



University of Essex



## **Ensuring Participatory Rights in Kenya's Energy Transition: A Legal Analysis of the Uymbo Nuclear Project**

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## 1. Introduction

In collaboration with the Center for Justice, Governance, and Environmental Action (CJGEA), this project seeks to investigate the application of procedural environmental rights as a means to empower the inhabitants of the Uyombo region (Kilifi County) of Kenya, which is earmarked for Kenya's first nuclear reactor. The project focused on three fundamental procedural rights enshrined in Kenyan law:

- i. Public Participation
- ii. Access to Information
- iii. Access to Justice

These legal provisions were benchmarked against international standards and best practices to assess Kenya's compliance with its national and international commitments.

This report presents the key findings on the implementation of these procedural rights in the context of the proposed nuclear plant project, highlighting areas where information disclosure, consultation, and transparency have fallen short of international standards. Furthermore, the report provides strategic litigation recommendations to aid CJGEA in advocating for stronger public engagement and accountability.

## 2. Background

In line with Kenya's vision 2030 to transition the country into a middle-income economy while ensuring environmental sustainability, the government has committed to achieving 100% clean energy to fulfill its obligations under the Paris Agreement.<sup>1</sup>

While renewable energy remains a key pillar of Kenya's energy strategy, there has been a recent shift towards nuclear energy as evidenced by the creation of the Nuclear Power and Energy Agency (NuPEA) under the Energy Act (2019).<sup>2</sup> In August 2020, NuPEA announced its plans to construct Kenya's first

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<sup>1</sup> University of Essex Human Rights Centre Clinic, *Environmental Rights for a Just Energy Transition in Kenya* (Essex HRC Clinic 2024–25).

<sup>2</sup> Ibid

nuclear power plant in Uyombo, Kilifi County, beginning construction by 2027 and connecting the plant to the grid by 2034<sup>3</sup>.

However, the project raises significant environmental and social concerns for the people of the Uyombo region. Considering that the Uyombo reef and creek is a breeding ground for many endangered species of marine ecosystems and is home to 4,153 fishermen and has a total of 199,674 families practicing agriculture on 112,879 ha of land,<sup>4</sup> NuPEA conducted a Strategic Environmental and Social Assessment (SESA) to evaluate these impacts.<sup>5</sup>

Nonetheless, the project has faced severe opposition from local communities, environmental organizations, and human rights activists concerning the potential environmental degradation, threats to livelihoods, and inadequate public consultation.<sup>6</sup> These protests escalated in May 2024 when the Kenyan police cracked down on peaceful protestors in Uyombo, firing live ammunition, rubber bullets, and tear gas to disperse community members. Several people were beaten and arrested during the incident.<sup>7</sup>

The resistance from the Kenyan government demonstrates the need for more inclusive decision-making throughout the project. This would be in line with the United Nations principles that protect the right to a clean, healthy, and sustainable environment and recognize it as a human right through the General Assembly Resolution GA/12437 adopted in 2022.<sup>8</sup> States are bound to ensure the respect of this right within their jurisdiction.

### 3. Objective

This research seeks to assess the extent to which the Kenyan government and relevant agencies – including the Nuclear Power and Energy Agency (NuPEA), the National Environmental Management

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<sup>3</sup> Media for Nature, 'The Nuclear Travesty and Fate of Uyombo Ecosystem' (24 February 2024) <https://mediafornature.org/2024/02/24/the-nuclear-travesty-and-fate-of-uyombo-ecosystem/> accessed [21 March 2025].

<sup>4</sup> University of Essex Human Rights Centre Clinic, *Environmental Rights for a Just Energy Transition in Kenya* (n [1]).

<sup>5</sup> Nuclear Power and Energy Agency (NuPEA), *Strategic Environmental Assessment Report (SEA) for Kenya's Nuclear Power Programme: Final Draft Report* (2020)

<sup>6</sup> Africanews, 'Kenya's First Nuclear Power Plant Faces Opposition from Coastal Residents' (12 October 2024) <https://www.africanews.com/2024/10/12/kenyas-first-nuclear-power-plant-faces-opposition-from-coastal-residents/> accessed [21 March 2025].

<sup>7</sup> Right Livelihood, 'Kenya Halts Nuclear Projects after Campaign Led by Laureate Phyllis Omido' <https://rightlivelihood.org/news/kenya-halts-nuclear-projects-after-campaign-led-by-laureate-phyllis-omidu> accessed [21 March 2025].

<sup>8</sup> UNGA Res GA/12437 (28 July 2022).

Authority (NEMA), and other key stakeholders – have complied with the national and international legal frameworks governing participatory rights in the nuclear energy sector.

## 4. Methodology

This study employs a three-step research approach:

- i. Legal Analysis: Examination of Kenyan constitutional, statutory, and regulatory provisions alongside international legal instruments.
- ii. Review of Stakeholder Engagement Practices: Analysis of consultation processes and transparency in decision-making related to the nuclear plant project.
- iii. Interviews and surveys: Engagement with affected community members, legal experts, and civil society organizations to access on-the-ground realities and perspectives on public participation.<sup>9</sup>

## 5. Key Areas of Concern

At the international level, participatory rights are integral to the broader right to a clean, healthy, and sustainable development. The United Nations General Assembly Resolution A/RES/76/300 (2022) explicitly links this right with access to information, public participation, and access to justice, highlighting their role in upholding environmental and human rights standards.<sup>10</sup>

Therefore, the research examines primary gaps in Kenya's compliance with participatory rights in environmental decision-making concerning access to information, public participation, and access to justice. As part of the analysis, the project reviews the Strategic Environmental and Social Assessment (SESA) report, evaluating it against national and international standards to assess the extent to which it upholds these participatory rights.

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<sup>9</sup> Due to timing constraints, interviews and surveys could not be conducted during this phase. However, all necessary materials have been prepared and are ready to be handed over to CJGEA for future implementation.

<sup>10</sup> UNGA Res 76/300 (28 July 2022) UN Doc A/RES/76/300.



These rights are fundamental to ensuring transparency, inclusivity, and accountability in environmental governance.<sup>11</sup>

## 6. Access to Information

### 6.1. Legal Analysis

Access to information is a cornerstone of environmental governance, enabling public participation, accountability, and informed decision-making. In Kenya, this right is grounded in the Constitution and operationalized through specific legislation and regulations.

The Constitution of Kenya 2010 establishes the foundation for access to information. Article 35(1)<sup>12</sup> guarantees every citizen the right to access information held by the state, while Article 35(3)<sup>13</sup> obligates the state to publish and publicize important information affecting the nation. These provisions ensure transparency and empower citizens to hold public institutions accountable. This means that if the public, including the Uyumbo community, have not been sufficiently informed, despite it being their constitution right, it may demonstrate a failure on the part of the duty bearers (the state and its institutions) and potentially a breach of the constitution.

Environmental matters are specifically addressed under Article 69(1)(d)<sup>14</sup>, which encourages public participation in environmental protection and management. Effective public participation is predicated on access to relevant and timely information<sup>15</sup>.

Legislation further elaborates on this right. The Access to Information Act, 2016 is the primary statute implementing Article 35<sup>16</sup>. It provides a framework for accessing information held by public entities and

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<sup>11</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

<sup>12</sup> Constitution of Kenya (2010), art 35

<sup>13</sup> Ibid

<sup>14</sup> Ibid, art 69

<sup>15</sup> Edna Moi and Omiti Gedrick John, 'Public Participation and Its Effect on Selection and Execution of Projects: A Case of Siaya County' (2024) 1(4) *International Academic Journal of Arts and Humanities* 84

<sup>16</sup> Access to Information Act 2016 (Kenya)

private bodies that affect the public interest. Section 4(1)<sup>17</sup> of the Act states that every citizen has the right to access information on request, while Section 8(1)<sup>18</sup> requires public entities to proactively disclose information, particularly on matters impacting the environment.

The Environmental Management and Coordination Act (EMCA), 1999<sup>19</sup> also contains provisions on access to information in environmental matters. Section 9(2)<sup>20</sup> empowers the National Environment Management Authority (NEMA) to disseminate information on environmental issues, while Section 59 requires the publication of Environmental impact Assessment (EIA) Reports.

In addition to these primary laws, regulations under EMCA, such as the Environmental (Impact Assessment and Audit) Regulations, 2003<sup>21</sup> provide operational guidelines. Regulation 17 mandates public disclosure of EIA reports, enabling stakeholders to assess and comment on potential environmental impacts.

## **6.2. Depth and Clarity of the Law**

Kenya's legal framework for access to information is robust on paper but faces challenges in implementation and clarity<sup>22</sup>.

The Access to Information Act, 2016<sup>23</sup> provides a comprehensive mechanism for requesting and obtaining information. Section 9 outlines the procedure for filing a request, including timelines for response (21 days). However, exceptions under Section 6<sup>24</sup>, such as restrictions on information affecting national security, are broad and open to misuse. While this provision aligns with legitimate limitations under international law, the lack of clear criteria for invoking such exemptions undermines transparency.

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<sup>17</sup> *ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> Environmental Management and Coordination Act 1999 (Kenya)

<sup>20</sup> *Ibid*

<sup>21</sup> Environmental (Impact Assessment and Audit) Regulations 2003 (Kenya)

<sup>22</sup> Kabata, V., & Garaba, F. (2019). The legal and regulatory framework supporting the implementation of the Access to Information Act in Kenya. *Information Development*, 1–15. Retrieved from

<sup>23</sup> Access to Information Act 2016 (Kenya)

<sup>24</sup> *ibid*, section 6

Proactive disclosure under Section 8 is another critical feature. However, the Act lacks specificity on what constitutes “information affecting the public interest,”<sup>25</sup> leaving room for discretionary interpretation by public entities. For instance, while environmental agencies like NEMA are expected to disclose data, inconsistent implementation limits the effectiveness of these provisions.

The EMCA, complements the Access to Information Act by specifically addressing environmental information. Section 9(2), for example, requires NEMA to disseminate environmental information<sup>26</sup>. However, the Act does not specify timelines or formats for such dissemination, leading to varied practices across institutions.

Secondary legislation provides additional clarity. The Environmental (Impact Assessment and Audit) Regulations, 2003, stipulate public disclosure of EIA reports<sup>27</sup>. Regulation 22 mandates that NEMA make EIA reports available for public inspection<sup>28</sup>. However, challenges arise in ensuring accessibility for rural and marginalized communities, who often lack the resources or infrastructure to access such information. It is important to emphasize that the Uyombo Community, as a rural and marginalized group, has been left without the necessary information<sup>29</sup>. This lack of access to vital details resonates deeply, as it further marginalizes them in a decision that will profoundly affect their future. Similarly, while Regulation 23 allows for public comments, the law is silent on how these comments influence decision-making processes.

The courts have played a significant role in interpreting access to information laws. In *Katiba Institute v President of the Republic of Kenya (2020)*, the High Court underscored the obligation of public entities to proactively disclose information<sup>30</sup>. Similarly, in *Trusted Society of Human Rights Alliance v Cabinet Secretary, Devolution and Planning (2017)*, the Court emphasized that access to information is integral to public participation, particularly in environmental matters<sup>31</sup>.

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<sup>25</sup> Ibid

<sup>26</sup> Environmental Management and Coordination Act 1999 (Kenya)

<sup>27</sup> Environmental (Impact Assessment and Audit) Regulations 2003 (Kenya)

<sup>28</sup> Ibid, regulation 22

<sup>29</sup> Environmental (Impact Assessment and Audit) Regulations 2003 (Kenya), regulation 23

<sup>30</sup> *Katiba Institute v President of the Republic of Kenya* [2020] eKLR

<sup>31</sup> *Trusted Society of Human Rights Alliance v Cabinet Secretary, Devolution and Planning* [2017] eKLR.



### 6.3. Comparing the Law to International Standards

Kenya's legal framework exhibits significant alignment with international standards but also reveals notable gaps.

The Aarhus Convention—a key regional international treaty on access to information, public participation, and access to justice in environmental matters—requires parties to ensure timely and effective access to environmental information<sup>32</sup>. While Kenya is not a party to the convention, the principles of the Convention are reflected in Article 35 of the Constitution<sup>33</sup> and the Access to Information Act, 2016<sup>34</sup>. For instance, the Aarhus Convention mandates that public authorities respond to information requests within one month, a standard met by Kenya's 21-day timeline under Section 9 of the Access to Information Act. Although the legislation seems to surpass international standards in this area, there are many challenges in its implementation. The Center for Justice Governance and Environmental Action (CJGEA) sought information from NuPEA regarding the nuclear project, but unfortunately, NuPEA did not respond until we involved the Office of the Ombudsman, which issued an ultimatum<sup>35</sup>. After the Ombudsman's intervention, NuPEA shared some information, but crucial details, such as the exact location of the proposed NPP, were still withheld.

However, Kenya falls short in several areas. The Aarhus Convention's emphasis on proactive dissemination of information is not fully realized in practice, as proactive disclosure under Section 8 of the Access to Information Act is inconsistently implemented as depicted by many state agencies, in this case NuPEA. Additionally, the lack of clear guidelines on the format and scope of information to be disclosed hampers compliance with international best practices.

The United Nations Environment Programme (UNEP) Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental

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<sup>32</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention)

<sup>33</sup> Constitution of Kenya (2010), art 35

<sup>34</sup> Access to Information Act 2016 (Kenya)

<sup>35</sup> Evidence to be provided by CJEA

Matters<sup>36</sup> also provide relevant benchmarks. These guidelines recommend capacity-building for public officials and public awareness campaigns to enhance the effectiveness of access to information laws. While Kenya has made strides in this area through initiatives by NEMA and civil society organizations, these efforts remain sporadic and underfunded. In this case, despite funding allocated for stakeholder engagement, NuPEA has failed to engage the community, which raises concerns about the potential mismanagement of public funds.

The World Bank Environmental and Social Standards (ESS10)<sup>37</sup>, which focus on stakeholder engagement and access to information, require project proponents to provide clear, accessible, and culturally appropriate information to affected communities. Kenyan laws partially meet this standard through provisions in EMCA and the EIA Regulations. However, challenges in implementation, particularly in reaching indigenous and marginalized communities, indicate a gap in compliance. Failure to do so is clear in NuPEA's handling of the nuclear issue in Uyombo as demonstrated by the reactions of the community.

Kenya's commitment to international standards is further evidenced by its alignment with the IAEA Environmental Protection Standards<sup>38</sup>, which emphasize the importance of transparency and public participation. The National Environment Policy, 2013<sup>39</sup>, echoes these principles by advocating for open access to environmental information. Nevertheless, the absence of a centralized database for environmental information limits public accessibility, a critical requirement under international best practices.

## **7. Public Participation**

### **7.1. Legal Analysis**

Public participation is enshrined in Kenyan law and international human rights legal frameworks. It ensures transparency, inclusivity, and accountability, which are crucial in environmental decision-making, especially for high-impact projects such as the planned nuclear energy project.

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<sup>36</sup> United Nations Environment Programme, Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters (UNEP, 2015)

<sup>37</sup> World Bank, Environmental and Social Standards (ESS10) (World Bank, 2016)

<sup>38</sup> International Atomic Energy Agency, Environmental Protection Standards (IAEA, 2005)

<sup>39</sup> National Environment Policy, 2013 (Kenya)

Kenya's constitution makes several provisions for public participation. Article 10(2)(a) declares public participation as a national value and a guiding principle, ensuring that it is upheld in all public affairs. Furthermore, Article 174(d) recognizes the rights of communities to manage their affairs and further their development through decentralized governance, while Article 42 affirms the right to a clean and healthy environment, making public involvement essential for environmental protection.

These rights are manifested through secondary legislation like the Public Participation Bill (2024)<sup>40</sup> and the Environmental Management and Co-ordination Act (EMCA) (1999).<sup>41</sup> The Public Participation Bill (2024) operationalizes the constitutional principles, requiring public participation plans and inclusive consultations for projects affecting communities. The Environmental Management and Co-ordination Act (EMCA) (1999) underscores the importance of public engagement in environmental decision-making, particularly through Environmental Impact Assessments (EIAs). This Act mandates consultations with affected communities.<sup>42</sup>

In performing the Environmental Impact Assessments, the EIA Regulations (2003) set clear steps for engaging communities, such as holding public meetings, publishing project details, and documenting feedback.<sup>43</sup> These measures aim to make environmental decisions more inclusive. Additionally, the Physical and Land Use Planning Regulations (2019) further emphasize public participation in urban planning by ensuring communities have a say in infrastructure and land use decisions, as stated: "The Law mandates that any person engaged in the physical and land use shall foster principles for the overall public good, for instance the physical planning and use shall promote the sustainable use land and that the shall integrate economic, social and environmental needs of present and future generations."<sup>44</sup>

This legal framework demonstrates Kenya's commitment to public involvement in national projects, although its effectiveness relies on proper implementation through enforceable mechanisms and global access for all citizens.

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<sup>40</sup> Parliament of Kenya, *Public Participation Bill* (2024).

<sup>41</sup> National Council for Law of Kenya, *Environmental Management and Coordination Act* Cap 387 (1999).

<sup>42</sup> Environmental Management and Coordination Act (Kenya) 1999, s 58(2).

<sup>43</sup> Environmental Impact Assessment and Audit Regulations (Kenya) 2003, reg 7, 10.

<sup>44</sup> Physical and Land Use Planning Regulations (Kenya) 2019, reg 4.

## 7.2. Depth and Clarity of the Law

Kenya's laws outline the right to public participation; however, their clarity and depth vary depending on the legislation. For instance, while the Public Participation Bill (2024) creates a structured approach to public participation, it does not specify how this legislation is applied in practice.

Furthermore, due to its status as a Bill, certain aspects of the legislation remain unclear and its enforcement is not guaranteed, particularly regarding the resources available to the public. Indeed, its compliance is assessed by the Registrar, and a public participation report can easily be rejected.<sup>45</sup>

According to Section III, Article 10 of the Bill, authorities have due diligence to ensure transparent and accessible information sharing during the process, facilitated through a clear Public Participation Plan. Under Article 10(c), the public has the right to participate and propose modifications to the project. The Bill outlines that the Public Participation Plan should include stakeholder engagement, dissemination of information, and a clear notification process detailing how the public can contribute. This requirement is fulfilled through public meetings that are accessible to marginalized communities and through publication in newspapers. However, an analysis of the SESA Report from the Netherlands Commission for Environmental Assessment reveals a lack of meaningful consultation, as well as an absence of available mitigation measures and risk disclosures.<sup>46</sup>

Moreover, the Public Participation in the legislative process Act<sup>47</sup> gives tools available to the population to engage in decision making, according to article 119 of the Constitution. However, these resources are not made inclusive and in the case of the Uyombo community, their involvement was limited since their knowledge on nuclear power is also limited. According to CGJEA, the presentation of the project was not made accessible due to the use of complex language, constituting a violation of Kenya's public participation and constitutional rights.

Similarly, the provisions made in the EMCA (1999) are broad. Communities often struggle with insufficient information about projects as outlined in section 2.1, which makes meaningful participation difficult. Indeed, the Public Complaints Committee - Article 32 - ensures the conduct of investigations in case of complaints against the government. Considering the situation of the Uyombo community, the rejection of

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<sup>45</sup> Parliament of Kenya, *Public Participation Bill* (2024).

<sup>46</sup> Netherlands Commission for Environmental Assessment, *Review of the Strategic Environmental and Social Assessment for the Nuclear Power Programme*, (5 November 2024)

<sup>47</sup> The National Assembly of Kenya, *Public Participation in the legislative process*, [Rev 2022]

several letters and impossibility to access documents on the mapping of the land reflects the defiance of the government towards stakeholders' participation.<sup>48</sup> This also fundamentally impacts the environment of the community, especially the conservation of their heritage stated under Section V, paragraph 2 (b) which emphasizes the necessity for a strict evaluation of the impact on lakes, rivers and wetlands. This could be done by orders issued by the Minister and a concrete management plan from the authorities, and this has also been neglected.

On the other hand, the EIA Regulations (2003)<sup>49</sup> list the requirements needed before conducting an Environmental Impact Assessment (EIA) and provide specific details on how public participation should be performed. They require public notices through posters, newspapers, and radio broadcasts in local languages. Project proponents must also hold public meetings and ensure community concerns are recorded and addressed in the EIA itself.

The jurisprudence on public participation shows challenges in the law itself regarding public participation. In the *Thuo case*<sup>53</sup> as well as the *Mui Coal Basin case*<sup>50</sup>, the petitioners claimed that there was a lack of public participation and awareness in the acquisition of the land and that their constitutional rights had been violated. In the ruling of the *Thuo case*, “customary land rights” refer to rights conferred by or derived from Kenyan customary law whether formally recognized by legislation or not.

It is interesting to note that the due process for the acquisition of the land is regulated by law and further if the criteria are met this land could be considered of public interest. In the *Thuo case*, the right of the land includes the right to be consulted. The question to the Court is whether the process of compulsory acquisition was legitimate in terms of the Kenyan law. Indeed, under Article 40 (3) of the Constitution the State can acquire the land solely if it is of public interest. If this precedent is applied to the nuclear power plant project, the legal issue would be if this power plant is of public interest. However, the term “public interest” explicitly involves the public as actors and beneficiaries of this project. This does not imply denying the right to consultation and awareness of the project, as well as the public involvement in the decision making.

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<sup>48</sup> Netherlands Commission for Environmental Assessment, *Review of the Strategic Environmental and Social Assessment for the Nuclear Power Programme*, (5 November 2024)

<sup>49</sup> Environmental Regulations (Impact Assessment and Audit) EIA/EA, (2003)

<sup>50</sup> *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2012] I High Court of Kenya I Nos 305 of 2012, 34 of 2013 & 12 of 2014

The Mui Coal Case establishes a different precedent, with the impact on the environment and advocacy for a healthier environment. While nuclear power is proved to be less harmful than coal, radioactive waste management needs to be conducted following the IAEA guidelines to avoid harmful effects on the population. This is not fully addressed in the SESA report after analysis by the Netherlands Commission: “According to the IAEA Guidelines Section 3.2 (2018) the following seven nuclear power impact areas, if relevant to the specific project, need to be considered in the SESA: 1. Main siting and technological considerations 2. Power plant construction, operation and decommissioning 3. Nuclear fuel cycle 4. Spent fuel management strategy/radioactive waste storage and disposal 5. Physical protection and security 6. Emergency preparedness and response 7. Wider physical infrastructure requirements Only impact area 1 is fully covered in the SESA.” The lack of management and preparedness is a breach of the right to a healthy environment and international guidelines.<sup>51</sup> In the case of the Uyombo community, this gives them evidence in contesting the lack of government compliance with the procedure. It also violates the procedural rights enshrined in national law as of the right to information Article 35, the right to a clean and healthy environment Article 42 and 70, Public Participation rights Article 10 and Economic and Social rights Article 43 which are protected by international human rights law.

### **7.3. Comparing the Law to International Standards**

Kenya’s legal framework aligns with some international standards. These include the IAEA Stakeholder Engagement Guidelines,<sup>52</sup> which provide industry standards for implementing safety measures and relevant legislation in the construction of nuclear facilities; The African Charter on Human and Peoples’ Rights,<sup>53</sup> a human rights treaty assuring regional human rights mechanisms, and the United Nations Declaration on the Rights of Indigenous People (UNDRIP),<sup>54</sup> a non-binding UN declaration that upholds the rights of indigenous people. Although these documents have varying levels of influence, they all set standards on an international level.

- IAEA Stakeholder Engagement Guidelines

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<sup>51</sup> UNHRC, “The human right to a clean, healthy and sustainable environment”, (8 October 2021), A/HRC/RES/48/13

<sup>52</sup> International Atomic Energy Agency, *Stakeholder Engagement in Nuclear Programmes* (IAEA Nuclear Energy Series No. NG-T-1.4, 2011).

<sup>53</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

<sup>54</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* (2 October 2007) UNGA Res 61/295.



The International Atomic Energy Agency (IAEA) makes provisions and ensures safety regarding nuclear power. The Agency emphasizes transparency, inclusivity, and ongoing engagement in nuclear projects. Specifically, the guidelines require:

- Pre-management of nuclear waste through established infrastructure and compliance with international safeguards.
- Risk assessment and vulnerability considerations for affected communities, particularly regarding radioactive waste disposal.

In alignment with these requirements, Kenya's Nuclear Power Energy Agency (NuPEA) engaged consultants and facilitated the performance of a Strategic Environmental and Social Assessment (SESA) for the proposed nuclear power program. Following the assessment, a report was drafted and submitted to NEMA Kenya.<sup>55</sup>

Although the SESA report identifies the management of radioactive waste at the site as a key consideration, it fails to adequately address the vulnerability of the Uyombo community concerning the predisposition and management of radioactive waste on their land.<sup>56</sup> Additionally, the SESA report has been criticized as lacking credibility, as it was not conducted by experts in nuclear energy and radioactive waste management.<sup>57</sup>

The IAEA's general safeguard requirements state: "The protection of the environment [is identified] as an issue necessitating assessment, while allowing for flexibility in incorporating into decision making processes the results of environmental assessments that are commensurate with the radiation risks."<sup>58</sup> In line with this, the SESA identified several potential environmental, socio-cultural, health, and safety impacts of the nuclear power project. However, it does not effectively address the emergency systems. Instead, it reiterated the consequences of past radioactive events and stated that: "Generally, disaster

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<sup>55</sup> Nuclear Power and Energy Agency (NuPEA), *Strategic Environmental Assessment Report (SEA) for Kenya's Nuclear Power Programme: Final Draft Report* (2020)

<sup>56</sup> Netherlands Commission for Environmental Assessment, *Review of the Strategic Environmental and Social Assessment for the Nuclear Power Programme*, (5 November 2024)

<sup>57</sup> Right Energy Partnership with Indigenous Peoples, 'Uyombo Community Call on the Kenya Government to Abort the Implementation of the Proposed Nuclear Power Plant in Uyombo, Kilifi County, Kenya' <https://rightenergypartnership.org/uyombo-community-call-on-the-kenya-government-to-abort-the-implementation-of-the-proposed-nuclear-power-plant-in-uyombo-kilifi-county-kenya> accessed 22 March 2025.

<sup>58</sup> INTERNATIONAL ATOMIC ENERGY AGENCY; "Prospective Radiological Environmental Impact Assessment for Facilities and Activities", (2018) IAEA SAFETY STANDARDS SERIES No. GSG-10

preparedness and management in the country is quite low. The energy sector has an inherent risk to the community due to high voltage, thermal release, radiation etc. The energy sector needs to develop specific stand-alone emergency response plans on the national level for each sub-sector".<sup>59</sup> This statement does not clearly provide any mechanisms nor infrastructures in radioactive waste disposal and undermines the right of the community to be aware of the health risks associated with the project.

The IAEA guidelines further state: "The key principles of stakeholder engagement are identified in this publication as: building trust, demonstrating accountability, exhibiting open and transparent communication, practising early and frequent consultation and communicating benefits and risks."<sup>60</sup> However, the Uyombo community was denied full access to relevant information on the project, especially regarding the benefits and risks of the project, as discussed earlier in the report. Kenya's Public Participation Bill and Energy Act reference these principles but fail in their implementation due to limited transparency and community involvement.

After analysis by independent agencies, including the Netherlands Commission for Environmental Assessment (NCEA), compliance with IAEA was not met in the NuPEA report.<sup>61</sup> The NuPEA report does not include a mutual dialogue strategy, violating IAEA recommendations that emphasize early and continuous engagement in nuclear projects.

- African Charter on Human and Peoples' Rights

Kenya is party to the African Charter on Human and Peoples' Rights, and entitled to pursue its engagement regarding public engagement. This Charter reiterates international human rights law treaties which preserve and promote universal rights, including the right to health, freedom of expression and the right to property. It also emphasizes equality among all people and especially reminds the importance of community land rights historically in the African culture and history.<sup>62</sup>

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<sup>59</sup> Nuclear Power and Energy Agency (NuPEA), *Strategic Environmental Assessment Report (SEA) for Kenya's Nuclear Power Programme: Final Draft Report* (NuPEA, 2020) p 185.

<sup>60</sup> INTERNATIONAL ATOMIC ENERGY AGENCY, "Stakeholder Engagement in Nuclear Programmes", (2021), IAEA NUCLEAR ENERGY SERIES No. NG-G-5.1

<sup>61</sup> Netherlands Commission for Environmental Assessment (NCEA), *Review of the Strategic Environmental and Social Assessment for the Nuclear Power Programme* (2024).

<sup>62</sup> Amnesty International, "A Guide to the African Charter on Human and Peoples' Rights", (2006) <https://www.amnesty.org/en/>

Article 24 provides that all people have the right to a general satisfactory environment conducive to development. Similarly, Article 13 guarantees citizens the right to participate in governance directly or through representatives.

Although Kenya has acknowledged these obligations, they have not been fully upheld during the implementation of this project. Article 13 of the Charter states: “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.” However, the exclusion of the Uyombo community from crucial decision-making processes violates this obligation.

- UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

The Kenyan Constitution recognises indigenous communities under the term “marginalized communities”. While Kenya is not formally bound by the UNDRIP, its principles are reflected in the Community Land Act (2016), which references Free, Prior, and Informed Consent (FPIC) in Section 36 regarding benefit sharing: “Subject to any other relevant written law, an agreement relating to investment in community land shall be made after a free, open consultative process and shall contain provisions on the following aspects - ... (b) stakeholder consultations and involvement of the community...”<sup>63</sup>

Even though not all affected communities are indigenous, they retain fundamental land rights as reaffirmed in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*; Initiative for Strategic Litigation in Africa [2021] P3 (SC). The court held that the right to land includes the right to challenge government actions that threaten one’s occupation or use of land. In this case the right to housing of the Uyombo community is enshrined in constitutional law.

Regardless of the established law and precedence, the Kenyan government has failed to exercise FPIC standards in the nuclear project, leaving communities without adequate representation.

- Lack of Free Prior and Informed Consent (FPIC)

The principle of Free, Prior, and Informed Consent (FPIC) is fundamental in international human rights law, ensuring that indigenous communities have the right to give or withhold consent to projects that may affect their lands and resources. This principle is enshrined in Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which states: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative

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<sup>63</sup> Community Land Act 2016, s36

institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."

In the context of the proposed nuclear project in Uyombo, there is a significant concern that the FPIC process was not adequately conducted. The people of the Uyombo community were not meaningfully consulted, nor did they have full access to project-related information in an accessible manner, as discussed earlier in this report. This lack of engagement raises questions about Kenya's compliance with its obligations under international frameworks that uphold participatory rights.

Moreover, a critical question remains as to whether the land associated with the proposed project can be considered "indigenous land". If it is so, the failure to secure FPIC would not only constitute a procedural lapse but also an infringement on the cultural rights and identity of affected communities. Given the strong connection between land, heritage, and traditional livelihoods, any disruption without proper consultation can lead to violations of fundamental human rights.<sup>64</sup>

## **8. Access to Justice**

### **8.1. Legal Analysis**

Access to justice is one of the fundamental principles of the supremacy of law, which implies that all citizens must have equal access to justice, such as the right to access to an effective remedy or to have access to the court. The right to access to justice is strongly integrated into the Kenyan Constitution 2010 and supported by different, more specific legal frameworks such as the Environmental Management and Coordination Act 1999, Environmental and Land Court Act 2011, Legal Aid Aid (Fund) Regulations 2024.

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<sup>64</sup> Food and Agriculture Organization of the United Nations (FAO), *Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities* (2016) <https://www.fao.org/3/i6190e/i6190e.pdf> accessed 22 March 2025

## **8.2. Depth and Clarity of the Law**

As the Kenyan Constitution is the supreme law of the Republic, it has a great impact on the access to justice for Kenyans. Such a powerful legislative framework enables the building of trustful relationships between the citizens and the government.

The recognition of access to justice in the Kenyan Constitution can be seen already from the preamble. Although it is a non-binding part of the legislation, the main purpose of it is to state the reasons and the intended effects of the proposed legislation. Various provisions in the Kenyan Constitution refer to the execution of the environmental rights. Article 48 of the Kenyan Constitution on the right to access justice grants the dispute resolution mechanism for all Kenyans. Complementing this, provision 6 (3) guarantees reasonable access to judicial services for those who bring claims to court.

For the Uyombo community, Article 22 on the Enforcement of the Bill of Rights is particularly relevant, as it facilitates the process for individuals with human rights disputes to appear in court. This access is further broadened by Article 258, which allows any individual to file a lawsuit if they believe the Constitution has been violated or is at risk of being violated. In the context of environmental rights, it implies that if the construction of a nuclear power plant infringes upon constitutional protection, affected parties can seek legal recourse action.

Furthermore, Article 27 (1) ensures the right to equal protection by law, giving an opportunity for the Uyombo community to legally challenge the detrimental effects of the proposed nuclear reactor. Article 159 of the Kenyan Constitution further strengthens their position by allowing the Uyombo community to receive unbiased and timely treatment in the proceedings because of few reasons: first of all, it emphasizes that it has to give justice to all persons, regardless of their status. Secondly, it means that the proceedings cannot be delayed and that any procedural complications should not be a 'shield' for maintaining substantive justice.

Article 70 is another pivotal provision related to the enforcement of environmental rights as it protects "the privacy of the home from deprivation of property without compensation,"<sup>36</sup> a safeguard particularly crucial for the Uyombo community. In the context of the proposed nuclear power plant, this article highlights their right to housing and ensures that they cannot be deprived of their property without appropriate legal remedy.

The judiciary independence is protected under Article 160, which aligns with Article 162 on the System of courts. However, while those provisions establish the structure of the judiciary, Article 62 raises some concerns as it does not explicitly mandate the State to facilitate environmental rights and land use protections. This could present challenges for the Uyombo community, who seek judicial intervention regarding the environmental matters related to their home.

Aside from the paramount law of the Constitution, it is crucial to mention the Environmental and Land Court Act 2011, which also established the Environmental and Land Court, specialising on the disputes related to the use and occupation of the land. It is important to note that the Court's jurisdiction is not limited only to the Environmental and Land Court Act 2011 solely, as it is confirmed by Section 13 (3): "Nothing in this Act shall preclude the Court from determining a dispute relating to the environment and land under any other law".

According to Section 4 for the establishment of the court, the ELC has the same status as the High Court in relation to holding disputes for complicated environmental matters. Regarding the right to access to justice, the Act upholds the Section 13 on the Jurisdiction of the Court, stating that "the Court shall have the original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title to, land"<sup>65</sup>. Further, subsection 2 specifically provides that the citizens can bring to the court "land related constitutional issues"<sup>66</sup> (for instance, particularly in the Uyombo community situation, the infringing of Article 42 on the right to a clean and healthy environment), and "matters related to environmental governance and public participation"<sup>67</sup>. Therefore, if CJGEA and the Uyombo community will fill a claim to the ELC, they can invoke environmental harm under Article 42 of the Constitution, unclear planning processes and subsequent lack of public participation in the decision-making, and the land use without the community's free, prior and proper consent.

As the matter of the Uyombo community directly correlates to the environmental harm and sub-issues, section 18 is particularly important here as it ensures that the court is bound by the principles of sustainable development and environmental justice, including "the principle of public participation...the cultural and social principles traditionally applied by any community in Kenya for the management of the

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<sup>65</sup> Environmental and land court Act, 2011 (No. 19 of 2011) Section 13 (1): "The Court shall have original and appellate jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of, and title to, land."

<sup>66</sup> Environmental and Land Court Act 2011 (No. 19 of 2011) Section 13 (2) (h)

<sup>67</sup> Environmental and Land Court Act 2011 (No. 19 of 2011) Section 13 (2) (i)



environment...the polluter-pays principle...the precautionary principle”<sup>68</sup> CJGEA can, therefore, argue that public participation was insufficient in terms of the construction of the nuclear power plant and that the community’s rights on their environment were violated to hold the proper course of action for ensuring the right to access to justice is upheld.

What is particularly beneficial for the Uyombo community, in this case, is that according to Sections 19<sup>69</sup> and 20, respectively, the procedure for applying to the court is free from complicated, technical strict procedural rules, which allows to the community to receive legal aid and representation in the court. Furthermore, Article 20 promotes a method of alternative dispute resolution, including “conciliation, mediation and traditional dispute resolution mechanisms”<sup>70</sup>. Subsequently, CJGEA can try to attempt mediation before litigation proceedings will occur fully, what is sometimes useful in environmental and community land disputes. Then the conflict between the community and the authorities can be resolved

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<sup>68</sup> Environmental and Land Use Act 2011 (No. 19 of 2011) Section 18: In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles- (a) the principles of sustainable development, including; (i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land; (ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural principles of natural justice.<sup>473</sup> 2011 Environment and Land Court resources in so far as the same are relevant and not inconsistent with any written law; (iii) the principle of international co-operation in the management of environmental resources shared by two or more states; (iv) the principles of intergenerational and intragenerational equity (v) the polluter-pays principle; and (vi) the pre-cautionary principle; (b) the principles of land policy under Article 60(1) of Constitution; (c) the principles of judicial authority under Article 159(2) of the Constitution; (d) the national values and principles of governance under Article 10(2) of the Constitution; and (e) the values and principles of public service under Article 232(1) of the Constitution.

<sup>69</sup> Environmental and Land Use Act 2011 (No. 19 of 2011) Section 19: (1) In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence: Provided that the Court may inform itself on any matter as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material. (2) The Court shall not be bound by the procedure laid down by the Civil Procedure Act and shall be guided by the No. 19 Procedure and powers of the Court.<sup>474</sup> No. 19 Environment and Land Court 2011 (3) The Court shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court while trying a suit, in respect of the following matters, namely — (a) summoning and enforcing the attendance of any person and examining them on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) requisitioning any public record or document or copy of such record or document from any office in accordance with Article 35 of the Constitution; (e) issuing commissions for the examination of witnesses or documents; (f) reviewing its decision; (g) dismissing an application for default or determining it ex parte; (h) setting aside any order of dismissal of any application for default or any order passed by it ex parte; (i) passing an interim order, including granting an injunction or stay after providing the parties concerned an opportunity to be heard, on any application made or appeal filed under this Act; and<sup>475</sup> 2011 Environment and Land Court No. 19 (j) any other matter which may be prescribed by the rules. (4) The Court shall have power to require any person who appears to it to have special knowledge of any relevant matter, or of any of the matters to which this Act applies or any written law to which it relates, to furnish in writing or otherwise, and to confirm on oath or affirmation, such expert opinion as may be relevant to any of the issues in the proceedings.

<sup>70</sup> Environmental and Land use Act 2011 (No. 19 of 2011) Section 20: (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution. (2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

in accordance with the court's principles of justice and equality before the law, without the delays due to the procedural technicalities. Overall, this legislation is particularly relevant to the CJGEA and the Uyombo community as they can challenge the construction of the nuclear power plant for the violation of their environmental rights through filing a lawsuit in the ELC.

Additionally, the Environmental Management and Coordination Act 1999 is related to the matter of how the Uyombo community can access the court proceedings. Section 125 states that "there is hereby established a Tribunal to be known as the National Environment Tribunal", and the appeals of this body are related to environmental impact assessment license approvals (according to Section 129)<sup>71</sup> and other environmental management decisions, for instance, pollution control decisions. Particularly Section 129 (1) provides that "any person who is aggrieved by a decision of NEMA...may within sixty days appeal to the Tribunal"<sup>72</sup> Therefore, the Uyombo community can also use this provision to uphold their right to access justice, as this procedure is less formal and more accessible than ordinary court proceeding. Additionally, CJGEA can file a complaint on behalf of the Uyombo community, if they are unable to participate directly, without needing a lawyer.

The right to access justice implies several concepts, and therefore, it can be interpreted broadly conjointly with such frameworks as access to information or the right of public participation. The Kenyan law is comprehensive, and the Uyombo community can use it to their benefit to raise their environmental rights. However, it has its own challenges, particularly whether the authorities interpret environmental rights in accordance with the law.

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<sup>71</sup> Environmental Management and Coordination Act 1999 Section 129: viiAny person who is aggrieved by:- a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder; the imposition of any condition, limitation or restriction on his licence under this act or regulations made thereunder; the revocation, suspension or variation of his licence under this Act or regulations made thereunder; the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder; may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal. Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose. Upon any appeal, the Tribunal may:- confirm, set aside or vary the order or decision in question; exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or make such other order, including an order for costs, as it may deem just. Upon any appeal to the Tribunal under this section, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

<sup>72</sup> ibid

For instance, it is crucial to mention the incident when justice was not served because of the police brutality aimed at local environmental activists, which occurred on the 21<sup>st</sup> of May<sup>73</sup>. The peaceful protest for the opposition to the construction of the nuclear reactor in the Uyombo area finished with the police firing 137 live rounds and 70 tear gas canisters near protestors for the violation of their fundamental rights granted by the Kenyan constitution. The police forces were extremely aggressive, and their actions were not proportionate in comparison with the actions of the Uyombo community: one woman questioned police authorities over the protests, and “the police turned around and beat her quite badly and injured her”<sup>74</sup>, saying Phyllis Omido<sup>75</sup>, the environmental defender. Two community members were arbitrarily detained, and 21 others were injured by a law enforcement entity that is meant to protect the community. This incident is directly related to the petition against the NPP, and this paper finds it crucial to mention this situation as its weight will hold both law enforcement and local administration accountable for their actions. This demonstrates that, unfortunately, the justice system in Kenya requires more accountability because such misconduct violates multiple frameworks of law.

This situation correlates to the current problem as the construction of a nuclear reactor must account multiple aspects, starting from a fundamental requirement that a nuclear power plant can only be built after a thorough Environmental Impact Assessment (EIA). Otherwise, the construction project would violate the Right to a Clean and Healthy Environment under Article 42 of the Kenyan Constitution.

Environmental rights are crucial and indisputable, as they directly impact not only the health and livelihoods of local residents, including future generations, but also have broader consequences. If a proper environmental impact assessment is not conducted, the consequences could extend beyond the Uyombo community, even potentially affecting neighbouring countries and global environmental stability. Therefore, taking into account those significant consequences, the Uyombo community must be consulted before the construction of the power plant to ensure transparency and fairness throughout the whole decision-making process. Therefore, another key principle which is closely tied to the access to justice is following from here is the right to public participation under Articles 10 and 69 of the Kenyan Constitution respectively. It allows the Uyombo community to be actively involved in the decision-making process that affect their environment and well-being. Guarantying their participation is crucial in upholding

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<sup>73</sup> Right Livelihood, “Police brutality in Kenya raises safety concerns for Phyllis Omido, local environmental defenders”, 24 May 2024

<sup>74</sup> Ibid

<sup>75</sup> The Guardian, 'East African Erin Brockovich' wins prize for closing polluting lead smelter'

the justice and preventing irreversible serious consequences related to the construction of the nuclear power plant.

For instance, the notoriously famous Chernobyl accident in 1986 is an example of a situation where the reactor was operated with inadequately trained personnel, which led to a tragedy affecting the lives of millions of people and future generations<sup>76</sup>. The history demonstrates that there are multiple very serious, life-threatening, or even fatal risks if the reactor is not maintained properly<sup>77</sup>. However, as we can see from the examples above, the community does not have access to the relevant information about the project. Ignorance of one's destiny has a very negative effect on the community, especially given the fact that they cannot feel like a part of the system. Therefore, if an individual does not feel that he is directly involved in the decision-making process, there is no access to justice because it implies in itself the fact that an individual cannot be represented to be a part as he/she cannot even dispute anything on paper because they merely do not have access to this. The construction puts the community's livelihood, especially fishing and tourism under big question. These factors are crucial to the area's economy, and the Uyombo community has to bring to the attention Article 43 to enhance their rights to health, social and economic well-being.

## **9. Legal Arguments and Strategic Litigation Considerations**

Legal action against the nuclear project can be based on clear constitutional, statutory, and international violations by the Kenyan government and its agencies. CJGEA is considering filing a case in the Environment and Land Court (ELC), which has the same status as the High Court and handles disputes concerning land and environmental rights in Kenya.<sup>78</sup> This section of the report identifies non-compliance with Kenyan laws and with international standards that can support CJGEA's strategic litigation consideration.

### **9.1. Establishing Government Non-Compliance**

#### **1. Violation of Constitutional and Statutory Obligations**

##### **a. Failure to uphold Articles 10, 35, and 42 of the Constitution:**

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<sup>76</sup> The Chernobyl Accident". United Nations Scientific Committee on the Effects of Atomic Radiation.

<sup>77</sup> *ibid*

<sup>78</sup> Judiciary of Kenya, 'Environment and Land Court' <https://judiciary.go.ke/environment-and-land-court/> accessed 22 March 2025

- i. Article 35 (Right to Access Information) requires state agencies to provide timely, accurate, and accessible information, which has not been fulfilled in consultations with Uyombo residents.
  - ii. Article 10 (National Values and Principles) mandates public participation and transparency in governance, which have been disregarded in the nuclear project's planning.
  - iii. Article 42 (Right to a Clean and Healthy Environment) establishes environmental protections that the government has failed to uphold through inadequate impact assessments and community engagement.
- b. Non-compliance with the Environmental Management and Coordination Act (EMCA) (1999, Revised, 2012):
  - i. The Strategic Environmental and Social Assessment (SESA) conducted by NuPEA failed to meet all the requirements for meaningful public participation and transparency.
- c. Breach of the Public Participation Bill (2024):
  - i. The Government's failure to conduct proper stakeholder engagement and consultations violates the legal provisions enshrined in the Public Participation Act.

## 2. Failure to adhere to international standards

- a. Non-compliance with IAEA Stakeholder Engagement Guidelines:
  - i. The International Atomic Energy Agency (IAEA) guidelines stress early, inclusive, and transparent engagement in nuclear energy projects, which has not been upheld in this project.
- b. Breach of the Aarhus Convention Principles
  - i. Although Kenya is not a signatory to the Aarhus Convention, its principles on access to information, public participation, and access to justice represent

international best practices that Kenya has failed to meet in the context of this project.

## A. Legal and Extralegal Remedies and Strategic Avenues

To challenge the government's failure to meet its legal and procedural obligations, the following legal remedies and strategic litigation pathways can be pursued:

### 1. Injunction Relief

This is the most immediate and accessible legal remedy available to suspend the project until proper procedural safeguards, including access to information and public participation are implemented.<sup>79</sup>

In Kenya, the Environment and Land Court (ELC) has jurisdiction over such cases and can order a halt to the project. For instance, in the *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.* (National Environmental Tribunal Appeal No. 196 of 2016) case, an environmental tribunal revoked a license for a coal plant due to inadequate public participation and insufficient consideration of climate change impacts of the EIA report.

### 2. Reparations

CJGEA could seek remedies for the Uyombo community, beyond monetary compensation. The remedies could include structural reinforcements to prevent future environmental damage, mandated community inclusion in ongoing project assessments, and long-term monitoring and safeguards to ensure health and safety compliance.<sup>80</sup>

### 3. Constitutional Litigation at the Land and Environment Court

A claim under Articles 42, 69, and 70 of the Constitution can establish that the project violates environmental rights and the right to public participation.

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<sup>79</sup> Environmental Law Institute, *The Role of Injunctive Relief, Restoration Orders, and Other Instruments in Addressing Environmental Justice Issues Through Enforcement Actions* (Environmental Law Institute, 26 September 2022) <https://www.eli.org/events/role-injunctive-relief-restoration-orders-and-other-instruments-addressing-environmental>.

<sup>80</sup> British Institute of International and Comparative Law (BIICL), *Global Toolbox: Definitions and Elements of Remedies for Environmental Harm*, available at: <https://www.biicl.org/global-toolbox-3b-3-definitions-and-elements>.



- Article 42 of the Constitution of Kenya guarantees every person the right to a clean and healthy environment: *"Every person has the right to a clean and healthy environment, which includes the right—(a) to have the environment protected for the benefit of present and future generations through legislative and other measures..."*
- Article 69 outlines the environmental obligations of the state and citizens: *"The State shall—(a) ensure that the environment is protected for the benefit of present and future generations through reasonable legislative and other measures; (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya..."*
- Article 70 provides for the enforcement of environmental rights through the courts: *"If a person's right to a clean and healthy environment is threatened, the person may apply to the court for redress."*

The court can declare the government's actions unconstitutional and order new public consultations if it finds that the procedural rights, including access to information and meaningful participation, have been violated in the implementation of the project.

#### 4. Regional and International Legal Avenues

##### I. African Court on Human and Peoples' Rights (AfCHPR):

If domestic remedies are exhausted, a case can be filed under Article 24 which states that *"All peoples shall have the right to a general satisfactory environment favorable to their development"* and Article 13 which states *"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives"*.

In the *SERAP v Nigeria (2012)* case, the African Commission ruled on environmental degradation affecting local communities. The case involved allegations that the Nigerian government had failed to protect the right to a healthy environment and to ensure the participation of affected communities in environmental decision-making. The Commission called for remedial measures, emphasizing the state's duty to prevent environmental harm and to ensure public participation in decisions impacting

communities. This case highlights the relevance of regional legal mechanisms in addressing environmental human rights violations when domestic remedies fall short.<sup>81</sup>

## II. UN Human Rights Mechanisms:

Filing complaints with the UN Special Rapporteur on the Right to a Clean and Healthy Environment and the UN Special Rapporteur on the Rights of Indigenous Peoples could exert international pressure on Kenya to comply with environmental and participatory rights obligations.

### 9.2. **Extralegal Advocacy and Strategic Partnerships**

Beyond formal litigation, advocacy efforts and strategic partnerships can amplify pressure on the government:

#### IAEA Complaints Procedure:

- Filing a formal complaint with the IAEA can highlight Kenya's non-compliance with international nuclear safety and transparency obligations.

#### Engaging UN Special Procedures:

- Raising concerns with UN Special Rapporteurs can attract international scrutiny and recommendations to improve participatory rights and environmental safeguards.
- Strengthening Civil Society Partnerships:
  - Collaborating with regional and international NGOs can increase visibility and provide legal and technical support for affected communities.
- Public Awareness and Media Advocacy:
  - Leveraging traditional and digital media to expose procedural violations and mobilize public opinion.

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<sup>81</sup> Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights (CESR) v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights, 2012.

## 10. Conclusion

The Uyombo Nuclear Project represents a significant test of Kenya's commitment to environmental justice, transparency, and public participation. Despite robust constitutional, statutory, and international legal frameworks guaranteeing access to information, public participation, and access to justice, the Kenyan government and its agencies have failed to meet these obligations in their handling of the nuclear project. The lack of meaningful community engagement, the withholding of crucial project details, and the violent suppression of peaceful protests all point to systemic failures in upholding procedural environmental rights.

These failures not only violate Kenyan law but also contravene international best practices, including those outlined in the Aarhus Convention, the IAEA Stakeholder Engagement Guidelines, and the African Charter on Human and Peoples' Rights. The consequences of proceeding without rectifying these violations are dire, both for the Uyombo community and for Kenya's credibility in sustainable development and environmental governance.

To address these concerns, immediate corrective measures must be taken. The government must halt the project until full and inclusive consultations are conducted, all relevant environmental impact assessments are transparently shared, and affected communities are granted the opportunity to participate meaningfully in decision-making. Additionally, legal action and international advocacy must be pursued to ensure accountability and protect the Uyombo community's rights.

Moving forward, Kenya must strengthen its procedural safeguards to ensure that all major infrastructure projects uphold the principles of transparency, participation, and justice. The Uyombo case underscores the urgent need for a governance framework that truly respects environmental rights—one that prioritizes the voices of those most affected rather than silencing them.

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