



**Okoiti v Ministry of Lands, Public Works, Housing and Urban Development & 11 others;  
Langata Reject AHP Committee (LARAC) & 18 others (Interested Party) (Environment  
and Land Petition E052 of 2025) [2025] KEELC 7247 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7247 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND PETITION E052 OF 2025  
OA ANGOTE, J  
OCTOBER 23, 2025**

**BETWEEN**

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

**AND**

**MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND URBAN  
DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT .... 2<sup>ND</sup>  
RESPONDENT**

**SLUM UPGRADING DEPARTMENT ..... 3<sup>RD</sup> RESPONDENT**

**AFFORDABLE HOUSING BOARD ..... 4<sup>TH</sup> RESPONDENT**

**MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES .... 5<sup>TH</sup>  
RESPONDENT**

**MINISTRY OF ROADS AND TRANSPORT ..... 6<sup>TH</sup> RESPONDENT**

**ATTORNEY-GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI CITY ..... 8<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 9<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 10<sup>TH</sup>  
RESPONDENT**

**RAYSMAGAN & SONS LIMITED ..... 11<sup>TH</sup> RESPONDENT**

**LANDMARK HOLDINGS LTD ..... 12<sup>TH</sup> RESPONDENT**

**AND**



**LANGATA REJECT AHP COMMITTEE (LARAC) & 18  
OTHERS ..... INTERESTED PARTY**

**RULING**

**Background**

1. Vide a Notice of Motion dated 30<sup>th</sup> July, 2025, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties/Applicants seek the following reliefs:
  - a. The court be pleased to suo moto certify that this matter raises substantial questions of law warranting the constitution of a bench, of an odd number of not less than three judges, by the Chief Justice under Article 165(4) of the constitution to hear and determine this Petition.
  - b. Pending the transfer of this file to the Chief Justice for empanelment, this court be pleased to issue interim conservatory orders preserving the subject matter of the petition and suspending any further excavation or related activity at the site.
2. The Motion is supported by the Affidavit of Fredrick Muriungi of an even date. It was his deposition that he is the Chairperson of Langata Reject AHP Committee and Langata South and Estate Residents Association (Lasera). He deponed that the instant Petition seeks to challenge the ongoing construction of the Southlands Affordable Housing Project, which is being undertaken on land historically reserved as a road and railway corridor, as well as an environmental buffer zone, contrary to the provisions of Article 62 of the constitution and the relevant planning laws.
3. He deponed that no public participation, stakeholder consultation, or meaningful community engagement was conducted prior to the approval and commencement of the project, in violation of Article 10(2)(a) and Article 69(1) (d) of the constitution, and the principles set out in the Environmental Management and Coordination Act (EMCA).
4. To date, he averred, the development is proceeding without a valid environmental impact assessment licence and that similarly, no strategic environmental assessment has been conducted despite the project's scale and impact, violating Articles 42 and 70 of the constitution.
5. He deposed that various public bodies, including the Nairobi County Government, the Ministry of Lands, the Ministry of Housing, the National Land Commission, and the National Environment Management Authority are either complicit in, or have failed to prevent the illegal change of user, rezoning, and conversion of this land into private residential developments.
6. According to Mr Muriungi, despite express warnings from the Kenya Railways Corporation and members of the local community, the project continues at an accelerated pace, and has resulted in the dumping of excavated soil and debris behind occupied homes blocking known emergency escape routes and significantly increasing the risk of injury or death in the event of a fire, flooding or structural collapse.
7. It was urged that the Petition raises significant constitutional questions concerning the conflict between the right to accessible and adequate housing, and other fundamental rights, including the right to life, right to property, the right to a clean and healthy environment and the principles of sustainable development and intergenerational equity.



8. In view of the constitutional gravity and the national significance of the issues raised, he urged, the application is merited and the matter ought to be referred to the Chief Justice for the empanelment of a three judge-bench.
9. In the interim, it was urged, it is imperative that interim conservatory orders be issued to preserve the subject matter of the Petition, prevent further excavation and development and avert irreparable harm without which the Petition and all pending applications will be rendered nugatory.
10. In response to the Motion, the 1<sup>st</sup> -7<sup>th</sup> Respondents filed Grounds of Opposition dated 23<sup>rd</sup> September, 2025 premised on the grounds that:
  - i. The Notice of Motion is fundamentally flawed, prima facie baseless and patently without merits, it is hollow, a mere empty shell and a shot in the dark tailored to unnecessarily delay resolution of the dispute and strain limited judicial resources.
  - ii. The Notice of Motion does not disclose or demonstrate substantial questions of law that warrant the constitution of a bench of uneven number of judges under Article 165(4) of the constitution to hear this dispute.
  - iii. The dispute before this court is neither novel nor complex. The tension between the right to development and environmental justice and how to balance the right to housing under Article 43(1)(b); right to a clean and healthy environment under Article 42; right to life under Article 26; right to property under Article 40 and right to public participation under Article 10 have severally been pronounced by no less than the Supreme Court. Principles of sustainable development which underpin the said tension are therefore settled and require no invention of the wheel.
  - iv. The Petition does not disclose any uncertainty or conflict in the law or differing interpretations of the law that would require empanelment of uneven number of judges to jurisprudentially settle it. The issue of conversion and or re-assignment of public land for other public uses is clearly and explicitly defined and settled in the existing legal framework and judicial decisions.
  - v. Empanelment under Article 165(4) is based on existence of substantial questions of law and not facts. Consequently, the fact that a dispute transcends multi-state organs or is publicly funded does not constitute substantial questions of law or warrant the empanelment of uneven number of justices.
  - vi. The Notice of Motion does not succinctly disclose whether the dispute is of public importance as the facts in issue are not only speculations but were rebutted.
  - vii. The dispute is neither precedent setting nor significantly impacts interpretation of the constitution. The issues raised have been settled and this case simply adds on a growing list of common land and environment court decisions.
  - viii. Referring the file to the Chief Justice to empanel an uneven number of judges is a matter of judicial discretion. The circumstances of this case do not in any way merit the exercise of the discretion in favour of referring.
  - ix. The conservatory order sought amounts to abuse of court process and it seeks to circumvent a substantive application dated 4<sup>th</sup> July, 2025 which was responded to and to which parties have already filed and exchanged submissions.
11. No other response was filed to the Motion.



## Submissions

12. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties/Applicants filed submissions on the 30<sup>th</sup> July, 2025. Counsel submitted that the test for certification under Article 165(4) of the [constitution](#) was established in *Esther Awuor Adero Ang'awa vs Cabinet Secretary Responsible for Matters Relating to Basic Education* [2021] KEHC 1927 (KLR) (citing the Court of Appeal in *Okiya Omtatah Okoiti v Anne Waiguru- Cabinet Secretary, Devolution and Planning & 3 Others* [2017] eKLR and the Supreme Court in *Hermanus Phillipus Steyn vs Giovanni Gnechi-Rusconne* [2013] eKLR).
13. It was submitted that the test as set out in the aforesaid cases is that for the matter to be certified, it must fall within the ambit of Article 165(3)(b) or (d) of the [constitution](#); the matter must raise substantial question(s) of law, clearly identified; the applicant must satisfy the court that the issue to be canvassed has a significant bearing on the public interest and holds unique significance within Kenya's constitutional democracy; and the Applicant must show that there is a state of uncertainty in the law.
14. Counsel submitted that the court must also consider whether the matter is complex, raises novel points of law, is likely to require substantial time for determination, and assess the potential impact of the prayers sought in the Petition.
15. According to Counsel, in *Okiya vs Anne Waiguru* [2017] KECA 679 (KLR), the Court of Appeal determined 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 and the categories of all factors that should be taken into account in arriving at that decision cannot be closed.
16. It was submitted that the present Petition raises significant questions of law that go to the core of our constitutional and legal framework; and that it challenges the legality of converting public land designated for infrastructure and environmental protection into private housing, without complying with constitutional requirements such as public participation, environmental safeguards, and lawful land use planning.
17. It was submitted that the Petition also raises important legal questions on the balance between competing rights, including the right to housing under Article 43(1)(b) and the right to life, environmental protection, and public safety under Articles 26, 42, and 69 of the [constitution](#).
18. Additionally, it was submitted, the Petition questions the constitutional responsibilities of multiple state organs, making it necessary for the court to determine the scope and limits of executive and regulatory authority, and that these legal questions are novel, unsettled, and of great public importance, thus meeting the threshold of significant constitutional issues.
19. Reliance was placed on the case of *Sammy Mwangangi & 10 others vs Commissioner of Lands & 3 others* [2021] eKLR, and *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamni and 4 others* [2014] eKLR.
20. Counsel urged the court to be guided by the exposition in *Philomena Mbete Mwilu vs Director of Public Prosecution & 4 others* [2018] eKLR where the court, despite finding that the matter could be handled by a single judge, decided to exercise its discretion in favour of an expanded bench.
21. As to whether the matter requires a substantial amount of time to dispose of, Counsel asserted in the affirmative, citing the case of *Esther Awuor Adero Ang'awa vs Cabinet Secretary Responsible for Matters Relating to Basic Education*(supra).



22. It was contended that, given the extensive volume of material, the numerous parties involved, and the significant public interest at stake, this matter will demand substantial judicial time and attention and that it will be unduly burdensome for a single judge to hear and determine the Petition.
23. The 1<sup>st</sup>-7<sup>th</sup> Respondents' counsel filed submissions on 1<sup>st</sup> October, 2025. Counsel submitted that the application for empanelment of a bench does not meet the requisite legal threshold. Relying on the decision in *Gitobu Imanyara & 3 Others vs Attorney General* [2012] KEHC 845 (KLR), the Respondents' counsel emphasized that the constitution of a three-judge bench is a discretionary matter for the court and not dependent on the consent or wishes of the parties.
24. It was contended that that the issues presented in the Petition, to wit, balancing the right to development, environmental justice, and socio-economic rights under Articles 26, 40, 42, and 43(1) (b) of the constitution, have been settled through numerous decisions of the superior courts, including the Supreme Court.
25. Counsel contended that the principles of sustainable development, public participation, and environmental protection are well-established in Kenyan jurisprudence, and there exists neither novelty nor uncertainty in the applicable law necessitating the constitution of a larger bench to interpret them.
26. Counsel stated that the mere fact that the case involves multiple state organs or public resources does not in itself constitute a substantial question of law. He urged the court to find that the threshold for empanelment has not been met and dismiss the application with costs.

### **Analysis and Determination**

27. Upon consideration of the Motion, responses and submissions, the sole issue that arises for determination is whether the Petition raises substantial questions of law warranting empanelment of a bench.
28. The law on empanelment of an uneven number of Judges to hear and determine a matter is anchored in Article 165 (4) of the constitution which provides as follows:

“(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”
29. Article 165 (3) (b) and (d) sets out the aforesaid matters as those with respect to:
  - “(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - (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.”

30. The Supreme Court of India in *Chunilal Mehta vs Century Spinning and Manufacturing Co.* AIR 1962 SC 1314, discussing what amounts to a substantial question of law stated 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 has 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 substantial.”

31. Expounding on this, the court in *Kinyanjui vs Attorney General & another; Omollo & 18 others (Interested Parties)* [2012] KEHC 5104 (KLR), opined as follows:

“Therefore, giving meaning to “substantial question” must take into account the provisions of the *constitution* as a whole and need to dispense justice without delay particularly given a 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.”

32. The court further noted:

“A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the “substantial question” than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case.”

33. The Court of Appeal in *Okiya Omtatah Okoiti & Another vs Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] KECA 679 (KLR) set out the principles to be applied when considering such an application. The court opined as follows:

“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”. 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;

The applicant must show that there is a state of uncertainty in the law;

- (ii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the *constitution*;
- (iii) 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.”

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.”

34. The court is so guided.
35. Vide the present Petition, the Petitioners seek, inter-alia, to stop the Southlands Affordable Housing Project until full compliance with constitutional, environmental, and planning laws is achieved. They have asked the court to declare that no EIA licence or approval should be issued without proper legal process, including environmental and social impact assessments, lawful land-use planning, and public participation.
36. They also seek declarations that the Respondents’ actions in approving, facilitating and proceeding with the impugned development has violated a host of constitutional rights including those protected under Articles 10, 19, 22, 31, 40, 42, 43, 47, 69 and 70 of the *constitution* and contravened the Environmental Management and Coordination Act (EMCA) and the *Physical and Land Use Planning Act* (PLUPA).
37. The Petitioners have further sought for the court to find that public land was unlawfully converted into private use, order its restoration, and compel rehabilitation of environmental damage. They seek injunction orders restraining all construction and related activities until compliance is achieved, as well as judicial review orders quashing irregular approvals and compelling Nairobi City County to revoke any unlawful permits.
38. As aforesaid, the Applicants are categorical that the Petition warrants certification under Article 165(4) of the *constitution*. They contend that the issues raised are weighty, complex, and of great public importance moving beyond the interests of the immediate parties and require consideration by a bench of more than one judge.
39. Conversely, the 1<sup>st</sup> to 7<sup>th</sup> Respondents maintain that the matter does not meet the threshold for certification. They argue that the issues presented are neither novel nor unsettled, and that they fall within the ordinary jurisdiction of a single judge of this court. According to them, the Petition



involves routine questions of compliance with planning and environmental laws that do not warrant empanelment of an expanded bench.

40. Having reviewed the pleadings, it is evident that this dispute goes beyond an ordinary planning or land use issue. It raises fundamental questions regarding the legality and constitutionality of the national Affordable Housing Programme, a flagship government initiative being replicated across the country. The determination of this Petition will therefore have far-reaching implications on how such projects are designed and executed, and on the legal, environmental, and governance standards that must be observed in their implementation.
41. The Petition also invites the court to determine the scope and adequacy of the legal, procedural, and institutional safeguards required under the *constitution* and relevant statutes, including the Environmental Management and Coordination Act, the *Physical and Land Use Planning Act*, and the *Fair Administrative Action Act* to ensure that large-scale public developments are undertaken in a lawful, transparent, and sustainable manner.
42. In addressing these issues, the court will be required to interpret and harmonize several interrelated constitutional provisions, including the right to housing under Article 43(1)(b) vis-à-vis the rights to life, the right to a clean and healthy environment, and obligations with respect to the environment including intergenerational equity under Articles 26, 42, and 69 of the *constitution*.
43. The court must also consider the meaning and scope of Articles 10, 60, and 62, which enshrine the national values of public participation, sustainable land policy, and proper management of public land. The interplay of these provisions presents novel and complex constitutional questions that are not free from difficulty and call for careful judicial balancing.
44. The Petition also raises matters of significant institutional and national concern. It involves multiple state organs and regulatory authorities whose statutory and constitutional mandates are under scrutiny.
45. In the circumstances, the court harbours no doubts that the issues raised are weighty, multifaceted, and of far-reaching public consequence. They concern the scope and limits of executive power in national development planning, the accountability of implementing agencies, and the enforcement of environmental and social safeguards in the realization of socio-economic rights.
46. It is also noted that the Motion seeks vide prayer III, interim conservatory orders. However, the record shows that on 30<sup>th</sup> July, 2025, the court (Mbogo J) declined to issue ex-parte interim conservatory orders which had been sought vide the Motion of 4<sup>th</sup> July, 2025. The court cannot reconsider this issue in view of the fact that there is no prayer for review of the said orders.
47. In the end, the court is satisfied that the issues herein raise substantial questions of law as contemplated under Article 165(4) of the *constitution* as to justify the empanelling of a bench of uneven number of Judges of this court, of not less than three, assigned by the Chief Justice. The court so certifies.
48. Accordingly, the court directs that this Petition be transmitted to the Hon. the Chief Justice forthwith for the purpose of empaneling a bench of uneven number of Judges of this court of not less than three.
49. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.**

**O. A. ANGOTE**

**JUDGE**



In the presence of;

Ms Ekasa for the Petitioner

Mr. Eredi for the 1<sup>st</sup> - 7<sup>th</sup> Respondents

Ms Mungania holding brief for Ochieng for 1<sup>st</sup> and 2<sup>nd</sup> Interested Party.

Ms Komen holding brief for Wanyama for 12<sup>th</sup> Interested Party.

Ms Jelegat for 9<sup>th</sup> Respondent

Ms Talam for Mogaga for 18<sup>th</sup> Interested party.

Mr. Athalo holding brief for Obuogi for 8<sup>th</sup> Respondent

Mr. Ngugi for 11<sup>th</sup> Interested party.

Court Assistant - Tracy

