



IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 58 OF 2014

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

NYAKINA WYCLIFF GISEBE.....2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

KENYA RAILWAYS CORPORATION..... 2ND RESPONDENT

PUBLIC PROCUREMENT

OVERSIGHT AUTHORITY 3RD RESPONDENT

CHINA ROAD AND

BRIDGE CORPORATION (KENYA)..... 4TH RESPONDENT

RULING NO. 3

1. This matter concerns the construction of the Standard Gauge Railway (SGR). It is therefore a matter of great public interest and that is why the petitioners, acting in public interest, have filed the petition seeking from the court relief for breaches of the Constitution and the law in implementing the project.
2. The petitioners' written submissions are titled, "*Justice delayed is Justice Denied.*" They submit that on 5th February 2014, they moved the Court by way of the petition and an ex-parte Notice of Motion under Certificate of Urgency complaining that the SGR project was contaminated with corruption and other violations of the Constitution and Statute, including oversight by both Parliament and the Controller of Budget and that their pleading clearly demonstrated this fact.
3. In their submissions they state, "*Therefore it is unacceptable that, to date, some damning **one hundred days late**, the Notice of Motion has not been disposed off even though the matter was*

certified as urgent. The enormity of delay can best be understood when it is held against the fact that an American President is given a performance assessment of his four year terms' agenda after his first one hundred days in office!" They continue "My Lord, whatever, the mitigating reasons, it goes without saying that justice delayed is justice denied. Given the gravity of the matter herein, the Petitioners had a legitimate expectation that the matter at least the Notice of Motion dated 5th February 2014 would have been disposed of by now."

4. In order to put the matter in perspective, it would be proper to give a history of the suit. The petition and an ex-parte application were filed on 5th February 2014 and the matter came before me on 6th February 2014, I certified it as urgent and directed that it be served and fixed for directions on 21st February 2014.
5. When the matter came up on 21st February 2014, the respondents had filed applications. The 1st and 3rd respondents filed a preliminary objection to the petition, the 2nd respondent filed a Notice of Motion dated 20th February 2014 seeking to strike out the petition while the 4th respondent also filed a Notice of Motion dated 20th February 2014 seeking to strike out the petition. I gave petitioner time to respond to the Notices of Motion and the preliminary objection that had been lodged by the respondents. I adjourned the matter to 13th March 2014 for further directions as to hearing of the matter.
6. On 13th March 2014, I directed that the petitioners deal with the issue whether this matter should be heard by a bench of not less than three judges empaneled by the Chief Justice under **Article 164(4)** of the Constitution as this was a prayer in the Notice of Motion dated 5th February 2014. I heard arguments from all the parties and delivered my ruling on the same day where I declined petitioners' request.
7. After delivery of the ruling, I issued further direction that the respondents' Notices of Motion and Preliminary objection be heard on 8th April 2014. As the Notices of Motion were in the nature of preliminary objections, I directed that they be heard first as in point of law they went to the issue of jurisdiction.
8. On the morning of 8th April 2014, the petitioners filed a Notice of Motion of the same date requesting me to recuse myself from hearing the matter. I heard arguments on the matter and issued my ruling No. 2 in which I dismissed the application for my recusal on the same day. I directed that the Notice of Motion and preliminary objection proceed for hearing. Due to the voluminous nature of the matter and the impending High Court Easter Vacation and the fact that I was to sit at the Embu High Court for the Service Week at the end of the month, I reserved the ruling to be delivered on notice. However, I informed the parties that I would in any event not deliver it later than 30th May 2014.
9. Before I could deliver my ruling, the petitioners' moved the Court by a Notice of Motion dated 13th May 2014. On that day, I directed that the application to be served and the same fixed for further directions and orders on 15th May 2014.
10. On 15th May 2014, I tried to explain to the 1st petitioner that the reserved ruling was almost ready and that he should await its delivery instead of interposing the pending proceedings with another explanation. My attempts to explain this fact did not succeed as he insisted on arguing the Notice of Motion notwithstanding the other parties had not had the opportunity to respond to the various matters raised in the application and the affidavit in support of the application. Although the matter was coming up for directions, I obliged the petitioners and heard their application in full. As the matter was not even scheduled for hearing on that date as I had to adjourn it for further hearing on 19th May 2014 as I was sitting on a three judge bench later that morning. I gave the respondents the liberty to file any depositions if they wished to do so. I heard all the parties and

reserved the ruling.

11. The Notice of Motion dated 13th May 2014 seeks the following main orders;

[3] THAT pending the hearing and determination of the Petition herein the Honourable Court be pleased to grant an interim conservatory order staying the Financial Agreement/Contract signed between the Government of Kenya and the EXIM Bank of the People's Republic of China to finance the Mombasa-Nairobi-Malaba/Kisumu Standard Gauge Railway project.

[4] THAT the Honourable Court be pleased to order the 1st Respondent to produce a copy of the Financial Agreement/Contract (also known as the Standard Gauge Railway agreement) signed between the Government of Kenya and EXIM bank of People's Republic of China.

[5] THAT the Honourable Court be pleased to forthwith deliver the ruling pending in the Preliminary Objection and in the Notices of Motion filed by the Respondents.

[6] THAT consequent to the grant of the prayers above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

[7] THAT costs be in the cause. [Emphasis mine]

12. The Motion was supported by the affidavit of the 2nd petitioner sworn on 13th May 2014. The grounds upon which the application is founded are set out on the face of the Notice of Motion as follows;

- a. *THAT the 1st, 2nd and 3rd Respondents are acting in bad faith by engaging in activities which are prejudicial to the Petition herein, including by causing to be signed a finance agreement between the Government of Kenya and the EXIM Bank of China for the loan to be used to finance the Mombasa-Nairobi-Malaba/Kisumu Standard Gauge Railway project.*
- b. *?THAT it is contemptuous of the Court for 1st, 2nd and 3rd Respondents to have gone ahead and caused to be signed the Financial Agreement/Contract between the Government of Kenya and the EXIM Bank of China while the parties are waiting for the Ruling on the Preliminary Objection and Notices of Motion filed by the same Respondents.*
- c. *THAT in the premise, the said Financial Agreement/Contract between Kenya and the EXIM Bank of China for the Standard Gauge Railway undermines the rule of law.*
- d. *THAT the said PO and Notices of Motion are frivolous and offensive to the Mutunga Rules i.e. the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and should be disposed off immediately.*
- e. *THAT unless this application is heard and determined as a matter of urgency and stay of the said Financial Agreement/Contract is granted, the Applicants/Petitioners and other Kenyans are bound to suffer irreparably and, as a consequence, the cause of action herein will be substantially rendered nugatory.*
- f. *THAT the Petitioners have a right of access to the Constitutional Court to defend the Constitution and to safeguard their rights and those of other Kenyans which have been, are being and are in danger of further infringement.*
- g. *THAT this Honourable Court has unfettered powers and jurisdiction to make the orders sought.*
- h. *THAT it is meet and just, for the purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.*
- i. *That the balance of convenience favours a suspension of the ongoing procurement process of the standard gauge railway.*

13. The deposition of the 2nd respondent states as follows, at the material parts;

[5] THAT 11th May, 2014, the Government of Kenya and the EXIM Bank of China signed the

Standard Gauge Railway Agreement.

[6] *THAT the 1st, 2nd and 3rd Respondents are acting in bad faith by engaging in activities which are prejudicial to the Petition herein, including by causing to be signed a finance agreement between the Government of Kenya and the EXIM Bank of China for the loan to be used to finance the Mombasa-Nairobi-Malaba Kisumu Standard Gauge Railway project.*

[7] *THAT it is contemptuous of the Court for 1st, 2nd and 3rd Respondents to have gone ahead and caused to be signed the Financial Agreement contract between Kenya and the EXIM Bank of China while the parties are wailing for the Ruling on the Preliminary Objection and Notices of Motion filed by the same Respondents.*

[8] *THAT in the premise, the said Financial Agreement contract between Kenya and the EXIM Bank of China for the Standard Gauge Railway was signed in bad faith and it undermines the rule of law, making it unconstitutional, invalid, null and void.*

[9] *THAT the said PO and Notices of Motion are frivolous and offensive to the Mutunga Rules i.e. the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and should be disposed off immediately. Further and in particular, the following Mutunga Rules are offended, violated, and/or threatened by the proceedings herein: Rule 3(4); Rule 10(3) & (4); Rule 11 (2); Rule 18; Rule 21 (1) & (3).*

[10] *THAT in support of my averments above, I now annex hereto copies of newspaper cuttings in bundle marked as "Exhibit NWG-1."*

[11] *THAT unless this application is heard and determined as a matter of urgency and stay of the said Financial Contract is granted, the Applicants/Petitioners and other Kenyans are bound to suffer irreparably and, as a consequence, the cause of action herein will be substantially rendered nugatory.*

[13] *THAT in view of the above, and pursuant to the High Court's duty to promote and safeguard constitutionalism and the rule of law, I verily believe that it is now incumbent for this Honourable Court to determine the issues raised in this Application to ensure that the law will henceforth flow from the Constitution be applied with certainty across the land.*

14. For the reasons that will be clear and having regard to the history of the matter which I have outlined herein above, I will only deal with prayers 4 and 5 of the Motion. The petitioners' accuse the Court of delaying the matter and therefore denying them justice. This is the tenor and effect of the application and submissions filed. I think the proceedings I have outlined demonstrate that this matter has not been delayed when viewed from any matrix of judging judicial proceedings. Any accusation or insinuation by the petitioners that the matter has been delayed lacks any factual or legal basis.
15. The petitioner argues that the preliminary objections and Notices of Motion are frivolous and offensive offend **rules 3(4), 10(3) and (4), 11(2), 18, 21 (1) and (3)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and should be disposed off immediately.
16. The very purpose of the hearing of the preliminary objection and the Notices of Motion was to dispose of them by determining whether in fact the applications are merited. The purpose of the rules which have been called in aid by the petitioners is to balance the scales of justice between the petitioners and respondents and to allow proceedings to proceed in an orderly manner so as to meet the objective of a fair hearing. Whether the respondents' applications are frivolous or not is a matter that the court has taken arguments from all the parties and for the petitioner to make such arguments once again and seek an that the court do deliver the ruling is presumptuous at best and contemptuous of the court at worst.

17. The record is very clear that I give specific directions as to the manner in which the matter should be heard and only ruling, which I indicated would be delivered in due course, was remaining. The manner in which prayer 5 is framed leaves no doubt in the petitioners mind that the case is the petition should proceed for hearing despite the fact that the court has not issued its ruling on whether or not to strike out the claim as prayed by the respondents. It implies that court is bent on delaying the matter which fact is not borne out by the proceedings. I had already issued directions on the manner in which the application will be heard and I think to determine the application for conservatory order at this stage would amount to reviewing the manner in which I had directed that the case proceeds particularly where there is a challenge to jurisdiction pending determination.

18. In such circumstances, I find that the Notice of Motion dated 13th May 2014 is an abuse of the court process. It must meet the fate of application of such a nature. It must be struck out. It is hereby struck out. In view of the position I have taken in this matter, I decline to deliver the ruling in respect of the applications to strike out the petition and I hereby set aside all the proceedings made in respect of the pending Notices of Motion and the 1st respondent's preliminary objection.

19. The matter shall be mentioned on before the Principal Judge of the High Court as there is no other judge sitting in the Division this week for further directions and orders.

DATED and DELIVERED at NAIROBI this 26th day of May 2014.

D.S. MAJANJA

JUDGE

Mr Okoiti and Mr Gisebe petitioners appearing in person.

Mr Njoroge, Deputy Chief Litigation Counsel, instructed by the State Law Office for the 1st and 3rd respondent.

Prof. Mumma instructed by Prof. Albert Mumma and Company Advocates for the 2nd respondent.

Mr Kimani instructed by Hamilton, Harrison and Mathews for the 4th respondents.