REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 159 OF 2018

CONSOLIDATED WITH

CONSTITUTIONAL PETITION NO. 201 OF 2019

WILLIAM ODHIAMBO RAMOGI.....................................1ST PETITIONER

ASHA MASHAKA OMAR..2ND PETITIONER

GERALD LEWA KITI...3RD PETITIONER

KENYA TRANSPORTERS ASSOCIATION LIMITED....4TH PETITIONER

AND

THE ATTORNEY GENERAL..1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT AND

INFRASTRUCTURE...2ND RESPONDENT

KENYA PORTS AUTHORITY......................................3RD RESPONDENT

KENYA RAILWAYS CORPORATION........................4TH RESPONDENT

COMPETITION AUTHORITY OF KENYA................5TH RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS....................1ST INTERESTED PARTY

MAINA KIAI...2ND INTERESTED PARTY

COUNTY GOVERNMENT OF MOMBASA....3RD INTERESTED PARTY

JUDGMENT

I. Introduction and Procedural Posture

1. This judgment is with respect to two Petitions. The first one is ***Mombasa High Court Constitutional Petition No. 159 of 2018***. This Petition was filed in Court on 23/05/2018 and amended on 03/10/2018. In the main, it challenges a clause in an Agreement dated 30th September, 2014 between the 3rd Respondent (Kenya Ports Authority) and the 4th Respondent (Kenya Railways Corporation). The offending contractual clause obligates the 3rd Respondent to consign to the 4th Respondent as a carrier a set volume of freight and or other cargo pursuant to commencement of the operations of the Standard Gauge Railway (SGR) to the 3rd Respondent's Inland Container Depot (ICD) at Embakasi. For reasons discussed later in this judgment, the 1st – 3rd Petitioners, public-spirited citizens, find the contractual clause to violate various constitutional provisions including their various fundamental rights contained in the Bill of Rights.

2. The second Petition is ***Mombasa High Court Petition No. 201 of 2019***. This Petition was filed in Court on 27/11/2019. In the main, the Petition challenges two directives issued by the 3rd Respondent directed at the members of the 4th Petitioner respecting the consignment of cargo and location of clearance depot for cargo arriving at the Port of Mombasa. This Petition was filed by the association of all transporters who feel aggrieved by the two directives.

3. ***Mombasa High Court Constitutional Petition No. 159 of 2018*** was, upon arguments by all parties, certified as raising substantial questions of law warranting the appointment of an uneven number of Judges. Subsequently, the Honourable Chief Justice empanelled the present bench to hear and dispose that Petition.

4. Upon empanelment, the 1st and 2nd Respondents raised a Preliminary Objection challenging the jurisdiction of the Court to hear ***Mombasa High Court Constitutional Petition No. 159 of 2018***. In a ruling dated 02/11/2018, this bench dismissed the Preliminary Objection and ruled that the High Court had jurisdiction to hear the Petition. An appeal to the Court of Appeal was unsuccessful paving way for the hearing of the Petition on its merits.

5. Meanwhile, the 4th Petitioner had filed ***Mombasa High Court Constitutional Petition No. 201 of 2019***. The Honourable Chief Justice empanelled the same bench to hear and determine that Petition. Subsequently, in directions dated 20/08/2020, the Court consolidated the two Petitions and gave directions on the hearing. The Consolidated Petitions were eventually canvassed through a combination of both written submissions and oral arguments over a scheduled three-day period.

6. For the sake of completeness, it is important to state that during the first day of oral arguments, the Honourable Attorney General sought to stay the proceedings pending the hearing and determination of an intended appeal to the Supreme Court by the 1st and 2nd Respondents to the dismissal by the Court of Appeal of their objection to the jurisdiction of this Court. As earlier stated, the Court of Appeal dismissed the 1st and 2nd Respondents challenge to this Court's jurisdiction and affirmed our determination that this Court has the requisite jurisdiction to entertain the matter. By the time we heard the oral arguments, the 1st and 2nd Respondents had not yet filed an appeal to the Supreme Court but had sought extension of time to file the appeal out of time. We declined to stay the proceedings in a ruling dated 21/09/2020.

7. Oral arguments were concluded on 24/09/2020 and we reserved judgment.

8. In the next part of this judgment, we briefly provide an overview of the two Petitions and the responses thereto. We then identify the issues presented in the Consolidated Petitions before analysing the issues at length. We finally announce our disposition of the case.

II. The Consolidated Petitions

9. The 3rd and 4th Respondents herein, the Kenya Ports Authority and the Kenya Railways Corporation respectively, entered into an Agreement dated 30th September, 2014 wherein the 3rd Respondent is *inter alia* obligated to consign to the 4th Respondent as a carrier a set volume of freight and or other cargo pursuant to commencement of the operations of the Standard Gauge Railway (SGR) to the 3rd Respondent's Inland Container Depot (ICD) at Embakasi. This obligation is contained in Clause 3 of the said Agreement hereinafter referred to as the "Take or Pay Agreement" or "Impugned Agreement."

10. The Impugned Agreement was challenged in ***Mombasa High Court Constitutional Petition No. 159 of 2018*** which was filed on 23/05/2018. It was supported by an affidavit sworn on 2nd October, 2018 by William Odhiambo Ramogi. It contends that various constitutional, human rights and fundamental freedoms of the 1st, 2nd and 3rd Petitioners and those of the people of Mombasa County have been infringed by the manner in which the agreement was concluded and implemented. They are further apprehensive that the contended infringements shall persist unless the Court intervenes.

11. The Petitioners urged the Court to issue:

a. A declaration that the Agreement dated 30th September, 2014, between the 3rd and 4th Respondent threatens and/or contravenes the social and economic rights of the Petitioners and the residents of Mombasa County under Article 43 of the Constitution.

b. An order that the 3rd Respondent's administrative decision requiring shippers, consignors, consignees, clearing and forwarding agents and owners of goods to deliver and collect freight and cargo from the 3rd Respondent's Embakasi ICD is unfair and contravenes the economic and social rights of the residents and business community of Mombasa County and is thus unconstitutional.

c. A declaration that the 3rd Respondent's operation vide its Embakasi ICD and/or other existing ICD threatens and or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition and is thus unconstitutional; in the alternative, that an ICD be established within a reasonable radius from the port of Mombasa within a geographical area of Mombasa County in order to secure the source of livelihood of the people of Mombasa County and surrounding Coastal Counties arising from the port activities and functions.

d. An order that the Mombasa Port services be assigned to the National Government and County Government of Mombasa in accordance with Paragraph 5(e) of Part 2 of the Fourth Schedule to the Constitution and particularly that the management and operations of the Port with respect to County transport harbour functions is a function of the Mombasa County Government.

e. An order for enforcement and implementation of County transport harbour functions by the 3rd Interested Party.

f. An order that the Respondents' actions complained of herein contravene Articles 6, 10, 43(1), 47, 55, 174 and 186 of the Constitution.

g. Costs of the Petition.

h. *Any further relief or orders that this honourable Court may deem just and fit to grant.*

12. Upon the completion of the SGR, the 3rd Respondent issued a directive on 15th March, 2019 notifying the general public that from the date of the directive, shipping lines would not be allowed to endorse a Bill of Lading to importers' Container Freight Station (CFS) of choice.

13. Thereafter, on 3rd August, 2019 the 3rd Respondent and the Kenya Revenue Authority issued another directive stating that all imported cargo for delivery to Nairobi and the hinterland shall be conveyed by the Standard Gauge Railway (SGR) and cleared at the Inland Container Depot – Nairobi.

14. The directives of 15th March, 2019 and 3rd August, 2019 (hereinafter jointly referred to as "Impugned Directives") prompted the 4th Petitioner to file ***Mombasa High Court Constitutional Petition No. 201 of 2019*** in which it seeks to challenge the constitutionality and legality of the Impugned Directives. The Petition is supported by an affidavit sworn on 27th November, 2019 by Dennis Okumu Ombok, the National Chairman of the 4th Petitioner.

15. The 4th Petitioner seeks:

a. A declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo from the Port of Mombasa to as destination of their choice.

b. A declaration that the directives issued on 15th March, 2019 and 3rd August, 2019 are in violation of Articles 1, 2(4), 10, 21, 22, 23, 43, 46, 47 & 174 of the Constitution of Kenya, 2010.

c. A declaration that the directives are in violation of sections 21 and 24 of the Competition Act No. 12 of 2010 and the Consumer Protection Act No. 46 of 2012.

d. A declaration that the directives infringe the social-economic rights of the residents of Mombasa and Kenya in general.

e. An order of certiorari quashing the directives.

f. A declaration that the 2nd Respondent has acted unlawfully and contrary to the Constitution of Kenya, 2010 in that he has deliberately violated Articles 1, 10, 28 and 47 of the Constitution.

g. A declaration that the 5th Respondent has acted unlawfully in the following instances:

i. Completely ignoring to act on the issues raised by the Petitioner vide the Petitioner's letter dated 15th August, 2019 with regard to the monopolistic tendencies with regard to the transportation of containers from the Port of Mombasa to other destinations.

ii. That the 5th Respondent be directed through an order of mandamus to take immediate action to demolish the monopolistic tendency with regard to the transportation of containers from the Port of Mombasa to other destinations in Kenya which is now monopolized by the 4th Respondent consequent to the unlawful directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 21st August, 2019.

h. General damages to be awarded to the members of the Petitioner against the Respondents jointly and severally.

i. Costs of the Petition.

j. *Such orders and directions as the honourable Court may deem fit.*

16. M/s Nyambura Kihoro Advocate filed submissions dated 14th September, 2020 on behalf of the 1st, 2nd and 3rd Petitioners in support of the Amended Petition.

17. M/s Gikandi & Company Advocates filed submissions dated 10th September, 2020 on behalf of the 4th

Petitioner.

III. The Responses to the Consolidated Petitions

18. Esther Koimett, the Principal Secretary, State Department of Transport swore a replying affidavit on 25th October, 2018 on behalf of the 1st and 2nd Respondents in response to the ***Mombasa Constitutional Petition No. 159 of 2018***. She deposed that enormous public participation, consultative work and research had been carried out by the government before it embarked on the construction of the SGR. Further that the ICD – Nairobi was constructed and gazetted as a customs area in 1984 to decongest the Port of Mombasa; provide accessibility of cargo to the Kenyan people while bringing cargo closer to the main consumers of the goods and to act as a transit hub for cargo destined for other parts of the country and neighbouring countries. She averred that the claim that the ICD has been constructed to deny Mombasa residents their livelihoods is therefore false.

19. It was the 1st and 2nd Respondent's argument that the orders sought by the Petitioners are not justiciable as they go against the constitutional mandate of the National Government to enter into loan and derivative agreements with other parties. That granting the orders would be tantamount to the Judiciary supervising the authority of the National Government to prepare financing for its budgeted programs which would be against the doctrine of separation of powers. The 1st and 2nd Respondents urged the Court to dismiss the Consolidated Petitions, particularly the declaration that transporters have a right to choose their mode of transport, stating that to do otherwise would deal a strain on the National Transport Policy.

20. Turasha N. Kinyanjui swore affidavits on 25th October, 2018 and 16th September, 2020 respectively on behalf of the 3rd Respondent, in response to the Consolidated Petitions.

21. According to Mr. Turasha, the 3rd Respondent has a statutory duty to manage ports and this duty includes the power to "*consign goods on behalf of other persons to any places whether within Kenya or elsewhere.*" The main thrust of the 3rd Respondent's case is that the impugned decisions are operational decisions by the 3rd Respondent which are not subject to the constraints the Petitioners desire to impose.

22. M/s Muriu Mungai & Company Advocates filed submissions dated 18th September, 2020 on behalf of the 3rd and 4th Respondents in which they asked the Court to dismiss the Consolidated Petitions for lack of merit.

23. A. K. Maina swore an affidavit on 3rd July, 2018 in his capacity as the Managing Director of the 4th Respondent, in opposition to ***Mombasa Constitutional Petition No. 159 of 2018***. He deposed that the Government of Kenya, in its Transport Policy, identified transport as the critical enabler for the realisation of Vision 2030, which aims to make Kenya a middle income country by the year 2030. That it is in this respect that the Government has focused on the expansion of the road and railway transport system in Kenya. The thrust of Mr. Maina's affidavit is that the 4th Respondent engaged in extensive public participation fora before SGR was constructed; and that the assertions that the SGR would occasion an economic meltdown in Mombasa County are untrue.

24. Hellen Mungania, the Corporation Secretary of the 4th Respondent swore a further affidavit on 2nd October, 2018 to augment the 4th Respondent's case. She contended that due process was followed in concluding the Impugned Agreement and deponed that the Agreement was entered into for the benefit of the residents of Mombasa and its environs, upon consideration of the wider public interest.

25. M/s Miller & Company Advocates filed submissions dated 19th September, 2020 on behalf of the 4th Respondent in opposition to the Consolidated Petitions.

26. Wangómbe Kariuki, the Director General of the 5th Respondent swore an affidavit on 11th May, 2020 in response to ***Mombasa Constitutional Petition No. 201 of 2019***. He conceded that the 5th Respondent received a

complaint from the 4th Petitioner on 15th August, 2019 regarding the directive issued by the National Government requiring all transportation of containers from the Port of Mombasa to other destinations in Kenya to be made through the SGR, but stated that the directive was withdrawn by the National Government on 6th August, 2019 and was never implemented.

27. The 5th Respondent stated that it held various meetings with various stakeholders including the 4th Petitioner with a view to have a better understanding of the issues raised in the complaint and as part of its investigations into the complaint. That at the time the Petition was filed, it was at an advanced stage of the investigations into the complaint. It urged that ***Mombasa Constitutional Petition No. 201 of 2019*** is therefore premature having been filed before the 4th Petitioner exhausted the redress mechanisms set out under the Competition Act.

28. M/s Cootow and Associates filed submissions dated 18th September, 2020 on behalf of the 5th Respondent.

29. After ***Mombasa Constitutional Petition No. 159 of 2018*** was filed, Muslims for Human Rights (MUHURI) and Maina Kiai made formal applications to be enjoined as Interested Parties to the Petition. They were so allowed in a ruling dated 03/07/2018. Subsequently, the County Government of Mombasa was equally permitted to join the Petition as an Interested Party on 26/09/2018. The Court also granted orders enjoining the National Environment and Management Authority (NEMA) as an Interested Party to the Consolidated Petitions. By directions dated 20/08/2020, MUHURI was intituled as the 1st Interested Party; Maina Kiai as the 2nd Interested Party; County Government of Mombasa as the 3rd Interested Party; and NEMA as the 4th Interested Party.

30. Khelef Khalifa, the Chairman of the Board of Directors of the 1st Interested Party swore a replying affidavit on 6th November, 2018 on behalf of the 1st and 2nd Interested Parties. Both Interested Parties work with communities within the coastal region and other parts of the country to empower them and build their capacity to actively engage in governance and improve their socio-economic welfare through sensitization and community action.

31. M/s Otieno Ogola & Company Advocates filed submissions dated 17th September, 2020 in support of the 1st and 2nd Interested Parties in which they asked the Court to find for the Petitioners and allow the Consolidated Petitions as prayed.

32. Elizabeth Kisingo, the 3rd Interested Party's Deputy Director of Legal Services swore an affidavit on 19th December, 2018 in reply to the Amended Petition in ***Mombasa Constitutional Petition No. 201 of 2018*** in support of that Petition. According to Ms. Kisingo, the Impugned Agreement is in contravention of Article 174 of the Constitution. She was also of the opinion that the Impugned Agreement violates Article 10 of the Constitution. Finally, Ms. Kisingo deponed that the Impugned Agreement violated the socio-economic rights of Mombasa residents guaranteed under Article 43 of the Constitution and the rights of youth to access employment under Article 55 of the Constitution.

33. M/s Paul Mwangi & Company Advocates filed submissions dated 14th September, 2020 on behalf of the 3rd Interested Party in support of the Consolidated Petitions.

34. The 4th Interested Party, NEMA, neither filed any responses nor participated in the hearing of the Consolidated Petitions.

IV. Issues for Determination

35. From our reading of the Court documents filed and consideration of the submissions of the Parties, we have identified the following seven issues for determination. In delineating these issues we have noted that some of the remedies sought were repetitive, overlapped, or in some instances cited procedural articles of the Constitution in an "omnibus" fashion:

(a) Whether the 1st and 2nd Interested Parties have impermissibly expanded the scope of the Consolidated Petitions in their presentations before the Court by pleading and submitting on issues related to Articles 6(2), 6(3) and 27 of the Constitution.

(b) Whether the complaints raised by the 4th Petitioner against the 5th Respondent (the Competition Authority of Kenya) are pre-mature and debarred by the doctrine of exhaustion.

(c) Whether the Impugned Directives contravene the Constitution by infringing on the 4th Petitioner's freedom to freely choose their mode of transportation of cargo arriving at the Port of Mombasa.

(d) Whether the Take or Pay Agreement and Impugned Directives are in violation of Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures.

(e) Whether the Take or Pay Agreement and Impugned Directives violate the Article 43 rights (social and economic rights) of the Petitioners.

(f) Whether the Take or Pay Agreement violates Article 174 of the Constitution as read together with paragraph 5(e) of part 2 of the 4th schedule of the Constitution and whether "an order for the enforcement and implementation of county transport harbour function by the 3rd Interested Party" should issue.

(g) *What remedies, if any, should be granted.*

36. We will now address each of the identified issues *in seriatim*.

a. **Did the 1st and 2nd Interested Parties Impermissibly Expand the Scope of the Consolidated Petitions as Interested Parties"**

37. In their oral submissions Professor Githu Muigai, SC and Mr. Nani Mungai, Learned Counsel for 3rd and 4th Respondents objected to what they called "*expansion of the Petitioners''* case beyond what was pleaded in the Consolidated Petitions by the 1st and 2nd Interested Parties. Counsel submitted that an Interested Party's case must not depart from the case between the Petitioners and the Respondents. Counsel submitted that the Interested Parties were pleading their own case different from the Petitioners' case. Counsel submitted that the Petitioners' case concerns only Articles 10, 43 and 47 of the constitution, and that an attempt to bring in other Articles, particularly Articles 6 (2), 6 (3) and 27 of the Constitution was expanding the dispute beyond the pleadings as delimited by the Petitioners.

38. The 1st and 2nd Interested Parties, in their submissions, relied on Article 6 (2) and (3) of the constitution, which is as follows:

Article 6 (2)

(2) The governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.

Article 6 (3)

(3) A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

39. The 1st and 2nd Interested Parties also sought to rely on Article 27 of the Constitution. Article 27 is the equal

protection clause of the Kenyan Constitution which prohibits all types of discrimination.

40. The 3rd and 4th Respondents' case is that Article 6 (2) and 6 (3) as well as Article 27 arguments were not pleaded in the Consolidated Petitions, and that the reliance thereon by the 1st and 2nd Interested Parties had the undesirable effect of expanding the scope of the Consolidated Petitions to the prejudice of the Respondents. The issue, therefore, is whether an interested party may frame its own fresh issues, or introduce new issues for determination by a Court in a civil suit.

41. The Black's Law Dictionary 9th Edition, at page 1232 defines an interested party as "a *party who has a recognizable stake (and therefore standing) in the matter."* It also defines a "Necessary Party" as "*a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."*

42. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013* defines an interested party as *"a person or entity that has an identifiable or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation."*

43. In ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others,*** **Supreme Court Petition No. 12 of 2013, [2015] eKLR (an application by Katiba Institute)** the supreme Court stated**:**

Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio*. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.*

44. The role of an interested party in proceedings is peripheral as was expressed in ***Methodist Church in Kenya v Mohamed Fugicha & 3 others [2019] eKLR***, where the Supreme Court was called upon to determine whether substantive orders could be granted in a matter where a cross-petition had been introduced to a constitutional matter by way of an affidavit by an interested party. In its majority decision, the Supreme Court stated as follows at paragraph 51-55:

"[51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution…

[53] … Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in ***Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR****, as follows (paragraphs 41, 42):*

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or

introduce new issues for determination by the Court...

[54] In like terms we thus observed in ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012*** *(paragraph 24):*

"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.

45. Similarly, an attempt to introduce new issues was considered by the Supreme Court in ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others [2017]*** eKLR viz:

The applicant, in essence is introducing new facts and issues that were not before Court. It follows that he is not in a position to advance any submission that will be helpful to the Court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.

46. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.

47. In the present case, it requires no belaboured analysis to conclude that the 1st and 2nd Interested Parties' submissions based on Article 6 (2) and 6 (3) as well as Article 27 of the Constitution and on any other non-pleaded articles of the Constitution cannot be entertained by this Court, and that the same is an unacceptable attempt to expand the scope of proceedings in the Consolidated Petitions. We will, therefore, not consider further any submissions based on alleged violations of Articles Article 6 (2); 6 (3) and Article 27 of the Constitution.

b. Are the complaints raised against the 5th Respondent (the Competition Authority of Kenya) pre-mature and debarred by the doctrine of exhaustion"

48. The next preliminary issue was raised by the 5th Respondent: the doctrine of exhaustion. The 5th Respondent pointed out that ***Mombasa Constitutional Petition no. 201 of 2019*** was filed three (3) months after the 4th Petitioner lodged its complaint with the 5th Respondent.

49. In the Petition, the 4th Petitioner argued that the Impugned Directives violate the provisions of sections 5, 20, 21, 50, 56 and 57 of the Competition Act. Consequently, argued the 4th Petitioner, the Impugned Directives not only deny importers the freedom to choose their preferred mode of transport, but that they constitute restrictive trade practices prohibited under section 21 of the Competition Act and are, therefore, illegal. They asserted that to date the 5th Respondent has not acted upon their complaint.

50. In rebuttal, the 5th Respondent admitted that it received a complaint from the 4th Petitioner on 15th August, 2019 regarding the directive issued by the National Government requiring all transportation of containers from the Port of Mombasa to other destinations in Kenya to be made through the SGR, but stated that the said directive was withdrawn by the National Government on 6th August, 2019 and was never implemented. That it consequently held various meetings with various stakeholders including the 4th Petitioner with a view to have a better understanding of the issues raised in the complaint and as part of investigations into the complaint.

51. In sum the 5th Respondent's case was that at the time of filing the Petition, it was at an advanced stage of investigations into the complaint. It urged that the Petition is therefore premature, having been filed before the 4th Petitioner exhausted the redress mechanisms set out under the Competition Act.

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR*,** where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** *in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

53. From the above extract, the question that arises is whether there are remedies available under Statute that the 4th Petitioner should have pursued before filing the Petition against the 5th Respondent.

54. Under the Competition Act, there are several remedies available to an aggrieved party. The Act provides the dispute resolution procedures to be pursued. Section 31 provides that the Authority may on its own initiative, or upon receipt of information, or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of: prohibitions relating to restrictive trade practices; or prohibitions relating to abuse of dominance. Upon receipt of the complaint, it is upon the Authority to make a decision on whether to proceed with the investigation, which decision should be communicated in writing to the aggrieved party as provided for under Section 32 of the Act.

55. The Competition Act also grants the Authority power to take evidence under oath and affirmation to reach a determination and grant appropriate relief either interim or permanent, which may include an award of damages to the Complainant, or any amount proposed to be imposed as a pecuniary penalty. Another remedy available is the right to Appeal to the Tribunal for persons aggrieved by a determination made by the Authority within 30 days of receiving the Authority's decision. A second Appeal to the High Court may be allowed for one dissatisfied by the

decision within 30 days of the decision.

56. There is on record minutes of a meeting between the 5th Respondent and the 4th Petitioner held at the 4th Petitioner's offices on 25th October, 2019. Minute no.3 of the meeting which was to discuss the way forward, indicates that the 4th Petitioner was to share its data on the comparative transport costs charged by its members, in comparison to those charged by the SGR for the various sizes of containers. Further, the 5th Respondent was to give feedback before the next meeting. No such report is, however, on record.

57. There is no question that the Competition Act has a statutory scheme for dealing with grievances and that parties are obligated to exhaust the mechanisms provided by that scheme before approaching Courts. A 3-judge bench of the High Court has said as much in ***Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-parte KTDA Management Services Limited [2016] eKLR (Consolidated with JR. No. 3 of 2015*****,** where the Competition Authority was the 1st Respondent). The Court held thus:

We agree with the respondent that the allegations raised about price fixing and manipulation falls within the province of investigation by the Competition Authority established under the Competition Act (Chapter 504 of the Laws of Kenya). Under Section 4 of the Act, the Authority is empowered to receive complaints from legal or natural persons or consumer bodies and has the power to investigate restrictive trade practices which include price fixing manipulation.

We are of the view that the Competition Act provides an efficacious remedy for resolution of matters concerning price-fixing and manipulation. This is not to say that the High Court does not have jurisdiction to deal with allegations of breach of fundamental rights and freedoms in such case, it only means that the High Court recognizes that there are other legal bodies that exist to resolve certain disputes. This principle is recognized by Article 159(2)(d) of the Constitution that obliges the Court to promote alternative dispute resolution. Further because of Article's 10 and 21 of the Constitution, these bodies are obliged to give effect to the National values and principles of governance and provisions of the Bill of Rights.

58. Similarly, in ***Okiya Omtatah Okoiti & another v Kenya Power and Lighting Company Limited (KPLC) & 4 others [2020] eKLR*** where the Competition Authority was sued as the 3rd Respondent), Makau J. held that:

[F]rom the above I agree with the 1st Respondent, on the power of Competition Authority to receive Complaints from legal or natural person or consumer bodies and to exercise the power to investigate restrictive trade practices. I am satisfied that in cases under Competition Act, the relevant body that is mandated to deal with complaints and investigate restrictive trade practices is the Competition Authority of Kenya. It is a port of first instance for complaints of breaches of its provisions.....From the aforesaid findings herein above it is clear that there exists an alternative remedy that is sufficient, effective, expedient and economical to resolve the issues raised by the Petitioners, herein which, the Petitioners have by-passed and rushed to this Court. The Petitioners cannot be allowed to overlook clearly laid out procedures and processes that exist for resolution of disputes. Such processes must be exhausted first, before a party approaches a Court. The mere fact that the constitutional provisions are cited or the Constitution is invoked is not sufficient reason to elevate the matter to a constitutional status, and confer jurisdiction to the High Court, to inquire, arbitrate, determine or in any manner deal with issues which are required to be dealt with through a clearly prescribed dispute resolution mechanism, that is provided for in a specific statute....

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In ***R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) (supra)*****,** after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also ***Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)***

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in ***Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.***

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

63. Article 165(1) of the Constitution vests in the High Court vast powers including the power to '*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'* and the jurisdiction '*to hear any question respecting the interpretation of the Constitution*.'

64. Though the 4th Petitioner's case against the 5th Respondent is largely with respect to the Competition Act, the ripple effect thereof is the subject of the alleged violation of their fundamental rights and freedoms. The issues are therefore intertwined. The statutory provisions available on dispute resolution under the Competition Act, cannot be construed in a very restrictive manner to oust this Court's jurisdiction, to determine the issues in dispute which qualify under the exceptions set out herein. From the foregoing it is our considered view that the doctrine of exhaustion though relevant, is not applicable in this case having regard to the nature of the grievance, and the public interest involved.

65. Hence, while a party is required to exhaust its remedies under the Competition Act before bringing an action in Court claiming violations of that Act, the Consolidated Petitions involved polycentric issues and multiplicity of parties including questions related to the fundamental rights of the Petitioners to warrant an exception to the doctrine of exhaustion as developed in our jurisprudence.

66. It is noteworthy, however, that the 5th Respondent in this case already commenced investigations with respect to the issues raised in the 4th Petitioner's letter of 15th August, 2019. There is on record minutes of a meeting between the 5th Respondent and the 4th Petitioner held at the 4th Petitioner's offices on 25th October, 2019. There is therefore, no doubt that the 5th Respondent had before the filing of this Petition, commenced investigations in

discharge of their mandate provided under section 31 of the Act. We therefore find that the 5th Respondent did not ignore the issues raised by the 4th Petitioner and ought not to have been sued in these proceedings.

67. Section 40 of the Competition Act provides an avenue through which a Complainant aggrieved by the decision of the 5th Respondent can obtain redress. The section provides that an aggrieved party may appeal to the Tribunal and if aggrieved by the Tribunal's decision, appeal to the High Court, whose decision shall be final. This, the 4th Petitioner has not done.

68. Additionally, the 4th Petitioner sought an order of mandamus directing the 5th Respondent to take immediate action to demolish the monopolistic tendency with regard to the transportation of containers from the Port of Mombasa to other destinations in Kenya. This is tantamount to asking the Court to direct the Competition Tribunal on what finding to make, an act which would amount to usurping the domain of the Tribunal.

69. In the premise, we find that none of the two orders we have been invited to grant under prayer in paragraph 52(g) in ***Petition no- 201 of 2019*** is available to the 4th Petitioner and we decline the invitation.

c. Did the Impugned Directives contravene the Constitution by infringing on the 4th Petitioner's freedom to freely choose their mode of transportation of cargo arriving at the Port of Mombasa"

70. One of the four substantive claims raised by the Petitioners is based on what the 4th Petitioner refers to as the "fundamental freedom to choose." The 4th Petitioner seeks a declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo from the Port of Mombasa to a destination of their choice.

71. The 4th Petitioner asserted that its case is centred on the freedom of choice and urged that freedom of choice is a fundamental right recognized under Articles 27, 28 and 46 of the Constitution. They also urged that freedom of choice is embedded in the Constitution by virtue of Article 6 of the International Convention on Economic Social and Cultural Rights (ICESCR) which, they argue, is part of the laws of Kenya by dint of Article 2(6) of the Constitution.

72. To buttress its arguments, the 4th Petitioner cited the decisions in ***Association of Kenya Medical Laboratory Scientific Officers vs. Ministry of Health & another [2019] eKLR; Robert N. Gakuru and others vs. Governor Kiambu County and 3 others [2014] eKLR; Mistry Amar Singh vs. Serwano Wofunira Kulobya [1963] EA 408; Macfoy vs. United Africa Co. Ltd [1961] at 1172*** and ***Owners of Motor Vessel 'Lilian S' vs. Caltex Oil (Kenya) Ltd [1989] eKLR***.

73. On the other hand, in the 1st and 2nd Respondent's view, both the Impugned Agreement and the Impugned Directives meet the constitutional threshold and they urge the Court to dismiss any contention to the contrary. The 1st and 2nd Respondents argue that the Impugned Agreement and the Impugned Directives seek to implement the policy decisions created by the 2nd Respondent with the aim of realizing the socio-economic rights envisaged under Article 43 of the Constitution. In this respect, the 1st and 2nd Respondents asked the Court to interrogate Kenya's Vision 2030, Sector Plan for Transport, 2008 – 2012; the Integrated National Policy developed in 2009 and the May 2019 Policy Paper on Integrated National Transport Policy for Kenya under the theme "Moving a Working Nation."

74. The 1st and 2nd Respondents argue that in order to finance the development of the railway infrastructure, the National Government took a sovereign loan from the Exim Bank. They further stated that the Impugned Agreement was geared to support the repayments to the Exim Bank and to help in the project management, finance and administration. It urged that the 3rd and 4th Respondents are the leading government agencies mobilizing resources to repay the colossal debt amount.

75. It was the 1st and 2nd Respondent's argument that the orders sought by the Petitioners are not justiciable as they go against the constitutional mandate of the National Government to enter into loan and derivative agreements with other parties. They argue that granting the orders would be tantamount to the Judiciary supervising the authority of the National Government to prepare financing for its budgeted programs which would be against the doctrine of separation of powers. To this end the 2nd Respondent cited ***Ndora Stephen vs. Minister for Education & 2 others, Nairobi High Court Petition No. 464 of 2012***.

76. The 1st and 2nd Respondents urged the Court to dismiss the Consolidated Petitions, particularly the declaration that transporters have a right to choose their mode of transport, stating that to do otherwise would deal a strain on the National Transport Policy.

77. Is there a fundamental freedom to choose one's mode of transport which has been infringed by the Impugned Directives" In essence, the 4th Petitioner argues that the Bill of Rights in our Constitution has such a right. It locates the provenance of the right primarily in Article 46 of the Constitution and argues that the right is accentuated by Articles 27 and 28 of the Constitution. Further, the 4th Petitioner locates the right to choose one's mode of transport in Article 6 of the ICESCR which, they point out, is part of the laws of Kenya by dint of Article 2(6) of the Constitution. This is because Kenya has ratified ICESCR.

78. Does Article 46 of the Constitution as read together with Articles 27 and 28 of the Constitution grant the freedom to choose one's mode of transportation as the 4th Respondent claims" Article 46 of the Constitution provides as follows:

(1) Consumers have the right –

a. To goods and services of reasonable quality;

b. To the information necessary for them to gain full benefit from goods and services;

c. To the protection of their health, safety, and economic interests; and

d. To compensation for loss or injury arising from defects in goods or services.

(2) *Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.*

79. On the other hand, Article 6 of ICESCR provides as follows:

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

80. The question presented by the 4th Petitioner is whether the cited articles in the Constitution read together and Article 6 of ICESCR guarantee a right for the 4th Petitioner to choose the mode of transportation for containers which arrive at the Port of Mombasa and, conversely, present the question whether these articles prohibit the State from abrogating the 4th Petitioner's "freedom" to choose their mode of transportation.

81. It is true that our Constitution's Bill of Rights has a general underlying value of freedom which is a right to be afforded an opportunity to choose from a range of options voluntarily. As the South African Constitutional Court has remarked of the similarly-structured South African Constitution, in ***MEC for Education: Kwazulu-Natal and Others vs. Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)***

A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues."…. we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.

82. However, while our Constitution puts a premium on the value of freedom, it has not inscribed "liberty of contract" as a fundamental right in our Bill of Rights. Our Constitution protects and ring-fences a number of enumerated rights and freedoms. These are rights and freedoms respecting which each individual is guaranteed including the right to be afforded an opportunity to choose from a range of options. However, the ring-fenced enumerated rights and freedoms do not include the right to make certain economic choices which may trammel the State's "Police" powers to direct health, security and economic activities.

83. The question presented is one of the extent to which the Constitution inherently limits the "liberty of contracts". Differently put, does the Constitution create a right for individuals to enter into any contracts on terms of their own choice" And if so, is such a right fundamental" When is it constitutionally permissible to limit or abrogate such freedom to contract"

84. In an earlier era of jurisprudential thought in the United States, the US Supreme Court answered the question in a vigorous endorsement of *laissez faire* economic theory by reading into the US Constitution the liberty of contracts and holding that inherent in the rights to liberty and property is a fundamental right to freely make contracts. Hence, in ***Allgeyer v. Louisiana* 165 U.S. 578 (1897)** the US Supreme Court stated:

The 'liberty' mentioned in [the 14th] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

85. This line of reasoning reached its apogee in one of the most widely condemned and infamous cases in US history – ***Lochner v New York 198 U.S. 45 (1905)***. The case held that the right to freely contract is a fundamental right under the 14th Amendment of the US Constitution.

86. The case involved a challenge to New York State law known as Bakeshop Act – one of the state's earliest labour laws, in an effort to regulate sanitary and working conditions in New York bakeries. A section of the Act stated that "*no employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day*."

87. Lochner, a bakery owner who was found guilty under the Bakeshop Act, challenged the constitutionality of the Act. The Supreme Court agreed with Lochner and struck down the Bakeshop Act holding that the offending section of the Bakeshop Act was unconstitutional because it was an interference with the right of contract between employers and employees, and that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." Therefore, the Court concluded, the right to contract one's labour was a "liberty of the individual" protected by the Constitution." The US Supreme Court stated:

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labour in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. ***Allgeyer*** **v.** ***Louisiana*****, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.** *Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labour is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.*

88. Justice Oliver Wendell Holmes, who would later be regarded as one of the founders of the American Legal Realism wrote perhaps his most important dissent in opposition to the approach taken by the majority in the case. He famously wrote:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.

89. The position taken in ***Lochner v New York*** remained in vogue in the United States for at least three decades. Over that period, the Court would strike down numerous attempts by state governments to pass laws aimed at protecting consumers or improving working conditions or otherwise regulating the economy – all under the guise of a liberty the Court found in the Due Process Clause of the 14th Amendment as opposed to any specific text in the Constitution. The US Supreme Court was, in effect, impliedly reading into the Constitution a strong "liberty" or "freedom" clause in the Constitution which protected economic liberties which were not explicitly protected by the text of the Constitution. The impact of this jurisprudential trend was to severely limit the ability of the government to direct economic policy in order to protect or channel in a given direction the health, morals, safety; or the general welfare of the public.

90. In the United States, the Supreme Court changed course and backed away from its ***Lochner*** line of cases in the mid-1930s. This heralded a trend towards increasing deference to state regulation of economic matters out of the principle that the government generally has much leeway to direct economic matters and policy as long as it does not use that power to enact oppressive and unjust laws. The Supreme Court announced the departure in ***West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)***. In this case, the majority, in a passage that heralds the modern day approach to the question of the constitutional freedom to contract, stated thus:

What is this freedom" The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular….[F]reedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to

government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

91. This is the correct approach to the regulation of economic activities which our Constitution divines. In its various principles as well as in its structure and variety of civil, political, social, economic, cultural and group rights which the Constitution enumerates, the Constitution plainly envisages a directive role of the State in respecting, promoting, and fulfilling the various enumerated fundamental rights of individuals and groups. Such a directive role, of necessity, means that the State has leeway to regulate and limit the freedom to contract by individuals in order to achieve other public interest objectives including the objective of achieving the social and economic rights of citizens. Put differently, it is true of the Kenyan Constitution, as it is of the US Constitution, that:

The liberty secured by the Constitution …to every person…does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. ***Jacobson* v. *Massachusetts*, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed**.

92. Or as the US Supreme Court said in ***Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383, 388**:

This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century……While this Court has held…..that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public required, but what measures are necessary for the protection of such interests.

93. Therefore, while the 4th Petitioner faults the Respondents for denying them the freedom to choose the mode of transport that they want, the 4th Petitioner wrongly assumes that the State, through the Respondents, has no right or constitutionally-protected and legitimate governmental interest in regulating the mode of transport for containers as part of the Government's efforts to fulfil the collective social and economic rights of all citizens. The truth is that the State has legitimate governmental interests, permitted by the Constitution, to impose certain reasonable restraints on freedom of contract. However, while the State has much leeway to impose reasonable limitations to the freedom to choose economic activities in the common good, such limitations must be reasonable; non-discriminatory; non-oppressive; and procedurally imposed for them to pass constitutional muster.

94. A party who claims that his freedom or liberty under the Constitution has been impermissibly abrogated or limited, therefore has the onus to demonstrate the following four things.

95. *First*, to establish whether the allegedly violated right is an enumerated right or freedom under the Constitution. If the concerned freedom or right is a fundamental one enumerated under the Bill of Rights, the State is required to justify any abrogation or limitation under Article 24 of the Constitution. In such a case, the onus immediately shifts to the State to demonstrate that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." In addition, the State must show that all the other requirements under Article 24 of the Constitution are satisfied.

96. *Second*, where the right or freedom allegedly violated or limited is not an enumerated right or freedom and is, instead, a non-fundamental right or a right generally covered under the general subtext of freedom or liberty under the Constitution or some other penumbral right or freedom as permitted under Article 19(3)(b) of the Constitution,

a person claiming a violation is required to demonstrate that the abrogation or limitation is either unreasonable or oppressive. The Claimant can satisfy this requirement by showing two things:

a. *One*, that the particular Policy or law in question does not serve any legitimate governmental interest; or

b. *Two*, that the particular Policy or law is not rationally related to the articulated governmental interest. Differently put, the means and goals of the Policy or law must be rationally related. A Claimant can succeed in showing that a law is unreasonable or oppressive if he can show that the means chosen to achieve the legitimate governmental interest is not rationally related to legitimate government goals.

97. *Third*, even where a policy or law passes muster under the rational basis test, it is incumbent for the State to demonstrate that the Policy or law limiting the non-fundamental right was crafted after a process of public participation or administrative fair hearing in which those most affected by the Policy or law have been given an opportunity to air their views and to have those views considered before the Policy or law is made final. This is a due process requirement.

98. *Fourth,* even where the impugned Policy or Law survives procedural scrutiny under the rational basis test and survives further scrutiny for public participation and administrative fairness, it must further survive a substantive scrutiny as to its impacts or effects on the rights of the Claimant. If the impugned Policy or Law otherwise violates an enumerated fundamental right or freedom in its effects (as opposed to its text and intent which must meet the requirements under Article 24 and is covered in the first requirement above), a Court would still find the impugned Policy or Law impermissible. For example, a Claimant can demonstrate that the specific Policy or Law being challenged has violated his or her social and economic rights under Article 43 of the Constitution as applied under Article 20 of the Constitution.

99. In the present case, on the basis of the pleadings and submissions, the 4th Petitioner did not claim or show that the Impugned Directives did not serve any legitimate governmental interests. Indeed, the Respondents consistently claimed, and it was not sufficiently controverted, that the Impugned Directives seek to implement the policy decisions created by the 2nd Respondent with the aim of realizing the socio-economic rights envisaged under Article 43 of the Constitution by directing economic activities in a way the Government believes is sustainable and equitable for the whole country. It can, therefore, be easily concluded that there is a legitimate governmental interest to be achieved.

100. Turning to the next question: Did the 4th Petitioner demonstrate that the means chosen (the Impugned Directives) to realize the legitimate government interests (to direct economic development in order to realize equitable and sustainable development in the region and the country as a whole) is not rationally related to the stated goals"

101. The onus was on the 4th Petitioner to demonstrate a disconnect between the means chosen and the articulated goals. In assessing whether the means chosen is rationally related to the legitimate governmental interest, the Court is sufficiently deferential to the substantive decisions made by the Executive in exercising its Police Powers to protect the health, morals, safety; or the general welfare of the public. This deferential standard deployed in this sphere of economic policy formulation is both an incidence of democratic principles as well as an acknowledgement of the need for technical expertise in the sphere: in the realm of economic policy formulation and governance, the political branches and technocratic agencies are more politically accountable and technically expert and therefore more suited than the Courts to the complex policy-driven task of crafting economic policies.

102. Applying this appropriately deferential rational basis test, we are unable to make a finding that the Impugned Directives are not rationally related to the expressed legitimate governmental goal of driving economic policy in Kenya through the Integrated National Transport Policy for Kenya. The 2nd Respondent tabled before the Court

what it called Kenya's Vision 2030, Sector Plan for Transport, 2008 – 2012; the Integrated National Policy developed in 2009 and the May 2019 Policy Paper on Integrated National Transport Policy for Kenya under the theme "Moving a Working Nation" to demonstrate that the Government has a rational and holistic Transport Infrastructure Policy and that the Impugned Directives are a necessary part of operationalizing that policy.

103. Additionally, the 2nd Respondent argued that in order to finance the development of the railway infrastructure, the National Government borrowed from the Exim Bank and that the Agreement dated 30th September, 2014 and the Impugned Directives are therefore geared to support the repayments to the Exim Bank and to help in the project management, finance and administration. It urged that the 3rd and 4th Respondents are the leading government agencies mobilizing resources to repay the colossal debt amount.

104. In making these arguments, the 2nd Respondent easily met the threshold required under the rational basis test to demonstrate that the means chosen to accomplish the legitimate governmental interest is rationally related to the goals. Conversely, there has been no showing that the means chosen did not rationally advance legitimate governmental interests.

105. We, therefore, conclude that the Respondents were able to demonstrate that the Impugned Directives serve legitimate governmental interests and that the means chosen (limitations of transport choices) is rationally related to the stated governmental goals. However, this leaves two questions yet to be answered:

i. The first one is whether the due process requirements were met in coming up with the Impugned Directives. This is analysed next. A governmental policy which passes constitutional muster under the rational basis test as analysed above still has to survive a due process scrutiny. The key consideration in that scrutiny is whether the policy was arrived at in a way which was administratively fair and after engaging in an appropriate program of public participation. This is a substantive issue raised in this Consolidated Petitions and it is analysed next.

ii. The second one is whether the Impugned Directives otherwise violate the social and economic rights of the 4th Petitioner as a substantive matter. As pointed out above, a governmental policy which passes muster under the rational basis test and survives a due process scrutiny for public participation and administrative fairness must, still, survive a further substantive scrutiny on its effects on the rights of a Claimant. In this case, the 4th Petitioner claims that the Impugned Directives violate its social and economic rights enshrined in Article 43 of the Constitution. This is a substantive issue raised in the Consolidated Petitions and is analysed immediately after the due process analysis.

d. <u>Did the Take or Pay Agreement and Impugned Directives violate Articles 10 and 47 of the Constitution for want of public participation and administratively fair procedures"</u>

106. The second substantive claim in the Consolidated Petitions centres on Articles 10 and 47 of the Constitution. The question presented is whether the Take or Pay Agreement and the Impugned Directives violate the due process requirements imposed by Articles 10 and 47 of the Constitution.

107. According to the Take or Pay Agreement, the 3rd Respondent undertook to consign to the 4th Respondent as a carrier a set volume of freight and or other cargo pursuant to commencement of the operations of the Standard Gauge Railway (SGR) to the 3rd Respondent's Inland Container Depot (ICD) at Embakasi. The Take or Pay Agreement provided as follows: -

(a) KPA shall consign to KRC as a carrier for transport to its Embakasi ICD (on "Take or Pay" basis) the minimum volume of freight and or other cargo stipulated in Schedule 1 hereto following the commencement of operation of the SGR.

(b) KPA shall make available such additional volumes of cargo (over and above the volumes stipulated in Schedule 1 hereto) for transport by KRC on the SGR line to KPA's Embakasi ICD at its discretion or as requested by KRC subject to the mutual agreement of the parties.

(c) *KPA and KRC shall institute and publicize measures to require shippers, consignors, consignees, clearing and forwarding agents and owners of goods to make provision for the delivery and collection of goods which KPA has consigned or intends to consign to KRC from Embakasi ICD.*

108. The 1st, 2nd and 3rd Petitioners averred that the directive of 15th March 2019 was issued by the 3rd Respondent and implemented the Take or Pay Agreement. Through the directive of 15th March 2019, the 3rd Respondent informed the necessary parties to collect their goods which the 3rd Respondent would consign to the 4th Respondent from the Embakasi ICD.

109. The directive of 3rd August, 2019 was jointly issued by the 3rd Respondent and Kenya Revenue Authority. It required all imported cargo for delivery to Nairobi and the hinterland to be conveyed by the SGR and be cleared at the Inland Container Depot in Nairobi.

110. The 1st, 2nd and 3rd Petitioners as well as the 1st and 2nd Interested Parties challenged the Take or Pay Agreement. They contended that the Take or Pay Agreement was a public policy decision as it had the effect of transferring port services from Mombasa to Nairobi. To that end, it was submitted that the Respondents' decision was administrative in nature and by dint of being public bodies, the Respondents had a duty to give Mombasa residents and Port users written reasons for their decision. It was further submitted that the Respondents were bound by the provisions of Article 10 of the Constitution, particularly the participation of the people, human rights, good governance, integrity, transparency and accountability. The 1st, 2nd and 3rd Petitioners and the 1st and 2nd Interested Parties also contended that the Respondents variously failed and/or neglected to comply with and as such violated Article 10 as read with Article 47 of the Constitution more particularly for lack of public participation.

111. The Impugned Directives were the main concern of the 4th Petitioner. The membership of the 4th Petitioner comprised of corporates variously engaged in the transport business. The 4th Petitioner contended that the decision to transport all cargo destined for Nairobi and the hinterland by SGR to Embakasi ICD was unilaterally reached by the 3rd Respondent. It was argued that the 4th Petitioner or any of its members', despite being key stakeholders in the transport industry, were not involved in the decision-making process. As a result, the 4th Petitioner strenuously contended that the Impugned Directives violated Article 10 as read together with Article 47 of the Constitution due to lack of public participation and consultations.

112. The 3rd and 4th Respondents took great exception to the foregoing position. They posited that the Take or Pay Agreement and the Impugned Directives were purely operational decisions as opposed to public policy decisions or administrative actions. According to the Respondents the said decisions were duly sanctioned by Section 12(1)(g) of the Kenya Ports Authority Act and Section 13(1)(d) of the Kenya Railways Act and were only meant to enable the public entities to discharge their day-to-day operations.

113. The Respondents posited that the Petitioners and the Interested Parties could therefore neither expect to be involved in the operations of the public entities nor purport to dictate the manner in which the 3rd and 4th Respondents ought to carry out their day to day operations. To the Respondents such operational decisions were not amenable to public participation or to the requirements of Article 47 of the Constitution**.** In essence the 3rd and 4th Respondents argued that statutory provisions do not require any public participation because such processes were undertaken during the law-making process.

114. From the foregoing, we discern the following three sub-issues: -

(i) *First*, whether a public authority undertaking statutory functions authorized by its parent statute is obligated to engage in stakeholders consultations and public participation while carrying out those functions.

(ii) *Second*, if the answer to the first question is in the affirmative, to what extent such consultation and public participation is required; and

(iii) *Third*, whether the Take or Pay Agreement and Impugned Directives required and were subjected to adequate public participation and consultations.

115. The starting point is the Constitution. Article 2 *inter alia* declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the Constitution.

116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

118. Expounding on Article 10 of the Constitution, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in ***Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR*** while referring to the South African decision in ***Doctors for Life International vs. Speaker of the National Assembly & Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC***) adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The **Black's Law Dictionary** 10th Edition defines '*consultation*' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR*** quoted with approval Ngcobo J in ***Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)*** as follows: -

……The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.…

122. In a Three-Judge bench the High Court in consolidated ***Constitutional Petition Nos. 305 of 2012, 34 of 2013*** *and* ***12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR*** the Court addressed the concept of consultation in the following manner: -

…. A public participation programme, must…show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account. (emphasis added)

123. Consultation or stakeholders engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** (supra) while dealing with the aspect of public participation in law-making process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In ***Matatiele Municipality v President of the Republic of South Africa (2) (CCT73/05A)***, the South African Constitutional Court stated as follows: -

A commitment to a right to…public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect…

126. The South African Constitutional Court in ***Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 others, CCT 86/08 [2010] ZACC 5*** discussed the importance of public participation as follows: -

….*engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.*

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in ***Legal Advice Centre & 2 others v County Government of Mombasa & 4 others*** (supra) referred to ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In ***Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others*** (supra) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

a) *First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See ***Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012****. In relevant portion, the Court stated:*

"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community

collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e) Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

f) Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

129. We will now consider the first two issues together, that is, whether a public authority undertaking statutory functions authorized by its parent statute is obligated to engage in public participation and/or stakeholders' engagement while carrying out those functions and if so, to what extent.

130. As we have shown above, the Take or Pay Agreement and the directive of 15th March 2019 were on the consignment of goods by the 3rd and 4th Respondents. As correctly submitted such powers are statutorily conferred. On one hand Section 12(1)(g) of the KPA Act states as follows: -

12(1). The Authority shall have power to: -

(g) to consign goods on behalf of other persons to any places whether within Kenya or elsewhere.

131. On the other hand, Section 13(1)(d) of the KRC Act states as follows: -

13(1) Without prejudice to Section 11A, the Corporation shall have power: -

(d) to consign goods on behalf of other persons from any place within Kenya to any other place whether within Kenya or elsewhere.

132. There was concurrence by all parties on the foregoing. The departure was in the manner in which such power is to be exercised. The parties were sharply divided on it.

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would

likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. The issue is not foreign to our Courts. In ***Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR,*** the Petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the Respondents argued that Section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process. **Rika, J,** expressed himself as follows: -

Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities" The High Court, in Robert N. Gakuru& Others v. Governor Kiambu County & 3 others [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation" Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director" In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1st Respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st Respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional-desired-effect under Articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of Article 10 of the Constitution, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

138. The Take or Pay Agreement was between the 3rd and 4th Respondents. We have carefully perused it. It was an agreement to the effect that the 3rd Respondent will consign a set volume of cargo and how that cargo shall be transported by the 4th Respondent by SGR to the 3rd Respondent's Embakasi ICD. The minimum volumes of the cargo and the turnaround times were provided for in Schedule 1 thereof. The 3rd Respondent thereafter issued the Impugned Directives to operationalize the Take or Pay Agreement.

139. We will now apply the above parameters to the Take or Pay Agreement and Impugned Directives to determine whether they were constitutionally amenable to public participation. We will deal with the Take or Pay Agreement and the Impugned Directives separately.

140. The nature and effect of consignment of cargo under the Take or Pay Agreement was captured by the 3rd Respondent's Head of Litigation and Disputes *vide* his affidavit in response to the Petition sworn on 27/10/2018. Mr. Turasha J. Kinyanjui deponed as follows:

16. *THAT even at its peak, the SGR will only ferry a maximum of 700 containers per day to the ICD (approximately 260,000 containers per year). The 3rd Respondent has received 393,182 import containers between January and August 2018. The total number of containers received at the port from January to August 2018 is 846,294. It is therefore obvious that the alleged death of the cargo transport business is a statement unsupported with any facts (I annex and mark as JT-4 a summary showing the container traffic at the port in 2018).*

141. The 1st, 2nd and 3rd Petitioners also pleaded as follows in their Amended Petition: -

12. *The Port of Mombasa is the second largest port in sub-Saharan Africa with a capacity of about 1,200,000 TEUs and a cargo handling capacity of approximately 28 million tonnes per year.*

142. The 1st, 2nd and 3rd Petitioners in essence pleaded that the Port of Mombasa had the capacity of conveying about 1,200,000 twenty-foot equivalent unit containers (TEUs) annually which translated to about 28 million tonnes of cargo per year. The Petitioners, therefore, echoed the position taken by the 3rd Respondent that the Port of Mombasa receives more cargo than the set volume destined to be conveyed by SGR under the Take or Pay Agreement.

143. The foregoing was further demonstrated by the Schedule annexed to the Take or Pay Agreement. The Schedule was for the expected tonnage of goods to be conveyed by the SGR from 2015 to 2034. The cargo tonnage destined to be conveyed by SGR was to be at its peak in the year 2020 when it was expected to be 6,000,000 tonnes per year. That was against the maximum handling capacity of the Port at 28 Million tonnes per year. The annual tonnage was set to gradually decrease from 2021.

144. It was therefore empirically demonstrated that the set cargo subject of the Take or Pay Agreement was only a fraction of the entire cargo the 3rd Respondent received and consigned annually.

145. It seems clear that the Take or Pay Agreement is an internal contractual arrangement between the 3rd and 4th Respondents. It also seems clear that looked at on its own, the Take or Pay Agreement has no tangible impact on any of the Petitioners. It is a classical operational decision of the 3rd and 4th Respondents – a decision each of them is eminently permitted to make under their parent statutes. The only question that arises is whether any actions or decisions taken by the 3rd and 4th Respondents in operationalizing the Take or Pay Agreement (which is, itself, an operational arrangement) affects other stakeholders or the public in such a way as to trigger the public participation requirement of the Constitution.

146. For avoidance of doubt, we hold that the Take or Pay Agreement, without more, belongs to the sphere of internal operations of the 3rd and 4th Respondents over which there was no need for constitutionally mandated

public participation. The 3rd and 4th Respondents are legally competent to conclude the Take or Pay Agreement without triggering the public participation requirement of the Constitution.

147. However, in order to operationalize the Take or Pay Agreement, the 3rd and 4th Respondents had to take certain actions. Some of these actions may belong to the sphere of internal operations of the two Respondents. Some, however, are outside that sphere and belong to the second scenario where they affect the interests and rights of stakeholders and the public. These latter actions and decisions must be subjected to public participation.

148. The question presented in ***Mombasa Constitutional Petition No. 201 of 2019*** is whether the Impugned Directives belong to this second scenario. We will now subject the Impugned Directives to this analysis.

149. The directive of 15th March, 2019 was by the 3rd Respondent addressed to all Shipping Lines and Agents. It directs, in pertinent part, as follows:

Henceforth shipping lines will not be allowed to endorse Bill of Lading (BL) to importers' CFS of choice.

150. On the other hand, the directive of 3rd August, 2019 was jointly issued by the 3rd Respondent and the Kenya Revenue Authority (KRA). In pertinent part it notifies the general public that:

1. All imported cargo for delivery to Nairobi and the hinterland shall be conveyed by Standard Gauge Railway (SGR) and cleared at the Inland Container Depot – Nairobi.

2. All imported cargo intended for Mombasa and its environs shall be cleared at the Port of Mombasa.

151. While the directive of 15th March, 2019 coercively removes the right of the importers to choose their CFS of choice, the directive of 3rd August, 2019 coercively requires all cargo which is not intended for Mombasa and its environs to be conveyed by the SGR and to be cleared at the Inland Container Depot in Nairobi. There is no question that these directives radically impact the 4th Petitioner and, indeed, all importers who use the Port of Mombasa. By their text, the Impugned Directives remove any choice from the members of the 4th Petitioner and Port Users on what CFS to use and what mode of transportation to employ to the ICD.

152. While the 3rd and 4th Respondents have legal authority to conclude an agreement on the minimum freight which must be conveyed by SGR, and may conclude such an agreement without the involvement of the 4th Petitioner and other stakeholders, the 3rd Respondent has no right to impose the decision resulting from that agreement on the 4th Petitioner's members and other stakeholders without involving them through public participation. As we analysed above (under issue (d)), the government has legitimate governmental interests which it may choose to promote by trammelling on the freedom of choice of the 4th Petitioner and other importers. However, while the government has leeway to craft an appropriate economic policy which may limit the freedom of contract of citizens, the government or its agencies can only arrive at a Policy or decision so limiting the citizens' freedom to choose after meeting due process requirements. In Kenya, as our jurisprudence discussed above has established, the government agency must involve the public through public participation and any stakeholders specially affected by the Policy through stakeholder engagement or consultation.

153. Here, as aforesaid, the 3rd Respondent, acting as a Public Authority, made a Policy and took actions whose effect was to clearly limit the economic freedom of the 4th Petitioner, its members and members of the importing public. While that freedom is not absolute as analysed above, and while the government, through the 3rd Respondent had a legitimate governmental interest to limit that freedom provided the means chosen are rationally related to the goals, the limitation can only occur after the due process requirement of public participation imposed by the Constitution has been satisfied.

154. There is no question that there was no attempt to subject the Impugned Directives to public participation in any way. Indeed, all the Respondents took the position that no public participation was required because the two directives were products of internal operations and authorized under the parent statutes establishing the 3rd and 4th Respondents. As we have established above, that reasoning was incorrect. A decision removing all sets of options from an economic actor, targeted group, participants in a particular trade or profession and requiring them to channel their economic activities in a particular direction, is, definitionally, one that must be arrived at after due consultations and meaningful public participation. As we analyse below, such a decision must, further, be arrived at in a manner that is administratively fair under Article 47 of the Constitution and the Fair Administrative Actions Act.

155. We have already held that the Impugned Directives required public participation. We have, also, already made a finding that no public participation was undertaken before the Impugned Directives were effected. For these reasons, the Impugned Directives are, constitutionally infirm.

156. The Impugned Directives are, also, for the same reasons, a violation of Article 47 of the Constitution. By the Respondents' own admission, no efforts whatsoever were taken to ensure compliance with Article 47 of the Constitution and the Fair Administrative Actions Act.

157. Article 47 of the Constitution. Sub-articles (1), (2) and (3) states that: -

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration

158. The legislation that was contemplated under Article 47(3) is the Fair Administrative Act. Section 5(1) thereof provides that: -

(1) *In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—*

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice—

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected

by his or her action to appeal; and

(iii) specify the manner and period within which such appeal shall be lodged.

159. Section 2 of the Fair Administrative Act defines an '*administrative action'* and an '*administrator*' as follows: -

'administrative action' includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

*'administrator' means 'a person who takes an administrative action or who makes an administrative decision'***.**

160. Addressing itself to these provisions, the Court of Appeal in ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** held that: -

*Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed***.**

161. The South African Constitutional Court in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1*** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

162. The High Court in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR*** had the following to say:

25. *In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are: -*

a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly,

their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.

b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. Irrationality and proportionality- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****[40]:-*

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

163. From the foregoing discussion, there is no doubt the Impugned Directives were administrative actions. In sum, they were administrative actions because they affected the legal rights and interests of the 4th Petitioner, importers, transporters, other Port users, and stakeholders. As such they had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

164. The Impugned Directives did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the 3rd Respondent had to do the following:

a. Give notice of the intended directives to the 4th Petitioner, importers, transporters, other Port users, and stakeholders;

b. Afford an opportunity for the 4th Petitioner, importers, transporters, other Port users, and stakeholders to be heard on the question; and

c. Give reasons for the decisions made – in this case, the Impugned Directives.

165. None of these happened. For this reason alone, the Impugned Directives are constitutionally infirm.

e. Did the Take or Pay Agreement and the Impugned Directives violate the Article 43 rights (social and economic rights) of the Petitioners"

166. The third substantive issue raised in the Consolidated Petitions is whether the Take or Pay Agreement and the Impugned Directives violate the Social and Economic Rights of the Petitioners as provided for under Article 43 of the Constitution.

167. In advancing their case that the Take or Pay Agreement violated Article 43 of the Constitution, the 1st, 2nd and 3rd Petitioners made averments on the socio economic benefits derived from the Mombasa Port and the effects of the Take or Pay Agreement thereon. The Petitioners contended that the Port of Mombasa is a key entry and exit point for oversees cargo destined to a vast hinterland that includes Kenya, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Tanzania, South Sudan, Somalia and Ethiopia; and is the second largest port in sub-Saharan Africa with a capacity of about 1,200,000 TEUs and a cargo handling capacity of approximately 28 million tonnes per year.

168. Further, that the existence of the Port of Mombasa has necessitated cargo handling activities such as clearing and forwarding, warehousing and cargo trucking which create opportunities for the residents of Mombasa County. The Petitioners estimated that there are about 450 forwarding agent firms established in Mombasa which on average have over 50 employees each, and 22 Container Freight Stations (CFS), out of which 21 are established in Mombasa and 1 in Nairobi all of which have an average of 200 employees per CFS.

169. The specific effects particularised by the Petitioners arising from the decision requiring the use of the SGR to deliver goods to Embakasi ICD for collection were as follows:

a) It now costs an extra approximately Kshs. 150,000/ to Kshs. 250,000/- excluding demurrage charges to clear a container at the Embakasi ICD. This extra cost is brought about by the extra time spent in transporting containers from the Port of Mombasa to Embakasi ICD as cargo trains queue for days in wait for clearance of offloading space at Embakasi ICD. Further, that demurrage charges have been as high as Kshs. 12 Million for one transaction, and that as a result of the foregoing the high costs of goods clearance has led to price increase of basic commodities.

b) The turnaround time for clearing and forwarding cargo has increased from about 7 days to about 60 days thus escalating the cost of importation in terms of clearing and forwarding costs, container storage & shipping line demurrage charges, and other related costs.

c) Since clearing and forwarding business entails physical verification of containerized cargo, this has necessitated relocation of businesses to Nairobi and the said firms have had to retrench employees in their establishments within Mombasa County.

d) Container Freight Stations have ceased to provide container storage facilities and thereby causing them to retrench their employees based in Mombasa.

e) The cost of importation of raw and finished products has escalated thus adversely affecting businessmen and manufacturers based in Mombasa thereby necessitating job cuts.

f) The foregoing is also reversing the gains Kenya has made on the World Bank Index on ease of doing import/export business as it creates artificial trade barriers.

170. The said Petitioners claimed that the residents and youth of Mombasa County and its environs are most affected by the loss of jobs and relocation of employment opportunities, and indicated in their supporting affidavit that they had annexed documents from the Kenya International Freight & Warehousing Association (KIFWA) confirming the contentions in the foregoing. They further relied on an article in *The Standard* newspaper of 27th March, 2018 titled "*Coast Seeks New Income as SGR Takes Over Cargo*", a copy of which was also annexed, for the contention that the loss of business arising from the aforestated effects was likely to cause a decline in revenue of Mombasa County by at least Kshs 40 billion in the calendar year 2018.

171. The 1st, 2nd and 3rd Petitioners also drew attention to an article published in the *Standard Newspaper* on 24th September, 2019 titled "*Monopoly of SGR freight derailing Coast economy*" which they annexed to their submissions. The article highlights a report by the University of Nairobi, School of Business which indicates that the entire logistics sector in the Coast region is collapsing owing to the Transport Policy implementation by the Respondents. The report further states that the Mombasa County economy will shrink by 16.1 per centum with 8,111 jobs lost if all cargo is evacuated by the SGR from the Port of Mombasa to the Embakasi ICD. It indicates that since the implementation of the Impugned Agreement, Mombasa County has lost Kshs. 17.4 Billion and 2,987 jobs, which is equivalent to 8.4 per *centum* of its annual earnings. Further, that to clear a container at the Embakasi ICD one will have to pay an extra sum of between Kshs. 150,000/= and Kshs. 250,000/=.

172. Counsel for the 1st, 2nd and 3rd Petitioners, in their submissions, also annexed an undated and unsigned Report by the 1st Petitioner titled *Ownership of the Port of Mombasa & Its Implications to the Economy of Mombasa.* The Report was to support the submission that the operations of the 3rd Respondent through the Embakasi ICD would undermine the economic development of Mombasa County and its environs.

173. The 1st, 2nd and 3rd Petitioners, therefore, contend that the Respondents' actions threaten the Mombasa residents' right to the highest attainable standards of economic and social rights as guaranteed under Article 43(1) of the Constitution of Kenya. In addition, they contend that the Respondents' actions violate Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which, they say, protects individuals' right to choose their work, and guarantees that they will not be unfairly deprived of employment. The 1st, 2nd and 3rd Petitioners argue that, having ratified the ICESCR, Kenya is obligated to uphold her citizens' economic right to work by dint of Article 2(6) of the Constitution.

174. The 1st, 2nd and 3rd Petitioners argue that the right to work does not require that the State employs an individual, but rather seeks to protect an individual's right to choose their work, and guarantees that they will not be unfairly deprived of employment. They urge that despite the fact that the Impugned Agreement has adversely affected the residents of Mombasa County, the Respondents have not taken any mitigation measures to provide alternative means of livelihoods.

175. Reliance was also placed on Article 55 (c) of the Constitution which provides that the State should take measures to ensure that the youth access employment. The 1st, 2nd and 3rd Petitioners cited the decision in ***John Kabui Mwai and 3 others vs. Kenya National Examinations Council & others [2011] eKLR*** for the position that inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uphold their human dignity.

176. The 4th Petitioner, on its part, also averred that the Respondents, by issuing the Impugned Directives, have violated Article 43 of the Constitution of Kenya by infringing on its members' rights to earn a living, and the rights to social and economic development of the residents of Mombasa. The 4th Petitioner contended that the members of the its Association and their employees and families have always sustained their livelihoods from the income that the said members lawfully used to make from undertaking transportation business of containers from the Port of Mombasa to other destinations out of Mombasa. However, that since the creation of the "monopolistic" arrangement which guarantees the said business solely to the 4th Respondent, the members of the 4th Petitioner's Association have literally been driven out of business which has led to a complete destruction of the capacity to earn money for the sustenance of the said members, their employees and their families.

177. The 4th Petitioner relied on a research report dated August, 2019 conducted by Dr. Kennedy Ogollah, Dr. Kingsford Rucha, Dr. Joshua Aroni and Mr. Gichiri Ndua on behalf of the County Government of Mombasa, a copy of which was annexed to the Affidavit of Dennis Okumu Ombok in support of ***Mombasa Constitutional Petition No. 201 of 2019***, to aver that Impugned Directives have violated the 4th Petitioners' members' rights to earn a living and the rights to social and economic development of the residents of Mombasa County as follows:

a) Road truckers' redundancies and closure of trucking business as a result of making it mandatory that imported cargo will be transported to Nairobi using the SGR.

b) Closure of Warehousing Businesses and Container Freight Stations in Mombasa as a result of the directive issued on 15th March, 2019 which notified the general public that shipping lines will not be allowed to endorse Bill of Lading to importers' CFS of choice.

c) Roadside Business Activities closure and/or contraction, as the drivers of the trucks are a major source of income to the businesses along the Mombasa-Nairobi highway.

d) Decrease in the Government revenue collection for Mombasa County and general job losses to residents of Mombasa County, which has large urban population as it is an industrial city, a port city and a major gateway to the East and Central Africa Region. As a result, many people who came to Mombasa in pursuit of employment opportunities, education, and investment opportunities, will be adversely affected by the closure of the transportation business and its related businesses which has been a major contributor in the housing business and other social services.

e) Increase in unemployment and crime rates. Reliance was placed on World Bank surveys that the 4th Petitioner says project unemployment rate in Kenya to rise and the need to create at least 900,000 jobs annually between now and the year 2025 to absorb the high number of youth joining the market. Also cited was an unidentified Kenya National Bureau of Statistics document which the 4th Petitioner says made a finding that 562,000 youth in Mombasa are unemployed and that this represents 45% of the total population.

178. In addition to the submissions made by 1st to 3rd Petitioners, the 4th Petitioner submitted that even though the SGR is a good infrastructure for the country, the policy requiring all imported cargo at the Port of Mombasa to be railed to Nairobi does not meet the constitutional thresh-hold of progressive realization of socio-economic rights. Further, that the employment benefits created by the use of the SGR are incomparable to the unemployment that will be caused by the Impugned Directives. Consequently, the 4th Petitioner urged that the Respondents have failed to give effect to Article 20(5)(b) of the Constitution which requires the state to ensure that the widest possible enjoyment of rights as a way to progressive achievement of socio-economic rights.

179. The Interested Parties supported the Petitioners' position on the socio economic effects of the Impugned Agreement and Impugned Directives. The 1st and 2nd Interested Parties averred that the socio-economic impact of the on-going translocation of cargo logistics from the Port of Mombasa to Embakasi ICD as a result of the integration of the Port and SGR operations, will lead to massive loss of jobs and investments in Mombasa County, and the coast region in general, and that there was no evidence that Kenyans, and Mombasa people in particular, were informed that this would be one or the consequences of the SGR. Further, that it is also not evident that any mitigation measures have been put in place to provide alternative livelihoods to those that are adversely affected by the implementation of the Impugned Agreement.

180. The 1st and 2nd Interested parties also singled out the costs of using the SGR train services and averred that the Kenya Railways has published SGR Mombasa Nairobi freight tariff of US$ 500 (Kshs 50,000) and US $700 (Kshs. 70,000) for 20 foot and 40 foot containers respectively. Further, that the tariff does not include the last mile transportation from the ICD to and from the shippers' premises, which on average costs an additional Ksh. 20,000/=. They argue that this imposes an unfair cost burden on port users including importers and the ultimate consumers of imported goods; and that the cost is higher than that charged by road truckers. The 1st and 2nd Interested Parties annexed various documents on the feasibility studies on, and procurement of the SGR in support of their averments.

181. The 3rd Interested Party on its part affirmed that containerization of cargo and increase in cargo traffic and trade in the region has brought about a significant redefinition of port services and demands for labour, thereby creating employment for the residents of the Mombasa County, and necessitated the establishment of firms and businesses within the county in a bid to provide specialized services. That consequently, the largest number of the residents of the County depend directly or indirectly on operations or activities emanating from the port, and any activities transferring the services from the Port of Mombasa would directly affect the employment and economic well-being of the residents of the County of Mombasa, and therefore prejudice the ability of the residents to enjoy socio-economic rights under the Constitution.

182. The 3rd Interested Party urged that the Impugned Agreement is in contravention of Articles 43 (1) as read with Article 55 of the Constitution of Kenya, 2010 as the said agreement has and will lead to an economic meltdown

within Mombasa County and its environs thus undermining the economic and social rights of the affected people. The 3rd Interested Party cited and relied on Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the cases of ***John Kabui Mwai & 3 others vs. Kenya National Examination Council & 2 others, High Court Petition No. 15 of 2011*** and ***Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others, High Court Petition No. 65 of 2010*** to submit that the Impugned Agreement infringes on the socio-economic rights and employment opportunities of the residents of Mombasa County, as well as their right to dignity.

183. The 1st and 2nd Respondents' response to the issue at hand was that the SGR stands to benefit the whole country, and its significance can be noted in the Kenya Policy Paper on Integrated National Transport Policy for Kenya under the theme "Moving a Working Nation" May 2009, a copy of which they attached. Further, that the said policy underscores that transport by trucks is expensive and deleterious to the environment, and that the SGR has brought benefits to the nation and the Mombasa region.

184. The 3rd and 4th Respondents, on the other hand, contended that the consolidated Petitions contained "falsehoods, misrepresentation of facts and outright lies." In particular, the 3rd and 4th Respondents argue that there is no evidence presented to show that the costs of clearing one container at the ICD is between Kshs. 150,000.00 to Kshs. 250,000.00, and that this cost is purely as a result of the container having been consigned to the ICD. Further, that the example of alleged charges of Kshs.12 million was not evidenced by any document. In addition, that the demurrage charges levied by the 3rd Respondent are levied in accordance with its Tariff Guide which is within the public domain and available for download from the 3rd Respondent's website at no cost. The 3rd Respondent annexed a copy of the Tariff Guide.

185. The 3rd Respondent further stated that it has clarified to all shippers that charges on containers consigned to the ICD will only accrue once the container has been issued by the 3rd Respondent. Further, that there is no evidence of the delay in clearing cargo at the ICD, and that even if it was proved that clearance of containers is delayed at the ICD, it could be a problem with the clearing agents not necessarily the ICD. In addition, that the change in price of goods or on the costs of importation is influenced by an infinite number of factors, and cannot be attributed to containers being consigned to the ICD.

186. The 3rd Respondent argued further that there is no evidence that clearing and forwarding companies or CFSs have lost employees due to the consignment of containers to the Embakasi ICD, and that the Petitioners' own documents confirm that CFSs are still operational and are in fact receiving containers from the 3rd Respondent. Furthermore, that the allegation that the consignment of cargo to the Embakasi ICD using the SGR will harm the clearing and forwarding agents, CFS and transport companies is unfounded and, is, in fact, contrary to available evidence.

187. According to the 3rd Respondent, the cargo transportation business is seemingly not affected, and the records from the Kenya National Bureau of Statistics show that there is an increase in the number of lorries and trailers that are being registered in Kenya. The 3rd Respondent annexed a copy of the Leading Economic Indicators Report of August 2018 issued by the Kenya National Bureau of Statistics as evidence. The 3rd Respondent stated that even at its peak, the SGR will only ferry a maximum of 700 containers per day to the Embakasi ICD (approximately 260,000 containers per year), while the total number of containers received by the 3rd Respondent at the port from January to August 2018 was 846,294. Therefore, the 3rd Respondent avers that the alleged death of the cargo transport business is a statement unsupported by any facts. The 3rd Respondent annexed a summary showing the container traffic at the Port of Mombasa in 2018.

188. On the socio-economic effects of the SGR, the 3rd Respondent averred that the Port of Mombasa is not the only income generator for Mombasa County, and that there are other options that can be explored to ensure the economic wellbeing of the people of Mombasa is guaranteed in sectors such as tourism. The 3rd Respondent listed

various benefits of the SGR to the country at large, including the emergence of new towns and urban development along the stations, reduced road accidents brought about by reduced traffic flow of heavy commercial vehicles ferrying cargo to Nairobi, reduction in freight haulage and transportation time, reduced air pollution, improved tourism, and reduction of road maintenance costs as a result of the heavy commercial trailers causing wear and tear.

189. The 4th Respondent similarly contended that the Petitioners' allegations that the SGR will occasion an economic meltdown within Mombasa County are untrue, and asserted that the SGR has brought with it many benefits. That in any event, the inhabitants of the County are free to carry on their private business in spite of the Impugned Agreement. The 4th Respondent also enumerated additional benefits of the SGR, which included reduced congestion at Port of Mombasa enhancing efficiency, which would make it the preferred facility in the region; reduced cost of transportation in the country making Kenya attractive to investment; accelerated industrialization through easier and cheaper transport and establishment of new industries to service the SGR; and enhanced freight security in comparison to road transport. The 4th Respondent also averred that the SGR has triggered the creation of an estimated 10,000 new jobs in the hospitality industry, and an estimated new 15,000 jobs in the self-employment sector.

190. The 3rd and 4th Respondents, accordingly, submitted that the Petitioners' case that the Impugned Agreement and the Impugned Directives violate Article 43 and 55 of the Constitution lack probative value, as they are not founded on any evidence. They cited the Court of Appeal's decision in ***Monica Wangu Wamwere v Attorney General [2019] eKLR*** for the proposition that a party who files a suit bears the burden and obligation to tender evidence to prove the claims made, and on the probative value of newspaper reports which it held to be hearsay evidence. This was also the holding in ***Apollo Mboya vs. Attorney General & 3 others & Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR***.

191. The submissions by the 3rd and 4th Respondents further faulted the introduction of the report prepared by the 1st Petitioner through submissions, a practice which, they submitted, was rejected in ***Maingi Celina v John Mithika M'Itabari suing as the Administrator of the Estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR.*** Regarding the report dated August, 2019 by the University of Nairobi School of Business relied upon by the 4th Petitioner, the 3rd and 4th Respondents' submissions observed that the letter dated 6th September, 2019 forwarding the said report to the 4th Petitioner, expressly declared that it was a draft which was subject to further views from stakeholders. Secondly, that the report was not signed by any of the persons alleged to have prepared it. In this regard, they cited ***Okiya Omtatah Okoiti & Another v Bidco Africa & 4 Others [2019] eKLR*** for the holding that such a report fails the admissibility test as the maker has not been disclosed and has not produced it.

192. The 3rd and 4th Respondents therefore asked the Court to return a verdict that there are no contraventions of the Constitution as pleaded by the Petitioners, urging that the wider public interest of the SGR and the impugned agreement outweighs the narrow private interests of the Petitioners. Reliance was placed on the decision to this effect in ***Okiya Omtatah Okoiti & 2 others vs. Attorney General & 3 others [2014] eKLR***.

193. We have considered the rival arguments by the parties on the issue whether there was a violation of Article 43 of the Constitution. The Petitioners allege that their socio-economic rights as guaranteed by Article 43 have been infringed by the Impugned Agreement and Impugned Directives, specifically the decisions and directives by the 3rd and 4th Respondents that inland cargo will be transported by SGR to the Embakasi ICD. The social and economic rights provided for in Article 43 of the Constitution include the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. The Constitution further provides that a person is not to be denied emergency medical treatment and enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants.

194. It is now a well settled principle that a Petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation – see ***Anarita Karimi Njeru vs Republic (1976- 80) 1 KLR 1272*** and ***Trusted Society of Human Rights Alliance vs Attorney General and Others Petition No.229 of 2012***. It is evident in this respect that the Petitioners in their pleadings and arguments as outlined in the foregoing did not allege that there was infringement of the specific rights provided for in Article 43, but instead focused on demonstrating the infringements on their right to livelihood, as forming the basis for the infringement of the rights in Article 43.

195. The interconnection between the right to work and earn a livelihood and social and economic rights was considered in ***Joseph Letuya and Others vs The Attorney General and Others, ELC No 81 of 2012 (O.S)*** where the Court stated as follows in this regard:

This Court recognizes that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level. However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6) of the Kenyan Constitution. Article 25 of the Universal Declaration of Human Rights (UHDR) does mention livelihood in relation to social security and states that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food…and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

In addition, Article 6(1) of the International Covenant on Economic, Social and Cultural Right (ICESCR) states that the States Parties "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The right to adequate standard of living as defined under Article 11 of ICESCR includes right to food, clothing, right to adequate housing, right to water and sanitation with an obligation to progressively improve living conditions.

These rights are also now expressly provided in the directive principles and Bill of Rights in the Kenyan Constitution. The Preamble to the Constitution, which directs this Court as to the considerations to be taken into account when interpreting this Constitution, proclaims that the people of Kenya, when making the Constitution were committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Likewise, the national values and principles that bind this Court when interpreting the Constitution under Article 10 of the Constitution include human dignity, equity, social justice, human rights, non-discrimination, protection of the marginalized and sustainable development.

Article 28 provides for the right of inherent dignity of every person and the right to have that dignity respected and protected. Lastly, Article 43(1) of the Constitution expressly provides for economic and social rights as follows:

"(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education."

It is therefore evident from the foregoing provisions that their purpose is to ensure that persons to whom they apply attain a reasonable livelihood.

196. It is evident from the foregoing that the right to life and dignity on the one hand, and economic and social rights on the other hand, are all inter-connected and indivisible, and it cannot be said that one set of rights is more important than the other. All these rights must, of necessity, be respected, protected, promoted and fulfilled for a person to attain a reasonable livelihood. However, while the right to a livelihood may be rightly considered to be a pre-condition and indivisible from the rights provided for in Article 43, there is a nuanced difference between the two sets of rights when it comes to the nature of the State's and State actors obligations as regards their observance. While the right to work and earn a livelihood is a negative right in the sense that it imposes a duty on the State not to act in certain ways that will infringe on the said rights; the social and economic rights provided for in Article 43 are positive rights, which impose obligations on the State to do as much as it can to secure for its citizens a core minimum of the social and economic rights specified in the Article.

197. Therefore, in terms of proof of infringement, in order to succeed on this claim, the Petitioners need to prove that the Respondents have caused harm or injury to, or limited their work and related activities in cargo handling and transport, either by way of direct actions or by omission to take reasonable steps to prevent such harm and injury. This burden of proof is provided under sections 107(1) (2) and 109 of the Evidence Act as follows:

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. <u>Proof of particular fact</u>

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

198. The issue of the burden of proof on a Petitioner in a Constitutional petition was addressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*****:**

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in <u>Anarita Karimi Njeru vs. Republic, (1979) KLR 154</u>: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

199. The Petitioners in this respect filed affidavits wherein they made various averments detailed in the foregoing as regards the manner of infringement by the Respondents in terms of the deleterious effects of the Impugned Agreement and Impugned Directives on the employment opportunities of the Petitioners' and of the residents of Mombasa in cargo handling and transport activities. They also annexed various documents, mainly research reports and newspaper reports on the said effects. The Respondents have in this respect contended that some of the evidence provided by the Petitioners is not admissible, and that it is also not of probative value to establish any such infringement on their part.

200. It is notable in this respect that the hearing of petitions filed under Article 22 of the Constitution are also regulated by Rule 20 (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013*, which provides that such hearing shall be either by way of affidavits, written submissions or oral evidence, or as the Court may direct. The Evidence Act is also clear on its application to constitutional petitions and affidavits in section 2 thereof, and provides as follows:

(1) This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.

(2) Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

201. On the probative value of the Petitioners affidavits, the applicable law is Order 19 of the Civil Procedure Rules. Rule 1 thereof provides matters to which affidavits should be confined as *"to such facts as the deponent is able of his own knowledge to prove, provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof". T*herefore, the sources of information and grounds of belief are primarily essential for the purpose of veracity of an affidavit, and consequently a failure by the deponent to disclose with particularity the sources of the information he has deposed to, has the effect of weakening the probative value of the information, and may even render it worthless. In ***A N Phakey vs. World-Wide Agencies Ltd (1948) 15 EACA 1****,* it was held that an affidavit drawn on information and belief is worthless without disclosing the source and ought not to be received in evidence.

202. In addition, where the testimony of a witness by affidavit is direct in terms of what the witness actually saw, heard or touched, that evidence has probative value where it is definite and supported by the testimony of others. The testimony by the Petitioners in their affidavits was however not direct. Instead, it relied mainly on circumstantial documents from which the facts sought to be proved were meant to be logically or reasonably inferred.

203. The rules as regards production of and admissibility of documentary evidence are, in this respect, set out in section 35 of the Evidence Act, which provides 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.

204. The 1st, 2nd and 3rd Petitioners in this regard annexed various documents as Annexures WOR 5a, 5b and 5c and 5d to their affidavit in support of the Amended Petition, which they alleged were given to the deponent by the Kenya International Freight and Warehousing Association (KIFWA) after holding discussions with the Association on the effects of the Impugned Agreement on stakeholders.

205. It is notable in this respect that Annexure WOR 5a is an undated and unsigned document titled "*Challenges KIFWA Members are facing in Cargo clearance at the Port and ICDN*". It does not state who the maker of the document is. There is, therefore, no way of establishing the authenticity of the document. Further, the competence of the author is not disclosed. More importantly the document is not specific to the effects of the Impugned Agreement. Neither does it indicate the causes of the challenges enumerated therein. Due to these authenticity deficit and internal substance deficiencies, this document was of little evidential value.

206. The next document relied on by the 1st, 2nd and 3rd Petitioners is Annexure WOR 5b. This is a letter dated 31st May, 2018 addressed to the 3rd Respondent's Managing Director on the transfer of empty containers ex-SGR to the CFS'. This letter expressly indicated that the 3rd Respondent's inefficiencies in handling the empty containers were leading to the backlog of the containers and increased costs experienced by the stakeholders. By its very text and context, this letter is unrelated to the Impugned Agreement. As such it had no probative value to the 1st, 2nd and 3rd Petitioners' case.

207. Annexure WOR 5c is an undated press release by KIFWA Secretary General with requests to various Government actors to tackle the Cargo Clearance challenges faced by agents and importers. While the press release attributes the challenges to certain decisions made by the 3rd Respondent, it is unclear which directives or decisions are blamed for the challenges. Indeed, it is noteworthy that the Press Release calls for a meeting of the various stakeholders to be held on 13th and 14th September, 2018 – which predates the Impugned Directives. The document, therefore, lacks relevance to the litigated question. Beyond that, the probative value of the Press Release is itself decidedly low: the document not only suffers from authenticity deficits but also constitutes hearsay evidence: the 1st, 2nd and 3rd Petitioners invite the Court to accept as truth statements made outside Court by a third party who neither came to Court nor signed an affidavit to the Court.

208. Lastly, Annexure WOR 5d is a letter dated 24th September 2018 from the Director General of the Kenya Maritime Authority addressed to, among others, KIFWA, on the "*Rapid Increase of Detention Charges by Shipping Lines*" and inviting stakeholders to discuss the matter. There is no specific reference to the Impugned Agreement indicated in the said document, or explanation on how the challenges and effects therein have been caused by the Impugned Agreement. The relevance of this document was, therefore, unclear to the litigated question.

209. Lastly all the annexures relied on by the 1st, 2nd and 3rd Petitioners discussed above were copies which were neither certified, nor produced in accordance with the provisions of section 68 of the Evidence Act as regards production of secondary evidence.

210. On its part, the 4th Petitioner sought to rely on a report titled "*The Assessment Report of the Socio Economic Impact of the Operationalization of the Mombasa – Nairobi Standard Gauge Railway on Port City Mombasa"*. This is the research report dated August, 2019 which is described as having been conducted by Dr. Kennedy Ogollah, Dr. Kingsford Rucha, Dr. Joshua Aroni and Mr. Gichiri Ndua of the University of Nairobi School of

Business. The deponent of its affidavit in support of the Petition sought to lay a basis for the same and its source by annexing a letter dated 6th September 2019 sent to the 4th Petitioner's Chief Executive Officer by the Governor's Office of the County Government of Mombasa inviting him to a presentation and validation of the draft report, and which enclosed the said draft report.

211. While expert evidence forms an important part of litigation, and, under section 48 of the Evidence Act, the opinions of science or art are admissible if made by persons specially skilled in such science or art, there are rules as regards the admissibility of such evidence. A 4-Judge Bench of this Court considered the admissibility of expert evidence in ***Mohamed Ali Baadi and others v Attorney General & 11 Others [2018] eKLR*** and held as follows:

'59. The first and foremost requirement of a party who calls an expert witness is to establish the credentials of the person as an expert, or one who is especially skilled in that branch of science, to the satisfaction of the Court. That, is, the witness should fall within the definition of 'specially skilled' as laid down under section 48 of the Evidence Act.

60. The question whether a person is specially skilled within the above provision is a question of fact that has to be decided by the Court and the opinion of the expert is also a question of fact and if the Court is not satisfied that the witness possesses special skill in the relevant area, his or her opinion should be excluded. Failure to prove the competency of a person a party calls into the witness box as an expert presents a real risk of evidence of such a person being ruled out as irrelevant.

61. The expert witness, in our view, ought to explain the reasoning behind his opinion. In scientific evidence, the reasoning may be based on the following:- site inspection reports, analytical reports, evidence of other witnesses, and the evidence of the experts. Opinion expressed must be confined to those areas where the witness is specially skilled. The weight to be attached to such an opinion would depend on various factors. These include the circumstances of each case; the standing of the expert; his skill and experience; the amount and nature of materials available for comparison; the care and discrimination with which he approached the question on which he is expressing his or her opinion; and, where applicable, the extent to which he has called in aid the advances in modern sciences to demonstrate to the Court the soundness of his opinion. The opinion of the expert is relevant, but the decision must nevertheless be the judge's.

212. Although the 4th Petitioner states that the Research Report was forwarded to it by the Governor's Office, the Governor's Office of the County Government of Mombasa was not the author of the said report. Its role was merely to commission the research which resulted in the report. The Petitioners did not annex any affidavit by the authors of the report establishing their identities; expertise; the scientific basis of their methodology; the actual methods used to generate the data relied on and so forth. In short, by relying on this report, the 4th Petitioner sought to rely on an expert statement of a person who was not a party to the suit without laying a proper basis for such reliance.

213. Beyond the authenticity challenges of the report, as alluded to above, there are some substantive challenges as well: as presented, it is not possible to determine what probative value to assign to the expert opinion allegedly presented in the report. This is because, the expertise of the authors is not established in the report. Neither is an attempt made to justify the scientific basis of the methodology deployed in generating the data for the report or the specific methods used to collect the data. Without all these information, it is impossible to assess the credibility of the methods used to collect and analyse the data as well as the conclusions reached by the authors. In short, the research report has little or no probative value.

214. In the present case, the evidential problems of the research report are exacerbated by the fact that it is, in fact, a draft report. By the terms of the letter introducing the document, the draft report was yet to be validated.

215. At various points in support of their case, the 1st, 2nd and 3rd Petitioners also sought to rely on various reports and surveys by the World Bank and Kenya National Bureau of Statistics. However, they did not annex the cited reports and surveys. Therefore, the Court could not place any reliance on the said reports and surveys.

216. Beyond the documents analysed above, the Petitioners also largely relied on newspaper reports for the quantitative data with which they hoped to establish a link between the increased costs of cargo transportation and losses caused by the Impugned Agreement and Impugned Directives. The newspaper reports relied on included: an article in the *Standard Newspaper* on 24th September, 2019 titled "*Monopoly of SGR freight derailing Coast economy*" and another one in the same newspaper of 27th March, 2018 titled "*Coast Seeks New Income as SGR Takes Over Cargo*."

217. On the admissibility and credibility of the various newspapers report relied upon by the Petitioners as evidence, we adopt the position of the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] e KLR*****, wherein it was held as follows:**

On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of Laxmi Raj Shetty -v-State of TamilNadu1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence.

218. **Lastly, as regards the newspaper reports and the report authored by the 1st Petitioner which were annexed to the 1st, 2nd and 3rd Petitioners' submissions, th**e applicable principle is that attaching evidence on a matter which ought to have been proved by affidavit or oral testimony to submissions is an invalid way of production of evidence. This was so held by the Court of Appeal *in* ***Douglas Odhiambo Apel & Anor. v Telkom Kenya Limited [2014] eKLR*** as follows:

The Learned Judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annextures to the plaintiffs' submissions. Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the Court would have been by the plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur.

We need not belabour the point.

219. In conclusion, the Petitioners failed to discharge the burden which the law places on them to prove with appropriate specificity the claims of violations of social and economic rights that they made in the Consolidated Petitions. While the Petitioners were successful in demonstrating that the right to a livelihood is inextricably linked to the social and economic rights enumerated in Article 43 of the Constitution, in their averments and arguments, the Petitioners alternately failed to present relevant evidence probative of the claimed violations or presented evidence which was not only inadmissible, but also of no probative value in proving the allegations made that the Impugned Agreement and Impugned Directives made by the Respondents affected and infringed the Petitioners' right to livelihood.

220. We must emphasize the importance of adherence to the rules of evidence – both in terms of presentation

(authenticity and foundation) and quality of evidence (credibility and probative value) required to establish violations of fundamental rights and freedoms especially in Public Interest or Strategic Litigation. The rules of evidence apply with equal force to this species of litigation as they do in run-of-the-mill litigation. This is especially true for cases where claimed violations are most appropriately proved by empirical evidence. Such evidence and data are often generated by experts and must be presented in adherence with the rules on presentation of expert evidence. Of course, reliance on empirical data does not detract from the need, in appropriate cases, to present direct evidence of the lived realities of the affected people on whose behalf the Public Interest Litigation has been filed.

f. Did the Take or Pay Agreement violate Articles 174 of the Constitution as read together with paragraph 5(e) of part 2 of the 4th schedule"

221. The last substantive issue presented in the Consolidated Petitions was whether the Take or Pay Agreement violates Article 174 of the Constitution as read together with paragraph 5(e) of part 2 of the 4th Schedule of the Constitution. The thrust of the 1st, 2nd and 3rd Petitioners' arguments in this regard is that the Take or Pay Agreement impermissibly trammels on the county government's authority to operate harbours and ferries as a county transport function under the Constitution. Ultimately, the argument advanced by the 1st, 2nd and 3rd Petitioners is that a correct rendering of the Constitution yields the view that port operations – including the consignment of cargo at the Port and other related stevedore services - are a county function. To this extent, the 1st, 2nd and 3rd Petitioners fault the Take or Pay Agreement for violating the devolution clauses in the Constitution and pray for orders and declarations which would reflect their understanding of the delimitation of port functions between the national and county governments.

222. The Port of Mombasa is currently owned, controlled and operated by the National Government through the Kenya Ports Authority, pursuant to Kenya Ports Authority Act, Cap 391, Laws of Kenya. In their pleadings as well as in their submissions, the 1st, 2nd and 3rd Petitioners aver that the international practice is that major ports of the world are managed jointly by the State and county governments under which they fall, and that such practice should be adopted in the management of the Kenyan Ports, and further that the Port of Mombasa should be managed jointly by the national and county governments so as to secure the region's economic growth in line with international practice, and tenets of devolution under the Constitution. The 1st, 2nd and 3rd Petitioners cited the ports of Shanghai and Rotterdam as examples of world class ports which are managed by county or local governments.

223. The 1st, 2nd and 3rd Petitioners further aver that in a shared control of the port and port services, the national government would be responsible for portfolios "*such as investment, financial policy, tariff policy, labour policy, licensing, information and research, legal and regulation of international shipping*." In that regard the county government would be responsible for ship navigation to and from the terminal; administrative issues; ship repairs; cargo handling; storage, warehousing and stevedore services, and harbour functions.

224. The 1st, 2nd and 3rd Petitioners aver that under Article 6(1) and the Fourth Schedule to the Constitution, the county transport include harbour services. The 1st, 2nd and 3rd Petitioners rely on Article 186 (1) and the Fourth Schedule, Part 1 paragraph 18 (f) and Part 2 paragraph 5 (e). The 1st, 2nd and 3rd Petitioners pray for an answer to the question whether marine navigation, the power reserved for the national government, comes to an end once the ship is docked at the port and begins after the ship leaves the port.

225. Article 186 of the Constitution of Kenya provides as follows –

(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

(3) A function or power that is conferred on more than one level of government is a function or power within the

concurrent jurisdiction of each of those levels of government.

(4) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

(5) For greater certainty, Parliament may legislate for the Republic on any matter.

226. Under Part 1 of the Fourth Schedule, the functions of the National Government are set out at paragraph 18(f) which provides that the National Government is tasked with transport and communications, including marine navigation. The functions and powers of the County Governments under Part 2 of the Fourth Schedule at paragraph 5(e) is County Transport, including–

(d) *ferries and harbours excluding the regulation of international and national shipping and matters related thereto***.**

227. The Constitution, therefore, clearly delimits functions between the two levels of government, and there is no constitutional grey area when it comes to the powers of the national and county governments. However, the Petitioners aver and maintain that the harbour services are for the management by county government, and that such functions should accordingly be transferred to the County Government of Mombasa.

228. In ***Kenya Ferry Services Limited v Mombasa County Government & 2 others [2016] eKLR***, M. J. Anyara Emukule, J. partly dealt with this issue in relation to operation of ferries, which the Petitioner in that case, petitioned the Court to declare a county function. The Learned Judge observed as follows:

The transfer of functions to County Governments is subject to the provisions of the Transition to Devolved Government Act, (Chapter 265A, Laws of Kenya) enacted pursuant to Articles 186(4) and 189(4) of the Constitution. Sections 23 and 24 of the Transition to Devolved Government Act provides the criteria and procedure for transfer of functions to County Governments….Pursuant to Section 15 of the Sixth Schedule to the Constitution as read together with Section 23 and 24 of the Transition to Devolved Government Act, 2012, and further to Legal Notice Number 16 of 2016, the Transition Authority approved the transfer of the functions specified in the Schedule to Legal Notice Number 152 of 2013, to the County Government of Mombasa. The transport function is set out in paragraph 5 of the said Schedule and reads –

"5. County transport including

o – *(c)*

o *(d) ferries and harbours including development, maintenance and operation of ferries and*

§ *harbours operating in inland lakes and waters."*

….The allocation of the function does not clearly include the operation of Likoni Channel Ferry. There is therefore no mistake in the Legal Notice transferring the ferry function in respect of lakes and inland waters but did not refer to the Indian Ocean, for example. The "grab" by the Respondent of the facilities and operations of the Petitioner in support of its core function of operating the deep Likoni Ferry Channel is not only contrary to all the provisions of Transition to Devolved Government Act, 2012, but it is outright contrary to Article 40 of the Constitution of Kenya 2010….It needs no reminding that under Article 187(2)(b) constitutional responsibility for the performance of the function or exercise of the power remains with the government to which it is assigned by the Fourth Schedule. Transport and communications, including in particular "marine navigation" is a matter assigned to the national government under paragraph 18(f) of the Fourth Schedule to the Constitution. In the premises, I entirely agree with

the conclusion reached by the Chairman of the Transition Authority in his letter dated 24th February, 2016 to the Respondents Governor that the actions of the Respondent in taking over the Petitioner's facilities which support its activities were against the letter and spirit of the Constitution of Kenya, 2010, and are therefore unconstitutional.…

This decision, including its reasoning, was affirmed by the Court of Appeal.

229. It is, indeed, true that marine navigation, the constitutional power reserved for the national government, comes to an end once the ship is docked at the port and begins after the ship leaves the port. However, it is clear that under Part 2 of the Fourth Schedule paragraph 5(e) the county government's powers over ferries and harbours, do not include regulation of international and national shipping and matters related thereto. What has come to an end is marine navigation. Although the 1st, 2nd and 3rd Petitioners argue that once the marine navigation is complete, the county government should then take over the control of harbours, there was need for the 1st, 2nd and 3rd Petitioners to distinguish whether the resultant powers presumably belonging to the county government were powers to operate harbour or powers to make policy. In the ***Ferries case (supra)***, the Court found that only harbours operating in inland lakes and waters were subject of county government powers, and that harbours operating on the Indian Ocean were not part of the functions approved for transfer by the Transition Authority as specified in the Schedule to the Legal Notice Number 152 of 2013 to the County Government of Mombasa.

230. The specific question presented by the 1st, 2nd and 3rd Petitioners is, in a non-trivial sense, tautological. The 1st, 2nd and 3rd Petitioners are asking the Court to "assign" to the two levels of government their various functions as delimited by the Constitution. That is not within the authority of the Court. That task was already undertaken by the Constitution. Paragraph 5(e) of Part 2 of the 4th Schedule of the Constitution is explicit. It states that the County Transport function includes "*ferries and harbours excluding the regulation of international and national shipping and matters related thereto.*" From this text, the county transport function is stated as including "ferries and harbours". The text is also explicit that the county function excludes "regulation of international and national shipping and matters related thereto" which belongs to the National Government.

231. What order, then, does the 1st, 2nd and 3rd Petitioners pray for beyond restating the constitutional text" It is unclear what specific remedy the 1st, 2nd and 3rd Petitioners desire given the material they have placed before the Court. Perhaps they desire the Court to pronounce itself on the outer limits of the regulation or policy making function assigned to the National Government under Paragraph 5(e) of Part 2 of the 4th Schedule of the Constitution. If so, the 1st, 2nd and 3rd Petitioners did not place before us sufficient material and/or sufficiently develop the Court record to give the Court the wherewithal to make that concrete pronouncement. In any event, such a concrete pronouncement can only be made in the context of a concrete case placed before the Court to determine if the National Government has, acting in its regulatory function, exceeded its mandate. That is not the case that is before us. That case will await a different controversy concretely presented to the Court.

232. Suffice it to say that in the circumstances of this case we are unable to accede to the request by the 1st, 2nd and 3rd Petitioners to issue an "order that the Mombasa port services be assigned to the National Government and County Government of Mombasa in accordance with paragraph 5(e) of Part 2 of the fourth schedule of the Constitution and particularly that the management and operations of the port with respect to County transport functions is a function of the Mombasa County Government."

g. What remedies, if any, should issue"

233. The Consolidated Petitions have partly succeeded. While the Petitioners were unable to demonstrate that they have a fundamental right to choose the mode of transportation of containers arriving at the Port of Mombasa, and that that right was impermissibly infringed by the Respondents, as they were unable to demonstrate that their social and economic rights under Article 43 of the Constitution were violated, they persuaded the Court that the Impugned Directives were constitutionally infirm for want of public participation and for violating the right to fair

administrative action. All the other claims failed as well.

234. In the end, therefore, the conclusions and findings of the Court are as follows:

a. That an Interested Party in a civil suit cannot expand the scope of the original suit as pleaded by the principal parties. In the present case, the 1st and 2nd Interested Parties impermissibly expanded the scope of the Consolidated Petitions by pleading and submitting on Articles 6 (2) and 6 (3) as well as Article 27 of the Constitution.

b. That a party is required to exhaust its remedies under the Competition Act before bringing an action in Court claiming violations of that Act. However, the Consolidated Petitions involved polycentric issues and multiplicity of parties including questions related to the fundamental rights of the Petitioners to warrant an exception to the doctrine of exhaustion as developed in our jurisprudence. This finding notwithstanding, the claims alleging infringement of the Competition Act by the 4th Petitioner could not be entertained in this suit since the 4th Petitioner had commenced proceedings before the Competition Authority of Kenya but did not pursue those proceedings. Instead, the 4th Petitioner approached this Court with an expanded Petition seeking reliefs beyond the scope of the Competition Act.

c. That the freedom to make choices in the economic sphere or the freedom to freely enter into contracts of one's choosing is a non-fundamental right. The government may limit that right if it satisfies the rational basis test: to demonstrate that the limitation is aimed at achieving a legitimate governmental interest and that the means chosen are rationally related to the goals. In addition, the government must satisfy the constitutional due process requirements as well as substantive scrutiny to confirm that the Policy or law in question does not otherwise violate any enumerated fundamental right – including the right to social and economic rights under Article 43 of the Constitution.

d. That the Take or Pay Agreement dated 30th September, 2014 and the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 pass constitutional muster under the rational basis test but needed to undergo both the due process scrutiny and the substantive scrutiny test.

e. That public bodies or agencies exercising authority granted under statutes do not have to engage the public and stakeholders when making decisions purely within their sphere of internal operations (internal operational decisions). However, such public bodies and agencies are obligated to craft a program of public participation and stakeholder engagement when making decisions which will affect the public or stakeholders.

f. That the Take or Pay Agreement dated 30th September, 2014 between the 3rd and 4th Respondents was an internal operational decision authorized by the parent statutes of the two Respondents and did not require public participation or stakeholder engagement. The 3rd and 4th Respondents are legally competent to conclude the Take or Pay Agreement dated 30th September, 2014 without triggering the public participation requirement of the Constitution.

g. That the directive of 15th March, 2019 coercively removes the right of the importers to choose their CFS of choice while the directive of 3rd August, 2019 coercively requires all cargo which is not intended for Mombasa and its environs to be conveyed by the SGR and to be cleared at the Inland Container Depot in Nairobi. These directives potentially affect the interests and rights of the 4th Petitioner and, indeed, all importers who use the Port of Mombasa. As such the 3rd Respondent was obligated by the due process requirements of Article 10 of the Constitution to subject these two directives to a program of public participation and stakeholder engagement.

h. That the 3rd Respondent failed to subject the directives dated 15th March, 2019 and 3rd August, 2019 to public participation and stakeholder engagement as constitutionally required.

i. That the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were administrative actions because they affected the legal rights and interests of the 4th Petitioner, importers, transporters, other Port users, and stakeholders. As such they had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness laid out in Article 47 of the Constitution and Fair Administrative Actions Act.

j. That the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act.

k. That the right to earn a livelihood is inextricably intertwined with the social and economic rights enumerated in Article 43 of the Constitution. A claimant can prove violation of Article 43 of the Constitution by demonstrating an impermissible infringement of their right or ability to earn a livelihood.

l. That a Petitioner claiming a violation of his or her Article 43 rights bears the burden to prove such violation on a preponderance of evidence and by using legally admissible evidence.

m. That the Petitioners failed to sufficiently discharge the burden of proof on their claims that the Take or Pay Agreement dated 30th September, 2014 and/or the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 violated their social and economic rights enshrined under Article 43 of the Constitution because they failed to avail legally admissible and credible evidence.

n. That no sufficiently precise controversy was framed for the Court to pronounce itself on the question of delimitation of functions between the National Government and the County Government of Mombasa respecting the harbour functions.

V. Disposition

235. Flowing from these findings and conclusions, the disposition of the Consolidated Petitions is as follows:

a. Claims that the Take or Pay Agreement dated 30th September, 2014 and/or the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 violated the social and economic rights of the Petitioners were not proved and are hereby dismissed.

b. The claim that the Take or Pay Agreement dated 30th September, 2014 was in violation of Articles 10 and 47 of the Constitution failed and is hereby dismissed.

c. The claim that the directives by the 3rd Respondent dated 15th March, 2019 and 3rd August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.

d. Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.

e. All the other prayers in the Consolidated Petitions fail and are hereby dismissed.

f. This being a public interest litigation, each party will bear its own costs.

Dated. Signed and Delivered at Malindi this 6th day of November, 2020.

HON. L. ACHODE **HON. J. NGUGI**

JUDGE **JUDGE**

HON. P. NYAMWEYA

JUDGE

HON. E. OGOLA **HON. A. MRIMA**

JUDGE **JUDGE**

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.

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