



Katiba Institute v National Assembly & 4 others; Ministry of Roads and Transport & 4 others (Interested Parties) (Petition E626 of 2024) [2025] KEHC 6358 (KLR) (Constitutional and Human Rights) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E626 OF 2024

LN MUGAMBI, J

MAY 22, 2025

BETWEEN

KATIBA INSTITUTE PETITIONER

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

SENATE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

NATIONAL TREASURY 4TH RESPONDENT

KENYA AIRPORTS AUTHORITY 5TH RESPONDENT

AND

MINISTRY OF ROADS AND TRANSPORT INTERESTED PARTY

KENYA ELECTRICITY TRANSMISSION COMPANY (KETRACO) INTERESTED PARTY

MINISTRY OF ENERGY AND PETROLEUM INTERESTED PARTY

ADANI GROUP INTERESTED PARTY

PUBLIC PRIVATE PARTNERSHIP COMMITTEE INTERESTED PARTY



RULING

Introduction

1. The petition dated 8th November 2024 challenges the constitutionality of sections 59, 60, 61, 62 and 72 (1) of the *Public Private Partnerships Act*, 2021 (PPPA) which allegedly confers upon the Executive, (through the 5th Interested Party), the ultimate authority to approve public expenditure in the ratification of all PPP-related concession agreements without any role played by Parliament.
2. In the Notice of Motion that accompanied the Petition, the Petitioner, in prayer 'd' of the Motion sought empanelment of uneven bench to resolve the substantial questions of law. The Petitioner / Applicant states:

'The Court be pleased to certify that the Petition raises substantial questions of law warranting the empanelment of an uneven number of judges (not less than three) to hear and determine the matter under Article 165(4) of *the Constitution*.'

Petitioner's Case

3. The application is supported by the affidavit of Emily Kinama's and the grounds on thereof.
4. The petitioner avers that in the recent times Kenya has turned to PPPs to finance various capital-intensive infrastructure projects. She notes that according to the 2024, Budget Policy Statement (BPD), Kenya's PPP Directorate disclosed that there are 31 projects at various stages in the PPP project cycle.
5. In this matter, the petitioner focusses on two of the projects. First. the PPP to build 3 electricity transmission lines and two sub-stations. This is to operate for 30 years at a cost of Kshs.95.68 billion. This project is as between the 5th respondent and Adani Energy Solutions which is a subsidiary of the 4th Interested Party. This project is to be implemented through the 2nd interested party.
6. Second, the other project is a 30-year concession for the development and operation of the Jomo Kenyatta International Airport (JKIA) wherein Adani Airports Holdings Limited, another 4th Interested Party's subsidiary submitted its Privately Initiated Proposal (PIP).
7. The Petitioner asserts that with reference to these two projects' PPPs and PIPs, their making and conclusion has been shrouded with secrecy and a lack of transparency in violation of Article 10 and 201 of *the Constitution*.
8. It is also alleged that proceeding with the two projects poses a real threat to the rights of other prospective bidders. This is because the 4th interested party's bid has received the State's support which in turn greatly prejudices and diminishes the fairness in the outcome of the tendering process.
9. Considering this, the petitioner contends that Kenya's legal framework which regulates the adoption and implementation of PPPs is currently incapable of guaranteeing the constitutional imperatives of transparency, accountability and sustainable development.
10. The petitioner alleges that these issues are of great public importance thus necessitate empanelment of a bench to try these issues. This is on the basis that:
 - a. The case on the unconstitutionality of actions undertaken under provisions of the PPPA will be lost under the presumption of constitutionality as rights would have already accrued to the 4th Interested Party.



- b. Under Section 61 (2) of the PPPA, the private party in the KETRACO project will be required to immediately commence project implementation actions including the signing of associated contracts (downstream contracts including EPC contracts) for the implementation of the project thereby conferring further rights and accruing expenses that the state might have to bear should the concession agreement be eventually deemed unconstitutional. Such obligation to reimburse the private party would offend Article 201 obligations on prudent and responsible use of resources.
- c. The signing of the JKIA agreement would unjustly undermine the rights of the other bidders who had expressed interest in the JKIA project to a fair procurement system contrary to Article 227(1) of the .
- d. The constitutional framework for checks and balances will be undermined, and its imperatives will be violated.

Respondents' Case

11. The Respondents response and submissions to the prayer of empanelment of a bench, is not in the Court file or Court Online Platform (CTS).

Interested Parties case

12. The 1st, 3rd, 4th and 5th Interested Parties replies and submissions to the prayer of empanelment of a bench, are not in the Court file or Court Online Platform (CTS).

2nd Interested Party's Case

13. Opposing the prayer for empanelment, the 2nd interested party filed its grounds of opposition dated 9th April 2025 on the premise that:
 - i. The subject of the present Petition being the constitutionality of sections of the *Public Private Partnerships Act* does not form a substantial question of law that would require empanelment of a bench of judges to determine the issue as established in the Court of Appeal case of Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] KECA 679 (KLR).
 - ii. The present petition impugns the procurement process of a specific PPP Project and by extension interpretation or constitutionality of specific sections of the PPP Act, and do not raise any novel issue which cannot ably handled by single judges or warrant empanelment of a bench.
 - iii. Questions on the constitutionality of laws and even Public Private Partnership processes are fairly settled having ably been handled and determined by the Tribunal established under Section 75 of the PPP Act, the High Court and extensively by the Court of Appeal.
 - iv. It is in the interest of justice, judicial economy and time that the Application seeking empanelment be dismissed with costs.

Petitioner's Submissions

14. The Petitioner in support of the application filed submissions dated 2nd April 2025 through its Counsel, Dr. Henry Paul Gichana who set out the single issue for discussion as: whether the Petition raises substantial questions of law warranting empanelment under Article 165(4) of *the Constitution*.



15. Counsel commenced by highlighting that the law on empanelment of a bench is provided under Article 165(4) of *the Constitution*. The Court must ascertain that the matter falls under Articles 165(3) (b) and (d) of *the Constitution* and raises a substantial question of law. Additional reliance was placed in *Okiya Omtatah Okoiti & another (supra)* where the Court of Appeal observed as follows:
- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
 - (ii) The applicant must show that there is a state of uncertainty in the law;
 - (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of *the Constitution*;
 - (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”
16. Counsel submitted that this matter raises substantial questions of law in the following areas:
- a. Whether by conferring on the national executive (through the 5th Interested Party) the final authority to approve public expenditure under PPPs and by excluding Parliament from the ratification of all PPP-related concession agreements, Sections 59, 60, 61, 62 and 72(1) as read with Section 63 of the *Public Private Partnerships Act* (PPPA) violate *the Constitution* and are hence unconstitutional.
 - b. Whether by making discretionary the decision as to whether a Privately Initiated Proposal (PIP) should be subjected to open competitive tendering, Section 44(5) & (6) of the PPPA violates Article 227 of *the Constitution* and is hence unconstitutional.
 - c. Whether Section 4(3) of the PPPA and Section 4(2)(e) of the *Public Procurement and Asset Disposal Act*, 2015 (PPADA) are unconstitutional to the extent that their ousting of the applicability of the PPADA to some PPPs ousts the applicability of Article 227 of *the Constitution*.
 - d. Whether the nature of PPPs and the circumstances surrounding this case justify a retroactive application of the Court’s declaration of unconstitutionality of the PPPA.
17. Counsel further noted that the matter concerns significant public interest as the impugned actions undermine the constitutional corpus which will have the most significant intergenerational impact. As such, Counsel argued that matters requiring the interpretation of *the Constitution* are matters of public interest as observed by the Courts in both *J Harrison Kinyanjui v Attorney General & Another* [2012] eKLR and *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others* [2022] KEHC 438 (KLR).
18. Counsel additionally submitted that the matters raised herein also present a state of uncertainty. This is because the questions remain uncertain as are yet to be settled by the Supreme Court of Kenya. On this premise, Counsel urged the Court to allow their prayer for empanelment of a bench.



2nd Interested Party's Submissions

19. MMA Advocates LLP for the 2nd Interested Party filed submissions dated 9th April 2025. The issue for determination was set out as whether a bench of uneven number of judges should be empaneled to hear and determine the petition.
20. Counsel submitted that Article 165(4) of *the Constitution* makes clear that to qualify, a matter must raise a substantial question of law. To emphasize this Counsel relied in *County Government of Meru vs. Ethics and Anti-Corruption Commission* [2014] eKLR where it was held that:

“The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.”
21. Similar reliance was placed in *J. Harrison Kinyanjui (supra)* and *Sir Chunilal V. Mehta and Sons Ltd vs. The Century Spinning and Manufacturing Co. Ltd* 1962 AIR 1314 1962 SCR Supl. (3) 549.
22. Counsel further pointed out that the Court in *Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae* [2014] eKLR offered the following caution:

“The decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Empaneling such a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country...”
23. Counsel also relying in *Okiya Omtatah Okoiti & another (supra)* submitted that application fails to satisfy the set criteria, for the Petition to be considered as one raising a substantial question of law. Counsel submitted that the dispute primarily concerns the alleged unconstitutionality of Sections of a law which question has time and again been ably handled by single judges.
24. Dependence was placed in *Okiya Omtatah Okoiti & another vs. Uhuru Muigai Kenyatta & 7 others (Ruling)* [2016] eKLR where it was held that:

“The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.”

Analysis and Determination

25. There only a single issue for determination in this motion, namely:

Whether the Petition dated 8th November 2024 raises substantial questions of law meriting certification before the Chief Justice for the empanelment of an uneven Judge bench.



26. The law on empanelment of a bench is provided under Article 165 (4) of *the Constitution* which provides thus:

- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

27. It is evident from the above cited provision that for a matter to be considered for empanelment, it must raise a substantial question of law under Article 165 (3)(b) or (d) of *the Constitution*. The Court in J. Harrison Kinyanjui (*supra*) discussed this issue as follows:

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

28. The Court went on to note that:

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

29. Furthermore, the Court in *Magare Gikenye J Benjamin v Salaries and Remuneration Commission & 146 others; Senate & 9 others (Interested Parties)* [2021] KEHC 13290 (KLR) citing the set jurisprudence in this area as outlined in a number of authorities, the court stated as follows:

- “ 9. The application under consideration relates to certification in the High Court; that is under Article 165 (3) and (4) of *the Constitution*. The manner in which a single Judge of the High Court certifies that a matter raises a substantial question(s) of law so as to warrant the empanelment of an expanded bench has, on several instances, been dealt with by the Superior Courts.

10. The Supreme Court of Kenya in *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR established the principles for certification under Article 163(4)(b) of *the Constitution*. However, those principles were adopted, with modification, by the Court of Appeal in *Okiya Omtatah Okioti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR when the Court of Appeal dealt with an appeal against



a refusal by the High Court to certify a matter as raising substantial questions of law under Article 165(4) of *the Constitution*.

11. The Supreme Court summed up the principles as follows: -

In summary, we would state the governing principles as follows:

- i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
- ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
- iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
- iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;
- vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;
- vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

12. As said, the Court of Appeal applied the above principles in *Okiya Omtatah Okoiti & another v Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR...”

30. From the foregoing, it is manifest that it is not a Party’s desire to be heard by an uneven bench that carries the day, for the Court to refer the matter for empanelment, it must be satisfied that the threshold for empanelment has been met in the particular case and this is whether the matter raises a ‘a substantial question of law’.



31. The Petitioner under Paragraph 14 of its Supporting Affidavit and Paragraph 8 in its written submissions lists the issues that according to them raise substantial question of law.
32. Besides, the petition sets out the reliefs that the Petitioner would be seeking ultimately, being:
- i. A declaration that by conferring on the Executive (through the 5th Interested Party) the final authority to approve public expenditure under PPPs and by excluding Parliament from the ratification of all PPP-related concession agreements, Sections 59, 60, 61, 62 and 72(1) as read with Section 63 of the Public Private Partnerships Act, 2021 (PPPA) violates the Constitution and are hence unconstitutional.
 - ii. A declaration that by making discretionary the decision as to whether a Privately Initiated Proposal (PIP) should be subjected to open competitive tendering, Section 44(5) & (6) of the PPPA violates Article 227 of the Constitution and is hence unconstitutional.
 - iii. A declaration that to the extent that the ousting of the applicability of the Public Procurement and Asset Disposal Act, 2015 (PPADA) to some PPPs ousts the applicability of Article 227 of the Constitution, Section 4(3) of the PPPA and Section 4(2)(e) of the PPADA are unconstitutional.
 - iv. A declaration that based on the principle that unconstitutional laws/ actions are void ab initio, the handling of both the KETRACO and JKIA PIPs was initiated and transacted through processes and provisions of the law that are unconstitutional, thereby rendering all the processes and any agreements arising from them unconstitutional and invalid.
 - v. In the alternative, a declaration that given the unique nature of PPPs all transactions and/ or agreements related to the two projects are unconstitutional based on a retroactive application of the Court's declaration of unconstitutionality.
 - vi. Alternative to prayers (d) and (e) above, a declaration that the handling of the JKIA PIP raises substantial doubts about the capacity of any subsequent processes guaranteeing fairness under Article 227 hence the 5th Respondents should file a report with the Court within 30 days as to what measures will be put in place to guarantee fairness and file a further report subsequent to the conclusion of the procurement on how the measures in the first report were implemented.
 - vii. Any other reliefs that the Court deems fit.
33. The obvious recurring theme is basically the constitutionality of the respondents' actions and the impugned provisions of the Public Private Partnerships Act and also, the compliance with the Constitutional principles in respect of the procurement processes for the impugned projects.
34. These issues in my humble view all involve the application of principles of constitutional interpretation and also application of the specific constitutional provisions' vis-vis the relevant statutory provisions and if there is inconsistency, thereon.
35. The issues raised in the Petition are well articulated and elaborate and although they may generate public interest, it is also necessary to remember that almost every constitutional petition has an element of public interest. My reading of this petition and issues it generates does not compel me to find that the Petition deserves an expedited uneven bench to adjudicate. Courts have delivered many decisions on unconstitutionality of statues or executive actions and thus, although facts change, the principles to be applied are constant.



36. I am guided by the following passage in the case of Wycliffe Ambetsa Oparanya & 2 others v Governors v Director of Public Prosecutions & another [2016] KEHC 5668 (KLR) where it was held thus:

“25. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying *the Constitution*. Whereas *the Constitution* permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly.”

37. The upshot therefore is that this Court is not satisfied that the threshold for empaneling an uneven bench to hear this Petition has been met. The application is declined.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MAY, 2025.

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L N MUGAMBI

JUDGE

