



**THE SUPREME COURT OF KENYA**  
**KENYA RAILWAYS CORPORATION & 3 OTHERS v OKIYA OMTATAH OKOITI & 3**  
**OTHERS**  
**PETITION NO. 13 OF 2020 as consolidated with PETITION NO. 18 (E019) OF 2020**  
**DATE OF JUDGMENT: 16<sup>TH</sup> JUNE, 2023**

**MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.*

***Orders: The Court of Appeal judgment is set aside and the Cross Appeal is dismissed.***

Two petitions were filed at the High Court against the Kenya Railways Corporation (KRC), the Attorney General, Public Procurement Oversight Authority (PPOA) and China Road and Bridge Corporation (CRBC). The petitions were filed by Okiya Omtatah Okoiti, Wyclife Gisebe Nyakina on one hand, and by the Law Society of Kenya (LSK) on the other hand). The petitions challenged the procurement process of the Standard Gauge Railway (SGR) project and the resultant contracts in favour of CRBC. The sum contention by the petitioners was that the appellants' actions and omissions were a flagrant violation of Articles 10, 73(2), 201, 227(1), (2)(d) and 232 of the Constitution as well as Section 87 of the Public Procurement and Disposal Act (PPDA), 2005 and the Public Finance Management Act (PFMA). The petitioners contended that the project was a collusive scheme designed to procure the construction of an SGR line at artificial and non-competitive price levels, and the project posed a danger to the environment contrary to Articles 42 and 69 of the Constitution. The petitions were consolidated by the consent of the parties.

In a judgment delivered on 21<sup>st</sup> November, 2014, the High Court dismissed the consolidated petitions. It affirmed its jurisdiction under Article 165(3) of the Constitution to interrogate constitutional violations and determined that: since the SGR project was funded by a loan from China, it was governed by the terms of the negotiated loan and not subject to the PPDA 2005; there was no violation of the PFMA as Parliament was involved in the budgeting of the funds to be utilized in the project; the allegation that the government had not put in place mechanisms to ensure value for money was a policy question and not law; it was immaterial that the World Bank had blacklisted CRBC as the project was not funded by the World Bank, and further that the company was not debarred by the Director General of PPOA under Sections 115 and 116 of the PPDA, 2005. Further, the court held that documents, which contained communication between various government agencies violated the right to privacy of the communication between the government and Exim Bank of China and the Code of Conduct and the Public Officers Ethics Act, and proceeded to expunge the documents.

Aggrieved, Okiya Omtatah Okoiti, Wycliffe Gisebe and the Law Society of Kenya moved to the Court of Appeal. The Court of Appeal partly allowed the appeal. It upheld the High Court decision on expunging the documents relied on in support of the petitions. It, however, held that KRC, as the

procuring entity, failed to comply with, and violated the provisions of Article 227 (1) of the Constitution, Sections 6 (1) and 29, of the PPDA, 2005 in the procurement of the SGR project.

Dissatisfied, KRC filed, before the Supreme Court, Petition **No. 13 of 2020**, while the Attorney General and PPOA filed **Petition No. 18 of 2020**. The two appeals were subsequently consolidated. They challenged the appellate court's findings on application of Article 227(1) of the Constitution and Sections 6(1) and 29 of the PPDA, 2005. Okiya Omtatah and Wycliffe Gisebe filed a Cross Appeal challenging the Court of Appeal's findings on the expunged documents.

The Supreme Court delineated the following issues for determination:

- (i) *Whether the appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution;*
- (ii) *Whether the appeal before the Court of Appeal was moot;*
- (iii) *Whether the learned Judges erred in expunging documents in support of the petitions filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents at the High Court;*
- (iv) *Whether there were environmental considerations by the appellants in the SGR project; and*
- (v) *Whether the procurement of the SGR was in accordance with Article 227 of the Constitution and the provisions of the PPDA, 2005.*

Upon consideration, the Supreme Court determined the issues as follows:

**Issue 1:** The Supreme Court has jurisdiction to hear and determine the issues raised in the consolidated appeal and cross appeal.

**Issue 2:** The issues in the petition are live and remain available for the Court's consideration. They raise matters of public importance owing to the enormity of the project, and the public finance expended. Further, the operating law surrounding the litigation is unsettled.

**Issue 3:** Pursuant to Section 80 and 81 of the Evidence Act, public documents can only be produced in court as evidence by way of producing the original copy or a copy duly certified to ensure authenticity and integrity of public documents. The documents having been adduced in evidence without adhering to these provisions, were inadmissible.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not request for the information relied upon under the procedure set out in The Access to Information Act No. 31 of 2016, enacted to effect Article 35 of the Constitution. The Court held that admission of illegally obtained information is detrimental to the administration of justice and in violation of the provisions of Article 50(4) of the Constitution and Article 31 of the Constitution which guarantees every person the right to privacy including privacy of communication.

The Court found that it was not enough for the 1<sup>st</sup> to 3<sup>rd</sup> respondents to allege that the documents were obtained from the National Environment Management Authority (NEMA) without the attendant contextualisation especially when the respondents failed to invoke the mechanism provided under Environment Management and Coordination Act (EMCA). It did not matter that some of the documents in issue had been tabled before Parliament.

Concerning the 1<sup>st</sup> and 2<sup>nd</sup> respondents' averments that they were acting from whistle-blower information on corruption allegations, the Court noted that there are constitutional and statutory mandated bodies such as the Ethics and Anti-Corruption Commission to investigate and recommend to the Director of Public Prosecutions, the prosecution of any acts of corruption, bribery or economic

crimes or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution. Further, the Witness Protection Agency established under section 3A of the Witness Protection Act No.16 of 2006 provides a procedure for giving special protection to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

The Court cautioned the misuse of Articles 22 and 258(1) of the Constitution noting that easy access to courts should not be a license to file frivolous claims disguised as public interest.

#### **Issue 4:**

The Court held that NEMA granted an Environmental Impact Assessment (EIA) Licence to the CRBC. Pursuant to Section 129 (1) of EMCA, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' grievances against the grant of licence were appealable to the Tribunal established under Section 125 of EMCA and not to the regular courts.

#### **Issue 5:**

The Court held that the issue of retrospective application of the Constitution did not arise the operationalization of the SGR project occurred under the dispensation of the Constitution of Kenya, 2010; the petitions before the High Court were filed four years into the new constitutional dispensation under Article 165 of the Constitution; and thirdly, the Sixth Schedule to the Constitution allows all law in force immediately before the effective date to be construed in conformity with the Constitution. Accordingly, Article 227, just like any other provisions of the Constitution of Kenya 2010 was applicable. The Court further held that procurement must still conform to the provisions of Article 227 even when done pursuant to the obligations of a treaty or agreement or any other procedure

On compliance with Article 227 of the Constitution as read with the provisions of PPDA 2005, the Court found that the procurement of CRBC was not undertaken by KRC but by the Government through the Ministry of Transport. That the procurement and contractual agreements between KRC and CRBC which are both state corporations, making it a government-to-government transaction exempt from the PPDA, 2005 as stipulated by section 6 (1) of PPDA, 2005. There was no challenge to the constitutionality of the said statutory provision. Further, that KRC did not allocate funds towards the project directly from the consolidated funds as the government itself opted to implement the financing model. KRC could not and did not therefore qualify as a procurement entity under the provisions of section 26(6) of the PPDA 2005. It was therefore not demonstrated how KRC, acting on the directives of the Executive, failed to comply with Article 227 (1) of the Constitution.

*The Supreme Court found merit in the appeal and issued the following orders:*

- i) The Court of Appeal judgment dated 19<sup>th</sup> June, 2020 is hereby set aside.*
- ii) The Cross Appeal dated 23<sup>rd</sup> September 2022 is hereby dismissed.*
- iii) We affirm the superior courts' decision on the expunging of documents.*
- iv) The procurement process for the Standard Gauge Railway project was undertaken in conformity with the provisions of Article 227 of the Constitution.*
- v) The SGR procurement was undertaken as a government-to-government contract hence exempt from the provisions of the Public Procurement Disposal Act, 2005 by virtue of section 6(1) of the Public Procurement Disposal Act, 2005.*
- vi) Each party bears their own costs.*