IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KOOME, GATEMBU & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 13 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI……..……..1ST APPELLANT
WYCLIFE GISEBE NYAKINA……..……..……. 2ND APPELLANT

AND

THE ATTORNEY GENERAL……...……..1ST RESPONDENT
KENYA RAILWAYS CORPORATION……..…....2ND RESPONDENT
THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY…….…….…3RD RESPONDENT
CHINA ROAD AND BRIDGE CORPORATION.....4TH RESPONDENT
LAW SOCIETY OF KENYA……..…5TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 10 OF 2015

BETWEEN

THE LAW SOCIETY OF KENYA……APPELLANT

AND

THE HON. ATTORNEY GENERAL ……..……..……1ST RESPONDENT
KENYA RAILWAYS CORPORATION……..……2ND RESPONDENT
THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY…….…….…3RD RESPONDENT
CHINA ROAD AND BRIDGE CORPORATION….4TH RESPONDENT
OKIYA OMTATAH OKOITI……..……5TH RESPONDENT
NYAKINA WYCLIFFE GISEBE……..6TH RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, J.) dated 21st November, 2014

in

Nai. Const. Pet. No. 58 of 2014

Consolidated with

Pet. No. 209 of 2014)

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JUDGMENT OF THE COURT

1. Although a substantial segment of the Standard Gauge Railway (SGR) project in Kenya is complete and operational, the manner in which it was procured continues to generate interest, perhaps on account of the magnitude of the investment in it. For instance, in a recent article published in the Daily Nation of 27th May 2020, Robert Shaw, wrote:

> *"The SGR was a government to government turnkey operation negotiated in the shroud of opaqueness and dumped upon the Kenyan population with the minimum of scrutiny. It's no exaggeration to say it has so far cost twice what it should have and the quotes submitted were around half of what it has cost so far. Why the government went for a more expensive non-tendered option is an open question, which most Kenyans can easily hazard a guess at the answer."*

2. In the judgment the subject of this appeal delivered on 21st November 2014, the High Court (***Lenaola, J.*** (as he then was)) declined an invitation by the appellants, Okiya Omtatah Okoiti, Wyclife Gisebe Nyakina and the Law Society of Kenya, to stop the construction of the SGR. The court dismissed the appellants' petitions in which they claimed that the procurement and

contracting for the SGR violated the Constitution and the laws of Kenya. In the same judgment, the learned Judge found that the documents that had been tendered by the appellants as evidence in support of the petitions were inadmissible having been obtained illegally. He accordingly ordered those documents to be expunged from the record.

3. Aggrieved by that judgment, the Law Society of Kenya (hereafter the LSK) filed Civil Appeal No. 10 of 2015 with 5 grounds of appeal while Okiya Omtatah Okoiti and Wyclife Gisebe Nyakina (hereafter Omtatah and Gisebe) filed Civil Appeal No. 13 of 2015 with 51 grounds of appeal. The two appeals were consolidated by an order of the Court given on 8th November 2016 with Civil Appeal No. 13 of 2015 as the lead file.

4. The grievances in the numerous grounds of appeal coalesce into three main issues which we will consider: First, whether the learned Judge erred in ordering to be expunged from the record the documents that had been presented by the appellants as evidence in support of the petitions; second, whether the Learned Judge erred in concluding that the procurement of the SGR did not contravene the Constitution of Kenya; and third, whether the learned Judge erred in holding that the repealed Public Procurement and Disposal Act, 2005 (the Act) did not apply to the procurement by reason of Section 6(1) thereof. There is a fourth preliminary issue which is whether the appeal is overtaken by

events, is an academic exercise and is moot because the construction of the railway is substantially completed. Before we address those issues, the procedural background to the appeals will provide context.

Background

5. In their petition presented to the High Court on 5th February 2014, Omtatah and Gisebe invited the court "*to intervene and stop the contracting of the 4th respondent to implement the Mombasa-Nairobi-Malaba/Kisumu standard gauge railway in flagrant violation of both statute and of the 2010 Constitution of Kenya*." At the time the petition was presented to court, construction of the railway was yet to commence. The appellants had hoped to stop it dead in its tracks, as it were. Simultaneously with the petition, they applied for interim conservatory orders to suspend the contracts entered into between the 2nd respondent, Kenya Railways Corporation (hereafter KRC or the 2nd respondent) and the 4th respondent, China Road and Bridge Corporation (hereafter CRBC or the 4th respondent) for the supply and installation of facilities, locomotive and rolling stock for the railway.

6. In the petition, Omtatah and Gisebe stated that they appreciated that the railway line "*is important and necessary*" for the realization of Kenya's development agenda but were opposed to "*the scandalous violations of both the Constitution and statutes in the manner the project was procured and is being implemented*"; that, "*for*

the project to be implemented efficiently, transparently, accountably and cost effectively, then it must be procured according to the established law and laid down procedures." They complained that no due diligence had been done; that no independent feasibility study and design of the project was undertaken before seeking contractors to implement it; that there was a conflict of interest in the Government contracting CRBC to implement the project whose feasibility study and design it had intriguingly carried out for free; that in any event CRBC was ineligible for the award of the contract as it had been blacklisted by the World Bank for engaging in corruption in a road project in the Philippines.

7. Omtatah and Gisebe contended in the petition that the single sourcing of CRBC to execute the project contravened Articles 10, 46, 47, 201 and 227 of the Constitution; the Act, the Public Officer Ethics Act; and the Ethics and Anti-Corruption Commission Act, and that the contract awarded to CRBC was therefore "*unconstitutional, irregular, illegal, invalid null and void*."

8. The petition was supported by an affidavit sworn by Omtatah on 5th February 2014 to which he annexed, in a bundle, correspondence emanating from the CRBC, the Ministry of Transport, office of the then Deputy Prime Minister, Embassy of the Republic of China, Attorney General's chambers (hereafter the AG or the 1st respondent), KRC, and Public Procurement

Oversight Authority (PPOA or the 3rd respondent), among other documents.

9. For reliefs, Omtatah and Gisebe prayed for declarations that: there was no valid contract between the Government of Kenya and CRBC; that the 1st to 3rd respondents failed to safeguard public interest and common good in failing to ensure the procurement accorded with the law; that the Government should not conduct business with CRBC; and that the railway should be procured through competitive bidding. They also sought: orders of injunction to restrain the 1st to 3rd respondents from transacting with or continuing with the contract with CRBC; mandatory orders to compel the AG to direct the Police to criminally investigate public officers including officials of the 1st to 3rd respondents who were involved in the fraudulent procurement process as well as officers of the 4th respondent.

10. The petition by the LSK, in which KRC and the AG were named as respondents, was filed on 2nd May 2014 and sought declarations that KRC as a procuring entity is subject to Articles 10, 42, 69, 70 201 and 227 of the Constitution; that the award of the contract to CRBC for the supply and installation of facilities and diesel powered engines which are outdated and pollute the environment violates those provisions of the Constitution; and that the purported *'christening'* of the contract as a government to

government contract is unlawful; and an order of Certiorari to quash the award of the contract.

11. LSK averred that under Article 227 of the Constitution, KRC is enjoined to contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective; that KRC was required to comply with the provisions of the Act which, under Section 29, required a procuring entity to use open tendering or an alternative procurement procedure. It was averred that under Article 42 of the Constitution, every person has a right to a clean and healthy environment; and that the use of diesel-powered engines which were to be procured would result in the pollution of the environment through emission of noxious and dangerous fumes; and that the cost of construction was overpriced.

12. Like the petition by Omtatah and Gisebe, the petition by LSK was also accompanied by an application under certificate of urgency seeking a conservatory order to restrain the respondents from proceeding with the execution of the contract or implementation of any agreements relating to the SGR project.

13. In his affidavit in support of the petition and the application, Apollo Mboya, the then Secretary of the LSK annexed a feasibility study report of the project undertaken by CRBC in January 2012; copies of award of contract dated 10th July 2012 and contract agreement dated 4th October 2012 between KRC and CRBC for the

construction of the project and purchase of locomotives and rolling stocks for the railway; copy of letter dated 14th March 2013 addressed to CRBC by KRC withdrawing the letter of award of contract on the basis that the procurement was to be funded by a negotiated grant/loan and therefore exempt from the application of the Act by reason of Section 6 (1) thereof; newspaper articles commenting on the project; correspondence between PPOA and the AG's office including an opinion by that office; correspondence from the office of the Deputy President Chief of Staff; and a press statement from the office of the President relating to the project issued on 28 January 2014, among other documents.

14. It was deposed that as the award of the contract was withdrawn, there was no valid contract in existence and that KRC: did not lawfully discharge its mandate under Article 227 of the Constitution; violated Article 201 of the Constitution; failed to observe national values and principles of governance under Article 10; failed to ensure sustainable exploitation, utilization, management of the environment; failed to ensure there was public participation in management, protection and conservation of the environment and in financial matters; failed to ensure that public money was used in a prudent and responsible way.

15. In his replying affidavit in opposition filed on 13th May 2014, A.K. Maina, Managing Director of KRC, after setting out the background and benefits of the project to the Country, deposed

that KRC developed a master plan for the project in 2009 and embarked on procurement of consultants to undertake a feasibility study for the construction of the SGR which process was halted through litigation; that on 12th August 2009, the Government of Kenya (GOK) signed a memorandum of understanding with CRBC for the feasibility study and preliminary design of Phase 1 of the project from Mombasa to Nairobi which provided that CRBC would undertake the study at its own cost and if viable, it would identify funding for the project; that GOK through the Cabinet subsequently directed the railway to be developed through Government to Government arrangement supported by Government budget and railway development fund.

16. He deposed further that the feasibility study was submitted to the GOK in February 2011 and following discussions between KRC and CRBC, the feasibility study and preliminary design report was approved by KRC on 26th June 2012; that thereafter KRC and CRBC appointed negotiating teams to negotiate commercial turnkey contracts for civil works and for the supply and installation of facilities, locomotive and rolling stock and the resultant contracts were approved by the Ministry of Transport and the A G's office; that the contract for civil works was signed by KRC on 11th July 2012 while that for the supply and installation of facilities, locomotive and rolling stock was signed on 4th October 2012 "*as part of the process towards the negotiations for funding for the project*"

from the Republic of China and were to "*become effective only after executing the financial agreement.*"

17. He went on to state in his affidavit that GOK entered into a financing agreement with Exim Bank of China for a concessional and commercial loan to support the project; that under that agreement, CRBC was to be engaged as the Engineering Procurement and Construction Contractor and that consequently, as this was a negotiated loan, the arrangement was in line with Section 6(1) of the Act; that the project was budgeted for in the 2013/14 budget and a railway development fund was established to be financed by a railway development levy approved by Parliament as part of the 2013/2014 Finance Bill on 24th October 2013.

18. He deponed further that it was established that CRBC had the requisite technical, financial and legal capacity to successfully implement the project; that an environment and social impact assessment study was undertaken in 2012 and all possible environmental concerns addressed; that in awarding the contract to CRBC, KRC ensured that the project design complied with all the environmental requirements. He stated that the matters the appellants were complaining of were already the subject of investigation by the other organs, namely, the National Assembly, the Auditor-General, and the EACC and that the petition was deficient in particulars.

19. In an affidavit sworn on behalf of the AG and PPOA in opposition to the petition, Mwangi Njoroge, Deputy Chief Litigation Counsel in the office of the AG decried that the alleged violations of the Constitution in the petitions were devoid of particulars or evidence; that Committees of the National Assembly had fully investigated the matter and concluded that the project should be implemented; and that the prayers sought would go against the doctrine of separation of powers.

20. The Deputy General Manager of CRBC, Xiong Shiling deponed in his affidavit in opposition to the petitions that CRBC is a state owned company of the People's Republic of China with extensive experience in international railways, airports and like projects; that the memorandum of understanding between CRBC and the Ministry of Transport provided that should the feasibility study be approved, the project was to proceed on the basis of "*an EPC contract*" (engineering, procurement and construction contract) or turnkey mode contract which is an internationally recognized mode of contracting, including by the International Federation of Consulting Engineers (FIDIC). It entailed the contractor undertaking the feasibility study, the design, the construction works, the equipment procurement, installation and commissioning of the project for a lumpsum contract sum; that under this form of contract the owner, in this case GOK, does not bear major risks on the project; that under an EPC contract, it is for the contractor to ensure the final product is delivered in a fully functional state

and the contractor bears any additional costs that may arise on account of inaccurate or incomplete information at the time of conducting the feasibility study or on account of substandard designs.

21. He deponed that the EPC contract included "*supplying and installing the locomotives, setting up the communication, signal and information system, setting up the electricity supply and installing the operating system of the entire railway system*" and that "*in the circumstances, it would not be possible for the locomotives to be supplied by a separate entity*."; that KRC would be in charge of supervision of the project and had in that regard invited bids for the appointment of independent consultants to review the design of the entire project and to oversee the implementation of the project including approving any payment certificates. He denied that it had inflated the price for the project.

22. Regarding the claim that CRBC was barred by the World Bank from undertaking projects, he deposed that it was debarred "*on suspicion of collusion not for being engaged in corruption*". He explained the circumstances in the Philippines leading to "*the World Bank unilaterally*" announcing its decision to sanction 7 companies including CRBC, a decision that CRBC challenged.

23. As the two petitions raised similar issues, they were consolidated by an order of the court given on 27th June 2014. On 1st July 2014, the parties agreed to abandon all interlocutory applications and to

focus on the hearing of the substantive consolidated petition. Leave was granted by the court for any of the respondents wishing to file cross petitions to do so within 72 hours.

24. KRC filed a cross petition on 7th July 2014 seeking declarations: that a constitutional petition cannot be founded on alleged "*public documents*" obtained in breach of the Constitution and the Evidence Act; that a constitutional petition cannot be founded on documents whose source or origin has not been disclosed and whose authenticity cannot therefore be vouched for; a declaration that the use and production of the alleged "*public documents*" without disclosing their source or authenticity is a breach of KRC's right to a fair hearing as guaranteed under Article 50 of the Constitution; orders to expunge from the record specific exhibits annexed to the affidavits in support of the petitions, among other prayers. Affidavits in reply to the cross petition as well as supplementary affidavits were filed.

25. The hearing proceeded thereafter before the High Court on the basis of the consolidated petitions, the affidavits and submissions culminating in the judgment, the subject of this appeal, that was delivered on 21st November 2014.

Submissions

26. At the hearing of the appeal, Mr. Omtatah and Mr. Gisebe, the appellants in Civil Appeal No. 13 of 2015, appeared in person. The

other parties were represented by learned counsel. ***Miss. Tabut*** held brief for ***Mr. Eric Masese*** for the LSK, the appellant in Civil Appeal No. 10 of 2015. ***Mr. Ngumbi*** held brief for ***Thande Kuria*** for the A.G and the PPOA. ***Professor Albert Mumma*** appeared with ***Mr. Charles Agwara*** for KRC, while ***Mr. Kiragu Kimani*** appeared for CRBC.

27. As already indicated, the crux of the appeal is that the Learned Judge erred in concluding that the procurement of the SGR project did not contravene the Constitution of Kenya; in holding that the Act did not apply to the procurement; and in ordering documents tendered in support of the petitions to be expunged from the record.

28. Urging the appeal, ***Mr. Omtatah*** submitted that the petitions were a "*plea for constitutional and statutory protection of the public interest in the procurement of the Standard Gauge Railway (SGR) project*"; that the Court was called upon to apply and uphold the supremacy of the Constitution, sovereignty of the people, national values and principles, and the Bill of Rights; and that the court should jealously protect "*the public interest against corrupt men of rank who lurk in the Republic's red carpeted offices, waiting to wedge themselves into contracts and then steal through public procurements*."

29. He argued that the procurement did not comply with the requirements of the Constitution; that the project was not provided for in the national revenue and expenditure estimates of

the relevant year as required under Article 220(1) of the Constitution which should have been subjected to public participation as required under Article 221(5) of the Constitution; that the provision for the project in the Finance Act, 2013 could not cure the violations of the Constitution committed in 2012; that there was no evidence that the process through which the project was procured was fair, equitable, transparent, competitive and cost efficient as required by Article 227(1) of the Constitution and the Act; and that the process of procurement was shrouded in secrecy, a violation of Article 35 of the Constitution on access to information.

30. It was submitted that the project was "*a 100% Kenyan funded venture*" and therefore subject to the standards and procedures laid out for the procurement of goods and services by public entities in the Constitution and the statutes; that in the procurement, the respondents ousted the oversight role of Parliament under Articles 206, 214, 220, 221, 222, 223 and 227 of the Constitution as the loan funding the project should have been paid into the Consolidated Fund and Parliament should have approved the expenditure through the national budget or in an Appropriations Act and the loan could therefore not be used under the law.

31. It was submitted that the single sourcing of CRBC violated Section 2 of the Act; that the interests of CRBC were put above those of

ordinary Kenyans in violation of Section 6(1) and 7(1) of the Act which requires the provisions of the Act to prevail over obligations arising from any agreement in the event of conflict; that the single sourcing also violated Sections 29 of the Act as there was no open tendering and the conditions for direct procurement under Section 74 of the Act were not met.

32. It was submitted that the argument by KRC that the contract was exempt under Section 6(1) of the Act did hold as that section "*applies to give exemptions only when there is a signed negotiated agreement*"; that under that provision, any expenditure/procurement "*can only commence after the signing of the agreement, the SGR project is not covered as its financing agreement was signed on May 11, 2014*"; that the procurement of the project purportedly executed under that provision "*before the signing of the finance agreement is null and void*"; that in order for Section 6 of the Act to apply, the financing or loan agreement that ousts the Act should be in place prior to the procurement; that such agreement is a condition precedent to the procurement because it is the terms and conditions of the signed agreement that will apply in the procurement process; that in this case there was no agreement or negotiated loan or grant between the Government of Kenya and the Government of China or Exim Bank when the contract for the construction of the SGR was entered into in 2012; and that the financing agreement which would have triggered the procurement under Section 6(1) of the Act was

signed between the Government of Kenya and Exim Bank on 11th May 2014 "*long after the contract had illegally been entered into*.". Furthermore, it was argued, Section 6 of the Act does not apply where, as here, the Government of Kenya contributes its own resources to the procurement.

33. It was argued that Sections 6, 15, 17 and 25 of the Public Finance Management Act were violated in that Parliamentary approval was not sought through the budget process; and that Sections 10, 11, 12 of the Public Officer Ethics Act which requires all public officers to respect the rule of law were also violated. It was contended that the respondents did not put in place measures to ensure value for money in undertaking the project; failed to consider the financial capacity of CRBC and failed to guard against conflict of interest; failed to undertake an independent feasibility study; failed to establish the project's market value through competitive bidding; that the 1st, 2nd and 3rd respondents committed outright fraud in the procurement by awarding the contract to CRBC at highly inflated cost; and failed to procure locomotives and rolling stock directly from equipment manufacturers. It was urged that there was no regard to environmental considerations and the contract was entered into before an environment impact assessment was released.

34. Regarding the complaint that the learned Judge erred in expunging from the record, the documents that had been presented by the appellants as evidence in support of the petitions, Omtatah argued that in addition to failing to heed Article 35 of the Constitution which recognizes that every citizen has the right of access to information held by the State, the learned Judge failed to appreciate that the documents in question had been tabled before Parliamentary Committees that were investigating the project and were not confidential; that the annexures expunged included a report of Parliament which is part of public record; that bearing in mind that the citizen is the highest authority, as all sovereign power belongs to the people in accordance with Article 1 of the Constitution, the learned Judge was wrong in stating that information could not be received from whistleblowers.

35. It was urged that the learned Judge misconstrued Article 50(4) of the Constitution and the Evidence Act and wrongly excluded the impugned documents; that all the documents tendered in evidence were public documents and that the appellants have a right to oversight the operations of public entities such as the 1st, 2nd and 3rd respondents; and that the appellants were not under a duty to disclose the individual identities of the whistle blowers who supplied the documents.

36. ***Miss. Tobit*** for the LSK identified fully with the arguments made by Mr. Omtatah. She submitted that the procurement violated the

provisions of the Constitution; and that there was no open tender by KRC inviting bids for the supply of the goods and services as required under Article 227 of the Constitution; and that the principles of public finance under Article 201 of the Constitution were not heeded. The decisions of the High Court in ***Kenya Transport Association vs. Municipal Council of Mombasa & anor*** and that of ***Erick Okeyo vs. The County Government of Kisumu, Kisumu H. C. Petion No. 1 "A" of 2014*** and the decision of the Supreme Court of South Africa in ***Millennium Waste Management (PTY) Limited vs. The Chairperson of the Tender Board, Limpopo Province and 2 others*** were cited for the argument that the procurement in this case was not done in a fair, equitable, transparent, competitive and cost-effective manner as demanded by Article 227 of the Constitution.

37. It was submitted that the unconstitutional and illegal procurement cannot be defended by a twisted interpretation of Section 6(1) of the Act; that it was conceded by the AG in an opinion given in the matter that "*government to government*" agreement is not a method of procurement and Article 227 must be observed; that in light of that concession, and on the strength of the decision in ***Creaw & others vs. AG, Nairobi, H.C. P No. 16 of 2011***, it must be accepted that the procurement did not comply with the law.

38. It was also submitted that in addition, Article 42 of the Constitution on the right of every person to a clean and healthy

environment, as well as the Environment Management and Coordination Act were violated in that an environment impact assessment was not undertaken; that the SGR runs through a national park with irreversible and irreparable adverse environmental impact in the same way the East African Court of Justice concluded in the case of ***African Network for Animal Welfare vs. The Attorney General of United Republic of Tanzania*** and should have been stopped.

39. It was urged that under Section 29 of the Act, there are two alternative tendering processes which were not met; that under Section 89 of the Act, CRBC was not eligible and was precluded from entering into the contract for the construction of the SGR having undertaken the feasibility study.

40. Counsel also faulted the High Court for expunging documents tendered as evidence; that in so ordering, the court violated the appellants' right to access to information under Article 35 of the Constitution; that it was not demonstrated that the documents were false and no witnesses were called to denounce them. Counsel urged the Court to allow the appeals and set aside the judgment of the High Court.

41. Opposing the appeals ***Mr. Ngumbi*** for the AG and the PPOA submitted that the appeals have been overtaken by events; that as the project has long been completed and commissioned the appeal

is moot and an academic exercise; and that what is done cannot be undone.

42. It was submitted that neither the Constitution nor the Act were violated in the procurement; that the appellants did not demonstrate any breaches of the Constitution; that the learned Judge correctly found that Parliament played its role in consideration of the project and enacted provisions for a railway development levy through the Finance Act; and that the claims of alleged violations of the Constitution were not given or particularized. The case of ***Anarita Karimi Njeru vs. Attorney General (1979) KLR 154*** and that of ***Trusted Society of Human Rights Alliance vs AG and 2 others [2012] eKLR*** were cited.

43. It was urged that the learned Judge correctly held that the Act was not applicable to the project as it was funded by the Government of China through Exim Bank; that under Section 6(1) thereof, contracts involving negotiated grants or loans were excepted from the Act. It was urged that the appellants failed to show how the project would adversely affect the environment; that an environmental impact assessment of the project was indeed undertaken; a feasibility study was done; and the National Environment and Management Authority (NEMA) issued a licence; that the study of the project was published in the Kenya Gazette and members of the public invited to make representation or lodge complaints within 60 days but the appellants did not avail

themselves of that opportunity; that if there was any issue with that licence then NEMA's decision to issue the license should have been challenged as there is a clear procedure under the Environment Management and Coordination Act for seeking redress. In that regard the case of ***Speaker of The National Assembly vs Karume, Civil Appl. No. Nai. 92 of 1992*** for the proposition that where there is a clear procedure prescribed by law for the redress of any particular grievance, such procedure should be strictly followed.

44. On the expunged documents, counsel supported the decision by the learned Judge arguing that the same had been illegally obtained and some of the documents were privileged and confidential and could only have been obtained through complicity of public servants acting in breach of the Public Officers Ethics Act; and that illegally obtained documents could not form the basis of the petitions. In that regard, reference was made to the High Court decision in ***Baseline Architects Limited & 2 others vs National Hospital Insurance Fund Board Management [2008] eKLR*** and the Industrial court decision in ***Leland I. Selano vs. Intercontinental Hotel [2013] eKLR***. It was submitted that there is a clear procedure for accessing public documents and the appellants did not follow such procedure. A decision of the Supreme Court of Appeal of South Africa in ***The Cape Metropolitan Council vs. Metro Inspection Services Western***

Cape CC and another, Case No. 10 of 1999(2001) ZASCA 56 was cited.

45. Furthermore, it was argued, it was incumbent upon the deponents of the affidavits in support of the petitions to disclose in their affidavits their sources of information as required under Order 19 rule 3 of the Civil Procedure Rules, and this too, they failed to do.

46. ***Professor Mumma*** for KRC began by contending that these appeals are a waste of judicial time; that it is common ground that the railway line from Mombasa to Naivasha has since been completed and is fully operational and the appeal is therefore moot and an academic exercise.

47. Turning to the grounds of appeal, he submitted that the learned Judge correctly allowed the cross petition and ordered documents that had been obtained in a clandestine manner and whose source was not disclosed to be expunged; that many of the documents the appellants relied upon were official documents comprising of commercial contracts, letters exchanged between Government officers and diplomatic missions, a draft cabinet memorandum, all of which were not public; that whereas Article 35 of the Constitution gives every citizen a right to access information held by the State, it does not permit "*self-help*" for citizens to obtain official documents from public officers clandestinely; that in order for a court to be satisfied as to the authenticity of documents relied upon, it is important that the procedure for accessing public

documents under Section 80 of the Evidence Act is followed; and that to allow for production of clandestinely obtained documents would breed a culture of illegality.

48. As to the contention that the documents were obtained from public spirited and well intentioned "*whistleblowers*", it was submitted that the issue is not the motive with which civil servants may have handed over official documents to the appellants, but rather the breach of the law and breach of the employee's duty to the employer under the Public Officers Ethics Act, 2003 which bars public officers from using information acquired in connection with their duties for personal benefit or for the benefit of others; and that such officers, described by the appellants as whistleblowers, should have provided information to designated enforcement authorities in accordance with the Witness Protection Act.

49. Referring to the English decision in ***Robert Technquiz & others vs. Vivian Imerman, Case No. A2/2009/2133 [2010] EWCA Civ. 908***, among others, it was submitted that a petition supported by documents obtained in breach of the law should not be recognized by a court; that the documents in this case were procured in breach of KRC's rights to privacy under Article 31 of the Constitution and the admission of the documents would offend Article 50(4) of the Constitution which provides that evidence

obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded.

50. Regarding the claims by the appellants that the project should have been halted as it infringes on the appellants' right to clean and healthy environment under Articles 42 and 69 of the Constitution, it was submitted that in compliance with the requirements of the Environmental Management and Coordination Act, 1999, an environmental impact assessment study was undertaken to assess the project from the perspective of environmental impact and sustainability and what was questioned was the adequacy of the report; and that National Environment and Management Authority (NEMA) approved the project after conducting public hearings in all counties where the railway was to run through.

51. As to the contention that Article 227 of the Constitution, the Act, and the Public Finance Management Act were breached, it was submitted that Article 227 of the Constitution does not, itself, provide the complete framework to govern procurements; that implementing legislation is envisaged; that competition is only one of many factors; that the Act provides for several methods of procurement, including procurements in instances of negotiated grants or loans under Section 6(1), as in the present case, and the learned Judge was right in holding that the project was lawfully procured. It was submitted that the project was deliberated upon by the National Assembly following which the Customs and Excise

Act was amended through the Finance Act, 2013 by making provision for Railway Development Levy to fund the construction of the SGR.

52. Counsel argued that although the appellants alleged breaches of constitutional provisions and fundamental rights, they did not demonstrate in what way the alleged breaches were committed; that the issues the appellants raised could have been adequately addressed by pursuing remedies provided in legislation; that there were parallel investigations in connection with the project by Parliament and the Ethics and Anti-Corruption Commission (EACC) to which the appellants should have availed themselves, and the court was right in taking the view that it should defer to those institutions. Reference was made to the High Court case of ***Stephen Nyarangi Onsomu & another vs. George Magoha & 7 others [2014] eKLR*** in which the decision of ***Harrikisson vs. Attorney General of Trinidad and Tobago [1980] AC 265*** was cited for the proposition that constitutional petitions should not be used as a substitute for normal procedures for invoking judicial control of administrative action.

53. ***Mr. Kiragu Kimani*** for CRBC also submitted that to the extent that the appellants' petitions attacked the process and award of the contract for construction of the SGR, the appeal is moot as the project has long since been completed and commissioned.

54. On the grounds of appeal, Mr. Kimani submitted that although the appellant alleged violations of the Constitution and the law in their respective petitions, there was no evidence to support those claims. That contrary to claims that Articles 42 and 69(1) of the Constitution were breached, an environmental impact assessment was indeed conducted before the commencement of the project and the report in that regard produced before the High Court.

55. Counsel submitted that under Article 227(2) of the Constitution, Parliament is mandated to enact legislation to provide a framework within which policies relating to procurement and asset disposal shall be implemented; that the relevant legislation in that regard is the Act; that under Section 6 of the Act, Parliament recognized that where a project is financed through negotiated loans or grants conflicts could arise between the conditions of the grant or loan and the provisions of the Act; that the terms and conditions of financing in this case between the Government of China and the Government of Kenya made it a condition that the contract be awarded to CRBC in which case Section 6(1) of the Act applies. Reference was made to numerous decisions of the Public Procurement Administrative Review Board, including the case of ***Power Technics Ltd vs. Kenya Power & Lighting Company Ltd, App. No. 3 of 2010***, that have given effect to Section 6(1) of the Act by holding that, that provision excluded negotiated grants and loans from the application of the Act.

56. It was submitted that even if the Act was to be applied, Section 87 thereof was not violated as a person who undertakes a feasibility study of a project, with a view to ascertaining viability, can nonetheless be contracted to implement the project if acceptable to the Government; and that an arrangement with a foreign government, as is the case here, is permissible under Section 6 of the Act. In any case, the procurement of the project in this case was not done by way of request for proposals under Section 76 of the Act and consequently Section 87 of the Act is not applicable. Furthermore, the contention that Section 87 was breached should be disregarded as it is not one of the grounds contained in the memorandum of appeal.

57. Regarding the order to expunge documents, Mr. Kimani submitted that the learned Judge was right; that although the right to access information from the State is enshrined in Article 35 of the Constitution, the appellants should have followed the correct procedure and requested for the information and should not be allowed to benefit from an illegality in the manner in which they got the information

58. In reply Omtatah and Gisebe urged that the Constitution is supreme; that although the project may have been completed, it remains open to the Court, under Article 2(4) of the Constitution, to declare that its procurement contravened the Constitution; that even though other organs like the EACC and Parliament may have

been investigating the project, the jurisdiction of the court remains intact and cannot be ousted.

Analysis and determination

59. We have considered the appeals and the submissions. Our mandate on a first appeal as set out in Rule 29(1) of the Court of Appeal Rules requires us to reappraise the evidence and to draw our own conclusions. In ***Peters vs. Sunday Post Limited [1958] EA 424***, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."***

60. This Court is therefore required, as was also stated by the Court in ***Selle and another vs. Associated Motor Boat Company Limited & 2 others [1968] EA 123*** to "***reconsider the evidence, evaluate it itself and draw its own conclusion"***. With that in mind, the issues for consideration, to restate, are: whether the appeal is moot; whether the learned Judge erred in expunging documents in support of the petitions; whether the learned Judge

erred in concluding that the procurement did not contravene the Constitution of Kenya; and whether the learned Judge erred in holding that the Act did not apply to the procurement.

61. On the issue of mootness, it was contended, as already noted, that as the SGR project is substantially completed and commissioned and that it is futile, an academic exercise and waste of judicial resources to pursue this appeal. The appellants on the other hand maintain that notwithstanding the completion and commissioning of the project, it remains open for the court to determine and declare that its procurement violated the Constitution and the law.

62. The objective for which the appellants instituted the petitions are appreciable from the prayers in the petitions. Omtatah and Gisebe prayed for declarations that: there was no valid contract between the KRC and CRBC; that the 1st to 3rd respondents failed to safeguard public interest and common good in failing to ensure the procurement accorded with the law; that the Government should not conduct business with CRBC; that the railway should be procured through competitive bidding; orders of injunction to restrain the 1st to 3rd respondents from transacting with or continuing with the contract with CRBC; mandatory orders to compel the AG to direct the Police to criminally investigate public officers including officials of the 1st to 3rd respondents who were involved in the fraudulent procurement process as well as officers of CRBC.

63. The LSK on its part, sought declarations that KRC as a procuring entity is subject to Articles 10, 42, 69, 70 201 and 227 of the Constitution; that the award of the contract for the supply and installation of facilities and diesel powered engines which are outdated and pollute the environment violates Articles 42 and 69 of the Constitution; that the award of the contract for the supply and installation of facilities, locomotives and rolling stock for the Mombasa Nairobi standard gauge railway by KRC to CRBC violates Articles 10, 201 and 207 of the Constitution; that the purported '*christening*' of the contract as a government to government contract is unlawful; and an order of Certiorari to quash the award of the contract.

64. In **Black's Law Dictionary**, 8th edition, a *"moot case"* is defined as "*a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights*", and as a verb, as meaning "*to render a question as of no practical significance*".

65. In ***Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) vs. County Government of Nairobi [2019] eKLR***, *Mativo, J*. stated that:

> ***"A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance***

or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact."

And that,

"No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

66. In ***National Assembly of Kenya & another vs. Institute for Social Accountability & 6 others [2017] eKLR***, this Court characterized the doctrine of *'mootness'* as complex; it cautioned that the doctrine should not be applied mechanistically in every factual situation; and that there is no sharp distinction between moot and live controversies. The Court expressed that the doctrine of mootness is not a magic formula that can automatically dissuade the court in resolving a case; and that the court will decide cases, otherwise moot, for example, if there is a grave violation of the Constitution. The Court concluded:

"… it is clear that the mootness doctrine, is not an abstract doctrine. Rather, it is a functional doctrine founded mainly on principles of judicial economy and functional competence of the courts and the

integrity of the judicial system. In the application of the doctrine to the wide ranging and varying factual situations, the court will inevitably consider the extent to which the doctrine advances the underlying principles, the certainty and development of the law particularly the Constitution law and the public interest."

67. Given those parameters, is this appeal moot? It is common knowledge that the Mombasa-Naivasha segment of the SGR project is built and completed. Undoubtedly, some of the reliefs that the appellants sought before the High Court are no longer available as the contract has been executed. At the time the petitions were presented, construction was yet to commence. That is the reason the appellants presented applications for interim conservatory orders contemporaneously with the petitions in the hope that construction would have been stopped. However, the parties opted to forego the applications for interim conservatory orders and to focus on hearing the substantive petitions. In doing so, the parties were alive to the fact that execution of the contract would have an impact on the petitions. Indeed, on 1st July 2014, when taking directions before the learned Judge for the substantive hearing of the petitions, Omtatah is recorded as having expressed his apprehension that delay in the disposal of the matter would render the litigation futile. In his words, "*…the situation should be arrested and stop the construction. The ground is shifting and we have spent 150 days without any progress. The cost of mobilizing construction is huge and I do not want to litigate in vain*."

68. In our view, while the reliefs in the nature of orders of injunctions to restrain the implementation of the impugned contract or to quash the award of the contract are no longer within reach, the issues relating to the constitutionality of the procurement; the interpretation and applicability of Section 6 of the Act; and the question whether annexures to the petitions were properly expunged, remain for consideration by this Court. Being of that view, we will first consider the question whether the learned Judge erred in expunging documents tendered in support of the petitions.

69. In its cross petition dated 4th July 2014, KRC averred that the documents the appellants sought to rely upon in support of their petitions "*are illegally obtained documents whose origin, source, legitimacy and/or authenticity has not been disclosed and/or explained by the deponents and as such cannot be relied upon*" by the court; that "*the said documents are produced…contrary to the express requirements of Article 31 and 35 of the Constitution and Section 80 of the Evidence Act, cap 80 of the Laws of Kenya and ought to be expunged from the records*." KRC contended that reliance on the said documents violated its constitutional rights to fair administrative action and fair hearing.

70. In a replying affidavit to the cross petition, *Apollo Mboya* deposed that "*all the documents that the Law Society of Kenya has relied on have been lawfully obtained*" and that the same were submitted to

the LSK "*by conscientious citizens in lawful possession of the said documents*."; that KRC had not shown that the documents were false or called the makers to denounce or repudiate them; that no criminal proceedings had been commenced by the makers of the documents alleging theft of the documents; that citizens have rights of access to information under Article 35 of the Constitution and all state organs are enjoined to be transparent and accountable and the prayer to expunge the documents was a smoke screen to distract the court from addressing the real controversy.

71. In his replying affidavit to the cross petition, Omtatah deponed that there was no basis for the contention that the documents were illegally obtained as no complaints had been made to law enforcement agencies that the documents were sourced in breach of the law; that the burden lay with KRC to demonstrate that the documents were illegally obtained; that the documents were in wide circulation before the appellants received them from whistle blowers and "*the decision to protect whistleblowers cannot be and is not fatal to the petition*" and that no reason was given by KRC "*why the whistleblower evidence herein should not be admitted*."; that having regard to the public interest involved, the court should have exercised its discretion and admitted the documents; that as stated by Justice Crompton in ***R vs. Leatham (1861) 8 Cox CCC 498***, "*it matters not how you get it, if you steal it even, it would be admissible in evidence*."; provided the evidence is relevant, it is admissible; that the documents were readily available as they were presented

during the proceedings of the Committees of Parliament which were open to the public.

72. In allowing the cross petition and ordering the documents to be expunged, the learned Judge expressed that if litigants choose to use clandestine means to procure information, such actions would heavily compromise the need for Article 35 of the Constitution and would violate the other parties' fundamental right to privacy under Article 31 of the Constitution; that had the appellants followed lawful channels and procedures available in law in obtaining the information, the question of violation of the respondents' right to privacy would not have arisen. The learned Judge went on to say that the procedure for introducing public documents into court as evidence under Section 80 of the Evidence Act guarantees the authenticity and integrity of documents relied upon in the court; and further that the documents in question did not meet the criteria of admissibility set in Section 35 of the Evidence Act; that to allow the documents in question to remain on record would be detrimental to the administration of justice; that irrespective of whether the respondents had made a complaint to law enforcement agencies regarding theft of documents, the appellants could not rely on information obtained in unclear circumstances; and that while a citizen is entitled to information held by the State, there is no need or room to use irregular methods in obtaining information.

73. We have considered the rival arguments. This issue brings to the fore the tension between the need for the court to be able to consider and have access to evidence which would enable it to fairly and effectively determine a dispute on the one hand and the need to avoid irregularity or impropriety in the way in which evidence is obtained or secured. In an article titled, ***The Court's Discretion to Exclude Evidence in Civil Case and Emerging Implications in the Criminal Sphere*** (2016) 28 SAcLJ, Professor Jeffrey Pinsler, SC put it this way: "…*the court must try to give effect to two conflicting public interests: the need for the court to have access to the evidence in the interest of fair and just adjudication and the avoidance of misconduct in the manner of securing evidence. The outcome of the balancing operation depends on the circumstances*."

74. As noted, the documents that the learned Judge ordered to be expunged from the record were produced as annexures to the affidavits sworn by Omtatah and Apollo Mboya in support of the petitions. Those documents comprised of copies of numerous letters exchanged between the Ministry of Transport and CRBC; correspondence between CRBC and the then Prime Minister's office; memorandum of understanding between Ministry of Transport and CRBC dated 12th August 2009; correspondence between the Chinese Embassy and Ministry of Transport; correspondence between the Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People's Republic of China; the feasibility study relating to the project; correspondence

between the Ministry of Transport and KRC; correspondence between the Attorney General's Office and the Ministry of Transport; correspondence between KRC and Public Procurement and Oversight Authority; correspondence between KRC and CRBC; correspondence between Public Procurement and Oversight Authority and the Attorney General's office; the commercial contracts between the KRC and CRBC for the construction of the railway and for supply and installation of facilities, locomotives and rolling stock; correspondence between the Office of the Deputy President and the Attorney General's Office and cabinet memorandum.

75. The sources of those documents were not disclosed in those affidavits and neither were such of those documents that consisted of public documents, certified. It was upon the filing of the cross petition seeking orders for those documents to be expunged that the appellants disclosed that the documents were supplied by "*conscientious citizens*" and "*whistleblowers*".

76. Part IV of the Evidence Act deals with public documents which are defined under Section 79(1)(a)(iii) to include documents forming the acts or records of acts of public officers. For purposes of authenticity, Section 80 of the Evidence Act, provides that every public officer having custody of a public document which any person has a right to inspect shall give the person on demand a copy of it on payment of the legal fees therefor, together with a

certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. Section 80(2) of the Evidence Act provides that any officer who by ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have custody of such documents within the meaning of that section. Section 81 of the Evidence Act on proof of certified copies provides that certified copies of public documents may be produced in proof of the contents of the documents or part of the documents of which they purport to be copies.

77. The issue of admissibility of illegally acquired evidence was considered by the Court in the case of ***Nicholas Randa Owano Ombija vs. Judges and Magistrates Vetting Board [2015] eKLR*** where the Court had this to say:

> ***"What does the law state regarding illegally obtained evidence? In the case of Karuma, Son of Kaniu vs. The Queen [1955] AC 197 which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that "the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is,***

it is admissible and the court is not concerned with how it was obtained" In that case the Privy Council decision was supported by the decision in Reg. vs. Leatham (1861) 8 Cox C.C.C 498 which was referred to in the judgment. In Reg. vs. Leatham (supra), it was said "it matters not how you get it if you steal it even, it would be admissible in evidence" In Olmstead vs. United States (1928) 277 US 438 the Supreme Court of the United States of America opined that "the common law did not reject relevant evidence on the ground that it had been obtained illegally." In Helliwell vs. Piggot-Sims [1980] FSR 356 it was held that "so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."

There is no doubt that the documents relating to the appellant's vetting of 10th September 2012 are relevant as his case hinges on them. Common law principles show that evidence, if relevant, is admissible even if it has been illegally obtained. The case of Karume vs. The Queen though a criminal case shows that common law principles developed in criminal law cases apply in civil cases."

78. That decision supports the argument that the overriding consideration when considering whether illegally obtained evidence is admissible is the relevance of such evidence. It has been followed, for example, in ***John Muriithi & 8 others vs. Registered Trustees of Sisters of Mercy (Kenya)t/a "The Mater Misericordiae Hospital & another [2018] eKLR*** where

the ELRC (***Wasilwa, J.***) pronounced that, "*in Kenya, illegally obtained evidence is admissible so long as it is relevant to the fact in issue or its admission would not affect the fairness of the trial*", and after making reference to Article 50(4) of the Constitution concluded, on the facts of that case, that:

> **"*In determining whether to allow evidence being sought to be expunged, I am guided by the fact that the primary duty of this Court is to do justice. If justice will be done using available documents and evidence not obtained in breach of the Constitution and the law then this Court would admit such evidence in order to have the right resources before it to enable determination of the issues in a just matter.*"**

79. This Court had occasion again to consider the matter of admissibility of illegally obtained evidence in the case of ***United Airlines Limited vs. Kenya Commercial Bank Limited [2017] eKLR*** where the Court rejected the contention that illegally obtained evidence is admissible in criminal law as long as it was relevant. The Court stated that the Constitution of Kenya 2010 had changed that position and that such evidence is not admissible by dint of Article 50(4) of the Constitution which provides:

> **"50 (4)** ***Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice…"***

In that case, the Court stated:

> ***"As submitted by learned counsel for the respondent, illegally obtained evidence was for a long time admissible in criminal law as long as it was relevant (see <u>Kuruma</u> <u>Son of Kaniu vs R</u> [1955] 1 All ER 236. However, the Constitution of Kenya 2010 has now shifted the paradigm and Article 50(4) of the Constitution now disallows such evidence…***
>
> ***…the Kuruma case (supra) is therefore no longer good law. <u>This article nonetheless applies to criminal law and not civil law, as it succinctly refers to "trial" as opposed to suit, and also relate to rights of an accused person</u>. Admissibility of documentary evidence is explicitly provided for under the Evidence Act."***

80. The interpretation given by the Court in that case that Article 50(4) of the Constitution applies only to criminal law and not civil law is, with respect, doubtful. Article 50 of the Constitution deals generally with *"fair hearing"*. In Article 50(1) for instance, reference is made to "*every person*" as having the right to a fair hearing. This is in contrast to Article 50(2) which is specific "*every accused person*". In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial. This view accords, we believe, with the Supreme Court decision in

<u>Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR</u>.

81. In the last-mentioned case, the Supreme Court of Kenya was invited to expunge certain documents in a presidential election petition. In its ruling, from which it is necessary to quote *in extenso,* the apex Court had this to say:

> ***"Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person 'unlawfully' or 'improperly' obtains any information held by an entity" Can a court of law admit such evidence…We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information… Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process…"***

And later in the same case went on to say:

> ***"The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under the Constitution and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us."***

82. Although that decision was rendered in the context of a presidential election petition, it is clear from that decision that by dint of Article 50(4) of the Constitution, the adage, *"it matters not how you get it if you steal it even, it would be admissible in evidence"* is not representative of the state of the law in our legal system, irrespective of whether the dispute is of a criminal or civil nature.

83. We reiterate that the appellants claimed to have been supplied with the contentious documents by "*conscientious citizens*" and

"*whistleblowers*". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the Constitution. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.

84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "*conscientious citizens*" or "*whistleblowers*" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.

85. We will consider the two remaining issues together. These are whether the procurement violated Article 227 of the Constitution and statutory law and whether the procurement in this instance was exempt from the provisions of the Act by reason of Section

6(1) thereof. Article 227 (1) of the Constitution of Kenya provides that:

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

86. As ***Musinga, J.A*** observed in the case of ***Al Ghurair Printing and Publishing LLC vs. Coalition for Reforms and Democracy & 2 others [2017] eKLR*** in relation to Article 227:

> ***"The mode of procurement of public goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, perhaps out of the realization that huge amounts of public resources are spent in procuring goods and services."***

87. The rationale behind Article 227 was also captured by the High Court in the case of ***Republic vs. Public Procurement Administrative Review Board & another Ex parte SGS Kenya Limited [2017] eKLR*** where *Mativo, J.* had this to say:

> *"**In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and public bodies wield massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of the state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where***

the procurement process is shown not to be so, courts have the power to intervene."

88. Also, in ***Republic vs. Independent Electoral and Boundaries Commission & 3 Others ex parte Coalition for Reform and Democracy Misc. Application No 637 of 2016*****,** the High Court expressed that:

> ***"Article 227 of the Constitution provided the minimum threshold when it comes to public procurement and asset disposal. Therefore, any procurement, before considering the requirements in any legislation, rules and regulations, had to meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. Any other stipulation in an enactment or in the tender document could only be secondary to what the Constitution dictated…."***

89. In ***Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others [2017] eKLR*** this Court stressed that:

> ***"…all procurement entities must at all times remain accountable and transparent in their operations and must adhere to the values in Articles 10, 20, 227 and 232 of the Constitution as incorporated in Section 3 of the Public Procurement and Asset Disposal Act."***

90. Article 227 of the Constitution should be interpreted in a manner that promotes its purposes, values and principles as Article 259 demands and also holistically. In ***Republic vs. Kenya National***

Highways Authority and 2 others, Ex Parte Amica Business Solutions Limited [2016] eKLR this Court stated:

> ***"The provisions of Articles 10 and 227 of the Constitution are not among those non-derogable rights that cannot be limited. It is our view that they can be interpreted in a purposive manner that would take into account the circumstances and the justice of the case, without necessarily adhering to the textual interpretation. This does not mean that they should be disregarded at will. Far from that, all constitutional safeguards are meant to be observed particularly when they are meant to protect citizens from flagrant excesses by the Executive and those other organs that are charged with the responsibility to offer services to the people."***

91. In the matter of ***Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of [2012] eKLR*** the Supreme Court explained the meaning of a holistic interpretation of the Constitution thus:

> ***"It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision reading it alongside and against other provisions so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of issues in dispute and of the prevailing circumstances."***

92. Article 227(1) does not stand alone. Article 227 (2) goes on to say:

"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented…."

93. Under that provision, it was left to Parliament to give effect to the principles in Article 227(1) through enactment of legislation. The statute enacted by Parliament pursuant to that provision is the Public Procurement and Disposal Act, Act No. 33 of 2015 which, in its preamble stipulates that it is "*An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes*." That Act commenced on 7th January 2016, well after the procurement of the SGR had been undertaken. The Act (the Public Procurement and Disposal Act, 2005) which was repealed by Section 182 of the 2015 statute, was therefore the applicable statute by dint of the transitional provisions to the effect that "*procurement proceedings commenced before the commencement date of this Act shall be continued in accordance with the law applicable before the commencement date of this Act*"

94. Although the Act recognized alternative procurement methods, the default procurement procedure under Section 29 was open tendering. Section 29(1) of the Act provided that for each procurement, the procuring entity shall use open tendering. Other procurement procedures recognized under the Act that were subject to prescribed safeguards include restricted tendering; direct procurement; request for proposals; request for quotations;

and procedure for low value procurements, among others. As regards restricted tendering or direct tendering, the safeguards under Section 29 (3) of the Act include obtaining the written approval of the procuring entity's tendering committee and recording in writing the reasons for using the alternative procurement procedure.

95. It is not the appellants' case, as we understand it, that the provision of alternative procurement procedures in the Act negates the requirements under Article 227 of the Constitution to the effect that procurement by public entities should accord with a system "*that is fair, equitable, transparent, competitive and cost effect*." In other words, the absence of *"competition"* in direct procurement in our view does not, in itself, render that procedure unconstitutional. We are therefore not persuaded, as contended by the appellants, that because the procurement of the SGR was not taken through a competitive bidding process, that in itself renders it unconstitutional.

96. Indeed, Sections 6 and 7 of the Act, contained provisions with respect to conflict between requirements under the Act with any obligations of the Country arising from treaties or agreements. Parliament recognized that there may be instances when conditions imposed in instances of negotiated grants or loans or by donor funds may conflict with the provisions of the Act. In that

case, such conditions would prevail thereby removing procurement from the purview of the Act.

97. Sections 6 and 7 of the Act (the Public Procurement and Disposal Act 2005) provided as follows:

> ***"6. (1) Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.***
>
> ***7. (1) If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others.***
>
> ***(2) This section does not apply if the donor of funds is a public entity."***

98. In ***Revital Health (EPZ) Limited vs Public Procurement Oversight Authority [2015] eKLR*** the High Court at Mombasa (***Mureithi J.***) expressed that:

> ***"Section 6 (1) of the PPDA ousts the provisions of the Act in cases of negotiated grants or loans where there is a conflict between the Act and any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party. It does not follow that all procurement conducted outside the PPDA is unconstitutional. Constitutionality of a procurement must be***

assessed on the touchstone of Article 227 of the Constitution, which provides that procurement by state organ or other public entity accords to 'a system that is fair, equitable, transparent, competitive and cost-effective.

20. Procurement can still meet the requirements of the Article 227 even where done pursuant to obligations under a treaty or other agreement or other procedure consistent with those requirements. The Constitution does not decree that public procurement may only be made under the provisions of the Act of Parliament enacted under article 227 (2) of the Constitution. The Constitution only empowers parliament to make such law as will guide the realization of the principles of public procurement set out in Article 227 (1) of the Constitution."

99. As already indicated, the appellants contend that the procurement of the SGR violated the provisions of the Act. The respondents on the other hand contend that the Act did not apply on account of the conditions in negotiated loan on procurement that conflicted with the requirements of the Act and that Section 6(1) of the Act therefore applies. In resolving that controversy, the learned Judge stated:

"As is evident, by virtue of the above provision i.e. Section 6(1) of the Public Procurement and Disposal Act the provisions of the said Act would not apply in regard to the contested procurement and I therefore agree with Mr. Kimani that Section 6(1) is clear that the Act does not apply in instances of negotiated loan or grants, because the SGR Project is being financed by a loan from the

government of China through Exim Bank of China. This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with the Public Procurement and Disposal Act."

100. The learned Judge found that the conditions that the Government of Kenya had to satisfy before the Chinese Government could finance the project included the requirement that the mode of procurement had to be in line with the conditions made by Exim Bank, namely that CRBC had to be awarded the contract and consequently the Act *"does not apply to the issues at hand."* The question therefore is whether that conclusion was well founded.

101. The facts, as they emerge from the material before the High Court show that on 12th August 2009, the Ministry of Transport of the Government of Kenya (MoT) entered into a Memorandum of Understanding and Cooperation (MoU) with CRBC on the basis of which CRBC was to undertake, at its cost, a study on the feasibility of a railway system between Mombasa and Malaba; to consider the technical details of the project; the financing required and the manner in which the project would be implemented. The MoU provided that if MoT approved the feasibility study, CRBC would carry out the preliminary design of the project with help from MoT and that the design "*shall include the technical and financial aspects of the project as well as the terms and conditions of the EPC contract after consultation with MoT*"; that after completion and agreement of the design, both parties "*shall appoint their own*

committee to start the negotiation immediately on the commercial contract of the project on the basis of the EPC" and that, "*an EPC commercial contract for the project will be duly signed by both parties*." With regard to financing, the MoU further stipulated that, "*after signing of the commercial contract of the project, CRBC shall try its best to look for the sources for the funding of the project*." [emphasis added]

102. It is clear from the MoU therefore that from conception of the project, it was understood by both the MoT and CRBC that should the feasibility study be approved and decision taken to go ahead with the implementation of the project, it would be on the basis that CRBC would be contracted to execute or implement it. CRBC undertook to carry out the feasibility study in respect of the project; to undertake the preliminary design of the project; and source for the funding of the project upon MoT and CRBC signing "*an EPC commercial contract for the project*".

103. The funding or financing options floated by CRBC at the time included, direct investment from CRBC; and/or buyer's credit from the Kenya Government; and/or seller's credit from CRBC; and/or direct investment from other financial institutions; and/ or other sources identified in future. Consequently, irrespective of how the project was going to be funded, the implementing entity would be CRBC. In other words, whereas there was no clarity at that time how the project would be financed, it was crystal clear

that once funding was secured, (however that would be achieved) the project would be executed by CRBC. The procurement of CRBC was therefore a foregone conclusion from the outset. The question of the procurement procedure being dictated by subsequent financing arrangement would therefore not arise.

104. The Managing Director of KRC, Mr. A.K. Maina, deponed in his affidavit that the feasibility study and preliminary design report were submitted to the Government of Kenya in February 2011; and that following discussions between KRC and CRBC, KRC approved the same on 26th June 2012. With regard to financing, the feasibility study had this:

> ***"The project proprietor is the Government of Kenya, who initiates the construction through the EPC model. China Road & Bridge Corporation (CRBC) will be the main contractor, who in charge of project engineering, procurement and construction-EPC. CRBC will assist the Government of Kenya to acquire the project investment."***

105. Mr. Maina went on to depone that following the approval of the feasibility study, negotiations then followed between negotiating teams representing both parties; that on 11th July 2012 and 4th October 2012, contracts were signed, with approval by MoT and the AG's office, between KRC and CRBC for the civil works and for facilities, locomotive and rolling stock respectively; that, "*the commercial contracts are part of the process towards the negotiations for funding for the project from the People's Republic of China and will*

become effective only after executing the financial agreement"; that the Government of Kenya has entered into a financing agreement with the Exim Bank of China (within a Government to Government framework directed by the Cabinet) for a concessional and a commercial loan to support the project" and that CRBC "*is to be engaged as the Engineering Procurement and Construction Contractor in line with Section 6 subsection (1) of the Public Procurement and Disposal Act 2005, this being an instance of a negotiated grants and loan*."

106. The contract for the supply and installation of the facilities, locomotive and rolling stocks had provision that:

> ***"The Government of Kenya and the Financial Institution of China have entered into the necessary financing agreement relating to provision of financing for the supply and installation of the facilities, locomotives and rolling stocks for the Mombasa-Nairobi Standard Gauge Railway Project.***
>
> ***The duly signed financing agreement entered into by the Government of Kenya and the Financial Institutions of China has been endorsed and certified by the State Law Office of Kenya."***

107. Based on the foregoing, it is not accurate, as was claimed by Mr. Maina, that the engagement of CRBC as the contractor was as a result of dictation by the financing agreement. We conclude, therefore, that the engagement of CRBC was not an obligation

arising from *"negotiated grant or loan"* agreement for purposes of Section 6 of the Act. This is because as indicated above, the contract with CRBC as the contractor was procured long before the financing agreement was entered into. The holding by the learned Judge to the contrary, is with respect, not supported by the facts as set out above.

108. We do not think that in enacting Section 6 of the Act, it was intended that the identification of a supplier of goods and services (in effect the procurement) would precede the loan agreement which would oust the procurement procedures under the Act. In this case, it is the procurement that dictated the terms of the loan that ousted the procurement procedures under the Act as opposed to the terms of the loan agreement dictating the procurement procedure or who the supplier of the goods and services would be. The situation is not at all ameliorated by the fact that the entity that undertook the feasibility study and spelt out the manner in which the project would be implemented dictated that it would be the implementor or executor of the project.

109. We conclude and hold, therefore, that in this instance, Section 6(1) of the Act did not oust the application of the Act from the procurement and KRC, as the procuring entity, was therefore under an obligation to comply with the requirements of the Act in the procurement of the SGR project.

110. In our view, the claims by the appellants that Parliament was by passed and that environmental considerations were not considered have no merit. Those claims were sufficiently countered. It was demonstrated that the project was deliberated upon by the National Assembly following which the Customs and Excise Act was amended through the Finance Act, 2013 by making provision for Railway Development Levy to fund the construction of the SGR. Equally it was also demonstrated that an environment impact assessment was undertaken and a licence granted in that regard.

111. The upshot, in conclusion, therefore is that:

    a. We uphold the decision of the learned Judge ordering to be expunged from the record documents that had been presented by the appellants as evidence in support of the petitions.

    b. We set aside that part of the judgment of the High Court holding that the procurement of the SGR was exempt from the provisions of the Public Procurement and Disposal Act, 2005 by reason of Section 6(1) thereof. We substitute therefore an order declaring that Kenya Railways Corporation, as the procuring entity, failed to comply with, and violated provisions of Article 227 (1) of the Constitution and Sections 6 (1) and 29, of the Public Procurement and Disposal Act,

2005 in the procurement of the SGR project. The appeals succeed to that extent only.

c. We order that each party shall bear its own costs of the appeal, this being a matter of public interest.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of June, 2020.

M.K. KOOME

……..……
JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

……
JUDGE OF APPEAL

J. MOHAMMED

……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR