

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

PETITION

TO

The High Court of Kenya at Mombasa

Mombasa

1. The humble Petition of **KHELEF KHALIFA AND WANJIRU GIKONYO** who bring this Petition in pursuit of the rule of law and in defense and protection of the provisions of the Constitution of Kenya and to protect against the violation and further threatened violation of fundamental rights to access to information, equal protection and benefit of the law, right to fair administrative action and whose address of service for purpose of this Petition is Care of **OTIENO OGOLA & CO. ADVOCATES, 11TH FL CMS AFRICA HOUSE, CHANIA AVENUE OFF MARCUS GARVEY ROAD, P.O. BOX 22671-00100 NAIROBI** is as follows:

JURISDICTION

2. The Petitioners brings this 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.

THE PARTIES

3. The 1st Petitioner is a 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. The 1st Petitioner is 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.

4. The 2nd Petitioner is an adult female citizen of the Republic of Kenya and also the National Coordinator of The Institute of Social Accountability and she brings this Petition in her own right and to further public interest and principles of the Constitution especially accountability in financial matters affecting the people of Kenya.
5. The Petitioners lodge this Petition under the provisions of the Constitution of Kenya, alleging contraventions and threatened contraventions of Fundamental Rights and Freedoms enshrined and protected under the said Constitutional provisions
6. The 1st Respondent is the Permanent Secretary in the Ministry for Transport, Infrastructure, Housing, Urban Development and Public Works in the Republic of Kenya. The Ministry's stated mission is "to provide efficient, affordable and reliable transportation services for sustainable economic growth and development." The Standard Gauge Railway project falls under this Ministerial docket since it was designed and built for the sole purpose of offering transportation services for both cargo and people. The State Department for Maritime and Shipping Affairs "is charged with formulation of maritime transport and shipping policies, coordinating and monitoring of ports development and facilities improvement, ratification of International Maritime conventions and maritime related agreements." The department exercises oversight responsibility over Kenya Ports Authority, Kenya National Shipping Line and Kenya Ferry Services. These departments fall under the Cabinet Secretary Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works
7. The 2nd Respondent is the Permanent Secretary in the National Treasury, which is responsible for among other things, formulating, implementing and monitoring macro-economic policies involving expenditure and revenue; managing the level and composition of national public debt, national guarantees and other financial

obligations of national government; and mobilizing domestic and external resources for financing national and county government budgetary requirements. In this capacity the Cabinet Secretary in the National Treasury is therefore responsible for all revenue allocation, budget making and loan acquisition and payments done by the government of the Republic of Kenya. He is expected to keep custody of government financial records and monetary contracts entered into by the government.

8. The 3rd Respondent is the Honourable Attorney General of the Republic of Kenya who is the Chief legal advisor to the Government of the Republic of Kenya, holding an office created pursuant to Article 156 of the Constitution of the Republic of Kenya and is being sued in that capacity. The State Law Office's mandate includes:
 - a. Vets, interprets and provides legal advice on public procurement and procurement contracts at the request of Government ministries, departments and State Corporations;
 - b. Provides legal advice at the request of Ministries, State Departments, State Corporations and County Governments on Public Private Partnerships (PPPs) and project finance for infrastructure projects.
 - c. Offers legal advice and opinions on commercial matters at the request of Ministries, State Departments, State Corporations and County Governments. This may involve drafting, vetting, negotiating or interpreting Memoranda of Understanding or Agreements before they are signed by the Government or its agencies.
 - d. Attends, as part of Government of Kenya delegations, loan, grant and financing negotiations with bilateral and multilateral donors.
 - e. Vets, drafts, interprets and provides legal advice on bilateral and multilateral loan, grant and financing agreements including subsidiary agreements before they are signed.

- f. Gives transactional legal advice on the restructuring of Government agencies and institutions in which the Government has an interest including the privatization of State Corporations/Parastatals.
 - g. Offers legal advice to Government on commercial transactions related to the extractives industries sector such as mining and petroleum.
- 9. The 4th Respondent is the Principal Secretary in the State Department for Transport and also the information officer for purposes of access to information. The 4th Respondent is sued in these proceedings in his personal capacity because he has a legal obligation to obey the constitution and the law at all times but has acted in violation of the Petitioner's right of access to information.
- 10. The 5th Respondent is the Principal Secretary in the State Department for Treasury and also the information officer for purposes of access to information. The 5th Respondent is sued in these proceedings in his personal capacity because he has a legal obligation to obey the constitution and the law at all times but has acted in violation of the Petitioner's right of access to information.
- 11. The 1st Interested Party is a non governmental organization that champions and advocates for constitutional governance and fidelity to the rule of law within the Republic of Kenya.
- 12. The 2nd Interested Party is a constitutional Commission established under Section 3 of the Commission on Administrative Justice Act, 2011, pursuant to Article 59 (4) of the Constitution. The Commission is mandated, under Section 25 of the Access to Information Act, to investigate possible violations of the Act, on its own motion or in response to a complaint.

THE CONSTITUTIONAL FOUNDATIONS OF THE PETITION

13. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds “all persons and all State Organs at both levels of government”.
14. Article 2 (2) of the Constitution provides that no person may claim to exercise State authority except as authorised under this Constitution.
15. Article 2(4) of the Constitution provides among other things that any act or omission in contravention of the Constitution is invalid.
16. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.
17. Article 10 of the Constitution which sets out the national values and binding principles of governance and identifies, amongst others, the following principles; rule of law, human rights, good governance, integrity, participation of the people, transparency and accountability.
18. Article 19(1) of the Constitution provides that the Bill of Rights is an integral part of Kenya’s democratic state and the framework for social, economic and cultural policies.
19. Article 20(1) states that the Bill of Rights binds all state organs. Article 20(2) provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. Article 20(4) requires Courts in interpreting the Bill of Rights to promote its spirit, purport and objects.

20. Article 21(1) places a fundamental duty on the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
21. Article 22 (1), read together with Article 258 (1) which gives every person the right to institute court proceedings claiming the right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 22 (2) and Article 258 (2) provides that in addition to a person acting in their own interest, court proceedings under clause 1 may be instituted by: a) a person acting on behalf of another person who cannot act in their own name; b) a person acting as a member of, or in the interest of, a group or class of persons; c) a person acting in the public interest; or d) an association acting in the interest of one or more of its members.
22. Article 27 (1) of the Constitution is to the effect that every person is equal before the law and has the right to equal protection and equal benefit of the law.
23. Article 33 of the Constitution is on freedom of expression and includes the freedom to seek, receive or impart information or ideas.
24. Article 35 of the Constitution which grants the right of access to information to every citizen and include information held by the State and further require the State to publish and publicise any important information affecting the nation.
25. Article 47 of the Constitution grants the right to fair administrative action which is explained to include administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47 (2) provides that if a right or fundamental freedom has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

26. Article 129 provides that executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution. Further that executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.
27. Article 155 which provides that each State Department shall be under the administration of a Permanent Secretary and the respective permanent secretaries are the principal officers of their ministries.
28. Article 165 (2) (b) of the Constitution which grants this Honourable Court jurisdiction to hear and determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
29. Article 201 of the Constitution states the principles that shall guide all aspects of public finance in Kenya, including openness and accountability and public participation.
30. Article 227 of the Constitution which provides that when a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
31. Article 258 of the Constitution which provides the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.

OTHER LEGAL FOUNDATION OF THE PETITION

32. The Access to Information Act 2016 provides further elaboration on Article 35 rights. Section 4 of the Act protects citizens' right to access to information. According to section 4(4) (4) the Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under

section 6. Section 6 provides for permitted limitations to the right of access to information including where disclosure of the information is likely to:

- a. undermine the national security of Kenya;
- b. impede the due process of law;
- c. endanger the safety, health or life of any person;
- d. involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;
- e. substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;
- f. cause substantial harm to the ability of the Government to manage the economy of Kenya;
- g. significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;
- h. damage a public entity's position in any actual or contemplated legal proceedings; or
- i. infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

33. Section 6(2) describes information related to national security.

34. Section 9 of the Act prescribes the procedure for access to information and sets out the period within which an information officer is to respond to a request to information made to him or her.

35. The Fair Administrative Action Act 2015 obligates public officers to discharge their duties to the public in an expeditious, efficient, lawful, reasonable and procedurally fair manner.

36. Section 3 of the Leadership and Integrity Act (LIA) and Sections 8, 9 and 10 of the Public Officers Ethics Act 2003 spells out the principles that have to be observed by public and state officers, including the requirements of Article 10, Chapter 4 on the Bill of Rights and provisions of Chapter Six of the Constitution.

THE FACTS

37. 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.

38. 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 this 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.

39. The Petitioners understands from limited public information 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 is expected to increase to Kshs 111bn after

a second loan becomes due in January 2021. Further, the SGR is operated by Africa Star Railway Company Limited, a private company, which is paid operating costs in excess of 1 billion per month.

40. According to government statistics, the SGR has operated at a financial loss since its inception. Thus 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.

41. The Petitioners are 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, the 1st Petitioner 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

42. 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 for not providing the documents or carrying out the project in violation of Articles 35 and 47 of the Constitution.

PARTICULARS OF VIOLATIONS OF THE CONSTITUTION

43. TO THE EXTENT THAT the 1st Petitioner has, in fulfilment of his rights under the Constitution made a request to be supplied with information and the Respondents have failed and/or refused to provide the Petitioner 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.

44. TO THE EXTENT THAT the Respondents have failed to provide the 1st Petitioner 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 the Petitioners' and Kenyans' right to information.
45. THE FAILURE by the Respondents to provide the 1st Petitioner with the information sought under Article 35 effectively gives rise to a breach of the 1st Petitioner's right to freedom of expression including his freedom to seek, receive or impart information.
46. The impugned act of the Respondents violates the Petitioners' right to equal protection and benefit of the law to the extent that the 1st Petitioner has been denied an opportunity to fully realise and actualise his right of access to information under Article 35. The said act therefore violates Article 27 right to equal protection and benefit of the law.
47. TO THE EXTENT THAT the Respondents have failed to provide the 1st Petitioner 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 accountability and openness, and the ability of the petitioners and Kenyans to participate in financial matters as envisioned by Article 201 of the Constitution.
48. 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 the 1st Petitioner with the information sought in exercise of the 1st Petitioner's right of access to information.

49. 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 the 1st Petitioner's right of access to information.

WHETHER THERE IS A PENDING SUIT RELATED TO THE INSTANT PETITION

50. The Petitioners affirm that there is no other pending suit and/or there has been no other pending suit pertaining to the present matter or the parties herein on the same issue.

51. As it stands therefore, the present matter has not been heard and determined on merits or otherwise by a Court of competent jurisdiction and hence the same is proper before this Court.

YOUR PETITIONER therefore **HUMBLY PRAYS** for the following **ORDERS THAT:** -

- a) **THAT** a Declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the 1st Petitioner's request dated December 16, 2019 is a violation of the right to access to information.

- b) **THAT** a Declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the 1st Petitioner's request dated December 16, 2019 is a violation of 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** a declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) is a violation of the obligations imposed on the said Respondents by Chapter Six specifically Articles 73(1) and 75(1) of the Constitution and Section 3 of the Leadership and Integrity Act and Sections 8, 9 and 10 of the Public Officers Ethics Act.
- d) **THAT** a declaration be issued that the failure by the Respondents to provide information sought under Article 35(1)(a) and also to publicise the information in accordance with Article 35(3) on the basis of the 1st Petitioner's request is a violation of the principles of openness and accountability of public finance management, and impedes the ability of the petitioners and Kenyans to participate in financial matters as envisioned by article 201 of the Constitution.
- e) **THAT** an Order be issued compelling the Respondents to forthwith provide, at the Respondents' cost, information sought by the 1st Petitioner in his letters to the Respondents dated December 16, 2019 and May 13, 2021.
- f) **THAT** an Order do issue that the 4th and 5th Respondents to pay compensation to the Petitioner for violation of his right of access to information under Article 35 of the Constitution.
- g) **THAT** an Order do issue to the Respondents to report to court on the status of compliance within a stipulated time period.
- h) **Costs of the Petition.**
- i) **THAT** this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.

DATED at Nairobi this.....day of.....2021

OTIENO OGOLA & COMPANY ADVOCATES

ADVOCATES FOR THE PETITIONERS

DRAWN AND FILED BY: -

OTIENO OGOLA & COMPANY ADVOCATES
OFFICE SUITE B11, 11TH FLR CMS AFRICA HOUSE
CHANIA AVENUE OFF MARCUS GARVEY ROAD
P.O. BOX 22671-00100, **NAIROBI**

Email: willis@otienoogolaadvocates.co.ke

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

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