

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTION AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. OF 2021

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22 (1),
AND THE ENFORCEMENT OF THE CONSTITUTION UNDER ARTICLE 258 OF THE
CONSTITUTION OF KENYA (2010)**

AND

**IN THE MATTER OF CONTRAVENTIONS AND THREATENED CONTRAVENTIONS OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2(2), 3(1), 10(2), 19, 20, 21, 33,
35, 201 AND 227 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTIONS 4, 9, 20 AND 28 OF THE ACCESS TO INFORMATION ACT, 2016

AND

**IN THE MATTER OF: DENIAL OF ACCESS TO INFORMATION PERTAINING TO THE CONTRACT
BETWEEN KENYA GOVERNMENT, CHINA EXIM BANK, CHINA ROAD AND BRIDGE
CORPORATION, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA
DEVELOPMENT BANK AND AFRICA STAR RAILWAY COMPANY**

BETWEEN

KHELEF KHALIFA.....1ST PETITIONER
WANJIRU GIKONYO.....2ND PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT.....1ST RESPONDENT
PRINCIPAL SECRETARY, NATIONAL TREASURY AND PLANNING.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
SOLOMON KITUNGU.....4TH RESPONDENT
DR. JULIUS MUIA.....5TH RESPONDENT
KATIBA INSTITUTE1ST INTERESTED PARTY
THE COMMISSION ON ADMINISTRATIVE JUSTICE.....2ND INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, **KHELEF KHALIFA**, an adult male of sound mind and of P.O. Box 42261-80100 Mombasa and resident of the Mombasa County within the Republic of Kenya, do hereby make oath and state as follows; -

1. **THAT** I am the 1st Petitioner herein and thus conversant with the facts of the matter herein, and hence competent to swear and depose this affidavit on my own behalf and I also have the authority of the 2nd Petitioner to depone and swear to this Affidavit on her behalf.
2. **THAT** I am an adult male adult citizen of the Republic of Kenya and also the Chairman of Muslims for Human Rights, an organization championing for human rights and good governance in Kenya. I am also a member of Okoa Mombasa, a coalition of workers' unions, businesses, professional associations, and civil society organizations who have come together out of concern for the livelihoods and well-being of the residents of Mombasa.
3. **THAT** the 2nd Petitioner is the National Coordinator of The Institute of Social Accountability, an Organization that works on promoting social accountability, social inclusion through developing policy frameworks and budgetary decisions for accountable and equitable distribution of resources.
4. **THAT** together with the 2nd Petitioner, we bring Petition suit under **Articles 22(1) and Article 22(2), Article 258 and 165 (3)** of the Constitution, 2010 which grants this Honourable Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent, with, or in contravention of, this Constitution.
5. **THAT** the Standard Gauge Railway (SGR) is the largest capital-intensive infrastructure project ever constructed in Kenya, costing taxpayers in excess of USD 4.5 billion. Despite this extraordinary expenditure of public funds, the SGR project has been undertaken with controversy and secrecy from its inception. To this day, fundamental

information about the project's financing, tendering process, and construction has not been released to the public. Key contracts related to these aspects of the project remain secret. Procedures in the Public Procurement Act have been routinely disregarded. The Court of Appeal in Civil Appeal 13 of 2015 affirmed that the SGR project was procured in violation of article 227(1) of the Constitution and sections 6(1) and 29 of the Public Procurement and Disposal Act, 2005.

6. **THAT** the High Court in Petition 159 of 2018 & 201 of 2019 (Consolidated) stated that where a public body exercised its powers and such exercise of statutory power transcended the borders of the entity or had significant effect on the stakeholders or the public, it ought to be subjected to public participation. In the case of the SGR Take or Pay Agreement that was the subject matter of that Petition, no public participation was carried out and therefore the directives emanating from this agreement were found to be constitutionally infirm and a violation of Article 47 of the Constitution.
7. **THAT** I understand from limited public information available on the project that financing of the SGR was largely obtained through a concessional and commercial loan by the China Exim Bank. The National Treasury began loan repayments in January 2019 to the tune of Kshs 74bn to date. This was expected to increase to Kshs 111bn after a second loan became due in January 2021. Further, the SGR is operated by Africa Star Railway Company Limited, a private company, which is allegedly paid operating costs in excess of 1 billion per month.
8. **THAT** according to government statistics and information in the public domain, the SGR has operated at a financial loss since its inception. Its operations are not generating funds to help pay back the loans that financed its construction, as planned. It is not publicly known what the consequences of a default in loan repayment would be according to the agreement between Kenya and China.

9. **THAT** I am concerned that such a heavy capital-intensive project with wide-ranging impact on the public purse and citizens livelihoods was undertaken with no public participation and insufficient information on the implications on the public purse and other assets. As a result, I wrote to each of the Respondents requesting the following information:

- a. Agreements entered between the government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the Standard Gauge Railway (SGR), including:
 - i. All contracts for the carrying out of feasibility studies relating the construction, operation and servicing of the SGR:
 - ii. Any and all documents relating to expression of interest for the financing, construction, management, operation and servicing of SGR prepared by the GOK or state/public agency or a third party on behalf of the GOK;
 - iii. Contracts and or Memorandum of Understanding (MOU) between GOK and any third party relating to the financing, construction, management, provision of operating stock, operation and maintenance/servicing of SGR.
 - iv. All agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the SGR.
 - v. Any concessions, agreements and or MOU relating to the operation of the SGR including (i) Take or Pay Agreement between Kenya Railways and Kenya Ports Authority and (ii) Agreement with Africa Star Railway Operation Company Ltd.
- b. All documents considering relating to the viability, economic, social, cultural and environmental impacts, including:

- i. Feasibility studies
- ii. Strategic Environmental Assessment
- iii. Environmental Social Impact Assessment
- iv. Cultural Heritage Assessment

10. **THAT** I made the request for information in in furtherance to my right to information as a citizen of the Republic of Kenya as provided under Article 35 of the Constitution and the Access to Information Act which constitute part of the laws of the Republic of Kenya.
11. **THAT** in breach of the cited laws, the Respondents have not complied with this request and have failed to cite a valid exception to producing the documents or provide a valid reason for their impugned decisions of not providing the documents or carrying out the project in violation of Article 47 of the Constitution.
12. **THAT** the 4th and 5th Respondents have a personal obligation to obey and adhere to the constitution and the law when performing the functions of their offices. In violation of the Constitution, they have failed to adhere to the provisions of Article 35 of the Constitution and the Access to Information Act by not supplying me with the information sought in exercise of my right of access to information.
13. **THAT** to the extent that the 4th and 5th Respondents have a legal obligation to adhere to the provisions of the law and having failed to do so in this particular instance, the Honourable Court should find the 4th and 5th Respondents to have in their personal capacities violated my right of access to information and hence personal sanctions against them should issue.
14. **THAT** it is imperative for the Honourable Court to take cognisance of the emerging conduct of public officers hiding behind their offices to violate the constitution and no attendant sanctions are visited upon them in their personal capacities. That the failure

to impose personal sanctions against such officers' breeds future impunity and it is tax payers who have been forced to meet the costs of such violations.

15. **THAT** to the extent that I have, in fulfilment of my rights under the Constitution made a request to be supplied with information and the Respondents have failed and/or refused to provide me with the information sought under Article 35(1) and have failed to publicise that information as required by Article 35(3) of the Constitution, the Respondents are in violation of Article 10 and specifically the values and principles on the rule of law, participation of the people, human rights, good governance, transparency and accountability.
16. **THAT** to the extent that the Respondents have failed to provide me with the information sought under Article 35(1) and to publicise that information in accordance with Article 35(3), the Respondents' action is a threat to and constitutes a violation of my right to information as enshrined in the Constitution.
17. **THAT** the failure by the Respondents to provide me with the information sought under Article 35 effectively gives rise to a breach of my right to freedom of expression including my freedom to seek, receive or impart information.
18. **THAT** the impugned act of the Respondents violates my right to equal protection and benefit of the law to the extent that I have been denied an opportunity to fully realise and actualise my right of access to information under Article 35. The said act therefore violates Article 27 right to equal protection and benefit of the law.
19. **THAT** to an extent that the Respondents have failed to provide me with the information sought under Article 35(1) and to publicise that information in accordance with Article 35(3), the Respondents are in violation of the principles of openness and accountability as provided in article 201 of the Constitution. Further, the Respondents

impede my ability and that of other Kenyans to participate in financial matters as envisioned by Article 201 of the Constitution.

20. **THAT** I swear this Affidavit in support of my Petition herein and for the Honourable Court to grant the Orders sought in the Petition as against the Respondents.

21. **THAT** I attach to this affidavit several bundle of documents marked KK-1 in support of my averments contained herein.

22. **THAT** what is deponed to hereinabove is true to the best of my knowledge save as to matters deponed to and information whose sources whereof have been disclosed and matters deponed to belief, the grounds whereupon have been stated.

SWORN at MOMBASA

this 21st day of June, 2021)

By the said KHELEF KHALIFA)

Khelef Khalifa

DEPONENT

BEFORE ME

COMMISSIONER FOR OATHS



DRAWN AND FILED BY

OTIENO OGOLA & COMPANY ADVOCATES

OFFICE SUITE B11, 11TH FLR CMS AFRICA HOUSE

CHANIA AVENUE OFF MARCUS GARVEY ROAD

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TO BE SERVED UPON:

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT
NGONG ROAD

NAIROBI

PRINCIPAL SECRETARY, NATIONAL TREASURY AND FINANCE
HARAMBEE AVENUE

NAIROBI

THE ATTORNEY GENERAL
SOCIAL SECURITY HOUSE, 4TH FLOOR
NKRUMAH ROAD,

MOMBASA

SOLOMON KITUNGU
STATE DEPARTMENT OF TRANSPORT

NAIROBI

DR. JULIUS MUIA
NATIONAL TREASURY

NAIROBI

KATIBA INSTITUTE

NAIROBI

THE COMMISSION ON ADMINISTRATIVE JUSTICE

NAIROBI

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BETWEEN

KHELEF KHALIFA.....1ST PETITIONER
 WANJIRU GIKONYO.....2ND PETITIONER

AND

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT.....1ST RESPONDENT
 PRINCIPAL SECRETARY, NATIONAL TREASURY AND PLANNING.....2ND RESPONDENT
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 KATIBA INSTITUTE1ST INTERESTED PARTY
 THE COMMISSION ON ADMINISTRATIVE JUSTICE.....2ND INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, WANJIRU GIKONYO, an adult female of sound mind and of P.O. Box 48353-00100 Nairobi and resident of the Nairobi County within the Republic of Kenya, do hereby make oath and state as follows; -

1. **THAT** I am the 2nd Petitioner herein and thus conversant with the facts of the matter herein, and hence competent to swear and depose this affidavit.
2. **THAT** together with the 1st Petitioner, we bring Petition suit under **Articles 22(1) and Article 22(2), Article 258 and 165 (3)** of the Constitution, 2010 which grants this Honourable Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent, with, or in contravention of, this Constitution.
3. **THAT** I adopt and reiterate the averments contained in the affidavit sworn by Khelef Khalifa, my co Petitioner herein as averments in support of the Petition herein.
4. **THAT** what is deponed to hereinabove is true to the best of my knowledge save as to matters deponed to and information whose sources whereof have been disclosed and matters deponed to belief, the grounds whereupon have been stated.

SWORN at NAIROBI this... 21st ...day of June ...2021)

By the said WANJIRU GIKONYO

).....
DEPONENT

BEFORE ME
Fredrick Otieno Okeyo
COMMISSIONER FOR OATHS
P. O. Box 624 - 00100,
NAIROBI

DRAWN AND FILED BY: -

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