REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 58 OF 2014

CONSOLIDATED WITH PETITION NO. 209 OF 2014

OKIYA OMTATAH OKOITI…….1st PETITIONER

NYAKINA WYCLIFFE GISEBE……...……2nd PETITIONER

LAW SOCIETY OF KENYA……..……...……..…….3rd PETITIONER

AND

THE HON. ATTORNEY GENERAL……...……1ST RESPONDENT

KENYA RAILWAYS CORPORATION…….…….2ND RESPONDENT

THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY…3RD RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION.……4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioners have filed the consolidated Petitions challenging the legality and constitutionality of the construction of the Standard Gauge Railway (hereinafter project the **"SGR project"**) in Kenya although the project is intended to benefit the larger East African Community. In their respective Petitions, they are seeking various reliefs for breaches of the Constitution and the law in implementing the said project.

2. In ***Petition No. 58 of 2014***, the 1st and 2ndPetitioners, Okiya Omtatah Okoiti and Wycliffe Nyakina Gisebe in their said Petition dated 5th February 2014 and supported by the Affidavit of the 1stPetitioner sworn on the same date, describe themselves as law abiding citizens of Kenya, public spirited individuals and human rights defenders. They are also members of Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya and founded on republican principles and set up with the purpose of promoting democratic governance, economic development and prosperity. In their Petition, they state that they are opposed to the SGR project owing to the manner in which it was procured and is being implemented. They are particularly aggrieved that the Government allegedly failed to exercise due diligence as it failed to independently carry out a feasibility study and design of the project before seeking contractors to implement it. They also claim that the Government erred in single-sourcing for the project and allowing the use of locomotives from the 4th Respondent which is not a manufacturer of the same. They also allege that there is a conflict of interest in the implementation of the project and lastly, that the Government failed to undertake due diligence in contracting the 4th Respondent which has been blacklisted by the World Bank and been declared ineligible to engage in any road and bridge construction funded by the World Bank .

3. In the Petition aforesaid they are seeking that this Court do determine the following questions;

> ***"(a) Whether the 1st, 2nd, and 3rd Respondents willfully or carelessly failed to comply with Article 227 of the Constitution, the Public Procurement and Disposal Act, the Anti-Corruption and Economic Crimes Act, the Public Officer Ethics Act, and the any other laws or applicable procedures and guidelines relating to the procurement, tendering of contracts, management of funds or incurring of expenditures by single sourcing the 4th Respondent to conduct feasibility studies, design of the project then supply and install facilities, locomotives and rolling stock for the Mombasa-Nairobi-Malaba/Kisumu standard gauge railway project.***
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> ***(b) Whether the so-called Government to Government contract has the capacity to oust the application of and adherence to procurement laws and constitutional provisions on public procurement and provisions on integrity.***
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> ***(c) Whether being blacklisted by the World Bank, the 4th Respondent lacks the integrity required to enter contracts with***

the Government of Kenya and/or its agencies and commissions.

(d) Whether the 1st, 2nd, and 3rd Respondents failed to conduct due diligence evaluation of the 4th Respondent.

(e) Whether integrity is a mandatory virtue to any entity which intends or qualifies to contract with the Government of Kenya or its agencies and commissions.

f. ***Whether the rights of the Petitioner and those of other Kenyans were violated by the failure of the Respondents to uphold the Constitution and other laws of Kenya.***

g. ***Whether in contracting with the 4th Respondent, the 1st, 2nd, and 3rd Respondents were under obligation but failed to meet the constitutional threshold in public procurement which is prescribed in Article 227, i.e. to be fair, equitable, transparent, competitive and cost-effective.***

h. ***Whether the 1st, 2nd, and 3rd Respondents discharged their mandate constitutionally and in accordance with the procurement laws when they single sourced the 4th Respondent to supply and implement the standard gauge railway project."***

4. Upon the determination of the above mentioned questions, they have sought the following orders;

"(a) A declaration that there is no valid contract between the Government of Kenya and the 4th Respondent.

(b) A declaration that the 1st, 2nd, and 3rd Respondents were required to but failed to safeguard the public interest and the common good by ensuring the procurement for the railway was done according to the law.

c. ***A declaration that the Government should not conduct business with the 4th Respondent because it is an entity blacklisted along with its subsidiaries by the World Bank.***

d. ***A declaration that the railway should be procured through competitive bidding as required by the Laws of Kenya.***

e. ***An order of injunction restraining the 1st, 2nd, and 3rd Respondents, by themselves or through their agents or representatives, or any person claiming through them, from transacting any business with the 4th Respondent until the Chinese corporation is cleared by the World Bank.***

f. ***An order of injunction restraining the Respondents, by themselves or through their agents or representatives, or any person claiming through them, from continuing with the contract they awarded to the 4th Respondent.***

g. ***A mandatory order to the 1st Respondent directing the Police to criminally investigate and, if culpable, criminally prosecute any public officers, including officers and officials of the 1st, 2nd and 3rd Respondents who were involved in the shambolic and fraudulent procurement process that led to the contracting of the 4th Respondent to deliver the railway project.***

h. ***A mandatory order to the 1st Respondent directing the Police to criminally investigate and, if found culpable, criminally prosecute the officials and officers of the 4th Respondent, who facilitated the shambolic and fraudulent contracting of the 4th Respondent.***

i. ***A mandatory order directing the 1st, 2nd, and 3rd Respondents to ensure that there will be no single sourcing in the procurement of the Mombasa-Nairobi-Malaba railway project.***

j. ***That this Honourable Court gives any other orders required to advance the cause of justice and the rule of law in this case.***

k. ***That the costs of this Petition be borne jointly and severally by the Respondents."***

5. In ***Petition No. 209 of 2014***, the 3rdPetitioner, the Law Society of Kenya states that it is established by the **Law Society of Kenya Act, Chapter 18 Laws of Kenya. Under Section 4 (e)** of the said **Act**, one of the objectives of the Law Society is ***"to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law".*** In its Petition dated 2nd May 2014 therefore and supported by the affidavit of Apollo Mboya, its Secretary/C.E.O. sworn on the same date, it claims that the manner of procurement of the contract for the construction of the SRG was in contravention of the Provisions of **Articles 10, 42, 69, 201** and **227** of the **Constitution.** It has therefore sought the determination and interpretation of the following questions;

> ***"(a) "Whether the 1st Respondent in the lawful discharge of its mandate under Article 227 of the Constitution of Kenya lawfully awarded Tender No. KRC/PLN/31/2012 for the supply and installation of facilities, locomotives and rolling stock for the Mombasa – Nairobi Standard Gauge Railway.***
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> ***(b) Whether the 1st Respondent in awarding the contract No. KRC/PLN/13/2012 violated the Constitutional provisions of Article 201 that require that in all aspects of public finance in the Republic, there shall be openness and accountability, including public participation in financial matters.***
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> ***(c) Whether the 1st Respondent observed the national values and principles of governance as set out in Article 10 of the Constitution in the award of the contract No. KRC/PLN/31/2012 to China Road and Bridges Corporation.***
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> ***(d) Whether the 1st Respondent in awarding contract No. KRC/PLN/31/2012 to China Road and Bridges Corporation ensured that there was sustainable exploitation, utilization, management protection and conservation of the environment.***
>
> ***(e) Whether the 1st Respondent ensured that there was public participation in the management, protection and conservation of the environment.***
>
> ***(f) Whether the 1st Respondent ensured that it established a system of environmental impact assessment, environment audit and monitoring of the environment.***
>
> ***(g) Whether the 1st Respondent eliminated processes and activities that are likely to endanger the environment.***

(h) Whether the 1st Respondent in awarding the contract No. KRC/PLN/31/2012 to China Road and Bridges Corporation which entailed use of a colossal amount of Kshs.400,000,000,000 (Four Hundred Billion Shillings) of public money ensured that the money shall be used in a prudent and responsible way.

(i) Whether it is open to the 1st Respondent as the procuring entity to pick and choose alternate procurement methods over the same subject matter without public participation as set out under the Constitution of Kenya, 2010.

(j) Whether the provisions of the Public Procurement and Disposal Act, 2005 as read with Article 227 apply to the Procurement and Award of Tender No. KRC/PLN/31/2012 by the 1st Respondent to China Road and Bridge Corporation.

(k) What is the meaning, extent and scope of public participation in financial matters with regard to public finance as set out under Article 201 of the Constitution?

(l) What is the meaning of public participation as set out under Article 69 of the Constitution?"

6. Upon the above questions being answered, it has then sought the following orders;

"(i) A declaration that the 1st Respondent as a procuring entity is subject to the provisions of Articles 10, 201, and 227 in the lawful discharge of its {Constitutional duties}.

(ii) A declaration that the 1st Respondent as a state entity is subject to the provisions of Articles 42, 69 and 70 of the Constitution.

iii. ***A declaration that the award of contract No. KRC/PLN/31/2012 for the supply and installation of facilities and diesel powered engines which are outdated and pollute the environment*** **violates Article 42 and 69 of the Constitution**.

iv. ***A declaration that the award of contract No. KRC/PLN/31/2012 for the supply and installation of facilities, locomotives and rolling stock for the Mombasa – Nairobi Standard Gauge Railway by the 1st Respondent to China Road and Bridges Corporation violates Articles 10, 201 and 207 of the Constitution.***

v. ***A declaration that the purported withdrawal of the above award No. KRC/PLN/31/2012 and to christen the same as a Government to Government contract is unlawful and was a belated attempt to sanitize a Constitutional infringement.***

vi. ***An order of certiorari to remove to the High Court and quash the award of contract No. KRC/PLN./31/2012 for the supply and installation of facilities, locomotive and rolling stock for the Mombasa – Nairobi Standard Gauge Railway or any Agreement for the supply of the same.***

vii. ***The Respondents to pay the Petitioner costs of the Petition in any event".***

7. On 27th June 2014, by consent, Petition No.58 and Petition No.209 of 2014 were consolidated with Petition No. 58 of 2014 as the parent file.

The factual background to the Petitions

8. The factual background leading to the Petitions has been set out in the two Petitions as well as in the Affidavits of Apollo Mboya and Okiya Omtatah Okoiti in support thereof, and is briefly as follows;

9. The Ministry of Transport, realizing the necessity of the construction of a railway, entered into a Memorandum of Understanding (MoU) dated 12th August 2009 with the 4th Respondent, China Road and Bridges Corporation, in which the latter was to undertake a feasibility study on the construction of an efficient Mombasa-Nairobi Electric Railway system with a total length of 500km. The MoU also provided that the 4th Respondent would undertake the studies at its own cost and that if the project turned out to be feasible, the 4th Respondent would help identify the sources of its financing. The 4th Respondent submitted its report to the Government in February 2011 and the Ministry of Transport directed the 2nd Respondent, as the State entity charged with the statutory mandate of developing the project, to review the Feasibility Study Report, which it did. Following several discussions between the 2nd Respondent's engineers and the 4th Respondent's technical personnel, the 2nd Respondent approved the Feasibility Study and Preliminary Design Report dated 26th June 2012.

10. On 3rd August 2012, following an exchange of correspondence between the National Treasury and the Government of China, the Cabinet decided that the financing of the project would be sourced from the Government of China and therefore the project would be undertaken under Government to Government terms. The discussions between the National Treasury and the Government of China were to the effect that part of the financing would be a concessional loan from the Government of China while another part would be a commercial loan from the Exim Bank of China. Accordingly, the 2nd and the 4th Respondents negotiated and signed two commercial contracts; one for the SGR line and the second one for the supply and installation of facilities, locomotives and rolling stock.

11. On 10th July 2012, the 2nd Respondent awarded the 4th Respondent a contract for the construction of civil works of the Mombasa-Nairobi SGR project for the amount of Kshs.220,921,502,221.08 (Kenya Shillings Two Hundred Twenty Billion, Nine Hundred and Twenty One Million, Five Hundred and Two Thousand, Two Hundred Twenty One and Eight Cents) in accordance with the terms and conditions of the contract. Subsequently, by a contract dated 4th October 2012, the 2nd Respondent entered into an agreement with China Road and Bridges Corporation to purchase from it, facilities, locomotives and rolling rock for the SGR project at a sum of USD 1, 146,791,008.75 (United States Dollars One Billion, One Hundred and Forty Six Million, Seven Hundred and Ninety One Thousands, Eight and Seventy Five Cents) on terms. The total contract sum for civil works and purchase and installation of locomotives and rolling stock was agreed in the sum of Kshs.327,000,000,000(Kenya Shillings Three Hundred and Twenty Seven Billion) and it was also a term of the contract that the 4th Respondent was to source and obtain financing for the said part of the project. It is all the above actions that triggered the filing of the above Petitions.

The 1st and 2nd Petitioners' Case

12. Mr. Okoiti Omtatah presented the 1st and 2ndPetitioners' case and he submitted that the Respondents had failed to comply with the provisions of the law regarding procurement. That by single sourcing the 4th Respondent, as implementer of the project, the said Respondents violated **Section 29** of the **Public Procurement and Disposal Act** which requires the use of open tendering in all contracts involving use of public funds. And even if they had decided to single source, they violated **Sections 74** and **75** of that **Act** in regard to direct procurement. As to funding, he claimed that the SGR project was being funded by the tax payer because the Government is paying 15% of the whole contractual sum upfront and the balance of 85% is to be paid through the use of a loan from EXIM bank of China which will have to be repaid back

to it. He thus submitted that the contract is in fact 100% funded by Government and therefore **Section 6** of the **Public Procurement and Disposal Act** applies fully to the SGR project contract and the Act was violated because projects funded through loans and grants are not exempted from competitive bidding. In any event, he claimed that **Section 6** would only apply after the signing of a negotiated loan agreement and not before the award of the SGR project and that Government money is not subject to lender's terms and conditions. It was also his contention that the procurement of the SGR project did not comply with **Regulation 114** of the **Public Procurement Regulations** which requires that 40% of the contract value should be used for sourcing supplies/services from local citizen contractors.

13. As to the alleged violations of the Constitution, Mr. Omtatah contended that the Respondents violated **Articles 2, 3(1), 19, 46, 47, 206, 214, 220, 221, 227** and **259** of the **Constitution;** that they ousted Parliament's role in procuring the SGR by contravening the mandatory stages of incurring Government expenditure established under Chapter Twelve of the Constitution; that the funds forming the consideration of the contract will have to be paid directly to the 4th Respondent instead of the same being paid out of the Consolidated Fund and therefore the Controller of Budget has been left out of the payment system; that the SGR loan is subject to **Article 206** of the **Constitution** because it is a public debt and public debt is charged on the Consolidated Fund unless otherwise provided for by an Act of parliament; that the SGR project loan was a public debt because it was raised and guaranteed by the National Government and further that it is to be repaid using general taxes including the railway levy; that under **Articles 220** and **221** of the Constitution, the funds can only be withdrawn using an Appropriation Act or as a charge against the Consolidated Fund and that the SGR project money has neither been included into any national budget nor any Appropriation Act and so the funds cannot be used at all under the law.

14. It was his further submission that the Respondents violated **Section 6** of the **Public Finance Management Act, 2012** for having failed to seek Parliament's approval of the SGR project via the budget process. That they also violated **Section 15** of that Act which empowers the National Treasury to manage the National Government's public finances and also **Section 25** thereof which requires the National Government to procure its goods and services in accordance with **Article 227** of the **Constitution. Section 50(3)** of the same **Act** was similarly violated because money was borrowed money without the approval of Parliament as provided for under the said Section.

15. Further, he submitted that the Respondents violated the provisions of the **Public Officer Ethics Act** for having failed to observe the rule of law and comply with the requirements of

Section 45(2) (b) of the said **Act** which concerns the administration, custody and management of public revenue or public property.

16. It was also his contention that in contracting the 4th Respondent who had been blacklisted by the World Bank for its alleged acts of corruption, the Respondents compromised Kenya's obligations to the fight against corruption by contracting a corrupt entity.

17. That the Respondents have also failed to guard against conflict of interest in allowing the same entity, which had carried out the feasibility study and with a prior understanding that it would be awarded the contract on its terms, if it is established that the project was feasible. That the international norm in the consultancy world is that whoever provides consultancy services cannot be the contractor for the same works and in any event, the feasibility study done by the 4th Respondent was not professional and competent as it did not cover all the specifics of the detailed terms of reference for the consultancy.

18. It was also Mr. Omtatah's claim that there is no value for money on the SGR project because it was conceived, approved and is being implemented as a fraud on the public for the direct benefit of the 4th Respondent. That the Respondents did not in that regard put in place any measures or exercise due diligence to ensure value for money in undertaking the SGR project and the 4th Respondent has no capacity to undertake a project of such magnitude because it is undercapitalized and has a very limited annual turnover which is lower than the cost of the SGR project.

19. It was the 1st and 2ndPetitioner's further contention that the SGR project has failed to take into account environmental and cultural considerations and the Respondents failed to consult stakeholders such as the Kenya Wildlife Service, Kenya Forest Service and the National Museums of Kenya before undertaking the said project and they thus claim that it was irregular and illegal for the Respondents to have approved the SGR project without a valid Environmental Assessment Report as is required by law.

20. As to the objection raised about the manner in which the evidence before the Court was obtained, it was the 1st and 2nd Respondents' case that they obtained it legally from whistle

blowers and that a report has not been made that the documents placed before Court were stolen and that the Respondents have not contested the authenticity of the evidence at all. That the evidence was not obtained in any manner that has breached the fundamental rights and freedoms of any person and was instead obtained from civil servants who have been authorized to possess it. It was also their case that it does not matter how evidence was obtained but that what matters is that it is before the Court and they relied on the case of ***R vs Leatham*** (no citation or authority provided) in support of that proposition.

21. They thus urged the Court to allow their Petition and grant the orders sought as it was a public interest case filed for the benefit of the larger public.

The 3rd Petitioner's Case

22. The 3rd Petitioner contended that the procurement of the SGR project was in utter contravention of the provisions of **Articles 10, 42, 69, 201 and 277** of the **Constitution. That Article 227** of the **Constitution** does not envisage that a public entity would contract for goods without compliance with a procurement system that is fair, equitable, transparent, competitive and cost effective. In addition, that **Section 29** of the **Public Procurement and Disposal Act** has established the steps to be undertaken in procuring goods and services and that the 2nd Respondent had failed to comply with the aforesaid constitutional and statutory provisions because it had declined to tender for the supply and construction of the SGR in either an open tender or through direct sourcing as provided by law. That the 4th Respondent was awarded the contract for the construction of the SGR in an opaque and discriminatory manner in violation of the Constitution and it referred the Court to the cases of ***Kenya Transport Association vs The Municipal Council of Mombasa and Another Petition No. 6 of 2011*** and ***Erick Okeyo vs County Government of Kisumu Petition No. 1"A" of 2014,*** where the Courts held that a contract involving substantial amounts of public money must be procured in accordance with the Constitution and the Public Procurement and Disposal Act and also after public participation.

23. It was the 3rd Petitioner's further submission that the contract for the construction of civil works and supply and installation of locomotives and services between the 1st and 4th Respondent was marred with malpractices as it contravened the provisions of **Section 87** of the **Public Procurement and Disposal Act** which prohibits a firm from entering into a procurement contract after it initially carried out any works including a feasibility study related to the original contract.

24. The 3rd Petitioner added that **Article 201** of the **Constitution** has put in place measures to ensure value for money when any project is undertaken for and on behalf of the public. That the Respondents failed to ensure value for money because, firstly, China Road and Bridges Corporation was awarded the contract when it does not have the necessary qualifications, capacity, experience, resources, equipment and facilities to ensure the construction of the SGR. Secondly, the entire procurement was ridden with conflict of interest because the 4th Respondent was the only party commissioned to conduct a feasibility study for the construction of the SGR; was solely responsible for determining the contract price and was the sole tenderer in an arrangement that had flouted procurement law and processes. Thirdly, the whole procurement process was tailor- made for an award of the contract to the 4th Respondent in exclusion of all others thus in violation of the provisions of the Constitution and the Public Procurement and Disposal Act. Fourthly, the contract between the 1st and the 4th Respondent is for the supply of diesel powered engines the operation of which will pollute and poison the environment through noxious and dangerous emissions thus a violation of **Articles 42** and **69** of the **Constitution**. Lastly, that costs of the construction of the SGR is 49% higher than the cost of construction of a comparative electrically powered railway gauge which is more economical to run, more efficient and environmental friendly. For instance, it stated that it will cost Ethiopia USD 5.25 Million to construct a kilometer of an electronically powered railway while it would cost Kenya USD 7.84 million to construct a kilometer of a railway line that is not electronically powered.

25. It was the 3rd Petitioner's further submission that the 2nd Respondent failed to undertake a mandatory Environmental Impact Assessment (EIA) as provided for under **Section 58** and **69** of the **Environment Management and Coordination Act** and in the circumstances construction of the SGR without on EIA will violate the citizens' right to a clean environment as provided for under **Article 42** of the **Constitution**. They relied on the case of ***African for Network for Anima Welfare vs The Attorney General of Tanzania, EACJ Reference No. 9 of 2010*** where it was held that the Government of Tanzania in undertaking its development obligations must consider the damage that those projects may cause on the environment as it has an obligation to preserve the environment for the purposes of future generations. In that regard they claimed that the proposed SGR runs through the Tsavo National park and yet an EIA had not been conducted by the 2nd Respondent as required by the law in that regard. It was thus the 3rd Petitioner's view that the SGR project is not ecologically sustainable as envisaged under **Article 69(2)** of the **Constitution** and should be stopped.

26. As to how the documents the Petitioners have relied on were obtained, the 3rd Petitioner claimed that they were lawfully obtained and were submitted to it by a public spirited citizen and in any event, it claimed that under **Article 35** of the **Constitution** it has a right to

information held by the State. Further, that the 2nd Respondent has failed to demonstrate that the documents relied upon are false and has failed to call the maker of the document to denounce the same and the makers of those documents have not instituted criminal proceedings alleging the theft of those documents. That the documents relied upon are therefore valid and give a candid exposition of the matters and facts surrounding the procurement process of the SGR thus providing the Court with information it needs in the determination of the Petition. In addition, that the Petition herein is in public interest and it cannot be a defense for the Respondents to claim that the documents were stolen and thus that the Court ought not to consider them. Lastly, that the Cross-Petition filed was intended to convolute the matters further and it referred the Court to the case of ***Njuguna S. Ndungu vs Ethics Anti-Corruption Commission & 3 Others Petition No. 73 of 2014*** where Odunga J. held that **Article 35(1)** does not impose conditions precedent to the disclosure of information by the State.

27. The 3rd Petitioner thus prayed that the Petition be allowed with costs.

The 1st and 3rd Respondents Case

28. The 1st Respondent, the Attorney General and the 3rd Respondent, the Public Procurement Oversight Authority, adopted the contents of the Cross-Petition filed by the 2nd Respondent dated 4th July 2014. In response to the Petition they filed an affidavit sworn on 2nd February 2014 by Maurice Juma, the Director General of the 3rd Respondent.

29. In his Affidavit, Mr. Juma deponed that the 3rd Respondent executed and discharged its mandate as provided by the Constitution and the **Public Procurement and Disposal Act** in regard to the SGR project. He stated that the Authority had warned the 2nd Respondent on the dangers of engaging a contractor or service provider through direct procurement method as it was not competitive and advised it on the need to carry out a market survey pursuant to the provisions of **Regulation 8(3)** of the **Public Procurement and Disposal Regulations 2006** so as to ensure that it obtained value for money expended on the subject procurement. That subsequently, it was informed by the 2nd Respondent that the contract signed between it and the 4th Respondent was a result of a negotiated grant between the Kenyan Government and the Chinese Government on a government to government funding. That there was therefore an error in referring to the project as a direct procurement. In that case a government to government ousted the applicability of the **Public Procurement and Disposal Act** in procuring the project and also its review by the 3rd Respondent. He thus stated that the Petition and allegations made against the 3rd Respondent ought to be dismissed.

30. It was further the submission of Mr. Njoroge for the 1st and 3rd Respondents that the evidence presented in the Petition ought to be struck out because the Petitioners have failed to disclose the source of that information. He relied on the cases of ***Rossage vs Rossage(1960) 1 ALL ER 600, A.N Phakey vs World Wide Agencies X V EACA 1*** and ***Blunt vs Park Lane Hotel (1942) 2. K. B 253*** where it was held that there was need to provide the source of information in an Affidavit failure to which the Affidavit would be struck out. He thus urged the Court not to admit the authenticity of the documents unless the Petitioners revealed the source of the same because there is a real likelihood that they may not be genuine or may have been altered for the Petitioners' benefit. Further, that the alleged makers of the documents have not produced the said documents and they contain neither primary evidence nor secondary evidence. He thus contends that under **Section 35** of the **Evidence Act (Cap 80 Laws of Kenya),** the documents are not admissible. He further submitted that the pleadings as filed are scandalous for the same reasons. He relied on the case of ***Royal Media Services Ltd vs Attorney General Petition No. 557 of 2013*** where the Court stated that it had the powers to strike out pleadings it considered scandalous.

31. As to the ramification of permitting the use of such documents in a case such as the present one, Mr. Njoroge contended that it depicted badly of public servants and public institutions and the Court must safeguard the general interest of the public. That there cannot be said to be values of good governance, integrity, transparency, accountability, honesty and discipline in the persons who illegally gave the vital documents as is required under **Articles 10** and **73** of the **Constitution** and there is also a reasonable expectation that privilege/privacy of communication must be protected. On the right to information, he submitted that the said right was not an absolute right and there was a need to safeguard information in public officers' custody and he gave an analogy of how information may end up in terrorists' hands in the same way the Petitioners have obtained the current information. He thus claimed that the procedure anticipated in procuring information must be followed in gathering such information.

32. It was the 1st and 3rd Respondents' further contention that the Petitioners have not shown how the constitutional provisions they claim to be violated have been violated. That the Petitions for that reason offend the doctrine of pleading particularity of breach as was stated in the case of ***Anarita Karimi Njeru vs Republic (1976-1980)*** **14** and ***Mumo Matemu vs Trusted Human Rights Society Petition No. 229 of 2012.*** In any event, they submitted that not every breach of the law amounts to a breach of the Constitution and there are other procedures laid down in law to remedy such breaches.

33. As regards the alleged failure to engage the procurement process to public participation, Mr. Njoroge submitted that the subject agreement was an international bilateral agreement and as such there has not been any structure laid down to ensure public participation.

34. As to whether there has been a breach of any law in dealing with an allegedly 'corrupt' 4th Respondent, Mr. Njoroge submitted that there has not been a competent Court that has determined that issue and the alleged World Bank report cannot be relied upon since it lacks the requisite probative value.

35. It was Mr. Njoroge's further submission that there has not been any breach of the **Public Procurement and Disposal Act** because the subject of the Petitions herein is excluded from the applicability of that statute. He claimed in that regard that the funds for the SGR project will be furnished by the Exim Bank of China which is owned by the Government of the Republic of China and that the 4th Respondent is a China Government owned Corporation and not a private company. That therefore, the Petitioners' suggestion of competitive bidding under the Act cannot arise in the circumstances of the procurement in issue where the Government is bound by an international bilateral agreement between itself and the Chinese Government. That the open tendering procedure under Part VI of the Public Procurement and Disposal Act as suggested by the Petitioners is therefore inapplicable and he thus stated that the Petitioners have failed to demonstrate any provisions of the said Act that have been breached.

36. It was his additional submission that this Petition ousts and upsets the mandatory provisions of **Article 79** of the **Constitution** and the provisions of **Section 11** of the **Ethics and Anti-Corruption Commission Act(EACC Act)** and that the Petitioners have failed to state what provisions of the **Public Procurement and Disposal Act, 2005,** the **Public Officers Ethics Act** and the **EACC Act** have been violated. In any event, he submitted that the breach of such provisions would lead to action on the part of the agencies constitutionally endowed with the power to handle the issues arising and the Petitioners are therefore bound under the provisions of **Section 42** of the **Public Officers Ethics Act** to lodge a complaint with the relevant public entity. He claimed that for the Court to entertain this matter, it would in essence be breaching the doctrine of separation of powers and relied on the case of ***Mumo Matemu (supra)*** in that regard.

37. As to whether the 2nd Respondent put measures in place to ensure value for money, they submitted that the Petitioners had failed to lead evidence to show that money was being lost in the project because of using the same company to construct and provide rolling stock. That the project is in any event a turnkey project and that is the best way to proceed since it ensures that all works are done to standard.

38. On the issue as to whether environmental impact assessment of the project was conducted before the project was commenced, Mr. Njoroge submitted that the 2nd Respondent carried out the said impact assessment and in any event, the Petitioners had failed to prove how the diesel engine would cause pollution to the environment.

39. In the end, the 1st and 3rd Respondents sought the dismissal of the Petitions and like the 2nd Respondent, prayed for orders as set out herebelow;

> ***"(a) A declaration that the Honourable Court can only rely on Public documents when the same have been legitimately obtained in compliance with Article 35 of the Constitution and produced before Court in accordance with Section 80 of the Evidence Act.***
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> ***(b) A declaration that the use and production of alleged public documents by the Petitioners herein without disclosing their source and/or authenticity is a breach of the Cross-Petitioner's right to a fair hearing as guaranteed by Section 50 of the Constitution.***
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> ***(c) An order expunging from the record all the documents comprising the Annextures marked AM 1, 2, 3, 5, 6, 7 and 8 to the Supporting Affidavit of Apollo Mboya sworn on 2nd May, 2014 and filed on the same day and Annextures marked AM 1, 3, 5, 6, 7, 8 and 10 to the Supplementary Affidavit of Apollo Mboya sworn on 6th June, 2014 and filed on the same date.***

d. ***An order expunging from the record all the documents comprising Annextures titled "Exhibit 000-1" marked A, B, C, D, E, F, G, H, I, J, K, L, M, N and P to the Supporting Affidavit of Okiya Omtatah Okoiti sworn on 5th February, 2014 and the Annextures to the***

Replying Affidavit of Okiya Omtatah Okoiti sown on 6th March 2014 and filed herein on 10th March 2014.

> ***(e) A declaration that the subject Standard Gauge Railway Project herein was carried out within the law and in compliance with the Constitution, the Procurement and Disposal Act and all other attendant laws.***

f. ***The Petition No.209 of 2013 dated 2nd May, 2014 together with the Application thereon dated 2nd May, 2014 and Petition NO. 58 of 2014 dated 5th February, 2014 be struck out.***

g. ***A declaration that this Honourable Court cannot review the findings and recommendations of a Parliamentary Committee carried out in compliance with the Constitution and within the law.***

h. ***Costs of the two Petitions from each of the Petitioners respectively."***

The 2nd Respondent's/Cross-Petitioner's Case

40. The 2nd Respondent/Cross-Petitioner, the Kenya Railways Corporation is a state corporation established under the **Kenya Railways Corporation Act (Chapter 397) Laws of Kenya**. It is charged with the key mandate of *inter-alia*, planning and development of the rail transport systems and promotion and facilitation of national railway network development. It is the sole Government corporation in-charge of railway transport in Kenya.

41. In response to the to the Petition, it filed a Cross-Petition dated 4th July 2014 and in a substantive reply to the Petition, It filed a Replying Affidavit sworn on 6th May 2014 and 20th February 2014 by Mr.A.K. Maina, its Managing Director.

42. In the Cross-Petition, it stated that the current meter gauge railway in Kenya cannot achieve the country's development aspirations of Vision 2030 and that as a result of that limitation, a railway master plan based on the standard railway gauge technology was developed by the East Africa Community countries and Kenya is supposed to implement the said plan within its borders. Subsequently, the Government directed that the railway line was

to be developed through a government to government arrangement which would be supported by a Government budget, a railway development fund as well as the signing of a Tri-lateral agreement between Uganda, Kenya and Rwanda. That pursuant to the foregoing, the 2nd Respondent developed a master plan and embarked on the procurement of consultants to undertake a feasibility study for the construction of the SGR and an international tender process was undertaken in that regard. It therefore invited tenders for consultancy services for the preliminary design and environmental and social impact assessment for the development of a modern high capacity SGR line. Bids were submitted and the lowest evaluated cost was approximately Kshs.1 Billion but efforts to procure a consultant for the feasibility study of the SGR were frustrated through numerous Court cases filed by Interested Parties.

43. Subsequently, that the Government signed an MoU on 12th August 2009 with the 4th Respondent and it was a term of the MoU that the 4th Respondent would undertake the feasibility study. A report was submitted to the Government and following elaborate discussions the 2nd Respondent approved the Feasibility Study and Preliminary Design Report on 26th June 2012. That the need to include the supply and installation of facilities and equipment in a turnkey project was to ensure a seamless development of the railway and for the railway to commence revenue generation immediately the infrastructure is ready as required by the funding conditions. It claimed that subsequently, the contractors for civil works and for the supply and installation of facilities, locomotives and rolling stock were approved by the Ministry of Transport, the Attorney General and the 2nd Respondent.

44. It was its contention that the Government then had discussions with Exim Bank of China based on a government to government framework and obtained a concessional and a commercial loan to support the project. That under the said government to government agreement, the 4th Respondent was to be engaged as the engineering procurement and construction contractor in line with **Section 6(1)** of the **Public Procurement and Disposal Act**. That the concessional loan agreement is part of the USD 20 Billion which the Government of China has availed for development projects in Africa, Kenya being one of the beneficiaries thereof. It is also term of the loan agreement that China Exim Bank's financing will cover 85% of the project cost while the Government of Kenya will provide 15% of the project cost. It claimed that the Government has put in place adequate measures to ensure that adequate funds will be available to meet its obligation.

45. It was its claim that the ground breaking ceremony of the project was presided over by the President of the Republic of Kenya on 28th November 2013 and the implementation of the project is currently underway and the contractual obligations of the parties under the various

commercial contracts therein have crystallized. It was therefore the 2nd Respondent's contention that the SGR project was procured within the law and the process does not in any way contravene the Constitution or any other written law and further claimed that Parliament in exercise of its oversight authority has investigated the legal compliance of the project and found no irregularity in it and contended that the Parliamentary findings and recommendations therein cannot be challenged or reviewed by a court of law.

46. Prof. Mumma who presented the 2nd Respondent's case submitted further that the documents relied upon by the Petitioners were illegally obtained and their source, origin, legitimacy and authenticity has not been disclosed and as such cannot be relied upon by the Court. That those documents were also produced in violation of **Articles 31** and **35** of the **Constitution** and **Section 80** of the **Law of Evidence Act** and therefore they all ought to be expunged from the record. Reference was made to the case of ***Robert Techquiz & Others vs Vivian Imermam Case No. A2/2009/2133 (2010) EWCA Civ 908, Prince Albert vs Strange (1849) 1 Mac & G 25 and Morison vs Moat (1851) 9 Hare 241***in support of that point. It was his further submission that the 2nd Respondent's right to fair administrative action and fair hearing would be violated if this Court were to rely on documents whose origin and authenticity is questionable.

47. It was his further argument that the Petitioners ought to have raised all their complaints with the EACC under **Article 79** of the **Constitution**, as the EACC is the body mandated to investigate and establish the legality of the procurement of the SGR project. That the Petitioners. by rushing to Court in the guise of public interest litigation, were acting in bad faith and have disparaged constitutionally established avenues and organs of oversight over public affairs. Reliance was placed on the cases of ***Janata Dal vs H.S Chowdhry & Others AIR (1993) SCV 892*** and ***Sachidan and Pandey vs State of West Bengal (1987) SCC 295 and 331***where it was stated that public interest litigation is a weapon which has to be used with great care and circumspection.

48. He added that the Petitioners are using the Court process to derail the SGR project and frustrate the Government's efforts to perform its constitutional mandate and the 2nd Respondent's mandate of performing its lawful mandate of building and operating a modern railway system for the country. It was therefore Prof. Mumma's submission that this Court should allow the procedure established under the law to reach its logical conclusion before it can intervene in any other way. He relied on the case of ***Stephen Nyaranqi Onsomu &Another vs George Magoha & 7 Others (2014) e KLR*** and that of ***Judicial Service Commission vs Speaker of the National Assembly & Others Petition No. 518 of 2013*** which

espoused the point that where a procedure for addressing any complaint in any law has been established in any law, the Applicant must first extinguish that procedure before rushing to Court.

49. In its Cross-Petition therefore, the 2nd Respondent seeks the following orders;

a. ***A declaration that a Constitutional Petition cannot be founded on alleged "public documents" obtained and produced in breach of the Constitution of Kenya, 2010, the Evidence Act, Chapter 80 Laws of Kenya, and the Cross Petitioner/2nd Respondent's constitutional right to a fair hearing and fair administrative action.***

b. ***A declaration that a Constitutional Petition cannot be founded on documents whose source and or origin has not been disclosed by the Petitioner and whose authenticity therefore cannot be vouched for.***

c. ***A declaration that the use and production of alleged "public documents" by the Petitioners herein without disclosing their source and/or authenticity is a breach of the Cross Petitioner's right to a fair hearing as guaranteed by Section 50 of the Constitution.***

d. ***An order expunging form the record all the documents comprising the Annextures marked AM 1, 2, 3, 5, 6, 7 and 8 to the Supporting Affidavit of Apollo Mboya sworn on 2nd May, 2014 and filed on the same day and Annextures marked AM 1, 3, 5, 6, 7, 8 and 10 to the Supplementary Affidavit of Apollo Mboya sworn on 6th June, 2014 and filed on the same date.***

e. ***An order expunging from the record all the documents comprising Annextures titled "Exhibit 000-1" marked A, B, C, D, E, F, G, H, I, J, K, L, M, N and P to the Supporting Affidavit of Okiya Omtatah Okoiti sworn on 5th February, 2014 and the Annextures to the Replying Affidavit of Okiya Omtatah Okoiti sworn on 6th March 2014 and filed herein on 10th March 2014.***

f. ***A declaration that in light of the investigations of the Departmental Committee on Transport and Infrastructure and the Public Investments Committee and the findings thereon in Petition No.209 of 2013 dated 2nd May, 2014 together with the Application thereon dated 2nd May 2014 and Petition No.58 of 2014 dated 5th February, 2014. The Petitions cannot be sustained and ought therefore to be struck out.***

g. ***A declaration that the Petitions filed herein are filed in bad faith and motivated by ulterior motives, devoid of the alleged public interest and/or protection of the constitutional rights and freedoms.***

h. ***An Order condemning the Petitioners to pay the costs of the Cross Petitioner/Respondent.***

i. ***Any other reliefs the Honourable Court may deem fit and expedite to grant."***

The 4th Respondent's Case

50. The 4th Respondent, China Road and Bridge Corporation opposed the Petition through the Affidavit of Xiong Shiling, its Deputy General Manager, sworn on 20th February 2014.

51. He stated that the 4th Respondent is a subsidiary of China Communications Construction Company and is a state owned company of the People's Republic of China. That it has participated in international projects for several decades and it mainly focuses on projects such as construction of roads, bridges, ports, railways, airports, tunnels, water conservancies, municipal works and dredging works. It claimed that railway construction therefore is one of the projects it has severally undertaken in the past and that it has established itself as a top international contractor and has received several awards including the China Africa Friendship Award for its outstanding contribution on the African Continent.

52. Its case was presented by Mr. Kimani who submitted that the Petitioners have made blanket violations that the 4th Respondent has violated mandatory provisions of the law such as the provisions of the **Public Procurement and Disposal Act, the Public Finance Management Act, the Public Officers Ethics, the Ethics and Anti-Corruption Commission Act** and the **Penal Code** but failed to demonstrate how those particular provisions had been violated. Further, that the Petitioners have not provided any credible evidence to support the allegations of the alleged violation of the statutes and the Constitution. In any event, he claimed that the procurement of the SGR was not in violation of the **Public Procurement and Disposal Act** because the applicability of that Act to the SGR project has been exempted by the provisions of **Section 6(1)** of the **Act** because the SGR project is being financed by a loan from China Exim Bank which is owned by the Government of China. He relied on the cases of ***Power Technics Ltd vs Kenya Power and Lighting Company Ltd App No. 3 of 2010, Victory Construction Company Ltd vs Ministry of Regional Development Authorities (2008-2010) PPLR 749, Intex Consortium Ltd vs Ministry of Roads (2008-2009) PPLR 418 and Areva Td-Viscas Consortium and Another vs Kenya Power and Lighting Co Ltd Application No. 4 and 6 of 2007***where the Public Procurement Administrative Review Board has upheld that position. He argued further, that since the loan is being granted by the Exim Bank, it is the terms and conditions of the financing agreement and not the provisions of the PPDA that would govern the procurement of the SGR project.

53. As to whether there is a conflict of interest in the 4th Respondent being awarded the SGR contract, he submitted that under **Section 43** of the **Public Procurement and Disposal Act,** conflict of interest could not be imputed since the feasibility study was reviewed by the 2nd Respondent as well the Exim Bank and independent consultants were engaged by the 2nd Respondent to oversee the 4th Respondent's work and that the 2nd Respondent also has in place personnel with technical abilities to oversee the work undertaken by the 4th Respondent. Mr. Kimani thus claimed that the allegation of conflict of interest was made without any legal basis. In any case, he submitted that **Section 87** of the **Public Procurement and Disposal Act** provides for alternative procurement procedures and that the procedures relied on by the Petitioners do not apply in the present circumstances.

54. As to whether the 4th Respondent should be barred from participating in the procurement because it has allegedly been blacklisted and barred by the World Bank, Mr. Kimani submitted that the 4th Respondent has not been barred from participating in procurement proceedings under **Part IX** of the **Public Procurement and Disposal Act** and as such it does not fall under the category of persons who have been disqualified from being awarded contracts by the Public Procurement Oversight Authority. And in any case, that the

blacklisting by the World Bank was meant for the projects funded by the World Bank and it was not a blanket debarment against the 4th Respondent in all its undertakings. That if the 4th Respondent was to be debarred from participating in any procurement in Kenya, then the lawful procedure has to be followed as provided under the **Public Procurement and Disposal Act** and where the provisions of the Public Procurement and Disposal Act do not apply due to the financing agreement, as is the case in the instant Petitions, a person would not be disqualified from participating in the procurement.

55. As to whether the taxpayer was to get value for money, it was the 4th Respondent's position that the construction of a railway line cannot be standard and depends on several factors and that the Petitioners have not provided any evidence to show that the SGR would be cheaper if it was to be procured through competitive bidding. That there is no basis therefore for the argument that for a party to be awarded a contract for an infrastructure, its annual turnover must be equal or more than the value of the project and the Petitioners have also failed to provide evidence of their claim that the prices offered by the 4th Respondent are highly inflated.

56. In regard to the argument that the contracts awarded to the 4th Respondent are illegal because it is in charge of both construction and providing the locomotives and rolling stock, Mr. Kimani submitted that the project was being undertaken under the Engineering Procurement Construction (EPC) mode which is a mode of contracting which ensures that the total cost of engineering, construction and procurement of a project form a lump sum. That EPC contracts therefore ensure that the final product is delivered to the owner in a fully functional and whole state.

57. As regards the issue whether the project has taken into account environmental considerations, The 4th Respondent contended that it was granted approval by the requisite body to undertake the SGR project and that an EIA license was in fact issued after the National Environment and Coordination Authority (NEMA) had been satisfied that the SGR project was environmental friendly. Mr. Kimani thus submitted that the Petitioners ought to have challenged the EIA license issued to the 4th Respondent before the National Environmental Tribunal as provided for under Section 125 of the Environmental Management and Coordination Act. On that point he relied on the case of ***Republic vs National Environment Management Authority (2011) e KLR*** where it was held that the said Tribunal is a specialized body that is acquainted with environmental issues and should have been given the first option to consider the matter. That even if the Court had jurisdiction to review the claim as made by the Petitioner, there was no legal basis for the Court's intervention and in

any event, that the Petitioners had failed to tender any evidence in support of the allegation that the environment would be damaged by the SGR traversing the Tsavo National Park or any other place in Kenya.

58. It was the 4th Respondent's submission therefore that the Petitions as filed do not disclose any violation of the Constitution or any law and it is a violation of the principles applicable in public interest litigation. Further, that the Petitioners have only made wild and reckless allegations against the Respondents and Mr. Kimani relied on the Indian cases of ***State of Uttaranchal vs Balwant Singh Chaufal & Others CA 1134-1135 of 2002*** and ***Holicious Pictures Pvt Ltd vs Prem Chandra Mishra & Others A12 2008 SC 913*** where the Courts stated that public interest litigation must not be abused and that a Court has the duty to protect the noble motive of public interest litigation from the filing of cases for ulterior motives. The 4thRespondent thus contended that had the Petitioners intended to assist in the investigations of the SGR project, they ought to have assisted the other constitutional bodies that were investigating the matter and not acted only by instituting these proceedings.

59. The 4thRespondent therefore urged the Court to dismiss the consolidated Petitions with costs.

Determination

60. The parties in these proceedings framed what they considered to be the issues for determination. Looking at those issues as framed and their respective submissions, I am in agreement that the issues for determination in the consolidated Petitions are as following;

> ***(i) Whether the Court has jurisdiction to hear and determine the Petitions in the face of the ongoing processes before other constitutional bodies.***
>
> ***(ii) Whether the consolidated Petitions are supported by valid evidence.***

iii. ***Whether the Petitions demonstrate breaches of fundamental rights or other constitutional provisions.***

iv. ***Whether the Respondents complied with the law in the procurement of the SGR.***

v. ***Whether the SGR project has taken into account environmental considerations.***

vi. ***Whether the Respondents have put in place measures to ensure value for money in undertaking the SGR project.***

vii. ***Who should bear the costs of these proceedings?***

I shall herebelow determine each of them based on the Pleadings, facts, the law and the submissions made with respect thereto.

Whether the Court has jurisdiction to hear and determine the consolidated Petitions.

61. It was the Respondents' contention that this Court has no jurisdiction to determine the consolidated Petitions because the Petitioners have not exhausted the known procedures in law before filing the said Petitions, to *wit* the procedures established under the **Ethics and Anti-Corruption Commission Act** and the **Public Procurement and Disposal Act**. In that regard, the issue of jurisdiction once raised is not an idle one. It is now an established and cardinal principle of law that jurisdiction is everything and without it a Court of law must down its judicial tools - See ***Owners of the Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd (1989) 1 KLR 14.***

62. The Petitioners contended *inter alia* that the procurement of the SGR project was in direct violation of the Provisions of the **Public Procurement and Disposal Act** for failure of the Respondents to take it through a competitive bidding process; failure to conduct a feasibility study for the SGR project which created a conflict of interest and for awarding a contract to the 4th Respondent after it had been blacklisted by the World Bank.

63. The 1st, 2nd and 3rd Respondents' contended on the other hand that the Petitioners ought to have filed all the above complaints with the Public Procurement and Administrative Tribunal as established under **Section 93** of the **Public Procurement and Disposal Act,** instead of instituting these proceedings and that therefore proceedings are not ripe for determination by this Court since the Petitioners have not exhausted the remedies available and provided under the relevant law. The 4th Respondent's contention in addition to the above was that the **Public Procurement and Disposal Act** does not apply in the procurement of the SGR project because Section 6 of the Act bars the applicability of that Act in instances of negotiated loans or grants between the Kenyan Government and other governments or other international organs or bodies.

64. In addressing the above issue, I note that **Article 227 (1)** of the **Constitution** provides that;

> ***"When a state organ or other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective".***

Article 227(2) then empowers Parliament to prescribe a framework within which policies relating to procurement and disposal of assets shall be implemented. Pursuant to this mandate, Parliament enacted **the Public Procurement and Disposal Act. Section 4(1)** of that **Act** stipulates that the Act applies with respect to;

a. ***Procurement by a public entity***

b. ***Contract management***

c. ***Supply chain management, including inventory and distribution; and***

d. ***Disposal by a public entity of stores and equipment that is unserviceable, obsolete or surplus.***

Section 6(1) of that Act however states as follows;

> ***"Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans."***

In that regard, the 2nd Respondent through the Affidavit of A.K. Maina explained that;

> ***"The discussions between the National Treasury and the Government of China were to the effect that part of the financing would be a concessional***

loan from the government of China (through Exim Bank) while another part would be a commercial loan from the Exim Bank of China, which is a state owned financing institution of the Government of China. The financing terms required:

a. ***That the government provide to the financier evidence of an existing commercial contract for the construction of the SGR amounting to the amount of the financing which the government sought from the government of China.***

b. ***That the Government provide counterpart funding of up to 10% of the overall cost of the project; and …"***

It was on those terms that the 2nd Respondent and the 4th Respondent negotiated and signed the two commercial contracts, the subject of these Petitions. One of the contracts was for the construction of the SGR line and the other for the installation facilities including locomotives and rolling stock. Both contracts provided that they shall become effective upon execution of the financing agreement between the Government of Kenya and Exim Bank of China.

65. As is evident, by virtue of the above provision i.e. **Section 6(1)** of the **Public Procurement and Disposal Act** the provisions of the said Act would not apply in regard to the contested procurement and i therefore agree with Mr. Kimani that **Section 6(1)** is clear that the Act does not apply in instances of negotiated loan or grants, because the SGR Project is being financed by a loan from the government of China through Exim Bank of China. This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with the **Public Procurement and Disposal Act.** The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the provisions of the **Public Procurement and Disposal Act**. I am clear in my mind that there is no conflict at all. I say so, because the Act has laid down procedures to be followed in public procurement of goods and services. In particular, it demands the use of open tendering in procurement with set down procedures and requirements and matters which ought to be evaluated as well as the notification of successful parties and the unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR project. They include the following; the finances required would be met by the Chinese Government and that the mode of procurement of the SGR project had to be in line with the conditions made by Exim Bank; i.e. the 4th Respondent had to be awarded the contract. Whether that term of the contract was oppressive or not is not for this Court to interrogate as in fact all evidence before me points to the fact that Parliament has already done

so and found it to be lawful. To my mind therefore, the arguments made by the Petitioners that the Government was involved in a restricted tendering or indirect procurement would not be valid. It is obvious therefore that the **Public Procurement and Disposal Act** does not apply to the issues at hand and I so find.

66. I make that finding well aware of the arguments made by the 1st and 2nd Petitioners that the funding of the SGR project is 100% by the Government because it has to repay the loan advanced to it by Exim Bank and that the proceeds of the loan are to be released per the MoU and the terms and conditions of the agreement. That fact notwithstanding, it means that the guiding principles are those negotiated as between the two entities and **Section 6(1)** of the **Act** is the law on which such loans and grants are based. Parliament must have had a reason to exclude them from open tendering and generally the operations of the **Public Procurement and Disposal Act.** In that regard, my duty is to interpret the law as made by Parliament and not to re-write it to suit popular opinions or beliefs or indeed my own beliefs, strong as they may be in this case.

67. Having found as above, it therefore follows that the arguments that the Petitioners ought to have lodged their complaints with the Public Procurement Administrative Review Board as established under **Section 93** of the **Public Procurement and Disposal Act,** are irrelevant and would not apply in the context of the Petitions before me. See of ***Power Technics Ltd vs Kenya Power and Lighting Company Ltd (supra) Victory Construction Company Ltd vs Ministry of Regional Development Authorities(supra), Intex Consortium Ltd vs Ministry of Roads (supra) and Areva Td-Viscas Consortium and Another vs Kenya Power and Lighting Co Ltd (supra)***for a discussion on that subject, generally.

68. It was also the 2nd Respondent's argument that if the Petitioners are complaining about corruption in the procurement of the SGR project, they ought to have filed complaints with the **Ethics and Anti-corruption Commission** for investigation.

69. In that regard**, Article 79** of the **Constitution** stipulates that;

> ***"Parliament shall enact legislation to establish an independent Ethics and Anti-Corruption Commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for***

purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter".

Under **Section 11** of the **Ethics and Anti-Corruption Commission Act,** the functions of the Commission are *inter-alia*:

"(a) …

c. **…**

(c) Receive complaints on the breach of the code of ethics by public officers

d. ***investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution. "***

It is thus crystal clear that the **Ethics and Anti-Corruption Commission** is the appropriate body to undertake investigations into the allegations of corruption in the SGR project. I must in that case agree with the 2nd Respondent that the **EACC** has the mandate, manpower and resources to properly investigate allegations of corruption and it would be prudent for the Petitioners to provide such information as they may possess to the **EACC** and aid any investigation that it may commence.

71. However, if I also understood the Petitioners well, they claimed that the Respondents have violated the provisions of **Articles 206, 214, 220, 221, 222, 223** and **227** of the Constitution dealing with public finances. That being the case, I am aware that **Article 165 (3)** of the **Constitution** sets out the jurisdiction of the High Court and it provides as follows;

" 165(3) Subject to clause (5), the High Court shall have—

a. ***unlimited original jurisdiction in criminal and civil matters;***

b. ***jurisdiction to determine the question whether a right or***

fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c. ***jurisdiction to hear an appeal from a decision of a tribunal***

appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

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"

72. That being so, and seeing that the Petitioners have invoked this Court's jurisdiction to interpret the Constitution and determine whether the acts of the Respondent in regard to the SGR project are in violation of the Constitution, then this Court has jurisdiction to address that issue, the merits or otherwise, notwithstanding. To find otherwise would leave the Petitioners without an avenue to ventilate their grievances and in any event, **Article 258 (1)** of the **Constitution** also grants the Petitioners the right to institute the consolidated Petitions. This Article provides thus;

"Every person has the right to institute court proceedings, claiming that this Constitution has been violated, or is threatened with contravention".

73. The Constitution is thus clear and grants every citizen a right of access to the High Court where there is an allegation of infringement of the Constitution. That is why the Court of Appeal in the case of ***Tononoka Steels Limited vs Eastern and Southern Africa Trade***

Development Bank- Civil Appeal No. 255 of 1998 stated as follows regarding access to Courts;

> ***"The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya".***

Similarly, in ***Davies & Another vs Mistry- 1973 EA 463*** Spry V-P quoting the case of ***Pyx Granite & Co. vs Ministry of Housing- 1960 AC 260*** stated that:

> ***"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Court for the determination of his rights is not to be excluded except by clear words."***

74. I am duly guided and with that clarification in mind, I find that save for the matters raised at the beginning of the determination of this issue, this Court has jurisdiction to entertain the Petitioner's claim and so I will.

Whether the consolidated Petitions are supported by valid documentary evidence.

75. It was the 1st, 2nd and 3rd Respondents' contention that the Petitioners have failed to disclose the sources of their purported documentary evidence which includes letters and documents apparently from different offices of Government and parastatal institutions regarding the SGR project. They are also apprehensive that the documents/information may have been illegally obtained and contended that those documents, annexed as **"Exhibit OOO1"** in the Affidavits of the 1st Petitioner sworn on 5th February 2014 and 6th March 2014 and the Affidavit of Apollo Mboya sworn on 2nd May 2014 cannot be relied upon by this Court because the alleged makers of those documents have not produced the said documents, neither are they primary nor secondary evidence.

76. On their part, the Petitioners have claimed that they lawfully obtained the documents because they were submitted to them by public spirited citizens and that under **Article 35** of the Constitution they have a right to information held by the State. In any event, that the 2nd Respondent had failed to state that the documents produced and relied upon are false. Further, it was their argument that the makers of those documents has not denounced them neither have criminal proceedings alleging the theft of those documents been instituted. They thus contended that the documents relied upon are valid and give a candid exposition of the matters and facts surrounding the procurement process of the SGR project.

77. I have considered the rival arguments placed before me and the issue of the admissibility and the probative value of the documents as raised by the Parties herein is significant, both as a matter of principle and practice. The arguments made require consideration of the law of confidence, both in general and as between public servants and the Government, the power of the court to exclude or admit wrongfully obtained documents and information and lastly, the proper relief a Court should grant when a party is relying on allegedly unlawfully acquired documents. While these issues involve criminal law and the law of evidence, **Articles 31, 35** and **50** of the **Constitution** must also be taken into account when determining the admissibility or otherwise of the named documents.

78. I will start off by considering firstly the submission made by Prof. Mumma that the public servants who disclosed the contested information to the Petitioners are in breach of their public duty and their duty to their employer for clandestinely and secretly removing official documents and handing them to third parties, being the Petitioners. The Petitioners have on the other hand described the persons who gave them the documents and the information as public spirited public servants and also as 'whistle blowers'. With respect to them however, and to my mind, I do not think that those persons fit the legal definition, meaning and conduct of whistle blowers. I say so because **Article 33** of the **United Nations Convention Against Corruption** states as follows in regard to whistle blowers;

> ***"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."***

79. It is thus clear from the above provisions that whistle blowers are supposed to make reports, in good faith, to competent authorities empowered by law to act on their reports, any corrupt conduct on the part of anyone. The Petitioners herein are not the authorities so contemplated under **Article 33** above and as such the persons who gave them the documents cannot claim to be whistle blowers.

80. Secondly, it was submitted that the public servants who handed over the documents to the Petitioners are in breach of the employees' duty to the employer as provided for under the **Public Officers Ethics Act, 2003. Section 11(2)(c)**of that **Act** states that;

"a public officer shall not for personal benefit of himself or another use or allow the use of information that is acquired in connection with the public officer's duties …"

Section 24 provides further that;

"a public officer contravenes the Code of Conduct and Ethics if he causes anything to be done through another person that would, if the public officer did it, be a contravention of the Code of Conduct and Ethics".

81. On the basis of the arguments made by the Respondents and presented to the Court on the issue before me now, there does seem to be a real possibility that those public servants responsible for handing over the documents to the Petitioners contravened the Code of Conduct and Ethics and violated **Section 11(2) (c)** of the **Public Officers Ethics Act** as stated above. I say so because many of the documents produced in Court, and as I have studied them, are in reference to commercial contracts, professional privilege and may even compromise diplomatic privilege because of the diplomatic communication and correspondence between Government officials. In that regard, in ***Robert Tchenguiz & Others vs Vivian Imerman(supra),*** the Court observed as follows:

"How can the law – how can the judges – countenance recourse to self-help in circumstances where the court itself declines to act, and when to do so would be not merely unprincipled but an unjustifiable invasion of someone's rights? In the instant appeal Mrs Imerman was not entitled to the confidential information at the stage she obtained it. The Family Proceedings Rules prevented it. The law forbids it. She should not be allowed to obtain an advantage over her husband who, for all the court knows, would have been honest when the time came for him to be honest, namely at the time the Rules required him to disclose his assets through Form E."

82. I am in agreement and self-help is generally not accepted with regard to documents held in confidence. The question in my mind right now therefore is whether the Petitioners were entitled to the documents at the stage they obtained the said documents. I heard the Petitioners to say that the persons who gave them the documents acted in good faith. That is why Apollo Mboya stated in his Affidavit at paragraph 62 that; ***"the documents relied upon were submitted to the Law Society of Kenya by conscientious public spirited citizens in lawful possession of the said documents".*** That clear averment notwithstanding, in my view, the defence of good faith would not stand in the current case because the Constitution at **Article 35** has provided that every citizen, including the Petitioners, have a right to obtain information held by the State and **Article 22** of the Constitution places on the Petitioners an obligation to request for that information and the State also has an obligation to disclose to them the

information sought unless there exist sufficient reasons for non-disclosure - See ***Nairobi Law Monthly & Another vs Kengen eKlr 2013***

83. Use of 'self-help' or clandestine means in the face of clear constitutional mechanisms is also, in my view, therefore unwarranted. In that regard in ***Tchenguiz vs Imerman (supra,)*** the Court observed as follows;

> ***"Are the courts to condone the illegality of self-help consisting of breach of confidence because it is feared that the other side will itself behave unlawfully and conceal that which should be disclosed? The answer in out judgment can only be: No".***

At paragraph 138 the Court stated further that;

> ***"Otherwise the position would be that the party employing the criminal or fraudulent agent would have it entirely within its power to decide which of the criminally or fraudulently acquired information he was willing to rely on and disclose and which he was not. Where such a party will be asking the court to make inferences from such material it is only fair that such material should be seen as a whole".***

84. The point made above in the context of the matter before me is that if litigants choose to use clandestine means to procure information such actions would heavily compromise the need for **Article 35** of the Constitution and would obviously violate the other parties' fundamental right to privacy under **Article 31** of the Constitution. Had the Petitioners followed lawful channels and procedures available in law in obtaining the information, then the question of violation of the Respondents' rights to privacy as alleged in the Cross-Petition would not have arisen. Indeed in ***Dubai Aluminium Co Ltd vs Al-Alawi (1999) 1 WLR 1964*** where confidential documents had been obtained by a private investigator's agents by making so-called 'pretext calls', the Judge held that there was a strong prima *facie case* of criminal or fraudulent conduct in obtaining of the information involving breaches of the England Data Protection Act of 1984. Rix J stated thus therefore;

> ***"It seems to me that if investigative agents employed by solicitors for the purpose of litigation were permitted to breach the provisions of such statutes or to indulge in fraud or impersonation without any consequence at all for the conduct of the litigation, then the courts would be going far to sanction such conduct. Of course, there is always the sanction of prosecutions or civil suits, and those must always remain the primary sanction for any breach of the criminal or***

civil law. But it seems to me that criminal or fraudulent conduct for the purposes of acquiring evidence in or for litigation cannot properly escape the consequence that any documents generated by or reporting on such conduct and which are relevant to the issues in the case are discoverable and fall outside the legitimate area of legal professional privilege. It is not as though there are not legitimate avenues which can be sought with the aid of the court to investigate (for instance) banking documents. That apparently is true in Switzerland as well. In any event, the material being investigated is usually material which falls within the other party's possession or control, and which in all probability he will in due course be obliged to disclose himself."

85. I agree with the above sentiments and the law in Kenya as regards the procedures for introducing a public document into Court as evidence is also clear. **Section 80** of the **Evidence Act** states thus;

"Every public officer having the custody of public documents which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees thereof, together with certificate written at the foot of such copy that it is a true copy of such document or as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title and shall be sealed".

86. To my mind, this provision exists in our law books for a good reason; it guarantees the authenticity and integrity of the documents relied upon in Court. The Petitioners in this case have relied on photocopies of several documents to support their case and yet **Section 83** of the **Evidence Act** states that;

"(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is –

a. ***Declared by law to be admissible as evidence of any particular fact; and***

b. ***Substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and***

c. ***Purporting to be duly certified by a public officer.***

> ***(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document."***

87. It is clear therefore that the documents produced in this Court fall short of the criteria established under the Constitution and the Evidence Act. The photocopies of the documents are not certified in accordance with the law and it therefore follows that this Court cannot rely on them because they are not admissible. In addition, **Section 35** of the **Evidence Act** also provides for the admissibility of documentary evidence as follows;

> ***"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say –***

a. ***If the maker of the statement either –***

i. ***Had personal knowledge of the matters dealt with by the statement; or***

ii. ***Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and***

b. ***If the maker of the statement is called as a witness in the proceedings:***

> ***Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."***

It is obvious that the documents purportedly relied upon by the Petitioners do not meet the above criteria and are therefore not admissible.

88. I would still have arrived at the same conclusion even if none of the Respondents had denied the existence of those documents or disputed their contents and I say so although i am aware of the decision in ***Karuna s/o Kaniu vs Reginam (1995)ALL ER*** where it was stated as follows;

> ***"In considering whether evidence is admissible, the test is whether it is relevant to the matters in issue, and, if it is relevant, the court is not concerned with the method by which it was obtained or with the question whether that method was tortious but excusable; this principle, however, does not qualify the rule that a confession can only be received in evidence if it is voluntary."***

89. Looking at the reasoning in ***Karanu (supra)*** I am certain that the same would not apply in the instant Petition. I say so because as will be seen from the provisions of the law as cited above, it is clear how documents are to be admitted as evidence. The law having concerned itself in such a manner, I do not think that is proper for a Court of law to disregard or concern itself with the method by which documents to be relied upon in evidence were obtained. I also say so because **Article 50 (4)** of the Constitution states as follows;

> ***"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice".***

The issue therefore and following on that provision is whether allowing the documents to remain on record, would be an action detrimental to the administration of justice.

In that regard, in ***Derby & Co Ltd & Others vs Weldon & Others (1990) 3 ALL ER 672*** it was held that;

> ***"Where privileged documents belonging to one party to an action were inadvertently disclosed to and inspected by the other side in circumstances such that the inspecting party must have realized that a mistake had occurred but sought to take advantage of the inadvertent disclosure, the court had power under its equitable jurisdiction to intervene and order the inspecting party to return all copies of the privileged documents and to grant an injunction restraining him from using information contained in or derived from the documents, even if it was not immediately obvious that the documents were privileged. Since the conduct of the defendants' solicitors made it plain that they were seeking to take advantage of an obvious mistake, the court would order them to return all copies of the privileged documents which they had obtained as a result of the mistake, including the three documents in issue."***

90. I am in agreement with the exposition of the law and I am also in agreement with the decision in ***Baseline Architects Ltd & 2 Others vs National Hospital Insurance Fund Board Management (2008) e KLR*** where it was stated that;

> ***"I therefore think [that] the intense criticism leveled against the employees of the applicant in the way the documents attached to the affidavits of the Respondents were obtained is a matter of great concern. Perhaps it shows the lack of respect and trust by the said employees".***

The Court went on to state that;

> ***"In my understanding, a party to a litigation is not obliged to produce documents which do not belong to him but which have been entrusted to his company by a third party in confidence. It would be an abuse of that confidence to disclose it, without the permission of the owner of the original documents".***

91. Applying the same reasoning to the present Petitions, I recall that the contention put forward by the Respondents was that the production and use of its documents illegally obtained is likely to be injurious to the public. My humble view is that a possible injury to public interest must be balanced with another risk which is the frustration of administration of justice by such refusal. On that issue, Lord Reid in ***Konway vs Limmer (1968) 1 ALL ER 874*** expressed himself as follows;

> ***"It is universally recognized that there are two kinds of public interest which may clash. There is the public interest that harm shall***

not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of the documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases, it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy, but there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interest involved. I do not believe that Lord Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration or the administration of justice."

92. I am in agreement and I must now address the issue whether a party is entitled to use, to his advantage, stolen or irregularly obtained documents in a manner that is prejudicial to other parties in proceedings such as the one before me. As stated elsewhere above, the documents produced and relied on by the Petitioners were meant for the Respondents and the Exim Bank of China. In my understanding, it is necessary to secure some freedom of communication especially in Government offices. The 2nd Respondent and the 3rd Respondent for example had sought advice from the 1st Respondent, the Attorney General, during the negotiations leading to the impugned contracts. It is a principle of public interest that such advise ought to be written with utmost confidence and if such communication were to be availed to members of the public in unclear circumstances, then I must agree with Mr. Njoroge for the 1st and 3rd Respondents that it is prejudicial to public interest, however pertinent the issue may appear and the reasons for that finding are not far to find. As was stated in ***Baseline Architects Ltd (supra)***

"In my humble view, it is of utmost importance that public service should function properly and to my mind it cannot do so unless commonplace communications between one civil servant and another are privileged from production. It would also seem to me that it would be an injustice to civil servants to hold that they are so timid that they would not write freely and candidly unless they know what they wrote could in no circumstances whatsoever, come to the light of the day to be used by a person not intended to see or rely on the contents of such documents. However it is also important to ensure that claims of privilege are not used unnecessarily to the detriment of the vital needs of the court to have the truth put before it.

The point I am making is that judicial control over the evidence in a case cannot be abdicated to the caprice of privilege, yet we cannot say that courts may automatically require a complete disclosure. It is in the public interest that the material should be withheld if by its production and disclosure, the safety and well being of the public could be adversely affected. It is, I think a principle which commands general acceptance that there are circumstances in which the public interest must be dominant over the interest of a private individual. To the safety or the well being of the general public, the claims of a private litigant motivated by profit may have to be subservient."

The Court went on to state that;

" It is therefore vital to protect the public form private interest peril – i.e. interests of a litigant must give way to that of the general public. It is quite obvious that public policy requires that the most unreserved communication should take place between public servants and it should not be subject to restraints or limitations. But it is quite clear that if the document in possession of the respondents is allowed to be produced, used and relied upon in a court of justice, that would in essence restrain the freedom of communication and render public officers to proceed in a more cautious, guarded and reserved manner in their communication and concerns."

In conclusion, the Court stated that;

"It is also clear in my mind that justice is administered in civil disputes on the principles that you cannot use an advantage obtained improperly or illegally in a manner prejudicial and/or detrimental to the interest of the opposite party. That principle is based and/or founded on fair play and there can never be justice without fair play. And in my opinion there cannot be fair play if we allow parties to steal a match by relying on documents improperly obtained from the other side."

I am in complete agreement with the learned judge and to my mind, it matters not whether a report of theft of those documents has been made or not. The Petitioners cannot simply rely on information that they obtained in unclear circumstances and to allow them to do so would in my view, defeat the very essence of **Article 35** of the **Constitution** and the purposes it intends to achieve as well as the rights of privacy enshrined in **Article 31** of the **Constitution**.

93. I have already said that a citizen is entitled to information held by the State and it is thus clear that there is no need or room to use irregular methods in obtaining information since the law has entitled every citizen the right to information only by use of lawful means. The duty

of the State to show why that information should not be given as sought is also clear but it must be remembered that the right to information is not absolute and may be limited in appropriate and reasonable circumstances.

94. I am also aware that **Article 35(3)** has mandated the State to publish information affecting the Nation. To my mind therefore, the Petitioners could properly compel the Government to publish the information relating to the SGR project in the event that it fails to do so and if that information affects the Nation, they can properly seek this Court's intervention. I have stated this to show that the Petitioners had in fact many avenues in law as to how they could have obtained the information, subject of the SGR project, without resorting to illegal and untidy measures.

95. It is therefore clear to my mind that in obtaining the documents which the Petitioners are relying on in the present Petition, they violated the 2nd Respondent's fundamental right to privacy and also the privacy of the communication between the State and the Exim Bank of China. **Article 31** of the **Constitution** grants every person the right to privacy which right includes the right not to have the privacy of their communication infringed. I have already stated elsewhere above that the public servants who indeed clandestinely gave the Petitioners the documents acted in violation of their Code of Conduct and the Public Officers Ethics Act. That being so, I am thus satisfied that the following documents viz;

i. Annextures marked as **AM 1, 2, 3, 5, 6, 7 and 8** to the supporting affidavit of Apollo Mboya sworn on 2nd May 2014.

ii. Annextures marked **AM 1, 3, 5, 6, 7, 8 and 10** to the supplementary affidavit of Apollo Mboya sworn on 6thJune, 2014.

iii. Annextures titled **"Exhibit 000-1"** marked A, B, C, D, E, F, G, H, I, J, K ,L, M, N and P to the supporting affidavit of Okiya Omtatah Okoiti sworn on 5th February, 2014.

iv. Annextures to the Replying Affidavit of Okiya Omtatah Okoiti sworn on 6th March 2014.

As well as;

NO. 1 ANNEXTURES MARKED AM 1, 2, 3, 5, 6, 7 AND 8 AFFIDAVIT OF APOLLO MBOYA SWORN ON 2ND MAY 2011

Annexture AM 1 - Feasibility Study Report January 2012.

Annexture AM 2 - Commercial contract between KRC and China Road & Bridge Corporation Contract Doc July 2012.

Annexture AM 3 - Contract document for the supply and installation of the facilities, Locomotives and Rolling stocks for the Msa-Nrb Standard Gauge Railway Project between KRC and China road and Bridge Corporation October 2012.

Annexture AM 5 - Letter dated 14th March 2013 Ref.OPR.9

Annexture AM 6 - Letter dated 5th April 2013 Ref.

Annexture AM 7 - Letter dated 30th April 2013 Ref.AG(CONF/2/C/90/VOL.1

Annexture AM 8 - Letter dated 28th October 2013 Ref.No.ODP/ADM./153

NO.2 ANNEXTURE AM, 1, 3, 5, 6, 7, 8, AND 10 TO SUPPLIMENTARY AFFIDAVIT OF APOLLO MBOYA SWORN ON 6TH JUNE 2014

Annexture AM 1 - Minutes of the tender Committee meeting No.107 held on Thursday 22nd April 2010 at 1.00 p.m. in the procurement & Logistics Manager's Office Block D. Kenya Railways Headquarters.

Annexture AM 3 - Letter dated 16th March 2011 from M.D. Kenya Railways Corporation Ref.MOT/5/8.002Vol.II(6)

Annexture AM 5 - Memo of Under and Co-operation dated 12th August 2009 between China Road Bridge Corporation and Government of Kenya

Annexture AM 6 - Letter dated 4th April 2011 Ref.OPR.9 from PS. Ministry of Transport.

Annexture AM 7 - Letter dated 29th January 2007 Ref.EAIFA/211/78/0 W(72) from The Treasury to H.E. Mr. Chang Ming

Ambassador Embassy of the people's Republic of China

Annexture AM 8 - Letter dated 27th March 2007Ref (invisible) from the

Economic and Commercial Cousellor's Office Embassy of the Peoples' Republic of China

Annexture AM10 - Letter dated 4th July 2012

Ref.AG/CONF/14/153Vol.VII(22) from A.G to P.S

Ministry of Transport

NO.3 ANNEXTRUE TITILED EXHIBIT 000-1 MARKED A, B, C, D, E, F, G, H, I, J, K, L, M, N, AND P TO AFFIDAVIT OF OKIYA OMTATAH OKOITI SWORN ON 5TH FEBRUARY 2014

Annexture

Exhibit 0001 A - Letter dated 4th May 2008 from China Road & Bridge

Corporation Kenya to Minister for Transport

Annexture

Exhibit 0001 B - Letter dated 9th September 2008 from China Road &

Bridge Corporation (Kenya) to Prime Minister

Annexture

Exhibit 0001 C - Letter dated 14th November 2008

Ref.MOT/C/RAIC/16 from MOT to GM China road

Annexture

Exhibit 0001 D - Memorandum of Understanding dated 12th August

2009

Annexture

Exhibit 0001 E - Letter dated 21st September 2009 from the Economic

and Commercial Counsellor's office

Annexture

Exhibit 0001 F - Letter dated 4th January 2010 form Office of Prime

Minister to Ambassador Embassy of Peoples Republic of China.

Annexture

Exhibit 0001G - Feasibility study

Annexture

Exhibit 0001 H - Letter dated 6th July 2012 Ref.MOT/5/8.002 VOL.II(17)

Annexture

Exhibit 0001 I - Letter dated 3rd October 2012 Ref.MOT/5/8.002 VOL.II/42

Annexture

Exhibit 0001 J - Letter dated 19th February 2013 Ref.KRC/PLM/PPO4/003

Annexture

Exhibit 0001 K - Letter dated 14th March 2013 Ref.OPR 9

Annexture

Exhibit 0001 L - Letter dated 5TH April 2013 Ref.PPOA/COMP/30/21/VOL.III(17)

Annexture

Exhibit 0001M - Letter dated 30th April 2013 Ref.AG/CONF/2/C/90VOL.1

NO.4 ANNEXTURE TO REPLYING AFFIDAVIT OF OKIYA OMTATAH

OKOITI SWORN ON 6TH AUGUST 2014

000-1 - Letter dated 19th November 2012 from Kenya Forest Service

- Letter dated 23rd November 2012 from KWS
- Letter dated 22nd November 2012 from National Museums of Kenya
- International Competitive Bidding Competitive Negotiations issued on October 2013
- Feasibility Study Report (Mombasa-Nairobi Standard Gauge Railway Project January 2012.
- Cabinet memorandum on Development of the Standard Gauge Railway Line from Mombasa to Nairobi by National Treasury and Ministry of Transport November 2013
- Contract Document October 2012 for Supply and Installation of the Facilities Locomotives and Rolling Stocks for the Mombasa-Nairobi Standard Gauge Railway project between Kenya Railways Corporation and China Road and Bridge Corporation

- Letter of award dated 10th July 2012

are hereby expunged from the record.

96. Having so expunged those documents from the record, Under **Rule 11(2)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, this Court can still determine a Petition without any Annextures or Affidavits thereto. I will therefore proceed to determine the Petitioners' claims as they are and without the expunged records and documents.

Whether the Petitions demonstrate a violation of the Constitutional provisions.

97. In determining whether the Petitioners have demonstrated a violation of the Constitution, I will also consider issues No. (iv), (v) and (vi) as framed above, together, as they answer the big question as to whether there was a violation of the Constitution and the law in the procurement of the SGR project.

Whether the Respondent complied with the law in the procurement of the SGR

Law on Procurement

98. As can be seen from my opinion elsewhere above, I have already made a determination that the **Public Procurement and Disposal Act** does not apply in the procurement of the SGR project. That being the case, I do not think that the law was violated in that regard.

Public Finance Management

99. The Petitioners claimed that the **Public Finance Management Act** was violated on various fronts. First, that Parliament's approval was not obtained before the SGR contracts were executed. Secondly, that **Section 15** of the **Public Finance Management Act** was violated because the National Treasury was not involved in the management of the funds committed to the SGR project since they were paid to the 4th Respondent directly instead of being paid into the Consolidated Fund which is managed by the National Treasury. That further, **Articles 220** and **221** of the **Constitution** were violated because there has not been passed an Appropriation Act through which the SGR project funds could be withdrawn and that the loan from the Exim Bank of China has not been included into any national budget nor any Appropriation Act. That therefore the said funds cannot be lawfully applied to any project undertaken under any law in Kenya.

100. On their part, the Respondents contended that finance laws were followed in all the transactions in issue and Parliament was not by passed and it indeed actively debated the SGR project as part of the **Finance Bill, 2013**.

101. In answer to the issue above, I note that **Articles 220** and **221** of the Constitution provide as follows, respectively;

> (1)Budgets of the national and county governments shall contain— (a) estimates of revenue and expenditure, differentiating between recurrent and development expenditure; (b) proposals for financing any anticipated deficit for the period to which they apply; and (c) proposals regarding borrowing and other forms of public liability that will increase public debt during the following

year. (2) National legislation shall prescribe— (a) the structure of the development plans and budgets of counties; (b) when the plans and budgets of the counties shall be tabled in the county assemblies; and (c) the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets.	
	Article 221 (1) At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National

	Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly. (2) The estimates referred to in clause (1) shall— (a) include estimates for expenditure from the Equalisation Fund; and (b) be in the form, and according to the procedure, prescribed by an Act of Parliament. (3) The National Assembly shall consider the estimates submitted under clause (1) together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary under Articles 127 and 173 respectively. (4) Before the National

	Assembly considers the estimates of revenue and expenditure, a committee of the Assembly shall discuss and review the estimates and make recommendations to the Assembly. (5) In discussing and rviewing the estimates, the committee shall seek representations from the public and the recommendations shall be taken into account when the committee makes its recommendations to the National Assembly. (6) When the estimates of national government expenditure, and the estimates of expenditure for the Judiciary and Parliament have been approved by the National Assembly, they shall be included in an

	Appropriation Bill, which shall be introduced into the National Assembly to authorise the withdrawal from the Consolidated Fund of the money needed for the expenditure, and for the appropriation of that money for the purposes mentioned in the Bill. (7) The Appropriation Bill mentioned in clause (6) shall not include expenditures that are charged on the Consolidated Fund by this Constitution or an Act of Parliament.	

Further, **Section 15** of the **Public Finance Management Act** which is the legislation that has operationalized **Articles 220** and **221** of the **Constitution** is titled **"National Treasury to enforce fiscal responsibility principles".** One of those principles is that **"public debt and obligations shall be maintained at a sustainable level as approved by Parliament."**

102. The above is therefore the law regarding budgeting and spending by the national and County Governments. Looking at the said law and the evidence before me, it is clear that Parliament was involved in the budgeting of the funds to be utilized in the SGR project. I say

so because **Section 6 of Act No. 38 of 2013,** the **Finance Bill 2013,** amended **Section 117A** of the **Customs and Excise Act, Cap 472 Laws of Kenya** by introducing a railway development levy. **Section 117 A** now reads as follows;

> ***"117A (1) There shall be paid a levy to be known as the railway development levy on all goods imported into the country for home use.***

1. ***The levy shall be at the rate of 1.5 percent of the customs value of the goods and shall be paid by the importer of such goods at the time of entering the goods for home use.***

2. ***The purpose of the levy shall be to provide funds for construction of a standard gauge railway network in order to facilitate the transportation of goods.***

3. ***The Cabinet Secretary shall, in regulations, establish a railway development levy fund with which all the proceeds of the levy shall be paid.***

4. ***The fund referred to in subsection (4) shall be established, managed, administered or wound up in accordance with section 24 of the Public Financial Management Act, 2012 and the regulations made under that Act." (Emphasis added)***

103. As can be seen, **Section 117A** has sought to provide funds for the construction of a standard gauge railway, the subject of this Petition. In fact the law has indeed established a **Railway Development Levy Fund** which would be administered in accordance with the provisions of **Section 25** of the **Public Financial Management Act, 2012**. I am thus satisfied that the **Public Finance Management Act** was not violated in the procurement of the SGR project. I shall say no more on that issue.

104. The Petitioners however also contended that the **Public Officers Ethics Act** was violated because the Respondents had failed to observe the rule of law and to comply with the requirements of **Section 45(2) (b)** of that **Act**. I have seen the provisions of **Section 45(2) (b)** of the **Public Officer Ethics Ac**t. That provisions deals with the issues of administration,

custody and management of public revenue or public property. The Petitioners merely claimed that the said Section was violated without minding to provide details of how and the manner in which it violated. For that reason I will not belabor the point further and for good reason - See ***Anarita Karimi Njeru Case (supra)*** on particularity of pleadings filed under the Constitution.

Whether in undertaking the SGR project, the Respondents have taken into account environmental considerations

105. It was the Petitioners' contention in the above regard that the SGR project is being implemented without environmental and cultural considerations being taken into account. That they also failed to consult rightful stakeholders like the Kenya Wildlife Service, Kenya Forest Service and the National Museums of Kenya before implementing the said project and they thus claim that it is irregular and illegal for the Respondents to have approved the SGR project without a valid EIA Report. On their part, the Respondents' contention is that they sought and were granted the approval to undertake the SGR project by the requisite bodies and that the Petitioners' complaints in that regard are invalid.

106. On my part, I have seen the Environmental Impact Assessment (EIA) License issued to the 4th Respondents on 5th February 2013. In addition, the Government had conducted an autonomous environment impact assessment on the SGR project and concluded that the SGR project should proceed. It is thus my finding, with that evidence before me, that the contention by the Respondents that the SGR project is detrimental to the environment lacks merit. I have also seen the Gazette Notice publishing the study report of the SGR project in accordance with the provisions of the Environment Management and Co-ordination Act (EMCA) and also a similar publication in a newspaper of wide circulation in Kenya. I note that in the said Gazette Notice and newspaper publication, the members of the public including the Petitioners were given sixty days within which to lodge complaints and or comments on the same as required under the said EMCA. None of the Petitioners did so. In that regard, and on that subject, Angote J. in ***Kwanza Estates Ltd v Kenya Wildlife Services (2013) e KLR*** stated as follows;

> ***"Environment Impact Assessment (EIA) is a toll that helps those involved in decision making concerning development programmes or projects to make their decisions based on knowledge of the likely impacts that will be caused on the environment. Where the impacts are negative and likely to result in significant harm, decisions makers will be able to decide what kind of mitigating measures should be taken to eliminate or minimize the harm. The projects that are***

potentially subject to EIA are specified in the second schedule of EMCA and they include an activity out of character with its surrounding, any structure of a scale not in keeping with its surrounding and change in land use."

He went on to state that;

"The importance of public participation in decision making in environmental matters is highlighted by the requirement that the EIA study report be published for two successive weeks in the Gazette and in a newspaper circulating in the area of the project and the public to be given a maximum of sixty days for submission of oral or written comments on the same. EIA process gives individuals like the Plaintiff in this case, a voice in issues that may bear directly on their health and welfare and entitlement to a clean and healthy environment."

The learned Judge then concluded thus;

"In addition to the requirements of the Constitution and the EMCA that the public must be involved in the development of policies, plans and processes for the management of the environment, the Environment and Land Court Act, No. 19 of 2011 at section 18 also reinstates that position. The other principle of sustainable development that must guide this court in the exercise of its jurisdiction is the pre-principle of sustainable development that must guide this court in the exercise of its jurisdiction is the per-cautionary principle. This principle states that if an action or policy has a suspected risk of causing harm to the environment, in the absence of Scientific consensus that the action is harmful, the burden of proof that it is not harmful falls on those undertaking the act. The principle is a statutory requirement under EMCA and the Environment and Land Court Act."

I am fully in agreement and I shall apply those words as if they were mine in the context of the consolidated Petitions.

107. In addition to the above, am also aware of the provisions of EMCA which establish the National Environmental Management Agency Tribunal (NEMA) Tribunal. That tribunal is obligated to hear and determine disputes relating to the administration of EMCA. **Section 125** of that **Act** specifically provides for the right to appeal to the National Environmental Management Tribunal against a decision by NEMA to grant a license to entities such as the 4th Respondent to undertake a project such as the SGR. The Petitioners have clearly failed to lodge an appeal nor make any presentations before the said Tribunal. At the moment, I do not have any exceptional circumstances that would make me intervene on the decision of NEMA. And even if I would assume and find that NEMA was wrong in awarding the license, this

Court has no jurisdiction to do so since no proper basis for intervening has been established. In any case, the Tribunal established under EMCA is the specialized body that is acquainted with environmental issues and this court lacks the expertise and the resources to determine whether the SGR project is detrimental to the environment or not. In that regard, the Petitioners' arguments must fail.

108. I now turn to consider the issue whether the Kenya Forest Service, the National Museums and the Kenya Wildlife Service (KWS) were consulted before the implementation of the SGR project. The Petitioners, while making those serious allegations, failed to state the law under which the National Museums and KWS would have had to be specifically consulted. They also failed to state how the SGR project would have had an irreversible damage to the environment and impact on cultural rights so that the court may determine the issue appropriately. Even so, and having expunged from the record the letters the Petitioners rely upon in that regard, I do not have reports from either KWS or National Museums showing how the environment, the ecosystem and cultural rights would be affected by the SGR report. That being the case, I am without sufficient material upon which to determine that aspect of the Petition. I therefore must reiterate the sentiments of the East African Court of Justice in ***African Network for Animal Welfare v Attorney General of United Republic of Tanzania, (supra)*** where the Court stated thus;

> ***"This reference raises issues that are today the subject of wide debate across the world, including environmental protection, sustainable development, environmental rule of law and the role of the state in policy formulation in matters relating to the environment and natural resources. In addition, the role of the court in balancing its interpretative jurisdiction against the needs of ensuring that partner states are not unduly hindered in their developmental programs has come to the fore. All these issues must however be looked at from one common thread running through the reference viz. the need to protect the Serengeti ecosystem for the sake of future generations and whether the road project has potential for inflicting irreparable damage to the environment. The damage will be irreversible and we have already ruled on that subject based on the evidence before us and no more."***

109. That is an important finding and sadly the same cannot be said in the instant Petition and I have already stated elsewhere above why. The **Serengeti case** is in any event distinguishable as the Applicant in that case brought forth clear evidence of environmental damage had the bitumen road across the Serengeti been constructed. No such evidence exists before this Court.

Whether the Respondents have put in place mechanisms to ensure value for money

110. It was the Petitioners' contention that the SGR project has not ensured value for money because the 1st and 2nd Respondents had failed to exercise due diligence in undertaking the SGR project. That the 4th Respondent also has no capacity to undertake a project of such magnitude because it is undercapitalized and has a very limited annual turnover which is even lower than the cost of the SGR project. They also claimed that the SGR project was more expensive compared to the cost incurred in other countries such as Ethiopia.

111. To my mind, the allegations made against the project based on what the Petitioners claim is lack of value for money are neither here or there. To my mind, important as the issue may be, the arguments made relate more to policy than clear issues of law. This Court has no mandate to make policy decisions nor can it direct the Executive on the manner in which the project is to be managed save that the Court can, in the some instances issue such directives as are necessary in that regard. This case is not one in which the Court can issue any such directive. And if indeed there was corruption in the procurement of the project or that value for money has not been achieved, there are other bodies which have been established to look into such issues. There are for example the Ethics and Anti-Corruption Commission, the Officer of the Auditor General, the Controller of Budget, the Parliamentary Committees on Finance which are well clothed with jurisdiction on the subject.

112. I do not therefore find any merits in the allegation made by the Petitioners as stated above and the fact that a project would cost a colossal sum of money is not a basis to claim that there will not be value for money or that the project will not deliver value for the money expended on it. In any event, the Petitioners failed to lead evidence to support their contentions and It is therefore obvious that I cannot uphold their submissions on the same.

113. As to the allegations that there is conflict of interest when the same entity is allowed to carry out a feasibility study and also to grant the same entity the contract, I have seen documents evidencing that the 2nd Respondent independently carried out a feasibility study and even when the 4th Respondent undertook the feasibility study, the 2nd Respondent's Engineers and technical team were involved. However, i also heard the Petitioners to be saying that the feasibility study undertaken by the 4th Respondent was not professionally done and is therefore incompetent for having failed to cover all specifics of the terms of reference.

114. Again, I am at pains to understand the role the Petitioners are giving this Court in that regard. To my mind, this Court cannot sit down and measure the efficacy or lack of thereof of the feasibility study conducted by the 4th Respondent. The 2nd Respondent which is the body mandated to undertake the construction of the railway lines in Kenya is not aggrieved. I therefore do not have the mandate or expertise to measure the efficacy of the feasibility study and that is all there is to say in that regard.

115. I will say no more on that issue save to state that whereas, generally, conflict of interest is an important matter in professional conduct, in commercial activities, contracts can be made on such terms as parties may agree and it is difficult to impugn those contracts solely on real or perceived issues of conflict of interest.

116. On the issue of contracting the 4th Respondent who has allegedly been blacklisted by the World Bank for having been corrupt, that allegation is neither here or there. If anything the SGR project is not a World Bank funded project and to my mind therefore the blacklisting, if at all, is not an automatic bar to participation of the 4th Respondent in any other project. **Sections 115** and**116** of the **Public Procurement and Disposal Act** governs the debarment process of any person in procurement, and it provide as follows;

> ***"115(1) The Director General with the approval of the Advisory Board may debar a person from participating in procurement proceedings on the ground that the person;***

a. ***Has committed am offence under this Act***

b. ***Has committed an offence relating to procurement under any Act***

c. ***Has breached a contract for a procurement by a public entity***

d. ***Has, in procurement proceedings, given false information about his qualification***

e. ***Has refused to enter into a written contract as required under section 68***

> ***(2) The Director General, with the approval of the Advisory Board, may also debar a person from participating in procurement proceedings on a prescribed ground.***
>
> ***(3) A debarment under this Section shall be for a period of time of not less than five years, as may be specified by the Director General***
>
> ***116. Before debarring a person under Section 115, the Director General shall give that person an opportunity to make representations to the Director General."***

117. The above Section has not been violated since the 4th Respondent has never been debarred by the Director General of the Public Procurement and Disposal Authority and that is all to say in that regard.

Conclusion

118. It is clear by now that I have answered all the questions that I set out to address and largely, save on the issue of jurisdiction, I have answered them in the negative. In the circumstances, the Petition must fail and the Cross Petition succeeds, partially.

119. Before disposing of the matter however, an issue was raised regarding what public interest litigation is in the context of the issue of costs. In that regard, I must express my concern about the way the right of every person to institute a claim for the violation of the Constitution in the name of public interest litigation is being handled in Kenya. It is time that this Court stated that any person who seeks to institute a claim for the violation of the Constitution must do so based on a legitimate, bona fide and genuine claim. It has over the years become increasingly popular for persons to institute a constitutional case claiming to be acting in the public interest but in fact self-serving and financial interests drive such claims. Indian has faced the same problem and in the Supreme Court of India case of ***State of Uttaranchal vs Balwant Singh Chaufal & Others CA 1134-1135 of 2002***, the Court stated that;

> ***"Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged and frivolous public interest litigation should be discouraged."***

The Supreme Court of India went on to refer to its decision in ***Holicious Pictures Pvt Limtied vs Prem Chandra Mishra & Others A12 2008 SC 913*** where it held that;

> ***"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking."***

120. I am in complete agreement with the exposition of the problem above and I must state that this Court has the responsibility of ensuring that parties do not file petitions in the guise of public interest for ulterior motives. To countenance such actions would be to promote an abuse of the Court process. A party with a genuine claim must endeavour to make its claim known to the Court for an appropriate redress. However, time has come to guard against parties who make reckless claims and who thus end up wasting judicial time and dragging parties in court in unwarranted litigation. Parties which approach the court in the name of public interest litigation must demonstrate that they are acting bona fide and not for personal gain or private motivation or other oblique considerations. This Court must not therefore allow its process to be abused by persons having clandestine motives. The words of Khalid J. in ***Sachidanad Pandey vs State of West Bengal (1987) SCC 295*** linger in my mind as I state so. He stated thus;;

> ***"Today public spirited litigants rush to courts to file cases in profusing under this attractive name. They must inspire confidence in courts and among the public. They must be above suspicion… Public interest litigation has now come to stay. But one is led to think that it poses a threat to courts and public alike. Such cases are now filed without any rhyme or reason. It is, therefore, necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If courts do not restrict the free flow of such cases in the name of public interest litigations, the traditional litigation will suffer and the courts of law, instead of dispensing justice, will have to taken upon themselves administrative and executive functions… I will be second to none in extending help***

when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

121. Those words hold true today as they did then. I am also attracted to the words of Sarkaria J. in ***Jasbhai Desai v Roshan Kumar (1976) 30 SCR 58b*** where he expressed his view that the application of a busy body should be rejected at the threshold in the following terms;

"It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories (i) person aggrieved; (ii) 'stranger'; (iii) busybody or meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, l may be no more than spooking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold."

122. While the otherwise stringent locus standi rule in the **Repealed Constitution** has been relaxed greatly in the **Constitution 2010**, I am in agreement that if a party is no more than a wayfarer or officious intervener without any interest or concern beyond what belongs to any of the 40 Million people of this country, the doors of the court will not be ajar for him. While therefore it is the duty of this Court to enforce the Constitution and the fundamental rights and freedoms embedded in it, the Court must ensure that **Articles 22, 165 and 258** of the **Constitution** that create the gateway to the Court are not abused. Public interest litigation cannot be used for the purposes of vindication of personal grudges or enmity and I reiterate that It must be used for legitimate claims based on the Constitution and nothing else but the law.

123. In the above context and despite the arguments of the Respondents to the contrary and looking at the Petitions before me, I do not see any private gain the Petitioners may obtain from this litigation. I also note that the 1st and 2nd Petitioners' have described themselves as

warriors of the Constitution. The 3rd Petitioner on the other hand is a statutory body with a clear mandate in the administration of justice. While I will exercise my discretion and not penalize the Petitioners with costs, they and the public at large must be told that not anything done under the authority of the Constitution is litigious in the name and spirit of public interest. Litigants must know that this Court has a duty to protect the noble motive of public interest litigation from those who file alleged public interest litigation for ulterior motives. The filing of false and frivolous public interest litigation which risk diverting the Court's attention from genuine cases will not be entertained. I therefore reiterate the words of Warsame J. (as he then was) in ***Truth Justice and Reconciliation Commission vs Chief Justice of the Republic of Kenya & Another (2012) e KLR*** where he stated thus on the issue of costs;

> ***"I think exemplary costs as a deterrent against frivolous and vexatious public interest litigations must be a mechanism which can be employed in such circumstances. It is depressing to note on account of cases like the present one initiated by fellow Commissioners, innumerable days and time are wasted, the time which otherwise could have been spent on disposal of cases by genuine litigants. Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which is dear to them must be addressed, the meddlesome interlopers having absolutely no grievances for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice."***
>
> I agree and it is obvious now why this Court must jealously guard its jurisdiction against abuse while ensuring that genuine litigants do not suffer unnecessarily from harsh orders on costs.

124. In any event, it is clear to mind that the same finding as was made by Warsame J. above cannot be applied to the present Petitioners and therefore because the present Petitions were clearly filed in the public interest, let each party bear its own costs.

125. Lastly, the Respondents may have succeeded in the present case but that is no license for them in future undertakings to relax their guard and not to strictly follow procurement laws. The public is watching them and this Court will not hesitate to uphold the Law where public bodies step outside its clear parameters.

126. Having found as I have done above. the final Orders therefore are the following;

i. **Petition No.58 of 2014** is hereby dismissed.

(ii) **Petition No.209 of 2014** is hereby dismissed.

iii. The 2nd Respondent's Cross-Petition is allowed in

the following terms;

a. ***A declaration is hereby issued that a Constitutional Petition cannot be founded on alleged "public documents" obtained and produced in breach of the Constitution of Kenya, 2010, the Evidence Act, Chapter 80 Laws of Kenya, and the Cross Petitioner/2nd Respondent's constitutional right to a fair hearing and fair administrative action.***

b. ***A declaration is hereby issued that a Constitutional Petition cannot be founded on documents whose source and or origin has not been disclosed by the Petitioner and whose authenticity therefore cannot be vouched for.***

c. ***A declaration that the use and production of alleged "public documents" by the Petitioners herein without disclosing their source and/or authenticity is a breach of the Cross Petitioner's right to a fair hearing as guaranteed by Section 50 of the Constitution.***

d. ***An order is hereby issued expunging form the record all the documents comprising the Annextures marked AM 1, 2, 3, 5, 6, 7 and 8 to the Supporting Affidavit of Apollo Mboya sworn on 2nd May, 2014 and filed on the same day and Annextures marked AM 1, 3, 5, 6, 7, 8 and 10 to the Supplementary Affidavit of Apollo Mboya sworn on 6th June, 2014 and filed on the same date.***

e. ***An order expunging from the record all the documents comprising Annextures titled "Exhibit 000-1" marked A, B, C, D, E, F, G, H, I, J, K, L, M, N and P to the Supporting Affidavit of Okiya Omtatah Okoiti sworn on 5th February, 2014 and the Annextures to the Replying Affidavit of Okiya Omtatah Okoiti sworn on 6th March 2014 and filed herein on 10th March 2014.***

iv. Since the Petitions were filed in the Public Interest, let each party bear its own costs.

127. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Mwenesi and Mr. Masese for 3rd Petitioner

No appearance for the 1st and 2nd Petitioners

Mr. Moimbo for the 1st and 3rd Respondents

Mr. Agwara for 2nd Respondent

Mr. Kimani for 4th Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE