



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**PETITION NO. 11 OF 2019**

**(FORMERLY NRB PETITION 40 OF 2019)**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL TREASURY.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**CHINA WU YI COMPANY LIMITED.....5<sup>TH</sup> RESPONDENT**

**PROJECT AFFECTED PERSONS**

**AD HOC COMMITTEE.....INTERESTED PARTY**

**RULING**

The matter for determination is the Notice of Motion Application dated 2<sup>nd</sup> September 2019 by the 1<sup>st</sup> Respondent/ Applicant seeking for orders that;

***1. THAT this Honourable Court be pleased to certify that the 1<sup>st</sup> Respondent's Notice of Preliminary Objection dated 5<sup>th</sup> April 2019, filed in opposition to the Petitioners Application and Petition herein raises substantial questions of law and forthwith refer the case to his Lordship the Chief Justice for constitution of a bench on an uneven number of Judges being not less than 3 in number.***

***2. THAT costs of this Application be in favour of the 1<sup>st</sup> Respondent/ Applicant.***

The Application is premised on the grounds that **Section 34(1)(f)** of the Advocates Act prohibit an unqualified persons from directly or indirectly , taking instructions or drawing or preparing any document or instrument relating to any other legal proceedings. Further that the Petitioner herein directly received instructions from the persons affected by project (PAPs) to initiate administrative and or litigation process on behalf of the affected 20,000 persons an over 30,000 passively affected ones. That acting on the instructions, the purported Petitioner herein proceeded to draw and prepare documents relating to the instant Petition which were filed in the High Court at Nairobi on **5<sup>th</sup> February 2019** in contravention of the express and mandatory provisions of section **34(1)(f)** of the Advocates Act. That in purporting to accept instructions , proceeding to draw pleadings , institute the Petition herein and personally appear in Court to prosecute the instant Petition, the purported Petitioner as an unqualified person has grossly compromised and contravened the rights to a **fair hearing** under **Article 50 (1)** of the Constitution and the watershed constitutional principle of rule of law under **Article 10(2) (a)**, which the legitimate project affected persons are entitled to in the circumstances.

Further that the pleadings filed by the Petitioner as an unqualified person are illegal, **null** and **void ab initio** and no relief can be founded thereon. Further that the Petitioner is guilty of non-disclosure and concealment of material facts relevant for just determination of his Application and Petition, being full particulars of all the alleged **20,000** persons affected by the project and **30,000** passively affected ones together with the respective amounts of compensation awarded and payable to the alleged PAPs. Further that the Petition is devoid of public interest and has been instituted to advance the private and commercial interests of individuals pursuing compensation who in any event have demonstrated capability to advance their own respective cases through their participation as an interested parties and filing of pleadings on the instant suit.

It was further contended that the instant Petition is an abuse of process of this Honourable Court as the purported Petitioner has converted the due process of this Court to advance and achieve extraneous ends, devoid of pursuit of justice and the public interest and namely to inflate by 30% the amount of compensation payable for compulsory acquisition of land contrary to section **113(2)(a)(iii)** of the **Land Act No. 3 of 2012**. It was further contended that the Applicant raised a Preliminary Objection dated **11<sup>th</sup> February 2019** against the jurisdiction of the High Court to hear and determine the Petition as filed. Further that the Applicant also raised a further Preliminary Objection dated **5<sup>th</sup> April 2019**. That when the matter came up for directions before **Hon. Mr. Justice Korir**, the Court issued directions to the effect that the Applicant's Preliminary Objection **dated 5<sup>th</sup> April 2019**, would be dispensed with first and the Court gave directions for filing of written submissions and set down the matter for hearing of the Preliminary Objection on **4<sup>th</sup> November 2019**. That subsequently the Petitioner filed an Application seeking the transfer of the Petition and that **Hon. Mr. Justice Mativo** directed that the matter be transferred to this Court.

It was further averred that pursuant to **section 21(2)(a)** of the **Environment and Land Court Act**, there are substantial questions of law which warrant constitution of a bench of an uneven number of Judges being not less than three by his Lordship the Chief Justice to determine the questions whether an Unqualified person can lawfully receive instructions, draw pleadings and institute and personally conduct Court proceedings pursuant to **Article 22 and 258 of the Constitution**, whether the said **Articles 22 and 258** of the Constitution render moot and nugatory the provisions of **sections 2, 9,31 and 34 of the Advocates Act**, provisions of the Law Society of Kenya **Act No. 21 of 2014**, dealing with the regulation of practice of law and qualification to be a member of the Law Society. Further whether the Petitioner being an unqualified person has compromised and contravened the right to fair hearing under **Article 50 (1)** of the Constitution, whether the purported Petitioner being an unqualified person, has compromised and contravened the constitutional principle of rule of law as established in the Advocates Act and the Law Society Of Kenya Act and the legality and validity of pleadings drawn and filed by an Unqualified person in purported pursuit of constitutional reliefs.

The Application is supported by the Affidavit of **Nathaniel Muga** sworn on **2<sup>nd</sup> September 2019**, who averred that he is a Senior Legal Officer with the 1<sup>st</sup> Respondent/ Applicant. He reiterated the contents of the grounds in support of the application. He also contended that from the Petitioner's own description of himself, he is not admitted as an Advocate and therefore that the Petitioner is an unqualified person within the meaning of **section 2 of the Advocates Act**. Further that from the Petitioner's Annexures, it has emerged that the Petitioner herein directly received instructions from persons affected by the project to initiate administrative and or litigation process on behalf of the affected **20,000** persons and over **30,000** passively affected ones.

That acting on the instruction as an unqualified person, he proceeded to draw and prepare documents relating to the instant Petition. Therefore, in the circumstances it is only fair, just and proper that the Honourable Court grant the prayers sought.

The Application is opposed and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed grounds of opposition and averred that the threshold for the grant of the Orders sought under **Article 165(4)** of the Constitution of Kenya have not been met. That the issues contained in the 1<sup>st</sup> Respondent's Notice of Further Preliminary Objection do not fall within the scope of substantial issues of law to warrant empanelment of a bench of an uneven number of Judges as provided for under **Articles 165(4)** of the Constitution. That **Article 165(3)** of the Constitution of Kenya gives all Judges of the High Court equal Jurisdiction to determine various issues including Application and interpretation of any law and even the Constitution. Therefore, a Judge of the **Environment and Land Court** can ably handle the Preliminary Objections and all the issues at hand. Further that the law provides for the right of appeal in the event any party is dissatisfied with the decision of the Court, whether single or multiple and this gives the Petitioner a remedy in case he is aggrieved by the decision of a single Judge. They further contended that the Application lacks merit.

Further in opposing the Application the Petitioner **Okiya Omtata Okoiti** swore a Replying Affidavit on **2<sup>nd</sup> December 2019** and averred that the Application is riddled with deliberate falsehood, misrepresentation of material facts and tailored to mislead the Court. He denied the allegations deponed in the Affidavit of **Nathaniel Muga** and averred that the averments are **misplaced, misguided and without basis** for the reason that **Articles 22 and 258** of the **Constitution** vest him with jurisdiction to move this Court in the public interest. It was his contention that he brought the Petition as a matter of public interest and on his own account and in line with his rights. Further that **Articles 22** in conjunction with **Articles 258**, of the Constitution gives him the right to institute Court proceedings when the Constitution has been contravened or is threatened with contravention. He further averred that **section 34 of the Advocates Act** does not limit him from instituting cases on his own and access to justice and fair hearing are entrenched under **Article 48 and 50(1)** of the Constitution. He denied the allegations that he had received instructions to initiate administrative and litigation process as an Advocate. Further that he has litigated matters in his name upto and including the Supreme Court, hence the Application is an abuse of the Court process and a waste of the Court's time and meant to delay the Petition.

It was his further contention that he transferred the matter to this Court as it was necessary as a matter of Court procedure and Jurisdiction and that the Preliminary Objection was the reason that he had to transfer the matter. That the matters concerning *locus standi* under **Articles 22 and 258**, of the Constitution have been litigated and settled by Courts of competent jurisdiction and as such, there is no need for empanelment of a bench of three or five judges to hear the Preliminary Objection dated **5<sup>th</sup> April 2019**.

The Petitioner further filed grounds of opposition dated **2<sup>nd</sup> December 2019**, and averred that the Preliminary Objection is incompetent and an abuse of the Court. It was the Petitioner's contention that the Court has jurisdiction under **Article 23** as read with **Articles 162,165(5)(b) and 159** to hear and determine the instant petition. He reiterated that **Articles 22 and 258** of the Constitution vest him with jurisdiction to institute the instant Petition, in his name and in the public interest. He urged the Court to dismiss the Application with costs.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered. The Court has also carefully read and considered the pleadings by the parties, the Affidavits in support of and the annexures thereto. The Court finds the issue for determination is **whether the issues raised by the Applicant fall under the scope of substantial issues of law to warrant empanelment**.

The question that then this Court must answer is whether the 1<sup>st</sup> Respondent/Applicant has demonstrated good grounds to warrant the Court to refer the matter to the **Hon. Chief Justice** to empanel a bench of uneven number of Judges. The grounds upon which the Applicant has brought the instant Application and sought the prayers is that the empanelment would be required to determine the question whether an

unqualified person can lawfully receive instructions and draw pleadings and personally institute Court proceedings pursuant to **Articles 22 and 258 of the Constitution**. Further whether the said Articles render nugatory the provisions of **Section 2, 9 and 31 of the Advocates Act**, and the provisions of the Law Society Act. Finally the legality and pleadings drawn by unqualified person in purported pursuit of constitutional reliefs.

In the case of **Okiya Omtatah Okoiti & another ...Vs... Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR** the Court of Appeal held that;

*“There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”[2]. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:*

*“(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;*

*(ii) Applicant must show that there a state of uncertainty in the law;*

*(iii) The matter to be certified must fall within the terms of Article 165 (3) (b) or (d) of the Constitution;*

*(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”*

*43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.”*

Further in the case of **National Super Alliance (NASA) Kenya ...Vs... Independent Electoral and Boundaries Commission [2017] eKLR** the Court held that;

*“Though the expression “substantial question of law” has not been defined in the constitution, the true meaning and connotation of this expression is now well settled by various judicial pronouncements among them the earlier cited decisions. There is a difference between question of law and substantial question of law. It is not a mere question of law but a substantial question of law that is required. A question of law will be a substantial point of law if it directly and substantially affects the rights of the parties. In order to be “substantial” it must be such that there may be some doubt or difference of opinion or there is room for difference of opinion. If the law is well-settled by the Supreme Court, the mere application of it to particular facts would not constitute a substantial question of law. This position was well stated by the Supreme Court of India which authoritatively held that once the Supreme Court has settled a question of principle, its application to the facts of a case is not a substantial question of law.”*

Persuaded by the above case law, it is not in doubt that the decision on whether or not to determine whether a question raised by a party is a substantial question of law that requires the Court to refer the matter to the Chief Justice for empanelment of Judges is enumerated by the provision of **Article 165 (4)** of the Constitution. It is also not in doubt that the said decision is **discretionary** and that while there is no real definition of what amounts to a substantial question of law, the Court is to be guided by whether the said question substantially affects the rights of parties, the law is uncertain and whether there might by a variance of opinions.

It is not in doubt that the question of whether a party has **locus standi** to institute Constitutional Petitions in this regard on behalf of other parties has been decided by various Courts with the same Jurisdiction as this Court and this has been submitted as much by the Petitioner. The Applicant has submitted that while the Supreme Court has dealt with the issue of whether an Unqualified Advocate can file pleadings in Court, the issue on whether an Unqualified person who is not an Advocate can be allowed to take instructions on behalf of clients and draw pleadings on their behalf has not been determined.

As already stated above by the Court, there are a plethora of decisions with regards to the **Locus** of parties to file Constitutional Petitions in terms of **Article 22 and 258 of the Constitution**. The Court is therefore called upon to determine whether the issue of drawings pleadings on behalf of other parties in a Constitutional Petition is a substantial point of law. In this instant this Court will base its discretion majorly in determining whether another set of Judges sitting on a bench of **three** or even **five** may have a variance of opinions from this Court. In essence whether there is room for a variance of opinion by the Judges that may be empanelment and therefore making the reference of the instant suit to a panel of Judges

The provision of law that relates to the right of a party to bring a Constitutional Petition is to be found under **Article 22 and 258** of the Constitution which provides that;

*“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. (2) In addition to a person acting in their own interest, court proceedings*

*under clause (1) may be instituted by—*

*(a) a person acting on behalf of another person who cannot act in their own name;*

*(b) a person acting as a member of, or in the interest of, a group or class of persons;*

*(c) a person acting in the public interest; or*

*(d) an association acting in the interest of one or more of its members.*

It is evident that the above provisions of the Constitution has ably set out who and how a person may choose to institute Constitutional Petitions. Further as s already acknowledged by the Applicant, though the said question has not been determined by the Supreme Court, there are a plethora of decisions on the issues on **locus standi**. It is not in doubt that even though the Chief Justice may empanel a bench of Judges to sit on the issue being High Court Judges, their decision may not be binding on the other High Court Judges, but may only be persuasive. See the case of Vadag Establishment ...Vs... Y A Shretta & Another where the Court held that:-

*“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”*

Further in determining whether a matter raises substantial question of law and in the process the Court in exercising its discretion , the Court is also required to determine whether it is in the best interest of Justice that the matter is referred to the **Chief Justice** and whether there will be delay if the matter is further empanelled. It is very clear that various Courts of competent and equal Jurisdiction as the Judges that may be empanelled have already made a finding on the matter as to the issue on whether individuals have the requisite **locus standi** to institute Constitutional Petitions on behalf of other persons. Would the empanelment of them maybe as a bench bear a different result seeing as their determinations will not be binding on the other High Court Judges? Certainly not! This Court finds that since this issue has been adjudicated by various Judges and given that it is not a new matter, the issue may be best placed if the same is raised in this Court and if the party will not be satisfied, then it can appeal that decision as opposed to seeking the empanelment of a bench of Judges in the said issue. See the case of National Super Alliance (NASA) Kenya...Vs...Independent Electoral and Boundaries Commission (supra) where the Court held that ;

*“I am clear in my mind that the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant constitutional, statutory provisions and relevant precedents. I with respect associate myself with the position adopted by Majanja, J in Harrison Kinyanjui vs. A. G. &Another where he held that:-*

*“the meaning of ‘substantial question’ must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges.”*

Consequently, this Court finds and holds that having the requisite Jurisdiction to deal with the matter and can adequately address the question on the legality and validity of pleadings drawn a by an unqualified person and whether the same is in contravention of the provisions of the Advocates Act and the Law Society Act. Further given that the said matter has partly been litigated, it is the Court’s considered view that it is not absolutely necessary that it be referred to the **Hon. Chief Justice**, for empanelment. Therefore, this Court finds and holds that the issues raised by the 1<sup>st</sup> Respondent/ Applicant are not substantial issues of law that requite the empanelment of a bench of Judges.

The Applicant has not satisfied the Court to warrant it to exercise its discretion and refer the matter to the Hon. Chief Justice for empanelment. For the above reasons, the Court finds and holds that the **Notice of Motion** dated 2<sup>nd</sup> September 2019, by the 1<sup>st</sup> Respondent / Applicant is not merited and the same is dismissed entirely with costs.

Let the matter be prosecuted in this Court and be determined on merit.

It is so ordered.

**Dated, signed and Delivered at Thika this 23<sup>rd</sup> day of July 2020.**

**L. GACHERU**

**JUDGE**

**23/7/2020**

**Court Assistant - Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via zoom**

**No Consent for petitioner**

**No Consent for the 1<sup>st</sup> Respondent though aware of Ruling date**

**No Consent for the 2<sup>nd</sup> Respondent**

**No Consent for the 3<sup>rd</sup> Respondent though aware of Ruling date.**

**No Consent for the 4<sup>th</sup> Respondent**

**No Consent for the 5<sup>th</sup> Respondent**

**L. GACHERU**

**JUDGE**

**23/7/2020**