



**Kamau & 142 others v Kenya Railways Corporation & 4 others; Institute of Engineers of Kenya (Interested Party) (Environment and Land Petition E001 of 2025) [2025] KEELC 5475 (KLR) (Environment and Land) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5475 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT AND LAND PETITION E001 OF 2025**

**MC OUNDO, J**

**JULY 24, 2025**

**IN THE MATTER OF ARTICLES 2(1) & 2, 3(1), 10, 19, 20, 21, 22, 23(1) & (3), 159 (2) (E) & 165 (3) (A), 9B, 244 (02), 249 (1) (B) & (C), 258 (1) AND (2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3, 6, 10, 10, 20, 21, 22, 23, 24, 26, 27, 28, 29, 40, 42, 43, 46, 47, 48, 53, 56 AND 57 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 9, 10 AND 51 OF THE KENYA RAILWAY CORPORATION ACT AND RULES 234 AND 235 OF THE GENERAL RULES OF THE KENYA RAILWAYS OF 1984.**

**BETWEEN**

**BERNARD NDUNGÚ KAMAU & 142 OTHERS ..... PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**THE MANAGING DIRECTOR KENYA RAILWAYS CORPORATION .... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**THE KENYA HUMAN RIGHTS COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 5<sup>TH</sup> RESPONDENT**



AND

THE INSTITUTE OF ENGINEERS OF KENYA ..... INTERESTED PARTY

RULING

1. Before me for determination are three Applications, the first one dated 3<sup>rd</sup> February, 2025, the second one dated 21<sup>st</sup> May 2025 and the third one dated 23<sup>rd</sup> June 2025. For ease of reference, the parties herein shall be referred to as they appeared in the Petition.
2. To begin with, the Application dated 3<sup>rd</sup> February, 2025, is a Chamber Summons Application brought by the Petitioners pursuant to the provisions of Article 10, 23(3) of *the Constitution* of Kenya 2010, Section 10 of the Judicata Act Cap 8, Section 1A, 1B and 3A of the *Civil Procedure Act*, Rule 2, 3 and 4 of the High Court Practice Rules, and the Inherent Jurisdiction of the Court in which the Petitioners have sought for the following orders:
  - i. Spent
  - ii. That the Honorable Court be pleased to issue injunctive orders, barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, either by themselves, employees, assignees, or whatsoever commencing and or proceeding with the reconstruction of the concrete tunnel and soil embankment bridge, for the Kenya-Uganda Railway track, to pass the gorge, through Kamuchira, Jerusalem, Githioro, Gorges and Ruiru villages of Maai Mahiu in Naivasha Sub County Nakuru County, pending the hearing and determination of the suit.
  - iii. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be directed to supply the Applicants with the safety and feasibility study report, Environmental Impact Assessment report and all relevant documentations that had influenced their decision, including construction designs and tender documents thereof.
  - iv. That the 5<sup>th</sup> Respondent be directed to in conjunction with Institution of Engineers of Kenya to conduct and furnish the Honorable court with safety and feasibility and Impact Assessment report and recommendations pending the hearing of the Petition.
  - v. That costs of the Application be borne by the Respondents.
  - vi. Any other or further orders as the Honorable court may deem just to grant.
3. The Chamber Summons was supported by the grounds therein and a Supporting Affidavit of an even date sworn on their behalf by Bernard Ndungu Kamau, one of the Petitioners herein who deponed that sometime in April 2024, the country, in the Rift valley region, had experienced heavy downpour wherein on 29<sup>th</sup> April 2024, flash floods swept off people and their belongings in the villages of Kamuchira, Jerusalem, Githioro Georges and Ruiru in Maai Mahiu, Naivasha subcounty within Nakuru county.
4. That the same had been caused by a burst in a blocked railway tunnel near Old Kijabe Town due to the accumulation of flood water in what was locally known as the dark tower which was a 183-meter-long and 10 feet diameter concrete tunnel, built to carry soil embankment bridge for the Kenya-Uganda Railway track to pass the 100-meter gorge.
5. That it was the responsibility of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and/or their employees, to keep a 24-hour vigil of the said bridge, and observe water levels in the event of rains or floods, so as to take appropriate



remedial steps to avert any disasters. That had the appropriate measures been taken, they would have been spared of the worst avoidable catastrophe wherein as a result of the Respondents' negligence/ defiance and breach of duty of care, they had suffered loss of their loved ones, homes, properties and businesses where they had been left destitute and helpless with false promises.

6. That as a consequence of the breach of duty of care, the Petitioners had been left vulnerable and exposed to the elements of nature and cruelty of loss of social protection, denial of access to their sources of income, identity and belonging, thereby constituting an infringement on their constitutionally guaranteed socio-economic rights where their right under the provisions of Article 70 to clean and healthy environment recognized under the provisions of Article 42 of *the Constitution* were infringed.
7. That without any form of remorse, precaution or participation of the people, the 1<sup>st</sup> Respondent, just like in the year 2020 was back at creating yet another outdated soil embankment bridge in the places that had been swept away by the 2024 floods, without the environmental impact assessment from the National Environmental Management Authority and in particular, the sustainability and safety of the communities living down the gorges. That unless halted by the Honorable court, the construction of the outdated tunnel and soil embankment bridge would continue at the detriment of the petitioners' lives, properties and livelihood.
8. In response and in opposition to the Petitioners' Application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents through their Replying Affidavit dated 28<sup>th</sup> April 2025 sworn by Eng. Shimrone Munga, a senior engineer at the 1<sup>st</sup> Respondent deponed that that the Kenya Meter Gauge Railway (MGR) for which the Uplands-Longonot section was part, plays a critical role in the transportation of goods and passengers to the western part of Kenya hence was played a significant role in the country's economy.
9. That between March and May 2024, Kenya had experienced above average rainfall which had led to widespread flooding and landslides across 42 of the 47 counties. That according to the National Drought Management Authority, the rains had been between 111% to 200% of the average across the country while some other parts of the central and rift valley had received more than 200% of the average.
10. That the most severe flooding had been reported in Nairobi, Homa Bay, Kajiado, Mandera and Nakuru. That unfortunately, the floods that had been caused by the el nino phenomenon had resulted in significance loss of lives, property, the country's economy and infrastructure which included the railway network more so the Uplands-Longonot section of the MGR located in the central Rift Valley, an area known for its varied terrain including steep slopes, valleys and proximity to the great Rift Valley which is a subject of the instant Petition. That the landslides had compounded the issues especially in the hilly regions where debris from sliding soil, rocks and trees had obstructed the tracks and culverts and flooding submerged several railways sections eroding embankments, track beds and ballast.
11. That the floods of 29<sup>th</sup> April 2024 which swept debris, had blocked culverts at KM 604 causing significant ponding and any attempts to unclog the same was futile. That while the drainage infrastructure had been sufficient to handle the hydraulic capacity, the damages had occurred from external factors like the human activities such as deforestation which had led to accumulation of boulders and tree stumps in the drainage paths thus blocking the same and causing upstream damming leading to complete embankment failure which in turn resulted in the creation of a deep valley thus discharging the water to the areas below it. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not been negligent as the events had been caused by 'acts of God' and other external factors like deforestation.
12. That following the investigations of the extent of the damages and its cause, a public participation exercise had been conducted on 6<sup>th</sup> August 2024 where the community had been invited to give input



- on solutions to mitigate such a disaster in future where it had been agreed that the immediate actions was the debris clearance, drainage restoration and water pumping including repairing of damaged road connecting Governor and old Kijabe town to ensure access for the residents and facilitate restoration works.
13. That since the floods had rendered the Uplands-Longonot section of the railway line impassable and disconnected, the 1<sup>st</sup> Respondent had commenced restorative works of the MGR infrastructure meant to return normalcy in the route.
  14. That upon being issued with the improvement notice by the 5<sup>th</sup> Respondent, the 1<sup>st</sup> Respondent had stopped the works wherein it had prepared and submitted an Environmental and social impact assessment report to the 5<sup>th</sup> Respondent on 24<sup>th</sup> April 2025 and were awaiting the assessment of the same.
  15. That the allegations by the Petitioners that the construction of the soil embankment bridges was outdated was untrue as the same had purely been restorative works and not a new project. That further, the infrastructure that was in place had not been the cause of the flooding as the same had been as a result of heavy rainfall and human activities.
  16. That subsequently, the Petitioners could not dictate to the 1<sup>st</sup> Respondent and the Government to use alternative construction methods as that was a policy decision that had been informed by many considerations including costs implications and topography. He thus urged the Court to allow the 1<sup>st</sup> Respondent to continue with the restorative works as the same had been done in the National and Public Interest.
  17. That the court had no jurisdiction to issue orders on provision of information, since the Petitioners had not exhausted the remedies provided under the Access of Information Act. They thus urged the court to exercise restraint and direct the Petitioners to exhaust the available remedies before coming to the court because the court only exercises appellate jurisdiction on the issues of access to information. Subsequently, he urged the Court to deny the orders sought by the Petitioners.
  18. The 5<sup>th</sup> Respondent also opposed the Petitioners Application vide its Replying Affidavit dated 21<sup>st</sup> March 2025 which was sworn by Joseph Kopejo, the County Director of Environment, Nakuru to the effect that the 5<sup>th</sup> Respondent was the principal instrument of government established under the provisions of Section 7 of the *Environmental Management and Co-ordination Act* (EMCA) to exercise general supervision and coordination over all matters relating to the environment with its main object being to exercise general supervision and co-ordination of all matters relating to the environment and implementation policies.
  19. That it was tasked with issuing Environmental Impact Assessment (EIA) Licenses which was a requirement of any proponent of any project specified in the second schedule to EMCA to undertake.
  20. That upon being served with the pleadings herein and having not received any complaints prior, it had undertaken a site visit of the project to ascertain the facts as had been alleged by the Petitioners. That the inspection team had observed evidence of reconstruction works of the railway line ongoing prior to the proponent of the said project having sought the EIA license. That subsequently, the improvement notice had been issued on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents requiring them to:
    - i. Stop any further construction.
    - ii. Conduct and submit an Environmental Impact Assessment Report within 7 days from the 13<sup>th</sup> March 2025.



- iii. Provide a commitment letter to the Authority and that the directives issued will be adhered to.
21. That it had been on the above basis that the 5<sup>th</sup> Respondent had supported the issuance of conservatory orders, barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with any further construction work until the provisions of EMCA were complied with.
22. That in relation to prayer (iv) of the Application, by dint of the provisions of Section 58 of EMCA, it was not the 5<sup>th</sup> Respondent's mandate to conduct an EIA Report, but the proponent of a project. That the 5<sup>th</sup> Respondent could only review the report.
23. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the Interested Party did not participate in the Petitioners' Chamber Summons dated 3<sup>rd</sup> February 2025.
24. The second Application dated 21<sup>st</sup> May, 2025 is a Notice of Motion brought by the 1<sup>st</sup> Respondent pursuant to the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, Section 1A, 1B, 3A of the *Civil Procedure Act* and Rule 45 (1) & (5), 51 of the Civil Procedure Rules in which the 1<sup>st</sup> Respondent sought that the court be pleased to vacate its interim orders that had been issued on the 26<sup>th</sup> March 2025 and extended on 29<sup>th</sup> April 2025 directing the 1<sup>st</sup> Respondent to stop the construction of the impugned site pending further orders of the court. It also sought that the costs of the Application be provided for.
25. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Eng. Shimrone Munga, the 1<sup>st</sup> Respondent's senior engineer who deponed that he was a registered Professional Engineer with the Engineers Board of Kenya (EBK) and a Corporate Member of the Institution of Engineers of Kenya (IEK) with over 10 years' experience in Civil and Structural Engineering Works. That he had extensive experience in Project conceptualization, Engineering Design, Contract Administration, Project Management and Maintenance Interventions for Building, Railways and Bridges.
26. That pursuant to the granting of the interim orders by the court stopping the 1<sup>st</sup> Respondent from commencing and/or proceeding with the reconstruction of the concrete tunnel and soil embankment bridge for the Kenya-Uganda railway line along the Uplands-Longonot region pursuant to a complaint by the Petitioners, the project having been commenced without a license from the 5<sup>th</sup> Respondent and an Environmental Impact Assessment report (EIA), in compliance with the Court's order and the 5<sup>th</sup> Respondent's improvement notice, they had immediately stopped any further works at the site and commenced the process of obtaining the EIA license which were submitted on 25<sup>th</sup> April 2025 to the 5<sup>th</sup> Respondent as had been required in its improvement notice for their review. That the 5<sup>th</sup> Respondent reviewed the reports, visited the site and extensively engaged the 1<sup>st</sup> Respondent on the project to satisfy itself that the project had met the legal and environmental safeguards requirements wherein on the 9<sup>th</sup> May 2025, it had issued the Applicants with an EIA License and a green light to continue with the Restoration of the railway line.
27. Having complied, that the court reviews and vacates its orders of 26<sup>th</sup> March 2025 and extended on 29<sup>th</sup> April 2025 on the grounds that;
- i. Due to the current rains being experienced, debris, mudslides and rocks had started blocking the existing tunnels, one such tunnel being right beside Rift Valley Academy (RVA) which in turn would create a temporary dam on the upper side of the tunnels which may lead to sweeping away of the tunnels thus causing yet another disaster.



- ii. That the 5<sup>th</sup> Respondent, had approved the process after lengthy site session with engineers, social and environmental professionals from both teams.
  - iii. The contracted contractors whose equipment were currently lying idle at the project site continued to charge the 1<sup>st</sup> Respondent for any delays wherein the costs were running into tens of millions of shillings of the tax payer's money, hence it was in public interest that the project was completed as soon as possible.
  - iv. The Uplands-Longonot section of the MGR serve as a vital corridor for transporting goods and passengers between Nairobi and Western parts of Kenya to Uganda. That subsequently, the delay in completion of the restoration was now threatening to cause diplomatic rows with their neighbors. That indeed, a delegation from Uganda had visited the country to try and implore the Government of Kenya to fast-track the restoration of the line.
  - v. The project was being implemented by qualified engineers from both the 1<sup>st</sup> Respondent and the Ministry of Transport and had also received an endorsement from the professionals of the 5<sup>th</sup> Respondent. That subsequently, the unsupported assertions by the Petitioners that the restoration works was based on outdated models was unmerited since the said Petitioners had not expressed any knowledge of the civil works that were currently being done.
28. That unless the said orders were vacated, the 1<sup>st</sup> Respondent would be highly prejudiced and the lives of many residents living on the lower sides runs the risk of another catastrophe. That no prejudice would be suffered by Petitioners as the same was meant to safeguard their interests as well as the public interest.
29. The application was opposed by the Petitioners' Replying Affidavit dated 30<sup>th</sup> May, 2025 sworn on their behalf by Bernard Ndungu Kamau, who deponed that contrary to the 1<sup>st</sup> Respondent's assertion, the 5<sup>th</sup> Respondent's backing of their Application for injunctive orders was not the only factor that had influenced the granting of the said orders since the Honorable Court had exercised its discretion as had been informed by the prevailing circumstances, public interest and the need to uphold the rule of law among others.
30. That the Public Participation meeting held on 6<sup>th</sup> May 2025 had been done clandestinely pursuant to a notice of a prescribed venue in Kamuchira village, which venue had been changed at the last minute to the site of the construction and later to some place in the bushes, where the Assistant County Commissioner, the Chief of Kamuchira village, and a consultant and the staffs of the 1<sup>st</sup> Respondent had fed the attendees, who were strangers, with a collection of fiction and falsehood including but not limited to employment opportunities and infrastructure meant to benefit the victims, but did not mention compensation or restoration of the lives of the people of Maai Mahiu.
31. That the marginalized communities of the Maai Mahiu villages who had suffered a catastrophe were not accorded an opportunity to submit their views on the construction of the railway in contravention of Articles 10 and 118 (1) (b) of *the Constitution*. Reliance was placed on the decided case of Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR.
32. That the said public participation meeting had ended in unanimous rejection of the railway project by the residents hence the said soil embankment tunnel bridges were not just a waste of public coffers but a death trap for the people living downstream and must not be allowed to proceed.
33. That if the construction proceeds, there was great risk of violence and bloodshed by the victims. That the issuance of the impugned EIA license by the 5<sup>th</sup> Respondent could not be the only determinant to warrant the lifting of the said orders as they had since appealed the said decision to the National Environmental Tribunal at Nairobi. That in any case, the lifting of the injunctive orders as sought by



the Applicant would have the unpleasant consequence to the pending Petition thus rendering it an academic exercise and a waste of court's precious time.

34. That the injunctive orders that had been issued by the Honorable Court had were limited to the reconstruction of the washed away bridge and did not extend to halting all the 1<sup>st</sup> Respondent's operations whose attempt to catastrophize the situation on the ground was only meant to derail the Court's focus on the matter at hand, by deflecting from the confessed negligence and or incompetence since maintenance was a continuing undertaking.
35. That the 1<sup>st</sup> Respondent's Application was ill-advised, in bad taste and meant to take the thunder out of their case hence the same should be dismissed for mootness, the license which was the heart of the Application being a subject of an appeal pending at the National Environmental Tribunal.
36. In rejoinder, vide an affidavit dated 18<sup>th</sup> June 2025 sworn by Eng. Shimrone Munga, the 1<sup>st</sup> Respondent deponed that they were surprised that the Petitioners, who had accused it of negligence were now opposed to the restorative works that were meant not only to repair the railway line but to also restore the blocked tunnels and prevent future calamities caused by the blockages.
37. That any challenge of the 5<sup>th</sup> Respondent's license fell within the jurisdiction of the National Environment Tribunal (NET). He reiterated that the 1<sup>st</sup> Respondent had complied with all the necessary procedures in the application for the license thus the Petitioners' allegations were unfounded. That the restoration works did not affect the substance of the Petition on compensation.
38. That the 1<sup>st</sup> Respondent had come to court with clean hands seeking to have the court's orders lifted in the interest of public and that the MGR line had always been functional and remained the only line to the western region and Uganda where the restorative works were being undertaken to the best standards and by competent engineers and contractors. That the Petitioners must not be allowed to disparage the construction with no basis since they had not claimed to have any knowledge of railway line construction hence they could not give an opinion on such construction.
39. He also reiterated that unless the said orders were vacated, the 1<sup>st</sup> Respondent would be highly prejudiced and the lives of many residents living on the lower sides run the risk of another catastrophe. That indeed, no prejudice would be suffered by the Petitioners as the same was meant to safe guard their interests as well as the public interests.
40. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents and the Interested Party did not participate in the 1<sup>st</sup> Respondent's Application dated 21<sup>st</sup> May 2025.
41. The third Application dated 23<sup>rd</sup> June 2025 is a Notice of Motion brought by the Petitioners pursuant to the provisions of Section 5 (1) of the Judicature Act, Cap. 8 and Section 3A of the Civil Procedure Act, Cap. 21, Order 51 rule 1 of the Civil Procedure Rules, Section 29 of the Environment and Land Court Act and all other enabling provisions of law seeking that the 2<sup>nd</sup> Respondent, more so one Philip Maingi, the person charged with the responsibility under Section 10 of the Kenya Railways Corporation Act (CAP 397), be found guilty of disobeying the Honorable Court's interim order of 26<sup>th</sup> March 2025 stopping any further construction by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the impugned parcel of land, and be committed to civil jail for a term of 6 months. They also sought for costs of the Application.
42. The Application was supported by the grounds therein and a Supporting Affidavit of an even date sworn by Benard Ndungu Kamau one of the Petitioners herein who deponed that on 26<sup>th</sup> March 2025, the Honorable Court had issued orders barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the reconstruction of the concrete tunnel and soil embankment bridge for the Kenya-Uganda Railway track that passes through Kamuchira, Jerusalem, Githioro, Gorges and Ruiru villages pending further



- directions. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Advocates had been present when the said orders were issued, to which the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had paused the construction.
43. That interim orders had been extended further on 29<sup>th</sup> April 2025 and on 3<sup>rd</sup> June 2025, for parties to comply with the court's directions to file their respective responses and submissions to the pending applications. That in blatant disregard of the court orders, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents resumed construction of the concrete tunnel and soil embankment bridge which act constituted an affront to the judicial authority of the Court.
  44. That the court had authority to mete out punishment against the 2<sup>nd</sup> Respondent in order to vindicate the court's authority so as to sustain the rule of law and the administration of justice in default, the court risked being reduced to a futile institution spewing forth orders in vain.
  45. In response and vide his Replying affidavit of 4<sup>th</sup> July 2025, Eng. Shimrone Munga, on behalf of the 1<sup>st</sup> Respondent deponed that upon being informed of the orders of the court, they had ceased any further construction on the site. The averments that they were constructing was thus not true and that the Petitioners ought to have discharged the onus of their allegations by providing the before and after photos of any new construction. That the photos supplied do not show any construction taking place, and neither do they bear any electronic time stamps to authenticate the dates they were taken.
  46. That the being aware of the court orders, the same did not prohibit the 1<sup>st</sup> Respondent from visiting the site and securing the equipment and machinery that were now lying idle. That as seen from the photos annexed to the application as annexure 3c, the current rains had now washed back the excavated soil to the excavated areas and unfortunately, the debris had started burying a number of machinery.
  47. That on 13<sup>th</sup> June 2025, the contractors also sought to know whether they could secure their machinery that were on the verge of being buried by debris flows and mudslides that were now being washed back to the excavated areas as evidenced by annexure SM 1 for which the orders granted did not stop any such exercise. That they had granted their contractors permission to remove their machinery so long as they did not carry out any further construction as seen in their letter annexed as SM 2. That the equipment was subsequently moved to higher grounds to avoid such losses and to secure valuable assets which action the Applicants could have mistaken for construction. That the application was unmerited and should be dismissed with cost.
  48. The three Applications were canvassed by way of written submissions which I shall summarize as herein under.

### **Petitioners Submissions.**

49. The Petitioners vide their submissions dated 24<sup>th</sup> June 2025 in support of the Petitioners' Application dated 13<sup>th</sup> January 2025 and in opposition of the 1<sup>st</sup> Respondent's Application dated 21<sup>st</sup> May 2023 the petitioners summarized the factual background of the matter and framed one issue for determination, to wit; Whether the injunctive orders against the re-construction of the damaged Kenya-Uganda Railways at Naivasha Sub-County should be lifted or confirmed.
50. They placed reliance in the decisions in the cases of *Giella v Cassman Brown & Company Limited* (1973) AC 135 and *American Cyanamid Co. v Ethicom Limited* (1975) AC 135 on the conditions for consideration in an application for injunction. Reliance was also placed on the Court of Appeal's case of *Mbuthia v Jimba Credit Finance Corporation & Another* [1988] KLR 1 to submit that it was settled that in interim applications, such as in the case herein, the court should avoid making final determination on the matters of fact on the basis of the conflicting Affidavit evidence.



51. Further reliance was placed in the decided case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR to submit that from the documents that had been presented as attachments to the supporting affidavits, the Applicants had clearly demonstrated that they had suffered a huge blow following the floods of 29<sup>th</sup> April 2024 that had been caused by the blockage of the tunnels owned and operated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. It was thus their submission that prior to any further constructions, the Petitioners/Applicants must be involved and the technology used must avert a repetition of the floods hence they had established a prima facie case with a probability of success.
52. On irreparable harm, they placed reliance in the Court of Appeal's decision in the case of *Nguruman Limited v Bonde Nielsen & 2 Others* [2014] eKLR to submit that it was not contested that in the year 2020, floods had swept a similar bridge which had destroyed properties belonging to some of the Petitioners herein. That the 1<sup>st</sup> Respondent had thereafter proceeded to reconstruct the said bridge which had been swept by the floods in the year 2024 killing tens of people and destroying millions worth of properties. They thus beseeched the court to take judicial notice that the 1<sup>st</sup> Respondent, being a state corporation, was funded by the public coffers and that indeed some of its infrastructure was funded with loans which Kenyans was owing foreign sovereigns such as China.
53. They submitted that should the Honorable Court proceed and lift the injunctive orders, it would have allowed the construction to resume hence the substratum of the Petition would be lost, Kenyan coffers would be drained and it would be imprudent to order for demolition. That subsequently, there would be no remedy left for the court to give should the Petition succeed and the residents would be forever endangered by any such occurrence of floods. That on the other hand, if the stoppage was upheld until the Petition was heard, the Respondents would be at liberty to continue the construction if they succeed in the instant suit. He placed reliance on the provisions of Article 201 of *the Constitution* on the principles of public finance to submit that the impugned constructions or repair works must take into consideration human dignity of the Residents of Maai Mahiu, the value for money for Kenyans and espouse the principles of public finance.
54. That indeed, the 1<sup>st</sup> Respondent had immediately commenced the reconstruction upon issuance of the EIA License by the 5<sup>th</sup> Respondent despite there being an order of stay against the said reconstruction. They thus submitted that the Application for lifting the stay orders was meant to sanitize an after the fact illegality. Reliance was placed in the decided case of *Sciborski v County Government of Nairobi* (Environmental and Planning Civil Case E008 of 2023) [2024] KEELC 6046 (KLR). Further reliance was placed on the provisions of Order 40 Rules 6 and 7 of the Civil Procedure Rules to submit that whereas rule 7 did not provide for circumstances under which an injunction order may be discharged, it had generally been accepted that the said circumstances would range from slumber after the said orders of stay, change of circumstance post stay orders, harshness of the subjects of the said orders and outright misrepresentation or illegalities in obtaining the said orders.
55. They also placed reliance on the provisions of Order 51 rule 4 of the Civil Procedure Rules to submit that a quick perusal of the 1<sup>st</sup> Respondent's ground in support of its Application to discharge the stay orders did not only reveal imagined urgencies but was also a choreograph to arm-twist the honorable court.
56. That the 1<sup>st</sup> Respondent's submissions had revealed that there was a mistaken belief that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were outside the scope of the court's supervisory jurisdiction. Reliance was placed on the provisions of Article 165 of *the Constitution* and the decided case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* [218] KEHC 2068 (KLR) to submit that the orders of stay never handicapped the 1<sup>st</sup> Respondent from maintaining the existing infrastructure thus the alleged incapacities had only served to illustrate the



luck-luster approach to public service and a perpetual strategy of deflection. That the said reason was not only farfetched, but also inadequate to warrant the lifting of the orders. That subsequently, the 1<sup>st</sup> Respondent's Application was only a scheme to maneuver around the court orders, in order to perpetuate impunity.

57. It was their submission that their Application and Petition did not necessarily revolve around compensation as had been alleged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents but rather that the same had sought to foster the rule of law, compliance with the laid down procedure before committal of public to white elephant projects and to make sure that the reconstruction of the damaged railway section was done in a manner that was not only on fours with the constitution but also guaranteed posterity and safety of generations to come, from recurrence of a similar catastrophe, which could only be guaranteed by the deployment of modern and more climate resilient technologies.
58. It was thus their submission that they had a prima facie case with a probability of success and that they stood to suffer irreparable loss and damage unless the orders of stay were sustained hence the balance of convenience tilted in their favour. That subsequently, the totality of the circumstances had warranted not just the sustenance of the stay orders but the fast tracking of the main suit to render a determination as opposed to the lifting of the stay orders which might have the potential of rendering the substantive suit nugatory.

#### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's Submissions.**

59. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents vide their submissions dated 20<sup>th</sup> June 2025 in opposition of the Petitioners' Application dated 3<sup>rd</sup> February 2025 and in support of the 1<sup>st</sup> Respondent's Application dated 12<sup>th</sup> May 2025 submitted as follows:
60. That prayers for injunctive orders seeking to stop the reconstruction work was unmerited and against the interest of the larger public. It placed reliance in the decided case of Kogo Flats Company Limited v Eldoret Water & Sanitation Company Limited [2025] KEELC 4307 (KLR) to submit that the grounds of the Petitioners' Application did not demonstrate any prima facie case to demonstrate that the reconstruction exercise by the 1<sup>st</sup> Respondent was not appropriate. That further, the deponent had not indicated to the Court that they had any engineering experience in relation to railway line design and construction hence there was no evidence on record that the reconstruction work had not been appropriate. That whereas the onus of proving the same had been on the Petitioners, they had failed to do so.
61. That on the contrary, Eng. Shimrone Munga had deponed that he was a registered Professional Civil Engineer with over 10 years' experience in Civil and Structural Engineering Works and had extensive experience in Project conceptualization, Engineering Design, Contract Administration, Project Management and Maintenance Interventions for Buildings, Railways and Bridges and that he was one of the engineers involved in the maintenance and rehabilitation of the subject railway line. That in any case, pursuant to the provisions of Section 13 (2) (a) of the Kenya Railways Corporation Act, the responsibility of designing and maintaining the Railway line was the sole responsibility of the 1<sup>st</sup> Respondent. That subsequently, the Petitioners could not be heard to direct or give any opinion to the 1<sup>st</sup> Respondent on ways of carrying out its mandate neither could the court be called upon to direct the 1<sup>st</sup> Respondent on how to carry out its mandate. It placed reliance in the Pelt Security Services Limited's case (supra) to urge the court to hold that it could not direct the 1<sup>st</sup> Respondent on how it should carry out its mandate having shown that one of its main mandate was to construct rails and bridges.



62. That in any case, the 1<sup>st</sup> Respondent had now received the green light from the 5<sup>th</sup> Respondent to continue with the construction hence the Petitioners' ground on the lack of license had been overtaken by events.
63. As to whether the Petitioners could be compensated by way of damages, they submitted that it was a fact that the Petition sought compensation by way of damages hence the substratum of the Petition would not be lost as the construction of the damaged line would not affect the said prayer. That on the contrary, the loss by the 1<sup>st</sup> Respondent could not be compensated by way of damages since the 1<sup>st</sup> Respondent represents the interests of the Country hence diplomatic tensions with the neighboring countries and economic losses arising from the delayed construction could not be compensated by the Petitioners.
64. As to whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should supply documents to the Petitioners, they submitted that the court had no jurisdiction to issue such orders in its original jurisdiction since the request for documents must be seen in light of Article 35 of *the Constitution* that grants a right to parties to access information held by the state. That there was a process stipulated under the provisions of *Access to Information Act* where one wishes to access information from the state. Reliance was placed on the decision in the Presidential Election Petition No. 4 of 2017, Njonjo Mue & Another v Chairperson of the Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR. That the process under the *Access to Information Act* required one to make a request to the entity holding that information and where the written request is denied, the party applies for a review to the Commission of Administration of Justice who had the power to order parties to supply such information. That the court only had Appellate powers under the provisions of Section 23 (3) of the Act.
65. They thus submitted that the said prayer by the Petitioners infringes on the doctrine of exhaustion yet it was trite that where there was a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly adhered to since there were good reasons for such special procedures. They placed reliance in the Court of Appeal's decision in Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling)
66. With regard to prayer (iv) of the Petitioners' Application, that the 5<sup>th</sup> Respondent and the Interested Party conducts and furnish the Court with the safety and impact report, they submitted that the 5<sup>th</sup> Respondent was not mandated by the law to conduct EIA of a project for which the court could not expand the 5<sup>th</sup> Respondent's mandate beyond what was provided for in law. That further, the Interested Party was not a state organ but an independent body aimed at only improving the engineering profession that subsequently, the court could not issue orders to an entity that had no such mandate.
67. That in any event, it was clear that the 1<sup>st</sup> Respondent had prepared the said report and submitted it to the 5<sup>th</sup> Respondent hence the Petitioners must follow the procedure under the law if they wished to obtain the same.
68. In support of the 1<sup>st</sup> Respondent's Application for the vacation of the court's order, they reiterated the grounds on the face of their Application to submit that the Petitioners had not impeached the grounds that had been advanced thereto but had taken issue with the issuance of the license by the 5<sup>th</sup> Respondent which was an issue vested with NET which was outside the jurisdiction of the court. That in any case, the Petitioners had stated that they had appealed the 5<sup>th</sup> Respondent's decision to NET.



69. That they had demonstrated immense public interest to finalize the restoration works after compliance with the 5<sup>th</sup> Respondent's directions where they had applied for and had been granted the license. That unless the court's order was vacated, the 1<sup>st</sup> Respondent would be highly prejudiced and the lives of many residents living on the lower sides run the risk of another catastrophe. That no prejudice would be suffered by the Petitioners as the same was meant to safeguard their interests and their Constitutional rights as well. They thus urged the court to find and hold that the 1<sup>st</sup> Respondent's Application for vacation of the orders was merited.
70. Their submissions in opposition to the Applicant's Contempt of Court Application dated 23<sup>rd</sup> June, 2025 was that the same was unmerited and should be dismissed with costs.
71. They framed one issue for determination as follows;

**i. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are in contempt of the orders issued on 26<sup>th</sup> March, 2025.**

72. Their submission was that the Applicants bore the onus of proving the allegations of continued construction as provided for under Sections 107 and 108 of the *Evidence Act*. That it was trite that Contempt proceedings were quasi-criminal in nature hence the standard of proof was higher than the ordinary standard of proof in civil cases. Reliance was placed on the decision in the case of Shigog (Through His Attorney Anwar Saleh Shigog) v Malindi Water & Sewerage Company (MAWASCO) & 3 others (Environment & Land Case 66 of 2022) [2024] KEELC 3604 (KLR)
73. That the principles governing grant of contempt orders were now well settled in the case of Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] eKLR:
74. That the Applicant had moved the court to find the 1<sup>st</sup> and 2<sup>nd</sup> Respondents guilty of contempt alleging that they disobeyed court orders by resuming construction. That the onus was on them to prove on a balance of probabilities that the Respondents deliberately failed to comply with the court orders. That the photos annexed to the application in an attempt to support their allegation did not prove any new construction for reasons that they did not produce evidence of the status of the construction prior to the date the orders were issued to demonstrate that the construction had indeed advanced from that date. (see the case of Shigog supra)
75. That secondly, the photos did not bear any electronic date and time stamps to verify the date that they were taken. (again reference was made to the Shigog case supra)
76. That lastly, there was no evidence of construction that can be deciphered from the photos produced. Reliance was placed on the decision in Sikalieh (Being Chairman of and suing in public interest on behalf of Karen Langata District Association) v Kenya Railways Corporation & 5 others; National Environment Management Authority & another (Interested Parties) (Environment & Land Petition E028 of 2024) [2024] KEELC 7479 (KLR).
77. That they had complied with the orders and had stopped the construction. That the said orders however did not stop their clients from accessing the site, and pursuant to a letter dated the 13<sup>th</sup> June 2025, and with their permission vide a letter marked as SM 2, they had gone to the site to secure their machinery that were on the verge of being buried by debris flows and mudslides, that had now been washed back to the excavated areas. That the act of moving the machinery to higher ground did not amount to any construction and that there was no disobedience of this court's orders. That the Applicants should have sought clarifications from them before filing the instant application. That mere allegations unsupported by clear and verifiable evidence, could not sustain a finding of contempt of court and the application ought to be dismissed.



## 5<sup>th</sup> Respondent's Submissions

78. The 5<sup>th</sup> Respondent vide its submissions dated 24<sup>th</sup> June 2025 in opposition to the Petitioners' Application dated 3<sup>rd</sup> February 2025, framed its issues for determination as follows:
- i. Whether the 5<sup>th</sup> Respondent was mandated by law to carry out an Environmental Impact Assessment of a project.
  - ii. Who should bear the cost of the Application?
79. On the first issue for determination it placed reliance on the provisions of Section 58 (1) of the Environmental and Coordination Act 1999 (EMCA) and the decisions in the cases of London Distillers (K) Limited v National Environment Management Authority & another (Environment and Land Appeal E007 of 2020) [2023] KEELC 19075 (KLR) (24 July 2023) and Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] KEHC 473 KLR to submit that it was not mandated to conduct EIA which duty clearly fell within the mandate of the proponent of a project. That their function was only to review the report and related studies submitted by the project proponents and to determine their adequacy in accordance with the law. That the court could not enlarge their mandate beyond what was provided by law.
80. That that upon learning that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had commenced operations without a license, the 5<sup>th</sup> Respondent had issued an Environmental Improvement Order halting the project wherein it had directed that an EIA be conducted and the report submitted to it. That indeed, an Environmental and Social Impact Assessment Comprehensive Project Report had been prepared and following its review, a license had duly been issued.
81. On costs, he prayed that the same should be awarded to the Respondents.

## Determination.

82. Before me for determination are three applications, and so as to put the matter in perspective the parties shall be referred to as they appear in the main Petition. The Petitioners herein have filed 2 applications. The first one dated 3<sup>rd</sup> February 2025 seeking for interim orders of injunction against the Respondents herein, while their second application is dated the 23<sup>rd</sup> of June 2025 seeking contempt proceedings against the 2<sup>nd</sup> Respondent, more so one Philip Maingi, the person charged with the responsibility under Section 10 of the *Kenya Railways Corporation Act* (CAP 397) for disobeying the Court's interim order of 26<sup>th</sup> March 2025 stopping any further construction by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
83. The 1<sup>st</sup> Respondent on the other hand filed an application dated the 21<sup>st</sup> May 2025 seeking that the Court vacates and/ or reviews its orders of 26<sup>th</sup> March 2025 that had barred the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the reconstruction of the concrete tunnel and soil embankment bridge for the Kenya-Uganda Railway track, pending further directions.
84. I have considered all the applications here in stated above, their responses the the submissions the authorities and the applicable law.
85. On the first Application, the issue for determination by this court is whether the Applicants have established a prima facie case to enable this court grant them the interlocutory injunctive orders sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the case of *Giella vs. Cassman Brown* [1973] EA 358 which sets out the conditions that the Applicants needs to satisfy for the grant of an interlocutory injunction which is firstly establishing and demonstrating that they have prima facie case with a probability of success,



secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

86. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, to issue injunctive orders, barring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, either by themselves, employees, assignees, or whatsoever commencing and or proceeding with the reconstruction of the concrete tunnel and soil embankment bridge, for the Kenya-Uganda Railway track, to pass the gorge, through Kamuchira, Jerusalem, Githioro, Gorges and Ruiru villages of Maai Mahiu in Naivasha Sub County Nakuru County, pending the hearing and determination of the suit.
87. At this stage, the Court is only required to determine whether the Applicants are deserving of the orders sought. The Court is not required to determine the merit of the case.
88. I have considered all the material facts placed before me and find that the Applicants' main ground for seeking interim orders against the Respondents was that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and/or their employees, had a responsibility to keep a 24-hour vigil of a bridge of railway tunnel near Old Kijabe Town and observe water levels in the event of rains or floods, so as to take appropriate remedial steps to avert any disasters. That sometime in April 2024, the Rift valley region of the Country experienced heavy downpour wherein as a result of a burst in the blocked railway tunnel near Old Kijabe Town, due to the accumulation of flood water in what was locally known as the dark tower, on 29<sup>th</sup> April 2024, flash floods swept off people and their belongings in the villages of Kamuchira, Jerusalem, Githioro Georges and Ruiru in Maai Mahiu, Naivasha sub county within Nakuru county. That without any form of remorse, precaution or participation of the people, the 1<sup>st</sup> Respondent, just like in the year 2020 was back to construct yet another outdated soil embankment bridge in the places that had been swept away by the 2024 floods, without the Environmental Impact Assessment (EIA) from the National Environmental Management Authority and in particular, the sustainability and safety of the communities living down the gorges.
89. In response, the 1<sup>st</sup> Respondent's response had been that indeed after the floods had rendered the Uplands-Longonot section of the railway line impassable and disconnected, they had commenced restorative works of the MGR infrastructure to return normalcy in the route. That they had been served with an improvement notice by the 5<sup>th</sup> Respondent, wherein they had had stopped the works, prepared and submitted an Environmental and social impact assessment report to the 5<sup>th</sup> Respondent on 24<sup>th</sup> April 2025 wherein the 5<sup>th</sup> Respondent reviewed the reports, visited the site and extensively engaged the 1<sup>st</sup> Respondent on the project to satisfy itself that the project had met the legal and environmental safeguards requirements and on the 9<sup>th</sup> May 2025, it had issued 1<sup>st</sup> and 2<sup>nd</sup> Respondents with an EIA License and a green light to continue with the Restoration of the railway line.
90. On the first issue for determination as to whether or not the Applicants have demonstrated a prima facie case seeking injunctive orders seeking to stop the reconstruction, it is trite that a prima facie case was described as follows in the case of *Mrao v First American Bank (2003) KLR 125*;
- “..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard that is higher than an arguable case.”
91. It is trite that in determining whether or not the Applicants have made out a prima facie case, that court at this stage is not required to determine the merits and demerits of their application certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.



92. It has therefore not been disputed that the basis of filing the application was overtaken by events upon the issuance of the Environmental Impact Assessment (EIA) license by the 5<sup>th</sup> Respondent pursuant to Section 58 (2) of the Environmental Management and Coordination Act, 1999 (EMCA) for which pursuant to Section 129 (1) of EMCA, any complaints arising therein on issuance of EIA licenses fell within the jurisdiction of the National Environment Tribunal (NET).
93. Secondly the Application for injunction was brought by the Petitioners on the presumption that the reconstruction of the reconstruction of the concrete tunnel and soil embankment bridge for the Kenya-Uganda railway line along the Uplands-Longonot region was outdated. No evidence had been placed before the court that the Petitioners' representative one Bernard Ndungu Kamau, had experience in Civil and structural engineering Works or that he was a Professional Engineer for that matter and no Affidavit had been filed from a professional to counter the disposition of Eng. Shimrone Munga, a representative of the 1<sup>st</sup> Respondent in as far as the structural engineering works of the railway and bridge were concerned.
94. In their Application, the Petitioners had also sought for orders that both they and the court be supplied with the safety and feasibility study report, Environmental Impact Assessment report and all relevant documentations that had influenced their decision, including construction designs and tender documents thereof.
95. It is trite that the right of access to information is not absolute and there are circumstances in which a person can be denied particular information. Specific procedures were provided in the law on how a person ought to access information held by another person and particularly a State organ or entity.
96. Article 35(1)(a) and (b) of *the Constitution*, read with Action 3 of the *Access to Information Act* grants all citizens the right to access information held by the State, or public agencies but that right is not absolute and can be denied. Procedures are provided in the law on how a person ought to access information held by another person or a State organ or entity for which Section 8 of the *Access to Information Act* provides as follows;
- ‘(1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.
- (2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.
- (3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.
- (4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.’
97. From above provision of the law, and having found that there are procedures provided for through which any person who seeks to access information should follow, no such evidence was adduced by the Petitioners to the effect that they had followed the said procedures for which information had been denied. (see the Supreme court decision in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* (supra))



98. With the aforementioned, I find that the Petitioners did not establish a prima facie case on the basis upon which they sought interim orders of injunction, and therefore they cannot benefit from an order of injunction for which I need not consider the other two conditions for the grant of temporary injunction as established in the *Giella –vs- cassman Brown Ltd* case (supra) since the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.
99. The Court of Appeal in the case of *Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society* (2001) IEA 86 cited by *Gitumbi, J* with approval in the case of *Joseph Wambua Mulusya –vs- David Kitu & Another* (2014) eKLR observed as follows:-
- “The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.
100. The Application for orders of injunction is thus dismissed.
101. On the second Application dated the 23<sup>rd</sup> of June 2025 where the Petitioners sought contempt proceedings against the 2<sup>nd</sup> Respondent’s Philip Maingi, the person charged with the responsibility under Section 10 of the [Kenya Railways Corporation Act](#), for disobeying the Court’s interim order of 26<sup>th</sup> March 2025 that had barred the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the reconstruction of the concrete tunnel and soil embankment, it was their contention that despite the said orders having been issued in court in the presence of their Counsel, that in blatant disregard of the orders, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents resumed construction of the concrete tunnel and soil embankment bridge which act constituted an affront to the judicial authority of the Court.
102. The said application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents wherein they had deponed that upon receipt of the court orders, they had ceased any further construction on the site, but had allowed their contractors to go to the site to secure their equipment and machinery that were now lying idle and for which because of the rainfall, which had washed back the excavated soil to the excavated areas, the debris had started burying a number of machinery, for which they had to take them (machinery) to higher grounds to avoid such losses.
103. That the photographs herein annexed in support of the Application, were not evident of contempt of the court orders as they neither showed any evidence on the status of the construction prior to the date the orders were issued and the photographs depicting the status after the orders had been issued, so as to demonstrate that the construction had indeed advanced from that date.
104. The Black’s Law Dictionary (Ninth Edition) defines contempt of court as:-
- “Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
105. Section 29 of the [Environment and Land Court Act](#) is clear to the effect that;
- “Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”



106. Courts have relied on the High Court of South Africa’s case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005, to speak to the fact that in order to succeed in civil contempt proceedings, the Applicant has to prove:
- a. the terms of the order,
  - b. Knowledge of these terms by the Respondent,
  - c. Failure by the Respondent to comply with the terms of the order.
107. It is not in contention that interim orders had been issued on the 26<sup>th</sup> March 2025 and extended on 29<sup>th</sup> April 2025 directing the 1<sup>st</sup> Respondent to stop the reconstruction of the impugned concrete tunnel and soil embankment bridge pending further orders of the court which orders by virtue of the holding in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR was sufficient for purpose of contempt proceedings.
108. The standard of proof in cases of contempt of Court is well established as was held by the Court of Appeal in the case of Mutitika vs Baharini Farm Limited [1985] KLR 229, 234 where it held that:
- “In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”
109. The Supreme Court of Kenya on the other hand in Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR held that;
- “The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged Contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”
110. This being the case and while considering that the Petitioners relied on three photographs herein annexed as Exhibit 3 (sic) in their application seeking contempt proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and further having had a look at the said photographs, in my view they do not depict whether the tractors are on a construction site of the matter in question, whether they belong to the Respondents herein and whether by virtue of them being on the undisclosed site, they were in contempt of the court orders. Indeed, as pointed out by the Respondents, there had not been a before and after photograph to show the site before the orders were issued and the site after the orders had been issued. There was nothing much to deduce from the Photographs that there was an ongoing activity in contempt of the court orders. Given the required standard set by law on contempt proceedings as herein above captioned, that such proceedings are higher than proof on the balance of probabilities, I find no merit in the application dated the 23<sup>rd</sup> June 2025 and proceed to dismiss it.
111. On the last application dated the 21<sup>st</sup> May 2025 wherein the 1<sup>st</sup> Respondent seeks that the Court vacates and/ or reviews its orders of 26<sup>th</sup> March 2025, having, dismissed both the Petitions application for injunction dated the 3<sup>rd</sup> February, 2025 and the application seeking contempt proceeding of court orders against both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents dated 23<sup>rd</sup> June 2025, I find that there is nothing that stops me from exercising my discretion in reviewing and/or setting aside the interim orders herein issued 26<sup>th</sup> March 2025 and extended on 29<sup>th</sup> April 2025, 3<sup>rd</sup> June 2025 and 24<sup>th</sup> June 2025, which orders automatically took effect upon the dismissal of the application for interim orders of injunction.



To this effect, the 1<sup>st</sup> Respondents Application dated the dated the 21<sup>st</sup> May 2025 seeking that the Court vacates and/ or reviews its orders of 26<sup>th</sup> March 2025 that had barred the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the reconstruction of the concrete tunnel and soil embankment bridge for the Kenya-Uganda Railway track pending further directions is herein allowed.

112. This being a public interest litigation, there shall be no orders to cost in all the three applications.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 24<sup>TH</sup> DAY OF JULY 2025.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

