SUBJECT : COMPENDIUM OF JUDGMENTS FOR THE YEAR 2024-2025

1. Honourable Attorney General & Another vs CAJ as Respondent

Case Metadata	
Case No :	Civil Appeal No. 7 OF 2018
Date delivered:	20th September, 2024
Case Class :	Civil
Court:	Court of Appeal
Case Action:	Judgment
Judge(s) :	M.A Warsame, S. Ole Kantai & P. Nyamweya
Citation :	Honourable Attorney General & Another vs CAJ
Court Division:	Constitution and Human Rights Division
County:	Nairobi
Case Outcome:	The Court Ordered that, the impugned guidelines were unreasonable and disproportionate. The court further affirmed and upheld the Order of certiorari issued by the High Court in the said Judgment to quash the Motor insurance underwriting Guidelines issued by IRA under Circular No. IC 07/2009 dated 20/11/2009 for this reason.

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 7 OF 2018

MA WARSAME, S OLE KANTAI & P NYAMWEYA, JJA

SEPTEMBER 20, 2024

BETWEEN

THE HONOURABLE ATTORNEY GENERAL……1ST APPELLANT

THE INSURANCE REGULATORY AUTHORITY……..……..2ND APPELLANT

AND

THE COMMISSION ON ADMINISTRATIVE JUSTICE……..RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (J.M. Mativo J.) (as he then was) dated 20th March 2017 in Nairobi Constitutional & Human Rights Petition No. 622 of 2014.)

JUDGEMENT

2. The appeal arises from a judgment by the High Court of Kenya at Nairobi (Mativo J.) (as he then was) delivered on 20th March 2017 in Nairobi Constitutional & Human Rights Petition No. 622 of 2014, that found merit in a petition that had been filed therein by the Commission on Administration of Justice, the Respondent herein *(hereinafter "CAJ")*. The High Court found that the Insurance Regulatory Authority, the 2nd Appellant herein (hereinafter "IRA"), acted outside its statutory power in issuing Motor Insurance Underwriting Guidelines, and that the said guidelines had not been gazetted, and did not therefore have the force of law. The High Court accordingly entered judgments in terms of the following orders:
    a. . A declaration that Motor Insurance Underwriting Guidelines issued by IRA under Circular No. IC 07/2009 dated 20th November 2009 are illegal, unconstitutional and therefore null and void for all purposes.
    b. A declaration that IRA had no legal, statutory and or constitutional mandate to issue Motor Insurance Underwriting Guidelines under Circular No. IC 07/2009 or any other similar guidelines.
    c. An order of certiorari to quash the Motor Insurance Underwriting Guidelines issued by IRA under Circular No. IC 07/2009 dated 20th November 2009.
    d. That IRA pays the costs of the petition to CAJ.
3. The Attorney General (the 1st Appellant herein) and IRA are aggrieved with the said judgment and lodged the instant appeal, in which they seek to set it aside. The said appellants have raised eight (8) grounds of appeal in a Memorandum of Appeal dated 9th January 2018 and lodged on 10th January 2018, namely:

1) The learned Judge erred in fact and in law by finding that IRA had no statutory power to issue the Motor Insurance Underwriting Guidelines issued under Circular No. IC 07/2009 dated 20th November 2009.
2) The learned Judge erred in law and fact in departing from the findings of a Court of equal jurisdiction. The issue had been litigated and contrary decision reached in Mombasa High Court Misc. Application no. 89 of 2010- Republic v the Insurance Regulatory Authority ex parte Kenya Transport Association, Mombasa branch.
3) The learned Judge erred in law in allowing the legality of the guidelines to be litigated in a manner that amounted to an appeal.
4) The learned Judge erred in law in finding that IRA had no powers to issue the guidelines without finding fault with the sections of the Insurance Act that donated those powers.
5) The learned Judge erred in quashing the guidelines after making a finding that IRA, as a regulator, had power to ensure effective regulation, enforce standards and ensure the financial solvency of insurance companies.
6) The learned Judge erred in finding that the guidelines did not meet the reasonableness, legality and proportionality test.
7) The learned Judge erred in law and fact in quashing the guidelines which would prejudice IRA's statutory and regulatory powers and cause prejudice to the public interest.
8) The learned Judge erred in law in finding that the guidelines did not have the force of law yet they were issued as administrative circulars under the Insurance Act.

4. We shall commence with a brief background of the appeal. CAJ's claim in the High Court was that on or about 20th November 2009, in purported exercise of the statutory powers and mandate of regulating and prescribing standards for the insurance industry, IRA issued to all insurance and reinsurance companies a Circular No. IC 07/2009 headed 'Motor Insurance Guidelines', in which it gave a wide ranging directive which set the prices of premiums which all commercial insurance companies in the insurance industry would charge the Kenyan public in respect of all forms of motor insurance cover and services provided. According to CAJ, the effect of the guidelines was that they constituted price fixing; supported monopolistic and cartel behaviour; outlawed competition and the free inter play of market forces thereby eliminating choices; and were ultra vires IRA's statutory mandate which did not

extend to fixing prices. Additionally, the purported guidelines also meant that there was no computation in terms of prices for the provision of motor insurance cover, thereby killing incentive in the provision of quality and affordable services.

5. It was CAJ's claim that the guidelines were in violation of the economic, social and consumer rights of Kenya provided in Article 43, 46 and 47 of the Constitution, and the right to fair administrative action provided in Article 47 and were also discriminatory to the extent that they gave special rights and privileges and treatment to one commercial interest group. They stated that although the matter was previously unsuccessfully litigated in Mombasa H.C. Misc. App. No. 89 of 2010 - Kenya Transport Association Mombasa vs Insurance Regulatory Authority ex parte Republic, it was not framed as a constitutional dispute, and the current Constitution had also not been promulgated. IRA pleaded that the guidelines were contrary to the current Constitution, the Insurance Act and the Insurance Amendment Act No. 11 of 2008 and the Price Control Act and Monopolies Act and the Consumer Protection Act and were therefore unconstitutional, unlawful, and null and void ab initio.
6. The Attorney General and IRA opposed the petition by way of a replying affidavit sworn on 29th September 2016 by Sammy Mutua Makove, the then Commissioner of Insurance and IRA's Chief Executive Officer. His position was that the Price Control Act and the Monopolies Act were unknown in law and therefore incapable of being violated; price fixing and monopolies are instead prohibited under the Competition Act, 2010, which CAJ had not specifically pleaded; even if it were pleaded, the Competition Act, 2010 did not apply in the circumstances of the case because IRA did not engage in trade; that industry price regulation which is aimed at stabilizing the industry to the benefit of consumers is neither a consumer right under Part II of the Consumer Protection Act, 2012 nor an unfair trade practice under Part III thereof; and that IRA was neither a competitor nor an active provider engaged in underwriting of insurance business, rather it was a statutory regulatory body established under section 3A of the Insurance Act, for the purposes of ensuring the effective administration, supervision, regulation and control of insurance and reinsurance in Kenya.
7. It was IRA's assertion that the guidelines were not a strategy to restrict competition, and only set minimum premium rates to be charged by insurance companies, to mitigate against underwriting losses and risk exposures due to application of the previous motor vehicle insurance rating based on flat rate, and to avoiding undercutting. Furthermore, the alleged abuse of Article 27, 43, 46 and 47 of the Constitution was

imprecise and lacked sufficient details of the alleged violations, and that the said Articles did not have retrospective effect and application, since the impugned guidelines came into force before the promulgation of the Constitution of 2010. While making reference to the objects and functions of the IRA as spelt out in section 3A of the Insurance Ac, it was further contended that the mandate therein included the power to control, formulate, regulate and enforce standards for the conduct of insurance and reinsurance business in Kenya, as well as to issue supervisory guidelines and prudential standards.

8. The IRA additionally made reference to the findings of an actuarial investigation into the Kenyan motor insurance industry commissioned by the Association of Kenya Insurers (AKI) in 2008, and the challenges identified as be devilling the Kenya motor insurance industry including underwriting losses, which it stated formed the basis and rationale to introduce measures to stabilize the motor insurance sector and the impugned guidelines on 20th November 2009. It was IRA's conclusion that the guidelines were not only made lawfully and within its powers, but also in the best interest of the wider public. In particular, that the guidelines stabilized the insurance industry by significantly reducing the risk of collapse of insurance companies; and increased business and the performance of the insurance companies thus enabling the insurers to pay the insurance claims as contracted.

After hearing the parties, the learned trial Judge found that IRA acted outside its statutory powers held as follows: "*My reading of the provisions of the Insurance Act is that the functions of the first Respondent (IRA) are: -to ensure effective regulation, supervision; development of insurance in Kenya; to formulate and enforce standards; to issue licences; to protect the interests of insurance policy holders and insurance beneficiaries; to promote the development of the insurance sector; to ensure prompt settlement of claims; to investigate and prosecute insurance fraud. In my view, regulation entails ensuring that players comply with the provisions of the Insurance Act. Supervision means the oversight function the first Respondent exercises over the operations of insurance companies. Among the supervisory functions are; Ensuring the viability of applications for licensing, ensuring that all board members are fit & proper, ensuring that all senior management staff fit & proper, ensuring that insurers have adequate capital at all times, approval of insurance products, inspection, investigation, analysis of accounts and returns, intervention and withdrawal of licenses among others. From the foregoing explanation derived from my interpretation and understanding of the provisions of the statute on what regulation and supervision entails, I find*

nothing to suggest, even in the slightest manner that regulation and supervision entails setting prices. I find no express or implied mandate in the statute to suggest that the first Respondent had powers to issue the said guidelines."

9. These findings are the genesis of this appeal, which we heard on this Court's virtual platform on 29th January 2024. Learned counsel Miss Mwangi appeared for the Attorney General and IRA, while learned counsel Mr. Weche who appeared for the CAJ, informed the Court that he did not have instructions to prosecute the matter on appeal. We declined to adjourn the hearing, after noting that this appeal was filed in 2018, and Mr. Weche had not filed any notice to withdraw from acting.

10. In commencing our determination of the appeal, we are mindful of our duty as set out in Selle & Another vs Associated Motor Boats Co. Ltd & Others (1968) EA 123, namely, to reconsider and evaluate the evidence, and draw our conclusions of fact and law. Additionally, we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in Jabane vs Olenja (1986) KLR 661; or where its discretion was exercised injudiciously as held in Mbogo & Another vs Shah (1968) EA 93.
11. The counsel for the Attorney General and IRA identified six (6) issues for determination in written submissions dated 3rd May 2022. These issues can be collapsed to one issue, namely whether IRA acted outside its statutory powers when it issued the impugned guidelines. It was counsel's assertion that section 3A (a), (b), (d) and (g) of the Insurance Act empowered IRA to control, formulate regulate and enforce standards for conduct of insurance and reinsurance business in Kenya as well as issue supervisory guidelines and prudential standards, and that it was common ground that the said section was not declared unconstitutional by the trial Court except for the guidelines that were issued. Counsel placed reliance on the decision by Ibrahim J. (as he then was) in the case of Mombasa High Court Misc. Application No. 89 of 2010- Republic vs The Insurance Regulatory Authority exparte Kenya Transport Association, Mombasa, Kenya, where the learned Judge found that IRA had powers to issue the same guidelines.
12. Therefore, that the learned trial Judge erred by allowing the issue of legality of the guidelines to be re-litigated and arriving at different finding and holding that IRA had no powers to issue the guidelines. Additionally, that the conduct and holding of the trial Judge amounted

to sitting on an appeal of a judgment from a Court of concurrent jurisdiction. Reference was made to the holding by this Court in Peter Ng'ang'a Muiruri vs Credit Bank Ltd & 2 Others, Civil Appeal No. 203 of 2006, that a Judge of concurrent jurisdiction could not supervise fellow judges. Counsel contended that the issue of the guidelines being in line with the Insurance Amendment Act had equally been well settled by Ibrahim J. (as he then was) in Mombasa High Court Misc. Application No. 89 of 2010 - Republic vs the Insurance Regulatory Authority ex parte Kenya Transport Authority, Mombasa Branch.

13. Lastly, counsel submitted that the reason for the guidelines was to ensure motor vehicles insurance claims were paid and motor insurance companies stay afloat, which is in the best interest of the public. IRA therefore met the proportionality and reasonableness test in issuing the guidelines, and which were for a legitimate purpose in fulfilment of its mandate under section 3A of the Insurance Act.
14. It is not in dispute that section 3A of the Insurance Act provided that the powers of IRA included ensuring the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya, and issuing supervisory guidelines and prudential guidelines from time to time, for the better administration of the insurance business of persons licensed under the Act. The singular question which we need to address is whether the said provisions empower IRA to set the premiums to be paid for various insurance covers by insurance companies. In the decision by Ibrahim, J. in Mombasa High Court Misc. Application No. 89 of 2010 - Republic vs the Insurance Regulatory Authority ex parte Kenya Transport Authority, Mombasa Branch, the learned Judge dismissed a suit that had challenged the same guidelines made by IRA, and his view on this issue was as follows: *"It is clear to me that the Respondent has powers under section 3A to formulate and enforce standards for the conduct of insurance and re-insurance business in Kenya"*. Such standards can definitely include prices for services. If the problem is undercutting and market forces have failed then regulation comes in. This is the economic reality that all public administrators must live with. It is good to place faith in the invisible hands of the markets but they can fail at times. When they fail, regulation moves in to fill the vacuum Of course there are those who will feel that regulation unnecessarily constrains freedom of the markets but on the other hand others will unload the public body for being bold to regulate. The interpretation contended by the ex parte Applicants is too restrictive to fulfill the intention of the legislature. Regulation in terms of setting minimum prices is not strange to the insurance service industry alone. I am familiar with

the Advocates Remuneration Order which contains provisions for minimum fees payable to Advocates. Similar provisions are to be found in the Architects and Quantity Surveyors Act."

15. It is settled law that a statutory body may only act within the scope of the powers or duties conferred on it, and accordingly, where a body acts outside the powers which are prescribed for it, such an action is ultra vires and null and void. Likewise, a statutory body may interpret and determine the scope of its powers or duties incorrectly, and as a result, act beyond its powers. Put another way, a statutory body will act unlawfully if it incorrectly interprets a statutory provision as conferring on it a power or a duty to act, when such provision confers no such power or duty. See in this respect sections 12.05 to 12.07 of Judicial Review: Principles and Procedure (2013), by Jonathon Auburn, Jonathan Moffet and Andrew Sharland, and section 7(2)(a) (i) and (ii) of the Fair Administrative Action Act, which makes such actions or decisions reviewable by the Courts.
16. Given the differing interpretations of the term "regulation" in relation to the statutory powers of IRA in Mombasa High Court Misc. Application No. 89 of 2010 Republic vs The Insurance Regulatory Authority ex parte Kenya Transport Authority, Mombasa Branch and the decision appealed against, it is necessary to engage in a process of statutory interpretation of the said term to determine the first question before us, which is whether or not IRA acted within its statutory powers.
17. In interpreting a statutory enactment, a two stage approach is identified in Bennion on Statutory Interpretation, Fifth Edition at pages 548-592. The first is to decide, by applying the plain meaning rule or on an informed basis, whether or not there is a real doubt about the legal meaning of an enactment. There will be no doubt where the legal enactment is grammatically capable of one meaning only, or where there is no doubt as regards the grammatical meaning intended by the legislator. In discerning the intention of the legislator, the legislative history and the context of the statutory enactment is considered, including the mischief sought to be remedied by the enactment. If there is still doubt, then one moves on to the second stage of resolving the doubt by applying the various rules of statutory construction.
18. In the present appeal, the Insurance Act does not define the term "regulate" or "regulation". The Black's Law Dictionary, Ninth Edition in this respect defines regulation as "the act or process of controlling by rule or restriction". It is notable in this respect that section 3A (2) of the Insurance Act clarifies that the objects of the supervision of insurers and reinsurers by IRA shall be—a.to promote the maintenance of a fair, safe

and stable insurance sector; b. to protect the interest of the insurance policyholders and beneficiaries; and c. generally to promote the development of the insurance sector.

19. A contextual interpretation of the term regulation is therefore necessary in light of the objectives of the said section and of the Insurance Act, which is to regulate the business of insurance. Three means of insurance regulation are identified in an article on "Principles for Insurance Regulation: An Evaluation of Current Practices and Potential Reforms" by Robert W. Klein published in The Geneva Papers, (2012) Vol. 37, at pages 175–199. The first is solvency regulation, which is justified by the fact that it is costly for consumers to properly assess an insurer's financial strength in relation to its prices and quality of service, and insurers can also increase their risk after policy-holders have purchased a policy and paid premiums, which is a "principal-agent" problem that may be very costly and difficult for policy-holders to control.
20. The goal of optimal insurance solvency regulation therefore is to minimise or limit the social cost of insurer insolvency within acceptable parameters. The social cost in this respect is more than the lost equity of the insurer, and includes the effects on policy-holders and third parties who may be creditors of insurers. Regulators potentially limit insolvency risk by requiring insurers to meet a set of financial standards and taking appropriate actions if an insurer assumes excessive default risk or experiences financial distress.
21. The second means of insurance regulation is price regulation, which is meant to curb incentives to incur excessive financial risk and engage in strategies that may result in inadequate prices, thereby preventing consumers from buying insurance from carriers charging inadequate prices without properly considering the greater financial risk involved. Another justification for the restrictions on prices in the insurance sector is that since it is costly for insurers to ascertain consumers' risk characteristics accurately, insurers already entrenched in a market have an informational advantage and this may create barriers to entry that diminish competition. According to this view, the objective of price regulation is to enforce a ceiling that will prevent prices from rising above a competitive level and enabling insurers to earn excess profits.
22. The last means of regulation identified by the writer is that of market conduct regulation, in which regulates certain insurer market practices, such as product design, marketing and claims adjustment. This is because constraints on consumer choice and unequal bargaining power between insurers and consumers, combined with inadequate consumer information, can make some consumers vulnerable to

abusive marketing and claims practices of insurers and their agents. The industry therefore takes steps to mitigate market conduct problems through self-compliance measures and the establishment of a voluntary self-regulatory organisations.

23. Arising from these different types of regulation of the insurance industry, we find that the learned trial Judge did err, to the extent that he found that regulatory powers of IRA under section 3A of the Insurance Act does not entail setting prices. We also note that the learned trial Judge did not interrogate the constitutionality or otherwise of the impugned guidelines whether in substance or effect, to support the order finding them unconstitutional. This finding was therefore also in error to the extent that it did not have any basis.
24. Having found that the setting of premium prices was within the statutory powers of regulation of IRA under section 3A of the Insurance Act, the next question we need to answer is whether this was a rational, reasonable and proportionate exercise of its power. These grounds of review of actions and decisions by public bodies are provided in section 7 (2) (i), (k) and (l) of the Fair Administrative Action Act. A statutory body, even when acting within its powers, may still act unlawfully if its decision is irrational, unreasonable or disproportionate. Section 7 (2) (i) of the said Act provides that an administrative action or decision will be irrational where it is not connected to-
    i. the purpose for which it was taken;
    ii. the purpose of the empowering provision;
    iii. the information before the administrator; or
    iv. the reasons given for it by the administrator.
25. On the other hand, a decision or action is unreasonable if it is objectively devoid of any plausible justification that no reasonable body of persons could have reached it, whereas it will be disproportionate where it is not commensurate with or does not justify the desired outcome. This Court (Musinga, Gatembu & Murgor, JJ. A), while citing the English case of Associated Provincial Picture House Ltd vs Wednesbury Corporation (1947) 2 All ER 680, expounded on the tenets of unreasonableness in the case of ABN Amro Bank NV vs Kenya Revenue Authority [2017] eKLR as follows: "*It has frequently been used and is frequently used as a general description of the things that must be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters that he must consider. He must exclude from his consideration matters that are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, and often is said to be acting "unreasonably." Similarly, there must*

be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".

26. As regards proportionality, the Supreme Court of Canada explained in R v Oakes (1986) 1 SCR 103 that the measures adopted in a decision or action must be carefully designed to achieve the objective in question; should impair as little as possible any relevant rights or freedoms, and there must be a proportionality between the effects of the measures, and the objective. The explanation provided by IRA for taking the route of price regulation was that an actuarial investigation had identified challenges facing the Kenya motor insurance industry, including underwriting losses and that this formed the basis of the impugned guidelines. While it is the indeed the position as urged by the Attorney General and IRA that regulation is necessary to maintain insurer solvency, compensate for inadequate consumer knowledge, ensure reasonable rates, and make the payment of insurance claims possible, no particular reason was provided by IRA to justify price regulation as opposed to the other means of regulation as the most appropriate intervention and measure of stabilising the motor insurance sector.
27. This justification is particularly relevant in light of the consequences of price regulation in the insurance industry, which were described in the aforementioned article as follows: *"The reality is that in most states and markets, at a given point in time, regulators do not attempt to impose severe price constraints. The problem arises when strong cost pressures compel insurers to raise their prices and regulators resist market forces in an ill-fated attempt to ease the impact on consumers. Inevitably, severe market distortions occur. Ultimately, insurance markets can be sucked into a "downward spiral" as the supply of private insurance evaporates and state mechanisms are forced to cover the gap. Rate suppression also can decrease incentives to reduce risk that can lead to rising claim costs that further increases pricing and market pressures. Together, these developments can create major crises in the cost and supply of insurance."*
28. Additionally, the economic foundation for the different types of regulation is to prevent or address specific market failures, and in price regulation, the main justification is the existence of monopolistic providers of a service. As noted by the same writer: -"With respect to solvency, regulators should seek to prevent insurers from incurring excessive financial risk and limit the cost of insurer insolvencies. As for market conduct, regulators should take steps to discourage and sanction insurers and intermediaries that take unfair advantage of consumers, such as misrepresenting the terms of insurance contracts

and failing to pay legitimate claims. There appears to be little justification for the regulation of insurance prices in competitive markets in which entry/exit barriers are low or non-existent."

29. No evidence of such monopolies in the insurance sector was provided by IRA to justify the setting of premium prices. Lastly, comparative insurance regulatory frameworks, such as those in the United Kingdom and Australia, normally have three pillars. These are, firstly, prudential standards which set out minimum requirements in relation to capital, governance and risk management of the insurance companies; secondly, reporting standards which dictate the data that regulated entities must report on or provide and when this is to be done; and thirdly, the guidelines setting out practices and steps that the regulated entities should follow in order to comply with the prudential and reporting standards. Therefore, this method of regulation is pre- emptive and is designed to prevent problems emerging, rather than providing a means to take action after harm is caused.
30. From the foregoing analysis, it would have been more rational, reasonable and less costly for IRA to prevent a crisis or mitigate its impact, than to directly regulate the supply of insurance services through price fixing, especially given the likely market effects, and that no market justification was provided by IRA for this method of regulation. We therefore find that the price regulation by IRA through the impugned guidelines was not a rational, reasonable and proportionate form of regulation.
31. In conclusion, this appeal therefore partially succeeds with respect to the finding that IRA acted within its powers in issuing the impugned guidelines, in the exercise of its mandate of regulation of the insurance industry. We therefore set aside the following orders made by the High Court in the judgment delivered on 20th March 2017 in Nairobi Constitutional & Human Rights Petition No. 622 of 2014 :

a) A declaration be and is hereby issued declaring that Motor Insurance Underwriting Guidelines issued by the first Respondent under circular No. IC 07/2009 dated 20/11/2009 are illegal, unconstitutional and therefore null and void for all purposes.
b) A declaration be and is hereby issued declaring that the first Respondent had no legal, statutory and or constitutional mandate to issue Motor Underwriting Guidelines under circular No. IC 07/2009 dated 20/11/2009 or any other similar Guidelines."

32. We have however found that the impugned guidelines were irrational, unreasonable and disproportionate. We accordingly affirm and uphold the order of certiorari issued by the High Court in the said judgment to

quash the Motor Insurance Underwriting Guidelines issued by IRA under Circular No. IC 07/2009 dated 20/11/2009 for this reason.

33. We also note that the CAJ pleaded that it had filed the petition in the High Court in furtherance of its constitutional mandate and powers to investigate any act or omission in public administration and complaints of abuse of power by public bodies, and the petition was therefore brought in the public interest. We therefore order that each party bears their costs of the suit in the High Court and of this appeal in the circumstances.
34. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024
M. WARSAME……JUDGE OF APPEALS.
OLE KANTAI……JUDGE OF APPEAL
P. NYAMWEYA……JUDGE OF APPEAL
I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR.

2. Legal Advice Centre T/A Kituo Cha Sheria vs CS Ministry of Labour & Social Protection

	Case Metadata
Case No :	ELRP No. E038 OF 2023
Date delivered:	6th June 2024
Case Class :	Civil
Court:	Employment and Labour Relations
Case Action :	Ruling
Judge(s) :	Mathews Nderi Nduma
Citation:	Legal Advice Centre T/A Kituo Cha Sheria vs CS Ministry of Labour & Social Protection.
Court Division:	Employment & Labour Relations
County:	Nairobi
Case Outcome:	The Preliminary objections raised by the respondents challenging the jurisdiction of this Court to hear and determine the petition or the dispute are misconceived, lack merit and are dismissed. The petition to proceed on its merit before the ELRC as filed.

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E038 OF 2023

MN NDUMA, J
JUNE 6, 2024

BETWEEN

LEGAL ADVICE CENTRE T/A KITUOCHA SHERIA……1ST PETITIONER
HAKI JAMII RIGHTS CENTRE……2ND PETITIONER
JOHN NG'ANG'A MUIGAI……3RD PETITIONER
FEITH MURUNGA SHIMILA……4TH PETITIONER

EUNICE WANGUI NJENGA……..……..……5TH PETITIONER

CELESTINE MUSAVAKWA……..……..……6TH PETITIONER

PAULINE MUTHONI KARIUKI……..……..……7TH PETITIONER

MEDIA TRICKS KHASANDI……..……..8TH PETITIONER

LUCY WAIRIMU NG'ANG'A……..……9TH PETITIONER

HANNAH NJERI NGUGI……..……10TH PETITIONER

BRENDA ANYANGO……..……11TH PETITIONER

JANE WANJIKU KAGIMBI……..……12TH PETITIONER

CATHERINE MUTURI……..……13TH PETITIONER

PURITY MBOGO……..……..……..14TH PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF LABOUR & SOCIAL PROTECTION……..……1ST RESPONDENT

KENYA NATIONAL EMPLOYMENT AUTHORITY……..……2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS……..……3RD RESPONDENT

DIRECTORATE OF IMMIGRATION & REGISTRATION OF PERSONS……..……..…..4TH RESPONDENT

THE NATIONAL INDUSTRIAL TRAINING AUTHORITY (NITA)……..5TH RESPONDENT

THE SPEAKER NATIONAL ASSEMBLY……6TH RESPONDENT

THE SPEAKER SENATE……7TH RESPONDENT

THE ATTORNEY GENERAL……8TH RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE……1ST INTERESTED PARTY

THE ASSOCIATION OF SKILLED MIGRANT AGENCIES IN KENYA……2ND INTERESTED PARTY

KENYA ASSOCIATION OF PRIVATE EMPLOYMENT AGENCIES……3RD INTERESTED PARTY

RULING

1. The petition is opposed vide a notice of preliminary objection by the Attorney General and other respondents couched as follows:-
    a) .The court lacks jurisdiction to hear and determine the petition or the dispute does not fall under the ambit of Article 162(2) of *the Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, No. 20 of 2011.
    b) That the germaine issues raised in the petition fall under the ambit of Article 165(3) (b) of *the Constitution*.
    c) That the suit is frivolous vexatious and an abuse of the court process.
    d) That the suit be struck out with costs.
2. The gravamen of the petition is the documented violation of human rights of migrant – domestic and other workers in the Middle East countries which include Bahrain; Bangladesh; Iraqi; Jordan; Kuwait; Saudi Arabia and United Arab Emirates among others. That these violations have been widely aired in Kenyan and International media. That the violations are further captured by individual narratives by the petitioners, victims and families of victims of violation of human and labour rights in the Middle East which violations include:
    a. Physical psychological and sexual abuse.

b. Trafficking, confiscation of travel documents by agencies and employers
c. Confiscation of mobile phones and communication restriction.
d. Withholding of salaries.
e. Contract substitution/violation of terms of employment replacing agreed pacts with harsh conditions.
f. Food and sleep deprivation
g. Rape
h. Forced suicide,
i. Slavery and servitude,
j. Murder and
k. Imprisonment prior to deportation over cooked up charges among others.

3. That the report in 2019 by the Parliamentary Committee on Labour and Social Welfare found that close to 55,000 Kenyans are working in Saudi Arabia alone which number had increased to 97,000 as at September 2022 as reported in the local media.

4. That the rise in unemployment and under employment in Kenya has led to many Kenyans seeking greener pastures and an estimated 30,000 Kenyans migrate to the Middle East to work each year.

5. That most of the workers are recruited and shipped to their work stations through local and foreign private employment agencies based in Kenya and Middle East.

6. That the Agencies deceptively lure these job seekers with "high pay" promises in the Middle East where the job seekers are abandoned on low quality jobs and abusive employers where some end up dead in unclear circumstances others sexually abused, tortured, in prison, deported or missing.

7. That in acknowledgment of the outcry on the poor working conditions, harassment, mistreatment and even mysterious deaths, and disappearance of Kenyan migrant workers in foreign countries, especially and in regard to migrant workers in the Middle East Region, the 1st respondent in acknowledging the scope and severity of the abuse imposed a ban on recruitment of Kenyans to work in those regions from September 2014. Similarly in November 2014, the 1st respondent revoked all accreditation license to private employment agencies.

8. The ban was however lifted in 2016 and thereafter the cases of abuse and death have escalated with families calling on the government for assistance on behalf of distressed families.

9. That on 25/5/2017, Hon. Phylis Kandie, then a Cabinet Secretary, Ministry of East African Affairs, Commerce and Tourism signed a bilateral agreement

(BLA) between Republic of Kenya and the Kingdom of Saudi Arabia and United Arab Emirates. However, despite the BLA no adequate protection has been offered to the migrant workers.

10. On 22nd July 2021 the Ministry of Labour officials appeared before parliament surrounding the death of one Melvin Kang'ere who died in Saudi Arabian Prison where she was detained for allegedly threatening to kill her employer reveals that Kenya recorded 93 deaths and 1,908 distress calls between 2019 and 2021 from Kenyans working in the Middle East which report has prompted fresh calls for travel ban.

11. As a result of the abuse, the petitioners allege, the state violated their rights to freedom and freedom from slavery and servitude in allowing interalia, young unsuspecting Kenyan workers to be sent to the Middle East where they are trapped to servitude under the Kafala System (without adequate protection from the state) knowing too well that it is a system that the special rapporteur on human rights of migrants and human rights bodies have recommended for its abolishment amongst a myriad of documented atrocities set out under paragraphs f(1) (a), (2) (a) to (g) 3(a) to (d); 4(a) to (j); 5(a) to (f); 6(a) to (j) and 7(a) to (d).

12. That the respondents have violated Articles 10, 21, 25,26, 27(1); 28, 29, 30, 35 and 41 of *the Constitution* of Kenya 2010. That the respondents have violated sections 83, 84, 85, 86 of the *Employment Act*; 2007, under which is legislated necessary steps to be observed in procurement of a foreign contract of service and in particular section 83 provides:-"A foreign contract of service shall be in the prescribed form, signed by the parties thereto and shall be enlisted by a labour officer."

13. That under section 84, a labour officer shall not attest to a foreign contract of service unless the officer is satisfied that the employee has consented to the contract; that it has not been procured through fraud, coercion, undue influence, any mistake or misrepresentation which might have induced the employee to enter into the contract; that the contract is in the prescribed form; the provisions of the contract comply with the Act, and have been understood by the employee and that the employee is medically fit to perform duties under the contract during the term of the said contract.

14. That under section 85, the labour officer is enjoined to require a foreign employer to provide security by bond in the prescribed form, with one or more sureties resident in Kenya and approved by the labour officer for the due performance of the contract in such sums as the labour officer considers reasonable.

15. That when there is a local agent in Kenya procuring foreign employment, the Cabinet Secretary may require that the security bond specified under section 85 (1) be given by the agent and the agent shall be personally

bound by the terms of the bond notwithstanding the disclosure of the principal.

16. Finally, section 86, makes it an offence for a person to induce another to proceed abroad under informal contract to work and such a person if found guilty of the offence and convicted is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

17. Further legislation regulates procurement of Kenyans to work abroad is found under the labour institutions (private Employment Agencies) Regulation 2016 and under regulation 18 is provided that a foreign contract of employment shall specify the party responsible for payment of their:

- Visa fee
- Air fare and
- Medical examinationprovided that reasonable administrative costs may be charged by the agent in respect of trade test, occupational test, and administrative fees, which amounts should not exceed the job seekers proposed one-month salary.

18. Reliefs sought in the petition are as follows:-

1.A declaration that the petitioners and victims of Middle East abuses were and are entitled to effective protection by the state against modern day slavery, human trafficking, violence, physical injury, threats, deportation, rape, death and other human rights violations and the state failed/neglected and has abdicated on its responsibility.

2.A declaration that the respondents failures and omissions of the state as particularized under paragraph f(1-7) have violated the petitioners' legitimate expectation of state's accountability, right to life and freedom from torture, right to and freedom from slavery and servitude, human dignity, right to information and right to fair labour practices as enshrined under Articles 10, 26(1), 28 and 29(c), (d), (e), (f), 30, 35 and 41 of *the Constitution* of Kenya 2010 and Articles 3, 4, 5, 9, 15 and 17 of the African Charter on Human and People's Rights and Articles 1, 2, 3, 4, 5, 23 and 24 of the Universal Declaration of Human Rights.

3.An order for the IMMEDIATE cessation/suspension of labour migration to the Middle East until the state demonstrates that the basic minimums as set out under paragraph 84 of the petition (petitioners' case section) have been met.

4.An order do issue for fresh vetting of all local employment recruitment agencies with immediate effect.

5.An order do issue compelling the respondents to evacuate or repatriate any migrant worker stuck and in distress in the Middle East abusive

employment, deportation centers and accommodation centers with immediate effect.

6.An order compelling the 1st respondent to table a formal report on the cause of death of the late Lucy Wambui Ng'ang'a and all those who have died under unclear circumstances in the Middle East within (3) months of the court's judgment.

7.An order for the repatriation of the body of the late Lucy Wambui Ng'ang'a for a dignified burial at the state expense and a status report be provided within three (3) months of the court's judgment.

8.An order directed at the Attorney General, the Ministry of Foreign Affairs and Ministry of Labour to initiate the process of ratifying:a.The Private Employment Agencies Convention, 1997b.ILO Domestic Workers Convention 2011 (No. 189); the Employment Policy Convention, 1964c.The International Migrant Convention on the Protection of the Rights of all migrant Workers and Members of their Families, 1990 in accordance with section 7 of the *Treaty Making and Ratification Act* and a status report be filed before this honourable court within 3 months of the court judgment.

9.An order do issue suspending the travel of Migrant Workers to the Middle East until Saudi Arabia ratifies C097 Migration for Employment Convention (Revised) 1949 and C143 Migrant Workers (Supplementary Provisions Convention 1975).

10.An order for the cessation/suspension of labour migration to the Middle East countries that lack consulate and embassy presence, lack labour offices and safe houses.

11.An order directed at the state to ensure establishment of labour offices, consulate and embassy presence and safe houses in all Middle East Labour destination countries accessible to any Kenyan in distress and a status report be presented to this honourable court within one (1) year of the court's judgment.

12.An order directed at the state particularly the 1st respondent to fast-track the review of the Bilateral Agreements in place to cover the identified gaps and emerging issues and specifically to renegotiate the terms in the agreements and a status report to be presented to this honourable court within six (6) months of the court judgment.

13.An order directed at the state particularly the 1st respondent to fast-track the development and adoption of Bilateral Agreements with the Middle East countries where such agreements have not been developed and adopted and a status report be presented before the honourable court within six (6) months of the court judgment.

14.An order directed at the state particularly the 1st respondent to ensure full implementation of all BLAs with all Middle East countries and a status

report be presented before this honourable court within one (1) year of the court judgment.

15.A declaration that the failure to enact the Labour Migration Management Bill and a comprehensive and harmonized labour migration policy that oversees labour exportation has increased the vulnerability of Kenyan migrant workers to abuse and human rights violations.

16.An order that in view of the above foregoing, the judgment of this honourable court be transmitted to the offices of the Attorney General, the Clerk of the National Assembly and the Clerk of the Senate for proposed law reforms for the purposes of enacting the Labour Migration Management Bill.

17.An order that in view of the above foregoing, the judgment of this honourable court be transmitted to the offices of the Attorney General for the purposes of enacting a comprehensive and harmonized labour migration policy.

18.An order directed at the state, particularly 1st respondent, to present a status report of its efforts to increase public awareness and education and to address the gaps in the Curriculum of Homecare Management within six (6) months of the court's judgment.

19.An order directed at the state particularly the 1st respondent to establish programmes that assist in rehabilitation and reintegration of victims and returnees and a status report be presented before the Honourable Court within six (6) months of the court judgment.

20.An order directed at the state to provide to the honourable court a status of all Kenyan migrant workers number and location of Kenyans abroad and conditions of employment abroad, those in prison facilities and deportation centers, their places of work, current and former migrant workers in distress and struck and those who have died in the Middle East countries within three (3) months of the court's judgment.

21.An order directing the 1st respondent to cater for travel expenses for the prospective migrant workers to avoid exploitation by their Middle East employers through the Kafala system.

22.An order do issue compelling the state to ensure that all identity and travel documents confiscated from the petitioners are returned to the petitioners and this to include issuing the 3rd respondent with a death certificate and regularizing any official documentation due to the petitioners.

23.An order do issue for the state to meet any medical and psychosocial costs incurred by the petitioners as a result of the death and abuses in the Middle East.

24.An order for provision of support for the children of the petitioners' particularly the late Lucy Wambui Ng'ang'a until they attain the age of majority at the state's expense.

25.A declaration that as a result of the breach of the rights enumerated above, the petitioners' suffered physical, mental and psychological trauma, loss, pain, special and general damages for which they are entitled to compensation.

26.An order do issue compelling the respondents jointly and severally to compensate the petitioners' as enshrined and provided for under Article 23(e) of *the Constitution* made up of special damages for the expenses incurred as well as general damages for pain and suffering, mental anguish, psychological trauma, loss of lives and exemplary damages pursuant to the declaration above for the petitioners'.

27.This being a matter of public interest there be no orders as to costs.

19. The objectors submit that the issues that fall for determination in this petition are not matters that may be heard and determined by this court whose jurisdiction is limited and well defined under Article 162(2) (a) as read with section 12(1) of the *Employment Act*, 2014 which provides: -1.The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—(a)disputes relating to or arising out of employment between an employer and an employee;(b)disputes between an employer and a trade union;(c)disputes between an employers' organisation and a trade union's organisation;(d)disputes between trade unions;(e)disputes between employer organisations;(f)disputes between an employers' organisation and a trade union;(g)disputes between a trade union and a member thereof;(h)disputes between an employer's organisation or a federation and a member thereof;(i)disputes concerning the registration and election of trade union officials; and(j)disputes relating to the registration and enforcement of collective agreements.

20. The court was referred to the Supreme Court decision in Samuel Kamau Macharia versus Kenya Commercial Bank and 2 others [2011] eKLR where the court stated:-"*A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law*"

21. The objectors refer to Article 165(3)(b) of *the Constitution* which clothes the High Court with jurisdiction as follows:" Jurisdiction to determine the question

whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened"

22. The objectors submit that the Employment and Labour Relations Court lacks jurisdiction to hear and determine this matter. They refer the court to the Supreme Court decision in Republic versus Karisa Chengo and 2 others [2017] eKLR where the court held: "The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court. (Emphasis ours)."

23. The court is also referred to the Court of Appeal decision in National Society Security Fund Board of Trustee versus Kenya Tea Growers Association and 14 others Civil Appeal 656 of 2022 [2022] KECA 80 (KLR) which decision has since been reversed by the Supreme Court.

24. The petitioners' have provided the Supreme Court decision in Kenya Tea Growers Association and 2 others and The National Social Security Fund Board of Trustees and 13 others Petition E004 of 2023 as consolidated with Petition No. E002 of 2023 in which the Supreme Court has authoritatively defined the jurisdiction of this court citing with approval the High Court decision per Majanja J. in United States International University (USIU) versus Attorney General, High Court Petition No. 17 of 2012 [2012] Eklr.

25. The court also notes that the USIU case had been earlier cited with approval by the Court of Appeal in the case of Professor Mugendi versus Kenyatta University and others.

26. The Supreme Court rendered itself thus on the jurisdiction of this court."[79]in our view there is nothing in *the Constitution*, the ELRC Act, or indeed in our decision in Karisa Chengo case to suggest that in exercising its jurisdiction over disputes that emanate from Employment and Labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do is to sit as if it were the High Court under Article 165 of *the Constitution* and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But if at the commencement or during the determination of a dispute falling within its jurisdiction as reserved to it by Article 162(2)(a) of *the Constitution* a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of the particular issues. Otherwise, how else would it comprehensively and with finality determine such a dispute?" Stripping the

court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of *the constitution* even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165(5)(b)"

27. Upon a careful consideration of the pleadings not yet placed in any dispute in this matter within the meaning of the decision in the Mukisa Biscuit case (supra), I could not think of a more suited case with multifarious statutory and constitutional issues arising for determination by this court since all and sundry relate to employment and labour relations in local and international sphere.

28. The objections raised by the respondents are misconceived, lack merit and are dismissed. The petition to proceed on its merit before the ELRC as filed.

DATED AT NAIROBI THIS 6TH DAY OF JUNE, 2024.
Mathews Nderi Nduma JUDGE

4. Hon. Samuel Kipkemoi Tanui vs Kenya Forestry Service & Others

	Case Metadata
Case No :	ELC Constitutional Petition No. 11 OF 2020
Date delivered:	30th September, 2024
Case Class :	Civil
Court:	High Court
Case Action :	Judgment
Judge(s) :	J.M Mutungi
Citation :	Hon Samuel Kipkemoi Tanui vs Kenya Forestry & Others
Court Division:	Environment & Lands Court
County:	Nakuru
Case Outcome:	The Ogiek Community's Rights of Access to information was violated by the Respondents but the Judgment on reparations dated 23rd June, 2022 has rendered any orders otiose. The Government should facilitate the implementation of the Judgment. The Petition No. 6 of 2022 was not proved and is dismissed. Each party to bear their own costs of the consolidated Petitions as the Petitions involved public interest.

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CONSTITUTIONAL PETITION 11 OF 2020

JM MUTUNGI, J

SEPTEMBER 30, 2024

BETWEEN

HON SAMUEL KIPKEMOI TONUI……PETITIONER

AND

KENYA FOREST SERVICE……..……..……..1ST RESPONDENT

THE ATTORNEY GENERAL…….……..……..2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF ENVIRONMENT & FORESTRY……3RD RESPONDENT

GEORGE
NATEMBEYA……4TH RESPONDENT

AND

LAW SOCIETY OF KENYA & OTHERS……1ST INTERESTED PARTY
ZAKAYO KIPKOECH LESINGO
(SUING ON HIS OWN BEHALF AND ON
BEHALF OF THE MAU OGIEK COMMUNITY OF
EASTERN MAU FOREST) ……..2ND INTERESTED PARTY
LIWOP-MOROP SELF-HELP GROUP……3RD INTERESTED PARTY
JOSEPH KIPKEMOI……4TH INTERESTED PARTY
JOEL KITUIYA……5TH INTERESTED PARTY
JOSEPH KIPYEGON SOMOEI……6TH INTERESTED PARTY
DAVIDSON KIPRONO LANGAT……7TH INTERESTED PARTY
BENJAMIN CHEPKOIMET CHEPCHIENG……8TH INTERESTED PARTY
ERASTUS NGETICH……9TH INTERESTED PARTY
DAVID KIPRONO MISOI……10TH INTERESTED PARTY
JOHANA KIPKURUI ROTICH……11TH INTERESTED PARTY
DAVID CHERUIYOT KENDUIYWO……12TH INTERESTED PARTY
OGIEK WELFARE COUNCIL……13TH INTERESTED PARTY

CONSOLIDATED WITH ELC PET 130 OF 2017

CHARLES K. LANGAT &
14
OTHERS……..PETITIONERS

VERSUS

DAVID
KIPRONO
BUSINEI……RESPONDENT

AS CONSOLIDATED WITH
ELC NAKURU PETITION NO. 5 OF 2020

JOHN NJENGA MBUGUA AND
5 OTHERS……...PETITIONERS

VERSUS

CABINET SECRETARY LANDS, HOUSING,
AND URBAN DEVELOPMENT AND
6 OTHERS……..……..RESPONDENTS

AS CONSOLIDATED WITH
ELC NAKURU PETITION NO. 16 OF 2020

OGIEK COUNCIL OF ELDERS
(suing on their own behalf
and on behalf of Mau Ogiek Community)
AND ANOTHER.....
PETITIONERS

VERSUS

ATTORNEY GENERAL
AND
10 OTHERS……..……RESPONDENTS

AND

COMMISSION ON ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

JUDGMENT

1. This Judgment is in respect of all the five (5) consolidated petitions namely; Petition No. 11 of 2020 by Hon. Samuel Kipkemoi Tanui; Petition No. 130 of 2017 by Charles K. Langat & 14 others; Petition No. E005 of 2020 by John Njenga Mbugua & 5 Others; Petition No. E006 by Johnson Kamuri Murugami & 16 Others and Petition No. 16 of 2020 by Ogiek Council of Elders (suing on their behalf and on behalf of the Mau Ogiek Community) & Another. On being consolidated, the Court directed that Petition No. 11 of 2020 becomes the lead, file. In all the petitions the subject matter is the Mau East Forest Complex and the broad issues are whether there was encroachment onto forest land; whether there had been any degazettment of any part of the forest; whether there were titles issued on forest land, and if so, the validity or otherwise of such titles; the rights of the Ogiek as a Community as pertains to occupancy of the Mau Forest Complex; and whether any parties constitutional rights were violated by the Government in its endeavor to protect and conserve the Mau Forest Complex.

2. To contextualize the Judgment the brief particulars of the consolidated petitions are as set out hereunder:-1.Petition No. 11 of 2020Hon. Samuel Kipkemoi Tonui –vs- Kenya Forest Service & 4 Others. The Petitioner on behalf of the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes alleged violation of their constitutional rights by the Respondents under Articles 10,22,23,28,29 (d) and (f), 40 and 47 of *the Constitution*. The Petitioner averred that the Respondents had set in motion actions to forcefully and illegally evict the residents of the aforestated settlement schemes in the guise of removing persons they claimed had encroached onto forest land. The operation was spearheaded by a Multi-Agency Team of officers from the Kenya Forest Service and Officers from the National Police Service coordinated by the Ministry of Interior through the Regional Commissioner. The Petitioners position was that they were not in occupation of forest land and had not encroached forest land. They contended they held valid titles issued to them by the Government following the establishment of the aforementioned settlement schemes after the forest boundary was altered. The Petitioners sought the following prayers vide the petition:-

1) A declaration that the actions of the Respondents are in violation of Constitutional rights of the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik settlement schemes specifically in violation of Articles 10, 22, 23, 26, 27, 28,29(d) and (f), 40 and 47 of *the Constitution* of Kenya.
2) An order that the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes be compensated by the Respondents for their illegal actions of threat to life, mass destruction of property and forceful evictions.
3) An order directed at the 1st Respondent to forthwith, and in any event not later than 365 days from the date of Judgment, establish the existing boundaries of the entire Mau Forest Complex, including Eastern Mau Forest and clearly mark the same by erecting a fence to separate the forest from the excised land.
4) An order that upon clearly marking the boundaries as per prayer 3 above, the 1st Respondent to issue a 6-month notice of vacation to persons found to have illegally occupied part of the forest which has not been degazetted and or excised.
5) An order directed at the Respondents to initiate resettlement of persons affected by prayers 3 and 4 herein above.
6) An order of permanent injunction against the 1st, 2nd, 3rd and 4th Respondents restraining them from interfering or continuing to interfere with the quiet and peaceful enjoyment of the property rights

of residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes.

7) An order for costs of the Petition.

3. Petition No. 130 Of 2017 Annah Chelangat & 50 others –vs- David Kiprono Busienei, C. S. Ministry of Lands, Housing And Urban Development & 2 Others.The Petitioners stated that they had been allocated parcels of land by the Government of Kenya in Nakuru/Tinet/Settlement Scheme in 1997 through the Local Administration. They claimed they were issued Allotment Letters through the District Commissioner, Nakuru and they settled on the land. However, about 2005, the Petitioners claim strangers were brought into the area for political reasons and were issued with title deeds leaving out the Petitioners. The Petitioners claimed they were subjected to constant harassment by the Local Administration who were using the Administration Police and that despite raising complaints to the National Land Commission they got no redress. It is the Petitioner's assertion that their constitutional rights were violated and there was deprivation of property contrary to Article 40(2)(b) of the Constitution. The Petitioners prayed for orders as follows:-

a. A declaration that the actions of the Respondents have been discriminatory, inhuman and degrading against the Petitioners.
b. An order directing the 2nd and 3rd Respondent to issue title to each of the Petitioners.
c. An order of permanent injunction restraining the 1st Respondent by himself, Agents, Servants and hirelings from interfering with, invading or in any other way dealing with Petitioner's land parcels contained in Map Sheet No. 12 Nakuru/Tinet/Sotiki Settlement Scheme together with the fixtures and developments thereon.
d. A declaration that the 3rd and 4th Respondents have abdicated their Constitutional and legal roles and are therefore escapists.
e. Any other relief the Court may deem fit to grant in redress of the clear violation of the Petitioners' rights to property and,
f. Costs of the Petition.

4. Petition No. E005 Of 2020.John Mbugua & 5 Others –vs- The Cabinet Secretary, Ministry Of Lands, Housing And Urban Development & 6 Others.The Petitioners in the petition averred that from about the year 1900 they together with the Ogiek Community settled in Nessuit, Mariashoni, Sururu, Likia, Teret, Kiptunga, Barget, Molo Forest and Elburgon Forest. The Petitioners stated that these were the only areas they knew as their homes having been born bred and brought up there. The Petitioners averred that their lives were cruelly disrupted in 1988 when they were violently and forcefully evicted by the Government allegedly on grounds of forest

conservation. The Petitioners claim they had resided, cultivated and had constructed schools and dispensaries within the areas they had settled in and were living harmoniously and were not in any way harming the forest but rather conserving the same. The Petitioners alleged the evictions were carried out in a discriminatory manner in that the Ogiek, with whom they had settled in the area were not evicted. Further, the Petitioners averred that the Government did not give them alternative area to settle.The Petitioners alleged that other persons from Kericho, Bomet and Baringo were settled in the same area that they had been evicted from in 1997. The Petitioners further aver that the Respondents were in the process of surveying, sub-dividing and alienating land in the area comprising. Nessuit, Marishoni, Sururu, Likia, Teret, Kiptunga, Barget, Molo Forest and Elburgon Forest to the person living there but the Petitioners contend as the original settlers in the lands, they are the persons entitled to be settled on the land and issued titles. The Petitioners inter alia seek orders for:-

i. Compensation for illegal and unjust evictions.
ii. Resettlement and to be issued titles.
iii. Permanent injunction.
iv. Damages for violation of their rights.
v. Costs of the petition.

5. Petition No. E006 of 2020.JOhnson Kamuri Muragami & 14 Others –vs- National Land Commission & 3 Others.The Petitioners petition dated 11th December 2020 was amended on 19th July 2021. The Petitioners claim that their fathers and forefathers were employees of the Colonial Government and were engaged in the development of forest and were actively involved in taking care of Mau Forest including planting trees and harvesting the mature ones and at the same time protecting the forest from illegal loggers and destruction by fire. The Petitioners claim as such employees they were permitted to cultivate within the forest and to settle therein with their families. The Petitioners aver that they had all the time dating to the colonial period resided within the forest and that in 1968 the late President Mzee Jomo Kenyatta promised that all families that were working within the forest were each to be allocated 2 hectares of land for their settlement. The Petitioners however state that the promise was never honoured and that the Petitioners were in 1988 unlawfully evicted from their settlements within the Mau East Forest and that in 1993 persons were brought from diverse places and settled in the areas that the Petitioners had hitherto occupied. The Petitioners contended their eviction was unlawful, forceful and infringed the right to human dignity and constituted deprivation of property. The Plaintiffs aver they were rendered squatters within the neighbouring trading centers and claim they have suffered

historical land injustice which the 1st Respondent has failed to redress contrary to Article 67 (2)(e)of *the Constitution* and Section 15(3)(b) of the *National Land Commission Act*. The Petitioners further averred by the Respondents settling and allocating other persons land that they had previously settled and occupied before they (Petitioners) were unlawfully and violently evicted, the Respondents were acting in a discriminatory manner and that constituted an infringement of the Petitioners rights under Article 27 of *the Constitution*. The Petitioners among other prayers seek declarations that they are entitled to protection of their proprietary land rights to the areas that they occupied before they were unlawfully evicted; that the 1st Respondent carries out investigation on the Petitioners historical land rights over the areas they occupied within the Mau East Forest with a view of recommending a comprehensive resettlement plan of the Petitioners; and compensation by way of damages for illegality and violation of the Petitioners Constitutional rights.

6. Petition *No. 16 Of 2020* (ELC No. E009 of 2020).Ogiek Council Of Elders (suing On Their Behalf And On Behalf Of The Mau Ogiek Community) & Another –vs- The Attorney General & 9 Others; Commission On Administration Of Justice And Prof. Karima Bennoune, Un Special Rapporteur, Cultural Rights. The Ogiek claim that Mau Forest is both their ancestral land and an integral part of their culture. The Ogiek state that there have been Judicial pronouncements in the Case of Joseph Letuya & 21 Others –vs- Attorney General & 5 Others (2014) eKLR where the Court found that Mariashoni and Nessuit, were ancestral lands of the Ogiek and their forced eviction from the land was therefore unconstitutional. The African Court on Human and People's Rights (African Court) also in 2017 delivered a Judgment where they held that the Mau Ogiek were an indigenous Community and that the Mau Forest was their ancestral land.In the petition, the Petitioners aver that the Respondents have in disregard of the Law and the rights of the Mau Ogiek declared their intent to issue individual titles and a block title in the Eastern Mau Forest which they claim would infringe on the rights of the Ogiek. The Petitioners aver that the Government constituted an unconstitutional and illegal "Multi-Agency Team" whose mandate was unclear but whose intention was to undertake activities in East Mau region that was to culminate to the issuance of individual titles to land to persons residing within the area on 11th December, 2020 in compliance with a directive issued by the President. The Petitioners claim there was an earlier Taskforce Report on the Mau to which the Petitioners had been denied access though their rights as a community were affected and they had a right to access the information contained in the Report. The Petitioners

faulted the Respondents in denying them access to information and further averred that the process through which the Respondents were carrying out the land audit, survey and other activities with a view of issuing occupants with 5 acres plots of land was unconstitutional as it infringed the rights of the Ogiek who were indigenous and the land was ancestral land. The Petitioners averred there was lack of Public participation and the work of the Multi Agency Team was shrouded in mystery as there was no gazettment of the Multi Agency Team and/or publication of its functions and/or its Terms of Reference.

7. The Petitioners contended the Respondents were in carrying out the activities that they were through the Multi Agency Team, in violation of the Petitioners rights under Article 10, 35, 40, 47,69 and 70 of *the Constitution*. The Petitioners sought a multiplicity of reliefs and orders including: That their right to access to information was violated; that the Respondents violated the national values and principles in Article 10 of *the Constitution*; that the Petitioners rights under Article 40 of *the Constitution* were violated; an order of Mandamus compelling the 3rd Respondent to furnish the Petitioners with information sought by the Petitioners in their letters of 8th April 2020 and to publish the Taskforce Report on the implementation of the decision of the African Court on Human and Peoples' Rights issued against the Government of Kenya and an order prohibiting the Respondents from issuing titles in Eastern Mau Forest or carrying any further activities relating to the issuance of titles until there has been compliance with *the Constitution*; the Environmental Management and Coordination Act, 1999; the *Access to Information Act*, 2016, the *Fair Administrative Action Act*, 2015; the Judgment of the African Court of Human and Peoples' Rights, and any other relevant Laws.

8. The Petitioners in Petition *No. 16 of 2020* (the Ogiek) applied and were joined as interested parties in the primary Petition *No. 11 of 2020* and participated as such interested party in that petition and separately prosecuted their substantive petition *No. 16 of 2020*. Save for the Petition by the Ogiek the other four petitions relate to persons claiming ownership of either individual parcels of land or persons who claim to have occupied and/or had settled within what the Government claims was part of the Mau East Forest and were evicted. The holders of title claim to have been allocated the land and were issued titles to the land by the Government following degazettment of the forest land and alteration of the forest boundary. As regards to the Ogiek, they claim that as a community they had always resided within the forest and that the land constituting the forest

is their indigenous and ancestral land. The Ogiek further claim their claim over the forest land had been adjudicated by both the National Court and the African Court on Human and People's Rights and the problem has only been with the implementation of the decisions, particularly the decision of the African Court on Human and Peoples' Rights delivered in 2017.

9. Various other parties who either had settled occupied and/or had been issued titles within the Settlement Schemes namely Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik applied and were joined as Interested Parties in the Petition. The general thread in the case by the various Interested Parties was that they had been allocated and settled on the disputed land by the Government following intermittent land clashes from the early 1990s and had been issued with titles which were valid and were not in unlawful occupation of forest land. The Ogiek Community apart from being admitted as Interested Parties in Petition No. 11 of 2020 filed their own distinct Petition No. 16 of 2020 as highlighted above. The case for the Interested Parties, was that the Respondents were unlawfully and illegally seeking to evict them from their land in respect of which they held lawful titles duly issued to them by the Government. The Interested Parties contended that the Respondents were acting in violation of their Constitutional rights to own property and that they could not be deprived of their property without due compliance with the law.

10. Amicus CuriaeProfessor Karima Bennoune, the United Nations Special Rapporteur in the field of Cultural Rights applied and was admitted to appear as an Amicus Curiae to provide neutral and unbiased expertise on the cultural rights of indigenous peoples and the obligation to seek the free prior and informed consent of indigenous peoples when their Cultural Rights are threatened. The application for leave to appear as an Amicus Curiae was supported with a detailed Amicus brief which the Court admitted as the pleading of the Amicus Curiae. On 26th July 2021, the Court directed that the Amicus brief was to be limited to presentation on the cultural aspects as they touched and related to the Ogiek Community. The Court further directed the Petition(s) as consolidated would proceed on the basis of the affidavit evidence and the documents filed and parties were further allowed to present limited oral evidence through witnesses to buttress the Affidavit and documentary evidence that had been filed.

11. The Petitioners Case (Petition No. 11 of 2020)Hon. Samuel Kipkemoi Tonui, then a member of the County Assembly and Deputy Speaker, Nakuru

County and who had filed the Petition on behalf of the affected residents within Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes testified in support of the petition on behalf of the Petitioners who all resided within East Mau, Nakuru County. In his testimony he relied on the Supporting and Supplementary Affidavits sworn in support of the Petition. In his testimony he claimed that the Kenya Forest Service (KFS) Officers were evicting people from their land purporting they were reclaiming forest land. It was his evidence that the persons targeted in the evictions had settled on their land for many years and that Kenya Forest Service was indiscriminately damaging and demolishing their homes and destroying their property.

12. The witness stated that the Government had vide a Legal Gazette Notice (EKN) No. 889 of 30th January, 2001 declared intention to alter the forest boundary through excision of 35,300 Hectares approximately out of the Mau Forest Complex for resettlement. He stated that the Notice of Intention to alter the forest boundary was issued by Hon. Nyenze (now deceased) when he was a Minister for Environment, while Hon. Katana Ngala who succeeded Hon. Nyenze as Minister issued Legal Notice No. 142 dated 8th October 2001 to alter the forest boundary through the excision of approximately 35,300 Hectares from the forest land. The Petitioner's position was that the Government's intention to alter the forest boundary was given effect as Settlement Schemes were created and people were allocated title and issued title deeds. He maintained that the Government's gazette Notice of intention to degazette the area earmarked for settlement out of the forest was never revoked by the Government and hence there was no basis for the persons who had been settled in the Settlement Schemes to be evicted from the land they had known as their homes.

13. The Petitioner contended that the title deeds the residents held were issued by the Government and had never been revoked and/or challenged through any legal process. He stated that the Government had no right to encroach onto the Settlement Schemes claiming it was part of the forest when the same Government had itself allocated the land and issued titles to the residents. He asserted that the boundary delineating forest land and the Settlement ought to be established so that the intermittent cases of unlawful evictions can be eliminated. The Petitioner stated he was aware the Ogiek Community had instituted a case before the African Court and had obtained Judgment in their favour and it was his position that the Petitioners were not opposed to the Ogiek Community being given land.

14. The Petitioner stated that at the time the Notice to degazette part of Eastern Mau Forest for excision, there were several other similar Notices to alter forest boundaries issued by the Government affecting various forests

in the Country. He stated the affected Eastern Mau Settlement Schemes have over 100,000 people and that Nessuit Ward alone has 12,000 registered voters.

15. Cross examined by Ms. Shirika State Counsel, PWI stated he brought the petition on behalf of the residents and that their claim was limited to the 35,300 hectares that had been excised out of the forest to create the settlements. He reiterated that the residents desired to have the boundaries of the Settlement Schemes delineated in conformity with the Gazette Notice of the alteration of the forest boundary.

16. Joseph Kipkemoi Kebenei (PW2) who was an Interested Party testified in support of the Petition. He had sworn a Replying Affidavit dated 3rd November 2020 and had annexed title to his parcel of land Nakuru/Likia/964 measuring 4.04 Hectares issued on 16th July 1997. He explained that he had been enlisted as one of the beneficiaries in the programme initiated by the Government to settle landless people and/or those who had been displaced during tribal land clashes. He stated that people were moved from South West Mau which was considered more of a Wet land comprising of Tiinet, Donnet and Kiptololo areas and settled within Eastern Mau, Nakuru County. He stated that the Government started subdividing the land for resettlement in 1995 and the Survey was spearheaded by Mr. Halake who was the Regional Surveyor, Rift Valley Province. He testified that in 2000 the Government gave notice of its intention to degazette part of the Mau Forest land for resettlement purposes. He stated that at the time the notice to degazette the forest land was issued, people had already moved into the area and the boundary of the area to be degazetted had been surveyed and people settled in the area. He stated the boundary of the forest land and the settlement area had been established and a survey map had been prepared.

17. PW2 further testified that in 2020 the Kenya Forest Service (KFS) personnel came to the settled area and started interfering with the residents requesting that they vacate the area. He stated that the people who had settled outside the boundary area and had encroached into the forest land had earlier been evicted. They however were harassing people who had been legally settled within the settlement Scheme boundary. He stated that the Government established the Multi-Agency Task Force who created what he stated was an imaginary boundary which fell inside the settled area with the result that a large number of the regularly settled residents were of a sudden being declared to be encroachers into the forest land. It was his position that the Respondents were acting illegally and unlawfully and in violation of the resident's Constitutional rights.

18. Respecting the Ogiek Community PW2 stated that they were occupants of Nessuit and Mariashoni Settlement Schemes and some of them had been issued with title deeds.

19. In Cross examination by Ms Shirika Senior State Counsel on behalf of the Attorney General, PW2 admitted that he was issued his title in 1997 and that by that time there had been no degazettment of the part of Mau Forest where the Settlement Schemes were created. He stated that he was removed from South West Mau in 1995 to Mau East where he was allocated land by the Government. He stated he was a member of the Ogiek Community. He stated the allottees of land were issued allocation letters and/or cards before they were issued with title deeds. It was his view that the activities of the Multi-Agency Task Force in forcing people out of their lands were unlawful since the people had been lawfully settled. He stated that a total of 35,301 Hectares of Mau Forest was degazetted to pave way for the settlements.

20. The witness in concluding his evidence stated he belonged to the Ogiek Community and that he had settled in South West Mau before moving to East Mau where he was allocated land. He stated the Ogiek Comprised 18 clans within East Mau and 7 groups in South West Mau. He stated there had been no challenge in regard to the titles issued to them by the Government and hence it was his position that the Multi-Agency Task Force was acting in violation of the law in chasing people away from their lands.

21. PW3 Charles Kiptum Chepsergon testified in support of the Petition on behalf of Lipop Morop Group who had been joined to the Petition as Interested Parties. He stated he represented about 1,900 land owners within the Sururu, Likia, Mariashoni, Nessuit and Doinnet Settlement Schemes. He stated the land owners have settled within the Settlement Schemes from 1997 and that the majority of them had been issued titles of the land they occupy by the Government following allocation. The witness affirmed that he applied for and he was allocated land by the Government. He stated that over time they had experienced repeated disturbances from the Forestry Department on the lands they occupy and stated there was need for the Government to settle the issue of land ownership vis-a-vis the forest land once and for all, as the settlers were at all times living in fear of being harassed and being evicted.

22. PW3 stated the Petitioner brought the Petition on their behalf to seek a lasting solution for the problems that they have repeatedly been exposed to. He asserted that Government has never recalled and/or cancelled the land titles that it issued to the settlers and it was their wish and desire that their titles be acknowledged and they be treated as lawful land owners.

23. In Cross examination the witness stated he was issued his title in 1997 and he had not been issued with an allotment letter before being issued with a title. He however stated the Survey Department had delineated the forest land and the settlement land. The witness asserted that the KFS had chased some people from the land claiming they were on forest land. He further affirmed that all the titles he had attached to his affidavit were from Likia Settlement Scheme.

24. PW4 John Mungai Kimani testified that he was previously working as a Headman in Nessuit Forest where he and others had been allowed as squatters to utilize portions of forest land while they nurtured forest tree nurseries. He however stated in 1988 they were ordered out of the forest and they camped outside the forest area as they waited to be resettled by the Government. He claimed that their pursuit of the Government to be resettled had not borne any fruit and they remain as squatters whom the Government had forgotten and assert they were the persons who should have been resettled by the Government. He claimed their pleas to the Land Adjudication and Settlement Office have only yielded the response that the office had no funds to have them resettled.

25. Case of the 2nd Petitioner: (Ogiek Community) Martin Lele Kiptiony testified on behalf of the Ogiek Community who had been joined to the Petition as an Interested Party. In his evidence he also prosecuted the petition filed on behalf of the Ogiek Community.

26. He stated he was the Secretary Ogiek Council of Elders and he testified the Ogiek Comprise of 22 clans spread over the Counties of Kericho, Narok, Nakuru, Baringo and Uasin Gishu. He stated that they had a National Council of Elders and that they had representatives in Sururu and Mariashoni. He stated he became aware of the Government Multi Agency Team when they were summoned by the Regional Commissioner to attend a meeting at Naivasha whose agenda was to discuss land and peace. He stated at the meeting, the Cabinet Secretary announced that all occupants of Mau would each get 5 acres of land. He testified that as the Ogiek Community, they did not consider that to be fair as they had always been residents and occupants of Mau forest.

27. The witness testified the Ogiek Community had a Judgment from the African Court and the High Court which had made pronouncements respecting the rights of the Ogiek Community that had not been implemented by the Kenya Government. He stated that at the Multi Agency Team they were not given an opportunity to state their concerns but were merely informed of the decision by the Interior Cabinet Secretary. He testified that as a Community it was not their intention to have individual titles but rather Community land title. He stated the Multi Agency Team

were supposed to comply with the decision of the African Court as the Court had given a timeframe within which the Judgment was to be implemented.

28. The witness further testified that the Government had kept them in the dark in regard to any steps they were taking to implement the Court Judgment and it was their right as parties who were affected to be furnished with this information. The witness asserted that it was their right to have the African Court on Human and People's Rights Judgment implemented fully and urged the Court to grant them the reliefs they have sought in their Petition.

29. On cross examination by Mr. Kipkoech Advocate for the 1st Petitioner, the witness stated Lady Justice Nyamweya in 2014 rendered a Judgment that directed that the Ogiek Community be settled by the Government on land to be identified but the Government did not implement the Judgment which led them to file the case before the African Court. The witness further stated that by the time the Multi Agency Team Meeting was called, the Kenya Forest Service had placed some beacons on the land without consultation with anybody.

30. In further cross examination by Ms. Shirika for the Attorney General the witness admitted that the Courts never set out the procedures to be followed by the Government to settle the Ogiek but he indicated that it was the wish of the Ogiek Community that they live together to observe and preserve their traditions and culture. He stated that they came to Court because the Government did not consult them on the implementation of the Court Judgment and/or furnish them any information on the implementation. He denied that the Court action by them frustrated the implementation of the Court Judgment.

31. The witness in concluding his evidence stated that the Multi Agency Team never furnished any minutes of the Naivasha meeting or any report on the status of implementation of the Judgment. He further stated that NEMA never involved them or consulted them on the implementation of the Court Judgment.

32. The Respondents' Case. The Respondents called two (2) witnesses namely; Solomon Kihiu- the County Director of Environment, and Evans Kegode, Head of Survey at Kenya Forest Service who testified on behalf of the Respondents in the consolidated Petitions.

33. The County Director, Environment in his evidence stated that he prepared the report dated 29th June 2021 which was filed in Court and he adopted the report as his evidence and indicated it was NEMA's response to the Petition.

34. The witness in cross examination by Ms. Kinama for Ogiek Community stated that he was not aware that any Environment Impact Assessment (EIA) for

for Eastern Mau had been done. He stated that he was appointed to join a special Task Force (Multi Agency Team) on 7th October, 2020 by a letter. He was unaware if the Task Force was gazetted. He stated he was not involved in the Naivasha meeting of 21st September, 2020 of the Multi Agency Team. He explained that as per the work – plan a EIA license would have been issued by 20th December, 2020. He affirmed that no Environment Impact Assessment (EIA) for Eastern Mau had ever been done as no report had been presented to their office to review. The witness explained that the County Commissioner was heading the Multi-Agency Task Force and he was the one who informed him the work of the Task Force had been stopped. He further explained that if the EIA report had been prepared it would have indicated whether people had settled in the forest land. He further stated as per the press release made by the Cabinet Secretary on 21st September, 2020 titles were to be issued on 11th December, 2020.

35. The witness affirmed that the work plan that had been prepared for EIA was never actualized as the activities of the Multi Agency Task Force was stopped by the Court.

36. Evans Kegonde (RW2) testified that as head of Survey at Kenya Forest Service his duties included Survey, Gazetting and maintaining all the records of all forests. He relied on his sworn Affidavit dated 16th September 2020 and filed in Court on 28th September, 2020 and the annextures attached thereto in his evidence.

37. The witness testified that Eastern Mau Forest was proclaimed as a forest vide *Legal Notice No. 34 of 1932* and was later confirmed vide *proclamation No. 57 of 1941*. Following independence Eastern Mau was in 1964 declared a Central Forest Via Legal Notice No. 174 of 20th May,1964. He stated Eastern Mau Forest is one of the 22 Blocks of Mau Forest complex. The witness explained the significance and importance of the Mau Forest Complex. He stated interference with the Mau Forest Complex ecosystem would be prejudicial and could have detrimental effects to many people who derive benefits from the existence and sustainability of the Mau Forest Complex. The protection and preservation of the Mau Forest Ecosystem was therefore vital and of critical significance.

38. The witness clarified that the *proclamation No. 57 of 1941* merely confirmed the earlier *proclamation of 1932*. He stated the declaration of Eastern Mau Forest in 1964 indicated that it comprised of 160,639 acres. The witness stated that as far as he was aware the boundaries of East Mau Forest have never been altered and have remained as per the *proclamation of 1932*. The witness explained that he was aware of Gazette Notice No. 889 of 30th January, 2001 published on 16th February, 2001 which he stated was an intention to alter the forest boundary but was not actualized as per the

provisions of the Forest Act Cap 385 Laws of Kenya. He stated the process of degazetting the forest land was never done. He stated the Settlement Schemes namely Nessuit, Mariashoni, Sururu, Likia, Territ and Sigotik that were established in the affected area were not legal and the titles that were issued in the said schemes were equally illegal. The witness however conceded the Notice of Intention to alter the forest boundary was not formally cancelled and/or revoked.

39. The witness further testified that the Government in 2020 established a Multi-Agency Task Force Team to ostensibly restore the Eastern Mau forest by confirming the forest boundaries. He stated the Task Force Team was also supposed to set aside some land to sort out the Ogiek Community. He reiterated that the laid down procedure under the Forest Act were neither adhered to nor complied with rendering the declaration of intention of no legal consequence. He contended the relevant Government Minister at the time never communicated with the Forest Department to have the appropriate and necessary Survey carried out and the authenticated survey plan used to Gazette the boundary alteration.

40. Under cross examination by Mr. Kipkoech for the Petitioner the witness affirmed the Gazettee Notice No. 889 of 30th January, 2001 was a declaration of intention to alter the East Mau Forest Boundary. He admitted that the Forest Department never objected to the Notice. The witness further admitted Legal Notice No. 142 of 8th October, 2001 altered the boundaries of Eastern Mau Forest and that as per the schedule land approximating 35,301.01 Hectares was to be degazetted from the East Mau Forest.

41. The witness affirmed there is a gazetted police station within Nessuit Settlement Scheme and another at Mauche but stated Government institution do coexist and there was nothing unusual with the police stations being located within a forest area/reserve. He admitted there were equally schools within the forest blocks.

42. The witness further admitted persons were pursuant to the *Legal Notice No. 142 of 2001* by Hon. Katana Ngala issued titles. He further stated in 2020 he was a member of a Multi-Agency Task Force that was formed to re-establish Mau Forest Boundaries. He stated the Task Force comprised representatives from various Government Departments and among other matters, the Task Force was to confirm the titles issued in the Eastern Mau Forest and that they indeed did confirm several people held titles in the area. He affirmed neither the Kenya Forest Service and/or the Attorney General has ever challenged those titles. The witness stated that they reestablished the boundaries for East Mau Forest but he did not have any beacon certificates.

43. The witness in concluding his evidence under cross-examination by Biko Advocate for Liwop-Morop Group – Interested Party affirmed that all the titles issued in the settlement schemes were signed by the Land Registrar. He admitted the Settlement Fund Trustees had mandate to facilitate settlement of people. He agreed amenities such as electricity, health centers and schools were within the settlement schemes.

44. The witness affirmed that he attended the Multi Agency Team meeting at Naivasha on 21st September, 2020. He stated their mandate as the Multi Agency Team was; to identify the number of parcels in the schemes; to identify the people with title deeds; to identify persons with titles and homes in the Schemes; and those who had encroached onto forest land. The witness further affirmed that prior to 1990 there were settlements within the forest reserves but these were phased out. He stated that the Government settled some of those who had squatted in the forest. The witness finally stated the Multi-Agency Task Force never completed its tasks as they were stopped by the Court.

45. The witness in re-examination by Ms. Shirika stated once there was a challenge to the intention to alter the forest boundary, the process stopped. He stated the Legal Notice issued by Hon. Ngala was issued in error and was ultra vires. He reiterated the titles issued pursuant thereof were illegal and of no legal consequence.

46. Following the close of the trial the parties made written submissions as per the directions of the Court and made highlights of the submissions orally on 9th October, 2020.

47. Submissions of the 1st Petitioner (Petitioners in Petition *No. 11 of 2020*).Mr. Kipkoech Advocate for the 1st Petitioner made submissions for and on behalf of 1st Petitioner on behalf of the residents of the Settlement Schemes. Mr. Biko Advocate and Mr. Mukira Advocate who represented some of the Interested Parties supported the submissions made on behalf of the 1st Petitioner.

48. Ms. Kinama Advocate for the Ogiek Council of Elders and the Ogiek Community the Petitioners in Petition *No. 16 of 2020* made submissions on their behalf and her submissions were supported by Ms. Musembi Advocate who appeared on behalf of the Commission on Administration of Justice (CAJ) who were an Interested Party in the Petition by the Ogiek Community.

49. The 1st Petitioner submitted that the Respondents had no Legal justification to evict residents of Nessuit, Marishoni, Sururu, Likia, Terit and Sigotik Settlement as they had lawfully been allocated land by the Government in these Schemes. The 1st Petitioner took the position that the Notice to degazette and to alter the Mau East Forest boundary having been issued and acted upon, the Respondents could not reverse that which had

already occurred. The 1st Petitioner argued that the residents had acquired lawful and valid titles which were indefeasible. The 1st Petitioner in consequence submitted the act of the Respondents notably the 1st Respondent in seeking to forcefully and violently evict them from their land was in contravention of the provisions of *the Constitution* Articles 10, 40 and 47. The 1st Petitioner submitted that the exercise by the Multi – Agency Task Force dabbed "operation to stop all illegal human activities from Government forests which form the Eastern side of Mau Forest Complex" was unlawful since they were seeking to evict people from their own lands which they had lawfully been allocated and issued titles.

50. The 1st Petitioner in his submissions highlighted the fact that settlement in the affected areas started in 1995 and that the forest excision process commenced by then Minister Nyenze in January 2001 and completed by his successor N. K. Ngala in October 2001 was to give legal effect to the settlements that the Government had established. The Petitioner argued that the residents have honoured and continue to honour the settlement boundaries and have not encroached onto the forest area under the Management of the 1st Respondent. The Petitioner in support of his submissions contended that the Court in the Case of Joseph Letuya & 21 others –vs- Attorney General & 5 Others (2014) eKLR acknowledged there had been forest excision in 2001. In the case Lady Justice Pauline Nyamweya as she then was stated:-"I have perused the Report of the Government Task Force on the conservation of the Mau Forest Complex, March 2009 and note that the Task Force undertook an extensive audit of the settlements made by the Government through excisions of forests since independence in 1963, and also more particularly of the 2001 excisions of the Mau Forest Complex whose purpose was to settle the Ogiek Communities and 1990's clash victims. The Court notes in this regard that the Nessuit and Mariashoni Schemes were two of the schemes considered in the report with respect to the 2001 excisions and that while Mariashoni scheme was intended to benefit the Ogiek families and had started in 1996 but was put on hold in 1997 due to a Court injunction, the beneficiaries of the Nessuit Scheme were not stated, and it was indicated that they were already resident on the land."

51. The Court further in the Joseph Letuya Case (supra) went on to hold that the eviction of the Ogiek from the settlement area without resettlement was in contravention of *the Constitution*. The Court ordered that the National Land Commission in consultation with the Ogiek Council of Elders, do identify any of the Ogiek members who ought to have been settled in the excised areas and were not, and to identify land for their settlement.

52. The 1st Petitioner in his submissions further contended that the Gazette No. 889 of 30th January, 2001 published on 16th February, 2001 declaring intention by the then Minister to alter boundary of Eastern Mau Forest and the subsequent Legal Notice No. 142 of 8th October,2001 confirming the alteration of the forest boundary effectively set apart a total of 35,301.01 hectares for settlement out of the forest land. The Petitioner contended that even though there were proceedings for Judicial Review filed at Eldoret High Court vide Misc. Applicati*on No. 38 of 2001* challenging gazette Notice No. 889 of 30th January,2001 the same was struck out on a Preliminary Objection and hence the Gazette Notice and subsequent Legal Notice remained valid and unchallenged.

53. The 1st Respondent contended that apart from the Gazette Notice relating to alteration of East Mau Forest there were other several notices for alteration of forest boundaries issued at the same period in various parts of the Country yet there have been no issues raised in regard to the other forests whose boundaries were altered. The 1st Petitioner submitted the Survey Map for the excised area delineating the Settlement Schemes exhibited in the Petitioners Supporting Affidavit established the scheme boundaries and that the Respondents ought to be bound by the boundaries as established following the excisions. The 1st Petitioner maintained that there was due compliance with the Section 4 of the Forest Act, Cap 385 Laws of Kenya(repealed) on the excision of forest land which provides as follows:-4.(1)The Minister may, from time to time, by notice in the Gazette –(a)declare any unalienated Government land to be a forest area;(b)declare the boundaries of a forest and from time to time alter those boundaries;(c)declare that a forest area shall cease to be a forest area.(2)Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty-eight days' notice of the intention to make the declaration shall be published by the Minister in the Gazette.

54. The 1st Petitioner contended that as the Legal Notice No. 142 of 8th October, 2001 has never been revoked the excision of 35.301.01 hectares out of Mau East Forest remained valid and consequently the Settlements and land titles issued to the settlers were equally valid and lawful. The Petitioner therefore argued the residents are entitled to compensation for unlawful evictions. The Petitioner argued that the Respondents effected evictions of the residents without any regard to their Constitution Rights and in violation of United Nations Guidelines on steps that ought to be taken in effecting evictions where large groups of people stood to be affected. The Petitioner in support of their submissions sought to rely on the Supreme Court decision in Mitu-Bell Welfare Society –vs- Kenya Airports Authority & 2 Others (2021) KESC 34 Atik Mohamed Omar Atik & 3 Others –vs- Joseph Katana & Another

(2019) eKLR; and Satrose Ayuma & 11 Others –vs- Registered Trustee of Kenya Railways Staff Retirement Benefits Scheme & 3 Others (2015) eKLR.

55. The 1st Petitioner in response to the Respondent's submissions filed Supplementary Submissions on 25th July 2023. The 1st Petitioner asserted that the residents who were allocated land and issued titles within the Settlement Schemes were first registered owners and that by virtue of the provisions of Section 143 of the Repealed Land Registered Act, Cap 300 Laws of Kenya, their titles were absolute and indefeasible. The Petitioner cited the cases of Ambale –vs- Masolia (1976) eKLR; Obiero –vs- Opiyo (1972) EA 227; and Esiroyo –vs- Esiroyo (1973) EA 388 to support this submission.

56. Further the 1st Petitioner submitted that the provisions of the Forest Act as variously amended cannot be applied retrospectively so as to invalidate any gazettment made by the previous Minister. The Petitioner argued the residents in the settlement schemes had a legitimate expectation that consequent to the Gazettment of the intention to alter the forest boundaries and the Legal Notice altering the boundaries, that their land allocation and subsequent issuance of title deed was validated. The Petitioner relied on the Case of Jane Kiongo & 15 others –vs- Laikipia University & 6 others (2019) eKLR where Muita, J cited the South African decision in the case of National Director of Public Prosecutions –vs- Phillips & Others (2002) (4) SA 60 (W) Para 28 where the Court stated: -"The Law does not protect every expectation but only those which are "legitimate". The requirements for legitimacy of the expectation, include the following: - i.The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification. ii. The expectation must be reasonable. iii. The representation must have been induced by the decision maker. iv. The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.

57. Submissions by the Ogiek Community (2nd Petitioners). As indicated earlier in this Judgment, the Ogiek Community filed their submissions through Ms Kinama Advocate. It was their position that the African Court had on 26th May 2017 delivered a Judgment in favour of the Ogiek in the Case of African Commission on Human and People's Rights –vs- Republic of Kenya (App. No. 006 of 2012). In the Judgment the Court held that the Mau Forest was the ancestral land of the Ogiek, an indigenous hunter – gatherer Community. The Court further held the forceful eviction of the Mau Ogiek from their ancestral lands violated their rights to culture, religious, property, natural resources, development and non-discrimination, contrary to the

African Charter on Human and Peoples Rights to which Kenya was a State party.

58. The African Court gave time frames for the implementation of their Judgment, which the Ogiek claim the Kenyan state failed to honour despite initiating several Taskforces ostensibly to oversee the implementation of the Judgment.

59. The 2nd Petitioner (Ogiek) contended that the Government (3rd Respondent) on 23rd October 2017 established the first Taskforce (the Dr. Mwakima Taskforce) whose terms of reference were published vide Gazette No. 10944 but averred the terms were unfulfilled and that one year later on 25th October 2018 the 3rd Respondent established yet another Taskforce on the implementation of the decision of the African Court (the Dr. Kibugi Taskforce). The Petitioner submitted the latter Taskforce held several public meetings, completed its work and submitted its report to the 3rd Respondent.

60. The 2nd Petitioner submitted that its rights to access to information was violated since despite requesting, they were not furnished with a copy of the Taskforce report and neither were the contents of the report published. The 2nd Petitioner stated that they formally made a request to the 3rd Respondent on 8th April 2020 seeking production of the Taskforce report but as of 10th November 2020 when the 2nd Petitioner filed its Petition they had not received any response from the 3rd Respondent save that they were invited to Naivasha to what turned out to be a meeting of a Multi-Agency Taskforce formed by the President which was not gazetted and/or its terms of reference publicized. The 2nd Petitioner argued that the Taskforce, not having been gazetted lacked any force of law to the extent that the President had not complied with the provisions of Section 135 of *the Constitution* which required all his decisions to be in writing and to be sealed. Further as the Multi Agency Team was seeking to carry out functions that are donated by various Acts of Parliament including the *Land Act*, *Land Adjudication Act*, the *Community Land Act*, and the Forest Conservation Act, the President needed to act in compliance with Article 132(3)(c) in establishing the same Article 132(3)(c) of *the Constitution* provides that the President shall:-(c)By a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.

61. The 2nd Petitioner in support of their submissions placed reliance on the Case of George Bala –vs- Attorney General (2017) eKLR in contending that the Multi-Agency Taskforce lacked any legal validity to carry out the functions it purported to carry out as it was neither gazetted and/or appointed by

the President as prescribed under the law. The terms of reference for the Multi-Agency Taskforce were unknown and hence the Taskforce was an unlawful entity.

62. The 2nd Petitioner (Ogiek Community) further submitted that even though the Government (3rd Respondent) was ordered/directed by the African Court to implement its merit Judgment delivered on 26th May 2017 and in that regard set up a Taskforce to oversee the implementation of the Judgment, the 3rd Respondent failed and/or neglected to give the 2nd Petitioner any information and/or any access to the working of the Taskforce despite request to be given the information. The 2nd Petitioner contended the 3rd Respondent's action violated Article 35(1) of *the Constitution* and Section 4 and 5 of the *Access to Information Act*. It was thus the 2nd Petitioner's position that to the extent that the Taskforce (s) were dealing with matters (issues) that directly affected the 2nd Petitioner it was necessary for the 3rd Respondent to involve the 2nd Petitioner in their deliberations as the 2nd Petitioner stood to be affected by any decision that would be arrived at. The 2nd Petitioner contended they were neither given access to any information and/or given any hearing contrary to Article 47(1) and (2) of *the Constitution* which constituted a violation of their right to Fair Administrative Action as envisaged under *the Constitution* and the *Fair Administrative Action Act*, 2015 Section 4.

63. The 2nd Petitioner further submitted that the Respondents violated Articles 2(6) and 10 of *the Constitution* by failing to obtain free prior informed consent of the Ogiek Council of Elders and the Ogiek Peoples Development Programme (1st and 2nd Petitioners in Petition *No. 16 of 2020*). The submission was premised on the merits decision of the African Court of 26th May 2017 and the reparations Judgment handed down on 23rd June 2022. The 2nd Petitioner argued that Kenya being a party to the protocol to the African Charter on Human and Peoples' Rights by virtue Article 2(6) of *the Constitution* was bound to execute and implement the Judgment of the African Court. In support of the submission the 2nd petitioner cited the Kenya Supreme Court Case of Mitu –Bell Welfare Society –vs- Kenya Airports Authority & 2 Others (2021) KESC 34 (KLR) (1) January 2021) where the Supreme Court stated:-"On the other hand, Article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of Law to apply international Law (both Customary and treaty law) in resolving disputes before them as long as the same are relevant, and not in conflict with, *the Constitution*, local statutes, or a final Judgment pronouncement. Where for example, a Court of Law is faced with a dispute, the elements of which require the application of a rule of international Law because, there is no domestic Law on the same, or there is a lacuna in the Law, which may be filled by

reference to International Law, the Court must apply the latter, because it forms part of the Law of Kenya. In other words, Article 2(5) and (6) of *the Constitution*, recognizes International Law (both Customary and treaty Law) as a source of Law in Kenya. A Court of Law is at liberty, to refer to a norm of International Law, as an aid in interpreting or clarifying a Constitutional provision."

64. The 2nd Petitioner argued that the Ogiek having been acknowledged as an indigenous Community by the African Court, the United Nations Declaration on Rights of Indigenous Persons (UNDRIP) should be held to be applicable to the Ogiek of the Mau Forest so that their Free Prior Informed Consent (FPIC) should have been sought and obtained before the Multi-Agency Taskforce was put in place since it was to deal with issues that affected them as an indigenous Community. In other words, the 2nd Petitioner's position was that the Ogiek of the Mau Forest were not represented in the Multi-Agency Task Force by any representatives nominated by them and hence there was no compliance with FPIC International Human Rights standard to insulate the actions of the Multi-Agency Task Force. The 2nd Petitioner contended the Ogiek of Mau Forest being an indigenous Community within the meaning of Article 260 of *the Constitution* deserved special protection owing to their vulnerability.

65. In the Reparations Judgment of the African Commission on Human and Peoples Rights –vs- Republic of Kenya (App No. 006/2012) delivered on 23rd June 2022 at Paragraph 142 the Court stated:------ that it is a basic requirement of International Human Rights law that indigenous people like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent state has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuous communication between the parties. Such consultations must be undertaken in good faith and using culturally- appropriate procedures. When development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is incumbent on the Respondent state to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior Informed Consent which is also reflected in Article 32(2) of the UNDRIP."

66. The 2nd Petitioner maintained that the Respondents were bound by the Judgment of the African Court and were under an obligation to obtain the Ogiek's free, prior and informed consent before embarking on a project concerning their rights to ancestral lands, natural resources, culture and

development. They asserted that the Multi-Agency Task Force was formed without any consultation with them and there was, therefore, no free prior informed consent from them which rendered all its activities including the 20th September 2020 at Naivasha at which some representatives of the Ogiek were invited, a nullity.

67. Finally the 2nd Petitioner submitted that the Respondents, notably the 10th Respondent, NEMA violated the right to a clean and healthy environment under Articles 42 and 69 of *the Constitution* as well as Sections 57 and 58 of the National Environment Coordination Act (EMCA) by failing to undertake a Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) before commissioning the titling and settlement of persons in the Mau East Forest. The 2nd Petitioner argued the Respondents were abrogating their responsibility of protecting and conserving the environment as envisaged under Article 69(2) of *the Constitution* and in that regard the Respondents acted in violation of Articles 10, 42 and 69 of *the Constitution* and Sections 57A and 58 of the EMCA and the enabling Regulations 4 and 42 of the EIA Regulations and the NEMA Guidelines on Strategic Environmental Assessments.

68. The 2nd Petitioner thus submitted they were entitled to the reliefs they sought in their petition No. 16 consolidated with the instant Petition.

69. Amicus Curiae Brief: The Amicus Curie Brief of the United Nations Special Rapporteur in the field of cultural Rights submitted by the Amicus Curiae supported the submissions made by Counsel for the Ogiek (2nd Petitioner) particularly in regard to the rights and treatment of indigenous communities such as the Ogiek. The amicus observed that the right to take part in cultural life is recognized in Article 15(1) (a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Kenya is a state party. Equally Article 27 of the International Covenant on Civil and Political Rights (ICCPR) to which also Kenya is a State Party recognizes cultural and indigenous rights and protections and hence the Ogiek as an indigenous community were deserving of the Cultural and indigenous rights being upheld and protected. Amicus has strongly urged that the Free, Prior and Informed Consent of affected indigenous communities should be a prerequisite before any project affecting the environment they live in is implemented and has further argued such communities have the ability and know how to practice culture and traditions without harming the environment.

70. In the Case of the Ogiek he states as follows at Paragraph 42 of his brief: -

"42. Forest dwelling peoples like the Ogiek are well placed to conserve their

ancestral lands, particularly if the customary ownership rights are recognized and protected, including by seeking and obtaining their Free, Prior and Informed Consent when their fundamental rights are at stake".

71. To underscore the role of indigenious communities the Amicus refers to the special Rapporteurs report on the Rights of Indigenous Peoples (6, UN.DOC. A/HRC/36/46 (NOV, 1,2017) where the Special Rapporteur stated thus:- "*Indigenous people are however not simply victims of climate change but have an important contribution to make to address climate change. Due to their close relationship with the environment, indigenous people are uniquely positioned to adopt to climate change. Indigenous people are also repositories of learning and knowledge about how to cope successfully with local-level climate change and respond effectively to major environmental changes such as natural disasters. Indigenous peoples play a fundamental role in conservation of biological diversity and the protection of forests and other natural resources, and their traditional knowledge of the environment can sustainably enrich scientific knowledge and adaptation activities when taking climate change related actions.*" In summation the Amicus stated as follows: -"---- As beekeepers, the Ogiek are particularly well suited to conserve their ancestral lands in the Mau Forest. Yet the Cultural Rights of the Ogiek are under threat from climate change, deforestation, and climate action that is not rights – respecting. The defence of those cultural rights is critical for their wellbeing and for their enjoyment of other human rights, but also for the protection of the environment and indeed the wellbeing of all.

72. Submissions by Commission on Administration of Justice (Interested Party) (CAJ). Counsel for the Interested Party filed written submissions dated 25th September 2023 basically supporting the Petition on behalf of the Ogiek Community. The Interested Party submitted that there was violation of Article 35(1) of *the Constitution* by the Government in regard to the right of access to information by the Ogiek Community on the actions being taken by the Government to implement the Judgment delivered in their favour by African Court on Human and people's Rights on 26th May 2017. It was the position of the Interested Party that the Task Forces that were formed by the Government to implement the Judgment were under Article 35(3) of *the Constitution* and Section 4 and 5 of the *Access to Information Act*, 2011 obligated to give access to the 2nd Petitioner to all information that related to and affected them. They argued the 3rd Respondent had never published any information respecting the Task Force that was formed to implement the Judgment of the African Court and that constituted a violation of its duty of disclosure under Section 5(1)(c) of the *Access to Information Act*. To support its submission in this regard the Interested Party

cited the Case of Katiba Institute –vs- President's Delivery Unit & 3 Others (2017) eKLR where the Court held a public authority cannot deny access to information without justification and that information should be disclosed free of charge notwithstanding the reason for seeking the information.

73. The Interested Party asserted that the facts revealed that the 2nd Petitioner had requested for information from the 3rd Respondent which was not provided. Though the 2nd Petitioner applied to the Commission for review of the refusal/denial of access to information and the review process was initiated, the 3rd Respondent merely responded that the report of the Task Force would be made public in due course and was never availed. The Interested Party contended that the 3rd Respondent ignored the 2nd Petitioner's request for information and concluded that the 3rd Respondent ought to be held to have violated the 2nd Petitioner's right to access to information.

74. Submissions of the Attorney General on behalf of the Respondents. The submissions on behalf of the Attorney General for the Respondents were dated 17th July and filed on the same date. The Attorney General's submissions related to all the Respondents in the instant Petition and Petition *No. 16 of 2020* save for the 10th Respondent (NEMA) in the latter petition. The Attorney General submitted that the consolidated petitions had everything to do with environmental protection and conservation and the question of sustainable development coupled with human settlement. At the heart of the petitions, the Attorney General argued, was preservation of the Mau Forest Complex of which the East Mau Forest which is the subject matter in the Petitions, was a part of. The Attorney General to contexliatise his submissions quoted an extract of the Judgment of my brother Justice Ombwayo, J in the Case of Tabot –vs- AG; Kalimbula Investments Ltd (2023) KEELC 16846 (KLR) where the Judge in opening his Judgment stated as follows: -"1.Our environment is everything and if we do not protect our beautiful environment, then we will end up destroying our lives. God put us in a clean and healthy environment 6 million years ago, early man did not interfere with his environment which was then known as the Garden of Eden, but later man started cutting down trees to access land for cultivation, settlement, timber and firewood, and soon the World is headed to a concrete jungle. The Governments of the World are to blame for the concrete jungle and desertification because they authorize the illegal acquisition of the forest land. Soon, human beings will be struggling with a very unhealthy Environment due to climate change caused by their negative activities towards the said environment."

75. The Attorney General in his submissions took the position that the Respondents were acting proactively in protecting the forest from intrusion

by illegal settlers in an endeavour to conserve and protect the environment for the benefit of both the current and the future generations as *the Constitution* demands.

76. The Attorney General submitted that although the Petitioner(s) in ELC Petition *No. 11 of 2020* had alleged violations of Constitutional rights in regard to Articles 10, 22, 23, 26, 27, 28, 29, 40 and 47 of *the Constitution* no proof of any violation had been demonstrated and that the allegations remained just mere allegations. In particular the Attorney General submitted there was no demonstration of how Article 10 had been violated and/or how the Petitioners had been discriminated against. The Attorney General submitted that no person had been deprived of any property and consequently argued there had been no violation of Article 40 of *the Constitution* as alleged. The Attorney General contended that some of the Petitioners who had been issued title deeds had been issued such titles unprocedurally and illegally and that the titles could not be protected under the Law as they were null and void. The Attorney General submitted that the titles issued to some of the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes annexed to the Petition at Pages 34 to 50 were issued between the periods 1997 and 2013 with a batch of them being issued in 1997 and 1999 though the Petitioner himself held no title in these schemes. The Attorney General submitted that there had been no degazettment of the Mau East Forest in 1997 and 1999 to enable any titles to be issued on land that was comprised in the Eastern Mau Forest gazetted as such through *proclamation No. 57 of 1941* and further declared as certified forest vide *Legal Notice No. 174 of 1964*.

77. The Attorney General pointed out that the Petitioners claim legitimacy and validity of the titles they hold on the basis that the Government degazetted part of the East Mau Forest vide Legal Gazette Notice No. 142 of 8th October 2001 that allegedly had about 35,301.01 Hectares of the forest land excised to create the settlements, yet some of the titles were issued prior to the alleged degazettment. The Attorney General submitted that it could not have been possible to issue titles on forest land that had not been degazetted and contended such titles could only have been unprocedurally and illegally issued. The Attorney General cited and relied on the Case of Clement Kipchirchir & 38 Others –vs- PS Ministry of Lands Housing & Urban Development & 3 Others (2015) eKLR where Munyao, J, held that titles issued before there was a formal degazettment of the forest land were invalid. The Attorney General further relied on the Case of Kiptarus Tabot –vs- Attorney General & Kahimbula Investments Ltd (supra) where Ombwayo, J, declined to declare the Plaintiff to be lawful allottees of Sururu Settlement Scheme and/or hold the titles that they held were valid

on the basis that the land from which they had been evicted from was still gazetted forest land and the titles had been obtained unprocedurally.

78. The Attorney General to fortify his submission that the process of degazettment of the Mau East Forest was never completed, cited the Case of Rep –vs- Minister for Environment & 5 others; Exparte Kenya Alliance of Resident Associations & 4 Others (Nairobi HC Misc. Civil Application No. 421 of 2001) where he asserted the Court stayed the implementation of the Legal Notice No. 140 – 153 giving notice of alteration to of forest boundaries of various forests. The Attorney General thus submitted there was no compliance with Section 4 of the Forest Act, Cap 385 Laws of Kenya (now repealed) that then provided the procedure to be followed before forest land could be degazetted as such. The Attorney General argued the Notice of intention to alter the forest boundary having been challenged in Court, meant that the whole process of degazzetting the forest on the basis of that notice, was stayed and could only have been restarted afresh which never happened.

79. The Attorney General consequently contended that any titles the Petitioners may have obtained could not be valid and they could therefore not rely on their indefeasibity to urge their case in the instant Petition. To illustrate the fact that illegally and/or unprocedurally acquired titles cannot be set up to defeat public interest, the Attorney General cited the Case of Republic –vs- Minister for Transport & Communication & 5 Others; Exparte Waa Ship Garbage Collector & 15 Others (2006) 1 KLR (E&L) 563 where Maraga, J (as he then was) stated thus:-"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the indefeasibility of title deed.----------A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of ----- *the Constitution*."

80. The Attorney General also cited the Cases of Mureithi & 2 Others (for Mbari ya Murathimi clan) –vs- Attorney General & 5 Others (2006) 1 KLR 443 where Nyamu J, (as he then was) echoed similar sentiments as Maraga, J, in the above case. The Attorney General thus took the position that the Petitioners had nonetheless failed to demonstrate that the titles that they held were within the alleged excised area within the Eastern Mau Forest. The Respondents denied there was any destruction of any property and/or that the Petitioners had proved any damage to entitle them to any compensation.

81. In regard to Petition No. 16 of 2020 by the Ogiek Community, the Attorney General submitted in part that the Court would have no power to compel the Respondents to implement the merits Judgment of the African

Commission on Human and Peoples Rights. At any rate the Attorney General submitted that the 2nd Petitioners prayer for a declaration that the Respondents had violated Article 40 of *the Constitution* by failing to implement the said Judgment had been overtaken by events as the African Court had on 23rd June, 2023 delivered the reparations Judgment respecting the implementation of the Merits Judgment delivered on 26th May 2017. The Judgment on reparations had ordered the implementation of the merit Judgment and gave specific measures and timelines to be adhered to by the Kenya Government.

82. On the issue whether the Respondents (the Government) violated the 2nd Petitioners right of access to information under Article 35 of *the Constitution*, the Attorney General submitted that the 2nd Petitioner had not demonstrated that the information sought was of importance to the Nation as to require publication as envisaged under Article 35(3) of *the Constitution*. The Attorney General argued the Multi-Agency Task Force was only to oversight operations and needed not to be gazetted. The Attorney General further submitted the Multi Agency Team never completed its task as its operations were stopped by the Court and hence had not prepared a report that could be publicized.

83. In conclusion the Attorney General submitted that Petition *11 of 2020* was an abuse of the Court process and should be dismissed with costs while as regards the Ogiek Community Petition the Attorney General left the issue of costs to the discretion of the Court.

84. Analysis, Evaluation And Determination:-After reviewing the respective pleadings of the parties, the evidence, and having considered the written and oral submissions made on behalf of the parties, I have identified the following issues for determination:-i.Whether the Government created settlement schemes in Nessuit, Mariashoni, Sururu, Likia, Terit, and Sigotik, and if so, whether the Petitioners in Petition *11 of 2020* were settled in these schemes? ii. Whether the Government had given notice to alter the forest boundary of the Eastern Mau Forest vide Legal Notice No. 889 of 30.1.2001, and if so, whether the process of degazettment of the forest area was completed? iii. Whether there was a clear delineation of the forest land and the settlement area, and if so, whether the Petitioners have encroached onto the forest land? iv. Whether the Petitioners legitimate expectation that they would be settled on the land they occupy and hold titles to was violated by the Government? v. Whether the Petitioners are entitled to compensation for any unlawful eviction from their land? vi. Whether the Ogiek Community's (2nd Petitioner's) rights to property were violated by the Respondent? vii. Whether the 2nd Petitioner's Rights of access to information in regard to the implementation of the Judgment of the African Commission

on Human and Peoples Rights were violated by the Respondents? viii. Whether the Multi-Agency Task Force established in August/September 2020 had any legal mandate to deal with issues relating to the disputed settlements within the Eastern Mau Forest?

85. From both the Affidavit evidence and the evidence adduced viva voce in Court by the witnesses, it is clear the Eastern Mau Forest has been the scene of various inter-tribal conflicts and clashes propelled by disputes over settlement. This puts into question how the warring factions came to be in the forest area. Were there any Settlement Schemes created in the area and/or how did the persons come to be inhabitants of the area?

86. The origin of land settlement schemes in Kenya has to do with the transition of Kenya from a colonial state to an independent state. At the time of transition, settlement schemes were conceived to de-racialize land ownership in the former whites – only scheduled Areas and to offer land to many of those who had been displaced during the struggle against the Colonial rule. The Government's primary objectives over the years in creating settlement schemes has been to satisfy hunger for land in regard to the landless, to promote political stability, and to ensure agricultural productivity of the land was sustained. The emergence of public land buying companies soon after independence whose purpose was to purchase large tracts of land and settle their members also prayed a significant role in the establishment of settlements. Notwithstanding the settlements created following the transition to independence, there were still numerous persons who had no land, those living in communal villages and informal settlements (slums) and those persons who were labourers in the white settlers' farms and forest workers following the abolishment of the "forest shamba system". In the instant Petition some of the settlers are the products of the forest shamba system where they were permitted to reside and cultivate within the forest as they nurtured the forest. This shamba system was abolished the 1980's rendering all those persons landless as many of them never had land elsewhere.

87. While the Ogiek Community were acknowledged in the Case of Joseph Letuya & Others –vs- Attorney General & 5 Others (2014) eKLR as an indigenous community who were living within the Eastern Mau Forest Complex which position the African Court on Human and Peoples Rights reiterated in their merits Judgment and the Judgment on reparations; the Government has not conclusively resolved the Ogiek Community land issue as recommended by the Courts in the Letuya Case and the African Court. In the instant Petition the Ogiek Community are basically seeking to have the Judgment of the African Court implemented.

88. Whether any settlement schemes were created by the Government? There is uncontroverted evidence that the Government during the 1990s allowed and/or permitted people to enter and occupy tracts of land which constituted forest reserves around Londiani, Elburgon, Njoro and Kuresoi which were within the Eastern Mau Forest Complex. In Nakuru District, the Government around 1997 designated thousands of hectares of the Eastern Mau Forest as settlement schemes and allocated 5 acres parcels of land to the settlers. This saw the creation of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik settlement schemes. It is not disputed that indeed such settlements exist and are occupied and settled in. The issue as I have understood it, is whether the settlement schemes were procedurally created and whether they legally exist. Of note is that at the same time that the Government sought to have part of the Mau Forest excised to create settlements, the Government was also privatizing what used to be known as Agricultural Development Corporation Farm (ADC) by creating settlement schemes. The only difference was that whereas the forest excision was intended for settlement of landless persons, the ADC farms were targeted for acquisition by well to do members of the Society. The case of Ngata ADC farm in the outskirts of Nakuru City would aptly illustrate the point.

89. The Government no doubt recognized there was a laid down procedure to be followed to alter the boundaries of any gazetted forest. The Government thus issued the requisite Notices under Section 4(2) of the Forest Act Cap 385 Laws of Kenya (now repealed) of the "Intention to Alter Boundary" of the Eastern Mau Forest vide Gazette Notice No. 889 dated 30.1.2001. The Notice provided as follows: -The Eastern Mau Forest Intention to Alter Boundaries in Accordance with the Provisions of Section 4(2) of the Forest Act, the Minister for Environment gives Twenty-Eight (28) days' notice with effect from the date of the publication of this notice of his intention to declare the boundaries of the Eastern Mau Forest, will be altered so as to exclude the area described in the schedule hereto. Schedule an area of land of approximately 35,301.01 Hectares, adjoining the Western, Northern and Eastern boundary of Eastern Mau Forest situated approximately 7 Kilometres, South of Njoro Township, in Nakuru District, Rift Valley Province, the boundaries of which are more particularly delineated, edged on boundary plan No. 175/388 which is signed and sealed with the seal of the Survey of Kenya and deposited at the Survey Records Office, Survey of Kenya; Nairobi and a copy of which may be inspected at the office of the District Forest Officer, Forest Department, Nakuru. Dated the 30th January, 2001.F.m. Nyenze Minister for Environment.

90. The Petitioners contend that the area that was intended to be set apart from the forest land as per the schedule measuring approximately 35,301.01 Hectares is what is now Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes. It was the Petitioners position that the Government had earmarked the area for settlement from way back in 1995 and settled people in the area and issued them with titles for their parcels of land in accordance with the survey that was carried out in 1997. The Petitioners maintained that clear boundaries were established and there was a clear cut line of the land excised from the forest and the settled area and that beacons were placed to delineate the forest land with the settlement land.

91. As affirmation that the forest land was indeed excised in terms of Boundary Plan No. 175/388 referenced in the Notice of Intention to alter the forest boundary, the Director of Survey wrote to the Chief Conservator of Forests on 23rd May 2002 (Letter exhibited as "SKT b" at page 87 of the Petition) as follows:-Date 23rd May 2002The Chief Conservator of Forests, Box 30513NairobiRe: Excision From Eastern Mau Forest B.p. No. 175/388It has been brought to my attention that a portion of Eastern Mau Forest that was part of the excision was left out on the boundary plan erroneously. The said portion is enclosed by beacons NI2-SW(anticlockwise) see F/R 380/44. I have amended the original of the boundary plan to include that area and forwarded to you five (5) copies as usual together with copies of the approved survey plans F/R's 301/30 and 380/44.However the total area under excision is not affected. Signed. S.M. MUHORO For- Director of Surveys.CC: - The Commissioner of Lands. The Provincial Surveyor.

92. The Petitioners have contended that the alteration of the Eastern Mau Forest together with various other forest boundaries were appropriately carried out pursuant to Legal Notices No. 142 to 153 dated 8th October, 2001 issued by N. K. Ngala then Minister for Environment and published on 19th October 2001. In regard to Eastern Mau Forest Legal Notice No. 142 provided thus: -Alteration of Boundaries – Eastern Mau Forest. In exercise of the powers conferred by Section 4(1) of the Forest Act, the Minister for Environment declares that the boundaries of Eastern Mau Forest be altered so as to exclude the area described in the schedule hereto. Schedule an area of land measuring approximately 35,301.01 hectares adjoining the Western, Northern and Eastern boundaries of Eastern Mau Forest situated approximately 7 Kilometres South of Njoro Township in Nakuru District, Rift Valley Province, the boundaries of which are more particularly delineated edged red, on Boundary Plan No. 175/388 which is signed and sealed with the seal of the Survey of Kenya and deposited at the Survey Office, Survey of Kenya, Nairobi, and a copy of which may be inspected at the Office of

the District Forest Officer Forest Department, Nakuru.Dated the 8th October, 2001N. K. NGALAMINISTER FOR ENVIRONMENT.

93. The Attorney General on behalf of the Respondents has argued that the intention to alter the Forest Boundaries and more specifically the Legal Gazette Notice No. 142-153 were challenged in Court and thus the process was stayed and was not completed. The Attorney General contended that the process of degazetting the forest land having not been completed, the settlement and the titles issued to some of the Petitioners were invalid and illegal since the land was and remained a gazetted forest. The Attorney General submitted that some of the titles exhibited by the Petitioners were subject matter in Nakuru ELC Petition *No. 42 of 2013*:- Clement Kipchirchir & 38 Others –vs- P.S Ministry of Lands & Urban Development & 3 Others (2015) eKLR and Nakuru ELC No. 288 of 2018:- Kiptanui Tabot –vs- Attorney General:- Kalimbula Investments Ltd (Interested Party) and the Courts found them to be invalid for having been issued on gazetted forest land. In the suits referred to, individual title owners were seeking to have the titles they held declared to be valid on the basis that they had been issued to them by the Government and the Courts took the position that it had not been proved that the forest land had been procedurally degazetted for titles to be issued on what was a gazetted forest.

94. In the instant petition the Court is called upon to determine whether the Government did in fact establish the settlement schemes said to be within the Eastern Mau Forest and whether the Government's intention to alter the boundary of the forest as envisaged under Gazette Notice No. 889 of 30th January, 2001 was complied with. There is no question and/or dispute that there was Government facilitated settlements in Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik where from 1995 persons were allowed to occupy portions of land that were surveyed and parcelled out and given distinct numbers. Indeed, a large number of people had title deeds processed and issued to them from 1997 through to 2017. I would therefore in answer to issue Number (i) affirm that on the basis of the evidence the Government consciously established the aforementioned settlement schemes and allocated and/or permitted persons to enter and occupy the land within the said schemes. The creation of the settlement schemes may have been motivated by consideration of other factors, most probably political, rather than environmental considerations. The Mau Forest Complex is a critical water tower upon which many lives and species depended both locally and regionally and hence it is vital that the Mau ecosystem is maintained and sustained for the benefit of the present and future generations. Any degradation and/or depletion of the Mau Forest

Complex would have far reaching ramifications and there is therefore need to jealously conserve and safeguard the forest land for the benefit of all.

95. The Government apparently in realization that there has been widespread intrusion and damage to the Mau Forest Complex, including within the Eastern Mau Forest, has embarked upon a campaign to restore and rehabilitate the Mau Forest. The question however remains whether such restoration should entail eviction of the settlers from the land that the Government voluntarily allowed and facilitated them to settle in without a clear resettlement plan. If the people are to be removed from the settlement schemes, and they could be in hundreds of thousands, where do you take them? Were they to blame for the occupation?

96. Was there an intention to alter the forest boundary? It is not disputed that the Government through the relevant Minister issued the Notice of Intention to Alter the Eastern Mau Forest Boundary vide Gazette Notice No. 889 of 30th January, 2001 as required under Section 4(2) of the Forest Act Cap 385 Laws of Kenya (repealed) Section 4 of the Forest Act, provides as follows:- 4(1)The Minister, may from time to time, by Notice in the Gazette:-a. Declare any unalienated Government land to forest area; b. Declare the boundaries of forest and from time to time alter those boundaries; c. Declare that a forest shall cease to be a forest area.(2)Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1) Twenty Eight days' notice of intention to make the declaration, shall be published by the Minister in the Gazette.

97. It is noteworthy that as at 30th January 2001 when the Minister issued the notice of intention to alter the forest boundary, settlements had already taken place in the settlement scheme. In a sense therefore the Minister was in effect taking steps to regularize what otherwise had been unlawfully done without first having the forest boundary altered before establishing the settlements. It cannot be that the Government did not know settlers had settled in the area earmarked for excision from the forest with the tacit approval of the Government. Many of the settled individuals were those who had been affected by the 1992 land tribal clashes and those who had been removed from the forest following the abandonment of the forest shamba system. These were basically landless people who the Government under Article 43 of *the Constitution* would have been expected to make provisions for under the ambit of economic and social rights guaranteed under the Bill of Rights. Article 43 of *the Constitution* provides as follows:- 43.(1)Every person has the right—(a)to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;(b)to accessible and adequate housing, and to reasonable standards of sanitation;(c)to be free from hunger, and to have

adequate food of acceptable quality;(d)to clean and safe water in adequate quantities;(e)to social security; and(f)to education.(2)A person shall not be denied emergency medical treatment.(3)The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

98. The Government's determination to complete the process of altering the forest boundary of the Eastern Mau forest is evidenced by the fact that the then Minister, N.K. Ngala on 8th October, 2001 issued Legal Notice No. 142 for Alteration of Boundaries – Eastern Mau Forest to effectively sanction the excision of 35,301.01 hectares as specified in the schedule attached to the Legal Notice from the forest. The question arises whether or not the Legal Notice took effect and/or was implemented. The Attorney General and the Kenya Forest Service have argued the Legal Notice was challenged and the implementation of the Legal Notice was stayed. The Attorney General, however even though he cited Nairobi High Court Misc. Civil Application *No. 421 of 2002* as having stayed the implementation of Legal Notice No. 142 of 8th October, 2001, did not furnish the Judgment and/or the order issued by the Court on 22nd April, 2002. It is therefore not possible to ascertain the terms of the Judgment and/or whether there was a Judgment. It was not demonstrated that the Legal Notice was quashed and/or what the terms of the stay were. At any rate if there was a Judgment in the suit referred to, it would only be persuasive and not binding to this Court. It not having been demonstrated that the Legal Notice No. 142 of 8th October, 2001 was quashed, and/or annulled, it is my view that, even if there was an order staying implementation it could not have been indefinite. An order of stay is ordinarily pegged on the occurrence of some event and cannot be for an indefinite time. The Legal Notice in my view still remained valid and consequently served to complete the process that was commenced by Minister Nyenze vide the Gazette Notice No. 889 of 30th January, 2001. Accordingly, I hold that the Legal Gazette Notice No. 142 of 8th October 2001 operated to alter the boundary of the East Mau Forest as expressed in the Gazette Notice.

99. Whether there was Delineation of the Forest Land? In the present Petition, the Petitioners claim they were within the area delineated as settlement area within the schemes. The Kenya Forest Service and the Government at large claim there has been intrusion by settlers into forest land. It is evident from the evidence there is no clear and definite delineation of the forest area. In this regard issues arise whether the boundary recognized by the Kenya Forest Service takes into account the settlement Schemes areas and specifically whether such boundary as acknowledged by the KFS includes the excision of approximately 35,301.01 Hectares as per the Legal Notice

No. 142 of 8th October, 2001 or it is the boundary before the excision. On the part of the Settlers is the boundary they refer to the boundary after the excision or before the excision? Most probably the settlers must be referring to the boundary after the excision and/or forest boundary after the alteration.

100. The Petitioners/settlers were freely and voluntarily settled in the parcels of land within the settlement schemes by the Government and many of them were issued with title deeds as in the Case of Liwop-Morop Self Help Group (3rd Interested Party) who exhibited nearly 2,000 titles issued to their members spread in Sururu, Likia, Mariashoni, Nessuit and Doinnet Settlement Schemes.

101. The Petitioners have contended that the Government having voluntarily allocated them the land on which they have settled, they had a legitimate expectation that the same Government would allow them to settle in peace and would not turn against them and seek to evict them. The Petitioners argue that following the Gazettement of the Notice of intention to Alter the Forest Boundary and the consequent gazettement of the Alteration of Boundary – Eastern Mau Forest they legitimately expected that their "troubles" of being landless would be over and they would henceforth be at peace and live happily in their newly found land. The Petitioners/settlers must have been even more fortified when the Government issued them titles.

102. The Supreme Court of Kenya in the Case of Fanikiwa Ltd & 3 Others –vs- Sirikwa Squatters Group & 17 Others (Pet. No E036 consolidated with E.038 & E.039) stated as follows at paragraph *87* & 88 of their Judgment in regard to the principle of legitimate expectation:

*(87) The Principle of legitimate expectation imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of public authority. If a public body has raised expectations that it will in future undertake a certain course of action, then it should ordinarily fulfil those expectations. This is important for the promotion of certainity and consistency in public administration. (88). For an individual to invoke the Principle of legitimate expectation, an expectation must have been induced by some conduct of the public authority. The principle extends to any individual who is in a situation in which it appears that the administration's conduct led him to entertain certain expectations***." *In the Case of Kenya Revenue Authority –vs- Export Trading Co. Ltd (2022) KESC 31 the Supreme Court** stated:-"---- Legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before a decision maker or it may take the objective form that a party may legitimately expect that before a decision that may be

*prejudicial is taken, one shall be afforded a hearing. Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question it is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate***." *In the Case of Communications Commission of Kenya & 5 Others –vs- Royal Media Services Ltd & 5 Others (2014) eKLR** *the Supreme Court summed the principles of legitimate expectations as follows:-a. There must be an express, clear and unambiguous promise given by a public authority. b. The expectation itself must be reasonable; c. The representation must be one which it was competent and lawful for the decision maker to make; and d. There cannot be a legitimate expectation against clear* provisions of the law or *the Constitution*.

103. In the Case at hand there can be no denial that the Government through its officers made promises to settle the Petitioners and in that regard established the six settlement schemes. Sururu, Mariashoni, Nessuit, Likia, Terit and Sigotik on which they allocated people land who moved in and settled thereon. In furtherance and execution of the promise the Government gave a Notice of Intention to alter the boundary of Eastern Mau Forest by issuing the Gazette Notice No. 889 of 30th January 2001 as required under the law. The Government had the power and authority to alter the forest boundary to create a settlement as they did. The Government duly gazetted the degazettment of the portion of 35,301.01 hectares of Eastern Mau Forest vide Legal Notice No. 142 of 8th October, 2001 which gazette Notice has never been annulled and/or revoked. The Petitioners were given a promise, they were let in occupation by the Government, and the Government by its conduct of gazetting the intention to alter the forest boundary, and ultimately degazetting the land set apart from the forest, gave the Petitioners and settlers within the Scheme legitimate expectation that their resettlement was "fait accompli". The Government had the ability to give the promise and the Petitioners were entitled to act on it. It is therefore my determination that the Petitioners/Settlers had a legitimate expectation that the Government would settle them in the land identified for settlement by the Government. The Government by seeking to go back on its promise, violated the Petitioners legitimate expectation and their property rights.

104. Admittedly the Government may have realized that it goofed by opening what was otherwise forest land to settlement and legitimizing it by undertaking the process of degazetting the forest land. The realization is fraught with challenges as to reverse the position to pre 1997 when the settlements commenced in earnest, would be nearly impossible. There are

thousands of people who have settled in the established schemes and any mass evictions would require a massive resettlement plan of the evictees. The Government has not indicated they had such a plan and if anything the Government appears only to be focused on getting the settlers out of what it claims to be forest land. While it is essential and necessary to preserve and conserve the forest, the Court must be alive to the situation on the ground and in doing so to also be conscious of the dictates of Article 43 of *the Constitution*. The Court has to be careful not to in the name of endeavouring to protect the environment, to unwittingly usher in a humanitarian crisis where inhabitants are flushed out and left on the roadsides and market and trading centers where they add to the population of internally displaced persons (IDP's). The Court takes notice that not all IDP's from the 2007/8 post-election violence have been settled to date.

105. The Court is conscious that there may be persons who may have taken advantage of the confusion relating to the delineation of the forest area from the settlement area and encroached onto the forest land. These persons, if found to have encroached onto the forest area beyond the boundary of the Settlement Schemes, are to be evicted forcefully as they could be the source of the problem. The Multi-Agency Task Force had one of its objectives being to reestablish the boundary between the settlement land and the forest land. Which boundary were they to re-establish? Was it the boundary before the degazettment of the forest vide Legal Notice 142 of 8th October, 2001 or after the degazettment? It is evident people were settled on the 35,301.01 hectares that were degazetted and that explains the present petition. Is it the Government's position that all the persons settled on the degazetted forest land were to be evicted? There was no clarity and no numbers were given although the Petitioners claimed there were over 100,000 inhabitants who stood to be affected.

106. As I have determined that the Government properly degazetted 35,301.01 Hectares of Eastern Mau Forest, it follows the persons who were settled within this area were validly settled and if they had been issued titles, such titles were valid and should be respected. The Government and the Kenya Forest Service have to move with speed to delineate the boundary and any person found to be beyond such boundary once established has to vacate from the forest land and/or be evicted forcefully.

107. There is no doubt that human activities over time globally have had adverse effects to the environment. There has been widespread deforestation that has seen forested land reclaimed for human settlement. There has been air pollution caused by industrialization and illegal disposal of toxic and hazardous waste. The combined effect is that globally we have

witnessed climate change and notably there has been increased global warming leading to the threat of desertification as rainfall yields decrease and rivers dry up. Kenya has not been spared the adverse effects of the global climate change and hence every activity that has potential to adversely affect the environment must be carefully considered and evaluated to ensure the adverse effects are mitigated. The allocation of part of the forest as settlement land definitely affected the ability of the Mau Forest Complex to act as water catchment area and as such action must be taken to restore the tree cover to the extent possible and it is for that reason as a mitigation measure of the impacts of deforestation, the Court recommends a limitation of the land use within the settlement area with a view of mitigating the adverse impacts of deforestation resulting from human settlement in what was forest land.

108. The protection and conservation of the environment is for the public good and the Government and the Agencies that have the responsibility to ensure the environment and water catchment areas are protected such as NEMA and the Water Resources Management Authority (WARMA) must play their part as the law mandates them to do. The Government under Article 66 of *the Constitution* has a broad duty to regulate use of land whether public or private. Article 66 of *the Constitution* provides as follows:- 66.(1)The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.(2)Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

109. Under Article 66(1) of *the Constitution* the Government in the public interest can impose regulations regarding the use of land and in my view, with regard to the settlements that were curved out of what was forest land the Government can properly through its Agencies regulate the land use such that the impacts of deforestation are mitigated to minimize the negative adverse effects of the action taken to degazette part of Eastern Mau Forest by the Government. Article 69(1)(a) and (b) of *the Constitution* places obligations on the state to ensure sustainable exploitation and utilization of resources and to also ensure a threshold tree cover of 10% is attained Country wide. These provisions provide as follows:- 69 (1)The State shall—(a)ensure sustainable exploitation, utilization, 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;

110. It is evident that the legal framework to ensure the environment is adequately protected and conserved exists and all that needs to be done is ensure there is a proactive and effective mechanism for enforcement and application of the law. The various State Agencies charged with the responsibility of coordinating environmental protection and conservation efforts must play their part for the objective to be realized. The Government and its agencies owe the public a duty to ensure the environment is conserved and protected.

111. The Petitioners in the Petition have prayed for compensation for unlawful and forceful evictions. While there is evidence there could have been some evictions, the Court is not able to ascertain whether the evictions were executed on forest land and/or settlement land. The Kenya Forest Service has mandate to protect forest land from intrusion and can properly carry out evictions from forest land provided they do so upon notice and effect the evictions in a humane manner. No evidence was adduced to demonstrate that they had carried out any evictions unlawfully and/or in an un humane manner. The claim for damages was not proved and is dismissed.

112. Whether the rights of The Ogiek Community were Violated? In this Petition the Ogiek Community claim that their right in regard to occupation and settlement within the Mau Forest Complex have been adjudicated by the African Commission on Human and Peoples Rights which rendered a merits Judgment on 26th May 2017 and a reparations Judgment on 23rd June 2022. In as far as the Ogiek community is concerned, it is only the implementation of the Judgments that remain outstanding and it was on that account they joined the Petition as Interested Parties and filed Petition *16 of 2020* which was consolidated with the instant Petition.

113. The Petition was filed after the African Commission on Human and People Rights had rendered its merits Judgment but before the Judgment on reparations arising out of the merits Judgment. The Judgment on reparations sought to give enforcement of the merits Judgment and that in its final orders in the reparations Judgment the Court granted specific remedies and set time lines for the fulfilment of other obligations by the State. The Ogiek under prayer (4) of their petition prayed thus:-That a declaration that the Respondents are violating the rule of Law under Article 40 of *the Constitution* by failing to respect and implement the Judgments of the African Court of Human and People's Rights in Application Number E006 of 2012.

114. With respect this prayer, given the reparations Judgment, has been overtaken by events. Besides this Court in my view would have no power/jurisdiction to compel the Respondents to enforce the decision of

the African Commission on Human and Peoples Rights. The commission through the reparations Judgment has demonstrated it has ability to enforce its own Judgment.

115. The Ogiek Community, in the Petition complained that when the Government set out Task Forces and more specifically the Multi-Agency Task Force to oversee the implementation of the Judgment of the African Commission on Huma and People's Rights they were denied access to information in violation of Article 35 and Section 4 of the *Access to Information Act*, 2016.

116. To the extent that the Task Forces were established with the objective of implementing the merits Judgment of the African Commission on Human and People's Rights (App. No. 006 of 2012) which the Ogiek Community had prosecuted and obtained the Judgment in their favour, they were entitled to be involved in the activities of the Task Forces and to be furnished information upon request. The activities that the Task Forces were undertaking were likely to affect the Ogiek Community and they therefore had the right to be informed what was happening and/or the progress of the activities.

117. The establishment of the Multi-Agency Task Force in August/September 2020, which was not gazetted and/or with any publicized Terms of Reference, and without the involvement of the Ogiek Community representatives and yet one of the Task Force's objectives was the implementation of the Merits Judgment of the African Commission on Human and Peoples Rights was unlawful and lacked any legal backing. The activities of this Task Force were a nullity as it lacked a Legal frame work to anchor its activities.

118. As I have observed the Ogiek Community joined the Petition and filed their Petition before the delivery of the reparations Judgment on 23rd June 2022. The Judgment on reparations changed the landscape fundamentally as it issued indictments against the state and set new time lines and thresholds for the Government to meet. As at the moment this Court has no information to what extent the terms of the reparations Judgment have been met. The Ogiek Community in my view should now focus on the implementation and satisfaction of the reparations Judgment as it was in effect, given in enforcement of the merits Judgment. This Court, as earlier observed, cannot execute the Judgment of the Regional Court, at least not within the ambit of the present Petition.

119. Although the issue was not raised and canvassed by the parties, the issue does arise as to whether this Court and indeed other Local Courts would stand bound by the decision of the African Commission on Human and Peoples Rights. The Ogiek Community have for instant presented the

Judgments delivered by that Court as though they were fait accompli where this Court was bound by them and all that remained was to implement the Judgments. I find some difficulty in that since as a National Court, the Court is expected to interpret *the Constitution* or the National Laws and on the basis of the evidence make a determination. Hence where a dispute concerns the application of any domestic laws and/or customary or International Law, the jurisdiction of the National Court cannot be surrendered to the Regional Courts but the jurisprudence from such Courts can be taken as persuasive authorities.

120. The Kenya Supreme Court in an advisory opinion on the matter of Attorney General (on behalf of the National Government –vs- Karua (2024) KESC 21 (KLR) had occasion to consider the position of Regional Courts in a matter where Karua, a Contestant of the Kirinyaga Gubernatorial Seat in 2017 having exhausted her Judicial remedies after the Supreme Court dismissed her appeal, approached the East African Court of Justice (EACJ) for review of the Supreme Court's decision. The Supreme Court inter alia held under Paragraphs *15*, *29*,*31* and *32* reproduced hereunder as follows:-
15.It was implied that *the Constitution* embodied the primacy of domestic laws and the subsidiarity of international laws. The principle of subsidiarity respected national sovereignty by recognizing that each State retained the ultimate authority over matters occurring within its territory, because in the case of Kenya, article 1 of *the Constitution* declared that all sovereign power belonged to the people of Kenya, and that power to be exercised only in accordance with *the Constitution*.29.International or regional courts were empowered to conduct procedural reviews on decisions of the national courts and call attention to violations only but in line with the mandate conferred by their parent treaty or convention, and not national laws. Therefore, in accordance with the EAC Treaty, EACJ's mandate was the interpretation and application of the EAC Treaty only.31.A mere disagreement with the interpretation that domestic courts have made of pertinent legal provisions did not constitute violations of the EAC Treaty. Interpretation of *the Constitution* or national laws, and weighing of evidence is the mandate of domestic courts, which could not be replaced by the EACJ in that regard.32.Regional and international courts such as the EACJ were, by Treaty or Convention, granted the mandate to examine how state organs satisfied regional or international obligations of the state to interpret and apply national laws save as for the specified limitations. Such courts should only act as agencies and tools for strengthening of local conditions, including democracy and the rule of law but not as substitutes of state organs.

121. Guided by the Supreme Court Advisory opinion, it is my view that notwithstanding the decision by the African Commission on Human and Peoples Rights the Court would be entitled to consider the applicable law and the evidence and make its own decision which of course would be subject to appeal.

122. In the present Petition subject to the determination the Court has made, the Petitioners are not opposed to the Ogiek Community being settled and allocated land as determined in the Judgment of the African Commission on Human and Peoples Rights, as long as their settlements (Petitioners) are not interfered with.

123. What remedies should the Court grant? The Petitioners have demonstrated they indeed are residents of Nessuit, Mariashoni, Sururu, Likia, Terit, and Sigotik Settlement Schemes having been allocated land in the Schemes that were created and established by the Government. The Court on the basis of the analysis and evaluation of the evidence finds and holds that the Petitioners/residents are rightfully in occupation of the land allocated to them provided such land falls within the forest land that was excised for Settlement purposes. Considering that the land was part of the Eastern Mau Forest before excision, the land use by the settlers must be such as compliments the greater Mau Forest Complex for sustainance of the Ecosystem of the Mau Forest as a Water Tower and a water catchment area. The residents must be required to ensure there is no interference with the riparian reserve of all rivers that flow through the Settlement lands. The Settlers must also be required to plant trees and to maintain a tree cover in respect of each parcel of land of not less than 30%. I am aware the Settlers have or will be issued free hold titles which have no encumbrances but I take cognizance that if Article 66(1) & 69 (2) of *the Constitution* are invoked both the Settlers and the Government Officers on the ground can enforce compliance. Article 69(2) provides:-(2) Every person has a duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

124. To attain the threshold of 30% tree cover, Kenya Forest Service would need to avail tree seedlings to the settlers and in liaison with the Local Administration of the Ministry of Interior and Coordination of National Government and the County Environment Department could easily ensure compliance. They are under Article 69(2) of *the Constitution* obligated to do that and they should. Everybody has a role to play in the conservation and protection of the environment for sustainable development to be a reality.

125. The upshot is that I find merit in the Petition and make the following is consequential orders:-1.That the Government with the intention of settling landless persons created Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes where the Government allocated people (Petitioners) individual parcels of land.2.That to facilitate the Settlement the Government gave notice to alter the boundary of East Mau Forest vide Legal Gazette Notice No. 889 of 30th January, 2001 and that the forest boundary was altered vide Legal Gazette Notice No. 142 of 8.10.2001 which Gazette Notices have never been cancelled and/or revoked.3.It is ordered that the Legal Notice No. 142 of 8th October, 2001 be implemented and the Government within a period of 12 months from the date of this Judgment to establish and delineate the forest boundaries within the Settlement Schemes by placing physical and visible beacons on the ground.4.The Government through the Ministry of Interior and Coordination of National Government and the Ministry of Lands, Housing and Urban Development is directed to verify and authenticate the allottees of land within the Settlement Schemes and to issue titles to any of the allottees who may not have been issued title to land allocated to them.5.That upon the delineation and establishment of the forest boundary any person found to have encroached onto the forest land to vacate forthwith failing which the Kenya Forest Service to be at liberty to evict such people forcefully but any such evictions to be humane and to comply with Section 152G of the *Land Act*, 2012.6.The owners of land within the Schemes shall be required to ensure there is no interference with the riparian reserve of any rivers flowing through their lands and every land owner within the schemes shall be required to increase the tree cover in their parcels of land to a minimum of 30% of the land within a period of 60 months from the date of this Judgment.7.The Ministry of Interior and Coordination of National Government, the Kenya Forest Service, the National Environment Management Authority (NEMA) and the Water Resources Management Authority (WARMA) shall oversee the implementation of (6) above under the auspices of Article 69(2) of *the Constitution*.8.The Ogiek Community's Rights of Access to information was violated by the Respondents but the Judgment on reparations dated 23rd June, 2022 has rendered any orders otiose. The Government should facilitate the implementation of the Judgment.9.The Petition *No. 6 of 2020* was not proved and is dismissed.10.Each party to bear their own costs of the consolidated Petitions as the Petitions involved public interest.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK AT KERUGOYA THIS 30TH DAY OF SEPTEMBER 2024.

J. M. MUTUNGI

ELC – JUDGE

6.Taj Mall Limited & 2 Others v CAJ as 3rd Interested Party.

	Case Metadata
Case No :	ELC Petition No.62 OF 2019
Date delivered:	20th November, 2024
Case Class :	Civil
Court:	Environment & Lands Court
Case Action :	Judgment
Judge(s) :	O.A Angote
Citation :	Taj Mall Limited & 2 Other V CAJ as Interested Party.
Court Division:	Environment & Lands Court
County:	Nairobi
Case Outcome: An award of damages in the sum of Kshs.164, 749,000 being the last valuation of the suit property together with interest accruing thereon at court rates from the date of filing this judgment until payment in full to be paid by the 1st Respondent. The 1st Respondent to pay the costs of the suit.	

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 62 OF 2019
OA ANGOTE, J
NOVEMBER 20, 2024

BETWEEN

TAJ MALL LIMITED……..**PETITIONER**

AND

KENYA URBAN ROADS AUTHORITY……..……..**1ST RESPONDENT**

MINISTRY OF LANDS AND PHYSICAL PLANNING.....…..…..……**2ND RESPONDENT**

HON ATTORNEY GENERAL……..……**3RD RESPONDENT**

AND

NATIONAL LAND COMMISSION……....……**1ST INTERESTED PARTY**

COUNTY GOVERNMENT OF NAIROBI……..**2ND INTERESTED PARTY**

COMMISSION ON

ADMINISTRATIVE JUSTICE……**3RD INTERESTED PARTY**

JUDGMENT

Background

1. Before the Court for determination is a Petition dated 13th November 2019 and filed on 15th November 2019. The Petitioner is seeking for the following orders:

a) A declaration that the Certi1cate of Title held by the Petitioner in respect of L.R No. 9042/694 (hereinafter 'the suit property') is conclusive evidence of the Petitioner's bona 1de ownership of the suit property and the Petitioner has an indefeasible title against the 1st Respondent and the whole world.

b) An order of injunction be issued restraining the Respondents or any of them from trespassing, cancelling, revoking the title to and/or dealing in any manner whatsoever with the suit property.

c) An order of mandatory injunction be issued compelling the 1st Respondent to remove from the Petitioner's land the road illegally built thereon.

d) In the alternative to prayers a, b and c above, an award of damages in the sum of Kshs. 164, 749,000 being the last valuation of the suit property together with interest accruing thereon at court rates from 11th January 2018 until payment in full.

e) The costs of the Petition be borne by the Respondents in any event.

2. In the Petition, the Petitioner averred that it purchased the suit property measuring approximately 0.440 Hectares from Auto express Limited (formerly known as Nyanza Petroleum Dealers Limited) who had initially bought the same from the original owner, Rev. Arthur Kinyanjui, on 14th December 1995. It was averred that a transfer was duly registered in the name of the Petitioner on 24th January 2014.

3. The Petitioner averred that prior to 1999, the suit property was registered as L.R No. 9042/G01 under grant IR No. G8598 measuring approximately 0.4460 Hectares; that in January 1999, Nyanza Petroleum applied for recti1cation of an anomaly of the acreage on the suit property and that the recti1cation was elected sometime in 2001.

4. Consequently, it was averred, Nyanza Petroleum surrendered Grant IR G8598 and was issued with Grant IR 8548G on 2nd February 2001 and continued to pay the requisite land rates and rents.
5. According to the Petitioner, sometime in May 2010, Auto express Limited realized that part of the suit property was going to be erected by the construction of the Eastern Bypass and expansion of Outering Road and that an enquiry was made

to the 2nd Respondent who replied stating that the suit property was encroaching on the Eastern Bypass.

6. It was averred in the Petition that Auto express Limited sought to 1nd out from the 2nd Respondent what area of the suit property was encroaching on the Eastern Bypass but the 2nd Respondent was not forthcoming with the information and that Auto express Limited informed the 2nd Respondent that it would no longer pay the land rates until the issue was resolved.

7. When the Petitioner bought the suit property, it was averred, it cleared the land rates owed (Kshs. 55,200); that it also applied for and was issued with a construction permit and building approval by the 2nd Interested Party and that subsequently, the 1st Respondent lodged a complaint with the 1st Interested Party sometime in 2014 seeking the review/revocation of the Petitioner's grant in the suit property.

8. It is the Petitioner's case that investigations by the 1st Interested Party were concluded in favour of the Petitioner; that the 1st Respondent sought a confirmation from the 1st Interested Party if the determination was authentic and that the 1st Interested Party confirmed that it was.

9. According to the Petitioner, the 1st Respondent maintained that the suit property was compulsorily acquired by the Government in 1960 and that based on the conduct of the 1st Respondent, the Petitioner is apprehensive that it will lose the suit property which was valued at Kshs. 14,749,000 on 11th January 2018.

10. The Petitioner averred that the actions of the 1st Respondent, violated its right to own property as enshrined in Article 40 of *the Constitution*; that the title to the suit property had existed for 17 years before the 1st Respondent filed a complaint and that the delay violated its right to fair administrative action as enshrined in Article 47 of *the Constitution*.

11. In response to the Petition, the 1st Respondent's Deputy Director for

Surveys deponed that having erected the Taj Mall, the Petitioner Managing Director approached the 1st Respondent seeking to know if it was okay to acquire the suit property for purposes of a car park for its demolished mall and that he was informed that the land was within Outer Ring Road reserve which had been acquired in 1960.

12. It was deponed that the Petitioner was aware of the public utility nature of the suit property as far back as 2010 which he disregarded and proceeded to acquire in 2014 by way of a transfer.

13. In response to the Petition, the 2nd Respondent filed a Replying Affidavit sworn by a land surveyor working with the Director of surveys who deposed that the records held at the survey records once relating to L. R. No. 9042/694 are represented in cadastral plan number F/R 384/146 held by the Director of surveys.

14. It was deposed that the said survey plan was approved and authenticated by the Director of surveys on 9th October, 2000 and a new deed plan number 232392 dated 12th October, 2000 issued and that the records shows that the parcel of land L. R. Number 9042/G94 measures approximately 0.4460 Ha.

15. It was deposed by the 2nd Respondent's surveyor that L. R. No. 9042/G94 is a resultant of re-survey of L. R. No. 9042/G01 which had been survey vide cadastral plan number F/R 290/107; that Deed plan number 201958 dated 22nd December, 1995 was issued by the Director of surveys and that the land measured 0.4460Ha.

16. It was deponed that the re-survey of parcel of land L. R. 9042/601 was found necessary when the registered proprietor of the land on 14th January, 1999 discovered that the parcel of land as originally surveyed encroached on a road reserve at the southern boundary.

17. According to the 2nd Respondent, L.R. No. 9042/601 as originally surveyed was located between railway reserve to the North and a road Grid intersection to the south; that in order to make provision for an adequate and suitable road truncation at the Southern boundary of L. R. number 9042/601 and to avoid the land encroaching onto the road reserve, part of the parcel was then required to be excised to form part of the road to avoid the encroachment onto the road.

18. It was deponed that the authority to undertake the re-survey which resulted into the creation of Deed Plan F/R No. 384/146 was the

commissioner of lands letter dated 12/0G/1992; approved part development plan number 42/14/92/3 dated 5th June, 1992 and the commissioner of land's letter dated 29th January, 1999.

19. It is the 2nd Respondent's case that L. R. No. 9042/601 was surveyed out of L. R. No. 3955/3 (original number 3955/2) and that the two parcels of land are represented in F/R No. 75/7 dated 25th July, 1996.

20. According to the 2nd Respondent, parts of L. R. 3955/3 (measuring 255 acres with 200 ft wide road traversing through the land covering 14 acres), together with parts of L. R. No. 7075/12, L.R No. 39/1 and L. R. No. 212/2 were identi1ed for compulsory acquisition for road and railway developments and expansion between 1864 and 1995 and that the specific parts of the erected parcels of land were identified via land acquisition plan number L.D. No. 36414/29A and S/37/30 – sheets.

21. It was deponed that surveys of the effected land were executed by the Director of surveys vide F/R No. 107/10 and F/R No. 107/11 approved on 28th July, 1996.

22. It is the 2nd Respondent's case that the Petitioner is not entitled to the suit property the same having been acquired compulsorily. The 2nd Respondent's Principal Physical Planner deponed that a part Development plan reference number 42/14/92/3 was prepared on 30th April, 1992 and assigned development plan number 273 and that the approved plan was in respect of a proposed site for petrol station and not a parking.

23. The Petitioner's Director filed a further affidavit in which he deponed that there is in existence a part Development plan ref. 42/14/87/5A of 1988 showing the properties that had encroached on the road reserve and that the Petitioner's L R. No. 9042/694 was not affected.

Hearing and evidence

24. Ramesh Chondra Govind Gorasu, the Managing Director of the Petitioner, testi1ed as PW1. He adopted his supporting affidavit sworn on 8th November 2019 and his further affidavit sworn on 28th March 2022 as his evidence-in-chief.

25. In the affidavit sworn on 8th November 2019, the deponent reiterated the contents of the Petition as set out above. He stated that the Petitioner is a bona fide purchaser for value without notice of defects on its title and

therefore has an indefeasible title against the world.

26. According to PW1, the Petitioner had a legitimate expectation that its rights would be protected when the 2nd Interested Party issued it with construction permits/approvals and the 1st Interested Party determined the complaint lodged by the 1st Respondent in its favour and that the Respondents should bear in mind the fact that the suit property is different from L.R No. 209/13938 which housed the demolished Taj Mall building.

27. According to PW1, the Petitioner's title was acquired through a lawful process sanctioned by the relevant government institutions including the 2nd Respondent and the 2nd Interested Party who issued the transfer and construction approvals respectively.

28. This fact, it was stated, was corroborated by the 1st Interested Party in its determination of the complaint submitted to it; that as per the 1988 Part Development Plan, the suit property was not among the properties that had encroached on the road reserve and that the compulsory acquisition process relating to the predecessor's title to the suit property (L.R. No. 3955/3) was never concluded.

29. On cross-examination, PW1 stated that the two affidavits bore different signatures but both of them were his; that he had produced the transfer but not the sale agreement because that came later and that the only sale agreement he had was between Rev. Kinyanjui and Nyanza Petroluem.

30. PW1 stated that the purchase price was Kshs. 9,000,000 but did not have any proof of payment and that he obtained a letter of allotment for the suit property which was issued in 1992 but had no clear date.

31. The witness acknowledged that there was a surrender of about half an acre that had happened before the Petitioner purchased the suit property. He stated that while it was noted in the title he exhibited, he did not have the surrender in his possession.

32. It was the evidence of PW1 that the rest of the land (1 acre) was okay; that he did a search to confirrm this but he did not have the search in his possession; that he dealt with Ardhi surveyors but later conceded that the survey was done before the purchase by the previous owner, and that the survey related to L.R No. 9042/G07 of which an acre remained after the surrender. The witness acknowledged that the surveyor noted that L.R No. 9042/G07 was a road reserve.

33. When questioned about the gazette notice relating to L.R 9042/601, he stated that it was the previous number before the surrender; that as at 22nd January 2016, the Petitioner was the owner of the suit property and that the valuation had been done in 2018 placing the value of the land at Kshs. 164, 749,000.

34. The witness clarified in re-examination that the gazette notice referred to L.R No. 9042/601 which was surrendered while the Petitioner's parcel is L.R 9042/694 which is what remained after the surrender. PW1 stated that the survey could not establish the extent of the road reserve and that nothing in the report showed that compulsory acquisition had been completed.

35. Wilfred Muchae, a Land Surveyor with the 2nd Respondent testi1ed as DW1. He adopted his replying affidavit dated 23rd September 2020 as his evidence-in-chief and produced his bundle of documents as exhibits. In his affidavit he stated that records held at the Survey Records once relating to the suit property indicate that the suit property measures 0.4460 ha.

36. According to DW1, the suit property was as a result of the resurvey of L.R No. 9042/G01 which measured 0.4460ha and that the re-survey (and excision) was necessitated by the realization on or about 14th January 1999 that the parcel as surveyed encroached on the road reserve at its southern boundary.

37. The deponent stated that L.R No. 9042/G01 was surveyed out of parcel L.R No. 3955/3 which was originally part of L.R No. 3955/2; that the surveys were approved in 195G and a deed plan issued for registration purposes in 1957 and L.R No. 3955/3 measured 255 acres less the provision for an un surveyed road reserve.

38. It was stated by DW1 that parts of L.R No. 3955/3 were identi1ed for compulsory acquisition for road and railway development/expansion in 1964 and 1965 and that the plans for the railway and road acquisition were consequently prepared.

39. However, it was averred by DW1, that the survey for purposes of acquisition of L.R No. 3955/3 was delayed because there were negotiations with the registered owners and that L.R No. 9042/G01 was created on 22/12/1995; that the excision was done post 1995 for a road and that the excision reduced the size of the land from 0.6060ha to 0.4460ha.

40. DW1 stated that the excision was authorized by letters dated 12th June 1992 and 9th October 1999 and a P.D.P dated 5th June 1992 and that he did not have any of the documents but acknowledged that they were part of the Petitioner's exhibits and that as per the above stated documents, the land

available on the ground was 0.48ha and not 0.6060ha and that the letters did not allude to a road reserve.

41. Referring to the acquisition plan for L.R No. 3955/3, the witness stated that the suit property lies in an area (shaded grey in the plan) that was set for compulsory acquisition to facilitate road and railway expansion; that the suit property was to be acquired for road expansion and the necessary drawings were prepared by the Ministry of Roads and that the survey was deferred to allow for negotiations with the registered owners.

42. The witness stated that the survey was never completed and did not know whether any compensation was done; that as per the letter on page 16 of his affidavit, L.R No. 3955/3 was not among land that was to be acquired and that L.R No. 3955/2 was cancelled with a comment stating, 'not needed'.

43. In conclusion, DW1 stated that the Petitioner's title was issued based on the P.D.P dated 5th May 1992 which was part of Mr. Mbahe's affidavit.

44. On re-examination, the witness stated that L.R No. 3955/3 was private land that was to be acquired; that the suit property fell therein; that the land in the letter of allotment was 'unsurveyed'; that this was the same land that was part of L.R No. 3955/3, and that the difference in acreage was because part of the land was being used as a road.

45. Abdulkadir Ibrahim Jatani, Director of Surveys for the 1st Respondent testi1ed as DW2. He adopted his replying affidavit dated 16th December 2019 as his evidence-in-chief. In the affidavit he deponed that the 1st Respondent oversaw the construction of the Eastern Bypass as part of its mandate.

46. DW2 stated that the Petitioner owned Taj Mall (which was eventually demolished) which was located on an adjacent property; that the Petitioner's managing director informally approached the 1st Respondent seeking to acquire the adjacent property for a parking lot and that the Petitioner was however informed that that property was within the Outer Ring Road reserve as per a 1960 survey.

47. Referring to documents at pages 46-49 of the Petitioner's bundle, the witness stated that there were letters showing that the Petitioner was aware of the public utility nature of the suit property as far back as 2010 but still went ahead to acquire it in 2014.

48. In cross-examination, DW2 stated that he had not produced any documents but was relying on DW1's exhibits. He acknowledged that he appeared

before the 1st Interested Party and presented evidence of the acquisition. He however stated that the 1st Interested Party found in favour of the Petitioner stating that the 1st Respondent did not present evidence showing that the land was paid for.

49. Arthur Kinyanjui Mbatia, Assistant Director of Physical Planning at the 2nd Respondent testified as DW3. He adopted his replying affidavit dated 23rd September 2021 as his evidence-in-chief. In his affidavit, he set out the process of land alienation before 1998.

50. It was the evidence of DW3 that the Part Development Plan relating to the suit property (Ref. No. 42/14/92/3) was prepared on 30th April 1992 and approved on 5th June 1992 and assigned Approved Development Plan Number 273; that the PDP was then entered in the register in respect of Embakasi 42/14, and that the approved plan was in respect of a petrol station and not a parking.

51. In cross-examination by the Petitioner's advocate, the witness stated that PDP No. 42/14/92/3 went through the requisite processes; that a ground check was undertaken and no adverse comments were made to show that the land was committed for road expansion but there was no record showing such allocation.

Submissions

52. The Petitioner filed submissions on 9th May 2024. It was submitted that the Petitioner is the registered owner of the suit property as per Grant of Title IR. 85486. It was further submitted that although the Respondents had tried to state that no title could have been issued on L.R No. 9042/601 as it was part of L.R No. 3955/3 which was private land, they had failed to explain how processes relating to public land such as the preparation and approval of Part Development Plans were conducted on private land.

53. It was submitted that acts done by public authorities such as the preparation of the above stated plans are presumed to be accurate unless proven otherwise and that the Respondents have not rebutted the presumption nor proven that the Petitioner's title is invalid.

54. The Petitioner's advocate submitted that the suit property was not compulsorily acquired as stated by the 1st Respondent; that DW1 acknowledged that although acquisition plans and drawings were prepared in the 1960s, the subject land was not acquired according to the requisite procedure and that DW3 testified that a Part Development Plan for

the suit property was made on 5th June 1992 in respect of petrol station.

55. It was submitted that this position contradicts the 1st Respondent's claim about compulsory acquisition because a PDP would not have been issued in respect of land that had been compulsorily acquired for a public purpose such as road/railway expansion and that DW2 made claims of compulsory acquisition but failed to produce any evidence of the same.

56. The Petitioner's advocate further submitted that the 1st Respondent's claim of compulsory acquisition was dismissed for lack of evidence by the 1st Interested Party and that the Petitioner had a legitimate expectation that its right to property under Article 40 would be respected.

57. The 2nd Interested Party filed submissions on 28th June 2024. It was submitted that the 2nd Interested Party was wrongly enjoined in the suit as the reliefs sought by the Petitioner are not applicable to it; that the 2nd Interested Party collects land rates as part of its statutory mandate, and that in doing so, it relies on information about land ownership provided by the 2nd Respondent. The 2nd Interested Party can therefore not be held to account if such information is invalid.

58. The 3rd Respondent filed submissions dated 27th July 2024. The 3rd Respondent submitted that the Petitioner did not lawfully acquire title over the suit property. It was submitted that even where the defence fails to adduce evidence, the burden of proof is still with the Petitioner.

59. It was further submitted that as per the Petitioner's own evidence (a survey report), the surveyor noted that the suit property was a road reserve and the remaining portion could only be issued with a temporary lease after the road construction was complete.

60. The 3rd Respondent submitted that the suit property had been alienated for a public purpose (specifically road construction) and could therefore not be allocated to the Petitioner nor its predecessors in title. The 3rd Respondent asserted that the Petitioner was not a bona fide purchaser for value.

61. The 3rd Respondent also called into question the Petitioner's claim of ownership based on the fact that the Petitioner did not adduce any sale agreement between itself and the previous owner, Autoxpress Limited. **Section 3(3) of the *Law of Contract Act*** and the cases of **Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR and Leo Investment Ltd vs Estuarine Estate Ltd [2017]** eKLR were relied upon.

62. The 3rd Respondent submitted that the documents from the 1st Interested Party that were relied upon by the Petitioner did not have any probative value because they were neither dated nor signed by the 1st Interested Party, and that the decision of the 1st Interested Party that the Petitioner seeks to rely upon was not gazetted nor published in newspapers with nationwide circulation as required by law.

63. It was submitted that it is only the decision calling for the revocation of the title for L.R No. 9042/601 that was published and that the Petitioner could not have a legitimate expectation as far ownership of the suit property goes because the title he holds is not anchored in law.

Analysis and Determination

64. The Petitioner has asked the Court to declare it as the owner of the suit property which it has maintained it acquired legally. The Respondents have averred that the Petitioner did not acquire the suit property legally because the suit property could not have been available for allocation having been compulsorily acquired for a public purpose, speci1cally for road expansion.

65. It was further argued by the Respondents that the Petitioner cannot be termed a bona-1de purchaser because he did not acquire the suit property through legal process, more so in the absence of a sale agreement between itself and Auto express Limited.

66. The right to own land and the circumstances under which such right can be limited are set out as follows under **Article 40 of *the Constitution* of Kenya, 2010:**

> 1) **Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**
>
> **a) of any description; and**
>
> **b) in any part of Kenya.**
>
> **2) Parliament shall not enact a law that permits the State or any person-**
>
> **a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**
>
> **b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds**

speci1ed or contemplated in Article 27(4).

3) **The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

   a) **results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

   b) **is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

   c) **requires prompt payment in full, of just compensation to the person; and**

   d) **allows any person who has an interest in, or right over, that property a right of access to a court of law.**

   e) **Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

   f) **The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

   g) **The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."**

67. The Respondents have claimed that the suit property was not available for allocation to the Petitioner nor to the previous owners because it had been set aside for a public purpose (road expansion) in 1965. The Court in ***Evelyn College of Design Ltd vs Director of Children's Department & Another [2013] eKLR*** stated as follows as regards acquisition of land by the government.

> " ***While I agree that the Commissioner has no right to alienate land which has been reserved for public purpose, the process of such a determination must be through a process recognised by the law. Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions***

of the Constitution.
First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such "finding" cannot be by any other means other than due process. Third, Article 47(1) guarantees every person fair administrative action which includes due process."

68. The Respondents have asserted that the suit property was part of L.R No. 3955/3 which was hived out of L.R No. 3955/2 and set aside for a public purpose. A perusal of the Respondents' exhibits shows a letter dated 30th August 1965 written by the state surveyor and addressed to the Commissioner of Lands.

69. The said letter listed properties that were erected by the road acquisitions. Among the properties listed is L.R 3955/2. However, there is a line crossing that particular land reference and the words 'plot needed' alongside the line. As to whether that amounted to a removal of the stated parcel of land from the list is not clear to this Court. The passage of time and the fact that the document on record is a copy makes such determination difficult.

70. The Respondents have also stated that L.R No. 3955/3 was among parcels identified for compulsory acquisition for road and railway expansion. There is a letter dated 8th December 1964 on record. It was written by the Director of Surveys and addressed to the Commissioner of Lands.

71. The letter enclosed some drawings and a request for the survey of parcels that were to be erected by the acquisition. L.R 3955/3 was listed among those parcels. There is another letter dated 5th August 1965 that relates to the acquisitions. It stated as follows concerning L.R No. 3955/3:

> ***"As negotiations are now in progress for the resumption of L.R .3955/3, I would suggest that the question of survey be left until such times as we shall have known the results of our negotiations***."

72. There is a subsequent letter dated 28th July 1966 written by the Commissioner of Lands and addressed to the Director of Surveys. The letter listed the parcels that had been approved for acquisition for road and railway expansion. L.R NO. 3955/3 was not among those parcels.

73. The import of the Respondents' evidence is that some parcels were set to

be acquired for road and rail expansion. What amounted to due process at the time was prima facie followed as evidenced by the correspondence on record. However, the evidence excludes L.R No. 3955/3 from those that were approved for compulsory acquisition.

74. According to the documents, negotiations concerning the said land were said to be ongoing and there is no evidence on record to the effect that the said negotiations were completed or that they resulted in compulsory acquisition.

75. This court has gone through the maps that the Petitioner's surveyor annexed on his report, and the maps produced by DW1. The said maps show the intended acquisition of the land as per the report of the surveyor. However, there is no evidence before this court to show that the land was actually acquired by the Government.

76. Indeed, this issue of whether the government acquired the land in 1960 or not was before the National Land Commission. In its finding dated 18th July, 2010, the National Land Commission stated as follows:

> ***" it is well settled principle of law that he who overs must prove. The onus of proving that there was compulsory acquisition carried out by the Government in 19G0 and that the procedure for compulsory acquisition was strictly adhered to, squarely had with the complainant without formal proof of the acquisition, the commission cannot find in favour of the complainant on the issue of compulsory acquisition. In absence of this, it is our view that the subject parcel was acquired in a lawful manner***."

77. The Respondents have never challenged the decision of the National Land Commission. Indeed, the Respondents have not produced any correspondence to show that the process of compulsorily acquiring the suit property was ever followed.

78. What is puzzling is that even after allegedly acquiring the entire parcel of land in the 1960's, the government went ahead to survey a portion of land known as L. R. 9042/601 in 1995. According to DW1, the survey plan for L. R. 9042/694 (the suit property) was approved on 9th October, 2000, which is a resultant of L. R. No. 9042/601.

79. DW2 informed the court that L. R. 9042/694 was created after it was found necessary to re-survey L. R. No. 9042/601 in 1999 when it was discovered that the parcel of land as originally surveyed (L. R. No. 9042/601), encroached on a road reserve at the southern boundary.

80. What this deposition means is that it is only a portion of L. R. No. 9042/601 that was encroaching on the road reserve, and this problem was resolved by curving out the suit property. That is what the 2nd Respondent's surveyor told the court.

81. Indeed, the creation of L. R. No. 9042/601 Seems to have been preceded by a Part Development plan number 273 dated 5th May 1997 which was signed by both the Director of physical plan and the Commission of Lands. The said P.D.P was produced in evidence by the 2nd Respondent, meaning that it emanated from its once.

82. To support the preparation and issuance of the said P.D.P, the 2nd Respondent's principal physical planner deposed as follows:

> **" 6.** ***that a part Development Plan Reg. No. 42/14/92/3 was prepared on 30th April, 1992 and approved on 5th June, 1992 and assigned approved Development Plan No. 273 … that the approved Part Development Plan Ref. No. 42/14/92/3 was in respect of a proposed site for petrol service station and not a parking."***

83. Having issued a Part Development Plan in 1992, the 2nd Respondent did caution to the allotee that the land was available for allocation. That is what must have informed the issuance of the letter of allotment to one Rev. Arthur Kinyanjui , 9th June 1992 and the subsequent survey and creation of L. R. No. 9042/601, which mutated to L. R. 9042/694.

84. The evidence on record shows that Rev. Kinyanjui sold the unsurveyed land to Nyanza Petroleum Dealers Limited which changed its name to Auto express Limited.

85. Based on the foregoing I find that while the Respondents showed that some parcels were compulsorily acquired, they have failed to prove on a balance of probabilities that L.R No. 3955/3 from which the suit property was hived was compulsorily acquired.

86. The Petitioner's title can therefore not be challenged on the ground that the suit property had been compulsorily acquired. That assertion was not proved by the Respondents to the required standards.

87. As per DW1's affidavit, the suit property was resurveyed based on P.D.P No. 42/14/92/3 dated 5th June 1992. This was the basis for the issuance of the allotment of letter in the Petitioner's possession. DW3 testified that Part Development Plans are only issued for unalienated government land, and not private land. He also stated that before a P.D.P is issued, due diligence is carried out to ascertain that the land that is the subject of the P.D.P is not

reserved for a public purpose.

88. The **Court in the case of Kenya Veterinary Vaccines Production Institute (KEVEVAPI) vs Attorney General & 15 Others; Warsama & 90 others (Interested Party) (Environment & Land Petition 939 of 2014) [2023] KEELC 16912 (KLR)** stated as follows:

> " **There is a presumption that all acts done by a public official have lawfully been done and that all procedures have been duly followed. The onus is thus upon the opposing party to prove otherwise. This position was propounded by the Supreme Court in the 2013 Presidential Election case, Raila Odinga & 5 Others vs Independent Electoral and Boundaries commission & 3 Others [2013] eKLR**:
>
> **"Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections …This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."**

89. The Respondents have not denied that the P.D.P originated from them. In fact, DW3 stated that the P.D.P was number 273, a fact that the Petitioner had been unable to prove. The existence of the P.D.P is therefore proof that the allotment letter and title that were issued therefrom were not issued in a vacuum as alleged by the Respondents.

90. Having found that there is no evidence to show that the suit property was reserved for a public purpose, it follows that the P.D.P was issued lawfully and the allotment letter and title flowing from it were also issued lawfully. Indeed, as was held by this court in the case of **Nelson Kazungu Chai & 9 Others vs Pwani University [2014] eKLR,** a Part Development Plan (PDP) can only be prepared and issued in respect of Government land that has not been alienated or surveyed.

91. The import of the foregoing is that no evidence has been adduced to show that the title held by the Petitioner was unlawfully acquired, or that the said land was compulsorily acquired. To the contrary, if at all the land has been utilised for the road, then the 1st Respondent should compensate the Petitioner for the same.

92. The last ground set out by the Respondents was that the absence of a sale agreement was in contravention of the provisions of the *Law of Contract Act* thus rendering the suit void. Section 3(3) of the *Law of Contract Act* provides as follows:

> " (3) **No suit shall be brought upon a contract for the disposition of an interest in land unless-**
>
> **a) the contract upon which the suit is founded-**
>
> **i. is in writing;**
>
> **ii. is signed by all the parties thereto; and**
>
> **b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**
>
> **Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 52G), nor shall anything in it affect the creation of a resulting, implied or constructive trust**."

93. The above section applies to suits which are based on contract. The current suit is a constitutional Petition based on Article 40. While that provision might have been of great consequence in a civil suit, and where the previous owner is laying claim on it, the same is not available to the Respondents and the Interested Parties as a defence.

94. Based on the foregoing, I find that all the grounds put forth by the Respondents impugning the Petitioner's ownership of the suit property have failed. It therefore follows that on account of the title on record, and the failure by the Respondents to prove that it was unlawfully acquired, the Petitioner is the lawful owner of the suit property.

95. Considering that a portion of the suit property has been utilised by the 1st Respondent as a road, and the land having not been acquired lawfully by the Respondents, it follows that the Petitioner should be compensated for the same. That being so, and in view of the valuation report on record, the court makes the following final orders:

a**). An award of damages in the sum of Kshs. 164, 749,000 being the last valuation of the suit property together with interest accruing thereon at court rates from the date of 1ling this judgment until payment in full to be paid by the 1st Respondent.**

b). The 1st Respondent to pay the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2024.

O. A.
ANGOTE
JUDGE

In the presence of;
No appearance for Appellant
Mr. Allan Kamau for the Respondents
Court Assistant: Tracy

7. **Republic vs the Ministry of Energy and Petroleum and CAJ as an Interested Party**

Case No :	MISCELLANEOUS APPLICATION NO. E043 OF 2023
Date delivered:	10th April 2025
Case Class :	Civil
Court:	High Court
Case Action :	Ruling
Judge(s) :	Bahati Mwamuye
Citation :	Republic vs the Ministry of Energy and Petroleum
Court Division:	Constitutional and Human Rights Division
County:	Nairobi
Case Outcome: The order of CAJ dated 12th October 2023 requiring the 1st Respondent to provide complete and accurate information concerning all approved power projects in Marsabit County as at 31st December 2021 was adopted as an order of the Court.	

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION MISCELLANEOUS APPLICATION NO. E043 OF 2023

IN THE MATTER OF ARTICLE 35 OF THE CONSTITUTION OF KENYA
AND

IN THE MATTER OF SECTION 23 OF ACCESS OF INFORMATION ACT NO.31 OF 2016
AND

IN THE MATTER OF THE COMMISSION ON ADMINISTARTIVE JUSTICE ACT NO. 23 OF 2011
AND

IN THE MATTER OF ENFORCEMENT OF THE ORDER ISSUED BY THE COMMISSION OF ADMINISTRATIVE JUSTICE ON 12TH OCTOBER 2023 AS A DECREE OF THE HONOURABLE COURT

BETWEEN

THE REPUBLIC…….....APPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF ENERGY……1ST RESPONDENT

ATTORNEY-GENERAL……2ND RESPONDENT

THE COMMISSION ON ADMINISTRATIVE JUSTICE……INTERESTED PARTY

GITSON ENERGY LIMITED……..EX PARTE APPLICANT

RULING

1. On 11th January 2022, the Applicant, through its Chief Executive Mr. James Gitau, wrote to the Ministry of Energy requesting information on all approved power projects in Marsabit County as of 31st December 2021. The request was made under Article 35 of the Constitution and the Access to Information Act (ATIA). The 1st Respondent did not respond to this request within the statutory 21 days or at all. No information was furnished and no refusal with reasons was communicated, effectively a deafening silence from the Ministry.

2. Aggrieved by the lack of response, the Applicant escalated the matter to the Commission on Administrative Justice, an independent commission mandated to oversee the implementation of the right to information. By an email and complaint dated 27th March 2023, the Applicant petitioned the Commission on Administrative Justice (CAJ) to review the Ministry's constructive refusal. The CAJ, acting pursuant to its oversight powers under Section 23 of ATIA and Section 8 of the CAJ Act, wrote to the Ministry on 5th April 2023 reminding it of the pending information request and urging a prompt response. Despite this intervention, the 1st Respondent still failed to provide any information or reply.

3. Consequently, after due inquiry, the CAJ exercised its powers under Section 23(2) of the Access to Information Act and on 12th October 2023 issued a formal enforcement order against the 1st Respondent. The order communicated by letter Ref. CAJ/ATI/… dated that day directed as

follows: "That the Ministry of Energy do facilitate access to information on all approved power projects in Marsabit County as of 31st December 2021" and further stipulated that compliance was required "within 7 days from the date hereof." For clarity, the CAJ's order essentially commanded the Ministry to release to the Applicant the very information he had requested, within a week – that is, by around 19th October 2023.

4. The 1st Respondent does not dispute that it received this order. Despite the binding nature of the Commission's directive, the Ministry did not comply within 7 days or at all. By the lapse of the deadline, no information had been forwarded to the Applicant.

5. It is also undisputed that the Respondents did not exercise their right of appeal under Section 23(4) of the Act, which allows an aggrieved party to appeal to the High Court within 21 days of a CAJ decision. They neither appealed the order nor sought any stay. The CAJ's order of 12th October 2023 therefore remained in force, unchallenged and unfulfilled.

6. Faced with this continued non-compliance, the Applicant moved this Court by the present Chamber Summons. The application, filed on 21st December 2023 under a certificate of urgency, seeks a single substantive relief: leave to enforce the CAJ's order of 12th October 2023 as a decree of the Court, pursuant to Section 23(5) of the Access to Information Act.

7. The Respondents, through the Hon. Attorney-General, filed Grounds of Opposition dated 11th November 2024 opposing the grant of leave. They raise two grounds: First, that the CAJ's order letter was sent to an out-of-date address (Eagle Africa Centre, Longonot Road, Upper Hill) instead of the 1st Respondent's correct address (Kawi House, South C, Nairobi). Second, and more substantively, that "the substratum of the Petition has been overtaken by events, the requested information having been furnished to the Petitioner." The Respondents assert that after this case was filed, the Ministry did provide the information sought, thereby satisfying the request and the CAJ order, and thus there is nothing left to enforce.

8. Indeed, it is a matter of record that on 28th March 2024, the Ministry of

Energy (1st Respondent) sent a letter to the Applicant – referenced ME/CONF/1/76 – enclosing what it described as the list of "all existing and proposed power projects within Marsabit County as at 31st December 2021," with details such as project names, capacities, approval status, current status, and nature of development. The 1st Respondent submits that this letter constituted full compliance with the CAJ's order "in terms of the Order by the Interested Party." It is on this basis that the Respondents argue the enforcement application is now moot.

9. The Applicant, however, vehemently disputes that the information provided on 28th March 2024 amounts to compliance. In the Supplementary Affidavit (and a follow-up letter dated 4th April 2024 annexed thereto), the Applicant catalogued various inaccuracies and gaps in the information supplied. For example, the Applicant avers that some approved projects as of 2021 were omitted, some data given was factually incorrect, and that the Ministry included projects not within the scope of the request, thereby not truly answering the query. The Applicant's position is that the 1st Respondent has "declined to provide proper information as requested", and what little was provided is "extremely questionable and inaccurate", falling far short of Article 35's standards. Therefore, according to the Applicant, the CAJ's order remains unfulfilled and must be enforced to procure the correct information.

10. The issues arising for determination are:
    i. Whether leave should be granted to enforce the CAJ order as a decree of this Court; and
    ii. Whether the 1st Respondent has provided the requested information in compliance with the CAJ order and Article 35 of the Constitution.

Leave to Enforce the CAJ Order as a Decree of the Court

11. The enforcement mechanism invoked by the Applicant is provided in Section 23(4) and (5) of the Access to Information Act, 2016. These provisions envisage that once the Commission on Administrative Justice has rendered a decision on an access to information complaint, any party dissatisfied may appeal to the High Court within 21 days. If no appeal is filed, then "*the party in favour of whom the order is made by the Commission may apply ex parte by summons for leave to enforce such order as a decree of the court",* and upon such leave being

granted, *"the order may be executed in the same manner as an order of the High Court to the like effect."* The effect is that the CAJ's order, once adopted by the High Court, gains the status of a court decree which can be enforced through contempt proceedings or other execution processes. This statutory mechanism ensures that the Commission's orders – which are not self- executing – do not rely solely on voluntary compliance, but can be backed by the coercive power of the court.

12. In the present case, it is undisputed that no appeal or review was lodged against the CAJ's order of 12th October 2023. The 21 days lapsed without any challenge. Therefore, the Applicant became entitled to move this Court under Section 23(5). The Chamber Summons was properly filed and served, even though the Act permits an ex parte application. The Respondents have had their opportunity to be heard on whether leave should issue.

13. The Respondents here have put forward two reasons they believe enforcement leave should be denied: (a) that the CAJ's order letter cited the wrong address for the Ministry (suggesting perhaps an issue with service or notice), and (b) that the information has now been furnished, making enforcement unnecessary (mootness). I will address each in turn.

14. On the issue of the address on the CAJ order: The order was addressed to the Principal Secretary, Ministry of Energy at "Eagle Africa Centre, Longonot Road, Upperhill, Nairobi". The Attorney-General has pointed out that the correct official address is "Kawi House, South C, Nairobi." It appears the Commission might have had outdated information on the Ministry's location. Be that as it may, I do not find that this irregularity invalidates the proceedings or the order. First, the 1st Respondent has not denied receiving the order; in fact, by March 2024 it acted in apparent acknowledgment of the order by providing a response. The Respondents were sufficiently aware of the order, at the latest when this court application was served with the order annexed (Annex "JG6").

15. Secondly, if the Ministry genuinely had no notice of the order due to mis-address, one would have expected it to say so on affidavit and perhaps seek an opportunity to comply upon learning of it. Instead, the Ministry's stance is that it did comply (albeit late). This implies they had notice of what was required. Thirdly, no appeal was filed to challenge the order on any ground, including improper notification. The order was validly

made by the CAJ, which had jurisdiction over the complaint.

16. In the circumstances, the address error is a minor procedural hiccup that did not prejudice the Respondents' substantive rights. The Ministry suffered no injustice from it – on the contrary, it ignored both the initial request and the Commission's follow- up even at presumably correct contacts. The Court is therefore not persuaded that this point has any bearing on whether leave should be granted. I concur with the Interested Party that such technical objections cannot be used to defeat the enforcement of constitutional rights, especially where the Respondents eventually took cognizance of the order.

17. On the issue of mootness (alleged compliance): This is the crux of the Respondents' opposition. They argue that since they furnished a letter with the requested information on 28th March 2024, the Applicant has obtained what it wanted, and there is no need for the Court to issue any orders. The Respondents **cites Road Safety Association v NTSA & Another (2023)**, where the High Court declined relief where the circumstances that prompted the petition had ceased to exist. That is a sound principle. However, whether it applies here depends on a factual finding: did the 1st Respondent's March 2024 letter constitute full compliance with the CAJ order and the Applicant's request? If the answer is yes, then indeed enforcing the order now might be superfluous. If the answer is no – if the Respondent's action was deficient – then the matter is very much alive and enforcement is not an academic exercise but a needed remedy.

18. In law, providing inadequate or incorrect information is tantamount to a refusal to provide the information, because the right protected by Article 35 is the right to access information held by the State. That implies the real information – not a distorted version of it. If the list supplied is inaccurate or incomplete, the Applicant still has not received "the information held by" the Ministry regarding the subject matter of inquiry. As such, the CAJ's order has not been substantially complied with. The order required the Ministry to "facilitate access to information on all approved power projects in Marsabit as of 31/12/2021." If the Ministry left out some projects or gave misleading data, it cannot be said to have facilitated access to the information. In the eyes of the Court, partial compliance is no compliance at all, especially when no explanation or justification is provided for such partial disclosure.

19. The Court has carefully reviewed the contents of the 28th March 2024 letter (annexed in the Applicant's supplementary affidavit) and the Applicant's rebuttal of the same. Without delving into exhaustive detail in this ruling, it is evident that there is a serious dispute as to the accuracy and completeness of the information provided. The Applicant has pointed out specific anomalies: for example, some projects that were approved and operational by 2021 (such as certain wind or solar projects) are not listed at all, whereas some entries in the list carry incorrect capacity figures or statuses. The Respondents chose not to directly respond to these allegations or clarify the content of the letter. In fact, after sending that one letter, the 1st Respondent did not engage further – even when the Applicant wrote back on 4th April 2024 highlighting the errors, there was no reply or correction from the Ministry.

20. In **Okoiti v CS, Ministry of Lands & Planning 2023**, the Court observed that a State agency's refusal to fully disclose requested information indicated a desire to avoid accountability. The principle from that and similar cases is that the constitutional obligation is only discharged by full, frank disclosure, unless a lawful exemption is invoked. Here, the 1st Respondent did not claim any exemption to justify withholding any portion of the information. Therefore, one can reasonably infer that the Ministry ought to have provided everything asked for. If it did not, then it remains in default of Article 35.

21. I align myself with the precedent in **Republic v Isaiah Kubai & Another; CAJ (Interested Party), Ex Parte Muthusi [2019] eKLR,** where the High Court granted leave to enforce a CAJ order in similar circumstances. In that case, the public body had not complied with a disclosure order, and the court underscored that the statutory mechanism is there to ensure the right to information is not defeated by bureaucratic intransigence. The same principle applies here.

22. In conclusion on Issue 1, leave is granted as prayed. The specifics of the enforcement order will be outlined in the disposition, but in substance, the CAJ's directive to the 1st Respondent will stand as an order of this Court, enforceable as such.

Whether the 1st Respondent Has Provided the Requested Information in Compliance with the CAJ Order and Article 35 of the Constitution

23. The right of access to information, guaranteed under Article 35 of the Constitution of Kenya, encompasses timely, accurate, and complete disclosure of information held by the state. The 1st Respondent, upon receiving a formal request from the Applicant dated 11th January 2022, was obligated under Section 9 of the Access to Information Act to respond substantively within 21 days. The record clearly indicates the Respondent did not adhere to this statutory timeline, failing to provide any response or justification for the delay, thereby infringing the timeliness aspect of the Applicant's constitutional right.

24. Following the complaint lodged with the Commission on Administrative Justice (CAJ), the 1st Respondent was issued with a binding order on 12th October 2023, requiring compliance within seven days. Again, the 1st Respondent disregarded this order, which further aggravated the infringement of the Applicant's rights and demonstrated non-compliance with both the spirit and letter of Article 35 and the Access to Information Act.

25. Although the 1st Respondent eventually furnished information on 28th March 2024, the Applicant raised credible and specific claims regarding significant inaccuracies, omissions, and discrepancies within the data provided. These claims were neither denied nor satisfactorily explained by the Respondent, leaving substantial doubts about the accuracy and completeness of the provided information. The provision of incomplete or incorrect information constitutes effective non-compliance, as Article 35 demands that information must be truthful and reflective of state records.

26. The belated nature of the provided information—coming more than two years after the initial request—seriously compromised the Applicant's constitutional right. Timely disclosure is crucial to the meaningful exercise of the right to information. A delay of this magnitude not only undermines accountability but also significantly erodes public confidence in government transparency. Such an extended and unexplained delay inherently violates the constitutional guarantee under Article 35, as reiterated in established jurisprudence such **as Katiba Institute v. Presidents Delivery Unit & Others [2017].**

27. Consequently, the 1st Respondent's conduct—characterized by delayed response, initial silence, subsequent inaccuracies, and incomplete disclosure—demonstrates a failure to comply substantively

with both the CAJ order and Article 35 of the Constitution. The partial and flawed information provided does not meet the constitutional standard envisaged by Article 35. Therefore, the 1st Respondent remains in breach of its constitutional and statutory obligations regarding the Applicant's right to access information.

28. In light of the foregoing, the Ex-Parte Applicant has satisfactorily demonstrated that leave to enforce the CAJ order ought to be granted, and further that the Respondents have not met their constitutional and statutory obligations to provide the requested information adequately, accurately, and timeously.

29. Accordingly, this Court makes the following orders:

    a. The Applicant is hereby granted leave to enforce the CAJ order dated 12th October 2023 as a decree of this Court.

    b. The order of CAJ dated 12th October 2023 requiring the 1st Respondent to provide complete and accurate information concerning all approved power projects in Marsabit County as at 31st December 2021 is hereby adopted as an order of this Court.

    c. The 1st Respondent shall, within thirty (30) days from the date hereof, comply fully with this decree by supplying the Applicant with a certified and accurate list of all approved power projects in Marsabit County as of 31st December 2021. The said information must clearly indicate project names, capacity, approval dates, current status, and project details as requested.

    d. Each Party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10th DAY OF APRIL 2025.

BAHATI MWAMUYE JUDGE
In the presence of: -
Counsel for the Respondents – Mr. Kaumba
Counsel for the Interested Party – Ms. Musembi
Counsel for the Ex parte Applicant – Ms. Thuku
Court Assistant – Ms. Neem

8. Moses Mega Githinji and 4 Others vs Nahashon Njuguna and 2 others

Case No :	CONSTITUTIONAL PETITION NO. E527 OF 2024
Date delivered:	27TH MARCH 2025
Case Class :	Civil
Court:	High Court
Case Action :	JUDGMENT
Judge(s) :	Bahati Mwamuye
Citation :	Moses Mega Githinji vs the Nairobi City Water & Sewarage Company
Court Division:	Constitutional and Human Rights Division
County:	Nairobi
Case Outcome:	A Declaration that the failure by the 1st and 2nd Respondents to provide information sought under Article 35(1)(a) on the basis of the Petitioners' request dated 1st December 2023 was and is a violation of the right to access information.

REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION CONSTITUTIONAL PETITION NO. E529 OF 2024 IN THE OF ARTICLES 10(2) (a), 19(3) (b), 20 (3) (b), 22(2) (b), 23, 33 (1) (a), 35 (1) (a), 43 (f), 47, 174 (c) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF AN ALLEGED INFRIGEMENT/ DENIAL/ VIOLATION OF THE RIGHT OF THE GROUPS OF THE PETITIONERS HEREIN TO ACCESS TO INFORMATION UNDER ARTICLE 35(1) (a) OF THE CONSTITUTION OF KENYA 2010 AND AS RECOGNIZED OR CONFERRED BY THE PROVISIONS OF SECTION 96(1) OF THE COUNTY GOVERNMENT ACT LAWS OF KENYA, SECTION 80 OF THE EVIDENCE ACT CAP 80 LAWS OF KENYA AS READ WITH THE PROVISIONS OF SECTION 10 OF THE PUBLIC OFFICER ETHICS ACT CAP 185B LAWS OF KENYA (Construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution of Kenya 2010) AS READ TOGETHER WITH THE PROVISIONS OF SECTION 5(2) (h) OF THE PUBLIC SERVICE VALUE AND PRINCIPLES) ACT NO. CAP 185A LAWS OF KENYA AND IN LINE WITH THE PROVISIONS OF ARTICLE 19(3) (b) OF THE CONSTITUTION OF KENYA 2010.

AND IN THE MATTER OF AN ALLEGED INFRINGEMENT / DENIAL/ VIOLATION OF THE RIGHT OF THE GROUPS OF THE PETITIONERS HEREIN TO FAIR ADMINISTRATIVE ACTION THAT IS EXPEDITIOUS, EFFICIENT, LAWFUL, REASONABLE AND PROCEDURALLY FAIR UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010 Page 2 of 34 AND AS RECOGNISED OR CONFERRED BY THE PROVISIONS OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT CAP 7L LAWS OF KENYA IN LINE WITH THE PROVISIONS OF ARTICLE 19(3) (b) OF THE

CONSTITUTION OF KENYA 2010. AND IN THE MATTER OF AN ALLEGED INFRINGEMENT / DENIAL/ VIOLATION OF THE RIGHT OF THE GROUPS OF THE PETITIONERS HEREIN TO THE RULE OF LAW UNDER ARTICLE 10 (2) (a) OF THE CONSTITUTION OF KENYA 2010 AS RECOGNISED OR CONFERRED THE PROVISIONS OF SECTION 96 (1) OF THE COUNTY GOVERNMENT ACT CAP 265 LAWS OF KENYA 265 LAWS OF KENYA, SECTION 4 OF THE ACCESS TO INFORMATION ACT CAP 7M LAWS OF KENYA, SECTIONS 80 OF THE EVIDENCE ACT CAP 80 LAWS OF KENYA AS READ WITH THE PROVISIONS OF SECTION 10 OF THE PUBLIC OFFICER ETHICS ACT CAP 185B LAWS OF KENYA (construed with the alterations , adaptations , qualifications and exceptions necessary to bring it into conformity with the Constitution of Kenya 2010) AS READ TOGETHER WITH THE PROVISIONS OF SECTION 5 (2) (h) OF THE PUBLIC SERVICE (VALUE AND PRINCIPLES) ACT CAP 185 LAWS OF KENYA AND IN LINE WITH THE PROVISIONS OF ARTICLE 19(3) (b) OF THE CONSTITUTION OF KENYA 2010. AND IN THE MATTER OF AN ALLEGED INFRINGEMENT /DENIAL / VIOLATION OF THE RIGHT OF THE GROUPS OF THE PETITIONERS HEREIN TO SEEK, RECEIVE AND IMPART INFORMATION UNDER ARTICLE 33(1) (a) OF THE CONSTITUTION OF KENYA 2010 AND Page 3 of 34 IN THE MATTER OF AN ALLEGED INFRINGEMENT/ DENIAL/ VIOLATION OF THE RIGHT OF THE GROUPS OF THE PETITIONERS HEREIN TO EDUCATION UNDER ARTICLE 43 (f) OF THE CONSTITUTION OF KENYA 2010 AND IN THE MATTER OF AN ALLEGED INFRINGEMENT/ DENIAL/ VIOLATION OF THE RIGHT OF THE GROUP OF THE PETITIONERS HEREIN TO RECEIVING POWERS OF SELF – GOVERNANCE AND ENHANCING THE PARTICIPATION OF THE GROUPS OF THE PETITIONERS HEREIN IN THE EXERCISE OF THE POWERS OF THE STATE AND MAKING DECISIONS AFFECTING THEM IN THE OPERATIONS OF THE 2ND RESPONDENT HEREIN UNDER ARTICLE 174 (c) THE CONSTITUTION OF KENYA 2010 AS RECOGNIZED OR CONFERRED BY THE PROVISIONS OF SECTION 96 (1) OF THE COUNTY GOVERNMENT ACT CAP 265 LAWS OF KENYA, SECTION 4 OF THE ACCESS TO INFORMATION ACT CAP 7M LAWS OF KENYA, SECTION 80 OF THE EVIDENCE CAP 80 LAWS OF KENYA AS READ WITH THE PROVISIONS OF SECTION 10 OF THE PUBLIC OFFICER ETHICS ACT CAP 185B LAWS OF KENYA (Construed with the alternations, adaptions, qualifications and exceptions necessary bring it into conformity the Constitution of Kenya 2010) AS READ TOGETHER WITH THE PROVISIONS OF SECTION 5 (2) (h) OF THE PUBLIC SERVICE (VALUE AND PRINCIPLES) ACT CAP 185A LAWS OF KENYA AND IN LINE WITH THE PROVISIONS OF ARTICLE 19 (3) (b) OF THE CONSTITUTION OF KENYA 2010.

BETWEEN

JAMES GACHERU KARIUKI
Suing as a member of and
in the interest of a group of persons going by the name
EINTRETEN ASSOCIATION ……..……..……..1ST PETITIONER
MOSES MEGA GITHINJI
Suing as a member of and
in the interest of a group of persons going by the name
MALEWA SIBS ASSOCIATION ……..……..2ND PETITIONER

JAMES GACHIRA NGANGA
Suing as a member of and
in the interest of a group of persons going by the name
WISELIKE GROUP ……..…3RD PETITIONER
BETH WANGUI KARIUKI
Suing as a member of and
in the interest of a group of persons going by the name
NONGAIMWARA ASSOCIATION ……..…..…...….4TH PETITIONER
JOYCE NJOKI KIBUTHU
Suing as a member of and
in the interest of a group of persons going by the name
LOBBYDALE ASSOCIATES ……..…..…5TH PETITIONER

AND

NAHASON MUGUNA ……..……....1ST RESPONDENT
NAIROBI CITY WATER
AND SEWERAGE COMPANY LTD….…….….2ND RESPONDENT
THE COMMISSION ON
ADMINISTRATIVE JUSTICE ..……..3 RD RESPONDENT

JUDGMENT

1. The Petitioners are Kenyan citizens residing and working for gain in Kiambu County. They instituted the instant Petition dated 24th September, 2024 in the interest of their respective groups.
2. The 1st Respondent, Nahason Muguna, is the Managing Director and the Statutory Information Officer designate of the Nairobi City Water and Sewerage Company Limited, the 2nd Respondent herein.
3. The 2nd Respondent is a body corporate established under the Companies Act Cap 486 Laws of Kenya.
4. The 3rd Respondent is a body corporate established under Section 3 of the Commission on Administrative Justice Act Cap 7J Laws of Kenya. Petitioners' Position.
5. The Petitioners allege that the groups of the Petitioners herein, in a joint letter dated 1st December 2023, requested to be granted access to specific information held by the 2nd Respondent herein.
6. They further allege that after 21 days with no response and in accordance to Section 9 (6) of the Access to Information Act [Cap 7M Laws of Kenya], they deemed their application for grant of access to information from the 2nd

Respondent to have been rejected.
7. According to the Petitioners, they proceeded to write a letter dated 29th December, 2023 to the 3rd Respondent herein for its review.
8. They further allege that on 9th January, 2024, the 3rd Respondent wrote to the 1st Respondent requesting that he responds to the Petitioners in line with Section 9 (4) of the Access to Information Act Cap 7M Laws of Kenya.
9. The Petitioners further state that on 19th March, 2024, the 3rd Respondent wrote to the 1st Respondent clarifying that the information sought by the Petitioners' groups had no relation to or with Nairobi Constitutional Petition No. E327 of 2022 and requested for an institutional report from the 1st and/ or 2nd Respondents herein.
10.The Petitioners further averred that on 20th March 2024, the Petitioners' groups wrote to the 3rd Respondent applying for a review of the Respondents' decisions with finality, to enable them take the next cause of action. They further contend that on 16th May 2024, the 3rd Respondent responded to the Petitioners and stated that they, the 3rd Respondent, were functus officio.
11. The Petitioners aver that in a letter dated 7th June, 2024, the 2nd Respondent granted the Petitioners herein access to the minutes of the Annual General Meetings for the years 2013, 2014 and 2017 but neglected, ignored and/ or refused to grant them access to the minutes for the years 2015, 2016, 2018, 2019, 2020, 2021, 2022 and 2023 and equally failed to demonstrate that the 2nd Respondent did not have those minutes.
12. The Petitioners further claim that the 3rd Respondent forwarded an edited version of the information sent to it by the 1st and/or the 2nd Respondent, thereby misleading the Petitioners to believe that they received the minutes of the Annual General Meetings for the years 2013, 2014 and 2017 only; which the 3rd Respondent forwarded to the Petitioners under its cover letter dated 10th June 2024.
13. The Petitioners filed an Affidavit in rejoinder sworn by James Gacheru Kariuki on 20th January 2025 where the Petitioners aver that without swearing under the Corporate Seal of the Nairobi City Water and Sewerage Company Limited, the 1st Respondent has no legal capacity to act on behalf of the 2nd Respondent.
14. The Petitioners further aver that the documents annexed by the 1st and 2nd Respondents marked 'NM4' and 'NM7' are not minutes but draft minutes that are unsigned and to date they have not been granted access to minutes of the AGM in the name of extra ordinary meeting for the year 2019 and the year 2023.
15. The Petitioners also contend that the Chief Executive Officer of the 3rd Respondent lacks locus standi to act on behalf of the 3rd Respondent as she has not sworn her Replying Affidavit under the Corporate Seal of the Commission as required by Order 9 Rule 2 of the Civil Procedure Rules 2010.
17. The Petitioners seeks the reliefs that: - A. A Declaration do issue that it is a

requirement, in line with the provisions of Articles 10 (2)(a), 33 (1)(a) & 174 (c) of the Constitution of Kenya 2010 and in accordance with the provisions of Section 4 (1), (5) & 7(1) of the Access to Information Act Cap 7M Laws of Kenya, Section 96(1) of the County Government Act Cap 265 Laws of Kenya, Section 80 of Cap 80 Laws of Kenya that as a state organ/ public officer, the Respondents herein jointly or in the alternative are to grant access to any information held by the 2nd Respondent to any citizen of Kenya expeditiously and as of a right upon a request. B. A Declaration do issue that the provisions of Articles 10(2)(a) participation of the people and the provisions of Article 174(c) of the Constitution of Kenya 2010 although not in the bill of rights are rights conferred and or recognized by the provisions of PART VIII as read with the provisions of section 92(1) of the County Government Act Cap 265 Laws of Kenya in line with the provisions of Article 19(3)(b) of the Constitution of Kenya 2010. Page 9 of 34 C. An Order do issue that the orders of the Commission on Administrative Justice herein made on 16th May 2024 in relation to the matter herein are hereby the orders of this Honourable Court. D. A Declaration do issue that the right of the groups of the Petitioners herein under Articles 10(2)(a), 33(1)(a), 35(1)(a), 43(f), 47 & 174(c) of the Constitution of Kenya 2010 have been infringed/ denied/ violated by the Respondents herein jointly or in the alternative. E. Aggravated damages included in general damages individually for the infringement/ denial/ violation of the rights of the groups of the petitioner under Article 10(2)(a) & (c) 33(1)(a), 35(1)(a), 43(f), 47 and 174(c) of the Constitution of Kenya 2010. F. Costs of the Petition and any other or further relied the honourable court may deem fit to grant.

17.In response, the 1st and 2nd Respondents opposed the Petition via a Replying Affidavit sworn by Nahason Muguna on 16th December, 2024 arguing that the Petition fails to state with precision the rights infringed. The 1st and 2nd Respondents were also of the opinion that the Petitioners dissatisfaction with the orders made by the 3rd Respondent ought to have been canvassed by way of an appeal filed within 21 days of the decision, and if they were satisfied, they should have applied for ex-parte summons for leave to enforce the Order.

18. It was further stated by the 1st and 2nd Respondents that the Petition is incompetent as it does not disclose any constitutional or human rights violations and it also offends the principles laid down in the seminal case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

19. The 1st Respondent further alleges that on 26th March 2014, an Annual General Meeting of the 2nd Respondent was held and directors appointed. The 1st Respondent states that subsequently Constitutional Petition No. 143 of 2014 was filed challenging the appointment of the directors; and during the pendency of the said Petition, no Annual General Meeting was held, and therefore there were no minutes to be provided by the 2nd Respondent.

20. He further alleges that the directors who were in place ceased holding office

and the 2nd Respondent continued to operate without directors up until about 15th July 2016, when a Board of Directors comprising of 11 members was constituted at an extra- ordinary general meeting of the 2nd Respondent. The draft meetings were then confirmed in the next annual general meeting held on 21st April 2017.
21.The 1st Respondent avers that on 27th September 2017, the Acting County Secretary of the Nairobi City County suspended the operations of the board of directors including all the meetings of the directors, pending investigations over their alleged misconduct.

22.He further avers that the Court issued orders on 25th September 2018 restraining Nairobi City County from proceeding with the extra Ordinary Meeting of the 2nd Respondent therefore no General Meeting was held from 27th September 2017 to 19th July 2019.

23.According to the 1st Respondent, in 2020, the Covid -19 pandemic negatively impacted the operations of the 2nd Respondent; and due to the measures outlawing the public gatherings, the 2nd Respondent wrote to the Registrar of Companies requesting that they be exempted from holding the Annual General Meeting for that year. The request was granted, and thus no AGM was held in the year 2020. He further contends that since the pandemic did not recede within the year 2020, on 24th March 2021 the Registrar of Companies granted the 2nd Respondent an extension of six months.

24.The 1st Respondent further avers that on 18th July 2022, the three-year term of the directors lapsed. The 2nd Respondent was unable to raise quorum as stipulated in the Articles of Associations; and thus no AGM was held in the year 2022.

25.According to the 1st Respondent, there were multiple disruptions beyond the control of the 2nd Respondent that prevented it from conducting the annual general meetings as required.

26.He further contends that the Petitioners filed another matter raising similar issues in HCCC PETITION NO. E327 OF 2022 – James Gacheru Kariuki & 18 others v WASREB, NCWSC & 68 Others where a Notice to Show Cause was issued as a result of the Petitioners failing to appear in court on several occasions. The 3rd Respondent equally filed a response opposing the Petition in line with the position taken by the 1st and 2nd Respondents. The 3rd Respondent further stated that the Commission is of the view that the information requested by the Petitioners was provided to them by the 2nd Respondent.

28.According to the 3rd Respondent, the Commission had no further legal obligation after issuance of its Orders dated 16th May 2024 as Section 23 (5) of the Access to Information Act requires a party in favour of whom the orders have been issued by the Commission to move the High Court for enforcement of such orders. The 3rd Respondent contends that it discharged its lawful obligations as provided by law by reviewing the application for denial of information and

issuing orders, which were complied with by the 2nd Respondent.
29.The Respondents, on the other hand, urges the Court to dismiss the Petition with punitive costs, arguing that the petition as drawn and filed does not disclose any justiciable grievance to warrant judicial review. Submissions by the parties Petitioners' submissions
30.The Petitioners argue that the 1st Respondent together with the Chief Executive Officer for the 3rd Respondent have no locus standi to swear their respective Replying Affidavits as they did not swear the Affidavits under the Corporate Seal of the 2nd and 3rd Respondents.
31.While discussing the issue of Locus Standi, the Petitioners relied on the following cases: **Bugerere Coffee Growers Limited versus Sebaduka & another [1970] EA 147, Anarita Karimi Njeru v Republic [1979] eKLR and finally the case of Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.**
32.The Petitioners further argued that the 1st Respondent did not discharge his statutory duty of granting access to the minutes of the Annual General Meetings and/or Extra Ordinary Meetings of the 2nd Respondent for the years 2017, 2019 and 2023 as the minutes provided are not signed and confirmed as the minutes of the 2nd Respondent.
33.They submit that the Respondents jointly or in the alternative infringed Petitioners' constitutional right of access to information held by the 2nd Respondent in violation of Article 35(1) of the Constitution of Kenya, 2010.
34.The Petitioners further submits that this Honourable Court has jurisdiction to determine whether a right or fundamental freedom has been denied, violated, infringed or threatened and thereafter grant appropriate reliefs. They prayed that this Honourable Court be guided by the principle of first precedent as outlined in the case of Raiply Woods (K) Ltd & another v Baringo County & 3 others [2017] eKLR to grant the appropriate reliefs. 1st and 2nd Respondents Submissions
35. The Respondents argues that the Petitioners' actions argues that the Petitioners' actions amount to forum shopping and an abuse of the court process since on 16th May 2024, the 3rd Respondent issued an order in the Access to Information (ATI) Review Application No. CAJ/ATI/NWSC/009/21/24-MW and became functus officio. The Petitioners ought to have either appealed the decision or applied for exparte summons to enforce the order as a decree.
36.They cite cases of Sports and Recreation Commission v Sagittarius Wrestling Club and Anor (2001), KKB V SCM & 5 Others (Constitutional Petition 014 of 2020) [2022] and finally the case of Mumo Matemu versus Trusted Society of Human Rights Alliance & 5 others (2013) eKLR in support of the issue that the Petitioners have failed to exhaust remedies under the Access to Information Act and in the principle of ripeness and constitutional avoidance this Honourable Court should

decline to entertain the Petition.
37. The 1st and 2nd Respondent argued that the case of Raiply Woods (K) Ltd & another v Baringo County & 3 others [2017] eKLR relied upon by the Petitioners in their prayer for general damages is incompatible with the present case as in the above cited case, the claim was quantifiable and specific as opposed to the instant petition. They further argued that constitutional reliefs are intended to vindicate rights and deter future violations not to compensate grievances.
38.They further argue that it would appear the sole aim in filing this petition is to get an award for damages and it is not surprising that the Petitioners have repeatedly relied on the above authority notwithstanding the incompatibility of the quoted precedence.
39. According to the 1st and 2nd Respondents constitutional reliefs are intended to deter future violations and not to serve as compensatory measures for grievances. Therefore, the focus must be on safeguarding rights and not monetary compensation.
40.The 1st and 2nd Respondents finally concluded that the Petition does not disclose any justiciable grievance and it will be in the interest of justice and fairness that this Honourable Court dismisses this petition with costs. Issues for Determination
41. Having considered the Amended Petition, the responses thereto both in support and in opposition, the written submissions filed by the parties, and the Court has identified the following five (5) issues for determination. a. Whether the 1st Respondent together with the Chief Executive Officer for the 3rd Respondent have locus standi to act on behalf of the 2nd and 3rd Respondents herein. Whether the Petition is procedurally and substantively ripe for consideration by this Honourable Court. c. Whether the Respondents have denied, violated and/or infringed the Petitioners' Rights of access to information.
(i) **Whether the 1st Respondent and the CEO of the 3rd Respondent have locus standi to act on behalf of the 2nd and 3rd Respondents respectively**
42. It is trite law that a company can sue in its own name with the sanction of its Board of Directors or by a resolution in a general or special meeting. It is during such meetings that authority is given to institute or defend a case on its behalf. It is therefore needless to say that an incorporated body has of necessity to act through agents who are usually members of its Board of Directors.
43. Order 9, Rule 1 of the Civil Procedure Rules provides that any Application to or appearance or act in any court required or authorized by the law to be made or done by a party in such a court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.

44. Order 9 Rule 2 (c) of the Civil Procedure Rules outlines that the recognized agents of parties by whom such appearances, applications and acts may be made or done are in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.
45. I am not persuaded by the arguments of the Petitioners that since there was no authority attached by the 2nd and 3rd Respondents showing that the 1st Respondent and the CEO of the 3rd Respondent had authority to defend the instant Petition on behalf of the 2nd and 3rd Respondents respectively, they should therefore be condemned to personally pay the Petitioners the costs of the Petition.
46. My view is that when a party is of the opinion that a suit is incompetent because of want of authority, such party needs to plead that issue, or even if it is not pleaded, such party needs to file an application before this suit is heard, so that the issue is sorted out earlier in the proceedings.
47. The essence of this is to reply to the Respondent to respond to the application. The Respondent can in response to such application, demonstrate that it has given authority to defend the suit and authority to the person who swore the affidavit. 4
8. It has not been demonstrated to me that the director of the 2nd Respondent and the CEO of the 3rd Respondent are not the persons who would ordinarily have the authority to sign documents on behalf of both Respondents.
49. The Articles of Association could authorize a suit to be commenced by an officer of the company independently, or require a resolution of the Board of Directors or even a resolution of the General Meeting or any other way that the Company wishes. The Articles of Association of the 2nd and 3rd Respondents have not been displayed to court by the Petitioners so as to demonstrate that there was a breach in the Articles of Association in the manner in which this suit was defended.
50. It is not for this court to speculate whether or not the requisite authority has been obtained from the 2nd and 3rd Respondents herein. The assumption should be that the response has been duly authorized by the 2nd and 3rd Respondents and the court can be put into inquiry if the 2nd and 3rd Respondents or an authorized agent puts material before the court that the Replying Affidavit has not been duly authorized. This is because authority to institute or defend the suit is an internal matter of the company emanating from its Articles of Association.
51. The appropriate officer authorized to swear an affidavit on behalf of a company is known internally to the Company under its Articles of Association. To state that an affidavit by a corporation is not properly sworn by a person who is not authorized by the Articles of Association of the company is a matter that touches on a violation of the Articles of Association.
52. In any event, the Affidavit sworn by the 1st Respondent has been sworn by

a director of the 2nd Respondent's company. Pursuant to the principles of Page company law, a director is a known agent of the company. It is within the ostensible authority of the directors to sign documents on behalf of a company including affidavits unless evidence is given that the 1st Respondent acted outside the scope of his actual authority. I cannot hold that he was unauthorized to swear the affidavit on behalf of the 2nd Respondent.

53. I am inclined to agree with the position of the decision of **D.K. Maraga J (as he then was) in the case of Mombasa HCCC No. 496 of 1995 Peter Onyango Onyiego vs Kenya Ports Authority** who stated as follows: "*from these definitions, it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest, therefore, that everybody who testifies for or on behalf of a corporation given under seal as required by order 3 rule 2 (c) is in my view not correct.* In the circumstances, I hold that other than verifying affidavits, which as I have stated must be sworn by the plaintiffs themselves or authorized agents, all other affidavits filed and used in courts are not among the acts covered by order 3 rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations anybody as long as that person is possessed of the facts and/or information that he depones on, that in the rules of evidence would be admissible. Mere failure to state that the deponent of such affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity courts can under Order 18 rule 7 of the Civil Procedure Rules ignore."

54. The equivalent of Order 3 Rules 1 to 5 referred to above is the current Order 9 Rules 1 to 4 of the Civil Procedure Rules, 2010.

55. Similarly in the case of Britind Industries Limited vs APA Insurance Limited [2017] eKLR borrowed from the authority of Mavuno Industries Limited & 2 Others vs Keroche Industries Limited HCCC No. 122 of 2011 where the court held that failure to file the requisite authority together with the plaint does not invalidate the suit.

56.I associate myself with the above position and find that the Replying Affidavits sworn by the 1st Respondent and the CEO of the 3rd Respondent are not incompetent in the absence of the Board Authority. My finding therefore is that this case if properly suited and both the 1st Respondent and CEO of the 3rd Respondent have locus standi to swear affidavit on behalf of the 2nd and 3rd Respondents respectively.

(ii) Whether the Petition is procedurally and substantively ripe for consideration by this Honourable Court.

57. A Court must satisfy itself that the case before it is not caught up by the bar of non-justifiability. The concept of non-justifiability has its basis in Article 159 of the Constitution which routes for Alternative Dispute Resolution. The concept of

non- justifiability is comprised of three doctrines: The Political Question Doctrine, the Constitutional Avoidance Doctrine and the Ripeness Doctrine which are cross cut and intertwined as discussed in length by a 3- Judge Bench in the case of **Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR.**

58. While speaking to the Ripeness Doctrine the Learned Judges stated that the doctrine focuses on the time when a dispute is presented for adjudication. They referred to the Blacks Law Dictionary 10th Edition which defines ripeness as the state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made. They encouraged courts to frown upon disputes that are hypothetical, premature or academic which have not matured into justiciable controversies.

59. Section 23(3) of the Access to Information Act, 2016 provides: A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty- one days from the date the order was made.

60. Section 23 (5) further provides: If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the order effect.

61. The 1st and 2nd Respondent while relying on the above Sections contend that on 16th May 2024 the 3rd Respondent issued an Order in the Access to Information (ATI) Review Application No. CAJ/ATI/NWSC/009/21/24-MW and became functus officio. They contend further that despite being fully aware of the existence of such order, the Petitioners failed to pursue the appropriate procedure under the Access to Information Act to enforce it. Instead, they prematurely burdened this Court with a petition and based on the principle of ripeness this Honourable Court should decline to entertain it as alternative legal remedies were readily available but were not pursued.

62. Article 22 of the Constitution however makes it clear that an applicant may approach a court to obtain an interdict to prevent violation of a right whether or not such an applicant will be successful.

63.The Article makes it clear that such an applicant will have standing to seek relief in such circumstances even though no violation exists. The issue of threats to violation of fundamental rights and freedom does not require real and live case for the court to intervene and the mere threat of violation of rights is sufficient for this court to intervene. Petitioner will have standing to seek relief even though no actual violation suffices.

64. The Petitioners having encountered a violation and/or infringement of their

rights to access information were well within their constitutional rights to approach this court for relief.

65. Article 23(1) of the Constitution of Kenya 2010 gives the High Court jurisdiction, in accordance to Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

66.Article 258 (1) further provides that every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention.

67. On interpretation of constitutional provisions, Article 259(1) of the Constitution provides that the Constitution shall be interpretated in a manner that promotes its purpose, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; and also contributes to good governance.

68.Although the 3rd Respondent is an independent body, that independence does not at all mean that this Court has no power to intervene where the Respondents engage in actions that amount to abuse of their discretionary powers. This is because any public body must exercise its powers judicially not whimsically.

69. In this case, I find that the Petition comprises of omnibus of issues the bulk whereof raises pure constitutional issues. It would therefore be more convenient to deal with the constitutional issues herein.

70. I am guided by the 5-Judge bench decision in **Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR.** The Court while analyzing and appreciating the doctrine of exhaustion stated as follows: "*60. As observed above, the first principle is that the High Court may in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this concept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] 62. In the instant case, the Petitioners*

allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

71.Similarly in the instant case, the Petitioners allege violation of their fundamental rights. The Petitioners are also alleging that they lacked proper audience before the 3rd Respondent and therefore decided to seek this Honourable Court's intervention. Guided by the above holding, I find that the irresistible conclusion is that the Petition herein raises constitutional issues that can be adequately litigated before this Court.

(iii) Whether the Respondents have denied, violated and/or infringed the Petitioners right of access to information.

72. Article 35(1) of the Constitution provides: (1) 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. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation.

73. The access to Information Act No. 31 of 2016 gives effect to Article 35 of the Constitution. Under the Access to Information Act the 3rd Respondent is empowered with the function and power to enforce its provisions. This is because it is the oversight authority as provided under Section 20(1) of the Act.

74. The functions of the 3rd Respondent under Section 21 of the said Act are*: (a) Investigate, on its initiative or upon complaint made by any person or group of persons, violation of the provisions of this Act; (b) Request for and receive reports from public entities with respect to the implementation of this Act and of the Act relating to data protection and to access and acts on those reports with a view to accessing and evaluating the use and disclosure of information and the protection of personal data; (c) … (d) Work with public entities to promote the right to access to information and work with other regulatory bodies on promotion and compliance with data protection measures in terms of legislation; (e) … (f) Hear and determine complaints and review decisions arising from violations of the right to access information; (g)… (h)…*

75. Where the 3rd Respondent is satisfied that there has been an infringement of the provisions of the Act, it is permitted under Section 23(2) to order for the release of any information withheld unlawfully.

76. The 3rd Respondent is the body mandated to receive complaints on the refusal by a public body to issue information as dictated by Article 35 of the

Constitution. A person seeking this information should first exhaust or satisfy the laid down mechanism in law before approaching the court.
77. The facts stated herein reveal that the Petitioner did make a complaint to the 3rd Respondent vide a letter dated 29th December 2023. The 3rd Respondent instructed the 1st and 2nd Respondents via an order dated 16th May 2024, to issue Annual General Meeting minutes to the 2nd Respondent's Company from 1st January 2013 to date and also to issue the Petitioners with public advertisements for all employees employed from 9th March 2013.
78.I agree with the 3rd Respondent that the Commission had no further legal obligation after issuance of its Orders dated 16th May 2024 in accordance Section 23 (5) of the Access to Information Act, 2016 and once the orders had been issued, it became functus officio thus it was upon the Petitioners of whom the orders have been issued in favour of to move the High Court for enforcement of such orders.
79.The 2nd Respondent complied with the order and vide letter dated 7th June 2024 forwarded copies of minutes of all general meetings held from 1st January 2013 and copies of public advertisement for all employees employed from March 2013 to date to the Petitioners.
80. The Petitioners contend that the Respondents granted access to the meetings for the years 2013, 2014 and 2017 but neglected, ignored and or refused to grant access to the minutes for the years 2015, 2016, 2018, 2019, 2020, 2021, 2022 and 2023.
81. The Court in the case **of Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR** while discussing the right to access information referred to section 4(1) (2) (3) (4) and (5) of the Access to Information Act and stated thus: *"It is important to note here that the right to information is not affected by the reason why a citizen seeks information or even what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information. 54. The respondents were under both a constitutional and legal obligation to allow the petitioner to access information in their possession and held on behalf of the public. This is an inviolable constitutional right and that is clear from the language of Article 35 of the Constitution, and any limitation must meet the constitutional test and only then can one raise limitation as a ground for non-disclosure."*
82. However, the 2nd Respondent in their Replying affidavit sworn by Nahason Muguna on 16th December, 2024 indicated that they could not avail the information as the same is unavailable. They indicated that that on 26th March 2014, an Annual General Meeting of the 2nd Respondent was held and directors appointed. Soon thereafter, Constitutional Petition No. 143 of 2014 was filed challenging the appointment of the directors and during the pendency of the Petition, no Annual General Meeting was held therefore no minutes to be

provided by the 2nd Respondent.
83.He avers that the directors who were in place ceased holding office and the 2nd Respondent continued to operate without directors until on or about 15th July 2016, when a Board of Directors comprising of 11 members was constituted at an extra- ordinary general meeting of the 2nd Respondent. The draft meetings were then confirmed in the next annual general meeting held on 21st April 2017.
84.The 1st Respondent further avers that on 27th September 2017, the Acting County Secretary of the Nairobi City County suspended the operations of the board of directors including all the meetings of the directors, pending investigations of their alleged misconduct.
85.He claims that the Court issued orders on 25th September 2018 restraining Nairobi City County from proceeding with the extra Ordinary Meeting of the 2nd Respondent therefore no General Meeting was held from 27th September 2017 to 19th July 2019.
86.According to the 1st Respondent, in 2020, the Covid -19 pandemic negatively impacted the smooth of the directors and due to the measures outlawing the public gatherings, the 2nd Respondent wrote to the Registrar of Companies to postpone holding the Annual General Meeting. The request was granted thus no AGM was held in the year 2020.
87.He contends that since the pandemic did not recede, on 24th March 2021, the Registrar of Companies granted the 2nd Respondent extension of six months to postpone the AGM.
88.The 1st Respondent further avers that on 18th July 2022, the three-year term of the directors lapsed. The 2nd Respondent was unable to raise quorum as stipulated in the Articles of Associations thus no AGM was held in the year 2022.
89.According to the 1st Respondent, there were multiple disruptions beyond the control of the 2nd Respondent that prevented it from conducting the annual general meetings as required.
90. Given the circumstances of this case plus what the Respondents have told the court, would the situation be made any better if this court were to grant leave for enforcement of the 3rd Respondent's decision? Since the 1st and 2nd Respondents have made it clear that for the years referred to in his affidavit no Annual General Meeting was conducted thus granting leave for enforcement of the 3rd Respondent's decision will not make any difference. The Respondents will be brought back here for non-compliance and the Court does not issue orders in vain.
91. However, Section 5 of the Access to Information Act, 2016 provides that a public entity should facilitate access to information held by it. The Act is also clear that the Information should be given without delay and at no fee notwithstanding why the citizen wants to access the information.
92. In **Nairobi Law Monthly v Kenya Electricity Generating Company & 2 others**

the Court went on to state; "*56 …State organs or public entities… have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a)…they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens.*"

93. In the present petition, the 1st and 2nd Respondent have given sufficient reasons as to lack of information for the years 2014, 2015, 2016, 2018, 2020, 2021 and 2022. However, no reason have been given as to why they declined to grant the Petitioners access to the minutes for the Annual General Meetings for the years 2019 and 2023.

94. It is also not in contention that the 1st and 2nd Respondents supplied the Petitioners with draft minutes that are unsigned.

95. The 1st and 2nd Respondents were both under constitutional and legal obligations to allow the Petitioners to access information in their possession and on behalf of the public. It is an inviolable constitutional right and that is clear from the language of Article 35 of the Constitution and any limitation must meet the constitutional test.

96. As indicated above, the 1st and 2nd Respondents were under obligation to obey the law and allow the Petitioners access information or where not possible give reasons for that. They failed in both by issuing the Petitioners with draft minutes as opposed to the final signed records and thus violated the Petitioners rights under the Constitution.

97. For the reasons outlined above, I am satisfied that the petitioners have proved their case to the required standard and must succeed.

98.On general damages, I wish to reiterate that assessment of damages is a discretionary relief. That being the case, a court is required to take into consideration public policy as well as the interest of the society as a whole. The petitioners did not specifically plead the loss they allegedly incurred as a result of failure by the 1st and 2nd Respondents to supply them with the minutes as requested. Alive to these facts, it is my view that an award of general damages is not just and appropriate in this case.

99.Consequently, the Petition dated 24th September 2024 is allowed in the terms below, and the following orders granted:

(a)A Declaration be and is hereby issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35(1)(a) on the basis of the Petitioners' request dated 1st December 2023 was and is a violation of the right to access information.

(b) A Declaration be and is hereby issued that the failure by the 1st and 2nd Respondents to provide information sought under Article 35(1)(a) on the basis of the Petitioners' request dated 1st December 2023 was and is a violation of Article 10 of the Constitution specifically the values of the rule of law,

participation of the people, good governance, transparency and accountability.

(c) A Declaration be and is hereby issued that the failure by the 1st and 2nd Respondents to provide full and accurate information sought by the Petitioners under Article 35(1)(a) was and is a violation of Section 4 (1), (5) & 7(1) of the Access to Information Act.

(d)An order of mandamus is hereby issued compelling the 1st and 2nd Respondents to forthwith provide the Petitioners Access to the original signed minutes of the Annual General Meetings held by the 2nd Respondent for the years 2013, 2019 and 2023 at the Respondents costs.

(e) Each party to bear their own costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH 2025.

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BAHATI MWAMUYE JUDGE

9. Paul Okoth Ondago vs National Police Service Commission

Case No :	CONSTITUTIONAL PETITION NO. E013 OF 2024
Date delivered:	14th May 2025
Case Class :	Civil
Court:	Employment and Labour Relations Court.
Case Action :	JUDGMENT
Judge(s) :	Nzioki wa Makau
Citation :	Paul Okoth Ondago vs National Police Service Commission
Court Division:	Employment and Labour Relations Court
County:	Kisumu

1. **Case Outcome:** A declaration that the refusal by the 1st Respondent to communicate, consider and/or make any findings with respect to his appeal is unlawful and unconstitutional. The Court having discerned that only administrative failures were proved, the Petitioner is awarded a sum of Kshs. 500,000/- plus costs in respect of the sum so awarded.

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT KISUMU
PETITION NO. E013 OF 2024

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 25, 28, 41(1), 47(1 & 2), 48, 50, 162 (a) AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25, 28, 41(1), 47 (1&2) AND 50(1) OF THE CONSTITUTION

AND

IN THE MATTER OF RULES 4, 10, 11, 13, AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF SECTION 4(6) OF THE NATIONAL POLICE SERVICE

COMMISSION ACT NO. 30 OF 2011 (SUBSIDIARY LEGISLATIONS)

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTION 41 AND 45 OF THE EMPLOYMENT ACT

BETWEEN

PAUL OKOTH ONDAGO ..... **PETITIONER**

VERSUS

NATIONAL POLICE SERVICE COMMISSION..... **1ST RESPONDENT**

INSPECTOR GENERAL OF POLICE..... **2ND RESPONDENT**

DEPUTY INSPECTOR GENERAL OF
ADMINISTRATION POLICE SERVICE..... **3RD RESPONDENT**

COUNTY AP COMMANDER GARISSA COUNTY ..... **4TH RESPONDENT**

ATTORNEY GENERAL..... **5TH RESPONDENT**

AND

THE CHAIRPERSON COMMISSION
ON ADMINISTRATIVE JUSTICE ..... **INTERESTED PARTY**

JUDGMENT

1. The Petitioner was employed as an Administration Police Constable on 9th May 2011 and posted to Garissa Provincial Headquarters. He asserts in his Petition that on 17th August 2013 at 2.00am he was assigned a mission

alongside other officers to head to the Galmagala AP Division in Bura, Fafi Sub County. What awaited them was a horrific scene—four of their fellow officers had been brutally gunned down, the camp lay in ruins, and their residences had been reduced to ashes. The Petitioner asserts the team gathered the bullet-riddled bodies of their fallen colleagues and transported them to the Masalani airstrip for evacuation to Nairobi. The very next morning, the County Administration Police Commander convened a "Tamaam Parade" where Paul, along with five other officers, was tasked with guarding the now-compromised Galmagala Police Division. This posting carried with it a heavy cloud of danger—this was reportedly the fifth attack on the division, allegedly by Al-Shabaab terrorists, and the area had gained notoriety for its insecurity.

2. Later that evening, the gravity of their assignment deepened when a local elder warned them of another imminent attack. Given the horrific scene they had just witnessed and their inadequate arms—G3 rifles with only two magazines of twenty rounds each—they saw the assignment as a certain death sentence. Attempts to relay the intelligence to their superiors proved futile as communication masts had been destroyed by the militants, leaving them completely cut off. Faced with the threat of a repeat of the previous day's massacre, Paul and his colleagues made the difficult decision to retreat to Garissa to deliver the intelligence in person. Upon arrival, they were ordered to surrender their weapons and ammunition and were informed that they would be relieved of duty. The following day, they met with the County Administration Police Commander and explained their decision, citing the threat and the breakdown in communication.

3. The Petitioner asserts that however, events took a harsh turn in April 2014 when he was transferred to Ugunja Sub-County headquarters. His salary was withheld, and on 19th September 2014, he was formally dismissed from the Police Service. The grounds for dismissal were cowardice and disobedience of lawful orders—offences deemed incompatible with service in the disciplined forces. According to the Petitioner the dismissal was retrospectively carried out to justify the withholding of his salary. He further claimed that his appeal was ignored and never addressed, denying him a fair hearing. As the sole breadwinner for his family, he asserted that his termination was not only procedurally flawed but also a violation of his constitutional rights. Consequently, he filed this petition seeking the following reliefs:
    a. The acts of the Respondents in dismissing him from the Police Service

is a breach of the Petitioner's constitutional rights under Articles 25(c), 28, 41(1) and (2), 50(1) of the Constitution of Kenya and that the same are null and void for all intents and purposes.

b. That the refusal by the 1st Respondent to communicate, consider and/or make any findings with respect to his appeal is unlawful and unconstitutional.

c. That the entire disciplinary proceedings against him contravened his rights to a fair hearing and fair administrative action and the same are therefore unlawful and void *ab initio*.

d. An order of judicial review of *Certiorari* to issue to quash his dismissal through the orderly room proceedings of the 19th August 2013 at Garissa County Headquarters.

e. An order of *Certiorari* to issue to quash his dismissal by the 1st Respondent vide the letter dated 5th May 2014 and received on 12th September 2014 for being unconstitutional and lacking procedural propriety without loss of benefits, rank or position.

f. An order of *Mandamus* to compel the 1st Respondent to reinstate him to the Police Service as his dismissal was unlawful, irregular and unjustifiable.

g. An order directing the Respondents to compensate him for the violation of his fundamental rights under the bill of rights in the Constitution.

h. The Respondents be compelled to expunge the record of the flawed disciplinary process from his service record.

i. An order directing the 1st Respondent to forthwith compensate him for the loss of employment benefits including unpaid salary dues for all the time he has been out of employment at the National Police Service inclusive of any salary increment within the said period up to the time the Petition is heard and determined.

j. General damages for blatant violation of his rights as well as for pain and suffering occasioned upon him by the Respondents' actions.

k. In the alternative to reinstatement, he be entitled to pension and accrued benefits from the time of termination to the time ofdetermination of this suit to the period of lawful retirement from service.

l. Costs and interest to be borne by the Respondents.

4. In response, the 1st Respondent, through an affidavit sworn by its CEO Mr.

Peter Leley, defended the dismissal, stating that the Petitioner had defied a lawful order to remain at Galmagala Division. The 1st Respondent argued that his actions constituted gross misconduct warranting disciplinary action. It further claimed due process was observed, noting that factors like length of service and the seriousness of the offence were duly considered. The 1st Respondent also stated that the Petitioner had not requested additional time to present a defence before the disciplinary panel. Regarding the appeal, the 1st Respondent maintained that it was time-barred according to Chapter 30, section 30 of the Service Standing Orders and Regulation 22 of the National Police Service Code Discipline Regulations 2015. Additionally, it argued that reinstatement was not viable beyond three years from the date of dismissal as per section 12(3)(vii) of the Employment and Labour Relations Court Act. The 1st Respondent concluded by urging the court to dismiss the Petition, citing lack of evidence to demonstrate a breach of constitutional rights or procedural law.

5. The Interested Party filed a replying affidavit but uploaded it in an unreadable format and failed to avail a hard copy as provided for under the Rules of this Court. The submissions filed were therefore of no benefit to this determination and were a waste of effort on the part of the Interested Party.

6. In his rejoinder, the Petitioner reaffirmed via a further affidavit dated 19th February 2025 that their withdrawal from Galmagala was not an act of cowardice, but a necessary decision due to the lack of communication channels. He also reiterated that no formal charges had been presented to him, nor was he afforded the opportunity to prepare a defence or consult legal counsel. He maintained that no disciplinary committee had been constituted, thus invalidating the orderly room proceedings that led to his dismissal.

7. The Petition was canvassed by way of written submissions.

Petitioner's Submissions

8. The Petitioner submits that his dismissal from employment was both procedurally and substantively unfair. He affirms that the process leading to his termination violated the Constitution, the National Police Service Act, the Service Standing Orders, and the Fair Administrative Action Act. In

support of this claim, the Petitioner asserts that he was not given a fair opportunity to prepare for the orderly room proceedings, contrary to Article 50(2)(c) of the Constitution. He relies on the case of **Rebecca Ann Maina & 2 others *v* Jomo Kenyatta University of Agriculture & Technology (2014) eKLR**, where the court emphasized the necessity of clearly outlining charges against an employee and providing adequate time for the preparation of a defence. The Petitioner further submits that the disciplinary process failed to comply with Article 246 of the Constitution, which mandates adherence to due process by the National Police Service Commission in the exercise of disciplinary control. Additionally, he cites Article 47, which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. He asserts that he was neither served with any documents nor provided with a charge sheet, thereby impeding his ability to prepare a proper defence. On this he again, he refers to the **Rebecca Ann** *(supra)* case, which affirmed that employees are entitled to access documents held by the employer that may assist in preparing their defence. The Petitioner also highlights breaches of the National Police Service Standing Orders, noting that the disciplinary committee that heard his case consisted of only one member, contrary to section 14, which requires a minimum of three members. He further asserts that he was not informed of his right to be accompanied by a colleague during the proceedings, in violation of section 14(3)(b), as read together with section 18(1).

9. With respect to his appeal against the dismissal, the Petitioner submits that it remains unheard to date, in contravention of his legal rights. He cites Article 50(1)(q) of the Constitution, which guarantees the right to appeal, and section 14(4) of the National Police Standing Orders, which similarly affirms this right. Consequently, the Petitioner submits that his dismissal from employment was unjustified and urges the court to grant the reliefs sought.

<u>Interested Party's Submissions</u>

10. The Interested Party submits that the Petitioner complied with the exhaustion doctrine by lodging an appeal in accordance with the National Police Service Act and the National Police Service Commission Regulations, 2015. In support of this, they cite Section 9(2) of the Fair Administrative Action Act, which bars courts from reviewing administrative actions unless all internal appeals, reviews, and other available remedies have been exhausted. The Interested Party emphases on the fact that the Petitioner lodged a formal complaint and subsequently appealed to the 1st

Respondent. The Interested Party further acknowledges the court's constitutional authority to hear and determine the petition, as granted under Article 165(3) of the Constitution. To underscore the importance of the exhaustion doctrine, the Interested Party relies on the definition found in **Black's Law Dictionary (11th Edition)** and draws support from several judicial precedents, including **Jeremiah Memba Ocharo *v* Evangeline Njoka & 3 others [2022] eKLR**, **Speaker of National Assembly *v* Njenga Karume [1992] KLR 2**, **Geoffrey Muthiga Kabiru & 2 others *v* Samuel Munga Henry & 1756 others [2015]eKLR** and **Krystalline Salt *v* Kenya Revenue Authority [2019] eKLR**.

11. Regarding the alleged violation of the Petitioner's right to fair administrative action, the Interested Party submits that this right was indeed infringed. They point to the 1st Respondent's failure to determine the Petitioner's appeal. To support this position, they reference the definition of "administrative action" as outlined in the 11th Edition of **Black's Law Dictionary**, section 2 of the Commission on Administrative Justice Act, the Fair Administrative Action Act, and various constitutional provisions. To the effect that administrative action is any decision or act by a public body that affects the rights of individuals to whom the action relates. The Interested Party further emphasizes the Petitioner's entitlement to efficient, reasonable, and procedurally fair administrative action, as guaranteed under section 4 of the Fair Administrative Action Act. They also invoke the Court's powers under Articles 22 and 23 of the Constitution, as well as section 7(2)(j) of the Fair Administrative Action Act, to enforce fundamental rights and review administrative decisions. In support of their argument, they rely on the case of **Republic *v* County Government of Kilifi [2021] eKLR**, where the court found that a delay in resolving the Ex-parte Applicant's issue amounted to a violation of the right to fair administrative action. In conclusion, the Interested Party urges this Court to allow the Petition herein.

12. The Respondents did not deem it befitting to favour the Court with any submissions.

Disposition

13. The Petitioner herein asserts violation of his constitutional rights. It is common ground that he was a Police officer based in a terrorist prone zone at the time – August 2013. He is said to have been part of a sextet that exhibited cowardice and flagrant disobedience of a lawful order by declining to serve at Galmagala Police Post in Fafi, Garissa County. Prior to the day of the alleged display of cowardice, the Petitioner and his

colleagues had attended to Galmagala AP Division in Bura, Fafi Sub County after an incident the day before – 17th August 2013. The Petitioner asserts that they came upon a horrific scene—four of their fellow Police Officers had been brutally gunned down, the camp lay in ruins, and their residences had been reduced to ashes. The Petitioner informed the Court that the incoming team gathered the bullet-riddled bodies of their fallen colleagues and transported them to the Masalini airstrip for evacuation to Nairobi. The Petitioner asserted that the very next morning, the County Administration Police Commander convened a "Tamaam Parade" where he, along with five other officers, was tasked with guarding the now-compromised Galmagala Police Division. The Petitioner posited that this posting carried with it a heavy cloud of danger—this was reportedly the fifth attack on the division, allegedly by Al-Shabaab terrorists, and the area had gained notoriety for its insecurity.

14. The Petitioner asserted that later that evening, the gravity of their assignment deepened when a local elder warned them of another imminent attack and given the horrific scene they had just witnessed and their inadequate arms—G3 rifles with only two magazines of twenty rounds each—they saw the assignment as a certain death sentence. The Petitioner asserts that attempts to relay the intelligence of this imminent attack to the superiors proved futile as communication masts had been destroyed by the terrorists, leaving the team completely cut off. The Petitioner held that faced with the threat of a repeat of the previous day's massacre, he and his colleagues made the difficult decision to retreat to Garissa to deliver the intelligence in person. Upon arrival, they were ordered to surrender their weapons and ammunition and were informed that they would be relieved of duty. The following day, they met with the County Administration Police Commander and explained their decision, citing the threat and the breakdown in communication.

15. The Respondents through the CEO of the 1st Respondent assert that the Petitioner wilfully disobeyed a lawful command by deserting his duty station. When the Petitioner was formally dismissed from the Police Service the grounds for dismissal indicated were cowardice and disobedience of lawful orders—offences deemed incompatible with service in the disciplined forces. The Respondents assert the dismissal was proper and after due process.

16. The Petitioner was taken through the orderly room proceedings of 21st

August 2013. The record indicates the Petitioner was allowed to ask questions of the two witnesses presented by the Police Service. The two indicated that the Petitioner abandoned his post by first attempting to leave immediately the posting was made and later making his way back to the camp in the company of the other officers. The Petitioner had been appointed on 9th May 2011 and was serving his second year as a corporal.

17. The testimony given by CIP Francis Gikeri the first witness for the Service was as follows:

I can very well remember that on 16/08/2013 at around 7.30pm when I was called by the County Commander and informed me that at 4.00 am the following day I prepare 10 APS including me to accompany him to Fafi District, Galmagala Division where our officers were attacked by al- shabaab and unfortunately 4 APS were gunned down. On 17/08/2013 at around 4.00am the 10 officers were all prepared including the accused to proceed to Galmagala. At around 6.00am we took off with the County Commander towards Galmagala and arrived at around 10.00am. We saw the same as reported to us when the incident happened. We witnessed the destruction caused including the residential houses and communication room. We also witnessed 4 APS who were already gunned down and lying in a pool of blood. We loaded the deceased bodies on to our GK Land Rover and taken to Masalani where they were airlifted to Nairobi. We spent the whole night there until the following day 18/08/2013 guarding the area. On 18/08/2013, at around 10.00am we had a brief meeting with the local chief and area elders where they were assured by the County Commander that the area will be guarded 24 hrs with instruction from DIG APS. Later the County Commander called for a team up parade with the officers and informed them that they will remain at Galmagala post to guard the area as directed by DIG APS as the County Commander made the necessary arrangement to transfer officers from within the County to the Division. While at the team up parade the County Commander appointed Senior Sgt Otieno from the County Hqs and Cpl Abass from Fafi Sub County to be the incharge of the officers to be left at Galmagala for temporary security of the area. The County Commander mandated me to select those to be left behind, the accused being one of them. After selecting them the County Commander left leaving me behind as I prepared to leave with the lorry. Instead of going back to the camp, the officers regrouped at the sentry box where they all boarded the lorry. I instructed them to alight from the lorry and they agreed except one APC Joseph Maina Muigai who refused saying he does not want work anymore. We started our journey back to the County Headquarters and arrived at around 4.00pm of 18/08/2013. On the same day at around 7.00 pm while at the camp with CIP Hillow and Cpl Jorum Mvoi we

saw a group of armed men approaching from the gate coming towards the camp. I sent Cpl Mvoi to find out who the officers were. The CPL reported back to me that they are the officers who were left to remain at Galmagala Division. I instructed Senior Sergeant Abdi Sheikh to take their details and inform them to return their firearms to the armoury. I reported the matter to the County Commander.

18. The Petitioner was asked if he had any questions for CIP Francis Gikeri and he replied that he had none. The next witness was Cpl Mvoi who stated the following:

I can very well remember that on 16/08/2013 at around 7.30pm, I was instructed by S/Sgt Sheikh to prepare 10 officers who will escort the County Commander to Galmagala Division which was attacked by al shabaab. We left county headquarters on 17/08/2013 and arrived at Galmagala at around 10.00am and witnessed the body of our officers who were killed by al shabaab. We spent the night at Galmagala and the following day 18/08/2013 at around 11.00am the County Commander instructed that some officers from the County Headquarters and others from Fafi will remain in Galmagala to provide security to the public. Thereafter I left with the County Commander back to Garissa and arrived at around 4.00pm. At around 7.00pm while at the camp, to my surprise the officers we left at Galmagala came back to Garissa without permission, the accused being one of them. I informed CIP Gikeri about the same and instructed me and S/Sgt Sheikh to inform the officers to return their rifles to the armory, which I did without hesitation.

19. The Petitioner was asked if he had any question for CPL Mvoi and he said he had none. In his own statement, the Petitioner stated thus:

On Friday 16/08/2013, one Cpl Jorum Mvoi came to mv house and instructed me that tomorrow at 3.00am I should be ready at the armory, which he did not brief me where we were heading. On 17/08/2013 at 3.00am I reported to the armory and I was ordered to collect a rifle and 3 magazines each with 20 rounds. After that we went to the county Commanders residence and that is where I was informed that we were heading to Galmagala division our officers were attacked by unknown assailants. When we reached there at around 9.00am we found our 4 officers lying on the ground dead, each one with bullet wounds not less than 20 rounds. We placed them on our GK vehicle where they were taken to Masalani and later airlifted to Nairobi. After that I assessed the situation and patrolled around the camp and saw that our officers have been attacked dangerously and their houses burnt. When we asked the locals, they told us that the assailants came in large numbers and our officers were caught unaware. All of us spent the following night at

Galmagala after we were instructed to remove everything including the solar system and our dead officers' belongings. The next day on 18/08/2013, the County Commander issued an order that some officers must remain at Galmagala. Then he instructed CIP Gikeri to choose officers to remain in the camp which I was one of those to remain. We tried to ask our County Commander some questions but never advised us on what to do and went to his vehicle and left us with the Chief Inspector. Due to the situation on the ground, I asked myself so many questions such as why our officers died, why the government provide helicopter to airlift the body of our officers only if they have died, why would they not bring the helicopter and enough strength to pursue the assailants. Therefore, I left the area as tactical withdrawal to save my life.

20. The Petitioner from the above account made a decision to leave his post. As a disciplined officer he knew the ramifications of such a move. It is indeed true one can be permitted to leave a zone as the one the Petitioner was in, however there are consequences. The display of cowardice exhibited by the officers left at Galmagala did not differ from that of APC Joseph Muigai who left on the material day with the officers retreating to Garissa.

21. In the Orderly Room proceedings, there is no indication that the Petitioner had come across intelligence that the area would be attacked again. There is no evidence adduced to show there was such intelligence shared. The Petitioner did not mention any such thing and only spoke of his disillusionment with his service. He says he had serious soul searching prompting him to depart for Garissa in what he termed "tactical withdrawal" to save his life. Tactical withdrawal in military parlance is a calculated retreat, often with danger associated with the manoeuvre which is geared to either exposing an enemy to the potential for an ambush, leading the enemy to booby traps or cornering them so as to annihilate them. The Petitioner did not lure the enemy into a trap, he did not use this tactic to ensure a victory for his team. Instead, it was used as a tactic to leave the post, a surrender of territory or ground at best. This cannot have been anywhere near a tactical retreat. Usually, a tactical retreat is undertaken in the throes of combat and not when there is no enemy in sight or when there is no imminent attack which the manoeuvre is supposed to forestall. When the Petitioner was given the opportunity at the Orderly Room proceedings to offer a defence to the charges preferred against him which were – a willfully disobedience of a lawful order given to him by the Garissa County Commander to temporarily remain in

Galmagala Division where 4 AP Officers were killed by suspected al shabaab militia; and a charge that on the same material day he left his place of work, which is Galmagala Division without permission, before he was relieved.

22. The two charges were proved in the testimony at the Orderly Room proceedings. In line with the Constitution of Kenya, the Petitioner was accorded his rights under Articles 25(c) and 50(1) – a right to fair trial, his dignity was respected in terms of Article 28, a right to fair labour practice in terms of Articles 41(1) and (2). Nowhere in his Petition has it been demonstrated that the rights were abridged save for the matter of his appeal.

23. The Petitioner upon being dismissed from service preferred an appeal. There was no communication made to him in regard to this aspect of his trial. The Interested Party asserts there was violation of the Petitioner's right to fair administrative action. It pointed to the 1st Respondent's failure to determine the Petitioner's appeal and asserts that a violation to fair administrative action should result in remedy.

24. Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In this case it is clear there was lethargic and inefficient administrative process. The Petitioner would be entitled to recover for this. The dismissal from service was from all accounts one that has little sympathy from the standpoint of the employer. When one offers their services in defence of a nation, there are attendant risks and one is death or injury. Desertion in the face of the enemy or shirking responsibilities, physically fleeing from combat and generally avoiding difficult situations due to fear is a serious offence. One can get dishonourable discharge to even more severe punishment like death. The departure from Galmagala by the Petitioner and his colleagues was not a tactical retreat. By their nature, tactical retreats – as is garnered from the expression, involve moving soldiers (combatants) or military equipment away from one position to a safer area or a pause to reorganize for a counterattack. The purpose of a tactical retreat is to avoid being overrun, to help the troops preserve strength, or ensure the fighting force gains a more advantageous position for engagement. Examples of tactical retreat include withdrawing from a poorly defended position to a stronger one where there may be trenches, caves or places to hide from direct enemy fire. It may also involve creating a trap for the enemy by drawing them in a specific area before launching

a counterattack to annihilate the enemy.

25. Since the Petitioner did not undertake any such manoeuvre with his team, their actions were similar to running away from the battlefield for which a soldier would probably be court martialed or killed. The Court returns that the Petitioner's termination of service was within the remit of the 1st Respondent and was effected within the confines of the law. As such, there would be no remedy on that aspect of the Petition.

26. The Petition is only successful to the extent that a declaration is made that the refusal by the 1st Respondent to communicate, consider and/or make any findings with respect to his appeal is unlawful and unconstitutional. The Court having discerned that only administrative failures were proved, the Petitioner is awarded a sum of Kshs. 500,000/- plus costs in respect of the sum so awarded.

Orders accordingly.

Dated and delivered at Kisumu this 14th day of May 2025

Nzioki wa Makau, MCIArb.
JUDGE

9. Kenya Vision 2030 Board vs Commission on Administrative Justice and 2 Others

Supreme Court Petition No. 42 of 2019	
Case No :	Petition No. 42 of 2019
Date delivered:	30th May 2025
Case Class :	Civil
Court:	Supreme Court
Case Action :	Ruling
Judge(s) :	Bernard Kasavuli
Citation :	Kenya Vision 2030 Board vs the Commission on Administrative Justice and 2 Others
Court Division:	Supreme Court
County:	Nairobi
Case Outcome:	The Appellant's party-party bill of costs dated 21st March 2025 was taxed at Kshs. 522,370.00

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION NO. 42 OF 2019

—BETWEEN—

KENYA VISION 2030 DELIVERY BOARD……..……APPELLANT

- AND-

THE COMMISSION ON ADMINISTRATIVE JUSTICE……1ST RESPONDENT

THE HON. ATTORNEY
GENERAL……..2ND RESPONDENT

ENG. JUDAH ABEKAH…….. 3RD RESPONDENT

RULING ON TAXATION OF THE BILL OF COSTS DATED 21/03/2025

Representation

Mr. Oyare- Advocate for the Appellant

Ms. Elizabeth Musembi-Advocate for the 1st Respondent

N/A for the 2nd Respondent

Mr. Kariuki -Advocate for the 3rd Respondent

INTRODUCTION

[1] The Appellant's bill of costs herein is premised on orders issued vide the Judgment delivered on 24th March, 2021 wherein the Petitioner was granted costs. The bill is comprised of a total of 21 (although they are actually 19) items with a cumulative value of Kshs. 1,029,370.00. The bill is opposed by both the 1st and 3rd Respondents vide their filed submissions dated 2nd May 2025 and 12th May, 2025 respectively. I will therefore proceed and consider tax the bill of costs as follows:

ANALYSIS AND DETERMINATION

INSTRUCTION FEES

[2] Paragraph 9(2) (3) of the Third Schedule of the Supreme Court Rules, 2020 provides as follows:

(2) "Thefees to be allowedfor instructions to appeal or to oppose an appeal shall be such sum as the taxing offcer shall consider reasonable, having regard to the amount involved in the appeal, its nature, importance and diffculty, the interest of the parties, the other costs to be allowed, the general conduct ofthe proceedings, thefund or person to bear the costs and all other relevant circumstances.

(3) Ihe sum allowed under sub-paragraph (2) shall include all works necessary and properly done in connection with the appeal and not otherwise chargeable, including attendances, correspondence, perusals, and consulting authorities. "[Underlining minel

The above provision of the law and the authorities relied on by all parties will guide me in taxation of the instant bill on record.

[31 On item 1, instructions to file a notice of appeal; the Appellant has sought for Kshs. 1,500/=. The Third Schedule provides for Kshs. 1,500/= hence it is taxed as drawn.

I have also considered item 2 on drawing the notice of appeal, the Third Schedule provides for Kshs. 500/= hence I allow it as drawn.

On item 3 attending court to file the notice of appeal, it is taxed at Kshs. 200/=.

[4] The most contentious item is on instruction fees to file the petition of appeal. The Appellant has sought for Kshs. 1,000,000.00. The 1st respondent vehemently opposes this claim on the basis that there is no basis given by the Appellant for arriving at this figure, it is excessive, illegal and unjustified. It is submitted that Kshs. 15,000/= will be sufficient compensation as instruction fees. The 3rd respondent on his part submits that Kshs. 1,000,000.00 is grossly excessive and not in accordance with the Advocates Remuneration Order (ARO) 2014 and the applicable laws. Relying on the ARO and while

bearing in mind that the value of the subject matter as per the judgment of the Court of appeal was Kshs. 8,602,000.00, the 3rd respondent submits that, in view of the Schedule 6A(1)(b) of ARO 2014, instruction fees should be Kshs.272,040/=.

[5] I have carefully considered the submissions by all the parties and I must state that, the ARO 2014 is not applicable to taxation of the party-party bill of costs before the Supreme Court unless specifically stated. It is for this reason that the Third Schedule to the Supreme Court Rules, 2020 exists and makes provision for taxation of costs before the Supreme Court. Paragraph 9 supra is very clear that, the fee to be allowed to appeal or oppose an appeal shall be based on what the taxing master considers reasonable and the factors to consider include; amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs.

[61 In the circumstances of this case, it is evident from the submissions by the 3rd respondent that the amount involved was Kshs. 8,602,000.00. The importance and difficulty of the litigation is not discernible from the judgment of the court, it is clear that the interest of the parties can be seen from the judgment of the court considering that this was resisted from its inception in the judicial hierarchy. I am also clear in my mind that when the appellant wrote to the court on 1st April, 2021 and 13th May, 2021, there was an indication that a clarification was needed from the court on the issue of costs before the Court of Appeal. The Supreme Court on 8th November, 2024 delivered a ruling in which the court reviewed the judgment dated 24th March, 2021 and the appellant was awarded the costs of the proceedings at the Court of Appeal in Civil Appeal No. 141 of 2015. This is a factor to bear in mind in taxation of instruction fees that the Appellant is entitled to other costs.

[7] Finally, I agree with the 1st respondent that, being a constitutional commission, it is the tax payers' funds that will be used to defray the costs herein. This too is a necessary factor to bear in mind while considering the amount to be paid as instruction fees.

[8] I believe that I have rendered myself sufficient on the factors to consider in arriving at instruction fees. Can the same then be taxed at Kshs. 15,000/= as proposed by the 1st respondent? In my view, this will be an inadequate assessment bearing in mind the industry the advocates for the appellant put into the matter resulting in a successful prosecution of the appeal.

[9] In this court, I have dealt with several cases in which the amount involved could not be discerned from the pleadings and having considered the other relevant factors, I awarded different sums for instruction fees on case by case basis. For instance, in Petition No. 26(E029) of 2022 Trattoria Limited Vs Joaninah Wanjiku Maina & 3 Others, I taxed instruction fees at Kshs. 500,000/= noting that the Petitioner had been awarded other costs. This position also obtains in this case.

[10] In conclusion, I am satisfied that the 1st and 3rd Respondents have made a good case for reduction of the instruction fees. I find Kshs. 500,000.00 as the reasonable amount to award in this case. Item 4 is taxed at I<shs. 500,000.00. Kshs. 500,000.00 is taxed off.

[10] On item 5, drawing the petition. The Third Schedule provides for Kshs. 2,000.00. I tax it at Kshs. 2,000.00.

On item 6, drawing appellant's digest of cases (2 folios). It is drawn to scale and I tax it at Kshs. 200.00.

Item 7 making 3 photocopies of each of the 202 pages of the authorities. I tax it as drawn at Kshs. 3,636.00.

Item 8 drawing appellant's submissions on the petition of appeal (45 folios). It is drawn to scale. I tax at Kshs. 4,500.00.

Item 9 making 3 copies thereof it is drawn to scale. I tax as drawn at Kshs. 2,700.00.

Item 10 attending before the Deputy Registrar, the Schedule provides for Kshs.300/= for the first 15 minutes and Kshs.100.oo for each subsequent 15 minutes. I tax it at Kshs.500/=. Kshs. 500.00 is taxed off.

Item 11 drawing further supplementary record of appeal (1 folio). I tax at Kshs. 100.00 as drawn per scale.

Item 12 making 3 copies each of the 13 pages Court of Appeal proceedings. I tax at Kshs. 234 /- as drawn per scale.

Item 13 attendance before the Deputy Registrar, I tax at Kshs. 500/=. 500/ = is taxed off.

Item 14 attendance before the Court for hearing (2hrs), I tax at Kshs.2,ooo/= as drawn per scale.

Item 15, Drawing bill of costs (4 folios) I tax at Kshs. 400/= as drawn as per scale.

Item 16 drawing the certificate as to the number of folios I tax at Kshs. 100.00 as drawn.

Item 17 attending court to file the bill of costs I tax at Kshs. 200/= as drawn.

Item 20 relating to disbursements I tax at Kshs. 3,100/= as drawn.

Item 21 security for costs is taxed off because it is refundable. I tax off Kshs. 6,000/ =.

[121 In conclusion, the Appellant's party-party bill of costs dated 21st March, 2025 is taxed as below:

Total Bill of Costs	Kshs. 1,029,370.00
Less taxed off	Kshs. 507,000.00
Bill of cost taxed at	Kshs. 522,370.00

I so certify.

DATED and DELIVERED by Email at NAIROBI this 30th Day of May, 2025.

HON.BERNARD KASAVULI
DEPUTY REGISTRAR, SUPREME COURT