

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO 32 OF 2021

KHELEF KHALIFA
WANJIRU GIKONYO.....PETITIONERS

VERSUS

1. PRINCIPAL SECRETARY MINISTRY OF TRANSPORT
2. PRINCIPAL SECRETARY NATIONAL TREASURY AND PLANNING
3. THE HON ATTORNEY GENERAL
4. SOLOMON KITUNGU
5. DR JULIUS MUIA
6. ATTORNEY GENERALRESPONDENTS

-AND -

1. KATIBA INSTITUTE
2. THE COMMISSION ON ADMINISTRATIVE JUSTICE.....INTERESTED PARTIES

RESPONDENTS' SUBMISSIONS

MY LORD,

FACTS IN BRIEF.

1. The petition was filed at the High Court, Mombasa on 21st June 2021. The petitioners plead that the Standard Gauge Railway is the largest capital intensive infrastructure ever constructed in Kenya, costing taxpayers in excess of US\$ 4.5 billion. That despite the extraordinary expenditure of public funds, the Petitioners aver that the SGR project has been undertaken with unprecedented controversy and secrecy since its inception. The Petitioners state that fundamental information about the project's financing, tendering process and construction has not been released to the public and key contracts are a secret to date.
2. The Petitioners further aver that the court of appeal in **Civil Appeal No 13 of 2015** affirmed that the SGR project was procured in violation of article 227(1) of the Constitution of Kenya and Section 6(1) of the Public Procurement and Disposal Act, 2005.

3. The Petitioners further state that the high court in 159 of 2018 and 201 of 2019 consolidated petitions court stated that the Take or Pay Agreement that was the subject matter of the petition, no public participation was carried out and the directives emanating therefrom were found to be constitutionally infirm
4. MY Lord, Petitioners **plead that they wrote to each of the Respondents** requesting the following information inter alia;
 - a) The agreements between the government of Kenya or any Kenyan state or public agency with all the service providers including foreign government or states in regard to the SGR.
To include, all contracts for carrying out of feasibility studies, expression of interest for financing the construction, M.O.U's between GOK and any third parting relating to the financing construction , loan agreements and any concessions relating to the operation of the SGR including the Take or Pay Agreement and the Agreement with Africa Star Railway Operation Company Ltd.
 - b) All documents related to the viability, economic, social, cultural and environmental impacts including;
 - Feasibility studies
 - Strategic environmental assessment
 - Environmental social impact assessments
 - Cultural heritage assessment
5. The petitions thus contend that despite numerous requests, the respondents have failed to cite a valid exception to produce the documents and have failed to provide a valid reason for carrying out the project in violation of Article 35 and 47 of the Constitution of Kenya, 2010.

6. It is the Petitioners case inter alia that, the respondents' failure to provide and publicize the information is a threat to the petitioners right to information and the failure gives right to a breach of the 1st petitioner's right to freedom of expression including the freedom to seek , receive or impact information. The petitioners have been denied a right to participate in financial matters as envisioned by Article 201 of the Constitution of Kenya. The petitioners thus pray for:

- a) Declaration that failure by the respondents to provide the information is violation of the right to access information
- b) That failure to publicize the information violates Article 10 of the Constitution and specifically the values of the rule of law, participation of the people, human rights, good governance, transparency and accountability
- c) That failure to provide the information sought is a violation of the obligations imposed on the said respondents by Chapter six specifically article 73(1) and 75(1) of the Constitution and Section 3 of the Leadership and Integrity Act
- d) An order compelling the respondents to provide the information sought vide the letters dated 16th December 2019 and 13th May 2021 at their costs
- e) An order compelling the 4th and 5th Respondents to pay compensation to the Petitioner for violation of his rights of access to information under Article 35 of the Constitution

RESPONDENTS' CASE

7. Respondents instructed the office of the Attorney General to enter appearance and oppose the entire petition as prayed. The grounds of opposition were filed on 12th June 2021. Respondents averred that the petitioner did not exhaust the means of dispute resolution. Thirdly the grounds of opposition address the issue that petitioners' claim against the 4th and 5th Respondents should be dismissed since they have been sued in their personal capacity.

8. The petitioners filed a reply to the grounds of opposition in a further affidavit alleging that there is no requirement to exhaust any internal dispute resolution mechanisms.

ISSUES FOR DETERMINATION

- i. Whether the suit is res judicata?
 - ii. Whether the claim against the 4th and 5th Respondents should be dismissed with costs
 - iii. Whether the documents are protected under the doctrine of states privilege and secrets?
 - iv. Whether the Petitioner exhaust the dispute resolution avenues available prior to filing the suit? If response is in the negative, whether this Honourable court has the jurisdiction to determine the issues herein
- i. **Whether the suit is res judicata?**

9. **MY LORD**, it is the respondents submission that the constitutional issue before this Honourable court was substantially in issue in Constitutional Petition No 159 of 2018 William Ramogi & Others v Ministry of Transport & Others where the Petitioner herein, MUHURI was the 1st interested party . My Lord, the respondents submit that this suit is res judicata for reason that;

10. **THAT** first, in terms of similarities of parties my Lord. The Petitioner herein was the 1st Interested party represented by same counsel as herein while the 1st and 2nd Respondents above, P.S.Ministry of Transport and P.S National Treasury were the respondents in that matter, Constitutional Petition 159 of 2018 Mombasa.

11. **THAT** secondly, my Lord, in terms of similarities of the subject matters before the courts. The Petitioners herein request for agreements entered into between the Government of Kenya or state agency or public agency with all service providers

and or third parties including foreign governments in regard to the standard gauge railway.

12. **THAT** it is the Respondents submission that the agreements and or documents pertaining to the Standard Gauge Railway- SGR Project were subject matter in the aforementioned Constitutional Petition 159 of 2018 Mombasa and subsequently produced as evidence before the five (5) judge bench.

13. **THAT** the Petitioners herein seek the release of all documents relating to the viability, economic social cultural and environmental impacts including feasibility studies, environmental impact assessment **yet the Petitioners being the 1st and 2nd Interested Parties in the consolidated Constitutional Petitions 159 of 2018 Mombasa annexed various documents on the feasibility studies on,** and procurement of the SGR in support of their averments in that petition while the Kenya Railway Corporation produced the Environmental Impact Assessments.

14. **THAT** thirdly, in terms of similarities of the issues my Lord, the Petitioners allege that the **SGR is a capital intensive project with wide ranging impact on the public purse and livelihood of citizens has been affected with no public participation** and or sufficient information on the implications on the public assets. In response to this issue, THAT the respondents submit that the issues of ;

- a. Effect of the Standard Gauge Railway on livelihood of citizens
- b. Issue of public participation

MY LORD, the five-judge bench in the Consolidated Constitutional Pet 159 of 2018 addressed the issue of the socio –economic impact of the TAKE or PAY Agreement entered between the Kenya Railways Corporation and the Kenya Ports Authority on **the livelihoods of citizens.**

15. **THAT** the court in Mombasa Constitutional Petition 159 of **2018** **determined the issue of Effect of the Standard Gauge Railway on livelihood of citizens by holding that the Petitioners had failed to submit proof that the livelihood of citizens had been affected by the Take or Pay Agreement.**

16. **THAT** the five judge bench further determined this issued by stating that the **Petitioners had failed to contradict the proof submitted by the respondents that the Take Or Pay Agreement as well as the National Integrated Transport Policy were purposely created by the national government under the big four agenda to improve the social economic wellbeing of Kenyans.**

17. **THAT** fourthly, my Lord the **Petitioners raise the issue of public participation** which was determined in the Constitutional Petition 159 of 2018. The Petitioners before you my Lord, allege that the project has been carried out in secrecy and in violation with Article 47 and 35 of the Constitution of Kenya.

‘... That there is no public participationrespondents failure to publicize the information, is a violation of the Petitioners right to information’

18. **THAT** my Lord, the question of whether or not public participation was undertaken during the development of the S.G.R. was determined in Mombasa Constitutional Petition 159 of 2018 **when the court upheld the rationale of the National Integrated Transport Policy** developed by the 1st respondent herein which focused on the expansion of the road and railway transport system in Kenya.

The court determined that indeed the respondent engaged in extensive public participation fora before SGR was constructed; ‘...and that the assertions that the SGR would occasion an economic meltdown Mombasa County are untrue.’

19. **THAT** the respondents aver that the court also determined the issue of public participation in Mombasa Petition 159 of 2018 by determining that, despite the fact that the directives of 15th March, 2019 and 3rd August, 2019 issued by Kenya Ports were constitutionally infirm, **public participation had been demonstrated by the respondents extensively from the point of inception to the point of implementation of the Take or Pay Agreement.**

20. **THAT** respondents further plead doctrine of estoppel against the Petitioner herein, Khelef Khalifa, the Chairman of the Board of Directors MUHURI who swore an affidavit on 6th November, 2018 on behalf of the 1st and 2nd Interested Parties in Mombasa Petition 158 of 2018, he is thus privy to facts and evidence relied upon by parties in that suit. The petitioner is thus estopped from pleading secrecy.

21. **THAT** fifthly, the respondents state that the **issue of constitutionality of the agreements** executed by the Respondents herein and third parties was determined in Mombasa Constitutional Petition 159 of 2018 Consolidated with 201 of 2019 contrary to the averments in paragraph 39 of the Petition.

22. **THAT** Mombasa Constitutional Petition 159 of 2018 Consolidated with 201 of 2019 held that the Kenya Railways Corporation and Kenya Ports Authority acted constitutionally by signing the Impugned Agreement and the Impugned Directives which aimed at implementing the policy decisions created by the Ministry of Transport in order to ensure realization of the socio-economic rights envisaged under Article 43 of the Constitution.

23. **THAT** the respondents plead therefore that the Petition before you My Lord is fatally defective, bad in law and a nullity since the matter in issue herein has previously been issue in Mombasa Constitutional Petition 159 of 2018 Consolidated with 201 of 2019 .

24. THAT the respondents pray that this honorable court be guided by the Civil Procedure Act's explanations with respect to the application of the res judicata rule. The respondents pray that the court abides by the Explanation 1-6 of the Civil Procedure Act Section 21 :

- a. Explanation (1) —The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.
- b. Explanation (2) —For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
- c. Explanation (3) —The matter above referred to must in the former suit **have been alleged by one party** and either denied or admitted, expressly or impliedly, by the other.
- d. Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
- e. Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
- f. Explanation (6) — Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, **all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

25. THAT respondents pray that this court abides by the jurisprudence established on the issue of res judicata in constitutional petitions. The respondents pray that this Honourable court finds that the suit herein is res judicata and dismisses the petition

with costs. Respondents rely on the Supreme Court in Petition no 17 of 2015 in John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] where ‘*the appellants were aware of the JR proceedings but were content to just stand by and see the battle waged by their colleagues in the trade without intervention much as they were entitled to. They must suffer the consequences. They cannot be allowed to reopen the same case now on constitutional grounds...*’

ii. Whether the claim against the 4th and 5th Respondents should be dismissed with costs

26. THAT on this issue, first, the respondents submit that it is trite law that the 3rd and 4th public officers cannot be held liable for actions and omissions undertaken in good faith for the purpose of executing the functions of the office pursuant to **section 22 of the National Government Coordination Act**

22. 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.

27. SECONDLY MY LORD, the 3rd and 4th Respondents’ actions of developing and implementing the National Integrated Transport Policy have been validated in Constitutional Petition 159 of 2018 as an act of good faith and a step towards realizing Article 43 of the Constitution of Kenya, 2010.

28. In conclusion on this issue, the respondents pray that this Honourable court find that the suit herein as against the 3 and 4th Respondents is a non-starter in law, a nullity and must be dismissed. That the respondents rely on the decision by the Court of Appeal in CA 247 OF 2005 Victor Mabachi, David Oliwa & Another v Nutun Bates Ltd [2013]Eklr- court held that an agent could not be sued where there was a disclosed principal.

iii. Whether the documents are protected under the doctrine of states privilege and secrets?

29. THAT without any admission thereof, the respondents submit that the release of the subject matter documents is an abuse of court process since, the respondents as at the time of filing this suit had already discharged their obligations under **section 8 and 9 of the Access to Information Act** in that, petitioners request was duly acted upon in the following manner;

30. THAT first, upon receipt of the request for information from the petitioners, **Kenya Railways Corporation** promptly responded vide letters dated 18th December 2019 and further vide letter dated 17th April 2020 and explained that the contracts of projects to which information is being requested are between government of the People's Republic of China and the Government of Kenya

31. THAT the petitioner was duly advised that, the agreements requested have non-disclosure clauses and therefore would be in breach of the contractual terms of the same agreement if the petitioners are supplied with the same. THAT the KRC stated that it would not be able to provide the information request on account of section 6(1) and (2) Access to Information Act No 31 of 2016.

32. THAT secondly, vide letters dated 28th August 2020 the 3rd Respondent herein, the Attorney General further Advised the petitioners herein inter alia that:

- *The office of the A.G is not a custodian of project documents such as the ones listed above. The role of the office is to render legal advice to the government as stipulated under Article 156*
- *We note that Kenya railway's has stated that the contracts have non-disclosure clauses therefore, the requested documents cannot be availed as it would be in breach of the agreements*

33. THAT thirdly, noting that the respondents had duly informed the petitioners the reasons for the nondisclosure the Petitioners had the burden of discharging prima facie case to warrant issuance of the orders sought. The Petitioners have failed to articulate the necessity of the documents and the beneficial actions in the interests of the public to be undertaken by themselves upon receipt of the same, the petition should be dismissed.

34. THAT in making these submissions, the respondents rely on the decision of the Supreme Court in Canada in Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 SCR 815 where the supreme court outlined the considerations to be made in the event claimants seek to enforce the right to access public information.

- “First, Necessity has to be established. Petitioners have to prove the necessity of having the prayers granted ‘...publicize the information sought....’
- Secondly, if this necessity is established, a prima facie case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by s. 2(b) of the Charter.
- It may also be that a particular government function is incompatible with access to certain documents, and these documents may remain exempt from disclosure because it would impact the proper functioning of affected institutions.

- If the claim survives this second step, then the claimant establishes that s. 2(b) is engaged, and the only remaining question is whether the government action infringes that protection.”

35. The respondents submit that, the Petitioners have failed to demonstrate the necessity of the contracts to themselves and to the public and no prima facie case has been established of the beneficial action they intend to undertake upon production of such the subject matter documents.

36. THAT without any admission thereof, if orders sought are granted, it would endanger the national security of the nation, injure the foreign relations between the states that the Republic of Kenya has entered into vide the bilateral agreements and it would stifle successful implementation of the National Integrated Transport Policy.

37. THAT the Respondents thus raise the defence of state secrets privilege and aver that that the contracts sought are secret in nature and the 4th and 5th respondents are prohibited pursuant to **section 3(6) and (7) of the Official Secrets Act, Cap 187** and such disclosure will be to the detriment of the (44) forty-four million citizens of the republic of Kenya.

38. THAT the respondents humbly submit that, the discretion not to disclose the documents sought is constitutional and protected by under **Section 6 (1) and (2) of the Access to Information Act**, since the disclosure thereof is likely to—

- undermine the national security of Kenya; since terms in the contract touch on foreign government information with implications on national security and foreign relations

- The release of the bundle of documents to the public would substantially prejudice the commercial interests of the third parties in this case foreign governments who may be signatories of the contracts and or M.O.U.s
- It would influence court of appeal's decision making process in **Civil Appeal No E12 of 2021 being the appeal filed by Kenya Ports Authority** against the orders of court issued on 6th November 2020 in the consolidated petitions 159 of 2018 and 201 of 2019 impede the due process of law; noting that the appeal is ongoing.
- My Lord, in the event orders sought are granted, it would cause substantial harm to the ability of the Government to manage the economy of Kenya; in the event of breach of terms of agreements with foreign nations or corporations e.g. Exim Bank it would cripple 1st respondent's ability to implement the Integrated National Transport Policy

39. In conclusion on this issue my Lord, the respondents pray that this Honourable court finds that the Petitioners have failed to provide proof of the necessity of the documents called for and the beneficial actions in the interests of the public to be undertaken by themselves upon receipt of the same, the petition should be dismissed.

iv. Whether the Petitioners exhausted the dispute resolution avenues available prior to filing the suit? If response is in the negative, whether this Honourable court has the jurisdiction to determine the issues herein

40. The respondents submit that the Petition herein is bad in law and a nullity for failure to adhere to the due legal process of dispute resolution provided under the **Access to Information Act No 31 of 2016.**

41. **THAT** the Petitioner repeatedly admits under paragraph 43 to 49 *that “1st petitioner made a request to be supplied with information and the respondents have failed.....and reiterated in the further affidavit paragraph 3 to 6 that, the requests were served upon the second interested party Commission on Administrative Justice....”*

42. **THAT** the 2nd Interested party herein referred to as the commission upon receipt of such complaints had the powers inter alia to;

- *Issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;*

43. My Lord no proof whatsoever has been provided before this Honourable court demonstrating that any of the respondents herein had been issued with summons to appear before the commission.

44. **THAT** the Petitioner has failed to provide this Honourable court with **the decision from the proceedings issued by the commission** 2nd Interested party noting that the commission upon conducting a hearing may, if satisfied that there has been an infringement of the provisions of the Act, order—

- (a) the release of any information withheld unlawfully;
- (b) a recommendation for the payment of compensation; or
- (c) any other lawful remedy or redress.

45. **THAT** upon **conclusion of proceedings** before the commission and upon receipt of the **decision by the commission**, the petitioners if not satisfied with an order made

by the Commission had the right to appeal to the High Court within twenty-one days from the date the order was made.

46. THAT it is evident that the petitioners have not provided an iota of evidence of compliance with the provisions of the law on adherence to the dispute resolution process as stipulated in the Access to information Act. THAT there is no proof of summons to the 1st, 2nd 3rd and 5th respondents either inviting them to attend to hearings, to respond to the complaint before the Commission, nor is there any proof of proceedings and no proof of orders issued by 2nd Interested party nor is there any proof of an appeal lodged at the high court against 2nd Interested party's decision.

47. THAT the respondents thus humbly submit that **the petition is premature and an abuse of court's process pursuant to section 23 of the Access to Information Act No. 31 of 2016.** That by dint of section 23 of the Act, this Honourable court has been established to have appellate jurisdiction and this position was reiterated in the case of Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR, Korir

'In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.'

48. THAT the respondents pray that this Honourable court abides by the decision of Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties) [2021] eKLR where petitioners sought orders

'compelling the Respondent to produce all the lease agreements, temporary or permanent agreements and or contract(s) entered between the Respondent and M/s Regional Logistics, M/s World Food Programme Organization, M/s Mitchel Cotts Freight (K) Ltd, M/s Mackenzie Maritime E.A Ltd, M/s Port Side Freight (K) Ltd and M/s Mercantile Cargo Terminal Operations Ltd.

the Applicant wrote letters dated the 17/7/ 2020 and 18/8/2020 to the Respondent pursuant requesting for documents to Article 35 of the Constitution. The Respondent responded via letters dated 22/7/ 2020 and 7/9/2020 objecting to the request. On the basis of that refusal, the Applicant believes that they are now rightfully before this Court.

49. In dismissing the petition, Court relied on the Supreme Court's decision in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] Eklr, the importance of courts and tribunals operating within their jurisdictional fields was emphasized as hereunder:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

50. THAT the averment in paragraph 5 of the further affidavit, ‘there is no requirement to exhaust any internal means of dispute resolution....’ is a gross misrepresentation of fact and relying on the above jurisprudence, the averment is a nullity in law.

CONCLUSION

51. MY LORD, the respondents pray that the court considers the issues raised above and dismisses the orders sought particularly captured in paragraph 6 of the submissions herein as well as orders in petition.

Dated at Mombasa this... .. 29th day of November... .. 2021.



Njau M.E. Mvoi
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