



**Muthui & 19 others v County Government of Kitui & 7 others (Environment & Land
Petition 26 of 2021) [2023] KEELC 15930 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION 26 OF 2021
LG KIMANI, J
FEBRUARY 22, 2023**

BETWEEN

**JOHN MUTHUI 1ST PETITIONER
RIXION KYALO LINA 2ND PETITIONER
VICTOR MULWA NZILU 3RD PETITIONER
FRANCIS MALUKI MUTIA 4TH PETITIONER
CHRISTOPHER KONDO KATHUMO 5TH PETITIONER
GEORGE KIVUSYU IKUTHU 6TH PETITIONER
NGOMO MWANZIA 7TH PETITIONER
ABEL SALU MUMU 8TH PETITIONER
JACOB MAVUSI KAVILI 9TH PETITIONER
PATRICK KIILU KITHAMBYO 10TH PETITIONER
SAMSON MWAKI MAVUSI 11TH PETITIONER
JULIUS NZOMO MUNYAO 12TH PETITIONER
GEOFFREY MWENZE MWEMA 13TH PETITIONER
TIMOTHY WAMBUA MBUSYA 14TH PETITIONER
JONATHAN MWANZA KIVUSYU 15TH PETITIONER
MBUSYA KALELU 16TH PETITIONER
WILLIAM KITHIIA MAVUSI 17TH PETITIONER
PATRICK NDOLO 18TH PETITIONER
FREDRICK SAKAYO KITHIIA 19TH PETITIONER**



DANLEWIS B. MWAVU MBULA	20 TH PETITIONER
AND	
COUNTY GOVERNMENT OF KITUI	1 ST RESPONDENT
RESOURCES, KITUI COUNTY	2 ND RESPONDENT
COUNTY ASSEMBLY OF KITUI	3 RD RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	4 TH RESPONDENT
POLICE SERVICE KITUI	5 TH RESPONDENT
KITUI COUNTY COMMISSIONER	6 TH RESPONDENT
PETER MULI KALUNGU	7 TH RESPONDENT
SAND TRANSPORTERS & ENVIRONMENT CONSERVATION GROUP	8 TH RESPONDENT

Issuance of any license or trading permit for sand harvesting by a county government without production of an environmental impact assessment license is prohibited by law

The petitioners claimed that the respondents had violated their constitutional duties to conserve the environment and ensure sustainable use of natural resources by allowing traders and unscrupulous persons to harvest and scoop sand from Tiva River without any regulations being in place. The court held that sand harvesting required submission of an environmental impact assessment (EIA). The court further held that if no EIA report was submitted to the National Environment Management Authority (NEMA), there was no public participation prior to the authorization of sand harvesting and transportation. The court noted that the 1st and 2nd respondents were authorized to issue trading permits and other licenses but the law prohibited them from issuing permits, licenses or authority to persons harvesting sand without first having been shown a license from NEMA.

Reported by Kakai Toili

Environmental Law - National Environment Management Authority (NEMA) – powers of NEMA – approval of sand harvesting and transportation from a river - whether sand could be harvested and transported from rivers without prior written approval from NEMA given after an environmental impact assessment had been carried out - whether a county government could issue permits, licenses or authority to persons harvesting sand without first having been shown a license from NEMA - Environmental Management Co-ordination Act, Cap 387, sections 42 and 58.

Environmental Law – environmental impact assessment (EIA) - process to be undertaken when conducting an EIA – public participation in EIA - whether there was public participation in sand harvesting and transportation where no EIA report was submitted to the National Environment Management Authority – Constitution of Kenya, 2010, article 10(2)(a).

Jurisdiction – jurisdiction of the National Environmental Tribunal (NET) -jurisdiction to determine a petition on alleged infringement of the right to a clean and healthy environment - whether the NET had the jurisdiction to determine a petition on alleged infringement of the right to a clean and healthy environment – Constitution of Kenya, 2010, article 42, 69 and 70.

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to a clean and healthy environment - whether an assumption could be drawn that the right to a clean and healthy environment was under threat where the procedures for the protection of the environment were not followed.



Brief facts

The petitioners were residents of areas known as Ndumoni, Tanganyika, Tiva and Nyanyaa in Kitui County (the County) which were next to and near Tiva River. They claimed that over a period of years, the respondents had violated their constitutional duties to conserve the environment and ensure sustainable use of natural resources in a manner which had been detrimental to the lives, interests and properties of the residents of the County, and all those who benefited from the river resources in and outside the County. According to the petitioners, the respondents had been allowing traders and unscrupulous persons to harvest and scoop sand from the river without any regulations being in place and that the excavation and harvesting of the sand from the river had led some wet areas to dry up including the river and its tributaries.

The petition sought among other orders; a declaration that the 1st, 2nd, 3rd and 4th respondents had violated article 10 of the Constitution in the manner in which they had over the years handled and dealt with the issuance, permits, licenses and allowed sand harvesting activities in Tiva River; and a declaration that the 1st, 2nd, 3rd and 4th respondents had infringed and violated the constitutional rights of the people of Kitui especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas as provided for in article 42 of the Constitution by failing to pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvesting activities in Kitui County.

Issues

- i. Whether the National Environmental Tribunal had the jurisdiction to determine a petition on alleged infringement of the right to a clean and healthy environment.
- ii. Whether sand could be harvested and transported from rivers without prior written approval from the National Environment Management Authority given after an environmental impact assessment had been carried out.
- iii. Whether there was public participation in sand harvesting and transportation where no environmental impact assessment report was submitted to the National Environment Management Authority?
- iv. What was the process to be undertaken when conducting an environmental impact assessment?
- v. Whether a county government could issue permits, licenses or authority to persons harvesting sand without first having been shown a license from the National Environment Management Authority.
- vi. Whether an assumption could be drawn that the right to a clean and healthy environment was under threat where the procedures for the protection of the environment were not followed.

Held

1. Under the provisions of the Constitution and section 13(4) of the Environment and Land Court Act, the ELRC was the court which had the jurisdiction to determine if indeed the petitioners' rights under article 42, 69 and 70 of the Constitution had been or were likely to be infringed upon and not the National Environmental Tribunal(NET).Considering that the petitioners were not challenging the decision of the 4th respondent, the National Environment Management Authority (NEMA), either in issuing a licence or otherwise in respect of the harvesting of sand from Tiva River by the respondents, and in view of the prayers sought in the petition which were confined to the alleged infringement of the petitioners' rights, the NET did not have the requisite jurisdiction to deal with the petition. It was the instant court that had the jurisdiction to deal with the issues raised in the petition and the application.
2. Article 42 of the Constitution granted to every person the right to a clean and healthy environment and protection of the same, which included the right; -
 - a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69 of the Constitution; and
 - b. to have obligations relating to the environment fulfilled under article 70 of the Constitution.
3. The entitlement to a clean and healthy environment and the duty to safeguard and enhance it was repeated under the Environmental Management and Co-Ordination Act No. 8 of 199 at section 3.



- Article 69 of the Constitution provided for certain duties and obligations of the State and all persons in respect of the environment. Article 70 of the Constitution granted any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment.
4. The governance structure of sand harvesting in Kenya started at article 69 of the Constitution which required the State to sustainably utilize, exploit, manage and conserve the environment and natural resources and share the accruing benefits in an equitable manner. Article 69 provided for the establishment of systems of environmental impact assessment (EIA), environmental audit and monitoring of the environment as it required elimination of processes and activities that were likely to endanger the environment; it called for utilization of the environment and natural resources for the benefit of the people of Kenya.
 5. The powers to manage the environment in Kenya was provided under the Environmental Management Co-ordination Act which was an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Under the Environmental Management Co-ordination Act, NEMA was established with the object and purpose to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.
 6. The regulatory powers were cascaded down to the counties under section 29 of the Environmental Management Co-ordination Act where county environment committees were established. The committees were constituted by the governor of the county by notice in the Kenya Gazette and were responsible for the proper management of the environment within the county for which it was appointed and to develop a county strategic environmental action plan.
 7. Section 42 of the Environmental Management Co-ordination Act provided for protection of rivers, lakes, seas and wet lands. For any person to carry out any of the activities prohibited under section 42, there had to be prior written approval from NEMA given after an EIA had been carried out. In the instant case NEMA stated that it had not received an EIA report for sand harvesting in Kitui, especially Ndumoni, Tanganyika, Nyanyaa and Tiva areas. It had also confirmed that it had not issued any license to the 7th and 8th respondents yet it was an admitted fact that the 7th and 8th respondents had been excavating sand and transporting it from River Tiva without the prior written authority of NEMA which was a direct contravention of the law. The 1st and 2nd, 7th and 8th respondents claimed that the 7th and 8th respondents were issued with authorization but were relying on an EIA report.
 8. Section 58 of the Environmental Management Co-ordination Act provided for application for an EIA licence and the process an applicant underwent to obtain the licence. Section 58(1) required submission by the proponent of a project of a project report to NEMA in the prescribed form, giving prescribed information and accompanied by prescribed fees.
 9. Sand harvesting was one of the projects specified in the Second Schedule to the Environmental Management Co-ordination Act and therefore required submission of an EIA report as it fell under the medium risk projects for artisanal mining which included quarrying and/or harvesting of aggregate, sand, gravel, soil, clay, stone and slate. The Act described an EIA as a systematic examination conducted to determine whether or not a programme, activity or project would have any adverse impacts on the environment.
 10. The 1st and 2nd respondents were under a legal obligation to require the 7th and 8th respondents to comply with the law before engaging in sand harvesting within their area of jurisdiction. NEMA denied having received any application for an EIA license or an EIA report on sand harvesting activities by the 7th and 8th respondents.
 11. It was not shown that the 7th and 8th respondents made an application to NEMA in the prescribed form and paid the requisite fee or that they submitted a project report. Neither had it been shown that they submitted the report to NEMA. Submission of a report to the 1st and 2nd respondents could not



- be a substitute or alternative to submissions to NEMA. The legal framework and governance structure for the control, regulation of sand harvesting existed but the 1st, 2nd, 4th, 7th and 8th respondents failed, neglected and or refused to adhere and comply with them.
12. If no EIA report was submitted to NEMA, there was no public participation prior to the authorization of sand harvesting and transportation. Public participation was a constitutional imperative provided for as one of the national values and principles of governance included under article 10(2)(a) of the Constitution. One of the key reasons for conducting an EIA was public participation, especially from the people who were likely to be affected by such a project.
 13. Public participation was provided for under Part VI of the Environmental Management and Co-ordination Act which elaborately outlined the process to be undertaken when conducting an EIA. The process begun with a proposal application and a license to undertake the project. A project notice was to be published in the Kenya Gazette and at least two newspapers circulating in the area or proposed area of the project and over the radio. The notice was required to give details of the project and extend invitation to the public for oral or written comments on the project. If that process was not followed, it could not be said that any resultant EIA followed the law. The 1st, 2nd, 7th and 8th respondents did not show that that process was followed.
 14. The procedure for obtaining an EIA licence was elaborate and detailed and was aimed at finding out whether or not a programme, activity or project would have any adverse impacts on the environment. No EIA license was adduced in evidence by the 7th and 8th respondents as having been issued by NEMA.
 15. The Environmental (Impact Assessment and Audit) Regulations, 2003, regulation 3 provided for approval of EIA. Any project implementation, issuance of any license or trading permit for sand harvesting by the 1st and 2nd respondents to the 7th and 8th respondents without first producing to the licensing authority (1st and 2nd respondent) a license of EIA issued by NEMA under the Regulations was prohibited by the law.
 16. The letter relied on by the respondents dated May 15, 2020 depicting authorization to harvest and transport sand from Mwita Syano and Tiva River was not a licence and was granted without following the laid down procedure and the same was illegal. The 1st and 2nd respondents were authorized to issue trading permits and other licenses but the law prohibited them from issuing permits, licenses or authority to persons harvesting sand without first having been shown a license from NEMA.
 17. The 1st and 2nd respondents had not claimed and neither had they produced any evidence indicating compliance with the National Sand Harvesting Guidelines, 2007. Some of the key features of the Guidelines were that it established the Technical Sand Harvesting Committee whose main mandate was to be responsible for the proper and sustainable management of sand harvesting within the County, designated sand harvesting sites, ensured that sand dams and gabions were constructed in designated areas, designated sand transportation roads, ensured EIA/EA were undertaken, undertook dispute resolution, fixed minimum sand prices, monitor restoration of sites and allocated areas to the Riparian Resource Management Association (RRMA).
 18. Section 29 of the Environmental Management and Co-ordination Act established the county environment committees whose functions were to be responsible for the proper management of the environment within the county for which it was appointed, develop a county strategic environmental action plan every five years; and perform such additional functions as were prescribed by the Act or as may, from to time, be assigned by the Governor by notice in the Gazette.
 19. The 1st to 3rd respondents admitted that there existed a gap in the legal and institutional framework on sand harvesting and other mining activities in River Kiva and Kitui County as a whole that may have led to the infringement of the petitioners' and others' right to a clean and healthy environment under the Constitution.
 20. Although the 1st respondent informed the court that it had published a gazette notice banning the transportation of sand outside the County, that gazette notice did not in itself satisfy the requirements



- of the law as related to any of the procedure for ensuring that a project involving sand harvesting was sustainable. Indeed, that gazette notice was what the petitioner called knee jerk reactions that did not offer any lasting solutions to the problems caused by sand harvesting as it did not amount to a law or a regulation.
21. Article 42 of the Constitution obligated the State, including the 1st, 2nd and 3rd respondents, to protect the right to a clean and healthy environment through legislative measures, which the 1st and 3rd respondents had failed to do.
 22. Award of damages entailed exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion.
 23. Legal precedents showed that an award of damages was discretionary depending on the circumstances of each case, the petitioners adduced evidence to guide the court on their individual claim to damages. They did not demonstrate how the sand harvesting activities on River Tiva had directly, negatively impacted them. The petitioners had not shown that they owned land near the river that had been affected by the sand harvesting. Declaration of right in the case would suffice as a vindication of the petitioners' rights and the more practicable remedy in the circumstances of the case was restoration of the River Tiva and an order directing compliance with the law in the sustainable use and exploitation of sand in the relevant areas.
 24. On prayer (e) of the petition, the petitioners had not proved that underage children had been undertaking the sand harvesting activities. Even though, the matter was a constitutional petition, the burden of proof was upon the petitioners. On prayer (d) of the petition on access to information. The 1st, 2nd, 4th 5th and 6th respondents' information as contained in their letters dated August 7, 2020 and duly served on the respondents and the same was not provided in contravention of article 35 of the Constitution on access to information. The said respondents had not responded substantively to the claim and the same was found to have been admitted to be true. The said respondents were thus in violation of article 35.
 25. Sustainable development was a principle provided for under article 10 of the Constitution on national values and principles of governance. All the national values and principles bound State organs, State officers, public officers and all persons whenever any of them applied or interpreted the Constitution, enacted, applied or interpreted any law; or made or implement public policy decision. The principle of sustainable development required that environmental considerations should be at the center of all development.
 26. The respondents did not follow the law in engaging in sand harvesting long River Tiva. The court in exercising its jurisdiction was guided by the precautionary principle as a principle of sustainable development as provided under section 3(5) (f) of Environmental Management and Co-ordination Act and section 18(e) of the Environment and Land Act No. 19 of 2011.
 27. There were threats of serious or irreversible damage to the environment due to the sand harvesting activities that had been going on without legal regulation and any lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The court could not therefore wait for scientific proof regarding the impact of sand harvesting on Tiva River as that could result in irreversible damage to the environment and in human suffering. Consequently, any economic setbacks that may result due to orders of the court could not outweigh the environmental imperatives of Tiva River. The respondents had the responsibility of abiding by the National Guidelines on Harvesting of Sand and the Environmental Management and Co-ordination Act, and enacting a law or regulations to ensure that there was sustainable exploitation of sand from Tiva River.
 28. The respondents had evidently failed to comply with existing the laws and guidelines pertaining to harvesting of sand from Tiva River. The 3rd respondent had also failed to pass laws and regulations which would regulate the exploitation of sand from Tiva River in an unsustainable manner within the



County of Kitui. There was therefore a large gap in management and regulation of sand harvesting activities in River Tiva, and there was need to address that.

29. Though the 7th and 8th respondents had been beneficiaries of the sand harvesting and transportation that had been carried out without the required regulation most of the prayers in the petition particularizing the orders sought did not substantively touch on them.

Petition allowed.

Orders

- i. *A declaration that the 1st, 2nd, 3rd and 4th respondents had violated article 10 of the Constitution in the manner in which they had dealt with issuance of permits, licenses and allowed sand harvesting activities in Tiva River in Kitui County especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.*
- ii. *A declaration was issued that the 1st, 2nd, 3rd and 4th respondents had infringed and violated the constitutional rights of the petitioners as persons living in Ndumoni, Tanganyika, Nyanyaa and Tiva areas as provided in article 42 of the Constitution by failing to follow the existing laws and guidelines and/or pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvesting in Kitui County.*
- iii. *A declaration that the 1st, 2nd, 3rd, and 4th respondents had violated the provisions of articles 60(1)(c), 60(1)(e), 69(1)(a), 69(1)(f), 69(1)(g), 69(1)(h), 69(2) and 201(a) of the Constitution in the manner they had handled and dealt with sand harvesting activities on Kitui especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.*
- iv. *A declaration that the 1st, 2nd, 4th, 5th and 6th respondents had violated the petitioners' rights under articles 35(1) and (b) of the Constitution by failing to supply information requested for vide the petitioner's advocates' letters dated August 7, 2020 and an order was issued directing the said respondents to supply the information requested within ninety days from the date of judgement.*
- v. *A declaration was made that the petitioners were entitled to participate in making, formulating, developing of laws, rules, regulations and guidelines to govern sand harvesting activities in Kitui County.*
- vi. *An order was issued directed at the 1st, 2nd, 3rd and 4th respondents to comply with the Environmental Management and Co-ordination Act No. 8 of 1999, the National Sand Harvesting Guidelines and all other provisions of the law regulating harvesting and transporting of sand and a report on compliance be filed in court within ninety days from the date of judgement. The report was to include measures taken to rehabilitate and restore the River Tiva in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County.*
- vii. *Conservatory orders were issued retraining the respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources more particularly sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County pending filing of the reports herein.*
- viii. *Prayers e) and f) of the petition dated September 11, 2020 were disallowed.*
- ix. *Costs of the petition were awarded to the petitioners to be paid jointly and severally by the 1st, 2nd, 3rd, 4th, 7th and 8th respondents.*

Citations

Cases

Kenya

1. ***Aoko, Celestine John & others v Shem Owino Muga & 7 others; Amicus Curiae Kenya National Commission on Human Rights*** Environment & Land Petition 2 of 2016; [2019] KEELC 2948 (KLR) - (Followed)
2. ***Diani Business Welfare Association and others v County Government of Kwale*** Petition 39, 45, 61 & 63 of 2014; [2015] KEHC 1968 (KLR) - (Followed)



3. *Fondo, George Karisa & 19 others v Said Ali Omar & 17 others* Petition 10 of 2016; [2021] eKLR - (Followed)
4. *Gachukia, Reuben Njuguna & another v Inspector General of the National Police Service & 4 others* Constitutional Petition 436 of 2017; [2019] KEHC 7830 (KLR) - (Followed)
5. *Ganya, Francis Gachu & 4 others v Attorney General & another* Miscellaneous Civil Application 374 of 2012; [2013] KEHC 3986 (KLR) - (Followed)
6. *Halai Concrete Quarries & 4 others v County Government of Machakos & 4 others; Kenya Power & Lighting Co & another (Interested Parties)* Environment & Land Petition 19 of 2020; [2023] KEELC 18601 (KLR) - (Followed)
7. *Kamau, Moffat & 9 others v Aelous Kenya Limited & 9 others* Constitutional Petition 13 of 2015; [2015] eKLR - (Followed)
8. *Leboo, Joseph & 2 others v Director Kenya Forest Services & another* Environment & Land Case 273 of 2013; [2013] KEELC 41 (KLR) - (Followed)
9. *Macharia, Francis Ngigi & 67 others v National Environment Management Authority* Environment & Land Case 36 of 2012; [2018] KEELC 2247 (KLR) - (Followed)
10. *Macharia, Mbutia v Annab Mutua Ndwiga & Commissioner of Lands* Civil Appeal 297 of 2015; [2017] KECA 290 (KLR) - (Followed)
11. *Makau, Patrick & another v Attorney General & 3 others* Environment and Land Case 466 of 2017; [2018] eKLR - (Explained)
12. *Muthui & 19 others v County Government of Kitui & 7 others* Environment & Land Petition 26 of 2021; [2023] KEELC 15930 (KLR) - (Followed)
13. *Oyugi, Kamoji Wachira & Joseph Otieno Malo v Attorney General* Constitutional Petition 441 of 2015; [2019] KEHC 10211 (KLR) - (Followed)

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) — order 1 rule 8 — Interpreted
2. Constitution of Kenya — article 3; 10; 35(1); 35(1)(b); 42; 53(1)(d); 60(1)(c); 60(1)(e); 69(1)(a); 69(1)(f); 69(1)(g); 69(1)(h); 69(2); 185; 201(a); Chapter 4 — Interpreted
3. Environmental (Impact Assessment and Audit) Regulations, 2003 (cap 387 Sub Leg)
4. Environment And Land Court Act (cap 8D) — section 13(4); 18(e) — Interpreted
5. Environment Management and Co-ordination Act (cap 387) — section 3(1); 3(2A); 29; 30; 42 (4); 58(2); 58(3); part 6 — Interpreted

Advocates

B. M. Musyoki for petitioners

Azangalala holding brief for Katunga Mbuvi for 1st and 2nd respondents

Nyawira for 5th and 6th Respondent

JUDGMENT

1. The petition before court for determination dated September 11, 2020 seeks the following orders:
 - a. A declaration that the 1st, 2nd, 3rd and 4th respondents have violated article 10 of the [Constitution](#) in the manner in which they have over the years handled and dealt with the issuance, permits, licenses and allowed sand harvesting activities in Tiva River in Kitui County especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
 - b. A declaration that the 1st, 2nd, 3rd and 4th respondents have infringed and violated the constitutional rights of the people of Kitui especially in Ndumoni, Tanganyika, Nyanyaa and



Tiva areas as provided for in article 42 of the Constitution by failing to pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvesting activities in Kitui County.

- c. A declaration that the 1st, 2nd, 3rd and 4th, 5th and 6th respondents have violated mandatory provisions of articles 60(1)(c), 60(1)(e), 69(1)(a), 69(1)(f), 69(1)(g), 69(1)(h), 69(2) and 201(a) of the Constitution in the manner they have handled and dealt with sand harvesting activities on Kitui especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
 - d. A declaration that the 1st, 2nd, 4th, 5th and 6th respondents have violated the petitioners' rights under articles 35(1) and (b) of the Constitution by failing to supply information requested for vide the petitioner' advocates' letters dated 7-08-2020 and an order directing the said respondents to supply the information requested within a specified period.
 - e. A declaration that the 7th and 8th respondents have violated the provisions of article 53(1)(d) of the Constitution by employing and engaging the services of children under the age of 18 years to load their trucks, lorries and trailers.
 - f. A declaration that the petitioners and people of Ndumoni, Tanganyika, Nyanyaa and Tiva areas of Kitui County have suffered damage as a result of violations of their rights and the Constitution by the Respondents and an order that an inquiry as to damages to the community be undertaken and adequate and commensurate compensation, restoration and reparations be undertaken by the respondents within a specified period.
 - g. A permanent injunction restraining the respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting the resources from Tiva River until such time as there shall be laid, enacted and legislated laws, regulations or guidelines with the force of the law for purposes of governing and regulating sand harvesting activities within Kitui County.
 - h. A declaration that the petitioners and the people of Kitui are entitled to be involved and participate in making, formulating, developing and legislating of laws, rules, regulations and guidelines to govern sand harvesting activities in Kitui County and any law, regulations, rules and guidelines enacted, passed or issued by the 1st to 6th respondents without involvement and participation of the petitioners and the people of Kitui shall be unconstitutional.
2. The petitioners herein are residents of areas known as Ndumoni, Tanganyika, Tiva and Nyanyaa in Kitui Central and Kitui Rural Constituencies of Kitui County which are next to and near a major river known as Tiva River. They claim that under articles 3 and 69 of the Constitution, every person, has a duty to defend and uphold the Constitution and cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. They state that Kitui County is classified as a semi-arid area and like all other areas of the country, environmental conservation should be at the core of the function of the organs entrusted with governance and that State organs have a duty to conserve the environment as they exploit the available natural resources.
 3. According to the petitioners, Tiva River originates from Mutonguni hills and Kitumui ridges and snakes its way through large areas which are fully inhabited by a large population all the way to Tsavo National Park; that the river and its tributaries serve and sustain quite a good number of the county's population. They claim that over a period of years, the Respondents have violated their constitutional duties to conserve the environment and ensure sustainable use of natural resources in a manner which



has been detrimental to the lives, interests and properties of the residents of Kitui County, and all those who benefit from the river resources in and outside the County.

4. It is the petitioners' case that most people from the region derive their livelihood from and depend on the Tiva River for both domestic and farm use and that these have been compromised by the way the respondents have exploited and allowed exploitation of the river resources particularly in the areas the petitioners reside. According to them, the Respondents have been allowing traders and unscrupulous persons to harvest and scoop sand from the river without any regulations being in place and that the excavation and harvesting of the sand from the river has led some wet areas to dry up including the river and its tributaries.
5. The petitioners claim that as a result of the actions and inactions of the respondents, the river Tiva is slowly drying up, pushing water levels down and deep such that the residents of the areas are unable to get enough water for their households, livestock and farms use and that the activities by the respondents are causing desertification, a process which is irreversible and a threat to the livelihoods and rights of the people of Kitui County and beyond. It was deponed that in addition to the dropping of water levels, the river is no longer able to retain water when it rains.
6. It was deponed that the 4th respondent, in recognition of the importance of conserving the environment in sand harvesting sites, developed sand harvesting guidelines which all persons and State organs should adhere to and that the guidelines are sound and if applied properly would go a long way in preserving and conserving the river and other sites in the country.
7. The petitioners claim that the 1st to 6th respondents have permitted, allowed, licensed and let the 7th and 8th respondents and other persons under the umbrella of the 8th respondent to harvest sand from the river without following the regulations laid down by the 4th respondent and that as a result, the environment in and around the river has gradually been degraded causing the river to dry up and as a consequence, put the lives of the petitioners and those of their future generations into uncertainty.
8. It was the averment by the petitioners that the 7th and 8th respondents and their associates have over a long period of time under the watch, permission and connivance of the 1st to 6th respondents carried out indiscriminate, uncontrolled and illegal harvesting and excavation of sand from the river which has made the areas 'residents' livelihoods very hard. That as result the petitioners have complained to the 1st, 2nd and 3rd respondents to make laws and regulations on sustainable use and exploitation of the resources from the river but the complaints have not yielded positive results
9. According to the petitioners, instead of coming up with concrete laws, rules or regulations on sand harvesting and exploitation of river resources and trade, the 1st respondent has been imposing cosmetic knee jerk bans which it immediately lifts at will without consulting community and the people who are affected by the said trade.
10. The petitioners deponed that following their agitation for licensing and regulation of sand harvesting, and in order to secure protection by the 5th and 6th respondents, the 7th and 8th respondents without consultation secured from the 1st and 2nd respondents a letter dated July 15, 2020 allowing them to harvest sand from the river Tiva among others. It is stated that sand harvesting of the magnitude carried out and authorized by the respondents has serious environmental impact on the community's right to life and a clean and sustainable environment.
11. It is the petitioners' case that article 42 of the *Constitution* grants them the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations through legislative and other measures, and to have obligations of the State and its organs relating to the environment fulfilled. In this regard, the respondents are constitutionally



- bound to pass laws and regulations and take other measures to protect the environment for the benefit of the petitioners.
12. Relying on article 69(1)(a) of the Constitution the petitioners deponed that the state, to which the 1st to 5th respondents belong, must ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits; and that the state should encourage public participation in the management, protection and conservation of the environment.
 13. Further, that article 69(1)(f) and (g) provides that there shall be established system of environmental impact assessment, environmental audit and monitoring of the environment and eliminate processes and activities that are likely to endanger the environment. The petitioners deponed that article 69(h) provides that the state shall utilize the environment and natural resources for the benefit of the people of Kenya; that it is a mandatory requirement under article 69(2) that every person has a duty to cooperate with State organs and other persons to protect and conserve and ensure sustainable development and use of natural resources and that the Respondents have by their conduct, actions and inactions complained of violated the above stated constitutional provisions and as a result violated their constitutional rights.
 14. According to the petitioners, the said violations are reflected in the following manner:
 - i) the 1st 2nd and 4th respondents failure to allow participation of the petitioners and public before allowing and permitting various people including the 7th and 8th respondents in harvesting sand from Tiva River;
 - ii) Ignoring threats to sustainable development of the area by compromising the environment and resources from the river and the surrounding areas;
 - iii) failing to practice and observe the rule of law by failing to implement guidelines and regulations developed by the 4th respondent to regulate sand harvesting activities in the country.
 - iv) Failure to share benefits of sand harvesting with the petitioners and the people of Kitui in violation of the provisions of article 69(1)(h) of the Constitution and that.
 - v) Lack of openness and transparency in the way of handling funds generated from the exploitation of the river resources.

The 1st and 2nd Respondents' Case

15. The 1st and 2nd respondents filed a response to the petition and a replying affidavit by the County Secretary of the 1st respondent Joshua K Chepchieng. The said respondents claim that they have at no time acted in violation or breached any of the fundamental and constitutional rights of the petitioners; that the County Government has taken all measures and precautions to protect its resources and more particularly coal, sand and charcoal and that the Petitioners have failed to clearly demonstrate which of their rights has been violated.
16. It is stated that the County Government of Kitui is in the process of enacting laws that govern, regulate and control sand harvesting pursuant to earlier orders of the court issued on November 27, 2020 and request for time to complete the process.
17. It was deponed that the 1st and 2nd respondents have not allowed and or issued permits to unscrupulous persons to harvest sand from Tiva River without any regulations and restrictions. They state that the 1st and 2nd respondents believe in environmental conservation and are keen on protecting, managing



and conserving the environment to ensure sustainable use of natural resources without jeopardizing it. They claim that some of the petitioners are imposters and do not hail from the area surrounding Tiva River as alleged in the application.

18. The 1st respondent accepted that it issued permits to the 7th and 8th respondents for sand harvesting at Tiva River; that the said harvesting of sand is regulated, controlled and informed by the annexed (EIA) Report that was conducted for the said purpose. Further that the 8th Respondent is a duly registered company with the permission from the County Government to harvest and excavate sand from Tiva River. It is contended that public participation was conducted as provided for under article 69(1)(d) of the Constitution and that the EAI report addressed all the issues raised in the petition and recommended and advised that the best alternative is for the sand harvesting project to be implemented.
19. According to the 1st and 2nd respondents, there are in place strict laws governing and regulating sustainable use of the sand and that the harvesting of sand by the 7th and 8th respondents is limited to internal use within the County of Kitui and local consumption. It is further stated that the Governor of the 1st respondent imposed bans on transportation and export of charcoal and sand outside the borders of the County of Kitui *via* gazette notice dated February 2, 2018 and that those who attempt to defy the ban and regulations imposed are usually arrested, charged in court.
20. It was deponed that the volumes of sand collected by the 7th and 8th respondent is self-sustaining and is used in building social amenities for the benefit of the residents of Kitui which amenities include schools, hospitals, offices and even roads in compliance with the EAI report. These social amenities and source of income and livelihood are some of the benefits of the harvesting and excavation of sand as provided for under article 69(1)(a) of the Constitution of Kenya.
21. The 3rd respondent did not enter appearance or file a response to the petition.

The 4th Respondent's Case

22. Zephaniah Ouma, the Acting Director of Compliance and enforcement in the service of the 4th respondent swore an affidavit in response to the petition deposing that contrary to the petitioners' assertion that the 4th respondents have issued a license to the 7th and 8th respondents, the National Environment Management Authority (NEMA) stated that they had not received an EIA report for sand harvesting in Kitui, especially Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
23. According to the 4th respondent through its deponent, the license to conduct sand harvesting can only be issued by the Authority once an EIA report is submitted by the proponents, reviewed and approved if it meets the threshold required by law and in this case, the 7th and 8th respondents have yet to do so, therefore no sand harvesting license has been issued to them.

5th and 6th Respondent's Case

24. The 5th and 6th respondents filed grounds of opposition stating:
 1. That the petition as drawn raises no cause of action against the 5th and 6th respondents hence the same should be dismissed as against them.
 2. That the mandate of implementing and ensuring compliance with the National Sand Harvesting Guidelines, 2007 as enacted by the 4th respondent lies with the 1st respondent.
 3. That the petitioner has not demonstrated through production of any iota of evidence that the 5th and 6th respondents provide escort and security to sand traders and their tracks in and out of the rivers where the sand harvesting takes place.



The 7th and 8th Respondents' Case.

25. The 7th respondent swore a replying affidavit on his own behalf and as the chairman of the 8th respondent and deposed that he is a businessman within Kitui County and part of his business involves transporting sand and other building or construction materials for hire and that as transporters who form the 8th respondent they buy sand or water or any other river resource from the river-line community groups who do the actual harvesting.
26. He stated that the transporters are not allowed to start loading or scooping or heaping up the sand or the river resources directly without first paying for it to the local groups, usually represented by youth groups or men from the river-line community. Further that they are purchasers and the community groups are sellers of the sand and that they provide the river-line community with a ready market for their products and provide them with a steady source of income for their families and the outlying communities. That they are in the forefront in promoting all programmes for conserving the environment and the river resources.
27. He deposed that as transporters, they were guided by the 2nd respondent on how to initiate their business project plan, and were advised to do an EIA report to inform and guide them on the positive and negative impacts of their business project objectives and plans and on the best way to integrate their business objectives and plans with the needs of the community, livelihoods, conservation and sustainability of the resources.
28. That they prepared an EIA report and that the same was registered with the office of the 2nd respondent. That the report was to examine issues of socio-economic and biophysical environment of the project area, developments on adjoining pieces of the land and the likely impacts of the project on the same; environmental impacts on sand harvesting and the products and wastes to be generated by the harvesting of sand.
29. It was deposed that the issues of the relevant legislations, sustainability, agenda 21 and other related issues were captured in the report and recommendations made to guide the group. Further, it was stated that public participation in preparing the report was adequately done; that the applicant's complaints are unfounded and that the complainants are constituted of a group that is rivalling the registered group that is harvesting and selling the sand to the transporters.
30. According to the 7th respondent, after the baseline preparation was achieved, they applied to the 1st and the 2nd respondents to authorize them to do the business of transporting the sand from the river; that the details of their trucks were enumerated in order to monitor and tract the volume and tonnage of the sand transported from the area and that as per the letter licensing their transportation business, the volume and tonnage of the sand taken is limited and controlled, and that the role of the 5th and 6th respondents is to enforce the same, and any single breach of the rules attracts a court case.
31. It was deposed that the 1st respondent, vide a Gazette Notice No. 936 of February 2, 2018, issued a ban on transportation and sale of charcoal and sand, outside the geographical boundaries of the County of Kitui, and revoked all licenses, permits and other documentations issued authorizing the transportation of sand and charcoal outside the County.
32. According to the 7th respondent, the intention of the 1st respondent in issuing the said Gazette Notice was to protect, conserve, control and regulate the natural resource in question for the benefit of the people of Kitui County and more so, against exploitation by unscrupulous traders.



33. The 7th respondent deponed that during the floods, sand deposits increases tremendously and some is deposited off the riverflow course and unto the farms; that lifting of the ban for a limited period to allow the harvesting and sale of the sand is a sound decision and that Tiva River is in a good condition.
34. The 7th respondent deponed that before the petitioners filed the petition, it was necessary for them to engage an audit of the existing environment around the river and present a situational analysis of the same as the basis of their complaints; that it is only an audit report by an expert that would convince the court about the petitioners complaints and that the main objective and motive of the petitioners herein in filing this petition was to secure temporary orders to scuttle their business because they (the transporters) have refused to work with them, and to frustrate the other registered group.
35. The 7th respondent finally deponed that no one visited the local community and the river in question and prepared any report to vouch for the alleged threat of the ecosystem and that there is no report from a hydrologist analyzing the water levels or depth of Tiva River or the level of degradation of the said river.

The Petitioners' Submissions

36. In submissions, counsel for the petitioners reiterated the contents of their petition and stated that the 1st and 2nd respondent do not deny that they have allowed the 7th and 8th respondents to harvest and trade in sand yet the 4th respondent's asserts that it has not received any Environmental Impact Assessment Report for sand harvesting in Kitui.
37. Counsel for the petitioners submitted that the 1st and 2nd respondents have failed to implement the National Sand Harvesting Guidelines and sand harvesting has been going on indiscriminately and unregulated under their watch. Counsel relied on the case of *George Karisa Fondo & 19 others v Said Ali Omar & 17 others* (2021) eKLR where the court held that uncontrolled sand harvesting activities in the County of Kilifi led to land degradation, low availability of and poor quality of water in the affected rivers. Counsel stated that the 1st and 2nd respondents have violated the rule of law by not implementing the guidelines and article 10 of the *Constitution*.
38. Secondly, the petitioners accused the respondents of lack of public participation before undertaking the sand harvesting activities, which is one of the national values enshrined in article 10(2) of the *Constitution*. They also submit there was no public participation as required by article 69(1)(d) and relied on Justice Munyao Sila's holding in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* (2013) eKLR where he held that the supposed public participation was not demonstrated.
39. The petitioners submitted that article 42 of the *Constitution* provides that every person has a right to a clean and healthy environment including the legislative and other measures contemplated in article 69. In their view, the 1st respondent has taken too long to come up with what they claim to be a Bill and policy and even the policy document relied on is not properly signed.
40. With regard to prayer (c) of the petition, the petitioners submitted that the facts and pleadings in this Petition demonstrate that the respondents have violated articles 60(1)(c) and (e), 69(1)(a), (d), (f), (g), (h), 69(2) and 201(a) of the *Constitution*. They stated that the once flowing river is now nothing more than a dry river bed with gaping gulleys and disastrous soil erosion.
41. Further to that, the petitioners submit that there should be equitable sharing of the benefits from natural resources as per article 69(1)(a) but there is no evidence of such benefit to the people of Kitui or petitioners.



42. On the need for an EIA under article 69(1)(f), the petitioners submitted that it has not been done they relied on the holding of the court in the case of *Patrick Makau & Another v Attorney General & 3 others* (2018) eKLR. The petitioners pointed out that the EIA report produced by the 1st and 2nd respondents was dismissed by this court in an earlier ruling of the court for being in breach of section 58(2) of the *Environment Management and Co-ordination Act*.
43. Submitting on prayer (d), the petitioners submitted that on August 7, 2020, they wrote letters to the 1st, 2nd, 4th, 5th and 6th respondents seeking specified information in respect of the sand harvesting activities on River Tiva but they did not respond. They claim to have been denied access to the information sought.
44. With regard to prayer (e), the petitioners submitted that it has not been denied that the 7th and 8th respondents have been engaging children to work in their sand harvesting activities, which is a serious violation of the laws against child labour as stipulated under article 53(1)(d).
45. The petitioners' submission on prayer(f) is that the photographs exhibited in the supporting affidavit and articles from media houses are evidence enough that the environment has been degraded by the respondents' activities and inactions. They are of the view that there are enough grounds for enquiry as to the damages caused by the activities complained of and possibilities of reparations and compensation. They relied on the holding and orders in the *George Karisa Fondo case* (*supra*) where the court ordered for restoration of the environment.
46. On prayer (g), the petitioners submitted that the purported Bill has not been forwarded for enactment and the Kitui County Mining Investment and Management Policy 2021 was developed after the case was already filed and after the ruling of the court in November, 2020.
47. Further, the petitioners submitted that they have issued licenses to the 7th to 8th respondents but have not told the court under what guidelines and regulations have such licenses been given. They prayed that that the injunction in force last until such a time that the 1st -4th respondents shall establish or enact laws and regulations governing sand harvesting activities in Kitui County.

1st and 2nd Respondent's Submissions

48. Counsel for 1st and 2nd respondents' submitted on the preliminary issues of whether the petitioners have locus standi to file this petition and whether the court has jurisdiction to hear and determine the petition.
49. The 1st and 2nd respondents denied allowing or issuing permits to unscrupulous persons to harvest sand from Tiva river without any regulations. They submitted that there are strict laws governing and regulating sustainable use of the resource of sand and that the EIA report was achieved after extensive public participation as provided for under article 69(1)(d) *Constitution of Kenya* and that it was the petitioners herein who failed to participate. They relied on the case of *Diani Business Welfare Association and others v the County Government of Kwale* (2015) eKLR.
50. Counsel submitted that the 1st and 2nd respondents are guided by the EIA report in evaluating and analyzing the area for controlled and regulated sand harvesting which was achieved after extensive public participation. They further submitted that the Governor banned transportation of sand outside Kitui County and details of the tracks and Lorries belonging to the 7th and 8th respondents were taken in order to monitor and track volumes and tonnage of sand being transported for purposes to control and regulate the usage of sand. It is the 1st and 2nd respondent's submission that the volumes of sand collected by the 7th and 8th respondent is self-sustaining and is used in building school amenities for



the benefit of residents of Kitui such as schools, hospitals, offices and even roads and a source of income to the residents. It is their final submission that there is no violation of the Constitution, and environmental laws or the petitioners' fundamental rights since the sand harvesting along Tiva River is regulated, controlled, lawful and does not degrade the environment.

The 5th and 6th Respondents' Submissions

51. The 5th and 6th respondents submitted that the petitioners have failed to set out the way in which they are involved in making laws in respect of and licensing of sand harvesting activities in the area. They submitted that the National Sand Harvesting Guidelines 2007 give guidelines on sand harvesting through the Technical Sand Harvesting Committee as the body responsible in ensuring proper and sustainable management of sand harvesting in the appointing district.
52. Further to that, they submitted that arbitration is the dispute resolution mechanism provided for at clause 15 of the guidelines and that the petitioners have not demonstrated that they exhausted this laid down avenue before coming to court.
53. They concluded by submitting that there is no liability disclosed against them by the Petitioners and as such the petition should be dismissed with costs.

Analysis and Determination

54. I have considered the petition herein, the answers to petition and the replying affidavits and grounds of objection filed in opposition to the petition. I have further considered the submissions filed by counsel for the parties and the authorities cited. I have noted that the 1st and 2nd respondents raised preliminary issues that require determination in the 1st instance;
 - a. Whether this court has jurisdiction to hear and determine the petition.
 - b. Whether the petitioners have the locus standi to file the petition.
55. The above two issues were dealt with exhaustively and conclusively determined in this case by Angote J. when he heard the Notice of Motion dated September 11, 2020 and gave a ruling dated November 27, 2020 *John Muthui & 19 others v County Government of Kitui & 7 others* [2020] eKLR. The respondents did not challenge the ruling and in my view the findings thereof still stand. On issue number a) the court found and stated as follows;

“Under the provisions of the Constitution and section 13(4) of the *Environment and Land Court Act*, it is this court which has the jurisdiction to determine if indeed the Petitioners' rights under article 42, 69 and 70 of the *Constitution* have been or are likely to be infringed upon and not the National Environmental Tribunal(NET).

Considering that the petitioners are not challenging the decision of NEMA, either in issuing a licence or otherwise in respect of the harvesting of sand from Tiva River by the respondents, and in view of the prayers sought in the petition which are confined to the alleged infringement of the petitioners' rights, it is the finding of this court that the National Environmental Tribunal does not have the requisite jurisdiction to deal with this petition. It is this court that has the jurisdiction to deal with the issues raised in the petition and the application.”



56. On issue number b) the court found and stated;

“The petitioners herein, whether they hail from Kitui County or not, and whether the harvesting of the sand from Tiva River affects them directly or not, have the *locus* to prosecute the petition which is premised on the ground that the respondents have infringed on their right to a clean and healthy environment. This right is applicable not only to them, but also the future generations. The petitioners in this matter therefore have the requisite *locus standi*.”

57. The court further dealt with the objection that the petition being a representative suit has not complied with the provisions of order 1 rule 8 of the [Civil Procedure Rules](#). The court considered rule 4 of the Mutunga Rules and found as follows;

“The above rule allows a petitioner to file a suit on his behalf and on behalf of a class of persons or in the public interest where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened. Such a petitioner is not required to give a notice to the affected parties before filing the petition. The petitioners herein are acting on their own behalf, and in the public interest of the people of Kitui County.”

58. I consider the issue that remains to be determined is whether the petitioners’ fundamental rights and freedoms under Chapter Four of the [Constitution of Kenya 2010](#) have been infringed as a result of the sand harvesting activities on River Tiva within the county of Kitui as claimed in the petition.

59. The right to a clean and healthy environment starts with appreciation of the environment as part of the Kenyan heritage, and the determination to sustain it for the benefit of future generations as stated in the preamble to the [Constitution of Kenya 2010](#). The preamble makes a constitutional commitment to nurturing and protecting the well-being of the individual, the family, communities and the nation. Article 42 grants to every person the right to a clean and healthy environment and protection of the same, which includes the right-

- a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69; and
- b. to have obligations relating to the environment fulfilled under article 70

60. The same entitlement to a clean and healthy environment and the duty to safeguard and enhance it is repeated under the [Environmental Management and Co-Ordination Act](#) No 8 of 1999 (EMCA) section 3 and in particular section 3(1) and (2A) provides that;

1. Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.
- (2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.”

61. Article 69 provides for certain duties and obligations of the state and all persons in respect of the environment and states that;

“(1) The State shall—



- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - (d) encourage public participation in the management, protection and conservation of the environment;
 - (e) protect genetic resources and biological diversity;
 - (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - (g) eliminate processes and activities that are likely to endanger the environment; and
 - (h) utilise the environment and natural resources for the benefit of the people of Kenya.”
- (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

62. Article 70 of the *Constitution* grants any person the right to commence proceedings for the enforcement of the right to a clean and healthy environment. The said article provides as follows:

- (1) If a person alleges that a right to a clean and healthy environment recognized and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. For the purposes of this article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”
- (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
 - a. to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - c. to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

63. The petitioners’ case is that they have been deprived of the benefit and enjoyment of the above constitutional rights and the same have been violated by the respondents in their various capacities. The detailed particulars of the violations have been previously set out but the same will be summarized



herein for ease of reference; Failure to conserve the environment and ensure sustainable use of natural resources and exploiting of the same and allowing exploitation of the river resources in a manner which is detrimental to the lives, interests, livelihoods and properties of the residents of Kitui County, and all those who benefit from the river resources of River Tiva, particularly in the areas they reside in. ii) Allowing traders and unscrupulous persons to harvest and scoop sand from the Tiva River without any control and/or regulations thus making some wet areas, the river and its tributaries to dry up. Iii) Failure to adhere to sand harvesting guidelines thus degrading the river and causing some parts to dry up, and as a consequence, putting the lives of the petitioners and those of their future generations into uncertainty; iv) Carrying out indiscriminate, uncontrolled and illegal harvesting and excavation of sand; v) Failure by the 1st, 2nd and 3rd Respondents to make laws and regulations on sustainable use and exploitation of the resources from the river. vi) Imposing cosmetic knee jerk bans on sand harvesting which are immediately lifted without consulting the people who are affected by the trade.

64. The 1st and 2nd respondents claim that they have taken all measures and precautions to protect its natural resources. The 1st respondent admitted that it issued permits to the 7th and 8th respondents for sand harvesting at Tiva River but claim that the said harvesting of sand is regulated, controlled and informed by the Environmental Impact Assessment Report that was conducted for the said purpose. That there are in place strict laws governing and regulating sustainable use of the said resource and that harvesting of sand by the 7th and 8th respondents is limited to internal use within the County of Kitui and for local consumption only.
65. They further claim that the volumes of sand collected by the 7th and 8th respondent are self-sustaining and the sand used in building social amenities for the benefit of the residents of Kitui. It is stated that these social amenities are a source of income and livelihood for the area residents and these are some of the benefits of the harvesting and excavation of sand as provided for under article 69(1)(a) of the [Constitution of Kenya](#).
66. The 7th and 8th respondents claim that they are business people carrying on the business of transporting sand and other building or construction materials for hire and that they buy the sand from the river-line community groups who do the actual sand harvesting. The claim that they provide the river-line community with a ready market and a steady source of income. Further that they have a business project plan, and carried out an EIA report to inform and guide them on the best way to integrate these business objectives and plans with the needs of the community, livelihoods, conservation and sustainability of the resources.
67. The 7th and 8th respondents further claim that there was public participation in preparing the EIA report as a result of which a licence was issued to them. Thereafter details of their trucks were enumerated in order to monitor and track the volume and tonnage of the sand transported. They claim that the volume and tonnage of the sand taken is limited and controlled, and that the role of the 5th and 6th respondents is to enforce the same.
68. That a ban on transportation and sale of charcoal and sand, outside the geographical boundaries of the County of Kitui was issued in order to conserve, protect, regulate and control exploitation of sand. That during the floods, sand deposits increases tremendously and some is deposited off the river course and onto the farms and that lifting of the ban for a limited period to allow the harvesting and sale of the sand is a sound decision and that Tiva River is in a good condition.
69. The 4th respondent stated that it has developed sand harvesting guidelines which all persons and State organs should adhere to for preserving and conserving the river. It claims that it has not received an Environmental Impact Assessment Report for sand harvesting in the areas in dispute. According to the 4th respondent, the license to conduct sand harvesting can only be issued by the Authority once



an Environmental Impact Assessment Report is submitted by the proponents, reviewed and approved if it meets the threshold required by law and in this case, the 7th and 8th respondents have yet to do so, therefore no sand harvesting license has been issued to them.

70. The Global and local State of the environment and sand harvesting was aptly captured in a 2019 report by the United Nations Environment Programme (UNEP) dubbed “Sand and Sustainability: Finding New Solutions for Environmental Governance of Global Sand Resources, United Nations Environment Programme/GRID-Geneva (2019)” where it stated that:

“Sand and gravel (hereafter aggregates) are the unrecognized foundational materials of economies. They are mined world over, accounting for the largest volume of solid material extracted globally. (Pedduzi.2014). Without them there is no concrete, no asphalt, no glass to build necessary schools, hospitals, roads, solar panels and other necessary infrastructure under current construction and industrial production systems and methods.

Sand is ubiquitous in construction and production because it is cheap, versatile and easy to acquire. Yet all indications are that we are approaching a future where access to this resource is a critical barrier to sustainability, and the full costs of uncontrolled sand extraction come due.

Extraction rates are exceeding natural sand replenishment rates (John, 2009). The increasing volume of aggregates extracted, often illegally from riverine and marine ecosystems results in coastal erosion, threats to freshwater and marine fisheries and biodiversity (World Wide Fund for Nature (WWF) 2018a). The people who work in unregulated extraction and those who live on these sites risk their safety, even their lives when they seek to stop uncontrolled extraction (Awaaz Foundation, 2017).”

71. The complaints raised by the petitioners herein on the consequences of uncontrolled and unregulated sand harvesting and the negative effect on the environment and the communities surrounding the River Tiva are a reflection of what is stated in the above report. The report is a clear indication of a sector that is in need of regulation and governance for sustainability at the global and local level.
72. Arising from the above report the International Resource Panel highlighted some key facts about global sand extraction and sustainability and recognized that sand is the largest extracted and traded solid resource by volume globally. That it is the least regulated resource in many jurisdictions and the extraction rate is exceeding the replenishment rate and therefore it is no longer viewed as a renewable resource. Further, it recognized that sand harvesting causes major impacts to riverine, marine and terrestrial areas through biodiversity and environmental degradation, sedimentation of coral reefs, lowering the water table, pollution, drying up of tributaries, turbidity of water, erosion of river banks and shorelines leading to flooding, and diverting waterways. It also leads to injuries and death for the sand harvesters and results in negative impacts on tourism, fisheries and agriculture. It also observed that the local and international media often refer to ‘sand wars’ when reporting on the sector in order to highlight the prevalent conflicts between sand harvesters with local communities, violence and cartel (sand mafia) networks that are associated with the sand industry. The report concluded that the environmental and social impact of sand extraction is an issue of global significance.”
73. The Governance Structure of sand harvesting in Kenya starts at article 69 of the [Constitution of Kenya, 2010](#) which requires the state to sustainably utilize, exploit, manage and conserve the environment and natural resources and share the accruing benefits in an equitable manner.- The said article provides for establishment of systems of environmental impact assessment, environmental audit and monitoring of the environment as it requires elimination of processes and activities that are likely



to endanger the environment; It calls for utilization of the environment and natural resources for the benefit of the people of Kenya.

74. The Hon. Justice Angote while granting conservatory orders in this case in *John Mutbui & others v County Government of Kitui* recognized that sand harvesting is necessary for economic development but at the same time upheld the principle of sustainable development and its ancillary principles of inter-generational equity, precautionary principle, sustainable, prudent, equitable and wise use of natural resources. The Hon Judge held:
112. Rivers all over the world are under immense pressure due to various kinds of anthropogenic activities, among them indiscriminate extraction of sand and gravel which is disastrous as the activity threatens the river ecosystem.
- ‘113. Sand harvesting activities affects the environment by causing land degradation, loss of agricultural lands, low availability of water and poor quality of water in the affected rivers. Bed degradation of rivers due to sand harvesting undermines bridge support, and may change the morphology of a river, which constitutes aquatic habitat. The loss of this ecosystem affects the environment in many and far reaching ways. To address the issue of sustainable harvesting of sand, NEMA has come up with sand harvesting guidelines (National Sand Harvesting Guidelines, 2007).’
75. In the case of *Celestine John Aoko & others v Shem Owino Muga & 7 others; Amicus Curiae Kenya National Commission on Human Rights* [2019] eKLR, the applicants claimed that sand harvesting had caused flooding in their farms, broken dykes and created pits which posed a safety risk amongst other hazards. The court held that the National Environment Management Authority (NEMA) retains regulatory powers over sand harvesting activities through the National Sand Harvesting Guidelines, 2007, issued pursuant to section 42(4) of *EMCA*.
76. The powers to manage the environment in Kenya is provided under the *Environmental Management Co-ordination Act* (EMCA) which is an Act of Parliament to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Under EMCA the National Environment Authority (NEMA) is established with the object and purpose to exercise general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.
77. The regulatory powers are cascaded down to the counties under section 29 of *EMCA* where County Environment Committees are established. The committees are constituted by the Governor of the county by notice in the Kenya Gazette and are responsible for the proper management of the environment within the county for which it is appointed and to develop a county strategic environmental action plan.
78. Further, section 42 of *EMCA* provides for protection of rivers, lakes, seas and wet lands and states;
- No person shall, without the prior written approval of the Authority given after an environmental impact assessment, in relation to a river, lake, sea or wetland in Kenya, carry out any of the following activities
- erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake, sea or wetland;
- excavate, drill, tunnel or disturb the river, lake, sea or wetland.



79. The foregoing provisions of the law provide that for any person to carry out any of the activities prohibited under section 42 of EMCA there has to be prior written approval from the NEMA given after an EIA has been carried out. In the present case NEMA the 4th respondent stated that it has not received an EIA report for sand harvesting in Kitui, especially Ndumoni, Tanganyika, Nyanyaa and Tiva areas. It has also confirmed that it has not issued any license to the 7th and 8th respondents yet it is an admitted fact that the 7th and 8th respondents have been excavating sand and transporting it from River Tiva without the prior written authority of the 4th respondent which is direct contravention of the law. The 1st and 2nd, 7th and 8th respondents claim that the 7th and 8th respondents were issued with authorization but were relying on an EIA report.
80. Section 58 of EMCA provides for application for an Environmental Impact Assessment Licence and the process an applicant undergoes to obtain the licence. Subsection (1) requires submission by the proponent of a project of a project report to NEMA in the prescribed form, giving prescribed information and accompanied by prescribed fees. Section 58(2) and (3) state as hereunder with regard to submission of an EIA report to NEMA;
- (2) The proponent of any project specified in the second schedule shall undertake a full environmental impact assessment study and submit an environmental impact assessment study report to the Authority prior to being issued with any licence by the Authority:
- Provided that the Authority may direct that the proponents forego the submission of the environmental impact assessment study report in certain cases.
- (3) The environmental impact assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.
81. It is to be noted that sand harvesting is one of the projects specified in the second schedule of the Act and therefore require submission of an EIA report as it falls under the medium risk projects for artisanal mining which includes quarrying and/or harvesting of aggregate, sand, gravel, soil, clay, stone and slate.
82. The Act describes an “environmental impact assessment” as a “systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment;”
83. The 1st and 2nd respondents were under a legal obligation to adhere to the above provisions of the law before authorizing sand harvesting and transporting. The said respondents authored the letter dated November 15, 2020 addressed to the 8th respondent which was stated to be “Authorisation To Harvest And Transport Sand From Mwita Syano And Tiva River” and which authorized the 7th and 8th respondents to harvest and transport sand of the amounts specified in the said letter and to transport through the routes stated therein.
84. The said letter further gave details of the Lorries belonging to the 7th and 8th respondents that were authorized to transport sand. The 1st and 2nd respondents were under a legal obligation to require the 7th and 8th respondent to comply with the law before engaging in sand harvesting within their area of jurisdiction. As stated earlier, the 4th respondent denied having received any application for an Environmental Impact Assessment license or an EIA report on sand harvesting activities by the 7th and 8th respondents; The 1st, 2nd, 7th and 8th respondents.
85. It was not shown that the 7th and 8th respondents made an application to the 4th respondent in the prescribed form and paid the requisite fee or that they submitted a project report. Neither has it been



shown that they submitted the report to the 4th respondent. Submission of a report to the 1st and 2nd respondent in my view cannot be a substitute or alternative to submissions to the 4th respondent. From the foregoing, I am of the view that the legal framework and governance structure for the control, regulation of sand harvesting exists but the 1st, 2nd, 4th and 7th and 8th respondents failed, neglected and or refused to adhere and comply with them.

86. The petitioners further claim that there was no public participation. If as the 4th respondent stated was no EIA report submitted to them it can only be concluded that there was no public participation prior to the authorization of sand harvesting and transportation. Public participation is a constitutional imperative provided for as one of the national values and principles of governance include under article 10(2)(a) of the *Constitution*.
87. One of the key reasons for conducting an EIA is public participation, especially from the people who are likely to be affected by such a project. In the case of *Francis Chachu Ganya & 4 Others v Attorney General & Another* [2013]eKLR:
- “Article 10(2) of the *Constitution*, national values includes participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views.”
88. Similarly relied upon by the petitioners is the holding in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* [2013] eKLR.
- “However, despite stating that the community has been engaged, no documents were displayed by the respondents to show any engagement with the community. Public participation is an important component of environmental management. This is indeed enshrined in the *Constitution* at article 69(1)(d) which provides that the State “shall encourage public participation in the management, protection and conservation of the environment”. No sort of public participation has been demonstrated by the respondents apart from stating that 60 community scouts were hired from Esageri CFA.”
89. The petitioners contend that they were not consulted when the 1st and 2nd respondents gave permission to the 7th and 8th respondents for harvesting and transporting sand from Tiva River. Further, they contend that after banning the said activities, the 1st and 2nd Respondents lifted the ban without any consultation.
90. Public participation is further provided for under Part VI of the *Environmental Management and Coordination Act* (EMCA) which elaborately outlines the process to be undertaken when conducting an EIA. The process begins with a proposal application and a license to undertake the project. A project notice is to be published in the Kenya Gazette and at least two newspapers circulating in the area or proposed area of the project and over the radio. The notice is required to give details of the project and extend invitation to the public for oral or written comments on the said project. If this process is not followed, in my view, it cannot be said that any resultant EIA followed the law. The 1st, 2nd, 7th and 8th respondents did not show that this process was followed.



91. Section 63 of the *EMCA* Act provides that:

“The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management.”

92. As can be seen from the foregoing, the procedure for obtaining an EIA licence is elaborate and detailed and is aimed at finding out whether or not a programme, activity or project will have any adverse impacts on the environment. No EIA license was adduced in evidence by the 7th and 8th respondents as having been issued by the 4th respondent. This brings about the question of legitimacy of the EIA report that the 1st and 2nd respondents and the 7th and 8th respondents have presented before the court and relied upon.

93. The *Environmental (Impact Assessment and Audit) Regulations, 2003* regulation 3 provides for Approval of environmental impact assessment and states that;

No proponent shall implement a project—

- (a) likely to have a negative environmental impact; or
- (b) for which an environmental impact assessment is for which an environmental impact assessment is required under the *Act* or these Regulations, unless an environmental impact assessment has been concluded and approved in accordance with these Regulations.

- (a) likely to have a negative environmental impact; or

- (b) for which an environmental impact assessment is for which an environmental impact assessment is required under the Act or these regulations, unless an environmental impact assessment has been concluded and approved in accordance with these Regulations.

(2) No licensing authority under any law in force in Kenya shall issue a licence for any project for which an environmental impact assessment is required under the Act unless the applicant produces to the licensing authority a licence of environmental impact assessment issued by the Authority under these regulations.

(3) No licensing authority under any law in force in Kenya shall issue a trading, commercial or development permit or license for any micro project activity likely to have cumulative significant negative environmental impact before it ensures that a strategic environmental plan encompassing mitigation measures and approved by the Authority is in place.

94. From the foregoing regulations it is clear that any project implementation, issuance of any license or trading permit for sand harvesting by the 1st and 2nd respondent to the 7th and 8th respondents without first producing to the licensing authority (1st and 2nd respondent) a license of environmental impact assessment issued by the Authority under the said Regulations was prohibited by the law.



95. In the case of *Francis Ngigi Macharia & 67 others v National Environment Management Authority* [2018] eKLR the court dealt with the question of production in court of an approved Environmental Impact Assessment (EIA) study report and stated that;

“ Even if the petitioners were licensed to harvest and transport sand, which they were not, section 30 of the *Environmental Management and Co-ordination Act* (EMCA) provides that the County Environment Committee shall be responsible for the proper management of the environment within the county for which it is appointed. The said management includes monitoring and controlling the way natural resources are exploited to ensure that the exploitation of such resources is done sustainably and in accordance with the law. 15. Section 58 of the *Environmental Management and Co-ordination Act* (EMCA) also provides that notwithstanding any approval, permit or license granted under the Act, any proponent of a project specified in Schedule 2 shall, before commencing such a project, undertake a full Environmental Impact Assessment Study and submit an Environmental Impact Assessment Study report to the respondent prior to being issued with a license.

Sand harvesting is a project which is usually located within rivers and requires an Environmental Impact Assessment Study to be undertaken before any license can issue. In view of the fact that the petitioners did not produce any approved Environmental Impact Assessment (EIA) study report; they cannot claim that the harvesting of sand that they were undertaking was being undertaken on licensed sites. 17. Consequently, it is the finding of this court that it is the mandate of the respondent, pursuant to article 69 of the Constitution and section 30 of the *Environmental Management and Co-ordination Act* (EMCA) to ensure that the natural resources of this country, including sand, are conserved and are sustainably exploited. In the absence of the approved Environmental Impact Assessment (EIA) study reports in respect of the purported sand harvesting sites that the Petitioners claim they are entitled to, I find that the petition before me lacks merit. The petition dated February 13, 2012 is therefore dismissed with costs.”

96. In my view the letter relied on by the respondents dated May 15, 2020 depicting authorization to harvest and transport sand from Mwita Syano and Tiva River is not a licence and the said authority was granted without following the laid down procedure and the same is illegal. The 1st and 2nd respondents are authorized to issue trading permits and other licenses but the law prohibits them from issuing permits, licenses or authority to persons harvesting sand without first having been shown a license from NEMA.
97. Apart from compliance with the provisions of the *Environmental Management and Co-ordination Act*, a proponent of a project involving sand harvesting must also comply with The National Sand Harvesting Guidelines, 2007. The guidelines are secondary legislation formulated under section 42(2) of the *Environment Management and Coordination Act* of 1999 and they apply to all sand harvesting activities in Kenya and provide procedures to streamline the activity countrywide with a view of making it a sustainable industry that supports economic development for enhanced livelihood while safeguarding the environment.
98. JO Olola, J in the case of *George Karisa Fondo & 19 others v Said Ali Omar & 17 others* [2021] eKLR highlighted the requirement to adhere to the National Sand Harvesting Guidelines, 2007 noting that:

“ In recognition of such harmful consequences, article 69(1)(a) of the *Constitution* requires the state which is represented herein by the 14th to 18th Respondents to ensure sustainable exploitation, utilization, management and conservation of the environment and natural



resources as well as to ensure the equitable sharing of the accruing benefits. In this respect and to its credit, the 18th Respondent has come up with the National Sand Harvesting Guidelines, 2007 which require every County where sand harvesting activities take place to establish a Technical Sand Harvesting Committee. That Committee is under the Guidelines mandated to ensure that sand dams and gabions are constructed in designated sand harvesting sites; that lorries are using designated access roads only to access the sites and that the said sites are rehabilitated appropriately.”

99. The 1st and 2nd respondents have not claimed and neither have they produced any evidence indicating compliance with the National Sand Harvesting Guidelines, 2007. Some of the key features of the Guidelines is that it establishes the Technical Sand Harvesting Committee (TSHC) whose main mandate is to be responsible for the proper and sustainable management of sand harvesting within the County, designate sand harvesting sites, ensure that sand dams and gabions are constructed in designated areas, designate sand transportation roads, ensure EIA/EA are undertaken, undertake dispute resolution, fix minimum sand prices, monitor restoration of sites and allocate areas to the Riparian Resource Management Association (RRMA).
100. The Guidelines further establish a Riparian Resource Management Association (RRMA) which comprises community leaders with the mandate to require EIA before sand harvesting operations start, annual environmental audits, sustainable management, provide access to sites, collection of revenues to be employed in rehabilitation of sites and revenue sharing with the community.
101. The guidelines place responsibilities on sand dealers and transporters to comply with them and the law and identify the social impacts of sand harvesting. They also ban child labour, require fair wages, the organization of loaders for self- regulation and establish a revenue sharing mechanism.
- The guidelines require sand harvesting to occur in designated areas only and under an environmental management plan. They provide for Farm, Lakeshore/Seashore and Riverbed sand harvesting as follows: it shall not exceed six (6) feet in depth, on-farm sand harvesting must be carried out at designates sites with a buffer zone of at least 50 meters from the riverbanks or dykes for, restoration will be undertaken concurrently with harvesting and under guidance from the Technical Sand Harvesting Committee, open-cast harvesting is recommended and underground tunneling must employ appropriate extraction technology to safeguard human safety.
102. Riverbed sand harvesting is banned on riverbanks and must be carried out in designated sites, must retain adequate reserves of sand to ensure water retention and maintain a buffer zone of 100 metres from any infrastructure.
103. The Guidelines require any person who wishes to remove and/or transport sand to obtain a written approval from the District Environment Officer, NEMA and they bar harvesting or transporting sand during the night.
104. In the case of *Moffat Kamau & 9 others v Aelous Kenya Limited & 9 others* [2016] eKLR, the court dealt with failure to follow procedures put in place for protection of the environment and stated;

“It has been my view, which I still hold, that where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. I cannot put it any better than I did in the case of *Ken Kasinga v Daniel Kiplangat Kirui & 5 others*, (*Supra*) where I stated as follows at paragraph 73 of the judgment: - “I am prepared to hold that where a procedure for the protection of the environment is provided by law and is not followed, then an assumption ought to be drawn that the project is one that violates the right to a clean and healthy



environment, or at the very least, is one that has potential to harm the environment. This presumption can only be rebutted if proper procedure is followed and the end result is that the project has been given a clean bill of health or its benefits are found to far outweigh the adverse effects to the environment.”

105. The petitioners have further complained that the 1st, 2nd, 3rd and 4th respondents violated their constitutional rights by failing to pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvestings in Kitui County.
106. Section 29 of the EMCA establishes the County Environment Committees whose functions are to be responsible for the proper management of the environment within the county for which it is appointed, develop a county strategic environmental action plan every five years; and perform such additional functions as are prescribed by the Act or as may, from to time, be assigned by the Governor by notice in the Gazette.
107. The petitioners showed evidence that on September 25, 2018, at a sitting of the County Assembly of Kitui it was resolved as follows;
 1. HE The Governor of Kitui County should lift the ban on transportation and sale of sand outside the geographical boundaries of Kitui County for sand deposited on farms located near the riverine areas along Athi, Tiva and other rivers in Kitui County during April May 2018 floods, for a period of 3 months to enable land reclamation.
 2. The Committee on Environment and Natural Resources should come up with a legal framework to regulate sand harvesting in the county in furtherance of the legislative authority vested on this house by article 185 of the Constitution.
108. The petitioners claim that as a result of the above resolution the Committee on Environment Energy and Mineral Investments Development went on a bench marking exercise on sand harvesting in Makueni and Kajado Counties where Makueni County has enacted the Makueni Sand Conservation and Utilization Act, 2015 and came up with a report. The 1st and 2nd respondents in the answer to the petition state that they are in the process of enacting laws that govern, regulate and control sand harvesting and other forms of mining in Kitui and that they only require time to have the Bill enacted. They have attached the Kitui County Mining, Investment and Management Policy, 2021 but it is not clear if the policy has been presented to the County Assembly or passed.
109. It thus appears that the 1st to 3rd respondents admit that there exists a gap in the legal and institutional framework on sand harvesting and other mining activities in River Kiva and Kitui County as a whole that may have led to the infringement of the Petitioners’ and others’ right to a clean and healthy environment under the Constitution.
110. Although the 1st respondent informed the court that it had published a Gazette Notice banning the transportation of sand outside the county, the said Gazette Notice does not in itself satisfy the requirements of the law as relates to any of the procedure for ensuring that a project involving sand harvesting is sustainable. Indeed, the said gazette notice is what the Petitioner calls knee jerk reactions that do not offer any lasting solutions to the problems caused by sand harvesting as it does not amount to a law or a regulation.
111. It is for this reason that article 42 of the Constitution obligates the State, including the 1st, 2nd and 3rd respondent, to protect the right to a clean and healthy environment through legislative measures, which the 1st and 3rd respondents have failed to do. In prayer (f) of the petition, the petitioners claim for general damages.



112. In prayer (f) of the petition, the petitioners claim general damages. The court in *Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others* [2019] eKLR discussed the principles applicable in deciding whether or not to award damages for constitutional violations and stated;

“The principles applicable to award of damages for constitutional violations under the Constitution were exhaustively discussed by the Privy Council in the famous case of *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004 wherein it was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.

113. In the case of *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR while the court found that it is well settled that an award of compensation against the state is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution, it also found that the award of damages would be available when it is the only practicable mode of redress available; The court stated;

“It is well settled that an award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. In principle, constitutional damages as a relief separate and distinct from remedies available under private law is competent. This is because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

114. Award of damages entails exercise of judicial discretion which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion. [63] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the court. The following principles clearly emerged from decided cases; [64]

- i. Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;
- ii. Such claim is distinct from, and in addition to remedy in private law for damages for tort;
- iii. This remedy would be available when it is the only practicable mode of redress available;
- iv. Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.

115. Legal precedents show that an award of damages is discretionary depending on the circumstances of each case, in my view, the Petitioners adduce evidence to guide the court on their individual claim to damages. They did not demonstrate how the sand harvesting activities on River Tiva have directly,



negatively impacted them. The petitioners stated that their farms have suffered soil erosion and as a consequence their productivity and production have gone down. They claim for reparations and/or compensation. The petitioners have not shown that they own land near the river that has been affected by the sand harvesting. In my view and in the circumstances of this case, declaration of right in this case will suffice as a vindication of the petitioners' rights and the more practicable remedy in the circumstances of this case is restoration of the River Tiva and an order directing compliance with the law in the sustainable use and exploitation of sand in the relevant areas.

116. On prayer (e) of the petition, the petitioners have not proven that underage children have been undertaking the sand harvesting activities. Even though this is a constitutional petition, the burden of proof is still upon the petitioners. The Court of Appeal in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR stated as follows with regard to the burden of proof:

117. On prayer (d) of the petition on access to information, the petitioners contend that they sought from the 1st, 2nd, 4th, 5th and 6th respondents information as contained in their letters dated August 7, 2020 and duly served on the said respondents and the same was not provided in contravention of article 35 of the *Constitution of Kenya, 2010* on access to information. The said respondents have not responded substantively to the claim and the same is found to have been admitted to be true. The said respondents are thus in violation of article 35 which states;

Every citizen has the right of access to –

- (a) information held by the State; and
- (b) information held by another person and required for the exercise or protection of any right or fundamental freedom

118. The petitioners claim that the respondents have violated their rights under article 10 of the *Constitution*. The article states that sustainable development is a principle provided for under article 10 of the *Constitution of Kenya 2010* on National values and principles of governance. All the national values and principles bind State organs, State officers, public officers and all persons whenever any of them apply or interpret the Constitution, enact, apply or interpret any law; or makes or implement public policy decision.

119. The respondents argued that the proceeds from sand harvesting from Tiva River is for the development of the County, and that the local community has immensely benefited from the said harvest. This contention may be true but the principle of sustainable development requires that environmental considerations should be at the center of all development. Angote J in this case *John Muthui & others v County Government of Kitui* (*Supra*) stated as hereunder with regard to the principle of sustainable development;

“Under Section 2 of the *Environmental and Management Co-ordination Act*, sustainable development is defined as follows:

“sustainable development” means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.”

In the case Concerning the *Gabcikovo-Nagymaros Project, (Hungary v Slovakia)*, 1997 WL 1168556 (ICJ), it was held as follows:

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon



the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed [and] set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular, they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.”

120. The court in *John Muthui case* (Supra) continued to state that sustainable development reaffirms the need for both development and environmental protection, and neither can be neglected at the expense of the other. The principle ensures that environmental considerations are integrated into economic and other development plans, programmes and projects. It also demands a balance between development and environmental protection.
121. The respondents stated that before the petitioners filed the petition, it was necessary for them to engage an audit of the existing environment around the river and present a situational analysis of the same as the basis of their complaints; that it is only an audit report by an expert that would convince the court about the petitioners complaints and that the main objective and motive of the petitioners herein in filing this petition was to secure temporary orders to scuttle their business because they (the transporters) have refused to work with them, and to frustrate the other registered group. However, the court is satisfied that the respondents did not follow the law in engaging in sand harvesting long River Tiva. The court in exercising its jurisdiction is guided by the precautionary principle as a principle of sustainable development as provided under section 3(5)(f) of *EMCA* and section 18(e) of the *Environment and Land Act* No 19 of 2011.
122. In the case of *Halai Concrete Quarries & others v County Government of Machakos & others*, Machakos ELC Petition No 19 of 2020. The court espoused the meaning of the precautionary principle as given in the

‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ (Rio Declaration on Environment and Development, 1992).

Central to the precautionary principle is the element of anticipation, reflecting a need for effective environmental measures to be based upon actions which take a longer-term approach. The principle evolved to meet the evidentiary difficulty caused by the fact that information required to prove a proposition may be in the hands of the party causing or threatening the damage to the environment. Waiting for scientific proof regarding the impact of the pollutants discharged into the soil, water and air from the impugned dump site could result in irreversible damage to the environment and in human suffering.”

123. In this case the court is satisfied that there are threats of serious or irreversible damage to the environment due to the sand harvesting activities that has been going on without legal regulation and any lack of full scientific certainty shall not be used as a reason for postponing cost-effective



measures to prevent environmental degradation. This court cannot therefore wait for scientific proof regarding the impact of sand harvesting on Tiva River as this could result in irreversible damage to the environment and in human suffering. Consequently, I am of the view that any economic setbacks that may result due to orders of this court cannot outweigh the environmental imperatives of Tiva River. The Respondents have the responsibility of abiding by the National Guidelines on Harvesting of Sand and the *Environmental Management and Co-ordination Act*, and enacting a law or regulations to ensure that there is sustainable exploitation of sand from Tiva River.

124. In my opinion, the respondents herein have evidently failed to comply with existing the laws and guidelines pertaining to harvesting of sand from Tiva River. The 3rd respondent has also failed to pass laws and regulations which will regulate the exploitation of sand from Tiva River in an unsustainable manner within the County of Kitui. There is therefore a large gap in management and regulation of sand harvesting activities in River Tiva, and there is need to address this.
125. It is noted that though the 7th and 8th respondents have been beneficiaries of the sand harvesting and transportation that has been carried out without the required regulation most of the prayers in the petition particularizing the orders sought do not substantively touch on them.
126. For the foregoing reasons this court allows the petition dated September 11, 2020 and makes the following orders;
 - A. declaration be and is hereby issued that the 1st, 2nd, 3rd and 4th Respondents have violated article 10 of the *Constitution* in the manner in which they have dealt with issuance of permits, licenses and allowed sand harvesting activities in Tiva River in Kitui County especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
 - B. A declaration be and is hereby issued that the 1st, 2nd, 3rd and 4th respondents have infringed and violated the constitutional rights of the petitioners as persons living in Ndumoni, Tanganyika, Nyanyaa and Tiva areas as provided in article 42 of the *Constitution* by failing to follow the existing laws and guidelines and/or pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvesting in Kitui County.
 - C. A declaration that the 1st 2nd 3rd and 4th respondents have violated the provisions of articles 60(1)(c), 60(1)(e), 69(1)(a), 69(1)(f), 69(1)(g), 69(1)(h), 69(2) and 201(a) of the *Constitution* in the manner they have handled and dealt with sand harvesting activities on Kitui especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
 - D. A declaration that the 1st, 2nd, 4th, 5th and 6th respondents have violated the petitioners' rights under articles 35(1) and (b) of the *Constitution* by failing to supply information requested for vide the petitioner' advocates' letters dated 7-08-2020 and an order is hereby issued directing the said respondents to supply the information requested within ninety days from the date of judgement.
 - E. A declaration is hereby made that the petitioners are entitled to participate in making, formulating, developing of laws, rules, regulations and guidelines to govern sand harvesting activities in Kitui County.
 - F. An order is hereby issued directed at the 1st, 2nd, 3rd and 4th respondents to comply with the *Environmental Management and Co-ordination Act* No 8 of 1999, The National Sand Harvesting Guidelines and all other provisions of the law regulating harvesting and transporting of sand and a report on compliance be filed in court within ninety days from the date of judgement. The said report to include measures taken to rehabilitate and restore the River Tiva in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County.



- G. Conservatory orders be and are hereby issued restraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources more particularly sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County pending filing of the reports herein.
- H. Prayers e) and f) of the petition dated September 11, 2020 are disallowed.
- I. Costs of the petition are awarded to the petitioners to be paid jointly and severally by the 1st, 2nd, 3rd, 4th, 7th and 8th respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF FEBRUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki: Court Assistant

B. M. Musyoki for the petitioners

Azangalala holding brief for Katunga Mbuvi for 1st and 2nd respondents

Nyawira for the 5th and 6th Respondent

