

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTION AND HUMAN RIGHTS DIVISION
CONSTITUTION PETITION NO. 32 OF 2021

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

AND

IN THE MATTER OF ALLEGED 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

AND

IN THE MATTER OF SECTIONS 4,9,20, AND 28 OF THE ACCESS TO INFORMATION ACT
2006

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

BETWEEN

KHELEF KHALIFA& 19 OTHERS.....1ST PETITIONER

WANJIRU GIKONYO.....2ND PETITIONER

AND

PRINCIPAL SECRETARY MINISTRY OF TRANSPORT.....1ST RESPONDENT

PRINCIPAL SECRETARY, NATIONAL TREASURY AND PLANNING
PLANNING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

SOLOMON KITUNGU.....4TH RESPONDENT

DR.JULIUS MUIA.....5TH RESPONDENT

KATIBA INSTITUTE.....1ST INTERESTED PARTY

THE COMMISSION FOR ADMINISTRATION OF JUSTICE.....2ND INTERESTED PARTY


NOTICE OF PRELIMINARY OBJECTION


TAKE NOTICE that the Attorney General for the 1ST, 2ND, 3RD, 4TH and 5TH respondent shall before the hearing of this petition raise and argue a preliminary objection on the following points of law:

1. That the petitioner has not exhausted all the available means of dispute resolution available in the matter and as such the matter is not properly before the court.
2. That the Petitioners have not availed any documentation in support of the petition and hence the petition is defective with no foundational factual basis and does not disclose a course of action and should be dismissed.
3. The petition is defective for suing the 4th and 5th respondent in their personal capacity contrary to section 22 of the National Government Co-ordination Act.

REASONS WHEREFORE the 1st, 2nd, 3rd, 4th and 5th Respondents pray that the petition dated 21st day of June 2021 be dismissed.

DATED at MOMBASA this 11th day of August, 2021

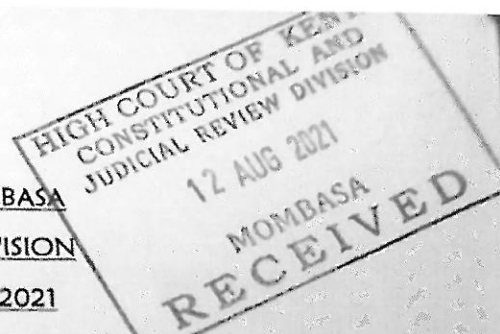

Njau M. E. Mvoi
STATE COUNSEL
THE ATTORNEY GENERAL


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KATIBA INSTITUTE.....1ST INTERESTED PARTY

THE COMMISSION FOR ADMINISTRATION OF JUSTICE.....2ND INTERESTED PARTY

GROUND OF OPPOSITION

TAKE NOTICE that the Honourable Attorney General opposes the PETITION dated 21st June, 2021 on the following grounds:

1. THAT the Petitioners have not availed any documentation in support of the petition and hence the petition is defective with no foundational factual basis and does not disclose a course of action.
2. THAT the petitioners have not produced before the Court a request for information in the form of a letter and as such the petitioner is engaging in hypothetical situations.
3. THAT the lack of such documentation offends Rule 11 of the Draft Rules For The Protection Of Rights And Fundamental Freedoms And Enforcement Of The Constitution (Mutunga Rules)

"If a party wishes to rely on any document, the document may be annexed to the supporting affidavit or the petition where there is no supporting affidavit."

4. THAT the existence of the said request for information is at the Centre of the Petition and its nonexistence renders the petition incurably defective. There is no petition without the request for information alluded therein.
5. THAT from the above paragraphs the petition is frivolous, vexatious and an abuse of Court process for not providing any proof of the existence of the request for information or proof of refusal of the request for information and should be struck out.
6. In *Katana Fondo Birya v Krystalline Salt Ltd & 2 others* [2018] eKLRN court stated
"Order 2 Rule 15 of the Civil Procedure Rules allows pleadings to be struck out if the same are scandalous, frivolous and vexatious. In Dawkins -vs- Prince Edward of Save Weimber (1976) 1 QBD 499, the Court held that:-
A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting the Court's time; or (v) when it is not capable of reasoned argument"
7. That should the court not strike out the petition it will occasion misuse of the courts time and resources. The court of Appeal in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR stated.
"There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the Constitution and the law to assist the court to

further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties"

8. That the petitioner has not exhausted all the available means of dispute resolution available in the matter and as such the matter is not properly before the court. The lack of the Request for information infers that the petitioner did not follow up the matter exhaustively and should not be granted audience by the Court.
9. The court in *Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others* [2015] ekir the court held:-

"It is imperative that where a dispute resolution mechanism exist outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute."

10. The petition is defective for suing the 4th and 5th respondent in their personal capacity contrary to section 22 of the National Government Co-ordination Act. Section 22 states:

"Nothing done by a public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand."

REASONS WHEREFORE the 1st, 2nd, 3rd, 4th and 5th Respondents pray that the petition dated 21st day of June 2021 be dismissed.

DATED at MOMBASA this 11th day of August, 2021

[Signature]

Njau M. E. Mvoi
STATE COUNSEL
THE ATTORNEY GENERAL

[Signature]

DRAWN & FILED BY:

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