



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 58 OF 2014

BETWEEN

OKIYA OMTATAH OKOITI 1ST PETITIONER

NYAKINA WYCLIFE 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

1. This matter came up for directions today and the first issue for consideration is whether I should certify the petition as one which should be referred to the Chief Justice under **Article 165(4)** of the Constitution as raising a substantial question of law for him to assign an uneven number of judges not being less than three to hear and determine the matter.
2. This discretion to certify the matter is reposed in the judge who must exercise his discretion judiciously having regard to the facts and circumstances of the case. In ***Royal Media Service Ltd & Others v Attorney General and Others Nairobi Petition No. 557 of 2013 [2003]eKLR***, I distilled some of the principles governing the exercise of discretion as follows;
 - a. The grant of a certificate under **Article 165(4)** is an exception rather than the rule.
 - b. The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or that raises a novel issue of law of fact or even one that is complex.
 - c. Public interest may be considered but it is not necessarily decisive.
 - d. The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter up to the Supreme Court.
3. The matters in dispute are undoubtedly matters of public interest which have been in the public

domain. The petition concerns contracts implementing the Mombasa-Nairobi-Malaba/Kisumu railway. The gravamen of the petitioners' case is that the procurement issues governing the contracts raise questions in relation to the provisions of **Articles 206, 214, 220, 221** of the Constitution, the ***Public Procurement and Disposal Act*** and their interaction with international law as applied in Kenya under **Article 2** of the Constitution.

4. I have considered the arguments of the parties and the matters in issue and I am not satisfied that a case has been made for this matter to be certified for consideration by the Chief Justice under **Article 165(4)**. In my view, the matter can be handled by any one judge of the High Court.
5. I wish to disabuse the notion that the issues raised by the respondents regarding delay and the constitution of the bench are purely management issues. Issues of delay and court management fall squarely within the provisions of **Article 159** which obliges the court to dispense justice without delay and **Article 48** of the Constitution which protects the right of access to justice. Without proper management of its dockets, the Court would be undermining the delivery of justice.
6. I decline to certify the matter as one falling under **Article 165(4)**.

DATED and DELIVERED at NAIROBI this 13th day of March 2014.

D.S. MAJANJA

JUDGE