



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 159 OF 2018**

**IN THE MATTER OF: CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
ENSHRINED UNDERS ARTICLES 6, 10, 43(1), 55, 174 & 186 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: INTERPRETATION, ENFORCEMENT AND PROTECTION OF BILL OF RIGHTS UNDER  
ARTICLES 19, 20, 22, 23, 24, 165 AND 258 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**WILLIAM ODHIAMBO RAMOGI.....1<sup>ST</sup> PETITIONER**

**ASHA MASHAKA OMAR.....2<sup>ND</sup> PETITIONER**

**GERALD LEWA KITI.....3<sup>RD</sup> PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF TRANSPORT AND**

**INFRASTRUCTURE.....2<sup>ND</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION.....4<sup>TH</sup> RESPONDENT**

**MUSLIMS FOR HUMAN RIGHTS.....1<sup>ST</sup> INTERESTED PARTY**

**MAINA KIAL.....2<sup>ND</sup> INTERESTED PARTY**

**RULING OF THE COURT**

1. By an application dated 25<sup>th</sup> June, 2018 brought under Article 165(3) (b) of the Constitution of Kenya, the Petitioners/Applicants seek to have this Petition placed before the Honorable the Chief Justice of the Republic of Kenya for the purpose of constituting a panel of 5 judges to hear and determine this Petition. The application is premised on the grounds set out therein and those in the supporting affidavit of WILLIAM ODHIAMBO RAMOGI sworn on 25<sup>th</sup> June, 2018.

2. The Applicants aver that the Petition involves the interpretation of the Constitution of Kenya 2010 with respect to the functions of County and National Governments in the management and operation of the Port of Mombasa. The Applicants allege that this is a novel issue that is

yet to be determined by the courts.

3. The Applicants claim that the Petition also seeks to determine the actions of the Respondents vis-à-vis the social and economic rights of the residents of Mombasa enshrined under Article 43 of the Constitution.

4. It is the Applicants' case that the Petition raises complex matters that are of public interest.

5. The Respondents and Interested Parties did not respond to the Application. The Application was canvassed by way of written submissions.

#### **Submissions**

6. The Petitioners filed their submissions on 6<sup>th</sup> July, 2018, while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed theirs on 9<sup>th</sup> July, 2018; the 3<sup>rd</sup> Respondent on 28<sup>th</sup> June, 2018; the 4<sup>th</sup> Respondent on 6<sup>th</sup> July, 2018; and the Interested Parties on 6<sup>th</sup> July, 2018.

7. **Ms. Kihoro**, Counsel for the Petitioners submitted that this court under Article 165 (3) (b) and (d) of the Constitution has the jurisdiction to determine whether a right or fundamental freedom has been violated or threatened. In exercise of this jurisdiction, Counsel contended that Article 165 (4) allows this court to certify a matter as raising a substantial question of law thus requiring to be heard by an uneven number of judges being not less than three assigned by the Chief Justice.

8. Ms. Kihoro submitted that the petition herein raises a substantial question of law. Counsel, while relying on the case of **Sir Chunilal V. Mehta vs. Century Spinning and Manufacturing Co Ltd 1962 SC 1314** opined that a substantial question of law is one which is of general public importance. Counsel submitted that this petition is of general public importance as the outcome of the petition will affect the social and economic rights of the residents of Mombasa, determine the impact of the actions of the Respondents to the economy of Mombasa County, and affect the relationship between the national government and the county government in relation to the Port of Mombasa.

9. Ms. Kihoro submitted that the issues raised in this petition were novel and have not been previously determined by any superior court in Kenya. Counsel urged this court to consider the following as the novel issues:

a. Whether or not the actions by the Respondents to obligate the 3<sup>rd</sup> Respondent consign to the 4<sup>th</sup> Respondent as a carrier a set volume of cargo via the Standard Gauge Railway to Embakasi ICD threatens and/or contravenes the social and economic rights of the Petitioners and Mombasa County residents as provided for in Article 43 of the Constitution of Kenya.

b. The impact of the Respondents actions on the economy of Mombasa.

c. Whether the actions by the Respondents are against the spirit of devolution.

d. The interpretation of the Constitution with respect to the collection and arrangement of functions of the County government and national government in relation to regulation, management and operations at the Port of Mombasa on the basis of devolution as provided for in the fourth schedule to the Constitution at paragraph 2 sub-paragraph 5€ wherein the County is vested with the function to manage county transport including harbors, excluding the regulation of International and national shipping and matters related thereto.

10. Ms. Kihoro submitted that this petition was complex and multifaceted as it involved not only the legal discipline but was also intertwined with political, social and economic disciplines. Due to this alleged complexity, Counsel contended that a single judge may be overwhelmed by the workload. Counsel also opined that the decision of a panel of judges may have more jurisprudential weight than that of a single judge. According to Counsel the panel should constitute of five (5) judges.

11. **Mr. Wachira**, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in support of the application submitted that the petition had raised issues of public interest as it entailed investigation of human rights vis-à-vis devolution and port management.

12. **Mr. Kongere**, Counsel for the 3<sup>rd</sup> Respondent also in support of the application submitted that the petition raises a substantial question of law. Counsel relied on the definition of "*substantial question of law*" given by the court in the case of **National Super Alliance (NASA) Kenya vs. Independent Electoral and Boundaries Commission [2017] eKLR** where the term was described as follows:

**"The test rendered by the Supreme Court of India for determining whether a matter raises substantial question of law are therefore: (1) whether directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view."**

Counsel submitted that the petition herein sought the interpretation of what constitutes "county transport". According to Counsel no superior court in Kenya has settled this question.

13. In relation to public importance, Mr. Kongere submitted that the petition seeks to protect the social and economic rights of the residents of Mombasa; the decision to transport cargo by the standard gauge railway or by road is of national importance; and the port of Mombasa is a national security installation. Counsel also contended that the 3<sup>rd</sup> Respondent's application to strike out the petition raised an important constitutional issue to wit, whether disputes such as the one in this petition should be resolved by resorting to a petition or by invoking

Section 35 of the Intergovernmental Relations Act.

14. As to whether the panel should constitute three or five judges, Mr. Kongere opined that a bench of five (5) judges would better dissect the complex questions of law raised by the Petition.

15. **Ms. Kaguri**, counsel for the 4<sup>th</sup> Respondent in further support of the application submitted that the petition had raised substantial issue of law as it seeks interpretation of Article 19, 20, 22, 23, 24, 165 and 258 of the Constitution in relation to the functions of the county and national governments in the management and operation of the Port of Mombasa. Counsel contended that these issues affected the general public and the East Africa region at large. Accordingly, Counsel opined that a panel of five (5) judges as opposed to three (3) judges would be better placed to determine the issues raised by the petition.

16. **Mr. Otieno**, Counsel for the Interested Parties also supported the application and submitted that the petition raises a substantial question of law as it meets the threshold set in the case of **Sir Chunilal V. Mehta vs. Century Spinning and Manufacturing Co Ltd (supra)** as the matters raised directly affect the rights of the parties; the matter is complex; issues raised are novel; and the issues raised have not been determined by any other court. However, Counsel submitted that the list offered by the Supreme Court of India in the aforementioned case was not exhaustive but simply a guide. According to Counsel, the issue of empanelment is largely within the discretion of the judge and each case must be evaluated on its own. Counsel pointed out the substantial questions of law as being the governance and decision making at the national and county government levels where the subject is a natural resource; and the administrative and managerial functions of the two levels of government with regard to the operations of the Port of Mombasa. Counsel contended that the impact of the decision in the petition will not only affect the residents of Mombasa but also the public at large.

### **The Determination**

17. The Petition herein was filed on 24<sup>th</sup> May, 2018 by the Petitioners who seek the following orders:

- a. A declaration that the Agreement dated 30<sup>th</sup> September, 2014 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent, threatens and/or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition herein and thus unconstitutional;
- b. A declaration that the 3<sup>rd</sup> Respondent's operations vide its Embakasi ICD threatens and/or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition herein and thus unconstitutional;
- c. A declaration that the Respondents have failed to safeguard the public interest and common good of Mombasa County residents by failing to protect their social and economic rights on the grounds stated in the Petition;
- d. An order that the port services be assigned to the National and County government of Mombasa in accordance with the Constitution and particularly that the management and operations of the port is a function of the Mombasa County and the National Government be responsible for regulation functions;
- e. An order that Mombasa County establishes a corporate body with the mandate to run the management and operational functions of the port in accordance with established law;
- f. An order that the Respondents actions complained of herein contravene Article 6, 10, 43(1), 55, 174 & 186 of the Constitution.

18. Subsequent to filing the Petition, the Petitioners filed this application seeking that this court finds that the petition raises substantial questions of law and refers the same to the Chief Justice for the purposes of constituting a panel of five (5) judges to hear and determine the petition.

19. The only issue that arises for determination by this court is whether the petition encompasses substantial questions of law necessitating empanelment of an odd number of judges by the Chief Justice, and if this issue is determined in the affirmative, whether the panel should constitute of three (3) judges or five (5) judges.

### **Whether the petition raises a substantial question of law**

20. Article 165(3) of the Constitution grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied or threatened or violated and to interpret the Constitution. The said Article reads as follows:

**(3) Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) 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;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

Sub-article (4) of the said Article then goes ahead to provide that any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) above shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

21. It is therefore evident that for a matter to be considered for hearing and determination by an uneven number of judges assigned by the Chief Justice, the matter must involve a substantial question of law. What then is a substantial question of law? The Constitution does not provide a definition for the term substantial question of law. However, in the case of **Sir Chunilal V. Mehta and Sons Ltd vs. Century Spinning and Manufacturing Co. Ltd (supra)**, the Supreme Court of India describe the term “substantial question of law” as follows:

**“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”**

22. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross section of the public. All parties are in agreement that the petition raises issues which affect not only the parties but members of the general public.

23. In determining whether a matter necessitates empanelment, the courts are also required to consider whether a matter is complex and time consuming and if it raises a novel issue which has not been previously determined by other courts, See the case of **Martin Nyaga and Others vs. Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR**.

24. However, despite the above guiding principles, a court can exercise its own discretion to determine whether or not a substantial question of law has been raised.

25. I have carefully read through the Petition. Accordingly I find that the following issues arise:

**a. Whether the agreement dated 30<sup>th</sup> September, 2014 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondents threatens and/or violates the rights of the Petitioners and residents of Mombasa County as expressed under Article 43 of the Constitution.**

**b. Whether the management and operation of the Port of Mombasa is a function of the National Government or the County Government of Mombasa.**

**c. The correct interpretation of Article 43 of the Constitution and whether the rights expressed therein can be limited.**

**d. Whether the agreement dated 30<sup>th</sup> September, 2014 is unconstitutional or whether it violates Articles 6, 10, 43(1), 55, 174 & 186 of the Constitution.**

**e. To what extent was the aspect of transportation devolved to the county governments.**

**f. The correct interpretation of Article 189 of the Constitution.**

26. The above issues are in my view substantial questions of law and the outcome of their determination may not only affect the residents of Mombasa County but the public in general. The Standard Gauge Railway (SGR) is a project of the national government which is meant to benefit Kenyans by easing transportation to and from the coastal region. The agreement dated 14<sup>th</sup> September, 2014 entered into by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents revolves around the transportation of cargo from Mombasa to Embakasi ICD in Nairobi. Prior to the construction of the SGR, cargo was predominantly transported by trucks. Various businesses have been established for the purpose of facilitation of cargo transportation. These businesses not only belong to residents of Mombasa but to persons across the country and even outside our borders. The agreement has been the subject of great discussion on its merits and demerits. The impact of the agreement can therefore not be restricted to the County of Mombasa.

27. In the opinion of this court, the petition herein is of public interest, the balance tilts towards empanelment. I have also noted that the issues raised by this petition have not been subjected to litigation before any court. In the case of **Amos Kiumo & 2 others vs. Cabinet**

**Secretary Ministry of Interior & Coordination of National Government & 3 others [2014] eKLR**, Lesiit J opined that the substantial question of law should not merely be novel and complex, but should also present unique facts not plainly covered by the controlling precedents. Some aspects of the issues raised in this petition may have been covered by precedents, for example, the issue of devolution. However, this court believes that the circumstances exhibited in this petition may not be similar to those found in the already decided cases.

28. Ultimately, I do find that the matters raised by this petition are weighty and of great public importance. They raised novel questions of law which should be heard and determined by an odd number of judges in accordance with Article 165(4) of the Constitution.

29. As to the issue of the number of Judges on the panel, the Petitioners, 3<sup>rd</sup> Respondent and 4<sup>th</sup> Respondent opined that a panel of five Judges will be better placed to deal with the petition than three Judges. To support this assertion they contended that the petition could be burdensome and time consuming. The odd number of Judges to be constituted in a bench is an administrative action of the Honorable the Chief Justice. The Chief Justice shall exercise his discretion in light of the circumstances of the said petition.

30. Accordingly, the Application dated 25<sup>th</sup> June, 2018 is allowed. The Petition herein is hereby certified under Article 165(4) of the Constitution as raising substantial questions of law and is to be transmitted to the Office of the Chief Justice to enable the Chief Justice constitute an uneven bench of not less than three Judges to hear and determine the Petition.

31. Costs shall be in the cause.

**Dated, Signed and Delivered in Mombasa this 24<sup>th</sup> day of July, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Ms. Nyabira for Petitioners

Ms. Kaguri for 4<sup>th</sup> Respondent

Mr. Alwenya holding brief Mr. Otieno for Interested Parties

Mr. Wachira for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Ms. Kaguri holding brief Mr. Kongere for 3<sup>rd</sup> Respondent

Mr. Kaunda Court Assistant