

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. OF 2019

IN THE MATTER OF: ARTICLE 1, 2 (4), 10, 21, 22, 23, 43, 46, 47 & 174 OF
THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF: THE COMPETITION ACT NO. 12 OF 2010, THE CONSUMER
PROTECTION ACT NO. 46 OF 2012, AND THE COUNTY
GOVERNMENTS ACT NO. 17 OF 2012.

-AND-

IN THE MATTER OF: DIRECTIVE ISSUED BY THE 1ST AND 2ND RESPONDENTS
ON 3RD AUGUST, 2019 REQUIRING ALL IMPORTED
CARGO FOR DELIVERY TO NAIROBI AND THE
HINTERLAND SHALL BE CONVEYED BY THE STANDARD
GAUGE RAILWAY (SGR) AND CLEARED AT THE IN-LAND
CONTAINER DEPOT- NAIROBI

-AND-

IN THE MATTER OF: RESTRICTIVE TRADE PRACTICE BY KENYA RAILWAY
CORPORATION TO MONOPOLISE THE TRANSPORTATION
OF ALL THE CARGO IMPORTED THROUGH THE PORT OF
MOMBASA

-AND-

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION AND
FAILURE BY THE 1ST AND 2ND RESPONDENTS TO INVOLVE
THE RELEVANT STAKEHOLDERS AND THE RESIDENTS OF
MOMBASA IN GENERAL BEFORE ARRIVING AT THE
DIRECTIVE REQUIRING ALL IMPORTED CARGO FOR
DELIVERY TO NAIROBI AND THE HINTERLAND TO BE
CONVEYED BY STANDARD GAUGE RAILWAY (SGR) AND
CLEARED AT THE IN- LAND CONTAINER DEPOT- NAIROBI

-AND-

IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2 (4), 10, 21, 22, 23, 43, 46,
47 & 174 OF THE CONSTITUTION BY THE RESPONDENTS.

-BETWEEN-

KENYA TRANSPORTERS ASSOCIATION LIMITED.....PETITIONER

-VERSUS-

KENYA PORTS AUTHORITY.....1ST RESPONDENT
KENYA REVENUE AUTHORITY.....2ND RESPONDENT
KENYA RAILWAYS CORPORATION.....3RD RESPONDENT
COMPETITION AUTHORITY OF KENYA.....4TH RESPONDENT

-AND-

CONTAINER FREIGHT STATIONS
ASSOCIATION OF KENYA.....1ST INTERESTED PARTY
FEDERATION OF KENYA EMPLOYERS.....2ND INTERESTED PARTY
LONG DISTANCE DRIVERS UNION.....3RD INTERESTED PARTY
SHIPPERS COUNCIL OF EASTERN AFRICA.....4TH INTERESTED PARTY
TRANSPORT WORKERS UNION.....5TH INTERESTED PARTY
KENYA CHAMBERS OF COMMERCE & INDUSTRY.....6TH INTERESTED PARTY
COUNCIL OF IMAMS.....7TH INTERESTED PARTY
HUMAN RIGHTS AGENDA.....8TH INTERESTED PARTY
COUNTY GOVERNMENT OF MOMBASA.....9TH INTERESTED PARTY

PETITION

(Under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms of Individual) Practice and Procedure Rules, 2013 and All Other Enabling Provisions of the Law.)

The humble petition of **KENYA TRANSPORTERS ASSOCIATION LIMITED** of Post Office Box 88502-80100, Mombasa within the Republic of Kenya showeth as follows:-

DESCRIPTION OF PARTIES

1. The Petitioner is a registered limited liability company incorporated in the Republic of Kenya whose key objective is to fight and promote the interests of transporters in Kenya. The Petitioner's address of service for purposes of this suit shall be care of Messrs Gikandi & Co. Advocates, Plot No. 352/21,

Suit No 1, Sauti ya Kenya Road, Opp. Alfarsy Education Centre (Behind Kilindini Post Office), P.O. BOX 87669-80100, Mombasa. The members of the Petitioner are as set out in the annexed list titled: "Members of Kenya Transporters Association Limited".

2. The 1st Respondent is the Kenya Ports Authority, a state corporation created under the Kenya Ports Authority Act, Cap 391 Laws of Kenya. (Service of this Petition upon the Respondent shall be through the Petitioner's Advocates office.)
3. The 2nd Respondent is the Kenya Revenue Authority, a statutory body charged with the responsibility of collecting revenue on behalf of the Government of Kenya and created pursuant to the provision set out in the Kenya Revenue Authority Act, Cap 469 Laws of Kenya. (Service of this Petition upon the 2nd Respondent shall be through the Petitioners Advocates office.)
4. The 3rd Respondent is the Kenya Railway Corporation, a statutory body charged with the mandate of running and maintenance of the Standard Gauge Railway. (Service of this Petition upon the 3rd Respondent shall be through the Petitioners Advocates office.)
5. The 4th Respondent is the Competition Authority of Kenya, a statutory body created pursuant to the Competition Act No. 12 of 2010. (Service of this Petition upon the 4th Respondent shall be through the Petitioners Advocates office.)

FACTS OF THE CASE

6. The Petitioner states that at all material times its members have been in the business of transporting imported cargo through the means of road from the port of Mombasa to other parts of Kenya and Africa in general.
7. At all material times the importers in Kenya have had the liberty to determine how their cargo is cleared at the port and the eventual modes of evacuation to various destinations or to storage facilities such as the Container Freight Stations.
8. The Petitioner states that the transportation business has been a key player in the socio-economic development of Mombasa and Kenya in general. There are at least 70 transportation companies which have employed at least 2 directors; the transportation companies have employed at least 5

office employees and drivers. These employees maintain families using the salaries they get.

9. The Petitioner states that the transportation business has also created other related jobs, to wit, clearing and forwarding business; real estate business; small business along the Mombasa-Nairobi highway; storage facilities such as the Container Freight Stations; and the increase of the revenue for the County Government of Mombasa. These businesses have created lots of employment to the residents of Mombasa and Kenya in general.
10. The Government of Kenya invested heavily in a world class infrastructure development projects. One of the key flagship projects completed in the Second Infrastructure Medium Term Plan (MTP) (2013-2017) arrangement was the Standard Gauge Railway (SGR) Project- the most important railway channel in Kenya, which links Mombasa and Nairobi in the first phase.
11. Upon the completion of the SGR the 1st and 2nd Respondent issued a directive on 15th March, 2019 notifying the general public that henceforth shipping lines will not be allowed to endorse Bill of Lading to importers CFS of choice.
12. Thereafter, on 3rd august, 2019 the 1st and 2nd Respondents issued another directive requiring all imported cargo for delivery to Nairobi and the hinterland shall be conveyed by standard gauge railway (SGR) and cleared at the in land container depot- Nairobi.
13. The Petitioner states that being a stake holder in the transportation industry, representing seventy three (70) transporters, the Petitioner ought to have been given a chance to participate in the manner in which the directive was passed.
14. The Petitioner further states that the 9th Interested Party having a major socio-economic stake in the shipping and transportation sector due to its location, on behalf of the residents of Mombasa was not involved in the said directive and/or did not care to involve the residents on Mombasa on matters concerning the said directives.
15. The Petitioner states that with the Government directive to have all the cargo to be boarded from vessel to the SGR, the traditional approach whereby the importers had the liberty to determine how their cargo is cleared at the port and eventual modes of evacuation to various

destinations or to storage facilities such as the Container Freight Stations has been taken away.

16. The Petitioner states that the directive issued by the 1st and 2nd Respondents is in breach of the public trust bestowed upon the 1st, 2nd, and 3rd Respondent by the residents on Mombasa and it is also in violation of the Constitution of Kenya, 2010.
17. The 1st Respondent is a creature of the Kenya Ports Authority Act, Cap.391 Laws of Kenya while the 2nd Respondent is a creature of the Kenya Revenue Authority Act, Cap.469 Laws of Kenya and the 4th Respondent is a creature of the Competition Authority Act No.12 of 2010. None of those statutes confer any power on any of the three Respondents to control, supervise or manage the transportation of containers of goods that are privately owned. As such, the involvement of the 1st and 2nd Respondents in the said process amounts to the two entities intermeddling in matters that do not concern them. It therefore amounts to an abuse of power by the said Respondents, in that regard, the effect of which is to confer unlawful monopoly on the 3rd Respondent, which the 4th Respondent has completely refused to use the powers granted to it to control and therefore undo the monopolistic tendency. With regard to this matter, the 1st and 2nd Respondents are acting outside their legal mandate, while the 4th Respondent has refused to act within its legal mandate to control the unlawful actions of the 1st and 2nd Respondents which continues to confer an unlawful monopolistic power on the 3rd Respondent. The consequence of the aforesaid monopoly has resulted in the members of the Petitioner to have been thrown out of the transportation business of containers and thereby the Petitioner has been highly prejudiced by the said actions.
18. The Petitioner has severally engaged the 4th Respondent and in particular vide a letter dated 15th August,2019 whereby the Petitioner has appealed to the 4th respondent to take action against the creation of a monopolistic tendency with regard to the movement/transportation of containers from the Port of Mombasa to other destinations outside Mombasa which the 1st and 2nd Respondents have literally gifted to the 3rd Respondent in the exclusion of all others and notwithstanding that the owners of such containers may be desirous of transportation thereof through means other than the Standard Gauge Railway (SGR) operated by the 3rd Respondent.
19. That the 4th Respondent has completely failed to even acknowledge the said letters or act on the said complaints, thereby the 4th respondent has not upheld either the Principle of National Values and Principles (Article 10

of the Constitution of Kenya, 2010) and/or upheld the Principle of Fair Administrative Action (Article 47 of the Constitution of Kenya, 2010).

20. That the members of the Petitioner's Association and their employees and their families in total 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. Since the creation of the aforesaid monopolistic tendency which guarantees the said business solely to the 3rd Respondent (whether the owners of the said containers like it or not) the members of the Petitioner's Association have literally been driven out of business which has translated to a complete destruction of earning any money for the sustenance of the said members, their employees and their families. Consequently, the said persons right to earn a living as guaranteed by Article 41 of the Constitution of Kenya, 2010 has been highly degraded with the consequential degradation of the said persons right to self dignity in that a man who does not earn any income to even sustain his family is a man without any dignity which amounts to a violation of Article 27 of the Constitution of Kenya, 2010.

21. The Petitioner states that the directives issued by the 1st and 2nd Respondents in favour of the 3rd Respondent and to the greater prejudice of the Petitioner was not subjected to any type of public participation contrary to **Articles 10, 118, 124 and 232 of the Constitution of Kenya, 2010**. The Petitioner further states that Kenya is as described in the preamble in the Constitution of Kenya, 2010 and also in Article 4 of the Constitution are a multiparty democratic State founded on the National Values and Principles of governance referred to in Article 10 of the Constitution of Kenya, 2010. As such, Kenya's economic foundation is on a *laissez-faire* principle (freedom of choice) where citizens have the freedom to choose how they would like to carry out their business provided they do not engage in illegal activities. As such, State directives to the effect that containers must be transported through the Standard Gauge railway (SGR) facility operated by the 3rd Respondent is completely unattainable.

22. That the joint actions of the 4th Respondent have directly adversely affected the Petitioner directly and indirectly. Furthermore, the Petitioner has a right granted under Article 22(2)(b) and (c) of the Constitution of Kenya, 2010 to file this Petition so as to insist on strict adherence and compliance by the 4th Respondent who are State organ to the rule of law.

23. That the result of the said directives has created chaos and anarchy and confusion in that while an upcountry based importer may have intended to

import goods to be used in Mombasa as long as the importers Personal Identification Number (PIN) reflects that his address is outside Mombasa, the 1st Respondent automatically hands over such containers to the 3rd Respondent and thereby great confusion is caused as containers intended for Mombasa are transported to Nairobi through the 3rd Respondent and then re-routed back to Mombasa at the cost of the importer. It is an absurd situation devoid of any logic.

24. That the sum total of the above is that the members of the Petitioner have suffered a lot of mental stress and damages and claims the same from the Respondents jointly and severally.

**PARTICULARS OF BREACH OF PUBLIC TRUST AND
CONSTITUTIONAL PROVISIONS BY THE 1ST, 2ND, AND 3RD
RESPONDENTS**

- a. The Respondents violated **Article 1 (1) of the Constitution of Kenya, 2010** by failing to give the Petitioner and the affected residents of Mombasa a right to participate in the process of coming up with the directives.
- b. The Respondent violated the objectives of devolution provided for under **Article 174 of the Constitution**, in particular the obligation to promote social and economic development and to give power of self-governance to the people and enhance the participation of the people in the exercise of the power of the state and in making decisions affecting them.
- c. The Respondents violated **Article 47 of the Constitution of Kenya, 2010** by failing to invite the Petitioner and the affected residents of Mombasa to take part in the process of coming up with the directives.
- d. The Respondents violated **Article 10 of the Constitution of Kenya, 2010** by failing to act in an accountable and transparent manner so as to uphold the rule of law, transparency, accountability and good governance.

25. The Petitioner states that by violating the aforesaid constitutional provisions, the 1st, 2nd, and 3rd Respondents have in turn violated **Article 43 of the Constitution of Kenya** by violating the Petitioner's members' rights to earn a living and the rights to socio and economic development of the residents of Mombasa as follows:

a. Road Truckers Collective Redundancies

26. By making it mandatory that imported cargo will be transported to Nairobi using the SGR, the Government has completely destroyed the transportation business. This will lead to the redundancies of the employers and employees who deal with the transportation business.

b. Closure of Trucking Business

27. The transportation business is closely related with the trucking business as the tracks are always trucked by the owners as a safety measure. Consequently, this business will also be forced to close down.

c. Closure of Warehousing Business and Container Freight Stations in Mombasa

28. The directive issued on 15th March, 2019 notified the general public that henceforth shipping lines will not be allowed to endorse Bill of Lading to importers CFS of choice. Therefore, by making it mandatory to have the cargo transported to Nairobi by SGR, the warehousing businesses will have no choice than to close down. This will automatically render million Kenyans job less.

d. Roadside Business Activities closure and/or contraction

29. The drivers of the trucks are a major source of income to the roadside business along the Mombasa-Nairobi highway. These businesses will be drastically affected by the aforesaid directives.

e. Decrease in the revenue collection for Mombasa County Government and General Job losses to residents of Mombasa.

30. It is a matter of general knowledge that the urban and pre-urban population is 98 per cent of Kenyan's population according to the 2009 census. It is projected to be 1,247,157 in 2018, 1,327,008 and 1,412,008 in 2020 and 2022 respectively. The large urban population can be attributed to the fact that Mombasa is an industrial city, a port city and a major gateway to the East and Central Africa Region. As a result, many people came to Mombasa in pursuit of employment opportunities, education, and investment opportunities. This has led to need for housing, transport and other social services. Most of this people 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, transportation and other social services.

f. Increase in unemployment and crime rates

31. The ten year World Bank survey projects unemployment rate in Kenya to rise by 10.5 per cent this year before slowing by 10 per cent in 2020. Kenya has to create at least 900,000 jobs annually between now and the year 2025 to absorb the high number of youth joining market, according the World Bank Report.

32. The rate of unemployment in Kenya, especially among the youth is almost at crisis levels. According to the Kenya National Bureau of Statistics (KNBS 2017) it is estimated that 562,000 youths in Mombasa are unemployed. This represents 45% of the total population. This situation will be made worse by the directives issued by the 1st and 2nd Respondent which will potentially lead to loss of employment by millions of Kenyans.

33. In the implementation of rights and fundamental freedom the State is enjoined under **Article 21 of the Constitution of Kenya, 2010** to, "take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under **Article 43 of the Constitution of Kenya, 2010.**"

34. Even though the SGR is an important infrastructure to the Kenyan Citizens, the 1st, 2nd and 3rd Respondents were under an obligation to assess the ramifications of the directives issued regarding the transportation of imported cargo by SGR, to the progressive realization of the rights guaranteed under **Article 43 of the Constitution of Kenya, 2010.**

35. The directives issued by the 1st and 2nd Respondent do not assist in realization of the rights guaranteed under **Article 43 of the Constitution of Kenya, 2010** due to the following reasons:

- a) The Government behaves as though the SGR is the only infrastructure which has ever been invested in Kenya and forgets that the road infrastructure development and the transportation companies have been a great source of revenue for this country thereby destroying what investments and business already in existence yet the Government should be creating more business with the new infrastructure and try to maintain the already existing businesses.

- b) The Government has failed to operate in a way that realizes that there is no business that is more important to the Kenyans than another as all businesses are equally important in the realization of Article 43 of the Constitution.
- c) The Government has failed to ensure that its directive create more employment opportunities rather than destroying the already existing employment opportunities.

36. The Petitioner states that the directives issued by the 1st, 2nd and 3rd Respondents are in violation of the Competition Act No. 12 of 2010.

37. The Petitioner repeats the contents of paragraphs 17, 18, 19, 20, 21, 22 and 23 set out hereinabove.

PARTICULARS OF BREACHES OF THE LAW BY THE 4TH RESPONDENT

- a. By making the transportation of imported cargo by the SGR to Nairobi mandatory the 1st, 2nd and 3rd Respondents have in turn created a monopoly which is against the spirit of the Competition Act.
- b. The 1st, 2nd and 3rd Respondents have violated Section 21 of the Competition Act by engaging in restrictive trade practice by limiting the participation of other stake holders in the transportation of cargo and completely barring importers from the right to decide which mode of transportation is suitable for them.
- c. The 1st, 2nd, and 3rd Respondents have violated Section 24 of the Competition Act by limiting the power of the importers to choose which mode of transport they would opt for their cargo from Mombasa to Nairobi.
- d. The 1st, 2nd, and 3rd Respondents have violated Section 24 of the Competition Act by limiting the participation and/or locking out transportation companies from the business of transporting cargo imported at the port of Mombasa to Nairobi.

38. The Petitioner states that vide a letter dated 15th August, 2019 the Petitioner lodged its complaint with the 4th Respondent against the 1st, 2nd,

and 3rd Respondents conduct as depict from the directives, however the 4th Respondent has not taken any serious action against the 1st, 2nd and 3rd Respondents.

39. The Petitioner states that the office of the 4th Respondent is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitution dictates. One such dictates is that in the exercise of their powers, it is to have regard to the public interest.

40. The Petitioner states that **Articles 10, 19, 20, 21, 22, and 23** enjoins the 4th Respondent to comply with constitutional standards of human rights and fundamental freedoms. It is to have regard to the public interest and the interest of justice. The 4th Respondent has failed in its mandate by failing to ensure that the directives issued by the 1st and 2nd Respondent are quashed.

41. The failure by the 4th Respondent to acknowledge or act on the Petitioners complaints amounts to the 4th Respondent having acted contrary Articles 10 and 47 of the Constitution of Kenya, 2010. Furthermore the 4th Respondent has a duty in law to ensure strict compliance with the law with regard to outlawing monopolistic tendencies. As the 4th Respondent has completely failed to act against monopolistic tendency created by the 1st and 2nd Respondents in favour of the 3rd Respondent, the 4th Respondent has thereby unlawfully aided and abated infringement of the law and thereby the 4th Respondent has failed in its constitutional duties to maintain a monopoly zero tolerance in Kenya.

42. The Petitioner state that the importers of goods in Kenya are protected under **Article 46 of the Constitution of Kenya** in as far their freedom of choice of the mode of transportation of their cargo to any part of Kenya is concerned.

43. The Petitioner states that the directives issued by the 1st and 2nd Respondents violate **Article 46 of the Constitution** and the purpose of the **Consumer Protection Act No. 46 of 2012**. Section 3 of the Consumer Protection Act provides that the purpose of the Act is to promote and advance the social economic welfare of consumers in Kenya by: Establishing a legal framework for the achievement of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; Reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services consumers;

Promoting fair and ethical business practices; Protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct; Improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior; Promoting consumer confidence, empowerment and development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; Providing a consistent, accessible and efficient system of consensual resolution of disputes arising from customer transactions; and Providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

44. The Petitioner states that instead of improving the consumers' awareness about the use of SGR, the Government has curtailed the consumers' right to make their own choice regarding which mode of transport is suitable for them.
45. The Petitioner states that this court is enjoined by **Article 23 of the Constitution** to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and grant appropriate reliefs including: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights; an award of compensation and an order of judicial review.
46. The Petitioner therefore seeks the intervention of the court through a declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo; a declaration that the directives issued by the 1st and 2nd Respondents 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; a declaration that the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019 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; a declaration that the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019 infringes the social-economic rights of the residents of Mombasa and Kenya in general; an order quashing the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019.

47. The Petitioner states that in light of the Constitutional issues raised in this petition, it is necessary that this petition be determined by three judges of the High Court. Further, in light of the constitutional rights violations posed by the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019, it is necessary that this petition be determined on a priority basis.

48. The matters aforesaid occurred in Mombasa County within the jurisdiction of this Honourable Court.

49. In all the circumstances, the Petitioners seeks for the following orders:-

- 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 a destination of their choice.
- b) A declaration that the directives issued by the 1st and 2nd Respondents 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 issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019 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 issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019 infringes the social-economic rights of the residents of Mombasa and Kenya in general.
- e) An order of certiorari be granted for purposes of quashing the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019.
- f) A declaration that the 4th 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 created by the 1st and 2nd Respondents to the 3rd Respondent with regard to the transportation of containers from the Port of Mombasa to other destinations.

- (ii) That the 4th 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 3rd respondent consequent to the unlawful directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 21st August, 2019.
- g) General damages to be awarded to the members of the Petitioner against the Respondents jointly and severally.
- h) Costs of the Petition.
- i) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

AND WHICH PETITION is grounded on the annexed affidavit ofand such further reasons to be adduced at the hearing thereof.

DATED at Mombasa thisday of, 2019

**KENYA TRANSPORTERS ASSOCIATION LIMITED
(PETITIONER)**

**GIKANDI & CO ADVOCATES
ADVOCATES FOR THE PETITIONER**

DRAWN & FILED BY:

GIKANDI&COMPANY,
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MOMBASA.

TO BE SERVED UPON:-

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MOMBASA.

KENYA PORTS AUTHORITY,
MOMBASA

KENYA REVENUE AUTHORITY
NAIROBI

KENYA RAILWAYS CORPORATION
NAIROBI

COMPETITION AUTHORITY OF KENYA
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COUNTY GOVERNMENT OF MOMBASA
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CONTAINER FREIGHT STATIONS ASSOCIATION OF KENYA

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AFFIDAVIT IN SUPPORT OF THE PETITION

I,of care of P.O. Box 88502-80100 Mombasa in the Republic of Kenya do hereby make oath and state as follows:-

1. **THAT** I am a male adult of sound mind, the national chairman of the Petitioner. As such I am competent to swear this affidavit.
2. **THAT** the Petitioner is a registered limited liability company incorporated in the Republic of Kenya whose key objective is to fight and promote the interests of transporters in Kenya. The Petitioner representstransporters. I annex herewith the authorization letter and mark the same as annexure “.....-1”. I also annex herewith a resolution dated 30th October, 2019 by the members of the Petitioner to institute this petition and I mark the same as annexure “.....-2”. I also annex a copy of a list of the members of the Petitioner which I mark as annexure “.....-3”.
3. **THAT** at all material times’ the Petitioner’s members have been in the business of transporting imported cargo through the means of road from the port of Mombasa to other parts of Kenya and Africa in general.
4. **THAT** all material times the importers in Kenya have had the liberty to determine how their cargo is cleared at the port and the eventual modes of evacuation to various destinations or to storage facilities such as the Container Freight Stations.
5. **THAT** the transportation business has been a key player in the socio-economic development of Mombasa and Kenya in general. There are at least 70 transportation companies which have employed at least 2 directors; the transportation companies have employed at least 5 office employees and drivers. These employees maintain families using the salaries they get.
6. **THAT** the transportation business has also created other related jobs, to wit, clearing and forwarding business; real estate business; small business along the Mombasa-Nairobi highway; storage facilities such as the Container Freight Stations; and the increase of the revenue for the County Government of Mombasa. These businesses have created lots of employment to the residents of Mombasa and Kenya in general.
7. **THAT** the Government of Kenya invested heavily in a world class infrastructure development projects. One of the key flagship projects completed in the Second Infrastructure Medium Term Plan (MTP) (2013-2017) arrangement was the Standard Gauge Railway (SGR) Project- the

most important railway channel in Kenya, which links Mombasa and Nairobi in the first phase.

8. **THAT** upon the completion of the SGR the 1st and 2nd Respondent issued a directive on 15th March, 2019 notifying the general public that henceforth shipping lines will not be allowed to endorse Bill of Lading to importers CFS of choice. I annex herewith a copy of the directive and mark the same as annexure "...-4".
9. **THAT** thereafter, on 3rd August, 2019 the 1st and 2nd Respondents issued another directive requiring 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. I annex herewith a copy of the directive and mark the same as annexure "...-5".
10. **THAT** being a stake holder in the transportation industry, representing seventy three (70) transporters, the Petitioner ought to have been given a chance to participate in the manner in which the directive was passed.
11. **THAT** the 9th Interested Party having a major socio-economic stake in the shipping and transportation sector due to its location, on behalf of the residents of Mombasa was not involved in the said directive and/or did not care to involve the residents on Mombasa on matters concerning the said directives.
12. **THAT** with the Government directive to have all the cargo to be boarded from vessel to the SGR, the traditional approach whereby the importers had the liberty to determine how their cargo is cleared at the port and eventual modes of evacuation to various destinations or to storage facilities such as the Container Freight Stations has been taken away.
13. **THAT** the directive issued by the 1st and 2nd Respondents is in breach of the public trust bestowed upon the 1st, 2nd, and 3rd Respondent by the residents on Mombasa and it is also in violation of the Constitution of Kenya, 2010 as set out at paragraph 16 of the petition.
14. **THAT** the Respondents have also violated **Article 43 of the Constitution of Kenya** by violating the Petitioners members' rights to earn a living and the rights to socio and economic development of the residents of Mombasa.
15. **THAT** vide a research 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 the directive issued by the 1st and 2nd Respondents have violated the Petitioners members' rights to earn a living and the rights to socio and economic development of the residents of Mombasa as follows:

a. Road Truckers Collective Redundancies

By making it mandatory that imported cargo will be transported to Nairobi using the SGR, the Government has completely destroyed the transportation business. This will lead to the redundancies of the employers and employees who deal with the transportation business.

b. Closure of Trucking Business

The transportation business is closely related with the trucking business as the tracks are always trucked by the owners as a safety measure. Consequently, this business will also be forced to close down.

c. Closure of Warehousing Business and Container Freight Stations in Mombasa

The directive issued on 15th March, 2019 notified the general public that henceforth shipping lines will not be allowed to endorse Bill of Lading to importers CFS of choice. Therefore, by making it mandatory to have the cargo transported to Nairobi by SGR, the warehousing businesses will have no choice than to close down. This will automatically render million Kenyans job less.

d. Roadside Business Activities closure and/or contraction

The drivers of the trucks are a major source of income to the roadside business along the Mombasa-Nairobi highway. These businesses will be drastically affected by the aforesaid directives.

e. Decrease in the revenue collection for Mombasa County Government and General Job losses to residents of Mombasa.

It is a matter of general knowledge that the urban and pre-urban population is 98 per cent of Kenyan's population according to the 2009 census. It is projected to be 1,247,157 in 2018, 1,327,008 and 1,412,008 in 2020 and 2022 respectively. The large urban population can be attributed to the fact that Mombasa is an industrial city, a port city and a major gateway to the

East and Central Africa Region. As a result, many people came to Mombasa in pursuit of employment opportunities, education, and investment opportunities. This has led to need for housing, transport and other social services. Most of this people 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, transportation and other social services. I annex a copy of the census report and mark the same as annexure “....-5”.

f. Increase in unemployment and crime rates

The ten year World Bank survey projects unemployment rate in Kenya to rise by 10.5 per cent this year before slowing by 10 per cent in 2020. Kenya has to create at least 900,000 jobs annually between now and the year 2025 to absorb the high number of youth joining market, according the World Bank Report. The rate of unemployment in Kenya, especially among the youth is almost at crisis levels. According to the Kenya National Bureau of Statistics (KNBS 2017) it is estimated that 562,000 youths in Mombasa are unemployed. This represents 45% of the total population. This situation will be made worse by the directives issued by the 1st and 2nd Respondent which will potentially lead to loss of employment by millions of Kenyans. I annex a copy of the KNBS report and mark the same as annexure “.....-7”.

I annex herewith a letter dated 6th September, 2019 inviting forwarding a copy of the said research to the Petitioner and the actual report and mark the same as annexure “.....-8”.

I further annex the headline news report in the Daily Nation of 16th November, 2019 which more or less repeats the findings in the report marked as No.6 and 7 and mark the same as “.....-9”.

16. **THAT** I have been advised by my advocates on record which advice I believe to be sound that in the implementation of rights and fundamental freedom the State is enjoined under **Article 21 of the Constitution of Kenya, 2010** to, “take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under **Article 43 of the Constitution of Kenya, 2010.**”
17. **THAT** even though the SGR is an important infrastructure to the Kenyan Citizens, the 1st, 2nd and 3rd Respondents were under an obligation to assess the ramifications of the directives issued regarding the transportation of

imported cargo by SGR, to the progressive realization of the rights guaranteed under **Article 43 of the Constitution of Kenya, 2010**.

18. **THAT** the directives issued by the 1st and 2nd Respondent do not assist in realization of the rights guaranteed under **Article 43 of the Constitution of Kenya, 2010** due to the following reasons:

- a. The Government behaves as though the SGR is the only infrastructure which has ever been invested in Kenya and forgets that the road infrastructure development and the transportation companies have been a great source of revenue for this country thereby destroying what investments and business already in existence yet the Government should be creating more business with the new infrastructure and try to maintain the already existing businesses.
- b. The Government has failed to operate in a way that realizes that there is no business that is more important to the Kenyans than another as all businesses are equally important in the realization of Article 43 of the Constitution.
- c. The Government has failed to ensure that its directive create more employment opportunities rather than destroying the already existing employment opportunities.

19. **THAT** I have been advised by my advocates on record which advice I believe to be sound that the directives issued by the 1st, 2nd and 3rd Respondents are in violation of the Competition Act No. 12 of 2010 as set out at paragraph 28.

20. **THAT** vide a letter dated 15th August, 2019 the Petitioner lodged its complaint with the 4th Respondent against the 1st, 2nd, and 3rd Respondents conduct as depict from the directives, however the 4th Respondent has not taken any serious action against the 1st, 2nd and 3rd Respondents. I annex herewith a copy of the letter dated 15th August, 2019 and draft minutes and mark the same as annexure "...9"

21. **THAT** the office of the 4th Respondent is an independent office which is empowered to conduct its duties free from any influence or control by any authority. Its actions must be within the law and in accordance with what the constitution dictates. One such dictates is that in the exercise of their powers, it is to have regard to the public interest.

22. **THAT** the Articles 10, 19, 20, 21, 22, and 232 of the Constitution enjoins the 4th Respondent to comply with constitutional standards of human rights

and fundamental freedoms. It is to have regard to the public interest and the interest of justice. The 4th Respondent has failed in its mandate by failing to ensure that the directives issued by the 1st and 2nd Respondent are quashed.

23. **THAT** the Importers of goods in Kenya are protected under Article 46 of the Constitution of Kenya in as far their freedom of choice of the mode of transportation of their cargo to any part of Kenya is concerned.

24. **THAT** the directives issued by the 1st and 2nd Respondents violate Article 46 of the Constitution and the purpose of the Consumer Protection Act No. 46 of 2012.

25. **THAT** instead of improving the consumers' awareness about the use of SGR, the Government has curtailed the consumers' right to make their own choice regarding which mode of transport is suitable for them.

26. **THAT** I reiterate particularly the contents of paragraphs 17, 18, 19, 20, 21, 22, 23 and 24 of the petition and add the following:

- (i) The members of the Petitioner and their employees and their families have undergone great mental stress in the last few months since the aforesaid monopolistic tendency was created since the said persons have been literally unable to earn a living.
- (ii) The Respondents who are State organs have generally treated the Petitioner with a lot of contempt.
- (iii) That none of the Respondents has undertaken any kind of public participation with the view to introduce a change in the way transportation is done in Kenya and this is not only violation of the Constitution of Kenya but also shows the great disdain that the Respondents have against the Petitioner.
- (iv) The 1st Respondent is a creature of the Kenya Ports Authority Act, Cap.391 Laws of Kenya while the 2nd Respondent is a creature of the Kenya Revenue Authority Act, Cap.469 Laws of Kenya. None of those statutes confer any legal power on the said Respondents to deal with matters involving the transportation of containers privately owned goods from one point to another. Consequently, the said Respondents aforesaid involvement in that regard amounts to acting in excess of their legal powers, further, the 4th Respondent is a creature of the Competition Authority Act No.12

of 2010 which confers powers on the said Respondent to control and stop monopolistic tendencies from taking root in Kenya. However, the 4th Respondent has completely abdicated from taking any action in that regard and has hence abused its legal mandate.

27. **THAT** the Petitioner therefore seeks the intervention of the court through a declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo; a declaration that the directives issued by the 1st and 2nd Respondents 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; a declaration that the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019 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; a declaration that the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019 infringes the social-economic rights of the residents of Mombasa and Kenya in general; an order quashing the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019.

28. **THAT** in light of the Constitutional issues raised in this petition, it is necessary that this petition be determined by three judges of the High Court. Further, in light of the constitutional rights violations posed by the directives issued by the 1st and 2nd Respondents on 15th March, 2019 and 3rd August, 2019, it is necessary that this petition be determined on a priority basis.

29. **THAT** in the circumstances, it is in the interest of justice that this Petition be heard and determined on an urgent basis so that the court makes the issue of the CRSP values declared by the Respondents in the public portal clear in so far as the compliance with the law is concerned.

30. **THAT** what I have deponed herein above is true to the best of my knowledge save for matters of information and belief wherein the source of information and belief is otherwise expressly stated.

SWORN by the said]
.....]
At Mombasa this.....day of.....2019]
]]
BEFORE ME:]

COMMISSIONER OF OATHS

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]
]

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TO BE SERVED UPON:-

KENYA REVENUE AUTHORITY,
MOMBASA.

KENYA PORTS AUTHORITY,
MOMBASA

KENYA REVENUE AUTHORITY
NAIROBI

KENYA RAILWAYS CORPORATION
NAIROBI

COMPETITION AUTHORITY OF KENYA
NAIROBI

COUNTY GOVERNMENT OF MOMBASA
MOMBASA

CONTAINER FREIGHT STATIONS ASSOCIATION OF KENYA

FEDERATION OF KENYA EMPLOYERS

LONG DISTANCE DRIVERS UNION

SHIPPERS COUNCIL OF EASTERN AFRICA

TRANSPORT WORKERS UNION

KENYA CHAMBERS OF COMMERCE & INDUSTRY

COUNCIL OF IMAMS

HUMAN RIGHTS AGENDA