Green Belt Movement v Honourable Attorney General & 9 others; Law Society of Kenya & 3 others (Interested Parties) (Environment and Land Petition E042 of 2024) [2025] KEELC 5945 (KLR) (14 August 2025) (Judgment)

Neutral citation: [2025] KEELC 5945 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E042 OF 2024

AA OMOLLO, J

AUGUST 14, 2025

IN THE MATTER OF ARTICLES 20(3), (4), 21, 22, 23, 42, 162(2) (B), 232 (1) (D), (E), (F) & 258 (2), (B), (C) & (D) OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF SECTION 2, 8, 21, 34, 40, 42, 44, 45, 47, 56(3), THE SECOND SCHEDULE AND THE THIRD SCHEDULE FOREST CONSERVATION AND MANAGEMENT ACT

AND

IN THE MATTER OF SECTION 2, 3(4), (5) 9, 44, 57A, 58 (8) (9) & SCHEDULE 2 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT

AND

IN THE MATTER OF SECTION 2, 3 (2), 15 (2), 15(5), 20 AND SCHEDULE ONE OF THE CLIMATE CHANGE ACT, NO. 9 OF 2023

AND

IN THE MATTER OF ALLEGED 10. 35, 42, 60(1), 69, 232 (1) (D), (E),

VIOLATION OF ARTICLES OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED 3, 5(2), (6), 21, 28 OF THE

CONTRAVENTION OF FORESTS (PARTICIPATION IN

REGULATIONS SUSTAINABLE FOREST MANE-

GEMENT) RULES 2009

AND

IN THE MATTER OF ALLEGED 17, 18, 21 AND 22 OF THE

CONTRAVENTION OF ENVIRONMENTAL IMPACT

REGULATIONS THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

THE GREEN BELT MOVEMENT ..... PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF ENVIROMENT CLIMATE CHANGE AND FORESTRY ..... 2ND RESPONDENT

KENYA FOREST SERVICE ..... 3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4TH RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 5TH RESPONDENT

ASSUP ENTERPRISES LIMITED ..... 6TH RESPONDENT

ATHI WATER WORKS DEVELOPMENT AGENCY ..... 7TH RESPONDENT

APEC CONSTRUCTION LIMITED ..... 8TH RESPONDENT

KENYA URBAN ROADS AUTHORITY ..... 9TH RESPONDENT

SINOHYDRO CORPORATION LIMITED ..... 10TH RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

NATURAL JUSTICE ..... INTERESTED PARTY

EAST AFRICA WILDLIFE SOCIETY ..... INTERESTED PARTY

FRIENDS OF KARURA FOREST COMMUNITY FOREST ASSOCIATION ..... INTERESTED PARTY

Section 58(9) of the Environmental Management and Co-ordination Act exposes Kenyans to the risk of environmental degradation but is not unconstitutional

The petition challenged the dualling of the Muthaiga–Kiambu–Ndumberi Road and the grant of special use licences (SULs) within Karura Forest for alleged non-compliance with environmental and constitutional requirements. The court held that the road project was lawfully licensed and adequately subjected to public participation. However, the SUL issued to the 6th respondent for a recreational facility contravened the Forest Conservation and Management Act and was revoked. The court further held that section 58(9) of the Environmental Management and Coordination Act exposed Kenyans to environmental risk but was not unconstitutional. The petition was partly allowed and each party ordered to bear its own costs.

Reported by Kakai Toili

Constitutional Law *– constitutionality of statutory provisions – constitutionality of section 58(9) of the Environmental Management and Co-ordination Act - whether section 58(9) of the Environmental Management and Co-ordination Act was unconstitutional for allowing a project to commence after three months even when a license had not been issued by the National Environment Management Authority – Constitution of Kenya, article 47; Environmental Management and Co-ordination Act (Cap. 387), section 58(9).*

Environmental Law *– forests - special use licences to undertake projects on a forest reserve - whether a special use licence could be granted for the operation of a recreational facility or an eco-friendly restaurant in a forest reserve - Forest Conservation and Management Act, Cap. 385, section 44.*

Constitutional Law *– national values and principles of governance – public participation - whether a variation in the size of land allocated for a road project could invalidate the process of public participation and warrant nullification of an Environmental Impact Assessment (EIA) licence issued to the project proponent.*

Environmental Law *– environmental impact assessments (EIA) - EIA licences – application for obtaining EIA licences - whether the procurement of financing and contracting for the Kiambu Road project prior to obtaining an EIA licence contravened section 58(1) of the Environmental Management and Coordination Act on the application for an EIA licence - Environmental Management and Co-ordination Act (Cap. 387), section 58(1).*

Brief facts

The petition challenged the award and implementation of contracts for the dualling of the Muthaiga–Kiambu–Ndumberi Road (Kiambu Road) and the establishment of facilities within Karura Forest. It was contended that the projects were commenced without obtaining mandatory environmental impact assessment (EIA) licences and without adequate public participation, thereby violating the right to a clean and healthy environment.

The petitioner argued that the 4th respondent, the National Environment Management Authority (NEMA), failed to discharge its statutory duties under the Environmental Management and Coordination Act by permitting the projects despite incomplete and outdated Environmental and Social Impact Assessment (ESIA) studies. It faulted the ESIA report for omitting critical details such as biodiversity impacts, land to be excised from Karura Forest, alternative project designs, climate change considerations, and mitigation measures. It was further alleged that the issuance of special use licences (SULs) to the 5th respondent, Kenya National Highways Authority, the 6th respondent, Assup Enterprises, and the 8th respondent, Athi Water Works Development Agency was unlawful and contrary to the Forest Conservation and Management Act, as the activities did not yield public benefit.

The petitioner further contended that section 58(9) of the Environmental Management and Coordination Act, which allowed projects to proceed if NEMA did not respond to an EIA application within three months, was unconstitutional for permitting environmentally harmful projects to continue without oversight. It maintained that the failure to meaningfully involve stakeholders invalidated the entire approval process. The petitioner thus sought for among other orders; an order of *certiorari* quashing the tender/agreement entered into between the Government and the 10th respondent and/or any other person or persons for the dualling of Kiambu Road without obtaining an EIA licence.

Issues

i. Whether section 58(9) of the Environmental Management and Co-ordination Act was unconstitutional for allowing a project to commence after three months even when a license had not been issued by NEMA.

ii. Whether a special use licence could be granted for the operation of a recreational facility or an eco-friendly restaurant in a forest reserve.

iii. Whether a variation in the size of land allocated for a road project could invalidate the process of public participation and warrant nullification of an Environmental Impact Assessment (EIA) licence issued to the project proponent.

iv. Whether the procurement of financing and contracting for the Kiambu Road project prior to obtaining an Environmental Impact Assessment (EIA) licence contravened section 58(1) of the Environmental Management and Coordination Act on the application for an EIA licence.

Relevant provisions of the Law

Constitution of Kenya

Article 10 - National values and principles of governance

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

Forest Conservation and Management Act, Cap. 385

Section 4 - Guiding Principles

The principles of this Act shall be—

(a) good governance in accordance with Article 10 of the Constitution;

(b) public participation and community involvement in the management of forests;

(c) consultation and co-operation between the national and county governments;

(d) the values and principles of public service in accordance with Article 232 of the Constitution;

(e) protection of indigenous knowledge and intellectual property rights of forests resources; and

(f) international best practices in management and conservation of forests.

Environmental Management and Co-ordination Act (Cap. 387)

Section 58 - Application for an Environmental Impact Assessment Licence

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

Held

1. The project was for public benefit and it was still at the preliminary stages. Consequently, the claim as against the 7th respondent was premature at that stage. Further, the project would benefit both the forest area and the public. The 7th respondent shall share information/engage with the petitioner at the appropriate time when they commence the feasibility study and or preparation of an EIA project report. Thus, the claim against the 7th respondent was premature and it was ordered struck out.
2. Under paragraph 19(a) of the SUL granted to the 6th respondent, the SUL was to be governed by the Laws of Kenya. The 3rd respondent, Kenya Forest Service, in its decision making of issuing the SUL was also under a duty under articles 10 and 47 of the Constitution to ensure there was stakeholder engagement as provided under section 4 of the Forest Conservation and Management Act.
3. The powers of the 3rd respondent to issue SUL or concession was not absolute. The law creating the 3rd respondent imposed an obligation on it for compliance with article 10 of the Constitution. The 3rd respondent referred to issuing the 6th respondent with an SUL license as a way of generating funds to conserve the Karura Forest. Therefore, the 4th interested party in light of their agreement with the 3rd respondent was one of the key stakeholders that should have been engaged with regards to the decision of the SUL that was likely to affect the Karura ecosystem (whether benefitting it or otherwise).

4. There were letters addressed to the 3rd respondent asking for details on what formed the basis of the issuance of the SUL and the proposed expansion of the Kiambu Road. The 3rd respondent did not reply to any of those letters hence their averment that they acted within the law was unsupported. They also appeared to be selective in implementing sections 56 of the Forest Conservation and Management Act without relating it to obligations sections.
5. The SUL use license issued to the 6th respondent did not conform with the purpose for which one should be granted (transportation, communication, energy, education and research). The 3rd respondent ought to have granted a concession under section 44 of the Forest Conservation and Management Act which allowed for where it was satisfied that utilization of a public forest could be done through the granting of a concession, it shall grant the concession subject to the provisions of the Constitution, the Act and any other relevant written law.
6. The allegations raised by the petitioner were merited for lack of consultation and want of following due process by the 3rd respondent while issuing the SUL. The 6th respondent had not produced evidence that they engaged the stakeholders during the process of making the application to the 3rd and 4th respondents. The documents produced only showed engagements with those two respondents particularly before submitting the EIA project report to the 4th respondent.
7. The court would not usurp the powers of the 4th respondent in reaching a determination on the application submitted to it by the 6th respondent. The petitioner could pick up that part of the process once the 4th respondent made a decision in accordance with the law. However, there was lack of evidence of public participation before the SUL was given to the 6th respondent. The 6th respondent did not show evidence of stakeholder engagement before submitting the EIA project report.
8. The Forest Conservation and Management Act specified reasons when an SUL could be granted and operation of a restaurant whether eco-friendly or not was not one of the reasons.
9. Whether or not the recreational facility was on the road reserve, the 6th respondent did not defend that it fell within the purposes of granting an SUL save for expressing their willingness to vacate whenever the land would be required for extension of the road. Therefore, the license as currently granted was obtained irregularly and unlawfully. Consequently, the same was to be revoked.
10. Parties were bound by their pleadings and a replying affidavit was considered as evidence given on oath. Since the assertion on the insufficiency of the public participation was alleged by the petitioner, the burden of proof lay squarely on their shoulders to prove. The gazette notice number 13771 of December 17, 2021 and the newspapers advertisements inviting comments from the public ran into pages itemizing the impacts of the project on *inter alia* on vegetation, solid waste, effluent from works and camps, blockage of wildlife and domestic animals' movement among others.
11. The 5th respondent having shared the details of the road design and having engaged in public participation, the different land size offered to it by the 3rd respondent could not invalidate the engagements previously undertaken. The inconsistency did not materially alter the process of public participation carried out which included the adverts and the description on the size of the dualling of the road. Hence, there was no basis to nullify the EIA licenses issued to the 5th respondent.
12. The submissions in paragraphs 21-24 of the 5th interested party's report did not consider the contents of the EIA study report presented by the 5th respondent. The 5th respondent relied on the gazette notice number 237 of 1951 which already had a design of the road drawing an inference that the design and road reserve was already in place as a foundation for the dualling and not the EIA Study report. The 4th respondent had powers bestowed on it by law to direct a project proponent to revise a study report after submission. Hence, the finality of a study report was dependent on the reviews of the 4th respondent.
13. The 5th respondent undertook adequate public participation with regard to its EIA licensing for the dualling of Muthaiga-Kiambu-Ndumberi Road. The petitioner and the 5th interested party seemed to confuse the decision-making process of the 3rd respondent (in generously excising part of the forest

land to the dualling of the road) done in contravention of section 4 of the Forest Conservation and Management Act. The inaction of the 3rd respondent to put to public participation on the size of land they were giving away to the 5th respondent could not be merged with the public participation process in obtaining the EIA license.

14. Condition 2.1 of the EIA license provided that the proponent shall obtain special use permit from the Kenya Forest Service prior to commencement of road construction works within Karura Forest. The 5th respondent stated that it would have to comply with the Land Act in so far as acquisition of the public land was provided for. The 3rd respondent's letter dated August 21, 2024 granting 51.64 acres to the 5th respondent as wayleave was incomplete.

15. Other than the SUL agreement executed between the 3rd and 6th respondents, no such evidence of SUL agreement was produced to have been executed by the 5th respondent. Consequently, it was premature to declare as null and void an SUL not yet issued to the 5th respondent. The 5th respondent had committed on oath to lawfully acquire the 0.1233ha of the forest to be utilized. An order of compliance was issued.

16. While challenging the inaction of the 4th respondent to act on the application for an EIA license within the three months stipulated in the Act, section 58(9) of the Environmental Management and Coordination Act created a dilemma for projects that may be harmful to the environment where NEMA failed to approve or decline the application. That was because after the lapse of the three months, the law allowed a project proponent to commence the project works. Three months after December 17, 2021, the 5th respondent would have commenced the road construction.

17. Although the 4th respondent owed Kenyans a duty to respond to all applications timely, it was not a legislative organ hence it could not bear the liability. However, as a policy implementation agency, it ought to make recommendations to Parliament for amendment of the laws where necessary. Under article 47 of the Constitution, the 4th respondent as a decision-making organ was mandated to respond to all applications within the three months to safeguard the public and environmental interests.

18. Where the decision was not made within reasonable time as in the instant case (EIA license being issued after more than three months), the petitioner was entitled to complain for violation of their article 47 of the Constitution right thus every person had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. To cure the *lacuna*, there was need to effect an amendment to section 58(9) of the Environmental Management and Coordination Act and code it in a way that avoid creating room for commencement of projects before receipt of an EIA license from the 4th respondent. The subsection was not unconstitutional to the extent that it did not exclude a project proponent from complying with all the constitutional and statutory requirements.

19. The EIA study was procedurally under-taken by the 5th respondent, the orders in prayer (a) and (b) were without merit as they were seeking to cancel the tender/agreement entered into between the Government of Kenya and the 10th respondent and/or any other person or persons for the dualing of Kiambu Road without obtaining an EIA license.

20. Section 58(1) of the Environmental Management and Coordination Act stated that the financing should not be sought before submitting the EIA study report to the 4th respondent. It was not speaking to the issuance of an EIA license which in the instant case was issued on November 26, 2024.

21. The information to the public about the project was published via advertisement carried out in the daily newspaper, a radio and Kenya Gazette. Once the public was put on notice, the burden/duty shifted on them to request for information they wanted to be provided with. Other than the 4th interested party there was no evidence of the petitioner making an enquiry that was not attended to by the 1st, 2nd, 4th, 5th – 10th respondents. In any event before moving to court for violation of article 35 right, section 14 of the Access to Information Act provided an alternative dispute resolution mechanism.

22. The petitioner alongside the 4th interested party wrote to the Commission on Administrative Justice and the 3rd respondent. That was before filing the petition and the Commission wrote to the 3rd respondent referring to the petitioner's letters of September 25, 2024 and October 9, 2024. The letters were responded by the 3rd respondent on October 11, 2024 and the requested documents provided. Thus, the breach alleged was already cured by the 3rd respondent before the suit commenced hence it would serve no purpose to issue any declaration as sought under paragraph (g) of the reliefs sought.

Petition partly allowed.

Orders

i. *A declaration was made that section 58(9) of the Environmental Management and Co-ordination Act exposed Kenyans to the risk of environmental degradation for allowing that a project may commence after three months even when a license had not been issued by the 4th respondent but it was not declared as unconstitutional since it did not take away any rights of the citizens as conferred in the Constitution.*

ii. *An order was issued directing that the 5th respondent shall only utilize beside its wayleave, the 0.1233 Ha. of the Karura forest land (to be acquired as per the Land Act) and not the 51.64 acres granted to it by the 3rd respondent vide an SUL dated August 21, 2024*

iii. *A declaration was given that the granting of an SUL to the 6th respondent for the establishment of a recreational facility at Karura Forest Reserve failed the test of an SUL and the agreement entered offended articles 42 and 69 of the Constitution.*

iv. *An order of mandamus was issued compelling the 3rd respondent to immediately cancel the SUL granted to the 6th respondent as the same fell beyond the scope of an SUL as provided for under the law.*

v. *Each party to bear their respective costs of the petition.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
2. *Baadi, Mohamed Ali v Attorney General & 11 others* [2018] KEHC 5397 (KLR) - (Mentioned)
3. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Mentioned)
4. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR)
5. *Communications Commission of Kenya v Royal Media Services Limited & 9 others* Civil Application 9 of 2014; [2014] KESC 51 (KLR) - (Mentioned)
6. *Council of County Governors v Attorney General* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Mentioned)
7. *Export Processing Zone Authority & 10 others v National Environment Management Authority & 3 others* Petition E021 of 2023; [2024] KESC 75 (KLR) - (Mentioned)
8. *Friends of Lake Turkana Trust v Attorney General & 2 others* ? 825 of 2012; [2014] KEELC 511 (KLR) - (Mentioned)
9. *M'Rinjiru v National Land Commission & 3 others* Petition E005 of 2024; [2024] KEELC 13775 (KLR) - (Mentioned)
10. *Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Mentioned)
11. *Mui Coal Basin Local Community & 15 Others v Permanent Secretary, Ministry of Energy & 17 Others* Constitutional Petition 305 of 2012; [2015] KEHC 473 (KLR) - (Mentioned)
12. *Musimba, Patrick v National Land Commission & 4 others* Petition 613 of 2014; [2016] KEHC 5956 (KLR) - (Mentioned)

13. *Republic v University of Nairobi ex parte Jackan Mwanyika Mwasi* Judicial Review 65 of 2018; [2018] KEHC 958 (KLR) - (Mentioned)
14. *Save Lamu & 5 others v National Environmental Management Authority (Nema) & another* Appeal 3 of 2019; [2019] KEELC 4739 (KLR)
15. *Trusted Society of Human Rights Alliance v James Kinuthia & another* [2019] KEELC 2444 (KLR) - (Mentioned)
16. *Ware Transport Limited v NEMA* [2024] KENET 338 (KLR) - (Mentioned)

Statutes

Kenya

1. Access to Information Act (cap 7M) sections 4, 14 - (Interpreted)
2. Climate Change Act (cap 387A) In general - (Cited)
3. Constitution of Kenya articles 10(2)(a); 20; 35; 42; 47; 60; 69(1) - (Interpreted)
4. Environmental (Impact Assessment and Audit) Regulations (cap 387 Sub Leg) regulations 7, 42 - (Interpreted)
5. Environmental Management and Co-Ordination Act (cap 387) sections 3, 58(1); 58(8); 58(9); 60; 63 - (Interpreted)
6. Forest Conservation and Management Act (cap 385) sections 8(c); 44; 56 - (Interpreted)
7. Forests (Participation in Sustainable Forest Management) Rules (cap 385 Sub Leg) rule 5(2); 21(2) - (Interpreted)
8. Land Act (cap 280) part 8 - (Interpreted)
9. Water Act (cap 372) In general - (Cited)

Advocates

Mr Waweru for the petitioner.

JUDGMENT

1. The petitioner filed this suit against the 1st -10th defendants *vide* petition dated December 10, 2024 amended on December 11, 2024 seeking for the following orders;

    a. A declaration that the award of the tender to the 10th respondent for the construction of Kiambu Dual Carriage way without obtaining the environment impact assessment licence offends the right to clean and healthy environment under article 42 and is therefore unconstitutional.

    b. An order of certiorari to remove into this court for the purpose of being quashed all that tender/agreement entered into between the Government of Kenya and the 10th respondent and/or any other person or persons for the dualling of Kiambu Road without obtaining an Environmental Impact Assessment licence.

    c. A declaration that the failure by the 4th respondent to issue a license or deny allowing the application for a license since 2020 exposes Kenyans to the risk of commencement of the construction without complete oversight from the lead agencies mandated with conserving and protecting the environment.

    d. A declaration that section 58(8) and (9) of the *Environmental Management and Co-ordination Act* expose Kenyans to the risk of environmental degradation for allowing that a project may commence after three months even when a license has not been issued by the 4th respondent and is therefore unconstitutional.

e. A declaration that the Environmental Impact Assessment study done and submitted to the 4th respondent is inadequate as the same lacks among others alternative project proposals and does not include a climate impact assessment study accompanied with sufficient mitigation measures.

f. A declaration that the public participation done during the environmental impact assessment was neither qualitative nor quantitative as the same lacked input from Kenya Forest Service, the Friends of Karura Forest Community Forest Association and did not include provision on how much Karura Forest land would be utilized in dualling Kiambu Road.

g. A declaration that petitioner's rights, individually or in association with others, to access to information held by the government and information held by other persons and required for the exercise or protection of any right or fundamental freedom guaranteed by article 35 of the *Constitution* have been contravened.

h. A declaration that the process of Strategic Environmental Assessment (SEA) was required legal step prior to embarking on the Environmental and Social Impact Assessment (ESIA) process or implementation of any of the individual components of the Kiambu Dual Carriage way Project pursuant to regulation 42 of the *Environmental (Impact Assessment and Audit) Regulations, 2003*.

i. An order of mandamus compelling the 8th respondent to at their own cost re-undertake the Environmental Impact Assessment Study attending to all the requisite components prior to any license being granted for the development of the Kiambu Dual Carriage Way by the respondents.

j. A declaration that the granting of special-use license to the 6th respondent for the establishment of a recreational facility at Karura Forest Reserve fails the test of a special-use license and the agreement entered offends article 42 and article 69 of the *Constitution*.

k. A declaration that the granting of a special-use license by the 3rd respondent to the 6th and 7th respondent for the construction of a recreational facility and an ablution block respectively without an environmental assessment being undertaken is unconstitutional.

l. An order of mandamus be and is hereby issued compelling the 3rd respondent to cancel the special-use license granted to the 7th respondent pending the environmental impact assessment being done and the application be submitted afresh.

m. An order of *mandamus* be and is hereby issued compelling the 3rd respondent to immediately cancel the special-use license granted to the 6th respondent as the same falls beyond the scope of a special-use license as provided for under the law.

n. The costs of the petition

2. The petition is premised on the supporting and further affidavits of Nyaguthii Chege sworn on December 11, 2024 and April 24, 2025 respectively. The petitioner outlined the background of the claim stating that it challenges the proposed dualling of Kiambu Road, which involves utilizing 51.64 acres of Karura Forest, a protected State forest gazetted in 1932 and designated a Central Forest in 1964.

3. That the Government of Kenya secured a Kshs. 38 billion loan from China for the project, to be executed by the 10th respondent. Although an Environmental and Social Impact Assessment (ESIA) was conducted, there are concerns about environmental degradation and inconsistencies in the basis for forest land use. That, while the 3rd Respondent approved a Special Use Licence for the 5th

respondent in March 2024, it also cited a 1951 wayleave, yet failed to provide documentation proving the 51.64-acre allocation was included.

4. The petitioner disputes the validity and environmental justification of using forest land, despite ESIA findings that the road project has both positive impacts like employment and better infrastructure and negative ones such as pollution, resource strain, and harm to nearby rivers.

5. The petitioner also challenges the legality of the Special Use Licence granted to ASSUP Enterprises (the 6th respondent) by the Kenya Forest Service (the 3rd respondent) on November 30, 2023 which license permitted the development of a recreational facility including a restaurant on 0.8451 hectares of Karura Forest land.

6. The petitioner alleges lack of transparency, absence of public participation, and failure to conduct or obtain an Environmental Impact Assessment (EIA) as required by law. It stated that the 4th respondent confirmed it had no knowledge of the said licence while also disowning the recreational and ablution projects.

7. The petitioner raises environmental concerns, including habitat disturbance, potential displacement of wildlife, and pollution from increased human activity. Additionally, that the proposed construction of a public ablution block by the 7th respondent is also contested for lacking a valid licence or environmental assessment, which omission the petitioner argues violates environmental protection laws and due process.

8. The petitioner argues that these actions contravene constitutional provisions, among them articles 10, 20, 42, 60, and 69 of the *Constitution* of Kenya, which emphasize sustainable development, public participation, access to information, and environmental protection. Further, It is their claim that the public was not meaningfully engaged, essential information regarding land usage and environmental impact was withheld, and the developments compromise rights to a clean and healthy environment.

9. The petition also raises the non-compliance with the provisions of *Environmental Management and Co-ordination Act* (EMCA). It highlights that there was insufficient public consultation as required under sections 3 and 59, failure to conduct a Strategic Environmental Assessment despite the project's magnitude, and inadequate Environmental and Social Impact Assessment (ESIA) reporting.

10. They aver that the ESIA report omitted critical details on biodiversity loss, alternatives to the project, and stakeholder input from entities like the Kenya Forest Service and the Community Forest Association.

11. Further, the petitioner states that the proposed developments breach the *Forest Conservation and Management Act*; challenges the legality of the licenses and authorizations issued. While arguing that the recreational facility should be classified as a concession requiring additional regulatory scrutiny, not a special use license. It contends that there is absence of site-specific forest management plans, as required by law and that the activities are inconsistent with the Karura Forest Management Plan for lacking proper mitigation measures.

12. The petitioner states that climate risk and vulnerability assessments were also not integrated into the ESIA as mandated under *Climate Change Act* and also stresses the contradiction between the government's afforestation goals and the destruction of forest areas in Karura.

13. In the supporting affidavit, it is deposed that the proposed dualing of Kiambu Road and the construction of a recreational facility and ablution block within the forest violate articles 42 and 69 of the *Constitution*, which guarantees the right to a clean and healthy environment and obligate the state to protect natural resources.

14. That despite repeated requests for information under article 35, government agencies such as the 3rd respondent and the 4th respondent failed to provide documentation on approvals, public participation, and Environmental Impact Assessments (EIA) study relating to the project. This necessitated the intervention by the Commission on Administrative Justice after which partial responses from various government agencies revealed troubling inconsistencies.

15. The deponent averred that the 3rdrespondent cited a year 1951 wayleave to justify the road project, yet still proceeded to issue the Special User License. Hence it raises questions about the legitimacy of both authorizations.

16. Further, they emphasized that grave and irreversible environmental risks, including deforestation, habitat destruction, and carbon emissions will occur which threats are exacerbated by the absence of proper planning in the Karura Forest Management Plan, which does not reflect the proposed developments. The petitioner argues that the economic gains from the project must not override the constitutional and ecological imperative to protect one of Nairobi's last remaining natural forests for the benefit of current and future generations.

The 4th and 5th Interested Parties' Replying Affidavits:

17. In support of the petition, the 4th interested party filed replying affidavit sworn on April 25, 2025 by Professor Karanja Njoroge and the 5th interested party filed a replying affidavit sworn on January 31, 2025 by Emily Kinama.

18. The 4th interested party acknowledged the public interest of the road in subject expansion but opposed the proposed excision of 5.4 acres of Karura Forest for the dualling of Kiambu Road. It argues that the existing 60-metre corridor is sufficient for the upgrade and that as a legally recognized co-manager of Karura Forest under a Joint Forest Management Agreement with KFS , it was not consulted on the decision to allocate forest land by way of the SULs.

19. That this lack of engagement violates statutory obligations under the *Forest Conservation and Management Act* (FCMA), rule 5(2) of the *Forests (Participation in Sustainable Forest Management) Rules,2009* and article 69 of the *Constitution*, which mandate public and community participation in forest management.

20. Further, the 4th interested party asserts that using a Special Use Licence (SUL) to permanently alienate forest land for a highway interchange is legally flawed as FCMA requires any excision of forest land to follow a transparent process involving parliamentary approval. That the attempt to bypass this constitutional and legislative process through the issuance of a SUL amounts to an unlawful circumvention of safeguards designed to protect public forests.

21. The 4th interested party emphasizes that the affected land is ecologically sensitive and has undergone extensive restoration. In addition to the road project, the 4th interested party raises concerns about development of a recreational facility by ASSUP Enterprises and a sanitation block by Athi Water Works Development Agency.

22. It states that neither project was subjected to Environmental Impact Assessments (EIAs), nor was it consulted, despite its legal co-management role. The 4th interested party highlights that NEMA confirmed no EIAs were submitted or approved for either project, contradicting KFS 's assertions and exposing serious breaches of environmental law and governance.

23. Similarly, the 5th interested party raised serious legal and environmental concerns regarding the proposed dualling of Kiambu Road, the issuance of a Special Use License (SUL) for a recreational facility, and the construction of an ablution block within Karura Forest.

24. They argue that the Environmental Impact Assessment (EIA) study dated April 2020 is outdated and does not meet the legal requirement under the *EMCA*, which mandates the 4th respondent to issue a decision within three months. That since over four years have passed without such a decision, a fresh EIA study was legally required to be repeated.

25. The 5th interested party also points out that the EIA study report fails to specify the 51.64 acres to be affected, making it incomplete and inconsistent with sustainable forest management. Regarding the recreational facility, the 5th interested party asserts that the SUL issued on November 30, 2023 is invalid because it was granted without a prior EIA study thus violating rule 21(2) of the *Forests Rules*.

26. That although the license required submission of architectural and EIA documents within six months, no evidence has been provided that these were submitted which omission gave the 3rd respondent grounds to cancel the license, yet no such cancellation has occurred.

27. The 5th interested party further asserted that the upfront payment of land rent and conservation fees implies that approval was presumed before assessing environmental risks, contradicting constitutional and statutory environmental protection duties.

28. On the ablution block, the 5th interested party supports the petitioners' argument that no EIA was conducted, despite its location in a sensitive forest ecosystem which project must undergo a proper EIA process to evaluate its impact.

29. The 5th interested party assert that the lack of environmental due diligence, coupled with the risk of imminent project commencement, poses a grave threat to the Karura Forest ecosystem, thus, it is in the public interest that the petition be granted in full to uphold environmental rights under articles 42 and 69 of the *Constitution*.

The 3rd, 5th, 6th and 7th Respondents' Replying Affidavits:

30. In opposition to the petition, various replying affidavits: for the 3rd respondent sworn on January 22, 2025 by Alex I Lemarkoko, its Chief Conservator; for the 5th respondent sworn by Dr Anthony Kusimba on February 19, 2025, for the 6th respondent sworn by Kevin Nzioka on March 23, 2025 and for the 7th respondent sworn by Eng. Joseph Kamau on March 20, 2025.

31. The 3rd respondent confirmed that Karura Forest was gazetted as a forest reserve in 1932, with a 1951 wayleave permitting a road through the forest. It asserts that only 5.4 acres of land outside the original wayleave will be affected by the road project. That this portion will be subject to a Special Use License (SUL) issued to the Kenya National Highways Authority (KeNHA), subject to full compliance with environmental laws and procedures, including compensation and sustainability measures.

32. The 3rd respondent defends its decision to grant a SUL to the 6th respondent for a 2.076-acre of land to build a recreational facility, arguing that it was lawfully issued under the *Forest Conservation and Management Act*, 2016. That the facility lies on the Kiambu Road wayleave and can make way for road construction if needed. It further argued that the license includes strict environmental safeguards and revenue collected is reinvested into forest conservation efforts.

33. With regard to the ablution block, the 3rd respondent states that it has approved a 0.055-hectare of land to the project proposed by Athi Water Works Development Agency (AWWDA) to serve the

adjacent Mji wa Huruma informal settlement. They aver the aim is to improve sanitation and reducing pollution into the forest and Ruaka River which project has not commenced and is still in the planning stage.

34. The 5th respondent explained that it was tasked by the Government with the effort to develop and maintain an integrated and coordinated transport infrastructure for efficient movement of passengers and freight and support disaster management efforts.

35. That it has embarked on the process of construction of Muthaiga -Kiambu-Ndumberi Rd(B32) into a dual carriage(B52/C558) starting at Pangani, through Muthaiga interchanges along Thika road, and through Kiambu town ending at Ndumberi covering a distance of 25 kilometres.

36. It stated that this road is expected to eradicate traffic jams on the road, reduce numerous road accidents and improve road infrastructure which will improve connectivity and broaden economic growth. The 5th respondent stated that the engineering design for the proposed road expansion was done through a Consultant Ms.APEC Consortium Ltd in a joint Venture with Span Engineers from October 22, 2028-April 21, 2020.

37. That the road section touching on Karura forest has an existing road reserves width of approximately 60 Meters and covering a distance of approximately 2.7 Kilometres. It avers that the wayleave was created through gazette notice no.237 of 1951 thus the allegations that 51 Hectares of Karura forest would be hived off to pave way for the dualing of Kiambu road is not correct.

38. It is deposed that the initial road design done by the Consultant for the area of Karura Forest section along the existing road provided for the excision of approximately 5.1 Ha. However, after revision of the design, the size of land was reduced to 0.1233 Ha subject to the relevant approvals and in line with the provision of Part VIII of the *Land Act*,2012.

39. The 5th respondent stated that they have followed due process in recommending the development of Muthaiga-Kiambu-Ndumberi Road into a dual carriage and have submitted a detailed ESIA study report which specifies the nature, purpose and potential environmental impacts to NEMA as required under regulation 7 of the *Environmental (Impact Assessment and Audit) Regulations, 2003*.

40. It averred further that it conducted public participation when undertaking the Environmental Impact Study inviting members of the public to submit comments on the dualling of the impugned road vide publications in the Kenya Gazette No.13771 of December 17, 2021.

41. Further on September 29, 2021, it placed an advertisement in a nationwide circulating newspaper, (the Standard and Daily Nation Newspaper) inviting the members of the public to give their views and comments on the proposed road expansion.

42. The 5th respondent state that after reviewing the EISR, NEMA issued a conditional license for the implementation of the project requiring the proponent to integrate climate smart technologies, climate change mitigation and adaption measures in the construction to climate proof the project and enhance its resilience to climate risks and vulnerabilities as stipulated in the *Climate Change Act*.

43. That in addition, the license issued required of the proponent to collaborate with EIA Experts to ensure that the proposed mitigation measures are adhered to during construction phase and where necessary, appropriate mending up activities undertaken and a report of the same submitted to NEMA. The proponent was also required to obtain special use permit from Kenya Forest Service prior to commencement of the road construction works within Karura Forest area.

44. The 5th respondent contend that the benefits of having a better road and infrastructure outweigh the risks alleged. That the petitioner will not suffer prejudice if the project proceeds and the court should apply the rational basis test herein and that the conservatory orders and stoppage of the road will cause more harm than good.

45. The 6th respondent stated that it was lawfully granted a Special Use License by KFS on November 30, 2023 to develop, operate, and manage a recreation facility on 2.076 acres of Karura Forest land. That the license was issued in full compliance with the *Forest Conservation and Management Act* (FCMA), 2016, specifically sections 56 and 8(c) and it allows the facility to operate until road construction (Kiambu Road dualling) requires vacating, a condition it has agreed to.

46. The respondent contend that the required fees were paid to KFS as shown in the annexed receipts and that the facility is designed to promote sustainable, lawful public access to Karura Forest and complies with the conservation goals.

47. The 6th respondent argued that Architectural and structural plans were submitted to align with environmental requirements and denies any unlawful encroachment or environmental harm and states that such claims are misleading and untrue. It asserted that the project is within the Kiambu Road dualling wayleave, and it is prepared to vacate if necessary and that the license includes strict environmental safeguards, including reporting and mitigation obligations.

48. The 7th respondent stated that its mandated to develop and manage water and sewerage infrastructure in Nairobi, Kiambu, and Murang'a Counties, under the *Water Act* 2016 and Legal Notice No 28 of 2019. As part of the Nairobi Informal Settlements Water and Sanitation Improvement Project (under NWSP), it plans to construct an ablution block at Mji wa Huruma informal settlement situtated near Karura Forest to reduce pollution in the Ruaka River and Karura Forest caused by poor sanitation.

49. The 7th respondent stated that the proposed facility includes 8 toilets, 4 bathrooms, 2 laundry areas, 1 water kiosk, 3 utility rooms, and a septic tank. That it sought and received approval from KFS for the use of 0.055 acres within Karura Forest for this purpose and that KFS Board approved the request and it has been invited to apply for a Special Use Licence.

50. The 7th respondent denies that any construction has begun and asserts that no tender has been awarded yet. Thus the claims of legal violations including of the *Constitution*, *EMCA*, *Climate Change Act*, and *Forest Conservation Act* are premature.

51. It also affirms that public participation has occurred and will continue and that it is not involved in alleged road dualling or recreational facility development within Karura Forest.

52. In response, to the replying affidavits by the respondents, the petitioners filed a further replying affidavit sworn by Nyaguthii Chege on April 24, 2025 contesting the respondents' failure to adequately address key legal and environmental concerns surrounding the proposed expansion of Kiambu Road, particularly the irregularities in public participation, licensing, and the EIA process.

53. The Petitioner highlights serious discrepancies in the reported amount of Karura Forest land to be affected, ranging from 0.3 to over 50 acres, which were not disclosed during public participation. The Petitioner asserts that the public could not have made informed contributions due to lack of clear, consistent information, in violation of the Environmental Management and Coordination Act (EMCA).

54. The deponent further points out that the Government of Kenya unlawfully procured financing for the project before obtaining the necessary environmental licenses from NEMA, contrary to section 58(1)

and (2) of *EMCA*. It argues that the EIA license issued during litigation was invalid due to a four-year delay beyond the 90-day statutory limit, with no justification provided.

55. That also, no licenses were issued for ancillary developments such as a restaurant and ablution block, rendering those components illegal. The petitioner underscores that these procedural violations cannot be excused by invoking public interest, and that any government action must strictly comply with the *Constitution* and environmental law.

56. It also raises concerns over the quality and credibility of the EIA process, noting contradictions in the identity of the EIA lead and the lack of assessment of long-term impacts such as increased car usage and pollution.

57. The petitioner also cited studies that show expanded roads often worsen congestion, challenging the argument that the project would ease traffic or reduce emissions.

Submissions:

58. Directions were taken that the prosecution of the petition be by way of written submissions. In support of the Petition, the Petitioner filed submissions dated April 24, 2025 while the 1st and 5th interested party filed submissions dated April 28, 2025 and March 25, 2025 respectively. The petitioner stated that there was no adequate public participation or access to information prior to the commencement of the impugned projects in Karura Forest.

59. That Public participation is a constitutional imperative under article 10(2)(a) of the *Constitution* and a foundational element of environmental democracy. Counsel for petitioner stated that such non-disclosure is a denial of the right to information and that the petitioner who's representing Kenyans was treated to cosmetic exercise in public participation.

60. He added that what has been exhibited as public participatron are 6 meetings and none of these meetings speak about the marginalized along that span e.g Huruma & Githoro. In support if their argument on what constitutes PP , they cited the case of *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others* [2019] KESC 15 (KLR) which held that public participation must be real, purposive, and inclusive not a cosmetic or perfunctory formality.

61. That in the case at hand, the ESIA Study Report failed to clearly identify the specific portions of forest land to be excised and lacked evidence of meaningful stakeholder engagement.

62. It submitted that key affected communities which are marginalized including residents of informal settlements like Githogoro and Huruma, were not consulted, and the 4th interested party, a legally mandated co-manager of Karura Forest was completely excluded.

63. The petitioner submitted that these omissions render the entire process defective and in violation of the principle laid out in *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR, which emphasized that public participation must involve an exchange of ideas and genuine incorporation of public input.

64. The petitioner also submitted that, access to information, which complements and enables effective public participation, was unjustifiably restricted. That article 35 of the *Constitution* and section 4 of the *Access to Information Act* place a positive obligation on public bodies/ state agencies to disclose relevant environmental information support at cited the case of *Mohamed Ali Baadi v Attorney General & 11 others* [2018] eKLR, where the court underscored the importance of the tripartite access rights, access to information, participation in decision making, and access to justice as essential to environmental governance.

65. That the State's failure to provide clear, timely, and complete project disclosures, as required under section 58 of the *Environmental Management and Co-ordination Act* (EMCA), invalidates any claim of meaningful engagement. In support it cited the case of *Doctors for Life International v Speaker of the National Assembly* (CCT 12/05), which held that the intensity of public participation must match the potential impact of a project on affected populations.

66. On the issuance of Special Use Licences (SULs) to the 6th Rep & 7th Rep, the petitioner submitted that it was unlawful and unconstitutional. That section 2 of the *Forest Conservation and Management Act* (FCMA) restricts SULs to activities yielding public benefit in transportation, communication, energy, research, or education.

67. The petitioner stated that the establishment of a recreational facility with a restaurant and associated services by the 6th and 7th respondents, falls outside this scope, thus is *ultra vires* exercise of 3rd Rep KFS 's powers. further, that regulation 21(2) of the *Forests (Participation in Sustainable Forest Management) Rules, 2009* Prudes that , SULs must only be granted after completion of any required Environmental Impact Assessment (EIA) and upon a determination that the proposed activity serves the public interest.

68. The petitioners contend that neither an EIA report was completed nor any site-specific forest management plan was submitted, as required under regulation 5(2) and (6) hence invalidating the issuance of the licences.

69. In support, it cited the case of *Trusted Society of Human Rights Alliance v James Kinuthia & another* [2013] eKLR, which held that where legal procedures meant to protect the environment are not followed, an assumption arises that the project violates the right to a clean and healthy environment.

70. It submitted that the grant of SULs in this case also contravenes section 56(3) of the *FCMA*, which prohibits authorizations in respect of forest land with existing wayleaves, such as the one purportedly gazetted in 1951.

71. The petitioner also submitted that the Government's procurement of financing and contracting for the development of Kiambu Road prior to obtaining an EIA licence was unlawful and in contravention of section 58(1) of *EMCA* which provision is unequivocal in mandating that no financing, commencement, or execution of a project listed in the Second Schedule may occur without the prior submission and approval of a project report.

72. The petitioner submitted that it has demonstrated that the licence purportedly issued in November 2024 was acquired after key financial and contractual commitments had already been made, thus rendering the earlier actions a nullity *ab initio*.

73. In support, it cited the case of *Export Processing Zone Authority & 10 others v National Environment Management Authority & 3 Others* [2024] KESC 75 (KLR), where the Supreme Court rejected arguments that projects could proceed without a licence based on administrative silence, reinforcing the mandatory nature of pre-licensing safeguards under section 58. Further, the petitioners challenge the constitutionality of section 58(9) of *EMCA*, which permits a project to proceed if the Director General does not respond within three months of application.

74. It argues that this provision directly undermines section 58(1), which imposes a non-derogable obligation to obtain an EIA licence before any undertaking can commence and in support cited the court in *Mohamed Ali Baadi & others v Attorney General & 11 others* [2018] KEHC 5397 which underscored the centrality of access to information and due process in environmental decision making.

75. That allowing projects to bypass licensing through bureaucratic silence subverts constitutional rights under articles 42 and 69, which guarantee a clean and healthy environment and impose obligations on the State to ensure sustainable development.

76. The petitioners submitted that the ESIA study submitted for the project is materially deficient and fails to meet the threshold set under regulation 18 of the EIA and Audit Regulations. That it omits critical components such as proper analysis of alternatives, adequate environmental and social impacts, and a comprehensive environmental management plan.

77. Despite the project's significant environmental and socio-economic impacts, further renders the report incomplete and in support cited the case of Mohamed Ali Baadi emphasizing that a SEA is a mandatory precursor for large-scale infrastructure projects with broad policy implications.

78. In highlighting the petitioner's submissions, Mr Waweru Advocate for petitioner stated that Environment law is administrative law in action, that the substance and procedure of law go hand in hand in environmental cases. He highlighted the inconsistencies in the 3rd respondent's Replying affidavit which refers to 5.4 acres as the size to be excised, while the 4th Respondent refers to 49.6 acreas and the 5th respondent refers to 0.304 acres yet still annex C (1), it refers to wayleave 51.64 acres.

79. The 1st interested party stated that there was contradictory information from Goverment agencies about the size of forest land to be excised, lack of public disclosure about the impact on Karura Forest, and insufficient notice to affected communities. It submitted that courts have consistently emphasized that public participation must be both qualitative and quantitative, involving meaningful engagement, proper disclosures, and public sensitization, standards which were not met.

80. The 1st interested party submitted that the SULs were unlawfully issued for non-forestry activities inconsistent with the principles of sustainable forest management outlined in the *Forest Conservation and Management Act* noting that construction of roads through protected forests such as Karura is incompatible with the conservation purposes mandated by law.

81. It relied on the case of *M'Rinjiru v National Land Commission* to support the argent that such licenses, if issued without coordination under the *Climate Change Act* and other environmental safeguards, are invalid.

82. The 1st interested party also criticized the failure to update biodiversity inventories and align environmental approvals with Kenya's climate commitments under the Paris Agreement, questioning the legality and ecological prudence of the projects.

83. The 5th interested party submitted that the issuance of the EIA licence based on the April 2020 EIA report violated legal and constitutional requirements due to inadequate public participation and failure to disclose the specific extent of Karura Forest land to be acquired.

84. That the EIA report lacked critical information, including the actual land size from the forest and mitigation measures, thereby rendering it incomplete under section 63 of *EMCA* and regulations 16 and 18(1) of the *EIA Regulation*s. In support it cited the case of *Mohamed Ali Baadi & Others v Attorney General & 11 others* [2018] KEHC 5397 (KLR) and *Mui Coal Basin Local Community & 15 others v Permanent Secretary, Ministry of Energy & 17 others* [2015] eKLR holding that effective public participation must be based on full and accurate disclosure.

85. It argued that the shifting and contradictory statements on land size from an indeterminate figure to 51.64 acres, then 5.4 acres, and later 0.3 acres demonstrate lack of transparency and undermine the legitimacy of the EIA process. Further, the licence was issued more than four years after the EIA report

contradicting section 58(8) and (9) of *EMCA*, violating the right to a clean and healthy environment under article 42 and the State's duty under article 69(1) of the *Constitution*.

86. The 5th interested party also submitted that section 58(9) of *EMCA*, which allows automatic approval where no decision is made within three months, is inconsistent with articles 42 and 69(1) and thus unconstitutional. Relying on the case of *Council of County Governors v Attorney General* [2017] eKLR, which emphasized the supremacy of the *Constitution* over legislation, the 5th Interested Party argued that the said section permits potentially harmful projects to proceed without oversight.

87. The 5th interested party submitted that the 3rd respondent violated section 56 of the *Forest Conservation and Management Act* (FCMA), rule 7 and 21 of the Forests Rules, section 58(1) of the *Environmental Management and Co-ordination Act* (EMCA), and articles 42 and 69(1) of the *Constitution* by issuing Special Use Licences (SULs) for the dualling of Kiambu Road and for the construction of a recreational facility and ablution block in Karura Forest without first requiring Environmental Impact Assessment (EIA) studies and licences.

88. That the SULs are irregular and unlawful because they were issued to public entities, 5th and 7th respondents, while the law expressly limits such licences to private sector actors for temporary and sustainable use.

89. Citing *Save Lamu & 5 others v National Environmental Management Authority & another* [2019] eKLR where the court underscored that issuance of development consent without an EIA violated the constitutional right to a clean and healthy environment and *Friends of Lake Turkana Trust v Attorney General & Others* [2014] eKLR where the court held that environmental decisions must adhere to public participation and EIA procedures, the interested party stated that the projects entail unlawful permanent alteration of forest land, contrary to constitutional environmental obligations.

90. It argued that the 3rd respondent's failure to cancel the SULs for non-compliance and its acceptance of fees despite absent EIAs demonstrates a prioritization of financial interests over conservation imperatives, thus undermining both statutory and constitutional safeguards.

91. In support of the respondents' case in opposition of the petition, the 1st,2nd, 3rd,7th and 9th respondents filed submissions dated April 22, 2025 and the 5th respondent filed submissions dated April 29, 2025.

92. The Respondents submitted that an order of *certiorari* should not issue to quash the agreement for the dualling of the Muthaiga-Kiambu-Ndumberi Road, as the project has strictly complied with all statutory, environmental, and procedural requirements. In support, they cited the case of *Republic v University of Nairobi ex parte Jackan Mwanyika Mwasi* (2018) eKLR, where the Respondent emphasized that *certiorari* is a discretionary remedy that requires a balancing of interests.

93. They stated that the road project, is a vital national infrastructure initiative, addresses acute traffic congestion, enhances public safety, promotes economic growth, and improves access to key services. That quashing the project would not only harm the public interest but also expose the government to potential liability for breach of contract with the 10th respondent.

94. They submitted that the petitioners have failed to demonstrate illegality, irrationality, procedural impropriety, or disproportionality, and therefore the threshold for judicial review is unmet. The respondents stated that on the infringement of fundamental rights, the petitioner did not plead their case with the necessary specificity, as required by *Anarita Karimi Njeru v Republic* (1979) KLR 154 and reaffirmed in *Mumo Matemu v Trusted Society of Human Rights Alliance* (2012).

95. The 5th respondent submitted that the petitioners have failed to present credible, specific, or admissible evidence of constitutional or environmental violations to justify halting the project. They also cited the

case of *Communications Commission of Kenya v Royal Media Services* (2014) which underscored the need to link the alleged violations to specific constitutional provisions and the actions complained of.

96. That in this case, the petitioner has made general claims without establishing a causal connection between the alleged breaches and the respondents' actions and as such, it is vague and lacking in merit, warranting dismissal by the court. The 5th respondent also asserted its full compliance with all legal and environmental requirements in the execution of the project stating that further, the road lies within an existing road reserve established in 1951, and the project does not encroach upon Karura Forest.

97. That also it conducted a comprehensive Environmental and Social Impact Assessment (ESIA) by NEMA-licensed experts, obtained a conditional Environmental Impact Assessment (EIA) license from NEMA, and engaged in extensive public consultations with stakeholders, addressing concerns such as traffic, pedestrian infrastructure, and environmental protection measures.

98. The 5th respondent submitted that the ESIA process included evaluation of five alternative routes, while a no-project alternative was deemed unnecessary based on scoping results indicating the project's overall positive impact. Regarding compliance with the *Environmental Management and Coordination Act* (EMCA), the 5th respondent emphasized its adherence to sections 58, 68, and 69 of *EMCA* by ensuring ongoing monitoring, audits, and public grievance mechanisms.

99. Further, that public participation process complied with constitutional provisions under Articles 10(2)(a), 42, 69, 118, and 232(1)(d), as well as regulation 17 of the *Environmental (Impact Assessment and Audit) Regulations, 2003* citing *British American Tobacco Kenya Ltd v Cabinet Secretary for Health* to state that courts require genuine and substantive public engagement rather than mere formalities.

100. It refuted the petitioners' challenge to the constitutionality of section 58(9) of *EMCA*, citing the case of *Ware Transport Limited v NEMA* (2022) where the Tribunal upheld that NEMA's failure to respond within three months effectively amounts to license approval.

101. The 5th respondent stresses that the said section requires submission, not prior approval, of the ESIA report before commencing the project. That its lawful execution of the road project, supported by valid environmental approvals and meaningful public participation, serves the overriding public interest by improving safety, reducing congestion, and promoting economic development.

102. The 5th respondent stated that halting the project on unsubstantiated claims would not only cause significant financial losses but also undermine future infrastructural initiatives that comply with environmental and constitutional safeguards.

Analysis & Determination:

103. The issues running across the pleadings and submissions rendered is whether or not there was compliance with the statutory and constitutional requirements with reference to development control as well as licenses granted to the 5th 6th and 7th respondents. Therefore, in addressing the complaints raised by the petitioner, i will consider under separate headings whether or not there is proof made against each of the three respondents cited.

Claim against the 7th Respondent:

104. For the 7th respondent, in its replying affidavit its deposed that it was yet to commence its project. In the replying affidavit of Eng. Joseph Kamau sworn on March 20, 2025, the 7th respondent deposes that applying for the special license from the 3rd respondent deposed that no tender had been awarded for the construction of the ablution block. It also stated that the ablution block is aligned with public

interest objects aimed at improving sanitation, prevent pollution and protecting the Karura forest ecosystem.

105. The Special Use license is defined in the Act to mean

> " authorization issued to a person to undertake an activity whose primary purpose is to yield public benefit in transportation, communication, energy, research or education." (underline mine for emphasis).

106. The petitioner's further affidavit sworn on April 24, 2025 did not contradict the facts set out in the 7th respondent's replying affidavit that the project was for public benefit and that it was still at the preliminary stages. Consequently, I hold that the claim as against the 7th respondent is premature at this stage. Further, in considering the public benefits visa vi the protection of the forest ecosystem of the proposed project, the project would benefit both the forest area and the public.

107. For this reason, the 7th respondent shall share information/engage with petitioner at the appropriate time when the commence the feasibility study and or preparation of an EIA project report. Thus, the claim against the 7th respondent is premature and it is ordered struck out.

Claim against the 3rd Respondent:

108. In the submission filed on their behalf, the 3rd respondent placed reliance on the provisions of section 56 of the *Forest Conservation Management Act* of 2016 which gives it power to grant inter alia, a special use license. It is also argued that the special use license granted observed all the principles of sustainability.

109. Under paragraph 19(a) of the Special Use license granted to the 6th respondent, it provided that the license is to be governed by the Laws of Kenya. The 3rd respondent in its decision making of issuing the Special Use License was also under a duty under articles 10 & 47 of the *Constitution* to ensure there was stakeholder engagement as provided under section 4 of *CAP 385* which states thus;

The principles of this Act shall be—

a. good governance in accordance with article 10 of the *Constitution*;

b. public participation and community involvement in the management of forests;

115. The authorization undertaken by the 3rd respondent was also subject to the provisions of section 57(3) which provided as hereunder;

> " When issuing authorizations under this Act, the Service shall comply with the relevant public procurement and asset disposal laws, and any other relevant written law."

110. The inference drawn is that the powers of the 3rd respondent to issue SUL or concession was not absolute. In this instance, the 4th interested party exhibited a conservation agreement they signed with the 3rd respondent. The purpose of such agreement is also provided for in *CAP 385* as follows;

> " joint management agreement" means authorization where the Service or the County Department responsible for forestry agrees to enter into partnership with other persons for the joint management of a specified forest area, specifying the contribution, rights and obligations of each party and setting out the methods of sharing the costs and benefits accruing from the forest so managed."

111. The law creating the 3rd respondent imposes an obligation on it for compliance with article 10 of the *Constitution*. The 3rd respondent refers to issuing the 6th respondent with an SUL license as a way of generating funds to conserved the Karura Forest. Therefore, the 4th interested party in light of their agreement with the 3rd respondent is one of the key stakeholders that should have been engaged with regards to the decision of the SUL that was likely to affect the Karura ecosystem (whether benefitting it or otherwise).

112. There were letters addressed to the 3rd respondent asking for details on what formed the basis of the issuance of the Special Use license and the proposed expansion of the Kiambu road. The 3rd respondent did not reply to any of these letters hence their averment that they acted within the law is unsupported. They also appear to be selective in implementing sections 56 of the *Act* without relating it to obligations sections.

113. Thirdly, the SUL use license issued to the 6th respondent did not conform with the purpose for which one should be granted (transportation, communication, energy, education and research). The 3rd respondent ought to have granted a concession under section 44 of *Cap 385* which allows for

    1. Where the Service is satisfied that utilization of a public forest can be done through the granting of a concession, the Service shall grant the concession subject to the provisions of the *Constitution*, this Act and any other relevant written law.

114. Hence, I conclude that the allegations raised by the petitioner are merited for lack of consultation and want of following due process by the 3rd respondent while issuing the special use license.

Claim against the 6th Respondent:

115. The petitioner also challenged the Special Use license awarded to the 6th respondent to operate a restaurant/recreational facility within the Karura Forest for not complying with the provisions of section 58 of *EMCA* and in contravention with articles 10, 42 and 70 of the *Constitution*. The second reason for challenging this SUL is the contention that the 6th respondent ought to have been issued with a concession and not SUL.

116. In a rejoinder, the 6th respondent deposed that it had complied with the law and produced documents to challenge the petition. Among those documents produced are; the special use agreement executed on November 30, 2023, certificate of incorporation of the 6th respondent; concept note addressed to the 3rd respondent dated December 16, 2024. The concept note enclosed the details of the proposed improvement and operations of an eco-friendly restaurant at Karura gardens.

117. The 6th respondent further enclosed a letter dated February 4, 2025 from the 4th respondent acknowledging receipt of a submitted EIA project report. The 4th respondent confirmed that it had not issued an EIA license for the 6th respondent's project. It is on the basis of these documents that the 6th respondent avers that the case against it has not met the threshold.

118. The 6th respondent has not produced evidence that they engaged the stakeholders during the process of making the application to the 3rd and 4th respondents. The documents produced only show engagements with these two respondents particularly before submitting the EIA project report to the 4th respondent.

119. Section 58(1) of *Environment Management and Co-ordination Act* (EMCA) No 3 of 1999 provides thus;

> "Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before any financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee."

Article 10(2) of the *Constitution* also provides that:

The national values and principles of governance include––

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

120. This court will not usurp the powers of the 4th respondent in reaching a determination on the application submitted to it by the 6th respondent. The petitioner can pick up that part of the process once the 4th respondent makes a decision in accordance with the law. However, I hold that the petitioner has demonstrated the lack of evidence of public participation before the Special Use license was given to the 6th respondent. Neither did the 6th respondent show evidence of stakeholder engagement before submitting the EIA project report.

121. As already stated hereinabove, *Cap 385* specifies reasons when a special use license can be granted and operation of a restaurant whether eco-friendly or not is not one of the reasons. The 6th respondent argued that the restaurant would be on the wayleave of Kiambu road and expressed willingness to vacate whenever the land would be required for expansion of the road. This contradicts why they would apply to the 3rd respondent and not the 5th respondent for permission to carry out the business in the impugned premises.

122. Whether or not the recreational facility is on the road reserve, the 6th respondent did not defend that it fell within the purposes of granting an SUL save for expressing their willingness to vacate whenever the land would be required for extension of the road. Therefore, I am persuaded to hold that the license as currently granted was obtained irregularly and unlawfully. Consequently, the same is to be revoked.

Case against 5th Respondent:

123. The thornier issue in this petition relates to the expansion of Kiambu road by the 5th respondent and its likely negative impact on the environment (Karura Forest). In their further affidavit, the petitioner deposed that the respondents had done little to address the question of adequacy of the Public Participation, Special User Licenses, the EIA Study, and the Government of Kenya signing up to borrow funds for the construction of the road prior to obtaining a license from the 4th respondent.

124. The petitioner argued that had there been sufficient public participation, the question of how much land was required for the road project would have been answered. As it stands now each of the agencies gave conflicting sizes with the 3rd respondent granting 50 acres, the 4th respondent refers to 20 acres of land and the 5th respondent speaks of 0.1233ha. The petitioner now wonders with all these inconsistencies, what is the size of land to be affected.

125. It is trite law that parties are bound by their pleadings and that a replying affidavit is considered as evidence given on oath. In answering to the petition, the 5th respondent retorted that it had complied with the law and to corroborate this assertion produced exhibits to affirm. The exhibits/documents produced included; the gazette notice of 1951 that gazetted the extent of Kiambu road, an EIA study report undertaken in the year 2020 and the publications (gazette notice of December 17, 2021 and Daily Nation & Standard newspaper of Sept 2021) issued inviting public to share their comments/ objections on the proposed project.

126. The EIA study report also recorded the dates scheduled for public engagements and a few pictures taken of attendees during the said public meetings. The details of the various stakeholders engaged are found from pages 312 of the 5th respondent's bundle and among them is the letter by the 4th interested party found at pages 342-343. In the said letter dated February 24, 2020, addressed to the consultants carrying out the EIA study, the 4th I. Party points out coordinates where they have observed monkey deaths while crossing the road. This evidences that they 4th interested party was aware of the EIA study that was being undertaken on behalf of the 5th respondent.

127. The report is indicated to have been received by NEMA (the 4th respondent) on June 23, 2021 (annex DO-2 in the 4th respondent's replying affidavit). The EIA Study report was shared out by NEMA, though the correspondence exhibited. For instance, the same was shared to the 3rd respondent and the National Construction Authority only. Both institutions responded vide their letters dated July 8, 2021 (NCA) and November 2, 2021 (by the 3rd respondent). Thus, it is incorrect for the petitioner to depose that the 3rd respondent was not contacted as a lead agency as provided for under section 60 of *EMCA*.

128. Despite these steps taken by the 4th and 5th respondents, the petitioner argues that the public participation done was not sufficient citing the case of *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* (Petition 5 of 2017) [2019] KESC 15 (KLR) (26 November 2019) (Judgment). The case cited set down the criteria of what constitutes qualitative and quantitative public participation.

129. It is argued for the petitioner that the insufficiency includes the issue of members of the public neither aware of the size of land to be utilized for the project. Further, that the ESIA Study Report does not indicate which portions of land were to be excised neither does it expressly provide feedback from key stakeholders as outlined by courts before. In addition, that there was no sensitization of the contents of the projects before stakeholder engagements were conducted.

130. Since the assertion on the insufficiency of the public participation is alleged by the petitioner, the burden of proof lay squarely on their shoulders to prove. The gazette notice number 13771 of December 17, 2021 and the newspapers advertisements inviting comments from the public ran into pages itemizing the impacts of the project on inter alia on vegetation, solid waste, effluent from works and camps, blockage of wildlife and domestic animals' movement etc.

131. As at December 2021, an EIA license had not been issued and therefore views of members of the public were welcome to be submitted and the adverts placed by the 5th Respondent described in detail what the project was about -the proposed dualling of Muthaiga-Kiambu-Ndumberi Road (B32). Besides the publications done, the meetings with the stakeholders included in the EIA Study report demonstrate they informed discussion going by the questions posed and the answers given.

132. The 5th respondent contended that the petitioner participated and shared their comments by proposing an alternative route design. According to the 5th respondent, the proposed alternative route was going to take more forest land than what is designed by their consultants (8th respondent). On the question of inconsistency of the size of land required as shown by the correspondences from the 3rd respondent, the same is resolved in the 5th respondent's affidavit annexing copies of the road design as proposed and the land size of 0.1233ha to be acquired under the *Land Act*.

133. It is also my considered opinion and I so hold that the 5th respondent having shared the details of the road design and having engaged in public participation, the different land size offered to it by the 3rd respondent can not invalidate the engagements previously undertaken. The inconsistency did not materially alter the process of public participation carried out which included the adverts and the description on the size of the daulling of the road. Hence, I find no basis to nullify the EIA licenses issued to the 5th respondent.

134. I also find that the submissions in paragraphs 21-24 of the 5th interested party's report did not consider the contents of the EIA study report presented by the 5th respondent. The 5th respondent clearly relies on the gazette notice number 237 of 1951 which already had a design of the road drawing an inference that the design and road reserve was already in place as a foundation for the dualling and not the EIA Study report. The 4th respondent has powers bestowed on it by law to direct a project proponent to revise a study report after submission. Hence the finality of a study report is dependent on the reviews of the 4th respondent.

135. In light of the foregoing, I am persuaded to hold that the 5th respondent undertook adequate public participation with regard to its EIA licensing for the dualling of Muthaiga-Kiambu-Ndumberi Road. The petitioner and the 5th interested party in my view seem to confuse the decision-making process of the 3rd respondent (in generously excising part of the forest land to the dualling of the road) done in contravention of section 4 of *Cap 385*. That is to say that the inaction of the 3rd respondent to put to public participation on the size of land they were giving away to the 5th respondent cannot be merged with the public participation process in obtaining the EIA license.

136. My holding finds basis in condition 2.1 of the EIA license quoted by the 5th interested party thus;

> " 2. 1 the proponent shall obtain special use permit from the Kenya Forest Service prior to commencement of Road Construction works within Karura Forest".

137. The 5th respondent has clearly stated that it will have to comply with the *Land Act* in so far as acquisition of the public land is provided for. The 3rd respondent's letter dated 21.8.2024 granting 51.64 acres to the 5th respondent as wayleave was incomplete. Under paragraph 3 it stated thus;

> " Kenya National Highways Authority (KeNHA) is therefore invited to engage Kenya Forest Service for issuance of a special use license to allow implementation of the proposed project inside the project."

138. Other than the SUL agreement executed between the 3rd and 6th respondents, no such evidence of sul agreement was produced to have been executed by the 5th respondent. Consequently, It is premature to declare as null and void a a special use license not yet issued to the 5th respondent. The 5th respondent has committed on oath to lawfully acquire the 0.1233ha of the forest to be utilized. An order of compliance is issued.

Claim against the 4th Respondent:

139. While challenging the inaction of the 4th respondent to act on the application for an EIA license within the three months stipulated in the Act, section 58(9) of *EMCA* creates a dilemma for projects that may be harmful to the environment where NEMA fails to approve or decline the application. This is because after the lapse of the three months, the law allows a project proponent to commence the project works. In this instance, three months after December 17, 2021, the 5th respondent would have commenced the road construction.

140. Although the 4th respondent owes Kenyans a duty to respond to all applications timely, it is not a legislative organ hence it cannot bear the liability. However, as a policy implementation agency, it ought to make recommendations to parliament for amendment of the laws where necessary. Under article 47 of the *Constitution*, the 4th respondent as a decision-making organ is mandated to respond to all applications within the three months to safeguard the public and environmental interests.

141. Where the decision is not made within reasonable time as in this case (EIA license being issued after more than three months), the petitioner is entitled to complain for violation of their article 47 right thus "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

142. To cure the lacuna, there is need to effect an amendment to section 58(9) of *EMCA* and code it in a way that avoid creating room for commencement of projects before receipt of an EIA license from the 4th respondent. The subsection is not unconstitutional to the extent that it does not excluse a project proponent from complying with all the Constitutional and Statutory requirements.

Conclusions:

143. Following the analysis hereinabove that the EIA study was procedurally under-taken by the 5th respondent, I find that the orders in prayer (a) and (b) is without merit as they are seeking to cancel the tender/agreement entered into between the Government of Kenya and the 10th respondent and/or any other person or persons for the dualing of Kiambu Road without obtaining an Environmental Impact Assessment license.

144. As rightly submitted by the 5th respondent, section 58(1) of *EMCA* staes that the financing should not be sought before submitting the EIA study report to the 4th respondent. It is not speaking to the issuance of an EIA license which in this case was issued on November 26, 2024.

145. In paragraph (g) of the reliefs, the petitioner prayed that its rights, individually or in association with others, to access information held by the government and information held by other persons and required for the exercise or protection of any right or fundamental freedom guaranteed by article 35 of the *Constitution* have been contravened.

146. As at the time of filing and prosecution of this petition, the petitioner had annexed several documents in the supporting affidavit. The petitioner submitted that Public Participation and access to information are dependent upon each other, and that article 35 of the *Constitution* creates a positive obligation on the State to disclose information that is of a public interest. That The right to information is key in achieving the values of transparency, accountability, public participation, the rule of law and good governance.

147. They further submit that the respondents unfairly limited the rights to access information on account of disclosures they ought to have complied with prior to the public participation. I have already stated

as regards the 5th respondent that the information to the public about the project was published via advertisement carried out in the daily newspaper, a radio and Kenya Gazette. Once the public was put on notice, the burden/duty shifted on them to request for information they wanted to be provided with. Other than the 4th interested party there is no evidence of the petitioner making an enquiry that was not attended to by the 1st , 2nd , 4th, 5th – 10th respondents.

148. In any event before moving to court for violation of article 35 right, section 14 of the *Access to Information Act*, 2016 provides an alternative dispute resolution mechanism as follows:

> " 14.
>
> (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—
>
> (a) a decision refusing to grant access to the information applied for;
>
> (b) a decision granting access to information in edited form;
>
> c. a decision purporting to grant access, but not actually granting the access in accordance with an application;
>
> (d) a decision to defer providing the access to information;
>
> (e) a decision relating to imposition of a fee or the amount of the fee;
>
> (f) a decision relating to the remission of a prescribed application fee;
>
> (g) a decision to grant access to information only to a specified person; or
>
> (h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13."

149. The petitioner alongside the 4th interested party wrote to the Commission on Administrative Justice (NCAJ) and the 3rd respondent as per the letters exhibited. This was before filing this petition and the Commission wrote to the 3rd respondent as shown in annex NC-6 & 7 October 19, 2024 referring to the petitioner's letters of September 25, 2024 and October 9, 2024. The letters were responded by the 3rd respondent on October 11, 2024 and the requested documents provided. Thus, the breach alleged was already cured by the 3rd respondent before this suit commenced hence it would serve no purpose to issue any declaration as sought under paragraph (g) of the reliefs sought.

150. In concluding, I find the petition is partially successful and I grant the following reliefs:

a. A declaration be and is hereby made that section 58(9) of the *Environmental Management and Co-ordination Act* expose Kenyans to the risk of environmental degradation for allowing

that a project may commence after three months even when a license has not been issued by the 4th respondent but it is not declared as unconstitutional since it does not take away any rights of the citizens as conferred in the Constition.

b. An order is hereby issued directing that the 5th respondent shall only utilize beside its wayleave, the 0.1233 Ha. of the Karura forest land (to be acquired as per the *Land Act*) and not the 51.64 acres granted to it by the 3rd respondent vide a Special Use License dated August 21, 2024

c. A declaration is hereby given that the granting of special-use license to the 6th respondent for the establishment of a recreational facility at Karura Forest Reserve fails the test of a special-use license and the agreement entered offends article 42 and article 69 of the *Constitution*.

d. An order of *mandamus* be and is hereby issued compelling the 3rd respondent to immediately cancel the special-use license granted to the 6th respondent as the same falls beyond the scope of a special-use license as provided for under the law.

e. Each party to bear their respective costs of the petition.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 14TH AUGUST, 2025

A. OMOLLO

JUDGE