental approvals, and mitigation plans relating to the project.
- d. In the event of full or partial non-compliance with Order C above, the attention of the Parties is drawn to 112 of the Evidence Act and the applicable caselaw on adverse inferences.
- e. The costs of this Application shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH 2026.

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

1st Petitioner represented by Ms. Ekesa

2nd Petitioner in person- Mr. Bernard Muchiri Muchere

Counsel for the 3rd Petitioner and 1st Interested Party- Mr. Charles Kanjama SC & Mr. Yoga

Counsel for the 1st & 2nd Respondents – Mr. Muturi & Ms. Sandra Kavangi h/b Mr. Chacha Odera SC

Counsel for the 3rd – 6th Respondents – Mr. Thande Kuria

Counsel for the 7th Respondent – Mr. Mbarak

Counsel for the 9th Respondent – Mr. Charles Agwara h/b Prof. Albert Mumma SC

Counsel for the 10th Respondent – Ms. Ochieng

Counsel for the 11th Respondent – Ms. Kairu

Court Assistant – Ms. Lwambia