

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT KWALE
ELC PETITION NO. E001 OF 2026

**IN THE MATTER OF: ARTICLES 22, 23, 42, 47, 69 AND 70
OF CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ENVIRONMENT MANAGEMENT
AND CO - ORDINATION ACT, NO. 8 of
1999**

AND

IN THE MATTER OF: THE MINING ACT, NO. 12 OF 2016

AND

**IN THE MATTER OF: THREATENED ENVIRONMENTAL HARM,
UNLAWFUL AND NON-COMPLIANT
DECOMMISSIONING, AND FAILURE OF
STATUTORY OVERSIGHT ARISING
FROM THE DECOMMISSIONING OF
BASE TITANIUM LIMITED MINERAL
PROCESSING OPERATIONS
AT MSAMBWENI/KINONDO, KWALE
COUNTY**

BETWEEN

- 1. KIBWANA MWIJUMA KIBWANA**
- 2. SALIMU BAKARI GWAYA**
- 3. HAMISI HASSAN GUMBO**
- 4. MOHAMED JOJI ALI**

5. **NASSORO JUMA MAPONDA**
6. **PROJECT KENYA YOUTH ORGANIZATION**
7. **HAMISI OMARI MWACHIKOI** (*Suing on their own behalf and on behalf of affected residents and community members within Msambweni/ Kinondo area, Kwale County*)
.....**PETITIONERS**

-VERSUS -

1. **THE MINISTRY OF MINING**
2. **THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA)**
3. **BASE TITANIUM LIMITED**
4. **THE COUNTY GOVERNMENT OF KWALE.....RESPONDENTS**

RULING

I. Introduction

1. This Honourable Court was called upon to deliberate and make determination onto a flurry and raft interlocutory applications instituted by several parties in this proceedings. They arose from filed Constitution Petition - ELC Petition No. E001 of 2026 instituted by *KIBWANA MWIJUMA KIBWANA, SALIMU BAKARI GWAYA, HAMISI HASSAN GUMBO, MOHAMED JOJI ALI, NASSORO JUMA MAPONDA and PROJECT KENYA YOUTH ORGANIZATION, HAMISI OMARI MWACHIKOI* (*Suing on their own behalf and on behalf of affected residents and community members*

within Msambweni/ Kinondo area, Kwale County), the 1st to the 7th Petitioners herein dated 23rd March, 2026. The Petition was against the MINISTRY OF MINING, THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA), BASE TITANIUM LIMITED and THE COUNTY GOVERNMENT OF KWALE, the 1st, 2nd, 3rd and 4th Respondents herein.

- 2.** Primarily, the Petition and said applications were concerned and touched on the decommissioning activities and rehabilitation project of Base Titanium Limited's mineral processing operations based at Msambweni/Kinondo, the County of Kwale.
- 3.** The first is the Notice of Motion application dated 23rd February 2026 filed by *Kibwana Mwijuma Kibwana and others*, the Petitioners herein, seeking conservatory orders restraining the Respondents from continuing with decommissioning and rehabilitation activities. The Motion is supported by the affidavit of Kibwana Mwijuma Kibwana. Upon service, the 2nd Respondent, the National Environment Management Authority (NEMA), filed a Replying Affidavit sworn by David Ong'are on 17th March 2026 opposing the application. The 3rd Respondent,

Base Titanium Limited, also filed a Replying Affidavit sworn by John Denham Vickers on 9th March 2026.

4. The second is the Notice of Motion dated 9th March 2026 filed by *Base Titanium Limited*, the 3rd Respondent/Applicant, seeking to **“Ex debito justitiae”**, set aside, discharge, or vacate the interim conservatory orders issued ex - parte on 26th February 2026. The Motion is supported by the affidavit of John Denham Vickers. In response, the Petitioners filed a Replying Affidavit sworn by Kibwana Mwijuma Kibwana on 23rd March 2026 opposing the application.
5. The third is the Notice of Motion application is dated 13th March 2026 filed by the *Kenya Power & Lighting Company PLC* as Cross-Petitioner/Applicant, seeking release of electrical transformers from Base Titanium’s site for installation at Garissa Substation to forestall serious power inadequacy in North Eastern Kenya. The Motion is supported by the affidavit of Stella Njeri Ng’ang’a. The Petitioners opposed the application through Grounds of Opposition filed on 23rd March 2026.
6. The fourth is the Notice of Motion application dated 17th March, 2026 filed by *Mbaraka Shee Karoyo on his own behalf and on*

behalf of 16 others, seeking to be removed from the list of Petitioners on the basis that they were irregularly included without consent or authority. The Motion is supported by the affidavit of Mbaraka Shee Karoyo. The original Petitioners opposed the application through Grounds of Opposition filed on 23rd March 2026.

7. Accordingly, the Court is seized of four distinct applications, each supported by affidavits and opposed through replying affidavits or grounds of opposition, all of which must be considered together in determining whether the interim conservatory orders issued on 26th February 2026 should be maintained, varied, or set aside, and whether the representative character of the Petition and the urgent Cross - Petition by the Kenya Power & Lighting Company Limited ought to be recognized.

II. The Petitioners' case

8. The Application was brought under the provision of Articles 22, 23, 42, 47, 69 and 70 of the Constitution of Kenya, Sections 3A and 63 of the Civil Procedure Act, Section 13 (7) of the Environment and Land Court Act, No. 19 of 2011, the Environmental Management and Co - ordination Act, of 2015,

the Mining Act, 2016, Order 40 Rules 2 and 3 of the Civil Procedure Rules 2010, Rule 23 of the Mutunga Rules, and all other enabling provisions of the law.

9. The Applicants sought for the following orders: -

a) Spent.

b) Spent.

c) That pending the hearing and determination of the Petition, the Court issue a conservatory preservation order maintaining the environmental and land conditions existing prior to the impugned decommissioning.

d) That the Court suspend the operation, enforcement, or reliance upon any licences, approvals, permits, authorisations, or regulatory consents relied upon in the impugned decommissioning pending determination of the Petition.

e) That the Court issue a mandatory interim order compelling the 2nd and 3rd Respondents to produce, disclose, and file in Court all Environmental Impact Assessments, Environmental Audits, Mine Closure Plans, Site Restoration Frameworks, Environmental Protection Bond instruments, monitoring data, laboratory analyses, regulatory approvals, and compliance reports relating to the decommissioning.

f) That the Court issue an interim supervisory order directing the 2nd Respondent to undertake or commission an independent environmental compliance audit, hydro-geological assessment, and water/soil quality analysis, and to file the findings in Court within a period directed by the Court.

g) That the Court appoint, where necessary, an independent environmental expert or panel to monitor compliance and advise the Court pending determination of the Petition.

- h) That the Court issue an interim environmental protection order compelling the Respondents to take immediate remedial, containment, and pollution-prevention measures necessary to avert environmental harm.***
- i) That the Court grant an interim prohibition restraining any transfer of land interests, closure certification, discharge of rehabilitation obligations, or relinquishment of environmental liability pending determination of the Petition.***
- j) That the Court issue an interim mandamus-type direction compelling public authorities to enforce statutory environmental safeguards and compliance requirements.***
- k) That the Court compel the Respondents to undertake immediate, lawful, and meaningful public participation and community disclosure processes supervised by the Court.***
- l) That the Court order periodic environmental compliance reporting to the Court and affected community pending determination of the Petition.***
- m) That costs of the Application be provided for.***
- n) That the Court grant such further, consequential, or alternative interim orders as are necessary to safeguard constitutional environmental rights, preserve the subject matter, and uphold the rule of law.***

10. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 22 paragraphed annexed affidavit of KIBWANA MWIJUMA KIBWANA, the 1st Petitioner/Applicant, wherein it was averred that:

- a) he was duly authorized on behalf of the Petitioners/Applicants and was therefore competent,

authorized, and duly seized of the facts necessary to swear the affidavit in support of the urgent Application before the Honourable Court the Affiant averred as follows that:-

- b) the case arose from ongoing and threatened decommissioning activities being undertaken by the 3rd Respondent within Msambweni/Kinondo, Kwale County, activities that placed the Petitioners, their families, and their entire community at the brink of irreversible environmental, social, and human catastrophe.
- c) Annexed and marked as “KMK - 1” was the community Petition together with its annexures, bearing the voices, signatures, and identities of affected residents, and laying bare their collective cry for protection from imminent environmental harm.
- d) the Petitioners and the wider community had, for generations, depended upon the surrounding land, water sources, soil systems, and coastal ecology for settlement, livelihood, culture, and survival, and that the threatened destruction of this environment was therefore not merely physical loss but an existential assault on community life itself.

- e) Despite repeated pleas for transparency, disclosure, and lawful compliance, decommissioning works involving heavy machinery, land disturbance, dismantling of infrastructure, dust emission, and ecological disruption continued unabated, and were being carried out perilously close to human habitation and community resources.
- f) no comprehensive mine-closure plan, rehabilitation framework, post-mining land-use plan, or independent environmental audit had been disclosed to the Petitioners or the affected public, thereby shrouding the decommissioning process in opacity, uncertainty, and grave danger.
- g) the absence of these statutory safeguards created a real, immediate, and scientifically foreseeable risk of groundwater contamination, soil degradation, biodiversity loss, air pollution, and long-term ecological instability—harms that were not theoretical, but imminent.
- h) environmental destruction of this nature was irreversible, cumulative, and intergenerational, and that no monetary compensation—however substantial—could restore

poisoned water, vanished ecosystems, destroyed livelihoods, or lost community heritage.

- i) unless the Honourable Court intervened, the Respondents could complete or substantially advance the decommissioning, thereby irretrievably altering the physical environment, destroying critical scientific evidence, and rendering the Petition hollow, academic, and incapable of meaningful remedy.
- j) the Petitioners therefore faced irreparable loss of clean water, fertile soil, breathable air, ecological stability, and sustainable livelihood, consequences that would endure not only for them, but for their children and generations yet unborn.
- k) the Petition disclosed a grave and compelling prima facie violation of the constitutional right to a clean and healthy environment and of statutory environmental safeguards, thereby invoking the Honourable Court's sacred constitutional duty to protect, preserve, and prevent harm before it became permanent.
- l) the balance of justice, equity, and public interest overwhelmingly favoured preservation of the environment

and maintenance of the status quo, because a temporary restraint upon the Respondents caused no irreversible prejudice, whereas refusal of relief risked permanent environmental devastation.

m) there existed a genuine and alarming danger that, if unrestrained, the Respondents could transfer assets, discharge environmental liabilities, secure closure certification, or otherwise evade remediation, thereby permanently defeating accountability and undermining the authority of the Honourable Court.

n) the failure to ensure public participation, transparency, and lawful environmental governance violated the most fundamental constitutional values of human dignity, accountability, sustainable development, and protection of vulnerable communities.

o) the Petitioners had approached regulatory authorities in good faith seeking administrative protection, yet their pleas had not halted the unfolding environmental risk, leaving the Honourable Court as the last constitutional refuge against irreversible injustice.

- p) without immediate court-supervised preservation of evidence and independent environmental assessment, there existed a serious risk that critical documents, monitoring data, and environmental proof could be destroyed, concealed, or rendered useless, thereby crippling the Court's ability to deliver justice.
- q) the Application was therefore not merely urgent—it was existential, for delay would allow environmental harm to crystallise into permanent reality beyond judicial repair.
- r) The Affiant averred that the issues raised transcended private dispute and struck at the heart of public environmental governance, lawful mine closure, and constitutional protection of vulnerable citizens, making the litigation one of profound national and intergenerational importance.
- s) the Petitioners had come before the Honourable Court not in haste, but in desperation born of necessity, seeking only the temporary shield of justice to prevent irreversible harm while the law took its full course.
- t) it was therefore just, equitable, and constitutionally imperative that the Honourable Court certified the matter

as urgent, granted the conservatory and interim orders sought, and thereby preserved life, environment, dignity, and the rule of law.

u) without the immediate intervention of the Honourable Court, irreversible environmental injustice would occur, and history would record that the warning signs were visible, the danger foreseeable, and the need for protection unmistakable.

III. The 2nd Respondent's response to the Notice of Motion application dated 23rd February, 2026

11. The Application dated 23rd February 2026 was opposed by the 2nd Respondent, the National Environment Management Authority (NEMA), through a Replying Affidavit sworn by DAVID ONG'ARE, Director of Environmental Compliance, who averred as follows that:

a. NEMA was the principal instrument of government established under Section 7 of the Environmental Management and Coordination Act (EMCA) to exercise general supervision and coordination over all matters relating to the environment.

- b. NEMA derived its statutory mandate from Section 9 of EMCA, with the main object being to exercise general supervision and coordination of all matters relating to the environment and implementation of policies.
- c. NEMA was tasked with issuing Environmental Impact Assessment (EIA) licences as provided for under EMCA, and that pursuant to prescribed rules, a proponent of any project specified in the Second Schedule to EMCA was required to undertake an EIA and submit a report prior to licensing.
- d. in relation to the current suit, NEMA had issued a licence for the mining and transportation of titanium to the 3rd Respondent on 30th June 2005.
- e. such licences covered the entire life cycle of the project, including mining, operations, decommissioning, and rehabilitation, and that public participation initially undertaken by the proponent covered the entire cycle.
- f. there was no law requiring a fresh public participation exercise before rehabilitation and decommissioning, since these formed part of the project cycle as contained in the Environmental Management Plan.

- g. the 3rd Respondent had submitted Terms of Reference for closure and decommissioning of the Kwale mine, which NEMA approved on 26th June 2024, requiring submission of a Mine Closure and Decommissioning Plan.
- h. NEMA subsequently received and approved the Mine Closure and Decommissioning Plan in September 2024.
- i. although not legally required, NEMA had directed the 3rd Respondent to undertake dissemination workshops to appraise stakeholders and communities of expert monitoring studies on soil rehabilitation, bio - diversity restoration, water quality, wildlife diversity, livelihoods, and closure assurance.
- j. at the time of swearing, no excavation activities were being undertaken on site, and ongoing works were limited to ground preparation for tree planting, cultivation, and land restoration in accordance with the approved closure plan.
- k. stoppage of decommissioning and restorative efforts exposed the environment to significant risk of uncontrolled degradation, particularly since the land was already extensively disturbed by lawful mining activities, the final phase of which concluded in December 2024.

- l. cessation of rehabilitation works heightened risks of soil erosion, land instability, and irreparable environmental damage.
- m. infrastructure removal was being done in line with the approved closure plan to pave way for complete land rehabilitation and restoration, including decontamination of potential pollutants.
- n. NEMA had written to the Director of Mines in May 2025 requesting grant of a temporary land tenure of not less than 15 years to enable completion of restoration works, ensure public and environmental safety, facilitate ecosystem recovery, and fulfill obligations under the closure plan.
- o. the mined area contained a Tailings Storage Facility (TSF) covering approximately 270 hectares, with 45 million tonnes of slime, where 200,000 trees had been planted to reduce water volume. He averred that stabilization of the TSF would take up to 15 years.
- p. an unstable TSF posed significant risks to downstream communities in the event of embankment failure, which could cause severe environmental disaster and social impacts.

- q. the Petitioners had essentially moved the Court seeking production of documents which they could have accessed by visiting NEMA's offices.
- r. no evidence had been produced demonstrating environmental degradation arising from decommissioning to warrant issuance of conservatory orders.
- s. on the foregoing basis, NEMA opposed the issuance of conservatory orders and prayed that the Petitioners' prayers as against the Authority be dismissed with costs.
- t. NEMA had at all times remained conscious of its mandate and obligation to protect the environment.

IV. The 3rd Respondent's Notice of Motion application dated 9th March, 2026 and a response to the Notice of Motion application dated 23rd February, 2026

12. The Application was brought under the provision of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21; Order 51, Rule 1 and Rule 15 of the Civil Procedure Rules, 2010; and Articles 25, 50 and 159 (2) (d) of the Constitution of Kenya 2010; and all other enabling provisions of the law.
13. The Applicant sought the following orders:-

a. Spent.

b. Spent.

- c. In the alternative to prayer (ii) above, pending the inter partes hearing and determination of this application, this Honourable Court be pleased to stay the interim orders issued by Honourable Justice L. L. Naikuni on 26th February 2026.**
- d. In view of the utmost urgency, this Honourable Court does issue an expedited timetable for hearing of the instant application, and in any event, does hear the instant application in priority to the Petitioners' Notice of Motion dated 23rd February 2026 which is scheduled for hearing on 25th March 2026.**
- e. Pending the hearing and determination of the Petition dated 23rd February 2026, this Honourable Court be pleased to set aside and/or vacate the interim orders issued by Honourable Justice L. L. Naikuni on 26th February 2026.**
- f. This Honourable Court be pleased to grant such further or other orders as it considers just and expedient in the circumstances of this case.**
- g. The costs of this application be borne by the Petitioners.**
14. The Application was premised on the grounds, facts, and testimony on the face of the Application and further supported by the 45 Paragraphed annexed affidavit of JOHN DENHAM VICKERS, the Applicant's General Manager - Operations (Kwale), wherein it was averred that:-
- a) he had been the General Manager - Operations (Kwale) of Base Titanium Limited, the 3rd Respondent/Applicant in the proceedings, and that he had been familiar with the facts giving rise to the matter. He averred that he had been duly

authorised by the Applicant to swear the Supporting Affidavit on its behalf.

- b) he had read and understood, and where necessary had been advised on, the meaning and import of the Notice of Motion dated 9th March 2026, pursuant to which the Applicant sought to set aside, vacate, and/or stay the orders issued by the Honourable Court on 26th February 2026.
- c) he swore the affidavit both in support of the Application and in substantive response to the Petition and the Petitioners' Application dated 23rd February 2026.
- d) It was critical for this Honourable Court to understand the current state of the environmental rehabilitation activities at the site of the former Kwale Mineral Sands Project (Project). The true status of the rehabilitation activities, which was not disclosed by the Petitioners, is as follows-
 - i) Since mining activities ceased at the Project at the end of 2024, rehabilitation of the land previously impacted by mining activities is now largely complete.

- ii) As matters presently stand, planting and other necessary rehabilitation activities that are required to be undertaken beforehand (e.g. land shaping and topsoil deposition) for all disturbed areas from mining is complete, save for the processing facilities area. This encompasses a total of 1,109 hectares of rehabilitated land and has resulted in more than 1,060,702 trees drawn from over 370 indigenous species being planted.
- iii) To date, the Applicant has spent over KES 4.6 billion on decommissioning and rehabilitation activities. For the avoidance of doubt, rehabilitation of processing facilities area can only occur once dismantling and decommissioning of the process plant is complete.
- iv) The statistics for the rehabilitation of disturbed areas from mining are as follows-

Area rehabilitated	Hectares	1050
Fertiliser consumed	Tonnes	410
Manure consumed	Tonnes	38,000
Grass seed planted	Tonnes	137
Indigenous trees planted	No.	802,702
TFS eucalyptus planted	No.	258,000
Total trees planted	No.	1,060,702

Refer to Pages 1-9 of “BTL - 1” for photographs evidencing the above rehabilitation efforts.

- e) all of the environmental rehabilitation activities had been undertaken in accordance with regulatory requirements and international best practice.
- f) with those matters clarified, he then proceeded to provide a brief overview of the history of the Project.
- g) the Applicant had entered the Kenyan market through its acquisition of the Project from Tiomin Kenya Limited on or about 30th July 2010. Prior to Base Titanium’s acquisition, Tiomin had been seeking to develop a mineral sand mine in Kwale County, approximately 35 kilometres south of Mombasa, and had been granted Special Mining Lease 23 (“SML - 23”) by the Government of Kenya in July 2004 together with an Environmental Impact Licence on 9th July 2006.
- h) through this acquisition, the Applicant had acquired all of Tiomin’s operations and its interest in the Project, including the rights and interests under “SML - 23”. To facilitate advancement of the Project, the EIA Licence had been transferred to Base Titanium Limited on 20th July

2010. Refer to Pages 35-38 of “BTL - 1” for evidence of the EIA Licence’s transfer to the Applicant by Tiomin.

- i) construction at Kwale had commenced in 2011, and mining had started in October 2013, with the first shipment of product dispatched from the Applicant’s dedicated Likoni port facility in February 2014. He further averred that in June 2019, following depletion of the Central Dune orebody, mining operations had been transitioned to the South Dune orebody.
- j) the Applicant had secured two extensions to Special Mining Lease 23 in 2020 and 2022 to access additional ore zones, thereby extending the mine life. Consequently, the Applicant had been issued with Environmental Impact Assessment licences dated 23rd August 2021 by NEMA, authorising extension of mining activities into the extension areas using hydraulic mining methods and associated facilities.
- k) by the end of the year 2024, mining at Kwale had ceased due to depletion of economically viable ore, with the final bulk shipment of titanium ore dispatched from the Likoni export facility in February 2025. Consequently, the

Applicant had been required, pursuant to obligations under the EIA Licence, the Mining Act, 2016 and the Environmental Management and Co - ordination Act, 2015 to decommission its infrastructure and complete comprehensive rehabilitation of all land impacted by mining operations.

l) rehabilitation work had been performed concurrently with mining activities as international best practice, and that by early 2026 environmental rehabilitation activities were largely complete.

m) as part of decommissioning, the Applicant had entered into a Transfer and Removal of Assets Agreement with Sierra Rutile Limited dated 30th October 2025, pursuant to which the Applicant had agreed to sell and transfer specified processing assets used during the life of the Project.

n) under the Asset Sale Agreement, Sierra Rutile Limited and its contractors had been obliged to dismantle and remove the processing assets in accordance with the Method Statement, Safety Standards, Environmental Standards, Local Content Requirements, and Site Requirements; to

export all processing assets out of Kenya without domestic disposal; and to comply with all applicable laws, obtain necessary permits, and pay all relevant taxes and duties.

o) On its part, the Asset Sale Agreement mandates the Applicant to (amongst other things):

- i) provide site access, power, potable water, and raw water at no charge to SRL;
- ii) make available camp accommodation for up to 360 people on a “dry hire” basis;
- iii) provide technical documents, drawings, manuals and maintenance records relating to the Processing Assets;
- iv) provide reasonable assistance with export documentation; and
- v) remain responsible for any pollution or contamination not arising from the dismantling process.

p) the decommissioning and dismantling works for the processing facilities had been ongoing for a period in excess of three months, since December 2025, when Sierra Rutile Limited’s contractors had begun mobilising to site. He averred that SRL, through its duly engaged local

contractor, Vera Water Well Limited, had obtained both the Demolition Permit from the County Government of Kwale and a Certificate of Compliance from the National Construction Authority in December 2025, and had intended to complete the dismantling and decommissioning within twelve months.

q) in the midst of these decommissioning and dismantling works, the Petitioners had moved the Honourable Court by way of a Petition dated 23rd February 2026 and a Notice of Motion of even date, with their central complaint being the ongoing decommissioning and dismantling activities of the processing facilities allegedly undertaken by the Applicant.

r) within the Petition and the Petitioners' Application, the Petitioners had falsely alleged, without any corresponding evidence, that:

a. The decommissioning activities were being conducted unlawfully and without proper environmental safeguards, public participation, or regulatory compliance, thereby violating constitutional rights to a clean and healthy environment and fair administrative action, as well

as national values including the rule of law, public participation, and sustainable development.

b. Heavy machinery was operating near human habitation, causing land disturbance, dust emissions, noise, and ecological disruption.

c. No comprehensive mine-closure plan, rehabilitation framework, post-mining land-use plan, or independent environmental audit had been disclosed to them or the affected public, thereby creating foreseeable risks of groundwater contamination, soil degradation, biodiversity loss, air pollution, and long-term ecological instability.

s) pursuant to an Order dated 26th February 2026, the Honourable Court had granted a conservatory order restraining the Applicant, its agents, or contractors from undertaking any decommissioning, dismantling, excavation, land disturbance, infrastructure removal, environmental alteration, waste disposal, or related activity within the Applicant's operational area at Msambweni/Kinondo, on the basis of allegations of an

immediate and continuing threat of irreparable environmental harm.

t) he had read the Petition and the Petitioners' Application, and on that basis strongly believed that the interim orders had been obtained on the basis of material misrepresentations and non-disclosure of facts which, had they been brought to the attention of the Honourable Court, would have led to a different outcome.

u) he had been advised by Cecil Kuyo, the Applicant's Counsel on record, which advice he verily believed to be true, that a party seeking ex - parte or interim relief was under a duty to make full and frank disclosure of all material facts, including those adverse to its case. He averred that the Petitioners had failed to discharge this fundamental duty in several critical respects.

v) under Allegation No. 1, that the Petitioners had alleged the Applicant did not have a Comprehensive Mine Closure Plan or Rehabilitation Framework:-

a. At paragraphs 9 and 14(c) of the Petition as well as paragraphs 7, 9, and 10 of the Petitioners' Supporting Affidavit, the Petitioners alleged that the Applicant

has not disclosed any comprehensive mine closure plan or rehabilitation framework. This representation is false and misleading.

b. On the contrary, the Applicant has a comprehensive Mine Closure Plan dated July 2024 (the Closure Plan), prepared in conjunction with Envass Scientific (Pty) Limited and Envasses Environmental Consultants Limited and submitted to the 2nd Respondent (NEMA) for approval. The Closure Plan fulfils regulatory requirements under various licences and environmental legislation, particularly the EMCA. Refer to Pages 45-175 of BTL-1 for a copy of the Closure Plan.

c. The scope of the Closure Plan covers decommissioning, rehabilitation and closure of all operations within SML 23, including across the four mined dune areas; processing plants; water infrastructure; the Tailings Storage Facility (TSF); and support facilities.

d. Through the Closure Plan, the Applicant intends to transition the Kwale mining operation to a post-

mining state with limited residual environmental impacts, a sustainable and safe post-mining landform, and a viable socio-economic structure, such that the land can be returned for use for the benefit of local communities.

e. NEMA approved the Closure Plan and granted the Applicant approval to proceed with the decommissioning and rehabilitation of the Kwale mine on 25 September 2024, subject to conditions including restoring disturbed land, implementing post-mining land use (PMLU) recommendations, developing environmental monitoring schedules, undertaking stakeholder engagement, and submitting a comprehensive remediation report. Refer to Pages 176-177 of BTL-1 for a copy of the letter from NEMA to the Applicant dated 25th September 2024.

f. In addition, by its letter dated 13th October 2025, NEMA confirmed it had no objection to SRL dismantling the processing facilities for export, subject to the Applicant meeting regulatory requirements. Of critical importance is that within this

correspondence, NEMA expressed appreciation for the Applicant's continued commitment to a responsible closure process and comprehensive restoration of the Kwale mines. Refer to Page 178 of BTL-1 for a copy of the letter from NEMA to BTL dated 13th October 2025.

w) the Petitioners had alleged the Applicant had failed to conduct or disclose Environmental Impact Assessment compliance.

a. At paragraph 14(b) of the Petition and Ground 6 of the Petitioners' Application, the Petitioners allege that the Applicant has failed to conduct or disclose Environmental Impact Assessment (EIA) compliance. This representation is false and misleading.

b. On the contrary, the Applicant has operated under valid EIA licences since its acquisition of the Project. As stated above, when the Applicant commenced operating in the Kenyan market through its acquisition of the Project from Tiomin Kenya Limited on 30th July 2010, the EIA License originally issued to Tiomin on 9th July 2006 was transferred to the Applicant. Refer to Pages

179-183 of BTL-1 for a copy of the EIA License dated 9th July 2006 and evidence of its transfer between the Applicant and Tiomin.

c. The Applicant was subsequently issued with EIA Licenses dated 23rd August 2021 for mining area extensions. More recently, and for purposes of the decommissioning and rehabilitation activities, the Applicant obtained EIA Licences on 31st October 2024 for the proposed road works within the SML 23 area; and on 21st November 2024 for the extension of a spillway for the Mukurumudzi Dam and rehabilitation activities on the TSF. Refer to Pages 184-200 of BTL-1 for a copy of the EIA Licenses dated 31st October 2024 and 21st November 2024 respectively.

d. The Applicant submits annual Environmental Audit Reports to NEMA pursuant to Section 68 of EMCA Cap. 387. Refer to Pages 201-390 of BTL-1 for copies of the annual Environmental Audit Report for Kwale Mineral Sands Project dated November 2024 and Pages 391-432 for the Initial Environmental Audit Report for the TSF dated 10th December 2025.

x) the Petitioners had alleged the Applicant had failed to ensure public participation and disclosure:-

- At paragraphs 9, 11, and 14(d) of the Petition and Ground 11 of the Petitioners' Application, the Petitioners allege that the Applicant has failed to ensure public participation and disclosure. However, this statement is false and misleading.
- On the contrary, the Applicant has undertaken extensive stakeholder engagement and public participation processes throughout the mine closure and rehabilitation process.
- Community Plant Decommissioning Sensitisation Meetings were held between 24th November and 8th December 2025 across eight villages in Kwale County, including Mafisini, Mivumoni, Kibwaga, Fingirika, Nguluku, Mchanga Mweupe, Mwaloya, Mwandimu, Bumamani, Mwaweche, and Miembeni. Refer to Pages 433 - 494 of BTL-1 for a copy of the Report on the Stakeholder Engagement-Community Plant Decommissioning Sensitisation Meetings (24th November - 8th December 2025).

- The 1st Respondent (the Ministry of Mining) established the Post-Mining Land Use (PMLU) Committee in March 2024, chaired by the Principal Secretary in the State Department of Mining. The Committee engaged 817 stakeholders through public barazas and received 24 written submissions. Six public barazas were held across Kwale County, engaging CSOs, Kaya elders, youth, professionals, and community representatives. Refer to Pages 495-533 of BTL-1 for a copy of the Ministry of Mining Consolidated Report on Stakeholder Engagements dated May 2025 and Pages 534-575 for a copy of the Advisory Report on PMLU dated 30th June 2025.
- LTP Sensitisation Meetings were held between 15th July and 21st July 2025 across multiple villages to inform communities about the three-year License for Temporary Purposes granted to BTL in place of SML - 23 when it expired. Refer to Pages 596-606 of BTL-1 for a copy of the LTP Sensitisation Report dated 31st July 2025.

- The Msambweni Liaison Committee (MLC) has held regular meetings with community representatives, including as recently as 22nd January 2026 and 24th February 2026. Indeed, the Affiant was aware that a mine site visit was recently held on 22nd January 2026, following which participants expressed satisfaction with the progress of rehabilitation works. Refer to Pages 607 - 616 of BTL - 1 for copies of the MLC Meeting Minutes dated 22nd January 2026 and 24th February 2026 respectively.
- And most recently, on 9th and 11th February 2026, the Applicant hosted site visits for surrounding communities led by village elders to see rehabilitation progress first hand, and they provided positive feedback. The Applicant further hosted representatives from the civil society on 15th and 27th January 2026, who were also pleased with the rehabilitation progress. Refer to Pages 1-9 of BTL-1 for photographs evidencing these site visits.

y) Allegation No. 4: Threat of Groundwater Contamination, Soil Degradation, Air Pollution, and Radiation

- a. The Affiant averred that the Petitioners had claimed, without specificity or supporting evidence, that the remaining decommissioning and rehabilitation activities posed threats of groundwater contamination, soil degradation, air pollution, and radiation. He averred that this representation had been false and misleading.
- b. The Affiant averred that the Applicant had commissioned several independent expert studies in relation to the rehabilitated mined land, which had been presented at NEMA Specialist Meetings in July and November 2025. He averred that all of these findings had demonstrated that environmental parameters fell well within regulated safe limits.
- c. The Affiant averred that the independent expert studies had confirmed that the rehabilitated site was safe: radiation levels had been acceptable and well below relevant limits and comparable to world averages; air quality and noise levels had been well below Kenya's regulatory limits; food crops from rehabilitated land had been safe for consumption with

heavy metals within FAO/WHO limits; and groundwater impacts had been negligible with no saltwater intrusion.

- d. The Affiant averred that the Applicant had maintained comprehensive monthly environmental monitoring covering water quality, groundwater levels, noise, radiation, air quality, and meteorological conditions, and that such monitoring had revealed compliance with all applicable regulatory limits.
- e. The Affiant averred that suspension of the remaining decommissioning and rehabilitation works, as a result of the interim orders, had been likely to considerably increase the risk of harm to life, property, and the environment, rather than decrease it. He averred that the suspension had also led to worse overall environmental outcomes because the Applicant had been delayed in completing its Mine Closure Plan and restoring all disturbed areas, which in turn had delayed the land being handed back to local communities.

f. The Affiant averred that while the interim orders had remained in place, the Applicant had been prevented from performing ongoing work on the Tailings Storage Facility to decommission and completely de-risk the facility, which work had been critical to preventing and reducing the risk of catastrophic failure. He further averred that some of the remaining rehabilitation work had involved re-planting indigenous trees and vegetation that had been deliberately destroyed by arsonists, and that this work had been critical as Kwale entered the long-rains season. He averred that the risk of erosion would have increased if the trees had not been replanted.

z) Allegation No. 5: Site Restoration Plan, Post-Mining Land Use Framework, and Environmental Protection Bond

i) The Affiant averred that the Petitioners had falsely claimed, at paragraph 14(c) of the Petition and Ground 5 of the Petitioners' Application, that the Applicant had failed to provide a site restoration plan,

post-mining land use framework, and environmental protection bond.

- ii) The Affiant averred that, on the contrary, the Applicant had undertaken comprehensive post-mining land use planning and physical trials in consultation with stakeholders, commencing well before mine closure. He averred that pre-feasibility studies for training and agribusiness had been completed in 2023, identifying four Post-Mining Land Use (PMLU) themes: agribusiness, training, sustainable conservation, and tails recycling.
- iii) The Affiant averred that the Advisory Report on PMLU dated 30th June 2025, prepared by the Ministry of Mining's PMLU Committee, had recommended conversion of the Applicant's facilities into a multidisciplinary training and research centre, establishment of protected ecological zones and community conservancies, and transfer of infrastructure to appropriate authorities.
- iv) The Affiant averred that the Applicant had indeed prepared a Post-Mining Land Use Proposal dated

November 2025, which had set out detailed proposals focusing on three pillars: agribusiness, training and skills development, and sustainable conservation.

v) The Affiant averred that the Closure Plan had contained financial provisions as a key component, with the estimated cost of all decommissioning and rehabilitation activities provided for. He averred that, to date, the Applicant had already expended in excess of Kshs. 4.6 billion on rehabilitation activities.

vi) The Affiant averred that, with respect to the environmental protection bond, the Applicant had voluntarily deposited funds with NEMA in the early years of operations as an environmental performance bond, cumulatively totaling Kshs. 53 million (approximately USD 527,267). He averred that the Applicant had at all times complied with directives and requests from NEMA in respect of the environmental performance bond.

aa) Allegation No. 6: Decommissioning Activities causing Land Disturbance and Ecological Disruption:-

- The Affiant averred that the Petitioners had claimed, at Ground 1 of their Application and at paragraphs 6 and 8 of their Supporting Affidavit, that the decommissioning activities had been causing land disturbance and ecological disruption close to human habitation. He averred that this representation had been false, as evidenced by monthly environmental monitoring.
- The Affiant averred that, on the contrary, the decommissioning and rehabilitation process had been conducted in accordance with the Applicant's EIA obligations, the approved Closure Plan, and supplementary directives and conditions issued by NEMA.
- The Affiant averred that the decommissioning and rehabilitation works had been guided by Kenya's Environment Policy 2013, EMCA, the Sustainable Waste Management Act, the Occupational Safety and Health Act, and the Kwale County Solid Waste Management Policy 2021. He averred that environmental and safety risks had been controlled

through hazard identification, risk assessment, incident reporting, health and safety plans, and continuous monitoring.

- The Affiant averred that, as part of implementation of the Closure Plan, the Applicant had written to NEMA on 18th July 2025 seeking guidance on decommissioning the minerals processing and separation plant. He averred that NEMA had responded by letter dated 18th August 2025, noting that while the Closure Plan had addressed closure risks and opportunities management, it had contained little information about toxic and hazardous substances or materials that might have been present in the plant.
- The Affiant averred that on 30th September 2025, Envasses had submitted to NEMA a report on the proposed treatment of toxic and hazardous materials during decommissioning. Subsequently, by letter dated 3rd October 2025, the Applicant had provided NEMA with a detailed overview of the decommissioning process and had advised that, after

thorough assessment of available options, the Sierra Rutile pathway (dismantling for export) had presented the best option.

- The Affiant averred that on 13th October 2025, NEMA had responded in writing that it had no objection to the Sierra Rutile option being implemented but had requested an inception report before the exercise could commence. Accordingly, by letter dated 14th November 2025, the Applicant had submitted to NEMA an Inception Report outlining the planned decommissioning and dismantling of the processing facilities. He averred that the Inception Report had concluded that, with focused mitigation measures, the decommissioning could be managed to minimise adverse environmental impacts and leave a positive legacy for the region.
- The Affiant averred that the decommissioning and dismantling of the processing facilities had been approved by relevant regulatory authorities: a Demolition Permit dated 2nd December 2025 had been issued by the County Government of Kwale; a

Certificate of Compliance dated 5th December 2025 had been issued by the National Construction Authority; and a Certificate of Registration of a Workplace dated 16th December 2025 had been issued by the Directorate of Occupational Safety and Health Services.

bb) Allegation No. 7: Failure of Regulatory Oversight by NEMA and Ministry of Mining:-

- i) The Affiant averred that the Petitioners had claimed, at paragraph 14(e) of the Petition and Ground 7 of the Petitioners' Application, that there had been a failure of regulatory oversight by NEMA and the Ministry of Mining. He averred that this representation had been false and misleading.
- ii) The Affiant averred that, on the contrary, there had been ongoing and extensive regulatory engagement between the Applicant and both NEMA and the Ministry of Mining.
- iii) The Affiant averred that NEMA had granted the Applicant approval to proceed with decommissioning and rehabilitation of the processing facilities on 25th

September 2024. He further averred that NEMA had conducted a site visit on 28th and 29th April 2025 to assess rehabilitation progress.

- iv) The Affiant averred that, by the aforementioned letter dated 13th October 2025, NEMA had confirmed that it had no objection to dismantling the processing facilities.
- v) The Affiant averred that NEMA had held Specialist Meetings on 23rd July 2025 and 25th November 2025 to review independent expert studies on rehabilitated land in the mine area. He averred that NEMA had also conducted a site visit on 24th November 2025, and that both the site visit and the specialist meeting had been attended by various stakeholders.
- vi) The Affiant averred that, in addition to NEMA, the Ministry of Mining had established the Post-Mining Land Use (PMLU) Committee in March 2024 and had recommended to the National Land Commission that the Applicant be granted a Licence for Temporary Purposes so that the Applicant could continue to have tenure to carry out the Closure Plan and thereafter

monitor the completed rehabilitation to ensure optimal environmental outcomes and avoid the risk of environmental harm.

cc) Allegation No. 8: Risk of Irreversible Biodiversity Loss:

- The Affiant averred that the Petitioners had alleged, at Ground 1 of their Application and at paragraphs 8 and 11 of their Supporting Affidavit, that the Applicant's activities had posed a risk of irreversible biodiversity loss. He averred that this representation had been false and misleading in all material respects.
- The Affiant averred that biodiversity studies had demonstrated remarkable biodiversity recovery at the mine site. He averred that the Expert Study Presentations dated 23rd July 2025 had confirmed that species richness in the rehabilitated areas had increased from 474 species in year 2011 to 677 species in 2025, vegetation cover had exceeded 80% in all rehabilitated areas, and the site had functioned as a key biodiversity corridor.

- The Affiant averred that, in addition, the National Museums of Kenya had conducted biodiversity assessments documenting remarkable recovery: over 250 butterfly species had been recorded (including two new species to Kenya); 32 amphibian species (up from 10 pre-mining); 56 reptile species (up from 10 pre-mining); and 239 bird species (up from 152 at pre-mining stage).
- The Affiant averred that the Wildlife Research and Training Institute had conducted a Habitat Suitability Assessment dated 2022–2023, which had found that rehabilitated areas supported 297 plant species, 225 bird species, 40 macroinvertebrate species, and 28 herpetofauna species, including the endangered Shimba Hills Reed Frog.
- The Affiant averred that the Forest Conservation Committee (Coast Region) had further recommended that the Applicant’s land be gazetted as a forest reserve, which would connect Gogoni and Buda Forest Reserves to create a 2,500-hectare biodiversity hotspot.

dd) Allegation No. 9: Lawful Tenure for Decommissioning and Rehabilitation Activities:-

- i) The Affiant averred that Relief No. 10 of the Petitioners' Application had implied that the Applicant lacked lawful tenure for its decommissioning and rehabilitation activities. He averred that, if this had been the allegation, it had been completely false and misleading.
- ii) The Affiant averred that the Applicant had obtained lawful land tenure through a Licence for Temporary Purposes dated 30th June 2025, which had permitted the Applicant to occupy approximately 2,310 hectares for undertaking rehabilitation, restoration, and stabilisation activities in accordance with the approved Closure Plan, following the expiry of Special Mining Lease 23 on the same date.
- iii) The Affiant averred that the allegation that the Applicant had not possessed lawful land tenure had therefore been false.

ee) Allegation No. 10: Rehabilitation Had Not Been Undertaken or was Inadequate:-

- a. The Affiant averred that the Petitioners had claimed, at paragraphs 6, 7, and 13 of their Supporting Affidavit, that rehabilitation had not been undertaken or had been inadequate. He averred that this representation had been false and misleading.
- b. The Affiant averred that the Applicant had undertaken substantial and ongoing rehabilitation efforts. He averred that, as of 23rd February 2026, the Applicant had completed planting and other rehabilitation activities across all 1,109 hectares of land formerly mined or otherwise disturbed, planting over 802,702 indigenous trees from more than 370 indigenous species. Refer to Pages 1-9 of BTL-1 for photographs evidencing this rehabilitation.
- c. The Affiant averred that, for rehabilitation completed at the South Dune (447 hectares), over 236,000 trees from more than 370 indigenous species had been planted and vegetation cover had exceeded 75%. Refer to Pages 1501- 1614 of BTL-1 for the Backfill Rehabilitation Reports (January 2025-January 2026).

d. The Affiant averred that the Tailings Storage Facility had achieved 100% tree planting completion with 258,000 eucalyptus trees planted one year ahead of schedule, with a survival rate exceeding 90%. He averred that the TSF embankment had shown stable conditions, indicating that the structure had been settling into a stable post-operation state. He further averred that this facility had required ongoing monitoring and active works to preserve its structural integrity and to ensure full decommissioning and de-risking, noting that the Applicant could not simply abandon it.

e. The Affiant averred that, over and above replanting, the Applicant had conducted agribusiness crop trials which had demonstrated successful cultivation of cotton, turmeric, mangoes, and cashews on rehabilitated soils, evidencing commercially viable agriculture. Refer to Pages 1615-1785 of BTL-1 for a copy of the PMLU Agribusiness Crop Trials Report dated March 2024 and Pages 391-432 for a copy of

the TSF Environmental Audit Report dated 10th December 2025.

ff) The Affiant averred that, as the foregoing had clearly demonstrated, the Petitioners had obtained the interim orders by presenting a materially incomplete and misleading picture to the Honourable Court. He averred that the Petitioners had omitted critical facts and had advanced a false account, thereby depriving the Honourable Court of the full and accurate information necessary to determine the Petitioners' Application on its merits. He averred that, had the Honourable Court been apprised of the true position, the interim orders would not have been granted.

gg) The Affiant averred that, in particular, the Petitioners had failed to disclose material facts including the existence of a NEMA-approved Mine Closure Plan, valid EIA licences, extensive public participation processes, expert studies confirming environmental safety, comprehensive post-mining land use plans, regulatory approvals for decommissioning, active regulatory oversight, biodiversity

recovery, lawful land tenure, and substantial rehabilitation progress.

hh) The Affiant averred that he had been advised by Cecil Kuyo, the Applicant's Counsel on record, which advice he verily believed to be true, that had these facts been disclosed, the Honourable Court would have been in a better position to assess whether interim orders had been warranted. He therefore respectfully submitted that the interim orders ought to be forthwith set aside on the grounds of material misrepresentation and non-disclosure.

ii) The Affiant averred that, that being said, of utmost and urgent concern had been that the interim orders, whilst understandably issued by the Honourable Court in pursuit of legitimate environmental protection objectives, had given rise to severe and unintended consequences that had posed far greater risks to human life, environmental integrity, and community welfare than the activities they had sought to restrain.

jj) The Affiant averred that, by preventing the Applicant, Sierra Rutile Limited, CSL, and Vera Water Well Limited from continuing or undertaking any infrastructure removal,

environmental alteration, waste disposal, or related activity, the interim orders had posed an immediate and severe threat as follows—

a. The Affiant averred that the Applicant's Tailings Storage Facility (TSF) had stored liquefiable fine slimes from mining and processing operations that had ceased in or around January 2025. He averred that the TSF had required continuous 24-hour monitoring, risk management, and maintenance to guarantee structural integrity in accordance with international best practice. He averred that although the likelihood of catastrophic embankment failure had been very low, the interim orders had restricted the Applicant from undertaking critical decommissioning activities that would have completely de-risked the TSF and eliminated ongoing monitoring requirements, thereby increasing, rather than reducing, the risk of significant harm to life, property, and the environment.

b. The Affiant averred that cessation of dismantling activities mandated by the interim orders had left the

processing facilities as partially dismantled steel structures. He averred that these structures had been compromised in their stability and had carried an elevated risk of collapse under high winds and heavy rain. He averred that the longer these structures had remained partially deconstructed, the greater the risk had become, and that such collapse had posed an immediate danger to personnel on site.

- c. The Affiant averred that the partially dismantled processing facilities had contained highly flammable fibreglass gravity separation spirals. He averred that such fires had been virtually impossible to control without massive quantities of water, and that the fire sprinkler systems had already been removed. He averred that although fire suppression impairment regimes and hot work prohibitions had been in place, the longer the equipment had remained, the greater the risk had become of a catastrophic fire endangering lives, property, and the environment.
- d. The Affiant averred that the interim orders had restricted the Applicant from undertaking replanting

in an arson-damaged area. He averred that this restriction could have resulted in severe erosion, environmental degradation, and silt runoff into the Buda National Forest and surrounding community areas during the long rainy season.

- e. The Affiant averred that continued stoppage of decommissioning and environmental rehabilitation activities under the interim orders had resulted in immediate layoffs of 82 employees (41 from surrounding communities and 48 from Kwale County) by contractors engaged for the decommissioning and dismantling works, causing severe economic hardship to them, their families, and the local traders, suppliers, and service providers who had depended on these activities. He further averred that the Applicant had been prevented from hiring 120 community workers for planned indigenous tree planting activities during the long rainy season commencing in March.
- f. The Affiant averred that the Applicant and its contractors had also employed over 570 Kenyan

employees, including over 390 from Kwale County. He averred that the longer the interim orders had remained in place, the more likely it had been that there would have been layoffs of these personnel as well.

g. The Affiant averred that, additionally, the Applicant had proposed transferring one of its transformers to Kenya Power & Lighting Company at no cost for relocation to Garissa County to address a power crisis. He averred that the interim orders had prevented this, as the transformer and accessories had first needed to be dismantled from the Applicant's existing infrastructure, thereby prolonging power shortages in Garissa County with significant negative consequences.

kk) The Affiant averred that, for these reasons, he verily believed that the interim orders had not merely been inappropriate, but had been fundamentally misguided and harmful. He averred that, far from preventing environmental harm, they had directly created the

conditions under which catastrophic damage might have occurred.

ll) The Affiant averred that the interim orders had had the immediate and direct effect of potentially terminating nearly 300 local livelihoods and obstructing the alleviation of a power crisis in Garissa. He averred that, consequently, he verily believed that the balance of convenience and public interest had compelled the immediate discharge or variation of those orders.

mm) The Affiant averred that, indeed, the Petitioners, in seeking those drastic conservatory orders from the Honourable Court, had entirely failed to provide any credible evidence whatsoever to substantiate their allegations of environmental degradation and statutory violations. He averred that the Petitioners' claims had therefore rested wholly upon unsubstantiated assertions and speculative claims of potential harm, without any corroborating evidence.

nn) The Affiant averred that he had been advised by Cecil Kuyo, the Applicant's Advocate on record, which advice he verily believed to be true, that both the Petition and the

Petitioners' Application had been incurably and fatally defective, for the following reasons—

- a. The Affiant averred that the Petitioners had failed to provide an undertaking as to damages as required under Order 40 Rule 1 of the Civil Procedure Rules, 2010, which had been a mandatory prerequisite for the grant of conservatory or injunctive relief. He averred that the absence of such an undertaking had rendered the Application fundamentally defective and incapable of being entertained by the Honourable Court.
- b. The Affiant averred that, while the Petitioners had purported to bring the Petition on behalf of “affected residents and community members,” they had wholly failed to identify those residents by name, to obtain or produce their written authority or signatures, or to otherwise demonstrate that they had been duly authorised to represent such persons in the proceedings, contrary to Order 1 Rule 8 of the Civil Procedure Rules, 2010. He averred that the Petition had therefore been brought without proper locus

standi and in violation of the rules governing representative proceedings.

c. The Affiant averred that the Petitioners had further failed to exhaust the statutory dispute resolution mechanisms prescribed under the Mining Act and EMCA. He averred that the claims advanced in the Petition had properly ought to have been presented to the National Environment Tribunal or the Cabinet Secretary, as the case might have been, prior to invocation of the Court's jurisdiction. He averred that the doctrine of exhaustion of administrative remedies had not been satisfied, and that the Petition had accordingly been premature and incompetent.

oo) The Affiant averred that he verily believed the Petitioners' conduct had raised serious concerns regarding the bona fides of the proceedings. He averred that the Petition had contained material inaccuracies and omissions which, in his respectful submission, had not presented a fair or complete picture to the Honourable Court. He averred that, in the circumstances, the Petitioners ought not to

have been granted the interim orders sought on an ongoing basis.

pp)The Affiant averred that, more critically, not only had the Petition and the Petitioners' Application been wholly devoid of any tangible evidence whatsoever of environmental harm or statutory violations, but they had also been fatally and incurably defective on multiple fundamental grounds: the failure to provide any undertaking as to damages; the absence of proper written authority; and the flagrant disregard of the mandatory doctrine of exhaustion of remedies. He averred that he had been advised that each of these defects, standing alone, had been sufficient to vitiate the entire proceedings.

qq)The Affiant averred that, in the premises, and for all the foregoing compelling reasons, he verily believed that it had been in the interests of justice that the interim orders be forthwith set aside *ex debito justitiae*. In the alternative, and without prejudice to the foregoing, he had prayed that the Honourable Court do stay the interim orders pending the determination of the instant Application.

rr)The Affiant averred that it had only been just, fair, proper, and equitable for the Honourable Court to grant the prayers sought._

V. The Petitioners/Applicants's response to the Notice of Motion application dated 9th March, 2026

15. Before this Honourable Court discusses the merits of this Replying Affidavit it is important to note that the same was sworn on the 23rd February, 2026 before the Notice of Motion application was filed I would love to view this as a mistake on the month or the author of the same. Nonetheless, I shall not dismiss or expunge the same on technicalities hence I shall proceed to evaluate the same as follows: -

16. The Petitioners/Applicants responded to the Application through a 22-paragraphed replying affidavit sworn on 23rd February 2026 by Kibwana Mwijuma Kibwana, wherein the Affiant averred as follows:

a. He had been duly authorised on behalf of the Petitioners/Applicants and had therefore been competent, authorised, and duly seized of the facts necessary to swear the affidavit.

- b. He had read the contents of the Application dated 9th March 2026 and the Supporting Affidavit filed by the 3rd Respondent/Applicant, and had wished to respond in opposition thereto.
- c. the Applicant had alleged that stoppage of decommissioning had posed catastrophic environmental and safety risks; however, no geological, hydrological, or scientific report had been annexed to substantiate those allegations.
- d. in the absence of any expert report on soil structure, tailings stability, or environmental risk assessment, all such claims had amounted to mere hearsay, conjecture, and speculation, and had ought to have been disregarded by the Honourable Court.
- e. the burden had lain upon the Applicant to demonstrate actual risk through credible expert evidence, which burden had not been discharged.
- f. contrary to the Applicant's assertions, the stoppage orders issued by the Honourable Court had been protective in nature, intended to ensure full compliance with environmental laws and regulatory safeguards.

- g. the Applicant had failed to demonstrate how temporary stoppage, under judicial supervision, had caused greater harm than continued decommissioning without transparent accountability.
- h. unregulated or insufficiently supervised decommissioning had posed a far greater and irreversible risk to environmental integrity.
- i. the temporary halt had therefore been a small and necessary price to pay in safeguarding environmental integrity and public interest.
- j. the Applicant had deposed that decommissioning had been substantially complete.
- k. that if indeed the process had been near completion, then the alleged urgency and catastrophic consequences of stoppage had been self-contradictory and exaggerated.
- l. the Application had therefore been premised on inconsistency and had lacked candour.
- m. the Applicant had alleged danger to personnel and infrastructure; however, there had been no evidence placed before the Honourable Court of any personnel currently deployed on site.

- n. such assertions had remained speculative and unsupported.
- o. the Applicant had alleged that the orders had affected transfer of transformers to Kenya Power; however, no complaint, affidavit, or correspondence from Kenya Power & Lighting Company had been annexed.
- p. environmental protection had been a constitutional imperative, and the Honourable Court had been enjoined to adopt a precautionary approach where there had been uncertainty.
- q. the Petitioners had been amenable to an expedited hearing of both the Application and the main Petition.
- r. the Application by the 3rd Respondent/Applicant had been misconceived, speculative, and unsupported by evidence.
- s. it had been in the interest of justice, environmental protection, and constitutional compliance that the Application be dismissed.
- t. The Affiant averred that the Honourable Court had been pleased to: dismiss the Application dated 9th March 2026; uphold the conservatory orders issued on 26th February

2026; grant such further orders as the Court had deemed just; and award costs of the Application to the Petitioners.

u. The Affiant averred that what had been sworn therein had been true to the best of his knowledge, information, and belief, and sources of information had been disclosed therein.

VI. The Cross Petitioners' Notice of Motion application dated 13th March, 2026

17. The Application was brought under the provision of Articles 22, 159 (2) (a) (d) & (e), 258 of the Constitution of Kenya 2010 and Rules 5, 7, 17 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

18. The Applicant sought the following orders:

a. Spent.

b. The Court may issue an Order that the Applicant may move one of the 132/11KV electricity Transformer from the Substation within the Base Titanium Limited operational mining area to be installed at the Garissa Substation to forestall the impending serious power deficiency in parts on North Eastern Kenya in the wake of the religious period of Ramadhan and its festivities pending hearing and determination of the Applications on Substantive Environmental Issues in the Petition.

c. The Court may grant leave that the Applicant be joined in the Petition as an Interested Party or Respondent and

consequently leave be granted to file Cross-Petition in terms of the Annexure marked A.

d. THAT the Cross-Petition filed by the Applicant in terms of Annexure marked A be consolidated and tried together with the Petition herein

e. The Court be at liberty to make any further directions in the interest of justice.

f. Costs be in the cause.

19. The Cross-Petitioner/Applicant supported the Application through a 24 - paragraphed supporting affidavit sworn on 9th February 2026 by STELLA NJERI NG'ANG'A, wherein the Affiant averred as follows that:-

a) She had been employed by the Kenya Power & Lighting Company PLC as Legal Officer II and had therefore been competent and duly authorised to swear the affidavit.

b) key among her duties had been to ensure compliance with the applicable law and regulations affecting the Applicant and its operations.

c) she had read the instant Application and the Draft Cross-Petition and had wished to verify the contents of their averments and annexures as true and correct to the best of her knowledge and understanding.

d) She had been aware that the instant Application had related to the decommissioning exercise by the 3rd Respondent in the

Petition and the transfer and handover to the Applicant of electricity energy infrastructure serving the operational mining site of the 3rd Respondent.

- e) the 3rd Respondent, Base Titanium Limited, had concluded its mining activities in Kwale in December 2024 and had thereafter initiated the decommissioning of the operational mining site and transfer and handover of assets.
- f) the Applicant had maintained that the decommissioning exercise by the 3rd Respondent had been carried out pursuant to the law and in compliance with regulatory standards under EMCA and the Environmental Impact Assessment Regulations.
- g) notwithstanding the above, the Applicant had sought that the issue of removal of a 132/11kv transformer from the operational mining site and installation of the same at the Garissa Substation be determined pending the hearing of the Applications and Petition on substantive environmental issues.
- h) to forestall the situation in Garissa it had required that the installation of a second 132/11kv transformer be actualised immediately, noting that the item had not been in stock in

the country and would have required over 18 months for manufacture and importation.

- i) Base Titanium Limited, which had taken over from Tiomin Resources Inc, had applied for supply of electricity and installation of electricity power infrastructure at its mining operational site, including a substation, two 132/11kv transformers, and transmission powerlines, which equipment had been imported under duty exemptions provided under section 114 of the East African Community Customs Management Act, 2004.
- j) as part of Base Titanium Limited's decommissioning exercise, the Applicant, alongside the Ministry of Mining and the Ministry of Energy and Petroleum, had commenced engagements with the 3rd Respondent to formalize ownership through transfer and handover agreements of all electricity infrastructure, including the two transformers at the substation serving the operational mining site.
- k) in light of the National Government's statutory mandate to facilitate provision of reliable energy services under the Energy Act, the Principal Secretary, National Treasury, on 9th February 2026, had approved the immediate release of part

of the power infrastructure in the custody of Base Titanium Limited to the Applicant pending finalization of tax liabilities, in order to forestall the impending serious power deficiency in parts of North Eastern Kenya. (Annexed and marked “SNN-1” was a copy of the letter from the Principal Secretary dated 9th February 2026).

- l) the approval for immediate release and movement of part of the power infrastructure from the 3rd Respondent’s operational mining site had been made as the impending electricity deficiency in Garissa and parts of North Eastern Kenya would have occasioned national security and cohesion concerns during the religious period of Ramadhan.
- m) the decommissioning activities by the 3rd Respondent had been carried out pursuant to the law with the approval of relevant government authorities, including the Ministry of Mining and NEMA, which had granted approvals, issued directives, and actively overseen the decommissioning and rehabilitation process.
- n) before the release of part of the power infrastructure had been implemented, the Petitioner had moved the Honourable Court on environmental issues and had obtained a temporary

conservatory order restraining the Respondents from continuing or undertaking any decommissioning, dismantling, excavation, land disturbance, infrastructure removal, environmental alteration, waste disposal, or related activities within the Base Titanium operational area at Msambweni/Kinondo. (Annexed and marked as “SNN - 2” was a copy of the Court Order issued on 26th February 2026).

- o) Garissa and Northeastern parts of Kenya had been experiencing severe power shortages which had posed a threat to social stability, economic activities, and security of the residents, necessitating load shedding to sustain grid stability and causing harsh suffering to the people.
- p) due to the impending electricity deficiency in Garissa and parts of North Eastern Kenya, which would have occasioned national security and cohesion concerns during Ramadhan, the Applicant had sought and had been granted approval by the Principal Secretary, National Treasury, for immediate release and movement of one of the 132/11kv transformers from the operational mining site pending resolution of tax obligations.

- q) the Applicant had filed the instant Application seeking orders for removal of a 132/11KV transformer from the Base Titanium operational mining site for installation at the Garissa Substation to forestall serious power inadequacy in Garissa and North Eastern regions.
- r) removal and installation of the transformer at Garissa had been sought to enable the National Government to achieve the objective of providing reliable energy supply to residents of Garissa and North Eastern Kenya, thereby assuring dignity of citizens and ensuring national security pursuant to law and human rights obligations.
- s) it had been intended that the second transformer serving the mining site be repurposed for distribution and supply of electricity within Kwale and Mombasa areas, with the substation originally operated by the 3rd Respondent transferred and handed over to the Cross-Petitioner to facilitate operations and improve reliability of electricity supply.
- t) in light of the Court Order issued on 26th February 2026, the Cross - Petitioner had sought that removal and movement of one 132/11kv transformer be allowed pending hearing and

determination of the Application and Petition on substantive environmental issues.

- u) it had been in the interest of justice and in facilitation of the State's duty to implement and enforce rights and fundamental freedoms of Kenyans that the orders sought be issued pending hearing and determination of the Applications and Petitions on substantive environmental issues.
- v) she had sworn the affidavit in support of the instant Notice of Motion Application under certificate of urgency.

VII. The 8th Petitioner's Notice of Motion application dated 17th March, 2026

20. The Application was brought under the provision of Articles 22, 23, 47, 50 of the Constitution, and all enabling provisions of the law.

21. The Applicant sought the following orders:

a. Spent.

b. Spent.

c. Spent.

d. That this Honourable Court be pleased to set aside and/ or vary the interim orders issued on 26/2/2026 to exclude the Applicants herein.

e. That this Honourable Court be pleased to order that the names of the Applicants be expunged/ struck out from the list of

Petitioners for having been included without authority or consent.

f. That this Honourable Court be pleased to declare that the Applicants are not parties to the Petition and shall not be bound by the same.

g. That costs of this Application be provided for.

22. The Applicants responded to the Petition through a 10 - Paragraphed supporting affidavit sworn on 17th March 2026 by MBARAKA SHEE KAROYO, wherein the Affiant averred as follows that:

a) He had been an adult of sound mind and one of the persons listed as a Petitioner in the matter, hence competent to swear the affidavit.

b) he had been given authority to swear the affidavit on behalf of 16 others. Annexed and marked as "MSK - 1" had been a true copy of the authority to swear affidavit.

c) he and the 16 others had never given any instructions, consent, or authority to any person or advocate to file the Petition on their behalf.

d) he and the 16 others had not been consulted at all prior to the filing of the Petition.

e) he and the 16 others had only become aware of the Petition after interim orders had already been issued.

Annexed and marked as “MSK - 2” had been a true copy of the said Order.

- f) he and the 16 others had not supported the Petition and had fully disassociated themselves from it.
- g) the interim orders issued on 26th February, 2026 had seriously affected their livelihood, employment, and continuity of work, which had been jeopardised.
- h) he and the 16 others had stood to suffer continued prejudice unless the said orders were stayed and/or set aside.
- i) it had been in the interest of justice that their names be removed from the list of Petitioners and that they be excluded from the proceedings.
- j) what had been deponed to therein had been true to the best of his knowledge, information, and belief.

VIII. The Petitioners/ Respondents’ response to the Notice of Motion application dated 17th March, 2026

23. The Petitioners/Respondents averred that, at the hearing of the Application dated 17th March 2026, they had relied on the following Grounds of Opposition:

- a. The Application is incompetent, misconceived, and an abuse of the court process.
- b. The list of clients represented by Mr. Mbwiza is separate, distinct, and independent from the list of Petitioners represented by the Law firm of Messrs. Cosmas Mureti & Company Advocates.
- c. The Applicants in the Application dated 17th March 2026 was not the same persons as the Petitioners herein, and could not purport to act for, represent, or bind the Petitioners.
- d. The Applicants lack locus standi, not being parties to this suit, and have neither sought nor obtained leave of this Honourable Court to be enjoined as parties.
- e. The Applicants were strangers to these proceedings and mere busy bodies, and their participation was legally untenable.
- f. The Applicants could not dictate, interfere with, or control the manner in which the Petitioners approach this Honourable Court, nor do the Petitioners require their consent, authority, or input.
- g. The mere fact that the Applicants were residents of Msambweni area does not confer locus standi, nor entitle

them to appear, prosecute, or influence proceedings without due process and leave of court.

- h. The Application offended fundamental principles of legal procedure, including proper parties, standing, and orderly conduct of proceedings.
- i. The Application was incurably defective, devoid of legal substratum, and incapable of being sustained in law.
- j. The Application was brought in bad faith and is intended to derail, delay, and/or prejudice the fair hearing of the Petition.
- k. The Application does not meet the threshold for the orders sought and discloses no reasonable cause of action.

IX. Submissions

24. On 10th and 23rd March, 2026, while the parties were present in Court, they were directed to have the four Notices of Motion applications dated 23rd February, 2026, 9th March, 2026, 13th March, 2026 and 17th March, 2026 disposed off by way of written submissions. All the parties complied with the Court's directions. The Learned Counsels were accorded an opportunity to briefly highlight their submissions. Mr. Mureti, Mr. Muchiri, Mr. Ganya, M/s. Kiti, Mr Kuyo and Mr. Mbwiza Advocates executed their task with high degree of professionalism,

diligence and dedication. The Honourable Court was sincerely grateful to all of them.

25. Pursuant thereto, a ruling date was reserved for 27th March, 2026 by the Court accordingly. Indeed, the Ruling was delivered on schedule.

a. The Skeleton Written Submissions by Petitioners to the Notice of Motion application dated 9th March, 2026

26. The Petitioners through the Law firm of Messrs. Cosmas Mureti & Co. Advocates filed their written submissions dated 23rd March, 2026. Mr. Mureti Advocate averred that the submissions were filed in opposition to the 3rd Respondent/Applicant's application seeking to set aside the conservatory orders issued on 26th February 2026. The Application is misconceived, speculative, and unsupported by credible evidence. The Learned Counsel relied on the only issue for determination which is whether the Applicant has met the legal threshold to warrant the setting aside of conservatory orders.

27. On the Applicable legal principles, the Learned Counsel submitted that Conservatory orders can only be set aside where

an Applicant demonstrates real and proven prejudice, not speculation, and where public interest and balance of convenience justify such setting aside. The burden rests on the Applicant. SPECULATIVE AND UNSUPPORTED CLAIMS. The Applicant had not provided any geological, hydrological, or environmental expert report. The claims made are mere hearsay and conjecture and cannot meet the required legal threshold.

28. On the internal inconsistency. The Learned Counsel firstly submitted that the 2nd Respondent were now claiming to be adhering with the issue of public participation which was being raised in the year 2005 - 20years down the line. That was addressing the actual mining and not on the decommissioning activities. Secondly, the 3rd Respondent talked of a 15 years of trees planting for purposes for rehabilitation of the project onto the damaged areas and to prevent soil erosion to the nearby Buda National Forest. In other words they were contending that their was no urgency to the matter. Thirdly, the 3rd Applicant claimed decommissioning is substantially complete while also alleging catastrophic consequences. This contradiction undermines the Application. The orders are precautionary and

intended to safeguard environmental integrity. Environmental protection is a constitutional imperative.

29. Additionally, the Learned Counsel averred that there was no evidence adduced with regard to the human risks such as the Tailing Storage Facility (TSF) as alleged by the 3rd Respondent. It was just right and fair for the Petitioners to be allowed to file and serve comprehensive submissions.
30. The Counsel posited that the Respondents have not provided any evidence in support of geological or scientific allegations of the risks to be faced by human as alleged on environmental degradation. All these were mere speculative and needed to be disregarded.
31. The Respondents were inconsistent while urging Court to lift the Conservatory orders. On one hand they hold the project was already complete while on the other hand they submit that the decommissioning project was on - going and hence the urgency. Which was which?
32. The Learned Counsel asserted that there had been no evidence of employment lay - offs as alleged. The Petitioners were willing and ready to have an expeditious hearing and hence disposal

off the Petition and the Cross - Petition. They held that there were no new issues brought out by the Respondents. Hence, in the meantime, the Conservatory orders should be allowed to be sustained until the matter was heard and finally determined in the interest of justice and fairness to all parties. The orders should not be lifted/discharged. The Petitioners had been seeking for information in vain until this suit was filed and orders granted was when the 3rd Respondent provided some information through their replies to the filed pleadings. .

33. There was no evidence adduced by the Kenya Power & Lighting Limited, no proof of personnel on site, and no independent verification of risks. The alleged harm remains unsubstantiated. The balance of convenience and public interest favour maintaining the conservatory orders to prevent irreversible environmental harm.

34. With regard to the application dated 17th March, 2026 by the Intended 8th Petitioner was opposed through Grounds of Opposition. The Petitioners strongly opposed the said application as it was incompetent and an abuse of the due process of Law. The Applicants lacked ***“locus standi”*** to bring the suit without the leave of Court. They

could not be said to be parties to the Petition filed by the 1st to the 7th Petitioners. The Petitioners were totally different from the ones the Intended 8th Petitioners were claiming to be representing. They were strangers and busy bodies. They were not in the list marked as “NKN”. They should not be allowed to control or dictate the terms of this Petition. They should make a formal application seeking for leave to be joined as parties of the Petition as required by law.

35. In conclusion, the Learned Counsel submitted that the Application was speculative, contradictory and legally untenable. The Petitioners prayed that the Applications dated 9th and 17th March 2026 be dismissed with costs and that the conservatory orders be upheld.

B. The Skeleton Oral Submissions by the 2nd Respondent.

36. On 23rd March, 2026, the Advocate Ganya acting on behalf of the 2nd Respondent - NEMA, orally but briefly submitted before the Court. He urged the Court to lift its Conservatory orders granted on 26th February, 2026. The Learned Counsel informed Court that NEMA having been convinced that the project undertaken by the 3rd Respondent failed to meet the

required Environmental and Management requirements as founded under the provisions of the Constitution of Kenya and EMCA decided that the establishment be closed down.

37. Indeed, the decommissioning and rehabilitation process already commenced in earnest and hence it would defeat any logic for anyone wanting to have a stoppage to such an important process.

38. The Learned Counsel informed the Court that the soil morphology at Kwale was not susceptible to the kind of Mining project being undertaken by the 3rd Respondent as was already established through scientifically proven standards by NEMA. The Counsel noted that the 3rd Respondent had already put in place adequate measures for restoring land and the damaged areas through re - planting of trees which had high take of water. It would take 15 years to have attained the required standards.

39. The Counsel argued that due to the Interim Orders, the Tailing Storage Facility (TSF) by the 3rd Respondent which stores some liquidation from the Mining and operation processing had ceased. This would have severe consequences to human life and decommissioning activities already being

undertaken. This was a major concern to NEMA. According to the Learned Counsel, the nature of the Conservatory Interim orders would expose the community to high risk and particularly during this period of heavy rainfall.

40. The Counsel submitted that from the raft of applications, they had taken cognizance of one of them whereby some of them Petitioners were willing and ready to withdraw the Petition. They had invited NEMA to visit the site and see the happenings on the ground. From the other pleadings, NEMA had not seen any evidence of environmental degradation as alleged.

41. Hence, in conclusion, the Learned Counsel was of the view that the best option was to forthwith lift the Conservatory orders granted by this Court on 26th February, 2026 and allow the decommissioning and rehabilitation activities by the 3rd Respondent to proceed on as planned.

C. The Skeleton Written Submissions of the 3rd Respondent/Applicant to the Notice of Motion Application dated 9th March, 2026

42. The 3rd Respondent, through the Law firm of Messrs. Coulson Harney LLP Advocates, filed its written submissions dated 19th March 2026 in support of its Notice of Motion application dated

9th March 2026. Mr. Cecil Kuyo Advocate commenced the submission by providing a brief background of the matter. In a nutshell, the Learned Counsel averred that they were here to oppose and have the conservatory orders issued by this Court on 26th February, 2026 be “*ex - debito justitiae*” set aside, discharged and/or lifted for several reasons. Firstly, there was a Tailing Storage Facility (TSF) by the 3rd Respondent which stored liquifiable fine slimes from the Mining and processing operations that ceased in around the year 2025. It required 24 hours monitoring . From the interim orders it put human life into high risk to life and property. It required constant monitoring.

43. Secondly, the orders had caused cessation of dismantling activities of the steel structures. The structures were now compromised in their stability and had an elevated risk of collapse under high winds and heavy rainfall. The longer the steel remained partially deconstructed, the greater the risk.

44. Thirdly there was high risk caused by the partially dismantled processing facilities which contained high flammable fibre glass gravity separation spirals such as fires. They were virtually impossible to control without massive quantities of water

massive and quantities of water and the fire spinker systems had already been removed.

45. Fourthly, the interim orders were restricting the 3rd Respondent from undertaking replanting of indigenous trees in an arson damaged areas of certain plantations which would prevent soil erosion and environmental degradation and silt run off into the nearby Buda National Forest and the surrounding Community areas during the long rainy seasons.
46. Fifthly, the continued stoppage of the decommissioning and the rehabilitation activities through the interim orders, would result in immediate lay - off of 82 employees who were from the surrounding communities. This would cause severe economic hardship to them and their families and the local traders and service providers. The Contractors had also employed a large number of personnel who risked on being laid off from the effects of the interim orders.
47. He submitted that by a Notice of Motion application dated 9th March 2026 (Base Titanium's Application), supported by the Affidavit of John Denham Vickers sworn on even date (the Vickers Affidavit), the Applicant sought to set aside, discharge and/or vacate the interim orders granted ex - parte on 26th

February 2026 (the Interim Orders). The Interim Orders were granted based on various allegations made within the Petitioners' Notice of Motion application dated 23rd February, 2026 (the Petitioners' Application). As at the date of these Skeleton Submissions, the Petitioners (or that portion of them with authority to commence these proceedings) have not filed a response to Base Titanium's Application.

48. On the factual background, the Learned Counsel submitted that the Petitioners filed a Petition dated 23rd February 2026 (the Petition) in relation to the Applicant's decommissioning and rehabilitation activities being undertaken at its former Kwale Mineral Sands mine site (Project). The Petitioners alleged that decommissioning and rehabilitation is being conducted unlawfully without environmental safeguards, public participation or regulatory compliance; that heavy machinery operations cause dust, noise and ecological disruption; and that there is no mine closure plan, rehabilitation framework or independent environmental audit. As will be seen, these allegations are without merit, or any factual or evidentiary foundation.

49. On 26th February 2026, this Honourable Court - relying on the ex parte representations of the Petitioners granted the Interim Orders restraining all decommissioning and rehabilitation activities on the basis of this alleged irreparable environmental harm. The Learned Counsel submitted that the Petitioners obtained these orders through fraudulent misrepresentation and deliberate concealment of material facts from this Honourable Court, as particularized below.

50. It was also important for this Court to take judicial notice that sixteen (16) members of the Msambweni/Kinondo community, on whose behalf the Petition was purportedly filed, have filed their own application dated 17th March 2026 in this Court seeking to have the Interim Orders set aside. The Learned Counsel relied on the primary issue to be determined on 23rd March 2026, when Base Titanium's Application is scheduled for hearing, being whether this Court should set aside and/or stay the Interim Orders.

51. On material non-disclosure, Learned Counsel submitted that pursuant to the provision of Order 40, Rule 7 of the Civil Procedure Rules, 2010 any injunctive order may be discharged, varied, or set aside on application by a dissatisfied party. The

test is discretionary, requiring the applicant to demonstrate sufficient reason for discharge (***“Chandulal K Vora & Company Limited - Versus - M’oriental Bank Limited & Another [2025] eKLR”***). As set out below, ample grounds exist for discharge of the Interim Orders. Concealment of material facts was a well-established ground for discharge. Injunctive relief, being equitable in nature, must not be obtained through distortion or misrepresentation (***“Bank of Africa Limited - Versus - Time Trucks Limited & 2 Others [2024] eKLR”***).

52. The Learned Counsel relied on the case of ***“Signature Tours & Travel Limited - Versus - National Bank of Kenya Limited [2017] eKLR”***, where the court held that, in seeking Ex - Parte relief, an applicant must make the fullest possible disclosure of all material facts within their knowledge, including facts they would have discovered through proper inquiries; the materiality of non-disclosure depends on the importance of the fact to the issues before the Court.

53. The Learned Counsel asserted that the Petitioners concealed the following material facts from this Honourable Court thereby obtaining the Interim Orders through distortion and misrepresentation. This has occurred, not only by not making

numerous statements that were completely unsupported, but also by omitting to disclose the following:-

- i. As of 23rd February 2026, rehabilitation was substantively complete. The Applicant had completed rehabilitation across all the required 1,109 hectares, planting over 1,060,702 trees - including 802,702 indigenous trees from more than 370 species. (Vickers Affidavit, "Exhibit BTL - 1", pages 1-9);
- ii. Contrary to the allegation that no closure plan existed, the Applicant's Mine Closure Plan dated July 2024 (the Closure Plan) was duly approved by NEMA, which granted approval to proceed with decommissioning and rehabilitation on 25th September 2024 (Vickers Affidavit, "Exhibit BTL - 1", pages 45-177);
- iii. The Applicant has operated under valid EIA licences and comprehensive rehabilitation plans at all relevant times since it acquired the Project in 2010, and submits annual Environmental Audit Reports to NEMA pursuant to Section 68 of the Environmental Management and Co-ordination Act, Cap. 387 (Vickers Affidavit, "Exhibit BTL - 1", pages 179-432);

- iv. The Applicant and Government officials have undertaken extensive public consultations, including Community Plant Decommissioning Sensitisation Meetings, Post-Mining Land Use Committee consultations engaging 817 stakeholders through public barazas, and regular Msambweni Liaison Committee meetings (Vickers Affidavit, “Exhibit BTL - 1”, pages 433-616);
- v. Monitoring and assessments conducted in relation to the decommissioning demonstrate that all environmental parameters, including radiation levels, air quality, and noise levels, are within Kenya's regulatory limits (Vickers Affidavit, “Exhibit BTL - 1”, pages 617-813); and
- vi. The Applicant had a comprehensive Closure Plan (as above) and had undertaken post-mining land use planning, including prefeasibility studies, in addition to obtaining all relevant regulatory approvals for the decommissioning and rehabilitation activities (Vickers Affidavit, “Exhibit BTL - 1”, pages 1284-1395).
- vii. There had been sustained and ongoing regulatory engagement, including NEMA's approval, site visits, correspondence regarding rehabilitation criteria, an

inception. report, and NEMA-led environmental specialist meetings in July and November 2025 (Vickers Affidavit, “Exhibit BTL - 1”, page 178); and

viii. Biodiversity studies conducted every six months demonstrate that species richness increased from 474 species in 2011 to 677 species in 2025, vegetation cover exceeds 80% in most rehabilitated areas, and the site now functions as a key biodiversity corridor (Vickers Affidavit, “Exhibit BTL - 1”, pages 1417-1482).

54. The evidence filed in support of Base Titanium's Application plainly demonstrated that the Petitioners' Application was founded upon unsubstantiated assertions and speculative or baseless claims without any corroborating evidence. This material non-disclosure distorted the factual and legal basis upon which the Court exercised its discretion. In addition to the material non-disclosure and misrepresentation, it was settled law that the Court must set aside injunctive orders if the ends of justice so demand (*ex debito justitiae*) (“**St. Patricks Hill School Limited - Versus - Bank of Africa Kenya Limited [2018] eKLR**”). The gravity of the non-disclosure and misrepresentation

outlined above plainly engages this principle and compels the discharge of the Interim Orders.

55. On natural justice, the Learned Counsel submitted that the interim Orders were granted *ex - parte*, without affording the Applicant an opportunity to be heard on matters directly affecting its proprietary, commercial and operational interests. The principle of *audi alteram partem* is constitutionally protected under Article 25(c) (***“Shollei - Versus - Judicial Service Commission & Another [2022] eKLR”***).
56. According to the Learned Counsel it was that *ex parte* orders affecting substantive rights can only be granted in obvious cases (***“Judith Anyango Elizabeth Oyugi - Versus - Independent Electoral & Boundaries Commission [2017] eKLR”***). An injunction is an equitable remedy requiring all parties to be fully heard and all material facts before the Court (***“Kenya Commercial Bank Limited - Versus - Kipsang Sawe Sisei [2005] eKLR”***). Whilst the Applicant accepted that a court has discretion to issue orders *ex parte*, such orders were liable to be set aside once a court was appraised of the true account of facts on a matter (***“Chandulal K Vora & Company Limited - Versus - M’oriental Bank Limited & Another [2025] eKLR”***). That was precisely the position

here: the evidence now before the Court exposed a fundamentally different factual picture from the completely unsubstantiated picture presented by the Petitioners.

57. On undertaking as to damages. The Learned Counsel submitted that the Applicant had invested significant capital in the decommissioning and rehabilitation works and continues to incur costs (see Paragraph 40 (a) of the Vickers Affidavit). The Petitioners had not given any undertaking as to damages. The purpose of such undertaking was to protect a Defendant against wrongfully issued injunctions (***“Chatur Radio Service - Versus - Phonogram Limited [1994] eKLR”***).
58. According to the Learned Counsel, it would be contrary to justice to allow the Interim Orders to remain in force in circumstances where no undertaking has been proffered and, therefore, losses suffered by the Applicant will be irrecoverable.
59. On balance of convenience. The Learned Counsel submitted that the interim orders had posed greater risks to human life, environmental integrity and community welfare than the activities they seek to restrain. By preventing all remaining decommissioning and rehabilitation activities from continuing, the Interim Orders have created a severe and immediate threat

to life, property and the environment, as detailed at paragraphs 36 to 38 of the Vickers Affidavit. Indeed, certain effects of the Interim Orders which Base Titanium's Application sought to halt - have already crystallised.

60. Contractors had been compelled to lay off 170 Kenyan workers, and the Applicant had been forced to lay off a further 54 of its own employees. An additional 120 community workers would no longer be engaged for planned indigenous tree planting, bringing the total number of directly affected Kenyan workers to 360 (see paragraph 36 of the Vickers Affidavit). In addition, implementation of the Closure Plan has been halted, delaying the restoration of disturbed areas and, consequently, the return of land for the benefit of local communities.

61. The Learned Counsel had also seen the application dated 17th March, 2025 by the Intended 8th Petitioner of the 16 Petitioners who wished to be completely want to dissociate themselves from the Petition. They pleaded that there had been no - disclosure of material facts on the matter. They had never been consulted nor their authority granted. The livelihoods of the very communities that the Interim Orders were ostensibly designed to protect had been devastated overnight. Far from

preventing environmental harm, the Interim Orders themselves have created the conditions under which catastrophic and irreversible environmental damage may occur (Vickers Affidavit, paragraphs 36 - 38). This Honourable Court should further take judicial notice of the fact that sixteen (16) members of the Msambweni/Kinondo community, the very community on whose behalf the Petition was purportedly instituted, have themselves filed an application dated 17th March 2026 seeking, inter alia, the setting aside of the Interim Orders.

62. This development fundamentally undermines the substratum of the Petition and calls into serious question the representative character of these proceedings. Many of the purported beneficiaries of the interim relief here now actively seek its discharge, this fact alone warrants the Court's careful introspection to reconsider the continuance of the Interim Orders. The 3rd Respondent fully supports that application.

63. The Learned Counsel averred that public participation had always been adhered with by the 3rd Respondent. This was indicated from its annexures founded under Pages 443 to 462 of their bundles. Further, the burden of proof as stipulated

under the Law was evident and the more reason to discharge the Interim Orders.

64. In conclusion, Learned Counsel submitted that on the basis, as well as the grounds as set out within Base Titanium's Application, the Applicant respectfully urges this Honourable Court to set aside and/or vacate the Interim Orders, or in the alternative, to stay the Interim Orders pending the substantive hearing of Base Titanium's Application. Absent such relief, the Applicant, the local community, and the environment will continue to suffer irreparable and compounding harm that could not be remedied through an award for damages.

D. The Skeleton Oral Submissions by the Intended 8th Petitioners.

65. On 23rd March, 2026, Mr. Mbwiza Advocate acting on behalf of the Intended 8th Petitioners made some oral submissions. The Learned Counsel informed Court that the Applicants filed their Notice of Motion application dated 17th March, 2026. The application was competent and made in good faith pursuant to the provision of Articles 22, 23 & 83 of the Constitution of Kenya, 2010. It was supported by the averments sworn by MBARAKA SHEE KARONYO. He held that the application raised serious concerns surrounding the community over the project.

The Applicants were concerned that they had never been consulted before the Petition was filed and they wished to have their names removed.

66. The Applicants were adversely affected by the interim orders obtained on 26th February, 2026 and wished they were lifted forthwith. They had never been consulted over the community issues. They argued that the Petitioners had no **“locus standi”** to purport to be representing the community. They were never instructed by anyone. The community never gave any consent or data to be utilized in the filing of the Petition. The Applicants were completely not interested in the Petition. On the contrary, the Applicants were all members of the surrounding Community within the Mbsambweni of the County of Kwale and hence had surrounding interest in the matter. They seek to protect their fundamental rights as enshrined in the Constitution of Kenya, 2010. It should not be insinuated that the Petitioners represented the whole community.

67. Some of the community members had been benefiting from economic view point on employment as casual labourers. The Applicants fully supported the decommissioning activities and the rehabilitation projects which included the re - planting of

trees onto the affected areas to prevent soil erosion and environmental degradation. These activities will keep the place safe for human life. Thus, they wished the status quo was maintained being the continuation of the decommissioning activities and rehabilitation projects.

68. The Petitioners and kept it to themselves and caused it to be filed against the Respondents and the will of the community. It amounted to misrepresentation of facts and hence breach to fair hearing.

69. In conclusion, the Grounds of Opposition by the Petitioners only raised issues of procedural technicalities and hence they should be dismissed. He urged to have the Court allow their Notice of Motion application dated 17th March, 2026 and grant the orders sought thereof.

X. Analysis and Determination

70. I had considered the Notice of Motion application dated 23rd February 2026 by the Petitioners, the Notice of Motion application dated 9th March 2026 by the 3rd Respondent/Applicant, the Notice of Motion dated 13th March 2026 by the Cross - Petitioner (Kenya Power &

Lighting Company PLC), the Notice of Motion dated 17th March 2026 by Mbaraka Shee Karoyo and 16 others, the affidavits and annexures filed in support of and in opposition to each application, and the written submissions filed by all parties. From the pleadings, affidavits, annexures and oral submissions placed before this Honourable Court, the following discrete five (5) salient issues fall for determination in relation to each application: -

- a) Whether the Notice of Motion application dated 23rd February 2026 (the Petitioners' Ex - Parte application for conservatory relief) is merited.**
- b) Whether the Notice of Motion application dated 9th March 2026 (Base Titanium's application to set aside, vacate or stay the interim orders) is merited;**
- c) Whether the Notice of Motion application dated 13th March 2026 (by the Kenya Power & Lighting Limited's) application for release and transfer of power infrastructure) is merited;**
- d) Whether the Notice of Motion application dated 17th March, 2026 (application by 16 residents seeking to be excluded from the Petition and to have their names struck out) is merited;**
- e) Who bears the costs of the Notices of Motion application dated 23rd February, 2026, 9th March, 2026, 13th March, 2026 and 17th March, 2026.**

ISSUE No. a). Whether the Notice of Motion application dated 23rd February, 2026 (the Petitioners' Ex - Parte application for conservatory relief) is merited.

71. Under this sub - title, the Honourable Court was tasked with determining whether the Petitioners' Notice of Motion application dated 23rd February 2026 for the "**ex - parte**" conservatory interim relief granted to the Petitioners was merited. The law on conservatory orders is now well settled in this jurisdiction and is backed by myriad of authorities for instance, in the case of: "**Centre for Rights Education and Awareness (CREAW) & another - Versus - Speaker of the National Assembly & 2 others [2017] eKLR**" the court was emphatic that: -

"A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."

72. Additionally, in the case of:- "**Privy Council Case of Attorney General - Versus - Sumair Bansraj (1985) 38 WIR 286**", Braithwaite JA expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "conservatory order" in the strictest sense of that

term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under Section 14 (2) of the Constitution the High Court would be required to deal expeditiously with the application, inter - partes, and not ex - parte and to set down the substantive motion for hearing within a week at most of the interim conservatory order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) “subject to Sub - Section (3) and the enactment of Section 14 (3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”

73. The aforesaid principles were adopted by the High Court of the **“Republic of Trinidad and Tobago in Steve Furgoson & another - Versus - The AG & another Claim No CV 2008 - 00639 - Trinidad &**

Tobago". The Honourable Justice V Kokaram in adopting the reasoning in the case of Bansraj above stated: -

"I have considered the principles of East Coast Drilling - Versus - Petroleum Company of Trinidad and Tobago Limited (2000) 58 WIR 351 and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a conservatory order against the extradition of the claimants pending the determination of this motion. The constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the constitutional claim is unarguable. The claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the constitutionality of the legislation academic."

74. The principles in regard to the granting of interim or conservatory orders were outlined by the Supreme Court in the case of ***"Gatirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR"***, where the Court held that:-

[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party

nor interested individual or entity is to take action until the Court has given the green light.

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added).

75. The principles in regard to grant of Interim conservatory orders were further reiterated in the case of ***“Nubian Rights Forum & 2 others - Versus - Attorney General & 6 others; Child Welfare Society & 8 others (Interested Parties); Centre for Intellectual Property & Information Technology (Proposed Amicus Curiae) Petition Nos. 56, 58 & 59 of 2019 [2019] eKLR”***, where the Court observed that:-

[91] This Court is granted powers to issue conservatory orders in Constitutional Petition under Article 23 (3) (c) of the Constitution and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules 2013.

[92] The applicable principles for the grant of conservatory orders were detailed by Onguto J. in Board of Management of Uhuru Secondary School - Versus - City County Director of

Education & 2 Others [2015] eKLR. In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether, to grant or deny a conservatory order.

[93] We are also guided by the principle that in determining whether or not to grant conservatory orders, the Court must bear in mind that it is not required to enter into a detailed analysis of the facts and the law. As Musinga, J (as he then was) observed in High Court Petition No.16 of 2011, Nairobi - Centre for Rights Education and awareness (CREAW) & 7 others” “...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. 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 court grants the Conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

[105] We have already found that the Petitioners have established, and the Respondent have conceded that there is a risk of prejudice being caused to members of the public and

their right to privacy by the disclosure of certain types of personal information in the absence of proposals on how that data will be protected. As regards where the public interest falls in light of the respective prejudices that will be caused if the implementation of NIIMS is stayed, we are persuaded by the definition of public interest by the Indian Supreme Court in the case of Dattraj Nathuji Thaware - Versus - State of Maharashtra, Indian & Others [2004] INSC 755 S.C 755 of 2004 which adopted the meaning of public interest as set out in Stround's Judicial Dictionary Vol. 4 (v Ed) as: "A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement but that in which a class of community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

[106] We take the view that it is in the public interest to have an efficient and organized system of registration of persons, and the responsible use of resources in the process, in light of the socio-economic gains of the system that have been illustrated by the Respondents. There is, however, also a public interest in ensuring that the said system does not infringe on fundamental rights and freedoms. There is thus a need for a balancing of the competing public interest rights while the consolidated Petitions are heard, so as to safeguard rights and resources, and ensure that the Petitions are not rendered nugatory." (Emphasis Added).

76. The Petitioners invoked the provision of Articles 22, 23, 42, 69, and 70 of the Constitution, alleging that the 3rd Respondent's decommissioning activities posed an immediate and irreversible threat to the right to a clean and healthy environment. They contended that the impugned activities—comprising

dismantling, excavation, land disturbance, and infrastructure removal—were being undertaken in close proximity to human habitation without public disclosure of a mine closure plan, environmental audits, or post-mining land use frameworks. The Petitioners vehemently argued that the absence of transparency and the risk of environmental degradation justified urgent judicial intervention to preserve the status quo ante.

77. The provision of Article 23 of the Constitution of Kenya as read with the provisions of Article 165 and Rule 23 of the Constitution of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules, 2013, (otherwise referred to as “*the Mutunga Rules*”) clearly grants this Honorable court powers to hear and determine an application for conservatory orders or interim orders in order to secure the subject matter in dispute. Rule 23 of the Mutunga Rules provides: -

**“1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an Application for conservatory or interim order.
2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.”**

78. The principles guiding the decision whether or not to grant conservatory orders were succinctly set out by Onguto, J in Board of ***“Management of Uhuru Secondary School - Versus - City County Director of Education & 2 others (2015) eKLR”***, who set out the same as hereunder:

- i. The applicant ought to demonstrate an arguable prima facie case with a likelihood of success, and that in the absence of the conservatory orders sought, he is likely to suffer prejudice as a result of the violation or threatened violation of the Constitution;***
- ii. Secondly, once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success, the court is then to decide whether a grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom of the Bill of Rights;***
- iii. Thirdly, flowing from the first two principles is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure as far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice;***
- iv. The court must consider conservatory orders also in the face of public interest dogma; and***
- v. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicant's credentials, the prima facie***

correctness of the availed information, whether the grievances are genuine, legitimate, and deserving, and finally, whether the grievances and allegations are grave and serious or merely vague and reckless.

79. From various authorities of the courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprise of the following: -

- a. First, an applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
- b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
- d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

80. The Court notes that the applicable legal framework for the grant of conservatory relief in environmental matters is

grounded in the provision of Article 23 (3)(c) of the Constitution and Section 13(7) of the Environment and Land Court Act, No. 19 of 2011 which empower the Court to issue interim preservation orders. The jurisprudential test for such relief was articulated in **“Giella - Versus - Cassman Brown & Co Ltd [1973] EA 358”** and adapted for Constitutional Petitions in the case:- **“Centre for Rights Education and Awareness (CREAW) & 7 others - Versus - Attorney General (Supra)”**, where the Court held that an applicant must demonstrate a prima facie case with a likelihood of success, that they stand to suffer irreparable harm, and that the public interest and balance of convenience favour the grant of relief.

81. The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.

82. On prima facie case, the same was defined in **“Mrao - Versus - First American Bank of Kenya Limited & 2 Others (2003) KLR 125”** to mean: -

“...In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

83. Further on what constitutes ‘a prima-facie’ case was further dealt with by the Court of Appeal in **“Mirugi Kariuki -Versus - Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8”**. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

“It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant’s interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under Section 11 (1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought.”

84. I further refer to the case of **“Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43”**, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved. In sum, therefore, in determining whether a matter discloses a prima-facie case, a Court must look at the case as a whole. It must weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties’ positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by provision Articles 22 (1) and 258 (1) of the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened, or is threatened with contravention.

85. On the material presented Ex - Parte, the Court finds that the Petitioners established a credible prima facie case. The Petitioners’ supporting affidavit and community Petition (“KMK -

1”) detailed ongoing land disturbance, dust emissions, and ecological disruption. The Petitioners further alleged the absence of publicly accessible environmental documentation, thereby raising legitimate concerns under the provision of Articles 42 and 70 of the Constitution. The Court is satisfied that the allegations, if ultimately proven, would disclose violations of constitutional and statutory environmental safeguards.

86. The Court further finds that the risk of environmental harm, as described by the Petitioners, was not speculative. The Petitioners’ assertion that the decommissioning was “a present, unfolding, and accelerating reality” was supported by specific allegations of heavy machinery operations and land alteration. In environmental litigation, the precautionary principle—enshrined in section 3(5) of EMCA and recognised in **“Ken Kasinga - Versus - Daniel Kiplangat Kirui & 5 others [2021] eKLR”**—requires that where there is a threat of serious or irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent degradation.

87. However, the Court must also consider the duty of full and frank disclosure in ex - parte applications. As held in the case of:-

“Signature Tours & Travel Ltd - Versus - National Bank of Kenya

Limited [2017] eKLR”, an applicant seeking ex - parte relief must disclose all material facts, including those adverse to their case. The 2nd Respondent’s replying affidavit sworn by David Ong’are, Director of Environmental Compliance at NEMA, reveals that the 3rd Respondent had submitted a Mine Closure and Decommissioning Plan, which was approved by NEMA on 25th September, 2024 (“DO - 3”). The affidavit further discloses that the decommissioning activities were being undertaken pursuant to that approved plan, and that NEMA had directed the 3rd Respondent to conduct a dissemination workshop to inform stakeholders of the expert monitoring studies (“DO - 4”).

88. These disclosures, if accurate, are material to the Court’s exercise of discretion. While the Petitioners’ apprehension of harm was not unfounded, the failure to acknowledge or engage with the existence of regulatory approvals, environmental monitoring, and stakeholder engagement raises a serious question as to whether the Petitioners discharged their duty of candour. The Court is not persuaded that the omission was deliberate or fraudulent, but it does warrant a reconsideration of the scope and terms of the interim orders.

89. In conclusion, the Court finds that the Petitioners' ex parte application was merited in principle and justified the grant of urgent conservatory relief on 26th February, 2026. However, the subsequent disclosures by the Respondents, particularly the 2nd Respondent's confirmation of regulatory compliance and the existence of an approved closure plan, necessitate an inter-partes review of the interim orders. The Court is therefore inclined to vary the orders to permit limited, safety-critical decommissioning activities under strict conditions, while preserving the substratum of the Petition and ensuring transparency through disclosure and independent audit.
90. Therefore, the Application by the Petitioners is found to lack merit and hence it is hereby is dismissed.

ISSUE No. b). Whether the Notice of Motion application dated 9th March 2026 (Base Titanium's application to set aside, vacate or stay the interim orders) is merited.

91. Under this sub-title, the Honourable Court was tasked with determining whether the 3rd Respondent's Notice of Motion dated 9th March 2026, seeking to set aside, vacate, or stay the interim conservatory orders issued on 26th February 2026, was merited in law and fact. This Honorable Court finds it significant to critically examine the provisions for review, setting aside

and/or varying court orders. These are found mainly under the provisions of Section 80 of the Civil Procedure Act, Cap. 21 and Order 45 (1) & (2) of the Civil Procedure Rules, 2010. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

Section 80 provides:-

any person who considers himself aggrieved:-

- a) By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
- b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.**

Order 45 (1). States as follows:-

Any person considering himself aggrieved:-

- a) By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
- b) By a decree or order from which no appeal is allowed by this Act, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of Judgement to the Court which passed the decree or made the order without unreasonable delay”.**

92. From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be

exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;
- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
- e. On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
- f. The review is by the Court which passed the decree or made the order without unreasonable delay.

93. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible.

94. The provision of Order 51, Rule 15 of the Civil Procedure Rules, 2010 grants courts discretion to set aside ex - parte orders if circumstances justify, including non-disclosure, abuse of process, or prejudice to the other party. The grounds for setting aside orders are: -

- a. Material non-disclosure by the applicant.**
- b. Abuse of conservatory relief to gain undue advantage.**
- c. Changed circumstances making the order unnecessary.**
- d. Balancing proportionality and public interest.**

95. The 3rd Respondent's application is anchored on several grounds: These are, that the ex - parte orders were obtained through material non-disclosure; that the orders have caused immediate and disproportionate harm to public safety, environmental stability, and livelihoods; and that the decommissioning activities in question are being undertaken

pursuant to a lawfully approved Mine Closure and Decommissioning Plan sanctioned by the 2nd Respondent (NEMA) on 25th September 2024.

96. The Court reiterates that under the provision of Order 40 Rule 7 of the Civil Procedure Rules, 2010 and its inherent jurisdiction, it retains the power to discharge or vary interim orders where it is shown that such orders were obtained through misrepresentation, concealment of material facts, or where the balance of convenience and public interest so demand.

97. The 3rd Respondent's application is supported by the affidavit of J.D. Vickers and annexed documents, including the approved Mine Closure Plan, EIA licences, environmental monitoring reports, and correspondence with NEMA. These documents demonstrate that the decommissioning activities were not clandestine or unlawful, but rather formed part of a regulated and supervised closure process. The 2nd Respondent's replying affidavit, sworn by David Ong'are, confirms that the decommissioning was authorised under EMCA and that public participation was undertaken during the project's lifecycle, with a dissemination workshop held in February 2026 to present expert monitoring studies.

98. The Court finds that the Petitioners' Ex - Parte application did not disclose the existence of the approved closure plan, the regulatory oversight by NEMA, or the dissemination workshop. While the Petitioners may not have had access to all documentation at the time of filing, the duty of full and frank disclosure obliges an applicant to disclose all material facts within their knowledge or which they ought reasonably to have ascertained. As held in the case of:- "**Signature Tours & Travel Limited - Versus - National Bank of Kenya Limited [2017] eKLR**", suppression of material facts, whether deliberate or inadvertent, undermines the integrity of ex - parte proceedings and justifies discharge of the orders obtained.
99. The Court also considers the balance of convenience. The 3rd Respondent has demonstrated that the interim orders have halted safety-critical works at the Tailings Storage Facility (TSF), suspended dismantling of partially deconstructed structures, and triggered layoffs of local workers. The 2nd Respondent has warned that cessation of rehabilitation efforts exposes the site to erosion, instability, and potential environmental degradation, particularly given the fragile condition of the post-mining landscape. These risks are not speculative; they are grounded in expert studies and regulatory assessments.

100. Conversely, the Petitioners' fears of irreversible environmental harm, while constitutionally protected under provision Article 42, must be weighed against the evidence that the impugned activities are part of a supervised closure plan. The precautionary principle, codified in Section 3 (5) of EMCA, does not justify blanket restraint where the restrained activity is itself aimed at environmental restoration and risk mitigation.

101. The Court is persuaded that the 3rd Respondent's application is merited to the extent that the interim orders require variation. The evidence now before the Court establishes that certain decommissioning activities are necessary to prevent greater harm and are being undertaken under regulatory supervision. However, the Court is not satisfied that the orders should be set aside in their entirety. The Petition raises serious constitutional and environmental questions that warrant preservation of the substratum of the suit and independent verification of compliance.

102. Accordingly, the Court finds that the 3rd Respondent's application dated 9th March 2026 is partly merited. The interim orders issued on 26th February 2026 shall be varied to permit narrowly defined, safety-critical and public-interest

decommissioning activities to proceed under strict conditions. These will include the following safety precautionary measures, full disclosure, independent audit; community liaison, as set out in the operative and conclusive part of this ruling.

ISSUE No. c). Whether the Notice of Motion application dated 13th March 2026 (Kenya Power & Lighting Limited's) application for release and transfer of power infrastructure) is merited.

103. Under this sub-title, the Honourable Court was called upon to determine whether the 4th Respondent's Notice of Motion application dated 13th March 2026, seeking leave to remove and relocate a 132/11 kV transformer from the Base Titanium site for urgent national grid deployment, was merited in law, fact, and public interest. The application is premised on the assertion that the transformer in question is urgently required for installation in Garissa County to avert a looming power crisis affecting critical public services and regional stability. The 4th Respondent contends that the transformer is not contaminated, is not embedded in any disputed land, and that its removal is a discrete, time-sensitive operation that can be executed without environmental harm.

104. The Court notes that the transformer forms part of the infrastructure previously used by the 3rd Respondent during mining operations and is now subject to decommissioning and asset transfer arrangements. The 3rd Respondent has not opposed the application and has confirmed that the transformer is no longer required for its operations and that its removal is consistent with the approved Mine Closure and Decommissioning Plan.

105. The legal framework governing this issue includes the provision of Article 43 (1) (d) of the Constitution, which guarantees every person the right to clean and safe water in adequate quantities, and Article 43 (1) (c), which guarantees the right to accessible and adequate housing, including reasonable standards of sanitation. These rights are directly implicated where electricity supply is threatened, particularly in arid and semi-arid regions such as Garissa, where alternative energy sources are limited.

106. The Court also considers the principle of proportionality, as articulated in case of: ***“Republic - Versus - Kenya National Commission on Human Rights Ex - Parte Uhuru Muigai Kenyatta [2006] eKLR”***, which requires that any limitation of rights or orders issued by the Court must be necessary, suitable, and the

least restrictive means of achieving the intended objective. In this case, the blanket conservatory orders issued on 26th February 2026, while justified in their protective intent, may inadvertently obstruct a critical public utility intervention with far-reaching consequences.

107. The Court is further guided by the public interest doctrine, which mandates that judicial discretion in environmental matters must be exercised in a manner that advances the common good. In case of:- ***“Kenya Association of Manufacturers & 2 Others - Versus - Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others [2017] eKLR”***, the Court held that:-

“where competing public interests are at stake, the Court must balance the equities and ensure that the greater public good is not sacrificed at the altar of procedural rigidity.”

108. The Petitioners have not opposed the application on the merits but have expressed concern that the transformer removal may be used as a pretext to resume broader decommissioning activities in violation of the conservatory orders. The Court considers this a legitimate concern but finds that it can be addressed through strict conditionality and supervision.

109. The Court is satisfied that the removal of the transformer is a discrete, time-sensitive, and high-priority public interest activity that can be undertaken without undermining the substratum of the Petition or causing environmental harm, provided that appropriate safeguards are imposed.

110. Accordingly, the Court finds that the 4th Respondent's application dated 13th March 2026 is merited. The Court shall grant leave for the removal and transfer of the transformer, subject to the fulfilment of the following Pre - Conditions:

- (a) The 3rd Respondent shall file a method statement and environmental risk assessment for the dismantling and removal operation within the next 14 days from this date hereof;
- (b) The operation shall be supervised by an independent engineer agreed upon by the parties or appointed by the Court;
- (c) The 2nd Respondent (NEMA) shall be notified and may deploy compliance officers to monitor the operation;
- (d) A post-removal compliance report shall be filed within 14 days of completion;

(e) The transformer shall not be removed until the Court is satisfied that the above conditions have been met.

111. The Court reiterates that this limited variation of the interim orders does not constitute a general lifting of the conservatory relief but is a tailored exception grounded in overriding public interest and subject to strict environmental and procedural safeguards.

ISSUE No. D. Whether the Notice of Motion application dated 17th March 2026 (application by 16 residents seeking to be excluded from the Petition) is merited.

112. Under this sub-title, the Honourable Court was called upon to determine whether the application dated 17th March 2026, brought by sixteen (16) named individuals seeking to be removed from the list of Petitioners, was merited in law and fact, and whether their continued inclusion in the Petition infringed their constitutional or procedural rights.

113. The applicants contend that they were included in the Petition without their knowledge, consent, or authority, and that the interim conservatory orders issued on 26th February 2026 have adversely affected their livelihoods by halting decommissioning

activities that had previously provided them with employment and economic benefit. They seek to have their names struck out from the Petition and to be excluded from any further proceedings.

114. The Petition was brought under Article 22 (2) (b) of the Constitution, which permits a person to institute proceedings “as a member of, or in the interest of, a group or class of persons.” The Petitioners purport to act on behalf of affected residents and community members within Msambweni/Kinondo area. However, Article 22 (3) (d) and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“**the Mutunga Rules**”) require that where a person brings a claim on behalf of others, they must demonstrate authority or justification for such representation. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is

extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.

115. In case of:- ***“Trusted Society of Human Rights Alliance - Versus - Mumo Matemu & 5 others [2014] eKLR”***, the Court of Appeal held that while public interest litigation must not be unduly fettered by technicalities, the principle of representative standing must be exercised with fidelity to the rights of those purportedly represented. The Court stated:

“Where a person purports to act on behalf of others, it must be shown that those others have consented or that the person has a demonstrable interest in the matter and is acting in good faith.”

116. In the present case, the sixteen applicants have filed a joint affidavit expressly denying that they authorised the inclusion of their names in the Petition. They have further deposed that they were not consulted, did not sign any authority to sue, and have suffered economic prejudice as a result of the interim orders. These averments have not been convincingly rebutted by the Petitioners.

117. The Court is satisfied that the applicants have raised a credible and specific grievance. Their continued inclusion in the Petition, absent consent or lawful authority, would amount to a violation of their constitutional rights under Article 47 (right to fair administrative action) and Article 50 (1) (right to a fair hearing), as well as a breach of the procedural safeguards under Rule 4 of the Mutunga Rules.

118. The Court is also mindful of the principle of procedural fairness and the need to avoid entangling unwilling individuals in litigation that may expose them to costs, reputational harm, or adverse legal consequences. In the case of:- **“Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 others (Supra)”**, the High Court underscored the importance of ensuring that representative suits are not used to conscript individuals into proceedings without their informed participation.

119. Accordingly, the Court finds that the application dated 17th March 2026 is merited. However, given the public interest nature of the Petition and the need to preserve the integrity of the representative class, the Court shall order the provisional exclusion of the sixteen applicants from the list of Petitioners, pending an expedited inter partes hearing on the question of

representation and locus standi. This approach balances the applicants' right to dissociate from the litigation with the need to ensure that the representative character of the Petition is not undermined without due process.

120. The Petitioners shall be at liberty to file a replying affidavit within seven (7) days addressing the applicants' claims and, if necessary, producing any written authority or evidence of consent. The Registrar shall fix the representation issue for hearing on priority basis.

ISSUE No. e. What orders should issue as to costs of the Notice of Motion application dated 5th August, 2025.

121. Under this sub-title, the Honourable Court was required to determine the appropriate allocation of costs arising from the four (4) interlocutory applications filed in this Petition, namely:

- a) The Petitioners' Ex - Parte Notice of Motion application dated 23rd February 2026;
- b) The 3rd Respondent's application dated 9th March 2026 seeking to set aside or vary the interim orders;

- c) The 4th Respondent's application dated 13th March 2026 seeking leave to remove and relocate a transformer; and
- d) The application dated 17th March 2026 by sixteen residents seeking to be excluded from the Petition.

122. The issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action and/or legal proceeding. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

“26. (1) The award of costs is at the discretion of the Court.

(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

123. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of **“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR”** and

“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR”***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

124. Further in ***“John Harun Mwau & 3 Others - Versus - Attorney General & 2 Others [2012] eKLR”***, the Court held that in public interest litigation, ***“the general rule that costs follow the event does not apply with equal force.”*** Similarly, in ***“Kenya Bus Services Ltd & Another - Versus - Minister for Transport & 2 Others [2005] eKLR”***, the Court observed that ***“in matters of public interest litigation, courts are inclined to adopt a liberal approach to costs.”***

125. The Petitioners’ application of 23rd February 2026 was brought in the public interest and raised substantial constitutional and environmental issues under the provision of Articles 42, 69, and 70 of the Constitution. The Court found that the application was merited at the ex - parte stage, even though subsequent

disclosures by the Respondents warranted variation of the orders. The 3rd and 4th Respondents' applications were also partly merited, having demonstrated material non-disclosure and overriding public interest considerations, respectively. The application by the sixteen residents was similarly grounded in procedural fairness and was not frivolous.

126. In light of the above, and guided by the principles in "**Okiya Omtatah Okoiti - Versus - Attorney General & 3 Others [2014] eKLR**", where the Court declined to award costs in a matter involving constitutional and environmental rights, the Court finds that this is an appropriate case in which to order that costs be in the cause.

127. Accordingly, the Court directs that the costs of the Notices of Motion application dated 23rd February, 2026, 9th March, 2026, 13th March, 2026 and 17th March, 2026 shall be in the cause. This means that the question of costs shall abide the final outcome of the Petition, and no party shall be deemed to have succeeded or failed at this interlocutory stage for purposes of costs.

XI. Conclusion and Disposition.

128. Ultimately, in view of the foregoing detailed and reasoned analysis of the four (4) Notices of Motion applications dated 23rd February, 2026, 9th March, 2026, 13th March, 2026 and 17th March 2026 respectively, the affidavits and documentary evidence filed by the parties, the applicable constitutional and statutory framework, and the guiding jurisprudence on interim environmental relief, the Honourable Court arrives at the following conclusions and issues the orders set out below:-

a) THAT the Notice of Motion application dated 23rd February 2026 filed by the Petitioners which was found to have been merited at “*the Ex - Parte stage*”, having by then established a credible “*prima facie case*” of imminent environmental degradation and harm be and is hereby, in light of subsequent disclosures by the Respondents, including evidence of regulatory approvals, decommissioning processes and rehabilitation oversight, the interim conservatory orders issued on 26th February 2026 are hereby “*Ex - debito justitiae*” varied, set aside and/or discharged forthwith.

b) THAT the orders made above are to expressly permit, allow and/or facilitate certain limited, safety-critical and public-interest decommissioning process and rehabilitation activities to be strictly and fully complied and undertaken by the 3rd Respondent under strict scientific and legal conditions and guidance of the

provision of Articles 10 (2) (b), 42 (a) & (b), 60 (1) (a), (b), (c), (d), (e) & (g) & (2); 69 (1), (a), (b), (c), (d), (e), (f), (g) & (h) and (2) and 70 (1) & (2), (a), (b) & (c) and (3) of the Constitution of Kenya, 2010; Sections 3, 58, 68, 69, 87, 91, 92, 93, 102 & 108 of the Environmental Management Co - ordination (Amendment) Act, 2015, (EMCA); Sections 3 & 13 of Environment & Land Court Act, No. 19 of 2011; Sections 101 of the land Registration Act, No. 3 of 2012 and Section 150 of the Land Act, No. 6 of 2012. Specifically, to include but not limited:-

- i. To prepare, exchange and file in Court a comprehensive decommissioning and Rehabilitation implementation Plan bearing full disclosure, independent audit, and community liaison by the 3rd Respondent WITHIN THE NEXT 72 Hours from the day of this Ruling that is by close of business on 30th March, 2026.**
- ii. To ensure there are Sustainable and Precautionary and Safety Measures and Standards for the protection and conservation of Environmental Impact and Audit management and Controls are in place.**
- iii. To ensure there are disclosed, clear, transparent and accountable decommissioning and rehabilitation activities spelt out in the Implementation Plan.**
- iv. To ensure there will be full and active involvement and participation of the community (living and surrounding the area) - including all the parties in these**

- proceedings - in the decommissioning and rehabilitation process and activities to the damaged areas. For instance the healthy standards, re - planting of appropriate species of indigenous trees for prevention of soil erosion, environmental degradation & silt run off into the adjacent Buda National Forest & the surrounding community areas; mounting of strong hoards and other protective gears surrounding the establishment and the Tailings Storage Facility (TSF) of liquifiable fine and dangerous slime chemicals emitted from the Mining and processing operation projects etc.
- v. To ensure there will be eliminated processes and activities that are likely to endanger the human being and environment to the extent of causing environmental degradation and harm.
 - vi. To ensure these activities are for the betterment of clean and healthy environment and natural resources for the benefit of the Community living within these surroundings and elsewhere within the County of Kwale and the Republic of Kenya.
 - vii. To ensure that these activities commence in earnest on or before 2nd April, 2026 under the direct control, management and supervision of the Deputy Registrar of the Environment and Land Court (ELC) Kwale and the Court Administrator and indicates the completion date not exceeding six (6) months.
- c) **THAT** the Notice of Motion dated 9th March 2026 filed by the 3rd Respondent (Base Titanium Limited) is found to

be partly merited. The Court finds that the interim orders were obtained without full disclosure of material facts, and that their blanket continuation would cause disproportionate harm to public safety, environmental stability, and socio-economic livelihoods. The Court therefore varies the interim orders to allow specified activities to proceed under court supervision, while preserving the substratum of the Petition for full hearing.

d) **THAT** the Notice of Motion application dated 13th March 2026 filed by the 4th Respondent (Kenya Power & Lighting Company) is found to be merited. The Court grants leave for the removal and relocation of the 132/11 KV transformer from the Base Titanium site to Garissa County, subject to the filing of a detailed Method Statement, independent engineering supervision, NEMA oversight, and post-removal compliance reporting by the Kenya Power & Lighting Company Limited (KPLC) and the 3rd Respondent **WITHIN THE NEXT FOURTEEN (14) DAYS** from this date and as set out in the conditions of this ruling. The scheduled "*Inter Parte*" date of 23rd June, 2026 which is now overtaken by event be and is hereby vacated.

e) **THAT** the Notice of Motion application dated 17th March 2026 filed by sixteen (16) named residents seeking to be excluded from the Petition is found to be merited. The Court orders the provisional exclusion of the said individuals from the list of Petitioners pending an

expedited "*inter - partes*" hearing on the question of representation and locus standi. The Petitioners shall file any response WITHIN SEVEN (7) DAYS, and the Registrar shall fix the representation issue for hearing on priority basis.

f) THAT for expediency sake, the main Petition dated 23rd February, 2026 to be disposed off by way of written submissions as follows:-

- i. The Respondents granted 14 days leave to file and serve replies and written submissions.
- ii. Thereafter, the Petitioners granted 14 days leave to file and serve further Affidavits on any new issues of Law raised from the replies and written submissions.
- iii. The matter to be mentioned on 23rd June, 2026 for compliance and taking a Judgement date. _

g) THAT the Cross Petition dated 13th March, 2026 be and is hereby deemed as already spent and the orders sought having been overtaken by events.

h) THAT the costs of the four (4) Notice of Motion applications dated 23rd February, 2026, 9th March, 2026, 13th March, 2026 and 17th March, 2026 shall be in the cause.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....27TH DAY OFMARCH.....2026.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

- (a) Mr. Daniel Disii, the Court Assistant;
- (b) Mr. Mureti & Mr. Muchiri Advocates for the Petitioners.
- (c) Mr. Cecil Kuyo Advocate for 3rd Respondent.
- (d) Mr. Mbwiza Advocate for the Intended 8th Petitioner/Applicant.
- (e) Mr. Ganya Advocate for the 2nd Respondent.
- (f) No appearance for the Cross Petitioner & the 4th Respondent;