



**Katiba Institute & 2 others v Attorney General & another; Judicial Service Commission & 10 others (Interested Parties); Changgui & 20 others (Intended Contemnors) (Petition 268 of 2018 & 251 of 2017 (Consolidated)) [2021] KEHC 3953 (KLR) (Constitutional and Human Rights) (23 September 2021) (Ruling)**

*Katiba Institut & 2 others v Attorney General & another; Judicial Service Commission & 10 others(Interested Parties);Li Changgui & 20 others(Intended Contemnors) [2021] eKLR*

Neutral citation: [2021] KEHC 3953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 268 OF 2018 & 251 OF 2017 (CONSOLIDATED)**

**AC MRIMA, J**

**SEPTEMBER 23, 2021**

**BETWEEN**

**KATIBA INSTITUTE ..... 1<sup>ST</sup> PETITIONER  
OKIYA OMTATA OKOITI ..... 2<sup>ND</sup> PETITIONER  
KENYA COALITION FOR WILDLIFE CONSERVATION AND  
MANAGEMENT ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL ASSEMBLY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... INTERESTED  
PARTY  
NATIONAL LAND COMMISSION ..... INTERESTED PARTY  
KENYA WILDLIFE SERVICE ..... INTERESTED PARTY  
KENYA RAILWAY CORPORATION ..... INTERESTED PARTY  
CHINA ROAD AND BRIDGE CORPORATION ..... INTERESTED PARTY**



**MINISTRY OF TRANSPORT AND INFRASTRUCTURE .... INTERESTED PARTY**

**MINISTRY OF ENVIRONMENT AND MINERAL RESOURCES . INTERESTED PARTY**

**HABITAT PLANNERS TEAM ..... INTERESTED PARTY**

**AFRICA CENTER FOR OPEN GOVERNANCE ..... INTERESTED PARTY**

**HOMESCOPE PROPERIESY LIMITED ..... INTERESTED PARTY**

**AND**

**LI CHANGGUI ..... INTENDED CONTEMNOR**

**LI GEN ..... INTENDED CONTEMNOR**

**REN WENFENG ..... INTENDED CONTEMNOR**

**DELILAH WENDY AMINILIWA ..... INTENDED CONTEMNOR**

**ENG. WANGAI NDIRANGU ..... INTENDED CONTEMNOR**

**ENG. FRANCIS GITAU ..... INTENDED CONTEMNOR**

**MR. ANDREW MITEI ..... INTENDED CONTEMNOR**

**MS . MARY GESARE ..... INTENDED CONTEMNOR**

**GEORGE WANJAU ..... INTENDED CONTEMNOR**

**PROTUS SIGEI ..... INTENDED CONTEMNOR**

**CHARLES GATHOGO ..... INTENDED CONTEMNOR**

**ENG. CAREY O. OREGE ..... INTENDED CONTEMNOR**

**ENG. PETER M. MUNDINIA ..... INTENDED CONTEMNOR**

**ENG. SAMUEL O. OMER ..... INTENDED CONTEMNOR**

**ENG. DAVID MUCHILWA ..... INTENDED CONTEMNOR**

**ENG. JAMES NJUGUNA GATTU ..... INTENDED CONTEMNOR**

**JAMES KOLUM BOWEN ..... INTENDED CONTEMNOR**

**WILLIAM MASITA ..... INTENDED CONTEMNOR**

**NORAH ODINGO ..... INTENDED CONTEMNOR**

**LEVINA WANYONYI ..... INTENDED CONTEMNOR**

**KENYA NATIONAL HIGHWAYS AUTHORITY .... INTENDED CONTEMNOR**

## **RULING**

### **Introduction:**

No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.



(A statement by Theodore Roosevelt, the 26<sup>th</sup> President of the United States of America)

1. The application subject of this ruling is a Notice of Motion dated 10<sup>th</sup> September, 2020. It is taken out by the 1<sup>st</sup> Petitioner herein, Katiba Institute and the 10<sup>th</sup> Interested Party, Africa Center for Open Governance. The application seeks to cite the 21 persons referred to in the above title as ‘the Intended Contemnors’ for disobedience of Court orders.
2. The application is opposed.

**The Application:**

3. The application did not indicate the provisions of the law under which it was hinged on. However, it seeks the following orders: -
  1. This Application be certified and is certified urgent for a recess hearing on a virtual platform;
  2. The Applicants be and is granted leave to serve this application on the 1<sup>st</sup> to 4 the contemnors through the 6<sup>th</sup> Interested Party’s advocates on record; and on the 5<sup>th</sup> to 21<sup>st</sup> contemnors Respondents through KENHA’s official email addresses: dg@kenha.co.ke and communication@kenha.co.ke;
  3. The court does find the Intended Contemnors in contempt of court in this matter and does, upon mitigation, sentence them appropriately;
  4. The contemnors do personally bear the costs of this motion.
4. The application is supported by three Affidavits sworn by Lempaa Suyinka, Michael Kioko Munguti and Abiud Onyach respectively. It is also further supported by the Petitioners’ written submissions dated 10<sup>th</sup> September, 2020 and a List of Authorities. Mr. Ochiel Dudley, Learned Counsel appeared for the Applicants.
5. The 2<sup>nd</sup> Petitioner herein, Okiya Omtatah Okoiti, supports the application.
6. The application is opposed by the Hon. Attorney General on behalf of itself as the 1<sup>st</sup> Respondent, the Ministry of Transport and Infrastructure (the 7<sup>th</sup> Interested Party), the Ministry of Environment and Mineral Resources (8<sup>th</sup> Interested Party) and the Kenya National Highways Authority (the 21<sup>st</sup> Intended Contemnor). The Attorney General filed Grounds of opposition, written submissions and a List of Authorities. Mr. Moimbo, Learned State Counsel appeared on behalf of the Hon. Attorney General.
7. China Road and Bridge Corporation (the 6<sup>th</sup> Interested Party), Li Changgui (the 1<sup>st</sup> Intended Contemnor), Li Gen (the 2<sup>nd</sup> Intended Contemnor), Ren Wenfeng (the 3<sup>rd</sup> Intended Contemnor) and Delilah Wendy Aminiliwa (the 4<sup>th</sup> Intended Contemnor) are also jointly opposed to the application. They filed Grounds of opposition, a Replying Affidavit sworn by one Jude Obiero, written submissions and a List of Authorities. Mr. Ondego, Learned Counsel appeared for the respective parties.

**Issues for Determination:**

8. From my reading of the Court documents filed and consideration of the submissions of the Parties, I have identified the following two main issues for determination: -
  - i. The competency of the application;



- ii. Whether the application ought to be allowed;
9. I will deal with the issues in seriatim.

**Analysis and Determination:**

The competency of the application:

10. Mr. Moimbo and Mr. Ondego lead a joint attack on the application. They vehemently argued that the contempt application is misconceived and incompetent on two grounds. The first ground is that this Court has not issued any orders stopping the construction of the Nairobi Expressway Project and the second ground is that the application flies in the face of ongoing proceedings at the National Environment Tribunal in NET 19 of 2020 where the Nairobi Expressway Project is being litigated.
11. According to Counsel, the 1<sup>st</sup> Petitioner, among others, lodged an appeal against the grant of the licence by the National Environment Management Authority, the 2<sup>nd</sup> Interested Party herein, for the construction of the Nairobi Expressway before the National Environment Tribunal (hereinafter referred to as ‘the Tribunal’). It is Tribunal NET No. 19 of 2020. They posit that the appeal is pending.
12. It is also argued that the 1<sup>st</sup> Petitioner herein and the 10<sup>th</sup> Interested Party herein have, among other Appellants before the Tribunal, filed an application dated 29<sup>th</sup> June, 2020 seeking stop orders against the construction of the Nairobi Expressway. The Tribunal is yet to determine the said application or to issue any stop order against the construction of the Nairobi Expressway.
13. Counsel further argued that the application is just aimed at vexing the proceedings before the Tribunal and that it ought to be struck out. They referred to several decisions in support of their arguments.
14. Mr. Ochiel Dudley countered the foregoing arguments. On whether this Court has issued any order against the construction of the Nairobi Expressway, Counsel submitted that indeed the order of this Court issued on 24<sup>th</sup> September, 2018 is an order in rem which binds everyone including the intended contemnors herein.
15. The 2<sup>nd</sup> Petitioner argued that the Tribunal has no jurisdiction to punish for the contempt of Court in issue, but this Court. He cited the provisions of the Interpretation and General Provisions Act on the effect of a repealed law which is reinstated.
16. In order to clearly understand the genesis of the above arguments, it is imperative to have a quick look at the background of the application.
17. Petition No. 251 of 2017 which is filed by the 2<sup>nd</sup> Petitioner seeks to challenge the constitutionality of the amendments brought to Section 129 of the Environmental Management and Co-ordination Act, 1999 (hereinafter referred to as ‘the EMCA’) vide Section 29 of the Prevention of Torture Act, 2017. The Petitioner therein prays for the following orders: -
  - i. A declaration that there is no nexus between the Environmental Management and Co-ordination Act 1999 and the Prevention of Torture Act 2017 to warrant the amendment of Section 129 of the Environmental Management and Co-Ordination Act 1999 vide Section 29 of the Prevention of Torture Act 2017.
  - ii. A declaration that It was improper for drastic amendments affecting the Environmental Management and Co-Ordination Act 1999, which required the publication of a standalone Bill, to be effected via miscellaneous provisions to the totally unrelated the Prevention of Torture Act.



- iii. A declaration that to the extent that the amendments to section 29(4) of the Environmental Management and Co-Ordination Act 1999 apply retrospectively, the said. Amendments violated the principles of natural justice that form the basis of the Constitution.
  - iv. A declaration that the action of introducing the impugned amendment on the floor : of the House, when the same was not the subject of the Bill that was published and was subjected to public participation, was contrary to the letter and spirit of Article 10 as read with Article 115 of the Constitution and, therefore, null and void ab initio.
  - v. A declaration that the amendment to Section 129(4) of the Environmental Management and Co-Ordination Act 1999 vide Section 29 of the Prevention of Torture Act 2017 is unconstitutional and therefore, null and void.
  - vi. An order quashing Section 29 of the Torture Act for being unconstitutional and, therefore null and void.
  - vii. An order that the costs of this suit be provided for.
  - viii. Any other relief the court may deem just to grant.
18. In Petition No. 268 of 2018, the 1<sup>st</sup> Petitioner challenges the constitutionality of the amendments brought to two Sections of the EMCA. They are Sections 125 and 129. The Petition prays for the following orders: -
- a. A declaration that the power and the function to appoint the Chairperson and other members of the National Environmental Tribunal is an exclusive function of the Judicial Service Commission in accordance with Article 172(1)(c) and cannot be limited, defined or broadened through statutory sophistry.
  - b. A declaration that section (2014) is unconstitutional because it violates or threatens to violate the principle of sustainable development under Article 10, and the right to a clean and healthy environment guaranteed by Article 42 of the Constitution of Kenya and further its retroactive application plates the rule of law principle under Article 10 of the Constitution.
  - c. A declaration that the amendments made on Sections 125 and 129 of the Environmental Management and Co-ordination Act No 8 of 1999 through the Statute Law (Miscellaneous Amendment) Act 2018 were done without meaningful and qualitative public participation in violation of the constitution.
  - d. An order invalidating sections 125(1)(bi-(d), Section 125(2) Section 125(4) C. Section 125(5) and Section 129(4) of the Environmental Management and Co-ordination Act No 8 of 1999.
  - e. An order directing the Judicial Service Commission to make the necessary appointments for the Chairperson and members of the National Environment Tribunal in strict compliance with Articles 172(1)(c) and 172(2)(a) and the Judicial Service Act.
  - f. Costs of this Petition.
  - g. Any other or further relief that this Honourable Court may deem fit and just to grant in the circumstances.
19. Prior to the impugned amendment of Section 129 of the EMCA, sub-section (4) thereof stated as follows: -



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.

20. The amendment changed the above provision as follows: -

Any status quo automatically maintained by virtue of the filing of any appeal prior to the commencement of subsection (3) shall lapse upon the commencement of this section unless the Tribunal, upon application by a party to the appeal, issue fresh orders maintaining the status quo in accordance with subsection (3)(a).

21. The Petitioners herein sought interim reliefs in the consolidated Petitions. On 24<sup>th</sup> September, 2018 this Court (Okwany, J.) issued the following order: -

1. That this matter be and is hereby consolidated with Petition No.251 of 2017 so that the two can be tackled at the same time.
2. That pending the hearing and determination of this Application inter-partes, an order do and is hereby issued, reinstating the statutory status quo before the amendment of Section 129(3) (d)(e) and (4) of the Environmental Management and Co-ordination Act 1999 by the Statute law (Miscellaneous) Amendment) Act, 2018.
3. All pending the wing and determination of this petition a Conservatory Order be and is hereby issued staying or suspending the implementation and operation of Section 125(1) and (5), and 129(3)(d)(e) and (4) ) of the Environmental management and Co-ordination Act 1999 as amended by Statute Law (Miscellaneous Amendment) Act. 2018.

22. It is the above order which formed the basis of the current application.

23. As stated, the licence authorizing the construction of the Nairobi Expressway was challenged in NET No. 29 of 2020. The appeal is still pending. There is no opposition to the fact that there is a pending application in the said appeal seeking stop orders against the construction of the Nairobi Expressway. That application is dated 29<sup>th</sup> June, 2020.

24. The application before the Tribunal in NET No. 29 of 2020 was filed by among others, the 1<sup>st</sup> Petitioner herein. As at the time of filing the said application before the Tribunal, the 1<sup>st</sup> Petitioner had long obtained the conservatory orders in the consolidated Petitions. Still, with the conservatory orders at hand, the 1<sup>st</sup> Petitioner sought for stop orders before the Tribunal.

25. The filing of the application before the Tribunal cannot, therefore, be said to have been in vain. It must have been based on an informed decision. That decision must have lingered around several legal issues including whether the conservatory orders issued in the consolidated Petitions automatically stopped the construction of the Nairobi Expressway.

26. The application before the Tribunal is yet to be determined. Had it not been the pendency of that application I would have endeavored a discussion on the effect of the conservatory orders on the construction of the Nairobi Expressway and whether the contemnors are guilty of disobedience of Court orders. However, such an attempt will in a way pre-empt the application before the Tribunal and will further curtail a party's appeal before the superior Courts.

27. Given the prevailing state of affairs, the order which best commends itself is that this Court exercises restraint and allow the Tribunal to determine the application seeking the stop orders. In the event the application is successful and there is disobedience, then the issue as to whether it is this Court, the Tribunal or any other Court which ought to punish for contempt of Court will be addressed.



28. Having said so, this Court agrees that the Notice of Motion dated 10<sup>th</sup> September, 2020 cannot stand. With such a finding, there is no value in dealing with the second issue.
29. This Court is also alive to the fact that the consolidated Petitions have been pending for the last couple of years. There is need for an expedited determination. The Court will issue appropriate directions to that end.
30. In the premises, the following final orders do hereby issue: -
  - a. The Notice of Motion dated 10<sup>th</sup> September, 2020 is hereby struck out.
  - b. Any party yet to respond to the consolidated Petitions shall do so within 14 days of this order.
  - c. The consolidated Petitions shall be heard by way of reliance on the Affidavit evidence and written submissions.
  - d. The Petitioners shall file and serve any supplementary response, if need be, together with written submissions within 14 days of (b) above.
  - e. The Respondents and the Interested Parties shall file and serve their respective written submissions within 14 days of service.
  - f. Highlighting of submissions on a date suitable to the Court and the parties.
  - g. Since the consolidated Petitions are in public interest, each party shall bear its own costs in respect to the Notice of Motion dated 10<sup>th</sup> September, 2020.
  - h. The Petitioners shall within 7 days' extract and serve a copy of this order upon the rest of the parties who are not before Court today.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021**

**A. C. MRIMA**

**JUDGE**

**Ruling No. 3 virtually delivered in the presence of:**

Mr. Ochiel Dudley, Counsel for the 1<sup>st</sup> Petitioner and 10<sup>th</sup> Interested Party.

Okiya Omtatah Okoiti, the 2<sup>nd</sup> Petitioner in person.

Mr. Moimbo, Counsel for the 1<sup>st</sup> Respondent, 7<sup>th</sup> and 8<sup>th</sup> Interested Parties and 21<sup>st</sup> Intended Contemnor.

Mr. Ondego, Counsel for the 6<sup>th</sup> Interested Party, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Intended Contemnors.

Elizabeth Wanjohi – Court Assistant.

