REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC PETITION NO. 1288 OF 2016

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

KENYA WILDLIFE SERVICE (KWS).....1ST RESPONDENT

KWS BOARD OF TRUSTEES.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

KENYA RAILWAYS CORPORATION.....4TH RESPONDENT

THE CS, ENVIRONMENT &

NATURAL RESOURCES.....5TH RESPONDENT

THE HON. ATTORNEY GENE.RAL.....6TH RESPONDENT

RICHARD LEAKEY.....7TH RESPONDENT

TOM LALAMPAA.....8TH RESPONDENT

NANCY SAUMU PETE.....9TH RESPONDENT

BRIAN HEATH.....10TH RESPONDENT

PETER KINYUA.....11TH RESPONDENT

THE PS, ENVIRONMENT &

NATURAL RESOURCES.....12TH RESPONDENT

THE PS, THE NATIONAL

TREASURY.....13TH RESPONDENT

THE PS, DEVOLUTION.....14TH RESPONDENT

INSPECTOR GENERAL OF POLICE.....15TH RESPONDENT

RULING

What is before the court is a Notice of Motion application dated 18th October, 2016 in which the petitioner/applicant has sought the following reliefs;

1. That pending the inter-partes hearing and determination of the application and/or the petition herein this Honourable Court be pleased to suspend the decision conveyed in press statements and media briefs released on 31st July, 2015 and on 10th August, 2016 or wherever and howsoever by the 1st, 3rd and 4th respondents allowing the Standard Gauge Railway to be routed through the Nairobi National Park.

2. That pending the inter-partes hearing and determination of the application and/or the petition herein this Honourable Court be pleased to issue a temporary order of prohibition prohibiting the respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect in any way whatsoever to the decision by the 1st, 3rd and 4th respondents allowing the Standard Gauge Railway to be routed through the Nairobi National Park.

3. That this Honuorable Court be pleased to certify that the petition herein raises a substantial question of law and forthwith refer the case to His Lordship the Chief Justice for appointment of a bench of three or five judges pursuant to Article 165(4) of the Constitution of Kenya 2010 to hear and determine the petition.

4. That this Honourable Court be pleased to forthwith place this application for inter-partes hearing before his Lordship the Chief Justice for priority hearing.

5. 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.

6. That the costs be in the cause.

The application was brought on the grounds set out on the face thereof and on the affidavit sworn by the petitioner/applicant, Okiya Omtatah Okoiti on 18th October, 2016. The applicant contended that plans were under way to implement the decision by the 1st, 3rd and 4th respondents allowing the Standard Gauge Railway (hereinafter referred to only as "the SGR") to be routed through the Nairobi National Park. The applicant contended that it was of utmost importance that the commencement of the implementation of the said decision be suspended to protect the interest of the public and these proceedings from being rendered nugatory. The applicant contended that he brought the petition herein on the basis of evidence of intentional neglect and that his intention was to protect the Nairobi National Park (hereinafter referred to only as "the NNP") and other conservation areas under the charge of the respondents.

The applicant averred that there was intentional or conscious failure or willful neglect by the trustees of the 1st respondent to perform their duty under the law of protecting the NNP. The applicant averred that the decision by the 1st, 3rd and 4th respondents aforesaid was not based on scientific studies of any nature. The applicant averred further that the stakeholders and the public were not given a chance to participate in the process that led to that decision. The applicant contended that the said decision by the 1st, 3rd and 4th respondents to route the SGR through the NNP was drastic and arbitrary. The applicant contended that by their failure to follow proper operational procedures, the trustees of the 1st respondent engaged in gross misconduct that had exposed the NNP with extinction.

The applicant contended that the 2nd respondent was actuated by ulterior or improper and corrupt motives when it knowingly failed to engage experts and other stakeholders including the general public in their decision to allow the SGR to be routed through the NNP. The applicant contended that if the decision by the 1st, 3rd and 4th respondents was allowed to stand, it would set a very bad precedent for the 2nd respondent which would have gotten away with murder by setting very low standards on which its performance would henceforth be measured. The applicant contended that the performance of the 2nd respondent was below the rules and standards set under the Wildlife Conservation and Management Act, 2013(hereinafter referred to only as "WCM Act"), the Fair Administrative Action Act, 2015, the Statutory Instruments Act and the Code of Governance for State Corporations (*Mwongozo*). The applicant averred that in allowing the SGR to be routed through NNP, the respondents not only acted irregularly but also exceeded their powers under the Constitution of Kenya, 2010 and the statutes mentioned above.

The applicant contended that the 2nd respondent had not developed a management plan for the NNP as required under WCM Act and as such developments such as SGR could not be allowed to be routed through the NNP. The applicant contended that its failure to develop a management plan for the NNP is a demonstration of the 2nd respondent's gross incompetence for which its members ought to be dismissed from office. The applicant averred that the 2nd respondent could no longer be trusted with the safety of Kenya's wildlife and urged the court to dismiss its members from their positions as Board of Trustees of the 1st respondent.

The applicant contended that he had the *locus standi* to move the court seeking the removal of the members of the 2nd respondent from office for breach of fiduciary duty through negligence, sabotage, incompetence, dereliction of duty and violation of the law. The applicant averred that the court had both the duty and jurisdiction to stop blatant disregard of the rule of law. The applicant averred that for the reasons he had given, the petition raised matters of huge public interest which required very careful interpretation and application of the Constitution and statute. The applicant averred that the petition involved substantial questions of law within the meaning of Article 165(4) of the Constitution concerning the basic structure of the Constitution requiring seminal interpretation of the Constitution, statutes and statutory instruments. The applicant averred that there were no settled principles that could be merely applied in the determination of those legal issues. The applicant averred that the issues raised met the standard for certification that the petition raised a substantial question of law. The applicant averred that he had satisfied the test that was laid down by the Supreme Court of India in Sir Chunilal V. Mehta and Sons Ltd. *v* Century Spinning and Manufacturing Co.Ltd. AIR 1962 SC 1314 for determining whether a substantial question of law is involved in a matter. The applicant contended that he had established a prima facie case against the respondents with high chances of succeeding. The applicant averred that the respondents would suffer no prejudice if the orders sought were granted. The applicant averred that even if the matter was considered on a balance of convenience, the same titled in favour of granting the orders sought in the application.

The petitioner's application was opposed by the respondents. The 1st, 2nd, 7th, 8th, 9th, 10th and 11th respondents opposed the application and

the petition through a Notice of Preliminary Objection dated 29th November, 2016 and replying affidavits sworn on 15th December, 2016 and 8th February, 2017 by Queenton Ochieng and Doreen Mutung'a respectively. In the preliminary objection that was raised by the 1st and 2nd respondents, the 1st and 2nd respondents contended that the court had no jurisdiction to disband the 2nd respondent or to remove its members from office. The 1st and 2nd respondents contended further that the 2nd respondent was not a body corporate capable of suing and being sued in its own name and as such there was no basis for joining the 2nd respondent in the proceedings. The 1st and 2nd respondents contended further that the role of the 2nd respondent and its members namely, the 7th to 11th respondents was to manage the 1st respondent and that there was no basis for suing the 2nd and 7th to 11th respondents when the 1st respondent was a body corporate capable of suing and being sued in its own name and was already a party to the suit.

In the replying affidavit sworn by Queenton Ochieng, the 1st , 2nd and 7th to 11th respondents contended that in bringing the application before the court and the petition on which it was based, the petitioner was abusing the process of the court because the petitioner/applicant had filed another case at the National Environment Tribunal(hereinafter referred to only as "the NET") namely, NET Appeal No. 192 of 2016, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 7 others seeking reliefs similar to those sought in the application and the petition before the court. The 1st, 2nd and 7th to 11th respondents averred that on 19th September, 2016, the NET issued a stop order which effectively halted the construction of phase 2A of the SGR (Nairobi-Naivasha section). They averred that the subject matter of the application and the petition before the court was the same as the subject matter of the dispute pending before the NET. The 1st, 2nd and 7th to 11th respondents contended that the petitioner's application and petition had no basis since there was no decision placed before the court that was capable of being suspended or upon which an order of prohibition could issue. The 1st, 2nd and 7th to 11th respondents termed the petitioner's application and petition as frivolous, speculative and abuse of the process of the court. The 1st, 2nd and 7th to 11th respondents contended that the application and petition were brought with the sole intention of blocking the commencement of the construction works in respect of phase 2A of the SGR.

In the replying affidavit sworn by Doreen Mutung'a, the 1st, 2nd and 7th to 11th respondents reiterated most of what is contained in the 1st and 2nd respondents Notice of Preliminary Objection and the affidavit of Queenton Ochieng the contents of which I have highlighted above. In this affidavit, the 1st, 2nd and 7th to 11th respondents averred that in addition to NET Appeal No. 192 of 2016, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 7 others, the petitioner had also filed NET Appeal No. 200 of 2017, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 8 others seeking reliefs similar to those sought before this court. The 1st, 2nd and 7th to 11th respondents reiterated that the subject matter of the petition and the application before the court, and the matters pending before the NET was the same. The 1st, 2nd and 7th to 11th respondents averred that the petitioner had obtained an order before the NET stopping the construction of phase 2A of the SGR and that the application and the petition before court had no basis. The 1st, 2nd and 7th to 11th respondents narrated the history of the SGR project, the magnitude of the project and its benefits, and the preparations that were undertaken before the project took off.

The 1st, 2nd and 7th to 11th respondents averred that before the route of the SGR through NNP was settled on, several consultations were done with stakeholders. The 1st, 2nd and 7th to 11th respondents averred that feasibility studies were also conducted and considered on the various options that were available for routing the SGR. The 1st, 2nd and 7th to 11th respondents averred that routing the SGR through NNP would neither cause environmental harm nor interfere with wildlife movement. The 1st, 2nd and 7th to 11th respondents averred that the 4th respondent had modified the design of the SGR that passes within NNP to enhance the movement of wild animals in accordance with the requirements of the 1st and 2nd respondents. The 1st, 2nd and 7th to 11th respondents averred that several experts were involved and were consulted on the proposal to route SGR through NNP contrary to the allegations by the petitioner. The 1st, 2nd and 7th to 11th respondents averred further that there were also extensive public and stakeholder engagement in the project approval process. The 1st, 2nd and 7th to 11th respondents averred that the allegations in paragraphs 39 to 68 of the petitioner's affidavit in support of the application were baseless and were meant solely to discredit the 1st and 2nd respondents.

The 1st, 2nd and 7th to 11th respondents filed a supplementary affidavit and further affidavit on 28th November, 2018 and 18th June, 2019 sworn by Leonard Maingi on 16th November, 2018 and 17th June, 2019 respectively. In the supplementary affidavit, Leonard Maingi who was the company secretary of the 1st respondent stated that the 7th, 10th and 11th respondents were appointed to serve in the 2nd respondent on 17th April, 2015 for a term of 3 years and that their terms came to an end on 17th April, 2018 and as such they were no longer trustees of the 1st respondent. He stated further that the 8th and 9th respondents were appointed as trustees of the 1st respondent on 1st July, 2015 for a term of 3 years and that the 9th respondent's term expired on 1st July, 2018 and was not renewed while the 8th respondent resigned as a trustee of the 1st respondent in March, 2017. He stated that the 7th to 11th respondents were no longer members of the 2nd respondent or trustees of the 1st respondent. In the further affidavit, Leonard Maingi stated that on 7th December, 2018, the NET delivered a judgment in NET Appeal No. 200 of 2017, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 8 others. A copy of the judgment was annexed to the affidavit.

The 4th respondent opposed the application through a replying affidavit sworn by David Njogu on 8th March, 2017. The 4th respondent averred that the SGR was a flagship project under the Kenya Vision 2030 development agenda. The 4th respondent averred that the SGR was expected to simplify transport operations across the borders of Kenya the effect of which was to benefit the economies of Kenya and neighbouring countries. The 4th respondent averred that the Governments of Kenya and Uganda signed a memorandum of understanding (MoU) in October, 2009 to construct the SGR from Mombasa to Kampala and that a tripartite agreement was also signed by the Governments of Kenya, Uganda and Rwanda in August, 2013 to fast track the development of the SGR to their respective capital cities. The 4th respondent averred that within Kenya, the SGR was divided into 4 phases namely, 1, 2A, 2B and 2C. The 4th respondent averred that phase 1 of the project covered Mombasa to Nairobi while phase 2A was to cover Nairobi South Railway Station to Naivasha Industrial Park-Enoosupukia. The 4th respondent averred that phase 1 of the SGR(Mombasa-Nairobi) was near completion and that the petitioner's challenge was targeted at phase 2A of the project.

The 4th respondent averred that it was aware of the mandatory provisions of the Environmental Management and Co-ordination Act and related statutes that had to be complied with prior to the carrying out of the SGR project. The 4th respondent averred that its team of experts and consultants carried out an in-depth environmental and social impact assessment (ESIA) of the project as required by law and submitted a report. The 4th respondent averred further that there was extensive stakeholder and public consultation and participation in the project approval process. The 4th respondent averred that the petitioner's contention that there was no stakeholder participation and public engagement in the project approval process was misleading. The 4th respondent averred that after compliance with all the statutory and constitutional requirements, National Environment Management Authority(NEMA) issued it with Environmental Impact Assessment License (EIA License) on 13th December, 2016.

The 4th respondent averred that several route options were considered for phase 2A of the SGR and that the route over NNP was found to be the most ideal when social-economic and ecological/environmental factors were taken into account. The 4th respondent averred that when the environmental and social impact of the project was being assessed, several objections were raised by stakeholders which objections were critically evaluated and suitable mitigation measures proposed in the ESIA report. The 4th respondent averred that the complaints the subject of the petitioner's petition herein were raised and adequately addressed in the ESIA report. The 4th respondent averred that the conservation loss and its implications within NNP were considered comprehensively and it was found that the same was mitigatable by expected economic benefits of the SGR and that there would be no major adverse environmental impacts to NNP. The 4th respondent averred that the filing of the petition herein was premature and that the petition was not well founded. The 4th respondent averred that the petition was an abuse of the process of the court since the petitioner had filed multiple proceedings relating to the same subject matter in the High Court and at the NET where he obtained stop orders. The 4th respondent averred that no basis had been laid for the orders sought in the petitioner's petition which it termed as frivolous, speculative and an abuse of the court process.

The petitioner filed grounds of opposition on 4th January, 2017 in response to the Notice of Preliminary Objection by the 1st and 2nd respondents in which the petitioner contended that the preliminary objection was incompetent and amounted to an abuse of the process of the court. The petitioner contended further that the said preliminary objection was vexatious, scandalous and was brought in bad faith. The petitioner filed 1st further affidavit, 2nd further affidavit and 3rd further affidavit on 9th May, 2017 in response to the affidavits filed by the 1st, 2nd and 7th to 11th respondents sworn by Queenton Ochieng and Doreen Mutung'a, and the affidavit by the 4th respondent sworn by David Njogu. In his 1st further affidavit in response to the affidavit by Queenton Ochieng, the petitioner denied that the application and the petition herein were an abuse of the court process. The petitioner averred that the subject matter of the petition herein is different from the subject matter in NET Appeal No. 192 of 2016, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 7 others. The petitioner averred that in NET Appeal No. 192 of 2016, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 7 others he was challenging the decision of NEMA to allow the construction of phase 2A of the SGR without an EIA License.

In his 2nd further affidavit in response to the affidavit of Doreen Mutung'a, the petitioner denied that this court had no jurisdiction to determine the validity of the appointment of the trustees of the 1st respondent. The petitioner contended that section 108 of WCM Act gave him a right to move this court for determination of such issue. The petitioner reiterated that the 2nd respondent was constituted contrary to section 8(2) of WCM Act as read with Articles 10, 27, 47, 73(2)(a) and 232 of the Constitution of Kenya. The petitioner reiterated that the court had jurisdiction to remove from office irregularly appointed members of the 2nd respondent. As to whether the 2nd respondent was validly sued, the petitioner referred to Article 260 of the Constitution and submitted that "person" includes body of persons whether incorporated or unincorporated. As to whether the members of the 2nd respondent were personally liable for the acts done in their capacity as trustees of the 1st respondent, the petitioner referred to section 106(1) of the WCM Act and Articles 1(1), 2 (1) and (2), 3(1), 10(2), 20(1), 73 and 75 of the Constitution and contended that the 2nd and 7th to 11th respondents were personally liable for breaches of the law that occurred during their tenor as trustees of the 1st respondent. The petitioner averred further that NET Appeal No. 192 of 2016, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 7 others had already been determined and as such the petition herein was not *subjudice*. With regard to NET Appeal No. 200 of 2017, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 8 others the petitioner contended that his complaint in that appeal concerned the low quality of ESIA study that the 4th respondent had carried out. The petitioner contended that the 1st, 2nd and 7th to 11th respondents had not countered his contestation that they had failed to obtain parliamentary approval of their decision to route SGR through NNP.

In his 3rd further affidavit in response to the affidavit of David Njogu, the petitioner reiterated that his complaint was that the 2nd respondent had failed to comply with the mandatory provisions of the WCM Act including the 4th Schedule thereto. The petitioner averred that the 4th respondent's ESIA report could only be approved after the proposal to route the SGR through the NNP had gone through the approval process spelt out in the 4th Schedule to the WCM Act. The petitioner averred that there was no public participation in the approval process in accordance with the procedure set out in the 4th Schedule to the WCM Act. The petitioner contended that the ESIA report of October, 2016 could not have informed the decision by the 2nd respondent to allow the SGR to be routed through the NNP that was communicated to the public by the 1st, 3rd and 4th respondents on 31st July, 2015.

The petitioner's application and the 1st and 2nd respondents' preliminary objection were heard together by way of written submissions. The petitioner filed his submissions on 9th May, 2017 while the 1st, 2nd and 7th to 11th respondents filed their submissions on 22nd November, 2019. The other parties did not file submissions. I have considered the application by the petitioner together with the affidavits filed in support thereof. I have also considered the Notice of Preliminary Objection and the affidavits filed by the respondents in opposition to the application. Finally, I have considered the submissions by the petitioner and the advocates for the 1st, 2nd and 7th to 11th respondents together with the authorities cited in support thereof. The following is my view on the issues before me for determination. The court has been called upon to determine three issues namely; whether the petition before the court lies as against the 2nd respondent, whether the petitioner has established valid grounds for the grant of the conservatory orders sought and finally, whether the petition raises a substantial question of law to warrant appointment by the Chief Justice of a bench of three or five judges under Article 165(4) of the Constitution of Kenya to hear and determine the same.

Before considering the application on merit, I have a duty to deal first with the preliminary objection that was raised by the 1st and 2nd respondents which touches on the jurisdiction of the court. The need to dispose of the question of jurisdiction at the earliest opportunity was explained by Nyarangi, J.A in Owners of the Motor Vessel "Lillian S" *v* Caltex Oil (Kenya) Ltd [1989] KLR 1 as follows:

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

In Hassan Ali Joho & Another *v* Suleiman Said Shahbal & 2 others [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

> **"To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors (1969) EA 696.**
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> **'a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration …… a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion."**

In Oraro *v* Mbaja[2005]1KLR141,it was held that:

> **"A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised."**

As I have stated earlier in this ruling, the 1st and 2nd respondents' preliminary objection was to the effect that this court has no jurisdiction to remove the trustees of the 1st respondent from office and to disband the 2nd respondent. The 1st and 2nd respondents also objected to the joinder of the 2nd respondent to the petition contending that the 2nd respondent is not a body corporate capable of suing and being sued. The 1st and 2nd respondents contended further that there was no basis for suing the 2nd and 7th to 11th respondents after suing the 1st respondent. I have considered the 1st and 2nd respondents' preliminary objection. The petitioner's complaint as set out in the petition and the application before the court is that the members of the 2nd respondent as trustees of the 1st respondent failed and/or neglected to follow the law while granting permission to the 4th respondent to route phase 2A of the SGR through NNP. The petitioner has also contended that while making that decision, the 2nd respondent was not properly constituted in that the 7th to 11th respondents were not appointed in accordance with the law. The petitioner has highlighted various provisions of the WCM Act and the Constitution that were allegedly flouted by the 2nd respondent when allowing the SGR to pass through NNP. The petitioner has also cited several provisions of the law that were allegedly violated during the appointment of the 7th to 11th respondents.

Section 108(1) of the WCM Act provides as follows:

> **"(1) Any person who has reason to believe that the provisions of this Act have been, are being, or are about to be violated, may petition the Environment and Land Court as established under the Environment and Land Court Act 2011, for appropriate redress."**

I am in agreement with the petitioner that under section 108(1) of the WCM Act he has *locus standi* to bring the petition herein and this court has jurisdiction to hear and determine the petition to the extent that the same is based on alleged violation of or threatened violation of the provisions of the WCM Act. In the circumstances, I find no merit in the first and second limbs of the 1st and 2nd respondents' preliminary objection.

The petitioner's petition was brought principally under Articles 22, 23 and 70 of the Constitution of Kenya. The application for conservatory orders on the other hand was brought under rule 23 the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. I am of the view that section 108(1) of the WCM Act as read with, Article 260 of the Constitution and rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 on the interpretation of the word "person" gives the petitioner a right to bring a petition against unincorporated body. The 1st and 2nd respondents' objection that the petition does not lie against the 2nd respondent is accordingly overruled. The last limb of the preliminary objection concerned the rationality of the petitioner's decision to bring a suit against both the 1st respondent, and the 2nd and the 7th to 11th respondents. I am of the view that this issue cannot be determined as a preliminary objection. Whether or not the 2nd and the 7th to 11th respondents have been properly joined as parties to the petition can only be determined at the trial after the petitioner has put forward his case against them. Furthermore, misjoinder or non-joinder of parties cannot defeat a petition. See, rule 5(b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. For the foregoing reasons, I find no merit in the 1st and 2nd respondents preliminary

objection. The same fails wholly and is accordingly dismissed.

Having disposed of the preliminary objection, I will now consider the merit of the petitioner's application. In Kevin K. Mwiti & Others *v* Kenya School of Law & Others [2015] eKLR the court stated as follows on the principles which govern the exercise of the court's discretion in applications for conservatory orders:

> **"The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success."**

In Kenya Association of Manufacturers & 2 others *v* Cabinet Secretary Ministry of Environment and Natural Resources & 3 others [2017] eKLR the court had this to say on the same principles:

> **"In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest."**

In Gatirau Peter Munya *v* Dickson Mwenda Kithinji & 2 others [2014] eKLR the Supreme court stated as follows:

> **"[86]** ***Conservatory orders*** **bear a more decided** ***public-law*** **connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the** ***public interest.*** **Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the** ***inherent merit of a case,*** **bearing in mind the** ***public interest, the constitutional values,*** **and** ***the proportionate magnitudes, and priority levels attributable to the relevant causes."***

I have considered the petitioner's application in light of the foregoing principles. The petitioner has raised several issues in the petition. However, the issue that has a strong bearing on the conservatory orders sought concerns the validity of the decision that was made by the 1st, 2nd and 3rd respondents to allow the 4th respondent to construct phase 2A of the SGR through the Nairobi National Park(NNP). The petitioner has faulted that decision in several respects. In my view the overarching argument in the petitioner's case is that in making that decision, the 1st, 2nd and 3rd respondents failed to adhere to the overriding principles which are set out in section 4 of the WCM Act. Section 4 of the said Act provides as follows:

> **"The implementation of this Act shall be guided by the following principles—**
>
> **(a) Wildlife conservation and management shall be devolved, wherever possible and appropriate to those owners and managers of land where wildlife occurs;**
>
> **(b) Conservation and management of wildlife shall entail effective public participation;**
>
> **(c) Wherever possible, the conservation and management of wildlife shall be encouraged using an ecosystem approach;**
>
> **(d) Wildlife conservation and management shall be encouraged and recognized as a form of land use on public, community and private land;**
>
> **(e) Benefits of wildlife conservation shall be derived by the land user in order to offset costs and to ensure the value and management of wildlife do not decline;**
>
> **(f) Wildlife conservation and management shall be exercised in accordance with the principles of sustainable utilization to meet the benefits of present and future generations;**
>
> **(g) Benefits accruing from wildlife conservation and management shall be enjoyed and equitably shared by the people of Kenya."**

As stated earlier, the petitioner has termed the decision by the 1st, 2nd and 3rd respondents to allow the SGR to be routed through NNP as irrational and arbitrary claiming that the same was arrived at without due diligence and adequate public participation having been conducted. In his petition, the petitioner has also contended that the said decision was arrived at without the seeking and obtaining the consent of the Maasai Community which donated the land where the NNP is situated. The petitioner has also taken issue with failure by the 1st, 2nd and 3rd

respondents to obtain parliamentary approval for the project. The petitioner has contended further that the said decision violated Article 42 of the Constitution that requires the environment to be protected for the benefit of the present and future generations. The decision is also said to have violated Article 69 of the Constitution that enjoins the state to; ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; establish systems of environmental impact assessment, environmental audit and monitoring; eliminate processes and activities that are likely to endanger the environment; and utilize the environment and natural resources for the benefit of the people of Kenya. Section 26 of the WCM Act provides as follows;

> **"(1) The provisions of this Act with respect to conservation, protection and management of the environment shall be in conformity with the provisions of the Environmental Management and Co-ordination Act (No. 8 of 1999).**
>
> **(2) The provisions of the Environmental Management and Co-ordination Act, 1999 (No. 8 of 1999) regarding reference to the Tribunal established under that Act shall apply to hearing of appeals arising from the decisions made under this Act."**

It is common ground that the dispute over the routing of SGR through NNP was taken before the National Environment Tribunal (NET) established under the Environmental Management and Co-ordination Act, No. 8 of 1999 by the petitioner by way of an appeal before the petition herein was filed. It is also common ground that after filing this petition, the petitioner filed another appeal at the NET challenging the Environmental Impact Assessment License (EIA license) that was granted to the 4th respondent by NEMA for the construction of phase 2A of the SGR through NNP. In his second appeal at the NET namely, NET Appeal No. 200 of 2017, Okiya Omtatah Okoiti and another *v* National Environment Management Authority and 8 others, the petitioner joined most of the respondents herein as parties and raised the same issues concerning the need to conserve the environment and natural resources that he has raised in the petition herein. In the appeal, the petitioner contended that while approving phase 2A of the SGR, NEMA relied on an incomplete and incompetent ESIA report. The petitioner contended further that no public participation was conducted and that NEMA ignored submissions by experts, conservationists and other stakeholders on the negative effects of the SGR more particularly to the animals within the NNP. In the appeal the petitioner sought among others, an injunction restraining the respondents in the appeal from commencing and/or continuing with the construction of phase 2A of the SGR and an order that the SGR should not pass through the NNP and that the same should be implemented in strict compliance with the law.

While this petition was pending the appeal before the NET was heard and a judgment delivered on 7th December, 2018 dismissing the same. In the judgment, the NET found that there was adequate stakeholder engagement and public participation during the preparation of the ESIA report on the basis of which NEMA issued EIA license to the 4th respondent herein for the construction of phase 2A of the SGR. The NET also considered and overruled the petitioner's contention that parliamentary approval under Article 71 of the Constitution was required before NEMA could grant EIA license to the 4th respondent. The NET considered also whether alternative routes for the SGR phase 2A were considered and whether the route through NNP was the most ideal. The NET found that several routes were considered and that the route through the NNP was found as the best option. The NET also found that the SGR was not going to dissect the NNP into two as was claimed by the petitioner and that the section of the SGR through the park was hoisted on raised pillars to ensure that the animals in the NNP could move freely. The NET which also visited the SGR route through NNP found no merit in the appeal. No evidence or material was placed before this court showing that the said decision by the NET has been varied or set aside.

Having analysed all the evidence and other material placed before the court by both parties, I am not satisfied that the petitioner has established a prima facie case against the respondents with a probability of success. The evidence before the court shows that there was extensive stakeholder engagement and public participation in the process leading to the approval of the route for phase 2A of the SGR. There is also evidence that several route options were considered for phase 2 of the SGR before the route through NNP was chosen. There is also evidence that possible negative impacts of the project on the NNP were identified and addressed. The evidence before the court shows that adjustments were made to the design of the section of the SGR that was to pass through the NNP to minimise interference with movement of animals within the park. The ESIA report that was produced by the respondents shows that other mitigation measures and project monitoring programmes were also put in place to address other negative impacts of the project.

I am not convinced at this stage that the decision to route the SGR through NNP was made arbitrarily and that the same was irrational as claimed by the petitioner. What the petitioner placed before the court as evidence of the said decision by the 1st, 2nd, 3rd and 4th respondents was also wanting. The petitioner relied on what looks like copies of slides of a power point presentation that was made on 13th September, 2016 by the 4th respondents' Managing Director during a media briefing on phase 2A of the SGR. The document is not signed. The other document that the petitioner relied on as evidence of the contested decision is what the petitioner referred to as a joint press statement that was issued by the 1st, 3rd and 4th respondents on 31st July, 2015. Again the document is not signed by any of these respondents. As was rightly submitted by the respondents, the contents of these documents cannot constitute a decision capable of being suspended or whose implementation can be stayed by the court. As I stated earlier, the limb of the petitioner's petition challenging the validity of the appointment of the trustees of the 1st respondent has no bearing on the conservatory orders sought by the petitioner. The less said about that aspect of the claim at this stage the better. I wish to state however that looking at the provisions of section 8 of the WCM Act on the appointment of trustees of the 1st respondent, there is no prima facie evidence that the 7th to 11th respondents were appointed as trustees of the 1st respondent unlawfully. In view of my finding that a prima facie case has not been established by the petitioner, the threshold for grant of a conservatory order has not been met. The orders sought cannot therefore be granted.

The final issue for determination is whether the petition herein raises a substantial question of law to warrant certification under section 21(2) of the Environment and Land Court Act, 2011 as read with Article 165(4) of the Constitution. The question as to what constitutes a substantial question of law was interrogated by the Court of Appeal in the case of Okiya Omtatah Okoiti & another *v* Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 3 others, Nairobi Civil Application No. 3 of 2015 (UR 3/2015) [2015] eKLR where the court stated as follows:

> **"The issue of what constitutes a "substantial question of law" has fallen for interrogation before the High Court on several occasions. In these decisions, the courts have adopted with approval the persuasive authority of the Supreme Court of India**

in Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 S.C 1314 wherein the court held that:

> **"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 Council 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 a substantial question of law."**

In Okiya Omtatah Okoiti & another *v* Anne Waiguru, Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR which is a final judgment of the same court in the case cited above, the court stated as follows:

> **"40. In Okiya Omtatah Okoiti and another vs. President Uhuru Muigai Kenyatta and 4 others, Petition No. 531 of 2015, Lenaola, J. (as he then was) in his ruling delivered on 5th February 2016[1] after reviewing earlier decisions had this to say:**
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> > ***"The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises."***
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> **41. We are fully in agreement with that approach. The position we take whilst embracing the test by the Supreme Court of India in Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd is that each case must be decided on its own facts and circumstances. No factor alone is decisive. A party seeking certification must lay a basis for the certification. Further, certification under Article 165(4) of the Constitution is a matter in the judicial discretion of the court. Such discretion must however, be exercised on sound basis."**

I am not satisfied that the petition before me raises any novel legal issue. The issues raised in the petition for determination by the court can be summarised into three; first, whether the 7th to 11th respondents were appointed as trustees of the 1st respondent lawfully; secondly, whether the decision that was made by the 1st, 2nd and 3rd respondents to allow the 4th respondent to route the SGR phase 2A through the NNP was valid; and finally, whether the petitioner is entitled to the reliefs sought in the petition. From my analysis of the petition, neither the facts giving rise to the petition nor the legal issues raised are complex. Most of the issues raised in the petition have been the subject of litigation in the superior courts and determinations have been made. Due to the foregoing, I am not persuaded that the petition raises a substantial question of law.

In conclusion, I find no merit in the Notice of Motion application dated 18th October, 2016. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 18th Day of May, 2020

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams in the presence of:

The Petitioner present in person

Mr. Kamau Muturi h/b for Mr. Ochieng for the 1st, 2nd and 7th to 11th Respondents

N/A for the 3rd Respondent

Mr. Kamau Muturi for the 4th Respondent

N/A for the 5th , 6th and 12th to 15th Respondents

Ms. C. Nyokabi-Court Assistant