

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CONSTITUTIONAL PETITION NO. E001 OF 2024**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 24, 27, 28, 29, 31, 35, 39, 40, 43,  
47, 50, 60, 64, 73, 82, 196, 232 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 10, (1) (a) (b) (c) 82 (a) (b) 20, 21, 22, 23, 24, 27,  
28, 29, 31, 35, 39, 40, 43, 47, 50, 60, 64, 73, 82, 196, 232, 259 AND 259 (1)**

**AND**

**IN THE MATTER OF COUNTY GOVERNMENTS ACT SECTION 87, 91, 98, 102**

**AND**

**IN THE MATTER OF WILDLIFE CONSERVATION AND MANAGEMENT ACT 2013**

**AND**

**IN THE MATTER OF COMMUNITY LAND ACT**

**AND**

**IN THE MATTER OF NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY  
(NEMA)**

**AND IN THE MATTER OF CONSTITUTIONAL & LEGAL VALIDITY OF THE  
PRESIDENTIAL DECREE REF OP/CAB.26/1/3A dated 26th July 2023**

**AND**

**IN THE MATTER OF SECTION 2 & 5 OF THE LAND ACT**

**AND**

**IN THE MATTER OF THE DOCTRINES OF PUBLIC PARTICIPATION AND UNFAIR  
DISCRIMINATION OF MINORITY LAND OWNERS**

**BETWEEN**

**GOLDEN FIELDS ASSOCIATION**

**(Through its members AGNES NYAMU, MWANGI NJEHIA,**

**STEPHEN MWANGI, JOHN MUIRURI**

& 41 others) .....  
APPLICANTS/PETITIONERS

AND

KAJIADO COUNTY GOVERNMENT ..... 1ST  
RESPONDENT

KENYA WILDLIFE SERVICES (KWS) ..... 2ND  
RESPONDENT

BIG LIFE FOUNDATION LTD ..... 3RD  
RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... 4TH  
RESPONDENT

THE ATTORNEY GENERAL ..... 5TH  
RESPONDENT

AND

THE LAW SOCIETY OF KENYA .....INTERESTED PARTY

**RULING**

*(In respect of the motion dated 30<sup>th</sup> September 2025 under article 165(4) of the Constitution)*

**INTRODUCTION**

1. Before this Court is a Notice of Motion dated 30<sup>th</sup> September 2025, brought by the Petitioners/Applicants under Article 165(4) of the Constitution of Kenya. The Applicants seek a formal certification that their substantive Petition herein raises substantial questions of law and a subsequent referral of the file to Her Ladyship the Chief Justice for the empanelment of a bench of an uneven number of judges, being not less than three (3), to hear and determine the matter.
2. The application is supported by the affidavit of James Maina, who deposes that the Petition challenges the constitutional validity of several administrative and legislative

actions that fundamentally alter the nature of the Petitioners' freehold land ownership in Kajiado County.

3. Notably, it has been represented to this Court, and confirmed by the parties during the mention of this matter, that there is a unanimity among all parties that the Petition herein raises substantial questions of law and should be referred to Her Ladyship the Chief Justice for the empanelment of a bench of an uneven number of judges. The Respondents, including the Kajiado County Government and the Attorney General, agree that the issues raised are of such gravity and novelty that they deserve to be considered and determined an expanded bench.

#### **THE SUBSTANTIVE ISSUES IN THE PETITION**

4. To determine whether a matter meets the threshold of Article 165(4), the Court must look at the core of the dispute.
5. The Petitioners challenge the 1st Respondent's declaration of a "Special Planning Area" (SPA) over their freehold properties. This declaration restricts land use exclusively to animal grazing and wildlife corridors, effectively prohibiting human habitation and commercial activities on the land including commercial farming.
6. The Petition therefore raises the critical constitutional question whether Sections 52 and 56 of the Physical and Land Use Planning Act (PLUPA), which empower County Governments to declare Special Planning Areas, violates Article 40 of the Constitution by effectively "taking" private property without compensation.
7. The Petition seeks the determination of the legal parameters of the emerging carbon credit trade industry in Kenya. Specifically, whether the 1st Respondent can enter into

conservation agreements with private actors (like the 3rd Respondent) to trade carbon credits over private lands while restraining the owners from utilizing those same lands.

8. The constitutionality of the Presidential Decree dated 26th July 2023 (and/or 26th April 2023) and its impact on land registries and the entitlement of group ranch/community land members too is under scrutiny. There are alleged violations of the rights to privacy, freedom of residence, and protection against unfair discrimination under Articles 27, 31, 39, and 40.

### **ANALYSIS AND DETERMINATION**

9. The application before this Court invites the exercise of judicial discretion to certify that the substantive Petition raises substantial questions of law requiring the intervention of an expanded bench. 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.”***

10. The jurisdictional hooks for such certification are found in Article 165 (3) (b) and (d), which provide that the High Court (and by extension the Environment and Land Court) has:

***“(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.”*

11. The term ‘substantial question of law’ is not expressly defined in the Constitution.

However, this Court is guided by a rich tapestry of local and international jurisprudence.

The Supreme Court of India in *Chunilal Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314*, in 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.”*

12. Locally, the Courts have proposed a nuanced approach to this consideration. In the case of *Republic v Minister for Agriculture & 2 others Ex-parte Samuel Muchiri Kinyanjui & 2 others [2012] eKLR*, the Court 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.”*

13. The Court in Kinyanjui case further elucidated that complexity alone does not suffice, noting that:

*“10. 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.”*

14. Further clarity is found in the case of *Philomena Mbete Mwilu v Director of Public Prosecution, Director of Criminal Investigation, Chief Magistrate’s Court (Anti-Corruption) Nairobi, Attorney General & Stanley Muluvi Kiima [2018] KEHC 3432 (KLR)*, where the Court observed:

*“24. ....a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference.”*

15. Finally, the Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] KECA 679 (KLR)* synthesized these principles by drawing a parallel to the certification required for the Supreme Court. The Superior Court opined:

*“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; (ii) The applicant must show that there is 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; (iv) 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.”*

16. Applying the four-pronged test in *Okiya Omtatah* case (*supra*) to the facts of this Petition, the Court notes that the Petitioners challenge the 1st Respondent's declaration of a Special Planning Area (SPA) over freehold land. This declaration—and the subsequent zoning for grazing and wildlife corridors—directly restricts the bundle of rights inherent in freehold ownership.
17. Is there a “state of uncertainty in the law”? The Court answers in the affirmative. While the State's power to regulate land use under Article 66 is well-settled, the specific intersection of such powers with the emerging global economy of carbon credits and conservation easements on private land is a frontier of law yet to be fully charted by our superior courts. The Petition asks whether administrative "sterilization" of land utility for carbon-trading benefits constitutes a "taking" under Article 40. This is a question that "calls for discussion of alternative views" as per *Chunilal Mehta*.
18. Furthermore, the determination of this matter clearly “transcends the circumstances of the particular case”. As counties across Kenya move toward spatial planning to address climate change and wildlife conservation, the precedent set here will have a “significant bearing on the public interest”. It will define the constitutional boundaries for all 47 County Governments in their relationship with private landowners.
19. It is also of great significance that everyone has agreed with the application. All parties, including the County Government and the Attorney General, concede that the issues herein meet the threshold of substantiality. This consensus reinforces the Court's view that the matter is indeed “not free from difficulty” and warrants the collective wisdom of an expanded bench.

#### **DETERMINATION**

20. In view of the foregoing, this Court is satisfied that the Petition meets the criteria for certification under Article 165(4) as interpreted through the lenses of Chunilal Mehta, and the above cited cases.

21. Accordingly this court makes the following orders:

- A. The Notice of Motion dated 30<sup>th</sup> September 2026 is hereby allowed.
- B. ELC Petition No. E001 of 2024 is hereby certified as raising substantial questions of law under Article 165 (3) (b) and (d) of the Constitution.
- C. The file ELC Petition No. E001 of 2024 be and is hereby referred to the Honorable Chief Justice for the empanelment of a bench of an uneven number of judges, being not less than three (3), to hear and determine the Petition.
- D. The Deputy Registrar is directed to transmit this file to the Chief Justice forthwith.
- E. Costs shall be in the cause.

It is so ordered.

**Dated Signed and Delivered at Kajiado Virtually this 26<sup>th</sup> Day of February 2026.**

**M.D. MWANGI**  
**JUDGE**

**In the virtual presence of:**

Ms. Mueni for the 3<sup>rd</sup> Respondent

Petitioners in person

N/ by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and the Interested Party

Court Assistant: Mpoye

**M.D. MWANGI**  
**JUDGE**

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