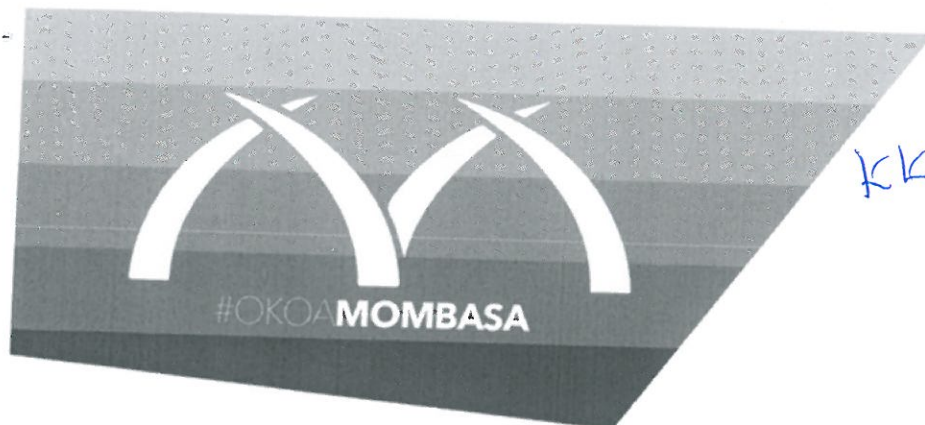


This is the annexure referred as KK1  
in the affidavit of Khelef Khalife  
Sworn at this 21st day of June  
[Signature] Commissioner for Oaths

KK-1

✉ okoamombasa@gmail.com  
🐦 @OkoaMombasa  
f OkoaMombasa



December 16, 2019

The Principal Secretary,  
Ministry of Transport, Infrastructure Housing,  
Urban Development and Public Works,  
Transcom House  
Ngong road  
P.O Box 52692 - 00200  
Nairobi.

The Managing Director,  
Kenya Ports Authority,  
P.O. Box 95009-80104,  
Mombasa.

The Managing Director,  
Kenya Railways,  
P.O Box 30121-00100  
Nairobi.

The Director General,  
Kenya National Bureau of Statistics,  
Herufi House, Lt Tumbo Lane  
P.O. Box 30266-00100,  
Nairobi.

The Registrar General,  
State Law Office,  
Sheria House, Harambee Avenue  
P.O. Box 40112-00100,  
Nairobi.

**Request for information under Article 33 and 35 of the Constitution of Kenya and the Access to Information Act, 2016**

I am a citizen of Kenya and a member of Okoa Mombasa Coalition. I am writing to request the following information from your various Government and State entities in accordance with Articles 33 and 35 of the Constitution and the Access to Information Act, 2016.

	Description	Period	Form of access
1.	<p>Agreements entered between the government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the Standard Gauge Railway (SGR), including:</p> <ul style="list-style-type: none"> <li>a. All contracts for the carrying out of feasibility studies relating the construction, operation and servicing of the SGR;</li> <li>b. Any and all documents relating to expression of interest for the financing, construction, management, operation and servicing of SGR prepared by the GOK or state/public agency or a third party on behalf of the GOK;</li> <li>c. Contracts and or Memorandum of Understanding (MOU) between GOK and any third party relating to the financing, construction, management, provision of operating stock, operation and maintenance/servicing of SGR.</li> <li>d. All agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the SGR.</li> <li>e. Any concessions, agreements and or MOU relating to the operation of the SGR including 1. Take or Pay Agreement between Kenya Railways and Kenya Ports Authority.</li> </ul>		Certified copies

	2. Agreement with Africa Star Railway Operation Company Ltd.		
2.	All documents considering relating to the viability, economic, social, cultural and environmental impacts, including: <ul style="list-style-type: none"> <li>a. Feasibility studies</li> <li>b. Strategic Environmental Assessment</li> <li>c. Environmental Social Impact Assessment</li> <li>d. Cultural Heritage Assessment</li> </ul>		
3.	Memorandum of Understanding between the Government of Kenya or a State/Public Agency and Kenya National Shipping Line, Mediterranean Shipping Company or any of its subsidiaries or affiliates, or any other private entity relating to the management and/or operation of Container Terminal 2 (CT2) Port of Mombasa, including all annexures and associated documents.		Certified copies
3.	Statistics around cargo handling at the Port of Mombasa (ICD Nairobi, Dry Port Naivasha etc.) including but not limited to the amount of cargo handled at the Port, Port storage capacity, amount of cargo loaded on SGR, SGR cargo capacity, number of trains per day.	From commencement of SGR services (passenger and cargo) to date.	Certified copies, online (Entities' website – proactive disclosure)
4.	Details of registration of Africa Star Railway Operation Company Ltd including but not limited to: <ul style="list-style-type: none"> <li>1. Particulars of registration,</li> <li>2. Details of all shareholders</li> <li>3. Proportion of shareholding for each shareholder.</li> </ul>		Certified copies

I am prepared to collect this information in person and undertake to pay the costs incurred for the reproduction of the information as per the Access to Information Act.

It is my view that the information I seek is information the state should have disclosed without any prompting based on positive and proactive disclosure obligations under Article 35 of the Constitution because it is information that is of importance to the public.

I request that you avail this information as soon as possible, but in any event, no later than 21 days from the date of receipt of this application, pursuant to section 9 of the Access to Information Act.

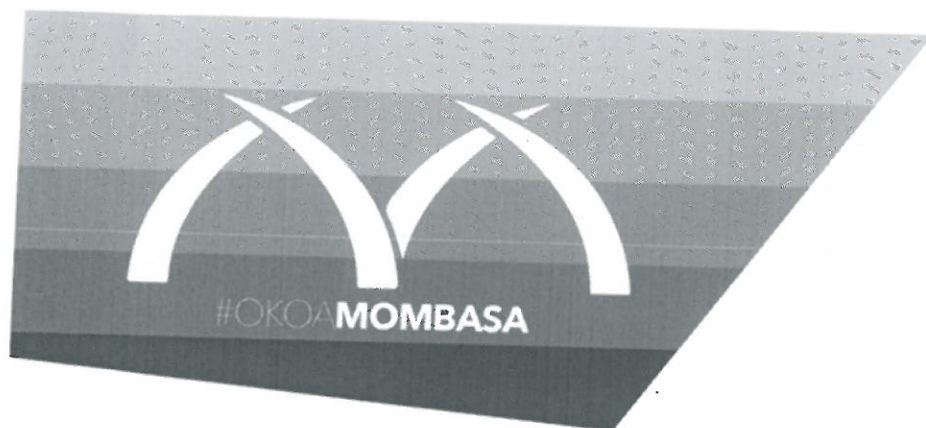
Kind regards,



Khelef Khalifa,  
Chairman MUHURI  
On behalf of Okoa Mombasa

cc.

The Chairperson,  
Commission on Administrative Justice,  
2<sup>nd</sup> Floor, West End Towers,  
Opposite Aga Khan High School off Waiyaki Way – Westlands,  
P.O Box 20414-00200,  
Nairobi.



✉ okoamombasa@gmail.com

🐦 @OkoaMombasa

📘 OkoaMombasa

May 13, 2021

The Permanent Secretary,  
The National Treasury  
Harambee Avenue, Treasury Building,  
P.O Box 30007-00100  
Nairobi

Email: ps@treasury.go.ke

**Request for information under Article 33 and 35 of the Constitution of Kenya and the Access to Information Act, 2016**

I am a citizen of Kenya and a member of Okoa Mombasa Coalition. I am writing to request the following information from the Treasury in accordance with Articles 33 and 35 of the Constitution and the Access to Information Act, 2016.

	Description	Period	Form of access
1.	<p>Agreements entered between the government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the Standard Gauge Railway (SGR), including:</p> <ul style="list-style-type: none"> <li>a. All contracts for the carrying out of feasibility studies relating the construction, operation and servicing of the SGR:</li> <li>b. Any and all documents relating to expression of interest for the financing, construction, management, operation and servicing of SGR prepared by the GOK or state/public agency or a</li> </ul>		Certified copies

	<p>third party on behalf of the GOK;</p> <p>c. Contracts and or Memorandum of Understanding (MOU) between GOK and any third party relating to the financing, construction, management, provision of operating stock, operation and maintenance/servicing of SGR.</p> <p>d. All agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the SGR.</p> <p>e. Any concessions, agreements and or MOU relating to the operation of the SGR including</p> <ol style="list-style-type: none"> <li>1. Take or Pay Agreement between Kenya Railways and Kenya Ports Authority.</li> <li>2. Agreement with Africa Star Railway Operation Company Ltd.</li> </ol>		
2.	<p>All documents considering relating to the viability, economic, social, cultural and environmental impacts, including:</p> <ol style="list-style-type: none"> <li>a. Feasibility studies</li> <li>b. Strategic Environmental Assessment</li> <li>c. Environmental Social Impact Assessment</li> <li>d. Cultural Heritage Assessment</li> </ol>		
3.	<p>Memorandum of Understanding between the Government of Kenya or a State/Public Agency and Kenya National Shipping Line, Mediterranean Shipping Company or any of its subsidiaries or affiliates, or any other private entity relating to the management and/or operation of Container Terminal 2 (CT2) Port of Mombasa, including all annexures and associated documents.</p>		Certified copies

I am prepared to collect this information in person and undertake to pay the costs incurred for the reproduction of the information as per the Access to Information Act.

It is my view that the information I seek is information the state should have disclosed without any prompting based on positive and proactive disclosure obligations under Article 35 of the Constitution because it is information that is of importance to the public.

I request that you avail this information as soon as possible, but in any event, no later than 21 days from the date of receipt of this application, pursuant to section 9 of the Access to Information Act.

Kind regards,



Khelef Khalifa,  
Chairman MUHURI  
On behalf of Okoa Mombasa

cc.

The Chairperson,  
Commission on Administrative Justice,  
2<sup>nd</sup> Floor, West End Towers,  
Opposite Aga Khan High School off Waiyaki Way – Westlands,  
P.O Box 20414-00200,  
Nairobi.



Search mail



Compose

Inbox

1,375

Sent from my iPhone

Starred

Begin forwarded message:

Snoozed

Meet

New meeting

Join a meeting

**From:** Okoa Mombasa <[okoamombasa@gmail.com](mailto:okoamombasa@gmail.com)>  
**Date:** May 13, 2021 at 5:34:32 PM GMT+3  
**To:** [ps@treasury.go.ke](mailto:ps@treasury.go.ke)  
**Cc:** Khelef Khalifa <[elbusaidykk@gmail.com](mailto:elbusaidykk@gmail.com)>  
**Subject:** Fwd: Request for Information under Articles 33 and 35 of the Constitution of Kenya 2010

Hangouts

willis



Trying to reconnect...

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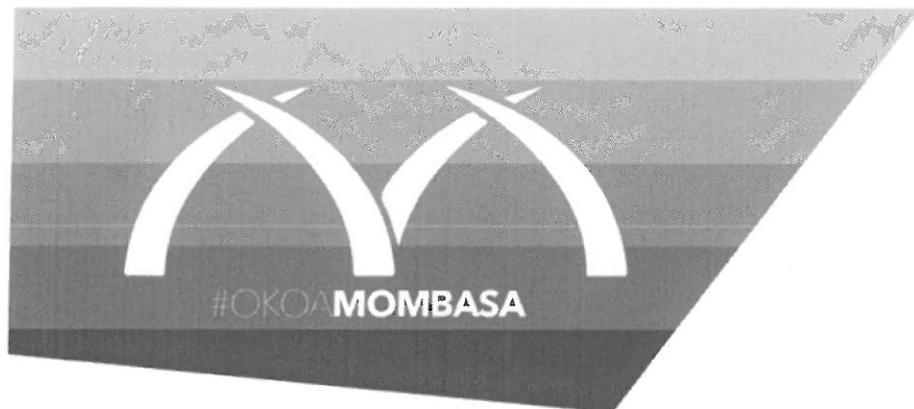
Dear Sir/Madam,

Please find attached a request for information for your attention.

Kind regards,  
Khelef Khalifa

No Hangouts contacts

[Find someone](#)



✉ okoamombasa@gmail.com  
 🐦 @OkoaMombasa  
 📌 OkoaMombasa

December 23, 2019

The Managing Director,  
 Kenya Railways,  
 P.O Box 30121-00100  
 Nairobi.

**Request for information under Article 33 and 35 of the Constitution of Kenya and the Access to Information Act, 2016**

I am in receipt and thank you for your letter dated December 18, 2019 signed by D. Njogu. That letter was in response to mine of December 16, 2019.

As you are aware, my letter particularized and enumerated the various pieces of information that we were seeking from your office. In your letter, you admit having some of that information. However, you cite non-disclosure on the basis of Section 6(1) and (2) of the Access to Information Act.

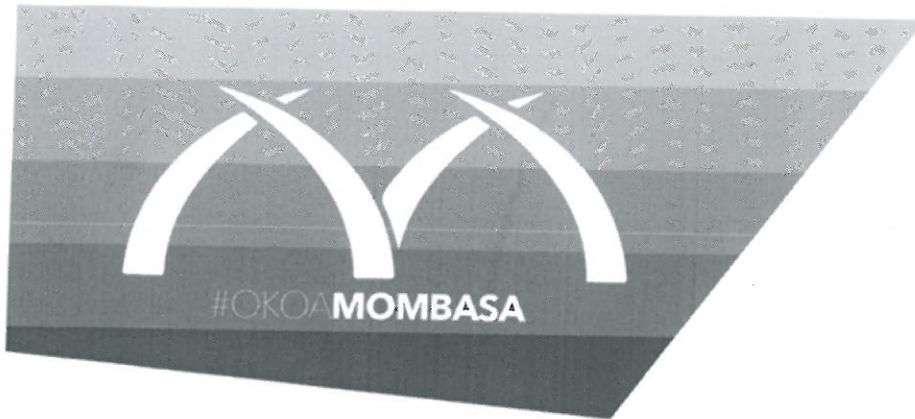
**Please note** that we require you to provide us with the following:

- a. The list of documents and pieces of information you have and in relation to which you seek non-disclosure;
- b. In regard to each item in respect of (a) above, the specific paragraph of Section 6 on which you are basing your objection to disclosure and the particularized and elaborate reasons for non-disclosure. As you know the grounds for non-disclosure under Section 6 are wide-ranging.

Please treat this as a request under Article 47 in particular but also articles 33 and 35 of the Constitution. Kindly avail the requested information and reasons within 7 days of the date of receipt of this request.

Kind regards,

Khelef Khalifa,  
 Chairman MUHURI  
 On behalf of Okoa Mombasa



✉ okoamombasa@gmail.com  
 🐦 @OkoaMombasa  
 📌 OkoaMombasa

May 28, 2020

The Solicitor General,  
 State Law Office,  
 Sheria House, Harambee Avenue  
 P.O. Box 40112-00100,  
 Nairobi.

Email: communications@ag.go.ke

**Request for information under Article 33 and 35 of the Constitution of Kenya and the Access to Information Act, 2016**

I am a citizen of Kenya and a member of Okoa Mombasa Coalition. I am writing to request the following information from your various Government and State entities in accordance with Articles 33 and 35 of the Constitution and the Access to Information Act, 2016.

	Description	Period	Form of access
1.	<p>Agreements entered between the government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the Standard Gauge Railway (SGR), including:</p> <ul style="list-style-type: none"> <li>a. All contracts for the carrying out of feasibility studies relating the construction, operation and servicing of the SGR:</li> <li>b. Any and all documents relating to expression of interest for the financing, construction, management, operation and servicing of SGR prepared by the GOK or state/public agency or a</li> </ul>		Certified copies

	<p>third party on behalf of the GOK;</p> <p>c. Contracts and or Memorandum of Understanding (MOU) between GOK and any third party relating to the financing, construction, management, provision of operating stock, operation and maintenance/servicing of SGR.</p> <p>d. All agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the SGR.</p> <p>e. Any concessions, agreements and or MOU relating to the operation of the SGR including</p> <ol style="list-style-type: none"> <li>1. Take or Pay Agreement between Kenya Railways and Kenya Ports Authority.</li> <li>2. Agreement with Africa Star Railway Operation Company Ltd.</li> </ol>		
2.	<p>All documents considering relating to the viability, economic, social, cultural and environmental impacts, including:</p> <ol style="list-style-type: none"> <li>a. Feasibility studies</li> <li>b. Strategic Environmental Assessment</li> <li>c. Environmental Social Impact Assessment</li> <li>d. Cultural Heritage Assessment</li> </ol>		
3.	<p>Memorandum of Understanding between the Government of Kenya or a State/Public Agency and Kenya National Shipping Line, Mediterranean Shipping Company or any of its subsidiaries or affiliates, or any other private entity relating to the management and/or operation of Container Terminal 2 (CT2) Port of Mombasa, including all annexures and associated documents.</p>		Certified copies

I am prepared to collect this information in person and undertake to pay the costs incurred for the reproduction of the information as per the Access to Information Act.

It is my view that the information I seek is information the state should have disclosed without any prompting based on positive and proactive disclosure obligations under Article 35 of the Constitution because it is information that is of importance to the public.

I request that you avail this information as soon as possible, but in any event, no later than 21 days from the date of receipt of this application, pursuant to section 9 of the Access to Information Act.

Kind regards,



Khelef Khalifa,  
Chairman MUHURI  
On behalf of Okoa Mombasa

cc.

The Chairperson,  
Commission on Administrative Justice,  
2<sup>nd</sup> Floor, West End Towers,  
Opposite Aga Khan High School off Waiyaki Way – Westlands,  
P.O Box 20414-00200,  
Nairobi.



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL  
&  
DEPARTMENT OF JUSTICE

YOUR REF: CAJ/ATI/AG/001/11/20 - SNK  
OUR REF: AG/CONF/4/70 Vol. II (240)

28<sup>th</sup> August, 2020

Ms. Lucy Ndungu, EBS  
Commissioner, Access to Information  
Commission on Administrative Justice  
West End Towers, 2<sup>nd</sup> Floor  
Waiyaki Way - Westlands  
NAIROBI

02 SEP 2020

**RE: REQUEST FOR INFORMATION BY KHELEF KHALIFA FROM YOUR OFFICE**

We make reference to your letter dated 26<sup>th</sup> June, 2020 requesting for information.

We comment as follows:

1. We note that Mr. Khelef Khalifa requests for the following documents:

*Agreements entered between the Government of Kenya (GOK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to the Standard Gauge Railway (SGR), including;*

- a) *All contracts for the carrying out of feasibility studies relating the construction, operation and servicing of the SGR;*
- b) *Any and all documents relating to expression of interest for the financing, construction, management, operation and servicing of SGR prepared by the GOK or state/public agency or a third party on behalf of the GOK;*
- c) *Contracts and or Memorandum of Understanding (MOU) between GOK and any third party relating to the financing, construction, management, provision of operating stock, operation and maintenance/servicing of SGR;*

SHERIA HOUSE, HARAMBEE AVENUE  
P.O. Box 40112-00100, NAIROBI, KENYA. TEL: +254 20 221700/22512/25071/04/555 0732520002  
E-MAIL: [info@attorneysoffice.go.ke](mailto:info@attorneysoffice.go.ke) WEB SITE: [attorneysoffice.go.ke](http://attorneysoffice.go.ke)

DEPARTMENT OF JUSTICE  
CO-OPERATIVE BANK HOUSE, HAILU LELASIE AVENUE, P.O. Box 5057 00100, Nairobi-Kenya TEL: Nairobi 2224029/2240537  
E-MAIL: [info@justice.go.ke](mailto:info@justice.go.ke) WEBSITE: [www.justice.go.ke](http://www.justice.go.ke)

ISO 9001:2008 Certified



d) All agreements and contracts entered into including loan agreements, concession agreements, guarantees and/or collateral for financing, construction, management, operation and maintenance/servicing of the SGR;

2. Further, the letter from Kenya Railways dated 17<sup>th</sup> April, 2020 under Ref. KRC/CS/MD/3/207 indicates as follows:

*"Kindly note that the projects to which information is being requested in clauses 1a – 1d are projects between the Government of the People's Republic of China and the Government of Kenya with Kenya Railway's mandate solely being as an implementing agency of the said contracts. The custody of the said contracts is with the Office of the Hon. Attorney General."*

3. Kindly be advised that this Office is not the custodian of Project documents such as the ones listed above. We further advise that the role of this Office is to render legal advice to the Government as stipulated under Article 156 of the Constitution.
4. We note that Kenya Railways in its letter has stated that the Contracts have non-disclosure clauses. Therefore, the requested documents cannot be availed as the same would be in breach of the Agreements and might have serious legal and financial repercussions.

Kindly be guided accordingly.



Njeri Wachira, MBS  
Deputy Solicitor General  
**FOR: SOLICITOR GENERAL**

Copy to: Hon. P. Kihara Kariuki, EGH  
**ATTORNEY GENERAL**

Mr. Kennedy Ogeto CBS  
**SOLICITOR GENERAL**

P.O. Box 30121-00100, Nairobi, Kenya  
 Tel: 0709-907 114, 0709-907 000  
 Cell: 0728-603 581, 0728-603 582  
 E-mail: info@krc.co.ke  
 Website: www.krc.co.ke



Your Ref: CAJ/ATI/M/TRA/004/6/20 - SNK  
 Our Ref: KRC/CS/MD/3/207

Date: 17<sup>th</sup> April, 2020

Mrs. Lucy Ndung'u  
 Commissioner  
 Commission of Administrative Justice  
 West End Towers, 2<sup>nd</sup> Floor  
 Waiyaki Way, Westlands  
 P.O. Box 20414 - 00200  
**NAIROBI**



Dear Madam

**RE: REQUEST FOR ACCESS TO INFORMATION/DOCUMENTS BY MR. KHELEF KHALIFA ON STANDARD GAUGE RAILWAY (SGR) TO KENYA RAILWAYS**

We refer to the above matter and your letter of even reference dated 12<sup>th</sup> March, 2020.

We have perused the letter from Mr. Khelef Khalifa on the Request for information under Article 33 and 35 of the Constitution of Kenya and the Access to Information Act, 2016 with particular reference to Agreements entered between the Government of Kenya (GoK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to Standard Gauge Railway (SGR) and noted the contents therein.

Kindly note that the projects to which information is being requested in clauses 1a - 1d are projects between the Government of the People's Republic of China and the Government of Kenya with Kenya Railway's mandate solely being as an implementing agency of the said contracts. The custody of the said contracts is with the Office of the Hon. Attorney General.

With regard to the Agreements in Clause 1e, the same have non-disclosure clauses and therefore would be in breach of the Contractual terms of the same upon submission of the said Agreements.

We thank you for your continued cooperation.

Yours Sincerely



PHILIP MAINA  
MANAGING DIRECTOR

P.O Box 30121-00100, Nairobi, Kenya  
Tel: 0709-907 114, 0709-907 000  
Cell: 0728-603 581, 0728-603 582  
E-mail: info@krc.co.ke  
Website: www.krc.co.ke



**Our Ref:KRC/CS/MD/207**

**Date: 18<sup>th</sup> December, 2019**

Okoa Mombasa  
okoamombasa@gmail.com

Dear Sir,

**RE: REQUEST FOR INFORMATION UNDER ARTICLE 33 AND 35 OF  
THE CONSTITUTION OF KENYA AND ACCESS TO  
INFORMATION ACT, 2016**

We refer to the above matter and your letter dated 16<sup>th</sup> December, 2019.

We have noted that some of the information requested for, Kenya Railways is not party to the contracts and therefore have no access.

On the others that Kenya Railways is a party to, we wish to advise that the Corporation is not able to provide the information requested for in your said letter on account of Section 6(1) & (2) Access to Information Act No. 31 of 2016 and due to contractual obligations of the parties.

Please be advised accordingly.

Yours faithfully,



**D. NJOGU**

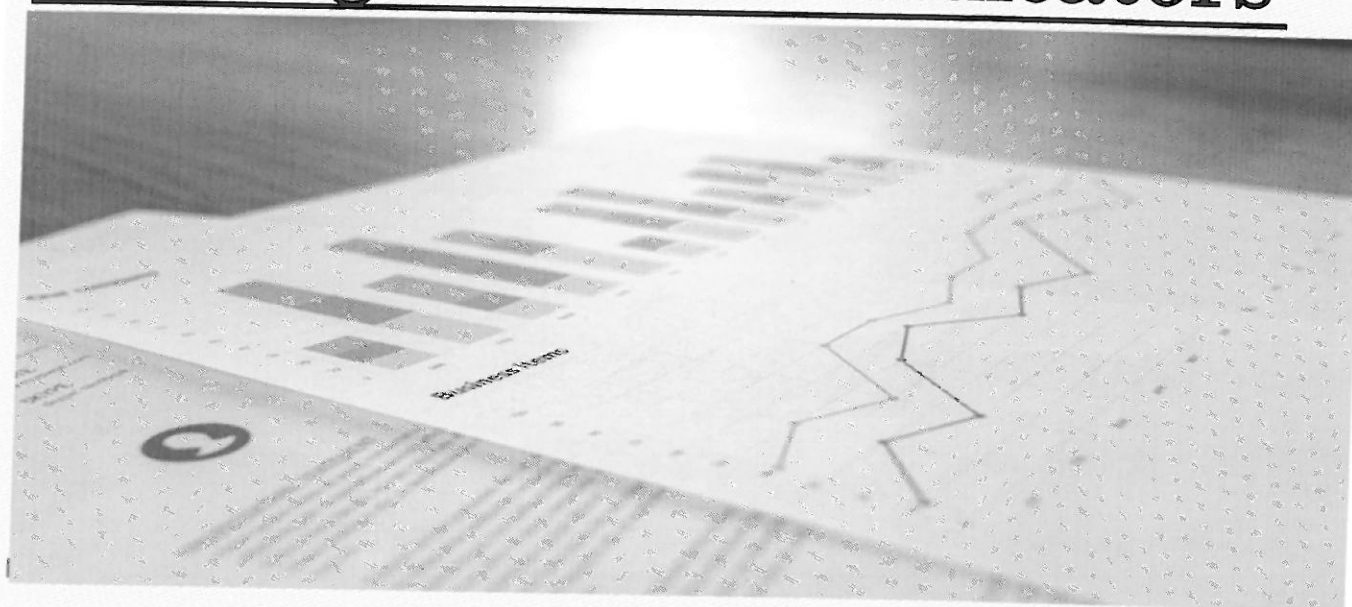
**GM- LEGAL SERVICES & CORPORATION SECRETARY**

**THE NATIONAL TREASURY  
DEBT MANAGEMENT DEPARTMENT  
SUMMARY STATEMENT OF PUBLIC DEBT**

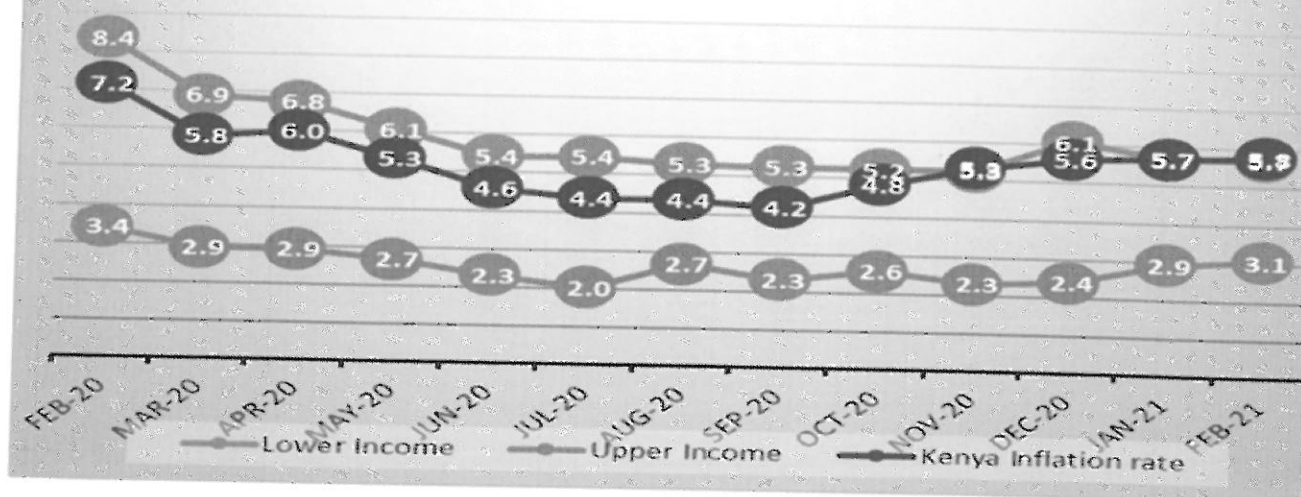
		AMOUNT OUTSTANDING AS AT 30-06-2017 Kshs.	AMOUNT REPAID AS AT 30-06-2018 Kshs.	AMOUNT OUTSTANDING AS AT 30-06-2018 Kshs.
<b>EXTERNAL LOANS</b>				
Pound Sterling Loans	Part I			
US Dollar Loans	Part II	650,142,163	3,336,844,073	271,679,223
Euro Loans	Part III	1,786,839,105,884	302,594,665,278	2,092,922,917,126
Other Currencies	Part IV	158,743,469,445	55,465,352,568	167,618,909,382
		137,046,583,433	114,264,398,976	143,085,596,453
<b>SUB TOTAL</b>		2,083,279,300,924	475,661,260,894	2,403,899,102,184
<b>INTERNAL LOANS</b>	Part V			
Pre-1997 Govt. O.D. Debt				
Treasury Bonds		24,448,755,686	1,110,000,000	23,338,755,686
Short Term Borrowing		1,338,719,195,967	111,700,845,296	1,495,557,343,612
		747,654,900,000	-	878,621,650,000
<b>SUB TOTAL</b>		2,110,822,851,653	112,810,845,296	2,397,517,749,298
<b>GRAND TOTAL</b>		4,194,102,152,577	588,472,106,190	4,801,416,851,482

FOLIO No.	CREDITOR	PURPOSE	INTEREST RATE %	CURR.	AMOUNT OUTSTANDING AS AT 30-06-2017 Kshs Equivalent	CUMULATIVE AMOUNT REPAID AS AT 30-06-2018 Kshs Equivalent	AMOUNT OUTSTANDING AS AT 30-06-2018 Kshs Equivalent	REPAYMENT TERMS / COMMENTS
R5 - 20	Spain Instituto De Credito (ICO)	Supply of Medical Equipment to Hospitals - Bilateral loan SPN-5 (1997011)	1	USD	-	-	-	Loan of USD 2,136,605.00. Repayable in 21 half year equal instalments commencing 21st May 2007 and ending on 21st May 2017
R5 - 22	Spain Instituto De Credito (ICO)	Rural Electrification Programme I Loan SPN-8 (1998027)	1	USD	294,850,820	214,642,745	262,302,461	Loan of USD 5,067,929.84. Repayable in 41 equal half year instalments Commencing on 23rd September 2008 and ending on 23rd September 2028
R5 - 23	Spain Instituto De Credito (ICO)	Supply of medical equipment Phase III - SPN-10 (2000014)	0.3	USD	346,138,502	191,780,194	313,165,413	Loan of USD 4,887,063.50. Repayable in 41 half year equal instalments Commencing on 20th February 2011 and ending on 20th February 2031
R5 - 24	Spain Instituto De Credito (ICO)	Rural Electrification Programme - II SPN -11 (2001001)	0.3	USD	384,623,870	151,993,783	361,367,526	Loan of USD 5,430,431. Repayable in 41 equal half year instalments commencing 1st June 2011 and ending on 1st June 2031
R5 - 40	China (Exim Bank of China)	Nairobi Eastern and Northern bypass - 2008006	2	USD	8,960,690,880	2,912,256,000	8,003,160,000	Loan of USD 108,000,000. Repayable in 30 semi annual equal instalments commencing 30th January 2015 and ending on 30th July 2023
R5 - 47	China (Exim Bank of China)	Kenya Nairobi Southern Bypass - 2011017	2	USD	19,041,468,120	-	18,552,780,000	Loan of USD 183,600,000. Repayable in semi annual equal instalments commencing 21st January 2018 and ending on 21st July 2030.
R5 - 85	China (Exim Bank of China)	Provision for Drilling Materials - 2012005	2	USD	37,569,804,440	-	38,651,625,000	Loan of USD 382,500,000. Repayable in 26 equal instalments commencing 21st July, 2020.
R5 - 73	China (Exim Bank of China)	Kenya Mombasa Nairobi Standard Gauge Railway project - 2014006	Libor + 3.6	USD	140,298,224,567	-	149,188,776,427	Loan of USD 1,600,000,000. Repayable in Semi Annually commencing 21st July, 2021 and ending on 21st January, 2034
R5 - 63	China (Exim Bank of China)	Kenya Nairobi-Naivaslia Standard Gauge Railway Project - 2015023	Libor + 3	USD	51,938,792,064	-	50,605,813,405	Loan of USD 1,482,745,029.43 to be repaid in 30 instalments from January 21, 2021 to July 21, 2035
R5 - 51	China (Exim Bank of China)	Kenya Mombasa Nairobi Standard Gauge Railway Project (comm) - 2014008	Libor + 3.6	USD	129,620,743,564	-	170,506,095,346	Loan of USD 2,003,584,028.87. Repayable in Semi Annual Instalments commencing 21st July, 2019 and ending on 21st January, 2029

# Leading Economic Indicators



## Kenya Inflation rate



FEBRUARY 2021

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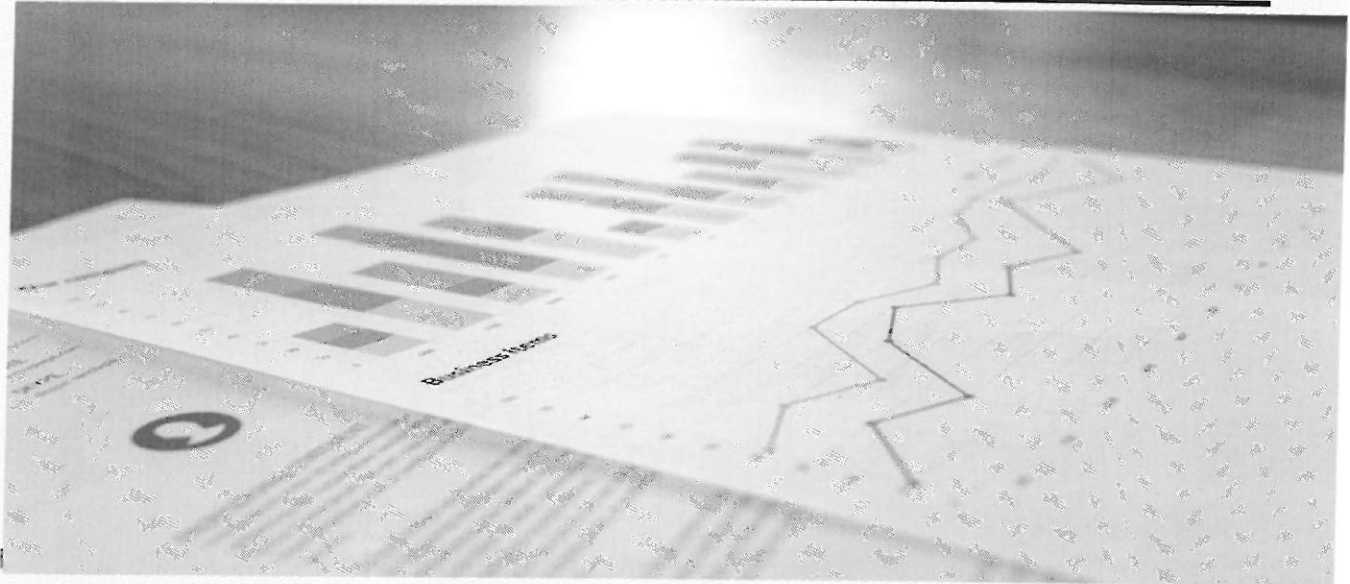
Table 19(d): Passenger and Cargo Movement on the Standard Gauge Railway

Month	PASSENGER				FREIGHT			
	2020		2021*		2020		2021*	
	No. Passengers	Revenue (KSh)	No. Passengers	Revenue (KSh)	Tonnage	Total Revenue (KSh)	Tonnage	Total Revenue (KSh)
January	117,380	130,259,172.00	156,918.00	163,768,440.00	375,828	1,092,488,053.49	449,731	1,052,531,751.00
February	114,241	127,932,570.00	142,346.00	156,558,140.00	293,088	834,306,615.27	456,136	1,008,013,109.00
March	89,109	95,221,510.00			259,138	755,413,357.33		
April	6,363	5,905,980.00			327,091	929,475,945.65		
May	0	0.00			342,326	962,667,608.25		
June	0	0.00			383,782	1,029,900,406.88		
July	19,502	22,833,600.00			421,745	1,233,867,658.74		
August	32,641	39,471,550.00			414,775	1,115,103,597.22		
September	43,235	51,837,050.00			369,246	1,037,717,598.49		
October	112,411	125,443,750.00			427,388	1,178,620,650.15		
November	119,238	128,922,180.00			412,426	1,162,966,849.40		
December	128,922,180	168,201,190.00			389,804	1,103,652,195.90		
<b>TOTAL</b>	<b>129,576,300</b>	<b>896,028,552</b>	<b>299,264</b>	<b>320,326,580.00</b>	<b>4,416,637</b>	<b>12,436,180,536.77</b>	<b>905,867.00</b>	<b>2,060,544,860.00</b>

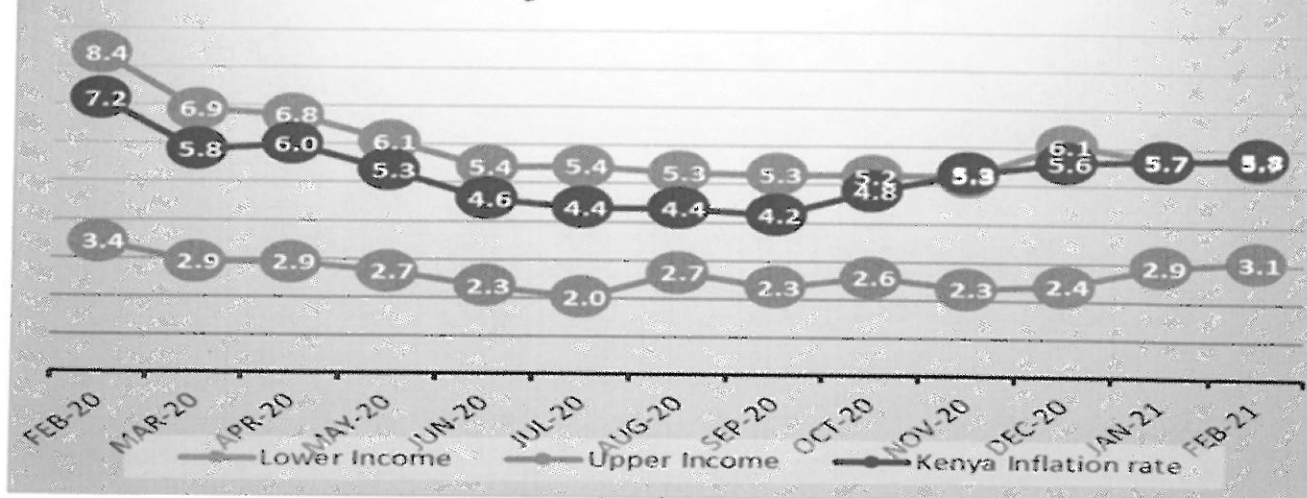
Source: Kenya Railways Corporation

\*Provisional

# Leading Economic Indicators



## Kenya Inflation rate



FEBRUARY 2021

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## KEY HIGHLIGHTS

### OVERVIEW

The Monthly Leading Economic Indicators report highlights changes in Consumer Price Indices (CPI) and inflation, interest & exchange rates. In addition, the report presents changes in selected indicators of international trade, agriculture, energy, manufacturing, building and construction, tourism and transport.

### MACROECONOMIC INDICATORS

The Consumer Price Index (CPI) increased from 112.58 points in January 2021 to 113.36 points in February 2021. The overall rate of inflation rose marginally from 5.69 per cent in January 2021 to 5.78 per cent in February 2021. In February 2021, the Kenyan Shilling appreciated against all major trading currencies except the Sterling Pound and the SA Rand. The average yield rate for the 91-day Treasury bills, which is a benchmark for the general trend of interest rates dropped from 6.92 per cent in January 2021 to 6.90 per cent in February 2021, while the inter-bank rate dropped from 5.12 per cent to 4.49 per cent over the same period.

The Nairobi Securities Exchange (NSE) 20 share index increased from 1,882 points in January 2021 to 1,916 points in February 2021. At the same time the total number of shares traded increased from 294 million shares to 331 million shares. The total value of NSE shares traded increased from KSh 8.85 billion in January 2021 to KSh 10.82 billion in February 2021.

Broad money supply (M3), a key indicator for monetary policy formulation, increased from KSh 3,992.89 billion in January 2021 to KSh 4,042.99 billion in February 2021. The value of Gross Foreign Exchange Reserves decreased from KSh 1,449.34 billion in January 2021 to KSh 1,447.60 billion in February 2021. The value of Net Foreign Exchange Reserves dropped from KSh 752.87 billion to KSh 717.90 billion during the same period.

## AGRICULTURE



The quantity of coffee auctioned at the Nairobi Coffee Exchange was 5,325.48 MT in February 2021 while the average auction price stood at KSh 664.49 per kilogram over the same period. The quantity of produced tea decreased from 48,896.13 MT in January 2021 to 43,398.65 MT in February 2021. The price of processed tea rose from KSh 222.81 per kilogram in January 2021 to KSh 230.27 per kilogram in February 2021. The quantity of cane deliveries decreased from 681.54 thousand metric tonnes in January 2021 to 660.44 thousand metric tonnes in February 2021.

The quantity of cut-flower exports in February 2021 was 17,411.90 MT while its value was KSh 11,946.71 million. The quantity of vegetable exports decreased from 6,066.26 MT in January 2021 to 5,363.26 MT in February 2021. The value of vegetable exports also decreased from KSh 3,428.14 million to KSh 2,222.24 million during the same period.

## INTERNATIONAL TRADE

Volume of trade rose from KSh 215.04 billion in January 2021 to KSh 227.21 billion in February 2021. The value of total exports increased from KSh 54.31 billion in January 2021 to KSh 67.49 billion in February 2021, while the value of imports decreased from KSh 160.72 billion in January 2021 to KSh 159.72 billion in February 2021. Domestic exports by Broad Economic Category (BEC) indicated that food and beverages was the main export category in February 2021 accounting for 43.13 per cent of the domestic exports, while non-food industrial supplies accounted for 24.33 per cent of the domestic exports.

Quantity of coffee exported increased from 2,129.36 MT in January 2021 to 3,481.13 MT in February 2021 while its value rose from KSh 1,342.45 million to KSh 2,161.12 million over the same period. The quantity of tea exported increased from 48,811.79 MT in January 2021 to 50,389.92 MT in February 2021. The value of exported tea also rose from KSh 11,378.64 million to KSh 11,725.86 million over the same period.

Imports by BEC indicate that non-food industrial supplies was the main import category in February 2021 with a share of 40.96 per cent. Fuel and lubricants; Machinery & other capital equipment; and transport equipment accounted for 15.57, 13.60 and 9.54 per cent of the total value of imports, respectively. Foods and beverages accounted for 12.39 per cent of the total imports in February 2021.

## ENERGY



Total local electricity generation decreased from 1,014.91 million KWh in January 2021 to 925.92 million KWh in February 2021. In the international market, the price of the OPEC crude oil basket increased from US Dollars 54.38 per barrel in January 2021 to US Dollars 61.05 per barrel in February 2021.

The national average domestic retail oil prices of motor gasoline premium rose from KSh 107.86 per litre in January 2021 to KSh 116.03 in February 2021. The price of light diesel oil rose from KSh 97.33 per litre in January 2021 to retail at KSh 102.84 per litre in February 2021. Similarly, the average price for Kerosene rose from KSh 88.07 per litre to retail at KSh 93.37 per litre during the same period. Charcoal prices averaged KSh 58.37 per Kg in February 2021. The price of a 13-Kg cylinder of gas averaged KSh 2,031.21 in February 2021.

## MANUFACTURING, BUILDING AND CONSTRUCTION



The quantity of cement produced decreased from 652,883 MT in January 2021 to 612,980 MT in February 2021. Consumption of cement dropped from 647,491 MT in January 2021 to 606,547 MT in February 2021. Sugar production increased from 58,044 Metric tonnes in January 2021 to 61,508 Metric tonnes in February 2021. Production of assembled vehicles in-

creased from 559 units in January 2021 to 561 units in February 2021. Milk uptake in the formal sector dropped from 59.17 million litres in January 2021 to 57.20 million litres in February 2021.

## ICT, TOURISM AND TRANSPORT



The total number of mobile money transactions was 164.20 million in February 2021 while their value stood at KSh 567.99 billion. The value of imports for telecommunication equipment dropped from KSh 2,003.02 million in January 2021 to KSh 1,158.86 million in February 2021.

The total number of visitors arriving through Jomo Kenyatta (JKIA) and Moi International Airports (MIA) decreased from 47,038 persons in January 2021 to 35,052 persons in February 2021. The number of passengers who landed at Jomo Kenyatta International Airport (JKIA) decreased from 85,066 persons in January 2021 to 66,488 persons in February 2021, and passengers who embarked decreased from 92,961 persons to 68,530 persons over the same period. Total monthly throughput at the port of Mombasa rose from 3,169.73 thousand metric tonnes in January 2021 to 3,214.66 thousand metric tonnes in February 2021.

Table 1(a): Kenya Consumer Price Indices

Kenya CPI: Base period February 2019=100

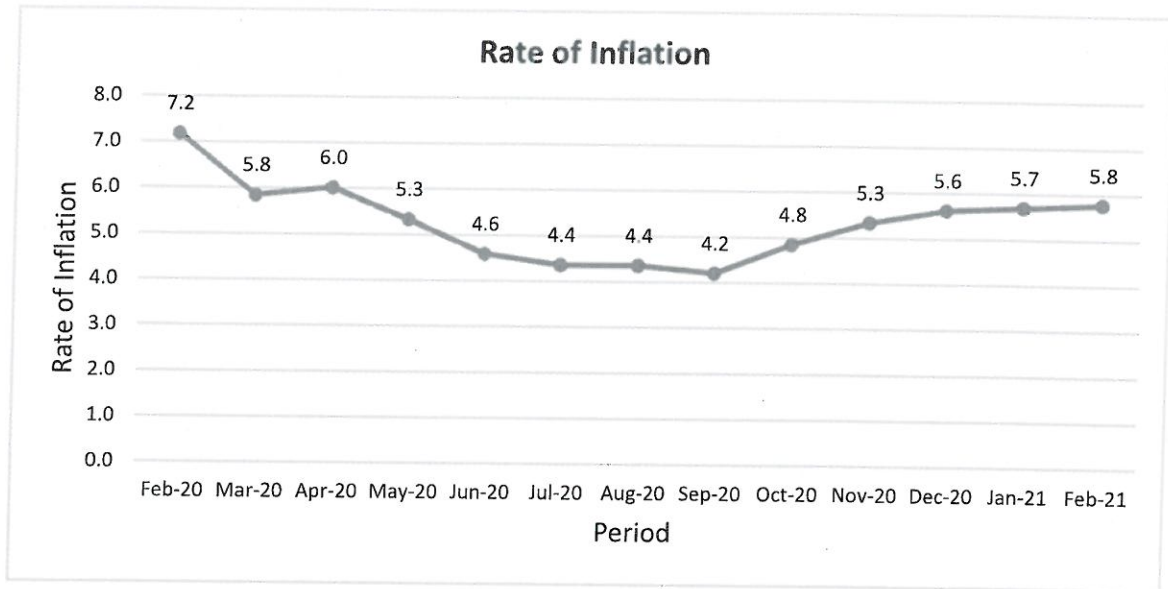
Group	Nairobi			Nairobi Combined	Rest of Urban Areas	Kenya CPI
	Lower Income	Middle Income	Upper Income			
<b>2020</b>						
January.....	107.50	102.99	102.65	105.48	107.25	106.51
February....	108.36	103.34	103.41	106.16	107.89	107.17
March.....	108.85	103.52	103.42	106.50	108.17	107.47
April.....	109.88	104.04	103.69	107.27	109.36	108.49
May.....	109.93	103.74	104.00	107.24	109.57	108.60
June.....	109.70	104.14	103.84	107.22	109.01	108.27
July.....	110.01	103.37	103.79	107.14	109.22	108.35
August.....	109.90	103.49	104.55	107.21	109.54	108.57
September..	110.04	103.63	104.26	107.30	109.48	108.57
October.....	110.40	104.42	104.60	107.79	110.89	109.60
November...	111.31	104.76	104.59	108.41	112.46	110.78
December...	113.06	105.65	105.10	109.74	113.38	111.87
<b>2021</b>						
January.....	113.63	106.20	105.63	110.30	114.20	112.58
February....	114.56	106.75	106.56	111.11	114.97	113.36

## Notes

1. Nairobi Lower Income Group constitute of Households spending KSh. 46,355 or less per month in February 2015 (they are 70.89% of the households).
2. Nairobi Middle-Income Group constitute of Households spending between KSh. 46,356 up to and including KSh. 184,394 per month in February 2015 (they are 25.58% of the households).
3. Nairobi Upper Income Group constitute of Households spending above KSh. 184,395 per month in February 2015 (they are 3.53% of the households).

Table 1(b): Kenya Inflation rate

Period	Inflation Rates					
	Nairobi				Rest of Urban Areas	Kenya CPI
	Lower Income	Middle Income	Upper Income	Combined		
<b>2020</b>						
February.....	8.36	3.34	3.41	6.16	7.89	<b>7.17</b>
March.....	6.90	3.29	2.89	5.28	6.24	<b>5.84</b>
April.....	6.77	3.40	2.90	5.25	6.55	<b>6.01</b>
May.....	6.08	2.68	2.67	4.61	5.84	<b>5.33</b>
June.....	5.42	2.79	2.29	4.23	4.84	<b>4.59</b>
July.....	5.44	1.84	2.01	3.90	4.68	<b>4.36</b>
August.....	5.30	1.79	2.68	3.88	4.69	<b>4.36</b>
September....	5.26	1.67	2.29	3.77	4.50	<b>4.20</b>
October.....	5.24	2.31	2.57	4.01	5.43	<b>4.84</b>
November.....	5.26	2.32	2.28	3.99	6.28	<b>5.33</b>
December.....	6.08	2.86	2.38	4.64	6.30	<b>5.62</b>
<b>2021</b>						
January.....	5.70	3.11	2.91	4.57	6.48	<b>5.69</b>
February.....	5.73	3.30	3.05	4.66	6.56	<b>5.78</b>

**Fig. 1: Inflation rates**

**Table 2: Mean Foreign Exchange rates of Kenyan Shilling against Selected Major Currencies at the end of the Month**

Year	2020											2021	
Currency	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb
1 US Dollar.....	100.79	103.74	106.41	106.68	106.40	107.27	108.32	108.41	108.64	109.25	110.59	109.83	109.68
1 Pound Sterling...	130.83	128.54	131.92	131.29	133.38	135.30	141.98	140.89	140.94	144.13	148.42	149.75	151.80
1 Euro.....	109.94	114.67	115.61	116.12	119.83	122.51	128.36	128.01	127.85	129.16	134.33	133.80	132.62
100 Japanese Yen.	91.58	96.37	98.78	99.55	98.92	100.34	102.45	102.68	103.22	104.65	106.55	105.90	104.12
1 SA Rand.....	6.72	6.29	5.74	5.87	6.22	6.39	6.46	6.48	6.59	7.01	7.41	7.26	7.41
USHS/KES.....	36.45	36.33	35.56	35.54	35.13	34.53	34.02	34.08	34.22	33.97	33.16	33.61	33.43
TSHS/KES.....	22.91	22.23	21.75	21.70	21.76	21.62	21.42	21.40	21.35	21.23	20.97	21.11	21.14

Source: Central Bank  
of Kenya

**Fig. 2: End of Month Mean Exchange rate of Kenya Shillings against Major Selected Currencies**

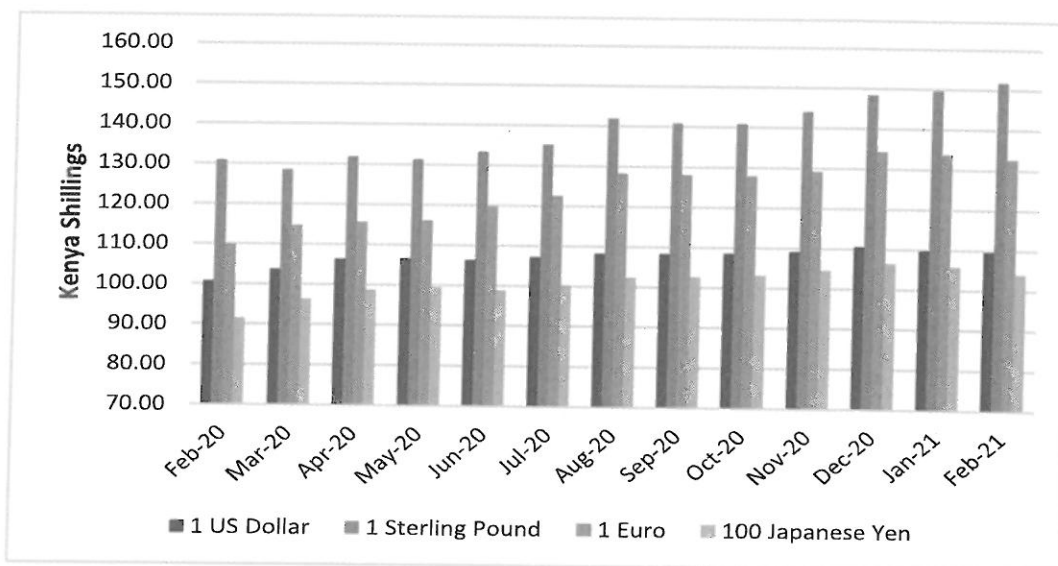


Table 3: Interest rate (%)

Month/Year	Average Yield Rates 91 – Days Treasury Bills	Central Bank Rate	Rates for Commercial Banks Loans and Advances (Weighted Average)	Overdraft Rates	Average Deposit Rate	Inter – Bank Rates	Savings (Commercial Banks Rates)
<b>2020</b>							
January	7.23	8.25	12.29	11.97	7.07	4.39	4.25
February	7.31	8.25	12.19	11.82	7.06	4.84	4.20
March	7.29	7.25	12.09	11.79	7.07	4.40	4.15
April	7.21	7.00	11.92	11.55	7.01	5.13	4.21
May	7.27	7.00	11.95	11.61	6.96	3.91	4.18
June	7.14	7.00	11.89	11.24	6.86	3.27	4.15
July	6.24	7.00	11.94	11.18	6.78	2.12	4.11
August	6.20	7.00	11.94	11.18	6.63	2.56	4.10
September	6.29	7.00	11.75	11.15	6.41	2.95	3.78
October	6.49	7.00	11.98	11.44	6.26	2.69	3.38
November	6.69	7.00	11.99	11.39	6.31	3.27	3.42
Dec	6.90	7.00	12.02	11.51	6.30	5.29	2.70
<b>2021</b>							
January	6.92	7.00	12.00	11.43	6.31	5.12	2.73
February	6.90	7.00	12.02	11.52	6.46	4.49	3.35

Source; Central Bank of Kenya

Table 4: Nairobi Securities Exchange

Month	Number of Equity Transactions	Number of Shares (Million)	Value of Shares (Million KSh)	NSE 20 Share Index
<b>2020</b>				
January.....	21,418	336	12,336	2,600
February.....	17,610	385	12,265	2,337
March.....	26,251	639	19,092	1,966
April.....	20,941	439	12,660	1,958
May .....	24,065	430	14,573	1,948
June.....	25,903	553	12,302	1,942
July.....	28,225	517	13,470	1,804
August.....	22,980	471	10,543	1,795
September.....	23,589	525	13,924	1,852
October.....	17,369	219	5,881	1,784
November.....	17,275	381	11,393	1,760
December.....	18,108	369	10,237	1,868
<b>2021</b>				
January.....	19,554	294	8,852	1,882
February.....	19,422	331	10,820	1,916

Source: Nairobi Securities Exchange Limited

Base Jan 1966=100

**Fig. 3: Nairobi Securities Exchange 20 Share Index**

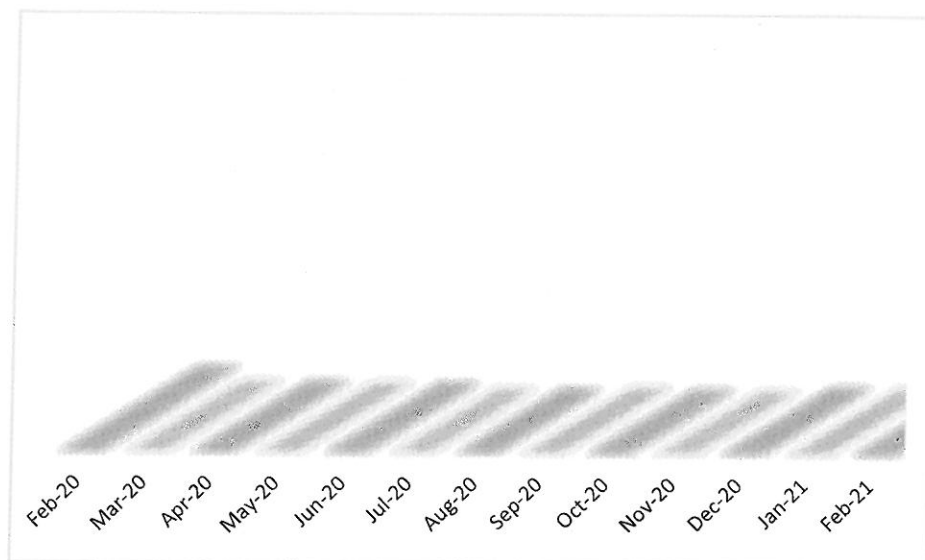


Table 5(a): Money Supply

KSh million						
As at end of month	Money (M1)*	Quasi – Money	Total (M2)**	Foreign currency deposits	Broad Money (M3)****	% Change
<b>2020</b>						
January	1,524,030	1,391,678	2,915,709	611,296	3,527,005	0.08
February	1,568,052	1,402,049	2,970,101	625,949	3,596,050	1.96
March	1,595,107	1,423,750	3,018,857	642,154	3,661,011	1.81
April	1,595,268	1,443,383	3,038,651	657,302	3,695,953	0.95
May	1,602,094	1,479,236	3,081,331	671,450	3,752,781	1.54
June	1,666,550	1,534,707	3,201,257	662,375	3,863,633	2.95
July	1,683,552	1,553,156	3,236,708	668,737	3,905,444	1.08
August	1,655,723	1,527,030	3,182,753	664,218	3,846,971	-1.50
September	1,665,778	1,514,748	3,180,526	662,974	3,843,500	-0.09
October	1,741,975	1,481,554	3,223,529	699,221	3,922,750	2.06
November	1,759,898	1,478,291	3,238,189	714,124	3,952,313	0.75
December	1,720,337	1,529,886	3,250,223	740,678	3,990,900	0.98
<b>2021</b>						
January	1,716,364	1,520,544	3,236,908	755,977	3,992,885	0.05
February	1,734,582	1,528,873	3,263,455	779,534	4,042,989	0.01

Source: Central Bank of Kenya

\* Currency in circulation less cash in banks plus all demand deposits except those of National & County government, Banks, non-residents and foreign currency deposits

\*\* All other deposits in commercial banks, except those of National government.

\*\*\*Broad money (M2) is the sum of M1, Quasi money in Banks and net Quasi money in NBFIs..

\*\*\*\* Broad Money (M3) includes M2 and Foreign currency deposits

M2=(M1+QM-NBFIs)

M3=M2+FCD

Table 5(b): Gross Foreign Exchange Reserves

KSh Million*							
Month	Central Monetary Authority		Total	Foreign Assets		Gross Total	Net of Foreign Exchange Liabilities
	Central Bank	National Government**		Commercial Banks	NBFI		
2020							
January	894,748	1,962	896,710	390,881	207	1,287,798	776,129
February	886,264	1,964	888,229	412,126	102	1,300,457	786,418
March	901,765	2,021	903,785	399,097	118	1,303,001	769,721
April	894,377	2,071	896,448	421,551	110	1,318,109	764,631
May	1,039,754	2,072	1,041,827	433,868	85	1,475,780	854,076
June	1,097,796	2,070	1,099,866	419,795	119	1,519,780	887,470
July	1,033,624	2,146	1,035,770	418,356	84	1,454,210	839,569
August	1,030,279	2,164	1,032,442	431,065	66	1,463,573	804,944
September	986,082	2,153	988,234	414,445	402	1,403,081	751,260
October	945,817	2,165	947,981	461,436	65	1,409,483	750,198
November	937,929	2,215	940,144	479,360	56	1,419,560	732,809
December	927,442	2,213	929,655	512,517	881	1,443,054	748,602
2021							
January	909,624	2,233	911,857	537,245	242	1,449,344	752,867
February	892,240	2,224	894,464	553,047	85	1,447,596	717,899

Source: Central Bank of Kenya

\* Includes encumbered reserves

\*\*National Government includes reserve position in the Fund and deposits with Crown Agents.

Table 6: Coffee Sales and Prices\*

Month	2019			2020***			2021***		
	QUANTITY (MT)	PRICE (\$ /kg)	PRICE (Ksh /kg)	QUANTITY (MT)	PRICE (\$ /kg)	PRICE (Ksh /kg)	QUANTITY (MT)	PRICE (\$ /kg)	PRICE (Ksh /kg)
January	4,166.77	4.46	452.57	3,048.63	4.34	438.95	3,824.34	6.34	697.01
February	5,723.84	4.49	449.47	4,409.60	4.24	427.28	5,325.48	6.06	664.49
March	4,057.03	2.97	298.47	4,845.46	4.06	421.92			
April	5,307.40	2.01	203.37	2,242.47	2.75	294.70			
May	4,084.00	1.98	200.58	1,125.04	2.59	276.10			
June**	2,020.80	1.89	191.97	-	-	-			
July	671.60	1.91	196.94	1,310.43	3.32	357.53			
August	1,646.63	2.10	216.51	1,208.67	4.86	525.29			
September	1,521.79	2.24	232.60	1,912.58	4.47	484.47			
October	2,540.68	2.51	259.85	1,328.52	4.85	526.80			
November	1,116.76	3.24	331.71	1,318.42	5.20	568.36			
December	770.82	4.29	435.44	1,666.58	5.98	660.07			
<b>Annual</b>	<b>33,628.12</b>	<b>2.84</b>	<b>289.12</b>	<b>24,416.40</b>	<b>4.24</b>	<b>452.86</b>	<b>9,149.82</b>	<b>6.20</b>	<b>680.75</b>

Source: Coffee Directorate

\* Auction Price

NB: MT denotes Metric Tonnes

\*\*\* Provisional

\*\* Nairobi Coffee Exchange was in recess in June 2020

Fig. 4: Coffee Sales at the Nairobi Coffee Exchange

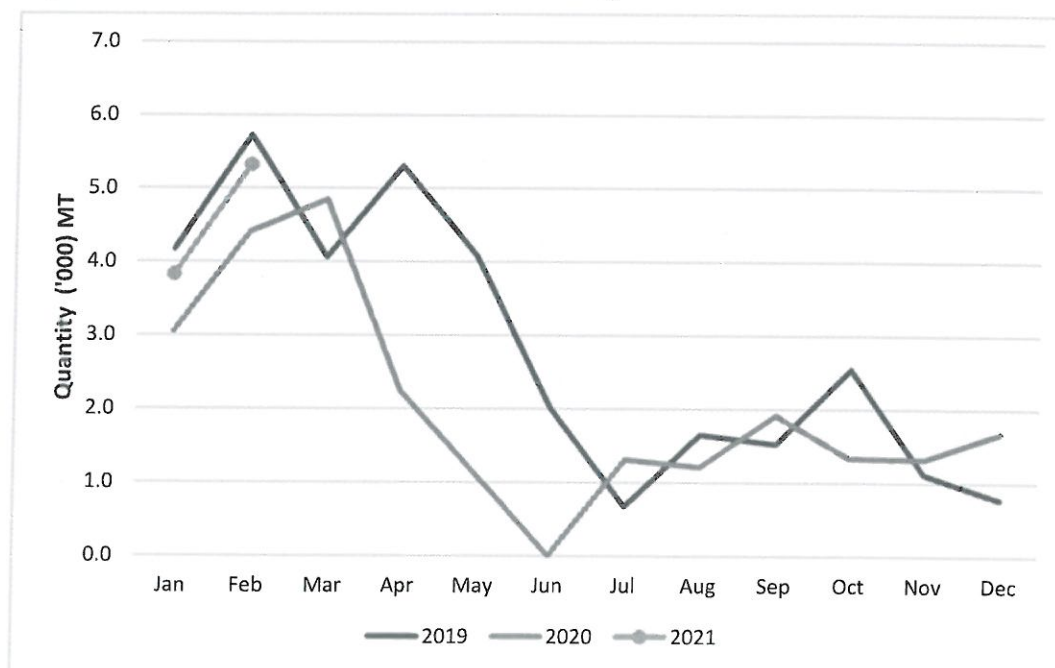


Table 7: Tea Production and Auction Prices

Months	2020			2021*		
	QUANTITY (MT)	PRICE (\$/Kg)	PRICE (KSh/Kg)	QUANTITY (MT)	PRICE (\$/Kg)	PRICE (KSh/Kg)
January	53,635.65	2.29	231.50	48,896.13	2.03	222.81
February	49,201.18	2.13	214.49	43,398.65	2.10	230.27
March	55,732.73	1.99	206.53			
April	49,656.07	2.11	225.07			
May	47,003.93	1.97	210.37			
June	46,377.67	1.86	197.62			
July	36,554.22	1.81	194.15			
August	38,524.78	2.00	216.61			
September	43,412.74	2.03	220.18			
October	48,274.64	1.98	214.85			
November	47,679.78	1.99	217.58			
December	54,411.94	1.94	215.13			
<b>Annual</b>	<b>570,465.34</b>	<b>2.01</b>	<b>213.67</b>	<b>92,294.78</b>	<b>2.07</b>	<b>226.54</b>

Source: Tea Directorate

MT denotes Metric Tonnes

\*Provisional

Fig. 5: Tea Production

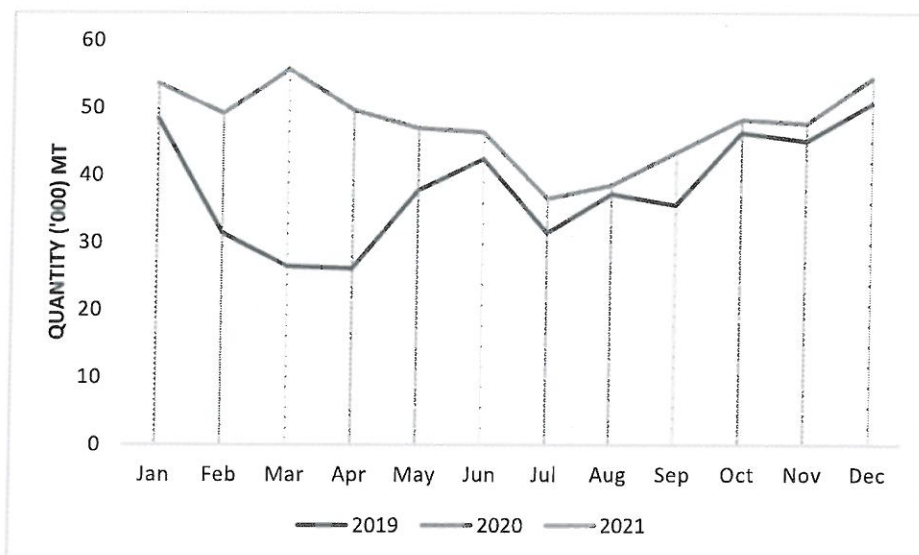


Table 8: Cane Deliveries

Month	000 Metric Tonnes				
	2017 <sup>+</sup>	2018 <sup>+</sup>	2019 <sup>+</sup>	2020	2021
January	581.60	687.52	538.67	522.89	681.54
February	519.40	555.88	453.48	529.94	660.44
March	470.73	445.17	456.17	583.14	
April	304.79	324.41	381.71	534.69	
May	231.97	266.43	348.04	544.36	
June	243.81	314.13	259.27	572.37	
July	246.89	378.60	266.97	625.61	
August	176.33	438.73	357.56	629.10	
September	351.75	445.69	397.52	645.31	
October	407.06	492.95	406.53	644.24	
November	578.31	491.96	357.45	594.18	
December	638.97	420.70	381.74	468.59	
<b>Total</b>	<b>4,751.61</b>	<b>5,262.16</b>	<b>4,605.10</b>	<b>6,894.40</b>	<b>1,341.98</b>

Source : Sugar Directorate

\* Provisional

Revised \*

Fig. 6: Cane Deliveries

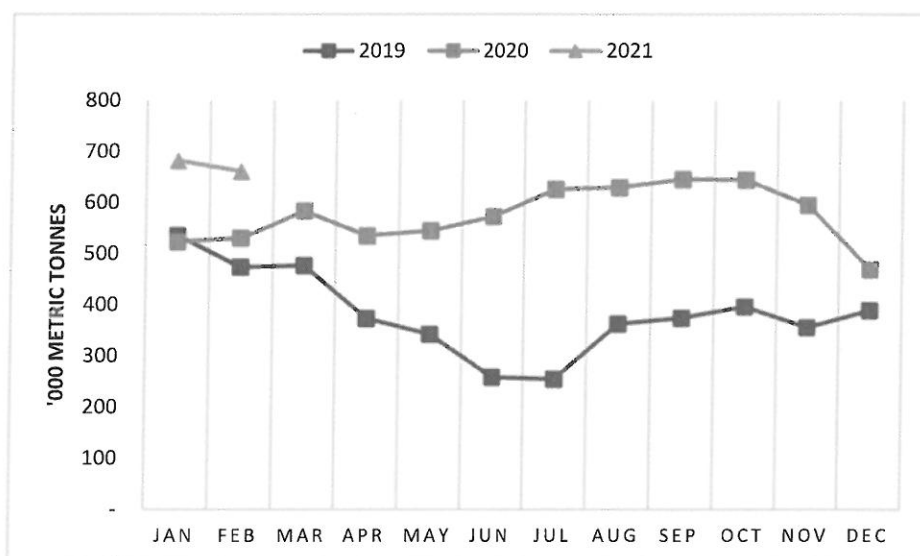


Table 9(a): Average Monthly Retail Prices for Dry Maize, 2020 (per Kg)

Market Name	January	February	March	April	May	June	July	August	September	October	November	December
Kiambu	50.0	50.0	50.0	-	-	-	50.0	50.0	56.7	-	-	-
Limuru	45.7	45.0	43.3	-	-	-	50.0	43.8	43.3	39.4	37.5	-
Thika	42.5	40.0	43.3	-	-	-	45.0	36.3	21.3	41.0	50.0	47.5
Githurai	42.5	43.3	45.0	-	-	-	35.0	35.0	35.0	39.0	40.0	40.0
Gatundu	40.0	40.0	-	-	-	-	45.0	44.5	40.0	40.0	40.0	40.0
Kutus	43.5	40.2	-	-	-	-	-	-	33.3	37.1	36.4	36.4
Kerugoya	43.8	47.6	-	-	-	-	-	-	-	-	34.8	36.5
Muthithi	44.2	-	33.5	-	-	-	-	30.0	30.3	-	29.8	39.6
Makuyu	47.7	-	41.9	-	-	-	-	36.8	39.1	-	39.0	41.8
Kiriaini	44.0	-	33.3	-	-	-	-	36.7	33.7	35.4	-	38.7
Oi Kalou	56.7	62.5	65.0	62.5	60.0	55.0	50.0	50.0	50.0	45.0	50.0	47.5
Ndaragwa	36.7	43.8	37.5	35.0	49.2	48.8	51.0	-	-	-	75.0	45.0
Nyeri	47.7	47.1	47.6	-	-	-	-	-	35.9	40.1	37.2	39.5
Karatna	47.1	46.0	47.6	-	-	-	-	-	36.9	38.9	45.2	47.6
Nanyuki	56.2	53.4	46.0	-	-	-	-	-	-	-	-	-
Nyahururu	44.9	44.4	44.4	-	-	-	-	-	-	-	-	-
Ukunda	50.0	49.5	49.0	46.3	43.0	46.3	41.6	40.0	49.0	44.0	42.5	43.0
Kwale	48.0	50.0	50.0	42.5	41.0	47.0	43.0	40.0	47.0	41.0	40.0	47.8
Voi	-	-	-	-	-	-	-	-	-	-	40.0	40.0
Mpeketoni	40.0	-	-	-	-	-	-	-	-	-	-	-
Mkunguni	46.4	45.0	45.0	-	-	-	50.0	50.0	-	45.0	45.0	45.0
Mwembe Tayari	69.0	65.0	71.3	66.3	65.0	63.8	63.0	63.8	63.8	63.0	53.8	52.5
Majengo	66.0	68.8	81.7	-	-	-	-	-	60.0	63.0	61.7	60.0
Sega	70.0	65.0	60.0	70.0	62.0	67.5	62.0	63.8	62.5	68.0	66.3	60.0
Kongowea	50.0	51.3	46.3	45.0	45.0	45.0	45.0	43.8	41.3	45.0	45.0	41.3
Runyenjes	48.6	53.3	63.5	-	71.5	40.7	-	-	-	-	-	-
Embu Town	46.2	46.8	47.6	-	27.9	30.5	-	-	-	-	-	-
Iciara	48.1	59.2	65.2	-	29.1	29.5	-	-	-	-	-	-
Kiritiri	52.9	63.6	71.4	-	76.7	45.2	-	-	-	-	-	-
Siakago	44.2	55.6	71.4	-	-	-	-	-	-	-	-	-
Kalundu	-	30.0	30.0	30.0	35.0	35.0	33.0	32.5	32.5	33.0	40.0	-
Machakos Town	50.0	50.0	43.1	43.0	45.0	-	40.0	40.8	40.0	40.0	50.0	-
Tala	42.0	40.0	-	40.0	40.0	-	35.0	33.0	35.4	37.5	-	-
Maua	41.3	-	-	-	-	-	-	-	-	-	35.0	35.0
Kianjai	44.4	30.6	27.8	-	-	-	-	-	33.3	-	33.3	33.3
Gakoromere	51.4	42.6	33.3	-	-	-	-	-	36.1	38.9	38.9	38.9
Wote	42.0	-	30.0	-	-	35.0	35.0	35.0	35.0	35.0	35.0	35.0
Garissa Town	70.0	66.3	70.0	65.0	66.0	77.5	72.5	70.0	70.0	70.0	70.0	70.0
Wajir Town	100.0	-	100.0	-	-	-	-	100.0	100.0	100.0	100.0	100.0
Isiolo Town	50.0	50.0	50.0	-	-	-	-	-	-	-	38.8	40.0
Daraja Mbili	47.5	-	36.2	39.4	35.6	-	-	-	-	-	-	-
Kibirigo	41.4	-	-	-	-	-	-	-	-	-	-	-
Keroka	41.9	-	-	-	-	-	-	-	-	-	-	-
Riochanda	41.9	-	-	-	-	-	-	-	-	30.4	28.0	-
Nyabile	-	-	-	-	-	-	-	-	-	43.5	-	-
Kibuye	40.8	41.3	40.1	41.8	41.3	44.0	43.0	39.1	36.2	34.9	36.4	36.2
Ahero	39.3	37.6	40.1	41.7	42.4	43.3	41.2	33.8	34.2	33.9	34.7	34.7
Kiboswa	37.4	33.5	36.4	41.8	39.5	37.7	38.7	38.4	35.3	35.7	34.8	34.8
Sondu	39.7	37.5	38.8	44.5	43.1	42.3	42.4	34.4	34.8	34.2	34.8	34.6
Kegonga	31.7	23.0	-	-	-	-	-	-	-	-	-	29.3
Oyugis	-	-	34.7	44.0	42.4	40.0	34.5	33.0	32.0	28.0	28.0	28.5
Kehacha	35.8	26.0	-	-	-	-	-	-	-	-	25.6	26.2
Migori	44.2	38.2	-	-	-	-	-	-	-	23.7	30.1	29.6
Soko Mjinga	43.5	-	40.3	41.7	-	-	-	-	-	-	-	34.1
Lodwar	77.3	-	-	-	-	-	-	-	-	-	91.7	77.4
Kabarnet	35.0	-	-	-	-	-	44.4	39.9	33.5	-	30.0	30.0
Kimulot	44.0	44.0	-	-	-	-	-	-	-	37.5	33.0	32.0
Sotik	40.0	40.0	-	-	-	-	-	-	-	37.0	37.0	36.0
Bomet	42.0	40.0	-	-	-	-	-	-	-	36.0	38.0	36.0
Nakuru Town	43.3	45.0	45.0	-	-	-	-	41.5	57.5	45.0	43.3	40.0
Kapsabet	38.5	38.0	38.0	-	-	-	-	35.8	28.3	25.5	28.1	-
Chepsonoi	37.3	39.6	40.0	-	-	-	-	36.4	27.9	25.6	28.0	-
Mulot	44.0	40.0	-	-	-	-	-	-	-	33.5	31.5	32.0
Kitale	41.4	41.7	41.7	41.7	41.7	41.7	41.3	40.6	41.5	37.0	27.4	34.1
Endebess	34.1	32.8	33.3	32.8	33.3	-	-	-	-	-	-	-
Sibanga	42.8	41.5	38.5	35.0	40.3	-	-	-	-	-	-	-
Eldoret	-	40.0	40.0	40.0	40.0	43.8	49.0	42.5	40.0	38.0	36.3	30.0
Burn Forest	35.0	35.0	28.0	36.0	36.0	36.0	39.0	29.0	25.2	21.5	24.0	-
Turbo	-	35.0	35.6	38.1	35.0	38.1	46.0	42.5	40.0	35.5	30.0	30.0
Kipkaren	-	35.0	35.6	36.9	35.0	38.8	47.0	45.0	40.0	35.0	31.9	30.0
Iten	34.6	-	-	-	-	-	-	45.0	-	-	-	-
Kajiado	50.0	45.0	44.5	45.8	44.0	41.3	48.0	52.0	50.0	50.0	51.3	48.8
Bungoma Town	-	-	-	-	-	60.2	43.8	32.8	29.0	28.6	29.4	30.5
Bumala	-	-	-	-	-	-	76.7	76.3	75.0	70.0	70.0	75.0
Busia Town	-	-	-	-	-	-	81.7	78.8	75.0	70.0	71.3	72.5
Sio Port	-	-	-	-	-	-	80.0	77.5	77.5	70.0	70.0	76.3
Butere	-	-	33.0	41.7	34.3	39.1	30.7	28.0	25.7	25.2	26.0	26.7
Kakamega	-	-	39.5	42.3	41.9	36.9	33.5	26.4	29.3	29.6	30.7	31.0
Mumias	-	-	33.4	38.5	40.9	38.4	28.6	25.6	24.0	25.8	27.4	26.0
Mundeta	39.7	38.1	38.1	-	-	-	-	-	-	-	-	-
Cheptula	39.5	40.5	38.9	-	-	-	-	-	-	-	-	-
Mbale	37.6	37.3	38.1	-	-	-	-	-	-	-	-	-
Muthurwa	-	-	-	-	-	-	-	-	-	-	47.6	47.6
Gikomba	-	-	-	-	-	-	-	-	38.1	-	47.6	47.6
Korokocho	-	-	-	-	-	-	42.1	-	36.4	-	36.4	-
Kayole	-	-	-	-	-	-	44.4	-	40.0	38.1	40.0	38.1
Total	44.8	44.6	43.6	43.5	44.6	44.3	44.5	42.1	41.4	39.4	40.5	40.4

Table 9(b): Average Monthly Retail Prices for Dry Maize, 2021 (per Kg)

Market Code	January
Kerugoya	43.5
Muthithi	34.8
Makuyu	32.0
Kiriaini	37.6
Engineer	47.9
Oi Kalou	50.0
Nanyuki	37.1
Nyahururu	39.6
Voi	37.5
Mkunguni	44.4
Kalundu	35.0
Maua	37.0
Kianjai	38.4
Gakromere	38.9
Wote	35.0
Marsabit Town	59.0
Isiolo Town	45.0
Daraja Mbili	31.9
Riochanda	31.0
Nyabite	31.0
Kibuye	33.9
Ahero	34.5
Kiboswa	34.8
Sondu	34.9
Kegonga	18.2
Oyugis	26.0
Kehacha	19.5
Migori	23.1
Soko Mjinga	33.3
Lodwar	42.6
Kimulot	33.6
Sotik	36.0
Bomet	32.4
Muthurwa Narok	29.6
Nakuru Town	52.5
Engare	28.6
Kilgoris	32.2
Mulot	32.4
Kitale	34.0
Eldoret	30.0
Burn Forest	25.2
Turbo	30.0
Kipkaren	30.0
Iten	45.0
Kajiado	50.0
Bungoma Town	29.4
Bumala	71.0
Busia Town	68.0
Sio Port	71.0
Muthurwa	47.6
Gikomba	47.6
Kayole	33.3
<b>Total</b>	<b>37.3</b>

Table 9(C): Average Monthly Retail Prices for Dry Beans, 2020 (per Kg)

Market Name	January	February	March	April	May	June	July	August	September	October	November	December
Klambo	88.3	-	101.1	-	-	-	105.3	109.7	113.3	-	-	-
Limuru	91.6	97.0	94.3	-	-	-	-	-	70.8	95.0	95.0	-
Thika	85.2	88.3	94.3	-	-	-	101.7	98.3	103.3	99.0	94.2	90.0
Githurai	82.4	76.1	78.9	-	-	-	97.5	102.2	105.0	99.5	95.0	95.0
Galundu	107.4	111.7	-	-	-	-	99.3	95.0	93.3	94.0	95.0	95.0
Kutus	72.2	75.0	-	-	-	-	-	-	81.8	90.4	91.3	87.0
Kerugoya	78.2	86.4	-	-	-	-	-	-	-	-	77.2	80.0
Muthithi	65.9	-	69.5	-	-	-	-	74.2	75.1	-	83.5	79.3
Makuyu	66.7	-	66.8	-	-	-	-	73.3	87.6	-	92.0	87.9
Kiriaini	67.2	-	68.4	-	-	-	-	78.5	81.8	93.5	-	79.0
Oi Kalou	61.9	59.5	60.0	60.0	60.0	74.4	61.0	55.0	51.7	53.3	80.0	103.3
Ndaragwa	50.0	58.8	95.7	95.0	101.8	84.6	68.2	-	-	-	120.0	111.0
Nyeri	101.7	108.1	89.3	-	-	-	-	-	105.2	113.0	105.3	96.2
Karatina	98.5	105.3	102.9	-	-	-	-	-	108.3	120.6	128.0	124.4
Nanyuki	124.0	113.7	111.1	-	-	-	-	-	-	-	-	-
Nyahururu	107.7	111.1	109.9	-	-	-	-	-	-	-	-	-
Ukunda	105.0	100.0	100.0	80.0	66.0	85.0	80.0	62.5	82.5	77.0	72.5	78.8
Kwale	100.0	100.0	100.0	80.0	64.0	90.0	80.0	60.0	77.5	80.0	80.0	82.5
Voi	-	-	-	-	-	-	-	-	-	-	108.8	110.0
Mpeketoni	100.0	-	-	-	-	-	-	-	-	-	-	-
Mkunguni	114.5	110.0	110.0	-	-	-	120.0	120.0	-	115.0	112.5	111.3
Mwembe Tayari	144.0	147.5	162.5	150.0	158.0	132.5	136.0	135.0	125.0	126.0	127.5	130.0
Majengo	119.0	120.0	108.0	100.0	100.0	100.0	100.0	100.0	103.3	98.0	106.7	115.0
Mackinon	120.0	120.0	120.0	120.0	120.0	-	120.0	120.0	120.0	120.0	120.0	120.0
Sega	111.7	117.5	120.0	102.5	116.0	115.0	112.0	112.5	107.5	110.0	115.0	128.0
Kongowea	99.0	91.3	78.8	105.0	110.0	102.5	100.0	87.5	85.0	90.0	100.0	97.5
Hola	-	-	-	-	-	-	-	-	-	120.0	120.0	-
Garsen	-	-	-	-	-	-	-	-	100.0	100.0	100.0	100.0
Runyenjes	75.3	98.3	116.3	-	107.0	97.6	-	-	-	-	-	-
Embu Town	130.6	114.6	95.2	-	100.1	95.2	-	-	-	-	-	-
Iciara	128.4	140.7	146.4	-	111.2	102.9	-	-	-	-	-	-
Kiritiri	103.4	114.0	119.0	-	101.8	95.6	-	-	-	-	-	-
Siakago	87.6	95.3	93.1	-	-	-	-	-	-	-	-	-
Kalundu	-	105.0	105.0	106.3	114.0	113.8	108.0	100.0	103.8	90.5	105.0	-
Machakos Town	100.0	100.0	85.0	88.0	100.0	-	120.0	111.7	112.9	116.0	120.0	-
Tala	82.0	70.0	-	70.0	70.0	-	100.0	90.0	100.0	115.0	-	-
Maua	90.0	-	-	-	-	-	-	-	-	-	80.0	80.0
Kianjai	79.2	72.2	72.2	-	-	-	-	-	77.8	-	88.9	84.7
Gakoromere	75.0	80.0	80.0	-	-	-	-	-	80.0	90.0	90.0	90.0
Wote	113.3	-	87.5	-	-	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Garissa Town	102.7	103.3	103.3	113.3	125.3	126.7	125.7	126.7	126.7	124.0	113.3	111.7
Wajir Town	120.0	-	120.0	-	-	-	-	120.0	120.0	120.0	120.0	120.0
Isiolo Town	85.0	80.0	80.0	-	-	-	-	-	-	-	95.0	85.0
Daraja Mbili	94.0	-	115.2	110.9	120.5	-	-	-	-	-	-	-
Kibirigo	89.7	-	-	-	-	-	-	-	-	-	-	-
Keroka	83.3	-	-	-	-	-	-	-	-	-	-	-
Riochanda	75.0	-	-	-	-	-	-	-	-	90.9	87.5	-
Nyabite	-	-	-	-	-	-	-	-	-	138.7	-	-
Kibuye	75.7	75.4	77.9	80.6	83.3	74.9	90.0	79.2	101.4	100.0	107.8	109.0
Ahero	75.5	78.3	79.9	82.6	86.6	86.1	93.0	82.0	103.3	103.5	108.6	108.8
Kiboswa	75.1	63.9	74.5	77.4	77.1	80.9	77.5	78.6	96.5	97.9	105.7	108.3
Sondu	77.0	78.3	79.3	79.2	82.4	84.8	95.7	82.6	104.3	104.3	105.3	104.5
Kegongga	91.0	84.0	-	-	-	-	-	-	-	-	-	84.2
Oyugis	-	-	106.2	139.1	114.4	110.0	92.5	76.0	76.0	82.0	78.0	99.6
Kehacha	83.5	88.0	-	-	-	-	-	-	-	-	86.4	88.0
Migori	109.8	110.5	-	-	-	-	-	-	-	115.5	120.3	105.4
Soko Mjinga	96.1	-	98.1	108.5	-	-	-	-	-	-	-	90.3
Lodwar	98.4	-	-	-	-	-	-	-	-	-	83.3	91.7
Kabarnet	91.7	-	-	-	-	-	120.0	105.0	115.0	119.0	110.0	100.0
Kimulot	79.0	76.0	-	-	-	-	-	-	-	83.5	85.5	84.0
Sotik	78.9	76.3	-	-	-	-	-	-	-	96.2	90.9	93.7
Bomet	83.3	83.3	-	-	-	-	-	-	-	73.1	108.7	111.5
Nakuru Town	60.0	60.0	60.0	-	-	-	67.1	60.0	60.0	60.0	64.4	60.0
Kapsabet	98.7	94.8	111.2	-	-	-	112.7	113.7	113.7	116.4	111.1	-
Chepsono	98.8	97.7	83.3	-	-	-	113.3	115.9	116.0	116.0	114.9	-
Mulot	76.3	76.9	-	-	-	-	-	-	-	78.1	75.0	73.1
Kitale	70.6	72.1	72.6	88.9	82.3	103.6	95.6	95.8	103.7	103.6	81.7	90.3
Endebess	50.9	59.9	63.9	64.2	66.7	-	-	-	-	-	-	-
Sibanga	62.5	63.7	67.8	77.7	68.8	-	-	-	-	-	-	-
Eldoret	-	122.5	125.0	125.0	133.0	133.8	138.0	128.8	108.8	132.5	132.5	132.5
Burn Forest	130.3	136.4	131.8	143.2	140.9	131.8	140.9	136.4	134.1	132.7	138.6	129.5
Turbo	-	110.0	111.3	125.0	144.0	142.5	140.0	128.8	106.3	134.0	135.0	133.8
Kipkaren	-	116.3	125.0	126.3	145.0	140.0	140.0	128.0	107.5	131.0	140.0	137.5
Iten	100.0	-	-	-	-	-	100.0	-	-	-	-	-
Kajiado	94.7	106.7	113.3	113.3	113.3	113.3	117.3	116.7	115.0	112.0	114.2	114.2
Bungoma Town	-	-	-	-	-	117.7	97.2	99.7	103.0	91.6	91.6	91.9
Bumala	-	-	-	-	-	-	-	-	-	-	-	135.0
Busia Town	-	-	-	-	-	-	-	-	-	-	-	125.0
Sio Port	-	-	-	-	-	-	-	-	-	-	-	132.5
Butere	-	-	119.3	123.8	107.8	108.3	122.2	126.7	81.9	102.2	100.6	96.7
Kakamega	-	-	162.0	175.9	150.3	136.1	114.9	97.3	91.2	90.4	85.8	86.5
Mumias	-	-	127.9	147.1	119.7	110.0	108.9	116.9	104.9	102.3	106.1	104.4
Mundeta	90.9	92.0	90.9	-	-	-	-	-	-	-	-	-
Cheptula	90.9	97.0	95.5	-	-	-	-	-	-	-	-	-
Mbale	100.0	106.1	98.5	-	-	-	-	-	-	-	-	-
Muthurwa	-	-	-	-	-	-	-	-	-	-	104.3	104.3
Gikomba	-	-	-	-	-	-	-	-	72.7	-	104.3	104.3
Korokocho	-	-	-	-	-	-	80.0	-	66.7	-	75.0	-
Kayole	-	-	-	-	-	-	80.0	-	80.0	80.0	80.0	72.7
Total	89.1	91.8	96.2	104.6	104.7	103.3	99.2	95.8	96.6	99.4	99.9	100.6

Table 9(d): Average Monthly Retail Prices for Dry Beans, 2021 (per Kg)

Market Name	January
Kerugoya	87.0
Muthithi	89.7
Makuyu	84.2
Kiriaini	91.2
Engineer	105.0
Oi Kalou	116.7
Nanyuki	103.6
Nyahururu	110.6
Voi	110.0
Mkunguni	111.3
Garsen	100.0
Kalundu	108.3
Maua	80.0
Kianjai	80.0
Gakromere	90.0
Wote	100.0
Marsabit Town	106.0
Isiolo Town	90.0
Daraja Mbili	104.5
Riochanda	88.4
Nyabite	102.2
Kibuye	111.3
Ahero	108.6
Kiboswa	108.3
Sondu	105.0
Kegonga	95.2
Oyugis	108.7
Kehacha	93.0
Migori	124.9
Soko Mjinga	91.5
Lodwar	96.6
Kimulot	96.0
Sotik	95.1
Bomet	86.2
Muthurwa Narok	112.0
Nakuru Town	60.0
Engare	75.5
Kilgoris	58.7
Mulot	74.6
Kitale	104.4
Eldoret	138.0
Burn Forest	132.7
Turbo	135.0
Kipkaren	138.0
Iten	90.0
Kajiado	104.8
Bungoma Town	110.4
Bumala	140.0
Busia Town	132.0
Sio Port	130.0
Muthurwa	104.3
Gikomba	104.3
Kayole	72.7
<b>Total</b>	<b>99.7</b>

Table 10: Exports of Coffee and Tea

Month	COFFEE *		TEA	
	Quantity (MT)	Value *(KSh. Million)	Quantity (MT)	Value *(KSh. Million)
<b>2020</b>				
January.....	2,639.38	985.32	48,770.49	11,452.01
February.....	3,168.50	1,686.82	47,569.72	11,021.86
March.....	4,604.42	2,410.16	51,440.71	11,665.48
April.....	4,395.52	2,590.20	57,722.34	13,192.62
May .....	4,312.75	2,279.12	48,594.07	11,289.33
June.....	5,414.08	2,956.33	46,399.01	10,293.00
July .....	3,546.25	1,799.26	46,850.57	10,013.82
August.....	3,181.82	1,484.15	47,034.93	10,269.11
September.....	3,391.49	1,606.84	44,724.70	10,199.89
October.....	2,732.15	1,322.08	43,655.91	9,937.34
November.....	3,594.29	1,836.61	46,352.88	10,610.96
December.....	2,405.44	1,284.84	46,166.69	10,300.58
<b>2021</b>				
January.....	2,129.36	1,342.45	48,811.79	11,378.64
February.....	3,481.13	2,161.12	50,389.92	11,725.86

Source: KRA Customs and Border Control Services department

\* Coffee, not Roasted

MT denotes Metric tonnes

**Table 11: Monthly Exports of Fresh Horticultural Produce**

Months	Cut Flowers				FRUITS				VEGETABLES			
	2020		2021*		2020*		2021*		2020		2021*	
	Quantity (MT)	Value (KSh Million)	Quantity (MT)	Value (KSh Million)	Quantity (MT)	Value (KSh Million)	Quantity (MT)	Value (KSh Million)	Quantity (MT)	Value (KSh Million)	Quantity (MT)	Value (KSh Million)
January	14,649.06	12,607.09	15,169.04	10,767.58	6,340.04	1,076.00	7,071.82	1,038.19	4,834.01	2,355.84	6,066.26	3,428.14
February	17,562.69	11,907.04	17,411.90	11,946.71	8,370.27	1,044.26	11,738.47	1,697.31	4,809.20	1,983.40	5,363.26	2,222.24
March	10,438.01	13,986.50			11,433.30	1,683.33			5,585.21	2,338.23		
April	7,989.61	8,608.43			11,671.61	1,640.06			4,839.67	1,664.25		
May	10,215.07	6,254.05			13,492.51	5,642.88			4,281.66	2,176.03		
June	9,373.96	5,355.97			10,367.69	1,431.74			4,678.09	1,741.78		
July	10,928.56	7,154.46			9,990.93	1,424.36			4,547.00	1,819.98		
August	11,497.87	7,973.91			8,874.50	1,286.90			4,561.09	1,708.51		
Sept	12,877.96	10,508.40			6,250.47	990.26			5,405.00	1,910.75		
October	14,480.22	7,473.06			7,073.45	889.94			6,274.31	2,169.66		
Nov	12,960.27	7,216.09			5,607.97	646.27			5,551.46	1,929.80		
Dec	13,060.27	8,463.58			5,586.80	670.96			7,208.70	2,430.21		
<b>Total</b>	<b>146,033.55</b>	<b>107,508.57</b>	<b>32,580.94</b>	<b>22,714.29</b>	<b>105,059.55</b>	<b>18,426.94</b>	<b>18,810.28</b>	<b>2,735.50</b>	<b>62,575.41</b>	<b>24,228.43</b>	<b>11,429.52</b>	<b>5,650.38</b>

Source: Horticultural Directorate

\* Provisional

Table 12: External Trade

KSh Million						
Month	Domestic Exports	Re-Exports	Total Exports	Total Imports	Volume of Trade	Home use Imports
<b>2020</b>						
January.....	47,324.80	5,801.50	53,126.30	155,432.97	208,559.27	145,663.40
February.....	47,900.33	13,205.92	61,106.25	133,824.66	194,930.91	126,980.05
March.....	49,652.97	14,830.75	64,483.72	137,240.93	201,724.65	104,004.63
April.....	40,675.66	2,537.29	43,212.94	119,758.20	162,971.15	100,367.05
May.....	41,800.44	5,398.51	47,198.95	108,699.14	155,898.09	104,957.03
June.....	44,520.97	3,528.33	48,049.30	121,602.01	169,651.31	119,885.40
July.....	45,695.71	6,304.59	52,000.30	138,761.11	190,761.41	136,026.07
August.....	49,502.50	4,660.60	54,163.10	137,775.57	191,938.67	137,350.10
September.....	48,536.58	7,870.26	56,406.84	143,391.27	199,798.11	140,485.82
October.....	49,319.22	3,842.81	53,162.02	145,238.48	198,400.51	140,564.71
November.....	47,390.54	3,398.24	50,788.79	139,042.14	189,830.93	132,791.54
December.....	52,299.28	5,209.71	57,508.99	161,455.69	218,964.68	157,227.72
<b>2021*</b>						
January.....	49,570.48	4,743.15	54,313.63	160,723.93	215,037.56	152,098.04
February.....	58,701.48	8,790.05	67,491.53	159,723.07	227,214.60	153,453.08

Source: Kenya Revenue Authority

+ Revised

\*Provisional

Table 13(a): Major Destinations of Domestic Exports

KSh Million											
Month/Country	Uganda	Tanzania	United Kingdom	Pakistan	Netherlands	Egypt	Germany	Rwanda	USA	United Arab Emirates	France
2020*											
January.....	3,709.11	2,369.38	4,050.58	4,193.52	3,855.89	2,152.66	919.27	1,534.50	4,664.67	2,112.66	486.10
February.....	5,275.30	2,105.73	4,914.40	4,586.76	4,633.00	1,658.73	1,251.99	1,851.74	3,467.86	2,059.26	450.65
March.....	5,332.22	2,894.28	4,266.20	4,654.94	4,003.95	1,597.23	1,276.14	2,269.51	3,693.21	1,648.62	602.84
April.....	2,290.71	1,981.76	4,413.58	5,558.22	2,784.69	1,367.24	1,427.26	866.42	2,949.42	1,871.26	840.73
May.....	3,613.15	1,837.64	3,848.13	5,137.95	3,372.75	1,412.17	1,293.18	1,280.15	2,866.05	1,415.22	722.16
June.....	4,349.66	1,899.77	3,820.66	4,221.27	2,609.82	1,604.56	989.03	1,936.60	5,091.41	1,214.39	819.70
July.....	5,663.36	2,598.34	4,040.28	4,099.59	3,070.10	1,290.26	1,031.01	2,370.08	3,588.08	1,367.54	912.55
August.....	6,399.79	2,572.96	3,821.02	5,136.91	3,401.57	658.66	1,231.58	2,524.04	5,346.14	1,339.46	963.24
September.....	6,386.83	2,681.66	4,126.01	3,970.74	3,295.61	1,696.98	1,251.17	2,168.05	3,775.68	1,653.71	916.74
October.....	5,322.72	2,640.28	3,917.36	4,003.78	5,230.07	1,764.74	1,040.20	2,329.39	4,578.11	1,686.60	581.82
November.....	4,421.78	2,777.85	3,899.39	4,838.67	3,751.75	1,477.93	1,003.65	2,305.75	4,518.63	1,458.23	677.08
December.....	6,437.79	3,110.31	4,391.66	4,063.96	4,558.36	2,052.45	1,059.75	2,255.96	3,665.78	1,356.79	717.01
2021*											
January.....	4,057.47	2,274.20	4,584.99	4,550.15	5,444.13	1,604.35	1,250.79	1,465.90	4,985.78	2,216.37	727.29
February.....	6,870.27	2,431.41	5,033.00	4,598.23	5,850.86	2,353.14	1,880.30	1,722.03	3,849.57	2,593.93	819.88

Source: Kenya Revenue Authority

\*Provisional

Table 13(b): Domestic Exports by Broad Economic Category

Descriptions	Value in KSh Million											
	2020											
	Feb	March	April	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	2021*
Food and beverages.....	20,579.64	23,783.29	24,122.52	21,886.63	21,993.41	21,049.33	21,397.98	21,056.62	21,587.21	21,659.27	22,473.85	23,048.97
Industrial supplies (Non-Food) .....	11,313.14	11,508.22	6,958.79	8,782.75	11,731.48	10,184.49	13,177.60	11,843.88	11,662.55	10,792.35	12,492.37	11,981.10
Fuel and Lubricants.....	726.13	239.62	314.26	298.00	248.77	736.20	661.85	507.02	796.17	268.54	520.79	127.19
Machinery & other capital Equipment.....	795.55	980.09	411.17	839.18	547.94	1,036.47	770.22	1,288.08	809.33	599.61	756.87	609.99
Transport equipment.....	361.51	790.50	204.14	241.93	270.87	350.72	347.32	498.90	401.72	526.54	490.81	388.65
Consumer goods Not elsewhere specified..	14,124.36	12,351.25	8,664.77	9,751.95	9,728.49	12,338.49	13,136.52	13,342.08	14,062.24	13,539.23	15,564.59	13,414.58
Goods not elsewhere specified.....	-	-	-	-	-	-	11.01	-	-	5.00	-	-
<b>Total .....</b>	<b>47,900.33</b>	<b>49,652.97</b>	<b>40,675.66</b>	<b>41,800.44</b>	<b>44,520.97</b>	<b>45,695.71</b>	<b>49,502.50</b>	<b>48,536.58</b>	<b>49,319.22</b>	<b>47,390.54</b>	<b>52,299.28</b>	<b>49,570.48</b>
<b>Percentage Shares:.....</b>												
Food and Beverages .....	42.96	47.90	59.30	52.36	49.40	46.06	43.23	43.38	43.77	45.70	42.97	46.50
Industrial Supplies (Non-Food).....	23.62	23.18	17.11	21.01	26.35	22.29	26.62	24.40	23.65	22.77	23.89	24.17
Fuel and Lubricants .....	1.52	0.48	0.77	0.71	0.56	1.61	1.34	1.04	1.61	0.57	1.00	0.26
Machinery and other Capital Equipment....	1.66	1.97	1.01	2.01	1.23	2.27	1.56	2.65	1.64	1.27	1.45	1.23
Transport Equipment.....	0.75	1.59	0.50	0.58	0.61	0.77	0.70	1.03	0.81	1.11	0.94	0.78
Consumer Goods not elsewhere specified..	29.49	24.88	21.30	23.33	21.85	27.00	26.54	27.49	28.51	28.57	29.76	27.06
Goods not elsewhere specified	-	-	-	-	-	-	0.02	-	-	0.01	-	-
<b>TOTAL .....</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>

Source: Kenya Revenue Authority (KRA)

\*Provisional

Table 14 (a) Major Origins of Imports

Month											Value (KSh Million)
	United Arab Emirates	United Kingdom	South Africa	Saudi Arabia	Japan	India	USA	Germany	Netherlands	France	China
<b>2020*</b>											
January.....	12,572.62	2,682.95	4,993.13	8,800.71	8,162.25	15,598.11	4,372.14	3,897.08	3,998.16	2,325.68	35,061.82
February.....	3,544.80	1,913.50	3,897.21	6,308.86	6,504.63	20,996.77	4,233.87	2,309.68	2,185.89	2,038.83	29,655.18
March.....	11,532.87	2,733.59	5,463.75	9,057.94	8,033.19	21,326.57	4,391.02	3,236.37	1,180.49	1,436.49	16,176.04
April.....	6,540.07	1,865.45	3,122.26	6,198.79	7,571.35	11,662.36	6,402.99	3,318.80	2,069.28	1,487.01	21,042.12
May.....	3,442.31	2,656.30	3,478.28	2,248.85	5,345.12	11,374.96	5,469.71	3,368.18	1,697.75	1,611.51	24,486.22
June.....	4,534.82	2,049.80	3,629.53	1,729.20	5,984.93	14,207.47	4,555.54	3,798.11	1,654.15	2,517.45	31,449.14
July.....	5,965.11	2,062.32	4,538.60	5,132.23	7,391.56	15,773.28	4,941.26	3,170.17	4,654.93	2,273.96	34,185.43
August.....	3,560.81	2,881.30	2,965.31	6,228.75	7,212.17	15,626.79	4,580.86	7,296.31	8,096.97	2,070.02	35,525.36
September.....	10,028.50	2,538.21	4,188.07	11,713.45	7,563.57	14,556.61	4,439.31	2,209.51	988.10	1,377.52	34,942.30
October.....	13,898.24	2,605.64	3,078.13	3,957.92	7,297.80	15,641.22	4,378.26	2,258.66	2,296.08	2,167.73	30,559.41
November.....	7,489.45	2,241.52	3,478.51	6,157.19	6,901.63	16,498.13	4,195.25	2,180.56	5,924.52	2,264.78	29,314.03
December.....	9,574.30	3,063.66	2,986.06	3,927.72	9,727.71	15,383.16	4,366.08	3,189.22	7,150.66	1,722.23	39,082.03
<b>2021</b>											
January.....	15,030.59	2,319.46	3,817.06	10,091.06	6,676.66	13,321.57	5,490.58	3,219.51	870.96	1,815.79	39,908.40
February.....	8,299.60	3,165.87	2,351.63	7,733.54	6,438.55	17,487.54	5,463.17	2,969.54	4,227.29	1,981.49	30,192.24

Source: Kenya Revenue Authority

\*Provisional

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**Table 14(b): Imports by Broad Economic Category**

Value in KSh Million													
Descriptions	2020											2021*	
	Feb	March	April	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb
Food and beverages.....	15,793.95	14,501.77	15,455.24	12,019.35	16,576.49	13,552.87	9,912.23	12,775.82	14,821.83	13,437.20	17,161.57	15,177.42	19,786.16
Industrial supplies (Non-Food) .....	46,297.96	51,560.21	47,459.91	49,471.40	46,442.76	54,599.69	45,582.40	60,055.92	61,110.60	57,002.99	61,773.95	65,149.41	65,424.95
Fuel and Lubricants.....	24,473.50	30,264.25	17,688.00	5,438.06	13,207.20	17,093.45	20,089.22	17,037.55	17,914.95	20,682.75	20,291.64	24,614.82	24,873.62
Machinery & other capital Equipment.....	25,990.99	18,945.93	16,836.18	16,357.09	22,422.36	26,724.05	25,786.87	21,593.62	24,124.03	21,863.38	28,750.18	26,890.73	21,715.53
Transport equipment.....	10,148.94	12,041.87	11,332.96	11,125.86	9,736.74	11,438.38	19,000.95	17,075.79	14,550.08	13,719.69	18,581.44	14,366.98	15,237.97
Consumer goods Not elsewhere specified..	11,107.45	9,913.59	10,917.42	13,642.90	12,967.62	14,018.48	17,318.43	14,658.62	11,430.04	12,335.79	14,555.54	13,007.90	12,574.38
Goods not elsewhere specified.....	12.18	13.32	68.51	644.49	248.84	1,334.18	85.46	193.94	1,286.96	0.35	341.36	1,516.27	110.47
Total .....	133,824.98	137,240.93	119,758.20	108,699.14	121,602.01	138,761.11	137,775.57	143,391.27	145,238.48	139,042.14	161,455.69	160,723.53	159,723.07
Percentage Shares:.....													
Food and Beverages .....	11.80	10.57	12.91	11.06	13.63	9.77	7.19	8.91	10.21	9.66	10.63	9.44	12.39
Industrial Supplies (Non-Food).....	34.60	37.57	39.63	45.51	38.19	39.35	33.08	41.88	42.08	41.00	38.26	40.54	40.96
Fuel and Lubricants .....	18.29	22.05	14.77	5.00	10.86	12.32	14.58	11.88	12.33	14.88	12.57	15.32	15.57
Machinery and other Capital Equipment....	19.42	13.80	14.06	15.05	18.44	19.26	18.72	15.06	16.61	15.72	17.81	16.73	13.60
Transport Equipment.....	7.58	8.77	9.46	10.24	8.01	8.24	13.79	11.91	10.02	9.87	11.51	8.94	9.54
Consumer Goods not elsewhere specified..	8.30	7.22	9.12	12.55	10.66	10.10	12.57	10.22	7.87	8.87	9.02	8.09	7.87
Goods not elsewhere specified.....	0.01	0.01	0.06	0.59	0.20	0.96	0.06	0.14	0.89	0.00	0.21	0.94	0.07
TOTAL .....	100	100	100	100	100	100	100	100	100	100	100	100	100

Source: Kenya Revenue Authority

\*Provisional

**Table 14 (c): Mobile Money Transactions**

As at the end of month	Mobile money Agents	Mobile money subscriptions (millions)	Number of Transactions (millions)*	Value (KSh billions)
<b>2020</b>				
January	231,292	59.17	150.20	371.90
February	235,543	58.67	148.53	350.48
March	240,261	58.71	150.69	364.51
April	242,275	59.43	124.99	307.99
May	243,115	60.24	135.92	357.37
June	237,637	61.73	143.14	392.17
July	234,747	62.07	157.76	450.98
August	252,703	62.78	163.21	473.52
September	263,200	64.03	163.34	483.21
October	273,531	65.26	174.11	528.90
November	275,960	65.77	170.03	526.81
December	282,929	66.01	181.37	605.69
<b>2021</b>				
January	287,410	66.59	173.91	590.36
February	294,111	67.16	164.20	567.99

Source: Central Bank of Kenya

Table 14(d): International trade in ICT

	2020												2021	
Imports	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	
Office machines 1.....	79.90	113.40	113.81	51.85	39.62	168.26	72.11	125.18	64.95	44.29	49.29	53.59	75.66	
Automatic data processing machines, storage units etc.....	707.23	1,267.91	1,170.54	998.67	1,598.26	1,386.40	1,445.80	873.65	1,024.34	1,084.21	1,103.44	1,066.69	800.61	
Part and accessories 2.....	45.53	64.90	30.44	62.36	80.64	117.36	167.69	51.51	52.39	36.95	80.43	50.60	69.89	
Monitors and projectors and reception apparatus for television3	751.91	482.14	537.36	691.50	980.01	1,177.44	999.30	1,190.65	964.97	1,068.24	889.20	996.95	806.37	
Reception apparatus for radio broadcasting4 .....	39.89	13.47	14.70	14.99	32.27	29.29	33.43	39.95	41.45	32.06	110.90	31.56	10.74	
Recording equipments 5.....	14.10	9.67	5.95	12.62	17.97	158.35	31.52	14.28	5.05	12.17	8.66	42.02	7.70	
Telecommunications equipment 6.....	1,151.53	1,829.69	739.03	1,589.56	2,651.51	3,115.44	2,141.07	2,411.17	3,642.68	1,663.96	2,235.01	2,003.02	1,158.86	
Exports														
Office machines 1.....	0.17	31.65	1.83	2.77	7.57	31.42	17.33	0.42	0.30	1.18	9.19	0.27	4.12	
Automatic data processing machines, storage units etc.....	56.13	101.57	67.46	31.97	53.99	31.82	36.12	124.18	72.86	15.16	35.96	33.58	56.48	
Part and accessories 2.....	0.07	1.81	0.87	0.94	5.19	5.32	14.30	0.39	3.32	2.65	0.68	2.63	4.12	
Monitors and projectors and reception apparatus for television3	2.23	7.63	46.94	5.31	1.07	4.85	7.90	3.24	5.04	10.58	20.90	11.94	3.68	
Reception apparatus for radio broadcasting4 .....	0.05	-	1.47	3.78	0.004	3.92	0.31	0.01	0.01	1.53	0.01	0.10	0.02	
Recording equipments 5.....	0.07	0.04	0.14	0.00	0.07	0.04	0.06	0.00	0.14	1.12	0.12	0.05	0.01	
Telecommunications equipment 6.....	23.60	41.51	24.15	4.09	13.93	44.55	19.40	213.02	21.35	52.19	45.73	3.80	114.85	

<sup>1</sup> Electronic calculating machines, cash registers, accounting machines, postage-

<sup>2</sup> For office machines and data processing machines

<sup>3</sup> Include Television sets, decoders etc

<sup>4</sup> Whether or not combined with sound recording or reproducing apparatus or a

<sup>5</sup> Sound recording, video recording or reproducing apparatus including or not

<sup>6</sup> Such as computer, laptops, networking equipments etc plus their parts and

Source: Kenya Revenue Authority (KRA)

**Table 15(a): Local Electricity Generation by Source**

KWh Million							
Month	Hydro	Geo - Thermal	Thermal*	Wind	Solar	Co-Generation	Total
<b>2020</b>							
January	357.69	476.60	54.51	89.70	7.59	0.01	986.09
February	341.94	430.73	53.83	100.16	6.94	0.02	933.62
March	359.11	460.27	55.65	85.88	7.80	0.02	968.74
April	297.63	411.76	35.75	88.03	7.75	0.04	840.96
May	319.47	391.79	56.30	105.62	7.89	0.01	881.09
June	334.17	421.44	61.87	88.45	6.96	0.01	912.90
July	357.84	433.46	60.63	110.42	6.78	0.00	969.14
August	357.69	423.59	70.50	118.62	6.68	0.01	977.09
September	355.75	380.70	89.46	139.82	6.79	0.01	972.51
October	373.09	440.13	79.51	121.83	8.16	0.01	1,022.74
November	385.05	396.82	59.65	147.84	7.59	0.01	996.96
December	400.31	392.50	77.37	134.98	7.10	0.03	1,012.29
<b>2021*</b>							
January	330.31	464.78	74.69	137.65	7.44	0.03	1,014.91
February	281.40	422.15	105.51	109.84	6.97	0.04	925.92

\*Provisional

Source: Kenya Power & Lighting Company

**Fig. 7: Electricity Generation by Source**

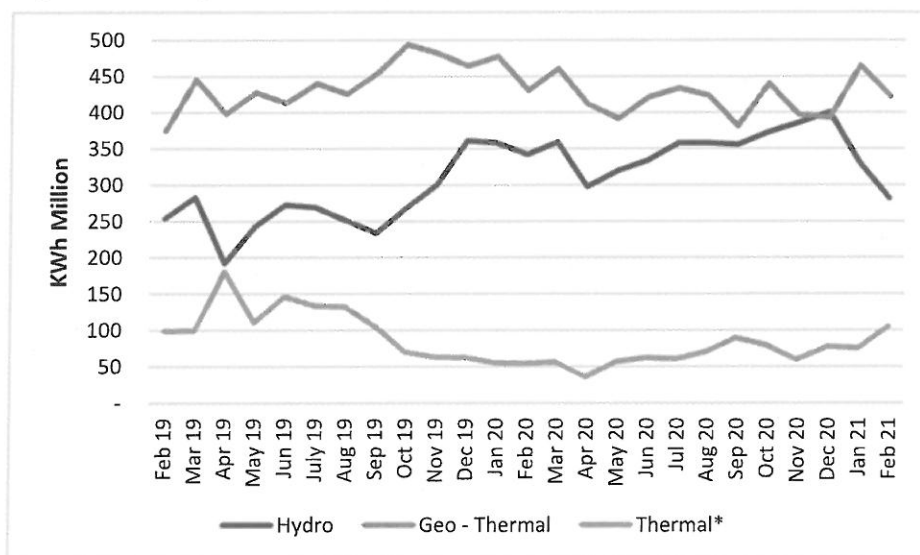


Table 15(b): Generation and Consumption of Electricity

Million KWh										
Month	Local Generation	Generation Imports			Total	Total Generation	Total KPLC Sales	Consumption Exports		
		Uganda	Tanzania	Ethiopia				Uganda	Tanzania	Total Exports
<b>2020</b>										
January	986.09	10.51	-	0.41	10.92	997.01	772.37	1.60	-	1.60
February	933.62	10.24	-	0.37	10.62	944.22	740.48	1.25	-	1.25
March	968.74	10.92	-	0.36	11.27	979.99	761.90	1.85	-	1.85
April	840.96	8.67	-	0.33	9.00	849.96	645.29	1.30	-	1.30
May	881.09	9.28	-	0.41	9.69	890.78	660.11	1.32	-	1.32
June	912.90	10.94	-	0.40	11.34	924.25	716.08	1.31	-	1.31
July	969.14	12.16	-	0.41	12.57	981.71	729.11	1.38	-	1.38
August	977.09	12.88	-	0.43	13.31	990.40	733.67	1.25	-	1.25
September	972.51	13.31	-	0.39	13.70	986.21	751.23	1.14	-	1.14
October	1,022.74	11.79	-	0.44	12.23	1,034.97	778.02	1.30	-	1.30
November	996.96	10.02	-	0.35	10.37	1,007.32	757.68	1.42	-	1.42
December	1,012.29	11.28	-	0.39	11.66	1,023.95	748.44	1.42	-	1.42
<b>2021*</b>										
January	1,014.91	16.00	-	0.44	16.44	1,031.35	792.01	0.73	-	0.73
February	925.92	20.26	-	0.41	20.67	946.59	742.34	0.49	-	0.49

\*Provisional

Source: Kenya Power &amp; Lighting Company

Table 15(c): Consumption of Petroleum Fuels

								'000 MT
Month	AGO (Light Diesel Oil)	Jet	Fuel Oil	Motor Spirit	Illuminating Kerosene	IDO (Heavy Diesel Oil)	LPG	Aviation Gasoline
<b>2019</b>								
January.....	183.69	61.25	30.61	119.69	19.54	0.00	28.49	1.33
February....	183.39	56.64	26.00	115.41	16.00	0.00	26.91	0.74
March.....	186.17	56.48	33.37	113.79	14.83	0.83	20.01	1.40
April.....	195.90	53.49	44.77	125.34	15.38	0.00	18.72	1.21
May.....	195.87	54.50	38.89	121.46	15.45	0.00	18.72	1.38
June.....	169.38	55.05	44.80	104.97	12.52	0.00	13.27	1.28
July.....	189.20	60.32	28.19	137.97	13.20	0.00	-	1.21
August.....	191.85	63.31	34.34	119.79	12.37	0.00	-	1.28
September..	178.76	60.71	32.95	113.23	11.13	0.00	-	0.12
October.....	181.66	57.29	24.27	118.91	14.19	0.49	25.27	0.07
November...	175.09	58.97	21.36	116.67	11.01	0.00	31.31	0.10
December...	167.79	61.34	23.22	127.09	12.68	0.00	26.73	0.10
<b>2020*</b>								
January.....	190.11	62.21	13.61	123.45	11.21	0.00	12.89	0.13
February....	173.90	58.45	18.10	112.98	10.93	0.32	36.54	0.10
March.....	187.57	42.55	24.79	111.44	10.85	0.21	23.98	0.11
April.....	137.71	6.32	21.36	82.20	10.76	0.00	31.43	0.03
May .....	139.71	17.38	22.79	91.89	10.98	0.00	30.86	1.19
June.....	158.19	19.42	18.85	103.91	12.16	0.00	23.33	0.02
July.....	185.64	23.19	21.14	125.51	9.93	0.00	28.24	0.05
August.....	191.38	29.72	25.96	120.20	13.18	0.03	41.31	0.06
September..	194.96	30.67	25.81	121.16	7.65	0.12	21.42	0.08
October.....	199.14	34.15	23.52	131.44	12.72	1.07	27.24	0.05
November...	187.96	34.06	23.51	121.94	9.29	3.54	26.61	0.08
December...	197.19	40.26	32.05	145.29	8.92	5.66	22.38	0.08

Source: Ministry of Energy and Petroleum and Energy &amp; Petroleum Regulatory Authority (EPRA)

MT: Denotes Metric Tonnes

\*Provisional

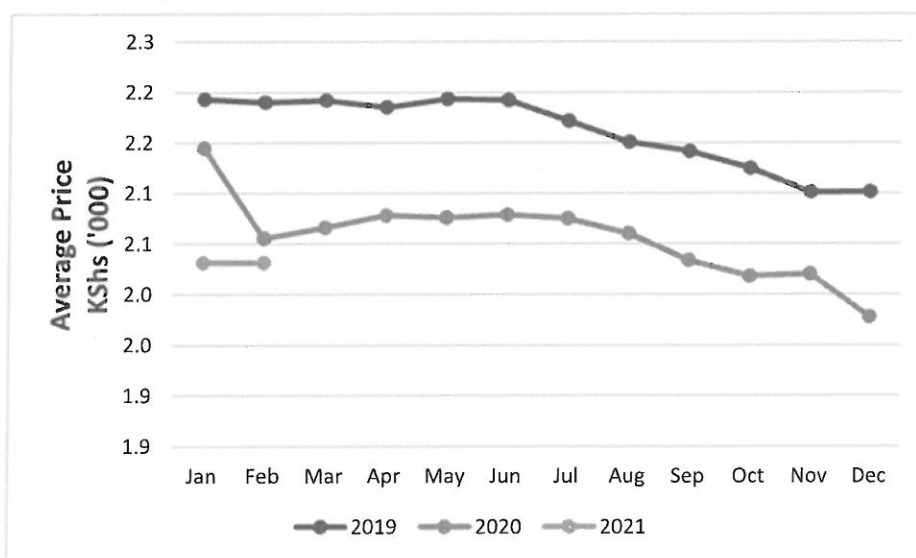
Table 15(d): Average Retail Prices for Selected Fuel Products within Nairobi

Period	KSh per litre		
	Motor Gasoline Premium	Light Diesel Oil (Gasoil)	Illuminating Kerosene
<b>2020</b>			
January.....	110.20	102.32	103.95
February....	112.87	104.45	102.69
March.....	110.87	101.65	95.46
April.....	92.87	97.56	77.28
May.....	83.33	78.37	79.77
June.....	89.10	74.57	62.46
July.....	100.48	91.87	65.45
August.....	103.95	94.63	83.65
September..	105.43	94.51	83.15
October.....	107.27	92.91	83.73
November...	105.85	90.70	81.63
December...	106.82	91.82	83.56
<b>2021</b>			
January.....	106.99	96.4	87.12
February....	115.18	101.91	92.44

**Table 15(e): Average Retail Prices for Selected Fuels in Kenya (National Average Retail Prices)**

Period	Motor Gasoline Premium (KSh per Litre)	Light Diesel Oil (KSh per Litre)	Illuminating Kerosene (KSh per Litre)	L.P.G (KSh per 13 Kg)	Charcoal (KSh per Kg)
<b>2020</b>					
January.....	110.61	102.81	104.46	2,144.81	152.25
February.....	112.58	105.37	103.65	2,055.30	58.12
March.....	112.07	102.93	96.72	2,065.98	56.83
April.....	94.09	98.84	78.59	2,077.88	57.87
May.....	84.58	79.67	81.08	2,075.87	57.41
June.....	90.34	75.88	63.79	2,078.50	57.19
July.....	101.37	92.81	66.41	2,075.00	57.37
August.....	104.83	95.57	84.60	2,060.15	58.60
September.....	106.30	95.45	84.09	2,033.57	58.29
October.....	108.13	93.85	84.67	2,017.77	58.20
November.....	106.72	91.64	82.58	2,019.88	58.20
December.....	107.69	92.75	84.50	1,977.36	57.76
<b>2021</b>					
January.....	107.86	97.33	88.07	2,018.93	58.51
February.....	116.03	102.84	93.37	2,031.21	58.37

Note: Unit of measure for charcoal changed to 1 kg beginning February 2020.....

**Fig. 8: Average Prices for Liquefied Petroleum Gas in Kenya ('000 KSh per 13 Kg cylinder)**

**Table 15(f): Opec Reference basket and Murban Crude Oil Prices**

Month/Year	US\$/ BBL				
	2017	2018	2019	2020	2021*
January.....	55.35	66.28	60.81	66.09	54.38
February.....	56.10	65.98	65.64	55.53	61.05
March.....	52.60	66.31	68.60	33.92	
April.....	53.40	70.97	73.05	17.66	
May.....	51.45	76.71	69.70	25.17	
June.....	47.30	73.22	62.75	37.05	
July.....	48.60	76.00	64.86	43.42	
August.....	48.85	74.91	60.16	45.19	
September.....	55.70	78.75	62.39	41.54	
October.....	63.83	81.28	60.88	40.08	
November.....	63.65	68.05	63.48	42.61	
December.....	62.06	59.33	66.66	49.17	

US\$/ BBL: US Dollar per Barrel

2016-2019 prices are Murban Adnoc crude oil monthly average prices

Price: Abu Dhabi Free On Board (FOB)

ADNOC: Abu Dhabi National Oil Corporation

\* As from Feb 2020 all prices published will refer to the OPEC reference basket as defined by the Monthly oil market report

\* As from Feb 2020 all prices published are crude spot prices on the 20th of the reference month

Table 16: Value of Building Plans Approved for Nairobi City County

KSh Million

Month	Actual Value of Buildings			Real *		
	Residential	Non Residential	Aggregate	Residential	Non Residential	Aggregate
<b>2020</b>						
January.....	12,361.60	7,985.49	20,347.09	126.87	82.73	208.88
February.....	24,801.96	6,716.30	31,518.26	254.55	69.58	323.57
March.....	22,827.64	7,744.80	30,572.44	234.29	80.23	313.86
April.....	12,284.89	8,749.42	21,034.30	126.08	90.64	215.94
May.....	3,430.74	2,582.29	6,013.02	35.21	26.75	61.73
June.....	-	-	-	-	-	-
July.....	-	-	-	-	-	-
August.....	5,037.15	2,127.04	7,164.20	51.70	22.04	73.55
September.....	3,302.22	828.84	4,131.06	33.89	8.59	42.41
October.....	-	-	-	-	-	-
November.....	8,335.88	5,160.24	13,496.11	85.55	53.46	138.55
December.....	16,776.05	2,522.87	19,298.92	172.18	26.14	198.12
<b>2021</b>						
January.....	6,329.78	2,702.02	9,031.80	63.23	27.20	90.26
February.....	7,497.72	2,130.36	9,628.08	74.90	21.45	96.22

\* Actual deflated by relevant construction cost indices (Dec1972 =100)

- No Building plans were approved

Table 17(a): Domestic Production of Sugar

Month/Year	Metric tonnes				
	2017	2018	2019	2020	2021*
January	53,071	62,819	53,060	53,155	58,044
February	49,094	53,835	46,139	51,083	61,508
March	42,238	49,148	45,463	52,699	
April	26,230	36,682	35,312	45,468	
May	15,246	28,933	36,307	46,350	
June	16,113	28,320	28,545	49,680	
July	17,882	30,260	25,097	53,155	
August	10,892	35,676	32,835	53,434	
September	21,649	40,725	33,356	54,873	
October	31,621	45,324	35,259	54,830	
November	43,175	41,107	30,900	50,227	
December	48,900	38,268	38,662	38,834	
<b>Total</b>	<b>376,111</b>	<b>491,097</b>	<b>440,935</b>	<b>603,788</b>	<b>119,552</b>

Source: Sugar Directorate

\*Provisional

Table 17(b): Production of Soft Drinks

					'000 Litres
Month	2016	2017	2018	2019	2020*
January	41,348	50,409	52,062	53,585	52,654
February	41,440	43,353	49,685	55,218	42,072
March	48,865	50,623	52,580	61,413	52,109
April	42,148	46,399	45,690	58,230	35,951
May	36,874	40,742	41,482	53,086	34,129
June	36,202	45,875	44,827	46,074	47,273
July	32,158	41,980	43,725	47,149	39,833
August	38,508	41,217	48,795	49,248	39,290
September	40,291	40,221	45,956	53,234	52,436
October	43,203	45,275	46,546	47,586	47,215
November	40,141	45,073	50,201	50,715	42,916
December	49,966	66,378	54,021	55,398	64,707
<b>Total</b>	<b>491,143</b>	<b>557,548</b>	<b>575,569</b>	<b>630,936</b>	<b>550,585</b>

\*Provisional

Table 17(c): Production of Assembled Vehicles

Month/Year	Numbers				
	2017	2018	2019	2020	2021*
January	276	395	431	614	559
February	578	529	614	861	561
March	645	548	633	830	
April	436	409	739	669	
May	434	407	732	659	
June	323	366	556	415	
July	483	587	648	735	
August	302	434	709	595	
September	351	606	595	591	
October	370	569	728	676	
November	364	476	872	533	
December	322	327	545	547	
<b>Total</b>	<b>4,884</b>	<b>5,653</b>	<b>7,802</b>	<b>7,725</b>	<b>1,120</b>

\*Provisional

Table 17(d): Production of Galvanized Sheets

Month/Year	Metric Tonnes				
	2017	2018	2019	2020	2021*
January.....	26,230	23,919	20,124	23,397	17,788
February.....	22,994	21,890	22,749	21,989	
March.....	22,574	22,048	26,313	18,527	
April.....	23,225	21,434	23,214	6,259	
May.....	23,081	22,271	22,501	18,042	
June.....	15,424	21,434	24,667	23,730	
July.....	22,640	22,510	23,260	24,493	
August.....	15,296	21,847	21,918	23,226	
September.....	24,188	22,425	22,641	20,801	
October.....	21,312	23,906	22,619	22,868	
November.....	24,357	22,877	21,871	23,268	
December.....	21,438	21,266	22,547	20,854	
<b>Total</b>	<b>262,759</b>	<b>267,828</b>	<b>274,425</b>	<b>247,455</b>	<b>17,788</b>

\*Provisional

Table 17(e): Cement Production and Consumption

Month/Year	2019		2020		2021*		Tonnes
	Production	Consumption	Production	Consumption	Production	Consumption	
January.....	485,178	483,747	530,404	528,904	652,883	647,491	
February.....	470,146	469,809	548,818	547,543	612,980	606,547	
March.....	507,037	505,465	559,424	551,914			
April.....	501,921	500,357	509,197	506,800			
May.....	486,301	486,637	511,961	509,698			
June.....	477,432	466,923	594,421	591,799			
July.....	527,115	527,771	666,341	659,798			
August.....	512,470	510,066	712,701	691,588			
September.....	519,370	515,953	707,033	677,381			
October.....	504,615	499,355	731,253	723,124			
November.....	479,085	474,075	668,507	662,609			
December.....	496,517	493,176	666,855	661,504			
<b>TOTAL.....</b>	<b>5,967,186</b>	<b>5,933,333</b>	<b>7,406,914</b>	<b>7,312,662</b>	<b>1,265,863</b>	<b>1,254,038</b>	

\*Provisional

Table 17(f): Milk Intakes in the Formal Sector

Month/Year	Million Litres					
	2016	2017	2018	2019	2020 <sup>+</sup>	2021
January.....	56.80	45.13	51.55	68.07	63.39	59.17
February.....	52.83	46.24	47.30	54.66	53.88	57.20
March.....	48.41	38.64	49.85	54.33	56.09	
April.....	54.35	47.09	52.01	41.46	54.78	
May.....	49.49	47.24	49.63	48.29	42.51	
June.....	66.37	48.87	50.33	52.33	53.24	
July.....	58.47	42.55	53.18	63.54	54.31	
August.....	56.15	54.95	52.56	60.46	59.31	
September.....	43.67	55.81	56.37	63.21	58.04	
October.....	56.93	58.14	55.25	59.32	59.71	
November.....	54.09	55.21	57.02	51.30	60.58	
December.....	50.66	51.51	68.15	68.91	67.86	
<b>Total.....</b>	<b>648.22</b>	<b>591.38</b>	<b>643.20</b>	<b>685.87</b>	<b>683.70</b>	

Source: Kenya Dairy Board

\* Provisional

Revised<sup>+</sup>

Fig. 9: Milk Intake in the Formal Sector

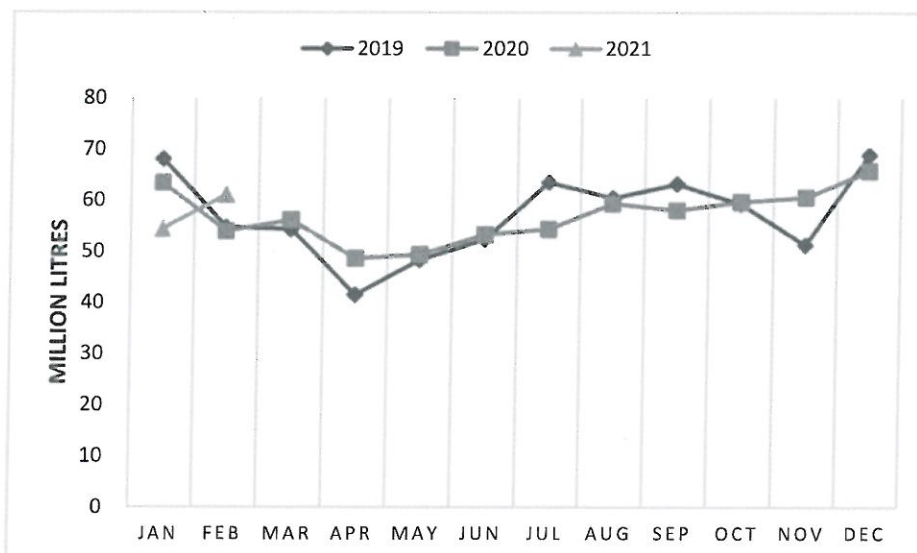


Table 18: Visitor Arrivals through J.K.I.A and M.I.A

Month	AIRPORT		Numbers*
	JKIA	MIA	Total
<b>2020</b>			
January	114,873	12,214	<b>127,087</b>
February	108,578	11,092	<b>119,670</b>
March	43,346	3,950	<b>47,296</b>
April	12	0	<b>12</b>
May	1,229	0	<b>1,229</b>
June	534	2	<b>536</b>
July	617	1	<b>618</b>
August	13,371	548	<b>13,919</b>
September	19,403	761	<b>20,164</b>
October	28,451	1,184	<b>29,635</b>
November	30,719	1,156	<b>31,875</b>
December	44,279	3,127	<b>47,406</b>
<b>2021</b>			
January	43,988	3,050	<b>47,038</b>
February	32,047	3,005	<b>35,052</b>

Source: Department of immigration Services Kenya

\* Visitor arrivals exclude Kenyans

Fig. 10: Visitor Arrivals through J.K.I.A and M.I.A

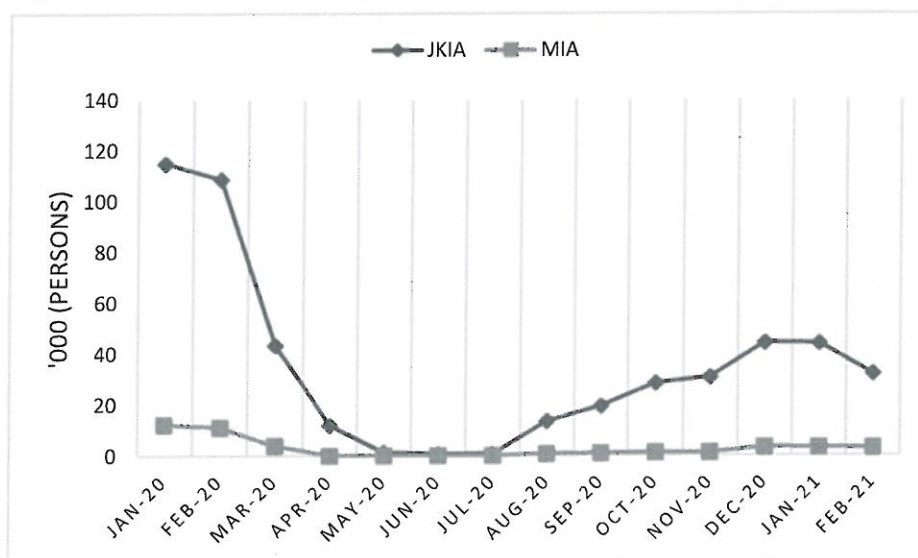


Table 19(a): Jomo Kenyatta international airport-Embarked Passengers by Port of Destination

	2020												Number	
PORTS/MONTH	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	
Amsterdam	10,367	6,631	212	0	406	298	2,919	1,873	2,642	2,401	3,154	3,918	2,579	
Brussels	0	0	0	0	0	0	0	0	0	0	0	0	0	
London	7,804	7,196	107	219	507	140	2,522	2,526	2,541	2,494	3,379	3,735	2,779	
Paris	3,916	4,543	0	0	0	81	1,117	1,291	1,441	773	1,678	2,712	1,250	
Zurich	455	70	0	0	0	643	113	347	209	2	0	0	0	
Other Europe	2,010	1,185	798	10	47	228	3,510	3,162	3,823	3,358	4,224	5,667	4,135	
Total Europe	24,552	19,625	1,117	229	960	1,390	10,181	9,199	10,656	9,028	12,435	16,032	10,743	
New York	5,497	3,467	3,465	0	0	0	0	0	0	91	512	1,075	351	
Other North America	0		0	0	0	0	0	0	0	0	0	0	0	
Total North America	5,497	3,467	3,465	0	0	0	0	0	0	91	512	1,075	351	
Dubai	17,201	10,344	15	0	4	1,200	3,785	5,186	6,665	7,544	10,128	10,653	7,960	
Jeddah	833	498	0	16	0	10	0	103	191	565	512	1,742	1,731	
Other Middle East	20,225	9,454	182	402	463	15	3,216	3,743	4,876	5,672	6,799	8,698	7,369	
Total Middle East	38,259	20,296	197	418	467	1,225	7,001	9,032	11,732	13,781	17,439	21,093	17,060	
Mumbai	2,108	1,587	0	0	467	229	0	0	689	1,983	1,918	1,542	1,521	
Bangkok	16	108	0	0	0	0	0	0	0	0	0	0	0	
Other Far East	58	0	0	218	118	333	1,075	1,021	1,381	2,492	3,937	3,887	2,683	
Total Far East	2,182	1,695	0	218	585	562	1,075	1,021	2,070	4,475	5,855	5,429	4,204	
Addis Ababa	15,438	9,381	217	308	1,050	650	3,264	3,655	4,945	5,987	7,504	9,606	7,253	
Bujumbura	1,473	533	0	1	1	49	0	58	0	648	908	836	481	
Dar-es-salaam	7,059	3,231	117	2	0	38	59	301	1,975	2,189	2,661	2,864	1,999	
Entebbe	6,432	4,802	0	5	34	73	46	62	3,500	4,615	5,190	4,999	4,718	
Kigali	5,013	2,578	3	28	86	0	1,796	1,693	1,957	2,296	2,836	2,336	1,238	
Kinshasa	133	252	4	0	4	4	19	359	882	961	1,126	1,623	1,672	
Other East & Central Africa	3,116	1,210	7	4	6	4	3	229	590	664	747	890	754	
Total East & Central Africa	38,664	21,987	348	348	1,181	818	5,187	6,357	13,849	17,360	20,972	23,154	18,115	
Mauritius	893	616	0	0	0	0	0	58	0	0	0	178	0	
Seychelles	380	353	0	55	125	0	0	0	4	0	86	0	7	
Zanzibar	3,703	1,440	0	0	0	0	0	118	1,010	1,448	2,461	1,156	773	
Other Indian Ocean Islands	153	595	4	0	0	0	300	278	678	820	1,184	1,843	356	
Total Indian Ocean Islands	5,129	3,004	4	55	125	0	300	454	1,692	2,268	3,731	3,177	1,136	
Abidjan	463	229	0	0	0	0	440	267	747	310	377	751	538	
Douala	404	183	0	0	0	0	436	427	499	397	890	969	681	
Lagos	617	842	0	0	0	0	48	922	1,132	2,230	3,581	3,047	1,283	
Accra	665	712	0	0	0	0	48	214	621	1,272	1,689	1,792	1,388	
Other West Africa	222	151	528	0	21	0	122	102	42	4	0	5	66	
Total West Africa	2,371	2,117	528	0	21	0	1,094	1,932	3,041	4,213	6,537	6,564	3,956	
Johannesburg	4,695	4,447	0	0	0	41	80	153	2,344	2,941	3,926	3,643	3,670	
Harare	114	509	0	0	4	0	5	0	261	205	486	489	285	
Lilongwe	696	498	0	10	0	7	0	176	409	505	999	1,095	762	
Lusaka	327	477	0	34	0	29	531	312	799	1,113	1,304	923	504	
Cape Town	2,095	846	0	0	0	0	0	0	0	0	173	69	124	
Other South Africa	738	523	0	0	0	0	183	0	323	526	1,167	1,385	1,095	
Total Southern Africa	8,665	7,300	0	44	4	77	799	641	4,136	5,290	8,055	7,604	6,440	
Cairo	2,611	1,589	0	1	136	0	1,149	739	758	860	1,103	1,170	979	
Khartoum	3	226	0	0	10	58	0	0	0	5	16	14	2	
Juba	2,108	1,271	24	0	74	195	1,125	1,639	1,692	1,849	1,581	2,801	1,657	
Other North Africa	25	1	144	5	0	0	0	2	13	6	4	67	9	
Total North Africa	4,747	3,087	168	6	220	253	2,274	2,380	2,463	2,720	2,704	4,052	2,647	
Other International	6,266	3,514	9	299	342	660	2,658	3,632	4,645	5,481	4,731	4,781	3,878	
Total International	130,835	82,625	5,836	1,617	3,905	4,985	30,569	34,648	54,284	64,707	82,971	92,961	68,530	

Table 19(b): Jomo Kenyatta international airport- Landed Passengers by Port of Origin

	2020												Number	
PORTS/MONTH	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	
Amsterdam	14,752	7,977	0	0	0	16	2,500	2,127	2,791	2,726	5,007	3,484	2,238	
Brussels	0	0	0	0	0	0	0	0	0	0	0	0	0	
London	11,649	6,881	0	143	389	1	2,837	2,600	3,443	3,584	6,509	4,216	2,750	
Paris	10,818	4,955	0	0	0	108	1,070	1,163	1,560	963	2,396	2,418	1,262	
Zurich	4,882	1,609	0	0	0	0	244	520	448	0	0	0	0	
Other Europe	9,773	3,127	3	11	7	140	4,017	3,617	3,977	4,482	5,892	5,768	4,031	
Total Europe	51,874	24,549	3	154	396	265	10,668	10,027	12,219	11,755	19,804	15,886	10,281	
New York	3,059	1,781	0	0	0	0	0	0	0	0	1,136	710	264	
Other North America	0	0	0	0	0	0	0	0	0	0	0	0	0	
Total North America	3,059	1,781	0	0	0	0	0	0	0	0	1,136	710	264	
Dubai	21,494	11,820	22	381	237	411	5,102	5,348	7,576	7,317	11,388	10,504	8,575	
Jeddah	1,806	643	0	0	0	179	162	87	827	881	621	559	678	
Other Middle East	18,209	7,869	0	21	139	344	5,348	4,017	4,750	5,147	9,371	7,301	5,988	
Total Middle East	41,509	20,332	22	402	376	934	10,612	9,452	13,153	13,345	21,380	18,364	15,241	
Mumbai	9,918	5,971	0	233	530	96	215	0	1,369	1,614	2,078	1,851	1,859	
Bangkok	3,834	857	0	0	0	0	0	0	0	0	0	0	0	
Other Far East	911	4	0	165	0	0	496	1,352	1,346	2,326	2,472	3,115	2,764	
Total Far East	14,663	6,832	0	398	530	96	711	1,352	2,715	3,940	4,550	4,966	4,623	
Addis Ababa	18,589	9,439	74	3	246	433	3,102	3,687	5,921	6,723	9,279	7,449	6,495	
Bujumbura	2,962	1,642	0	7	0	16	7	93	2	511	807	1,003	522	
Dar-es-alaam	10,468	6,202	0	1	0	5	424	304	2,259	2,396	2,787	3,645	2,560	
Entebbe	18,078	8,826	0	4	8	0	63	63	2,957	3,823	5,030	5,108	4,130	
Kigali	7,918	4,405	3	0	36	1	1,346	1,375	2,007	2,334	3,122	2,728	1,630	
Kinshasa	2,661	1,494	4	0	8	6	27	416	770	999	1,142	1,354	1,492	
Other East & Central Africa	6,301	3,709	0	6	1	5	10	148	101	455	1,200	1,076	1,102	
Total East & Central Africa	66,977	35,717	81	21	299	466	4,979	6,086	14,017	17,241	23,367	22,363	17,931	
Mauritius	2,048	1,160	0	0	0	0		23	0	0	0	0	0	
Seychelles	1,018	984	0	0	0	0		0	0	4	87	0	6	
Zanzibar	7,057	4,611	0	0	0	0		90	1,164	1,281	1,932	1,709	991	
Other Indian Ocean Islands	5,450	3,228	0	0	0	1	235	352	750	1,361	1,494	667	578	
Total Indian Ocean Islands	15,573	9,983	0	0	0	1	235	465	1,914	2,646	3,513	2,376	1,575	
Abidjan	1,630	1,071	0	0	125	0	238	261	486	460	652	615	507	
Douala	122	11	0	0	0	0	0	0	0	121	0	0	0	
Lagos	3,694	1,681	0	0	36	0	227	436	923	1,857	2,648	2,404	1,119	
Accra	3,616	2,140	0	0	0	3	69	231	940	1,412	1,600	1,622	1,707	
Other West Africa	1,994	1,165	0	0	0	0	417	610	537	622	562	1,427	753	
Total West Africa	11,056	6,068	0	0	161	3	951	1,538	2,886	4,472	5,462	6,068	4,086	
Johannesburg	11,177	6,307	0	1	176	19	289	169	2,518	3,795	4,827	3,801	3,127	
Harare	2,558	1,438	0	0	4	0	93	5	472	792	1,023	1,017	591	
Lilongwe	1,554	870	2	0	48	0	7	212	439	292	393	487	567	
Lusaka	3,308	2,395	0	11	0	0	567	236	486	567	982	644	502	
Cape Town	2,435	1,531	0	0	0	0	0	0		0	206	248	109	
Other South Africa	5,114	3,771	0	4	0	0	16	107	649	1,156	1,855	1,723	1,209	
Total Southern Africa	26,146	16,312	2	16	228	19	972	729	4,564	6,602	9,286	7,920	6,105	
Cairo	1,713	729	0	0	24	0	774	933	813	899	975	794	754	
Khartoum	739	509	0	2	0	97	3	12	6	0	9	0	8	
Juba	2,710	1,777	1	18	104	110	1,183	1,284	1,505	1,665	2,833	1,684	1,518	
Other North Africa	0	8	0	1	0	9	7	1	0	6	6	50	1	
Total North Africa	5,162	3,023	1	21	128	216	1,967	2,230	2,324	2,570	3,823	2,528	2,281	
Other International	6,602	3,716	38	220	122	179	1,408	2,646	3,979	4,155	5,070	3,885	4,101	
Total International	239,562	126,532	147	1,232	2,240	2,179	32,503	34,525	57,771	66,726	97,391	85,066	66,488	

Table 19(c): New Vehicle Registration

BODY TYPE	2020										2021	
	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb
SALOONS	663	984	890	949	1,053	794	850	737	767	775	640	459
ST. WAGONS	4,561	6,605	6,576	6,405	7,827	5,294	6,322	5,390	6,341	6,070	5,128	3,773
VANS	392	529	555	451	531	463	570	464	430	342	390	325
PICK UPS	343	543	432	392	518	440	399	395	342	372	353	357
MINI BUSES	151	161	183	158	211	127	159	122	192	130	77	60
BUSES	102	106	120	114	126	106	119	91	174	130	94	78
LORRIES	560	612	667	551	646	593	573	435	572	453	494	606
TRAILERS	122	156	118	111	179	147	176	141	151	108	358	320
MOTOR CYCLES	18,304	19,717	19,063	14,608	20,118	16,542	15,995	16,792	17,247	17,563	22,945	11,026
THREE WHEELERS	833	427	557	598	649	754	708	607	450	516	632	975
WHEELED TRACTORS	148	182	164	116	153	142	115	133	100	100	251	360
OTHERS	255	330	376	407	430	292	295	263	297	194	534	483
<b>TOTALS</b>	<b>26,434</b>	<b>30,352</b>	<b>29,701</b>	<b>24,860</b>	<b>32,441</b>	<b>25,694</b>	<b>26,281</b>	<b>25,570</b>	<b>27,063</b>	<b>26,753</b>	<b>31,896</b>	<b>18,822</b>

Source: National Transport and Safety Authority

Table 19(d): Passenger and Cargo Movement on the Standard Gauge Railway

Month	PASSENGER				FREIGHT			
	2020		2021*		2020		2021*	
	No. Passengers	Revenue (KSh)	No. Passengers	Revenue (KSh)	Tonnage	Total Revenue (KSh)	Tonnage	Total Revenue (KSh)
January	117,380	130,259,172.00	156,918.00	163,768,440.00	375,828	1,092,488,053.49	449,731	1,052,531,751.00
February	114,241	127,932,570.00	142,346.00	156,558,140.00	293,088	834,306,615.27	456,136	1,008,013,109.00
March	89,109	95,221,510.00			259,138	755,413,357.33		
April	6,363	5,905,980.00			327,091	929,475,945.65		
May	0	0.00			342,326	962,667,608.25		
June	0	0.00			383,782	1,029,900,406.88		
July	19,502	22,833,600.00			421,745	1,233,867,658.74		
August	32,641	39,471,550.00			414,775	1,115,103,597.22		
September	43,235	51,837,050.00			369,246	1,037,717,598.49		
October	112,411	125,443,750.00			427,388	1,178,620,650.15		
November	119,238	128,922,180.00			412,426	1,162,966,849.40		
December	128,922,180	168,201,190.00			389,804	1,103,652,195.90		
<b>TOTAL</b>	<b>129,576,300</b>	<b>896,028,552</b>	<b>299,264</b>	<b>320,326,580.00</b>	<b>4,416,637</b>	<b>12,436,180,536.77</b>	<b>905,867.00</b>	<b>2,060,544,860.00</b>

Source: Kenya Railways Corporation

\*Provisional

Table 19(e): Monthly Cargo Throughput at the port of Mombasa

Year	Metric tonnes											
	2020											2021
	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	Nov	Dec	Jan
<b>Imports</b>												Feb
Dry General-Containerized	737,749	686,997	750,081	663,891	720,712	786,489	688,869	787,868	822,189	736,072	793,000	919,137
Dry General- Conventional	172,799	175,108	106,373	195,878	136,418	198,412	125,872	174,045	231,494	242,678	266,000	80,678
Dry Bulk	575,534	674,529	655,030	626,179	712,782	828,288	631,722	811,782	759,150	493,532	592,000	843,199
P.O.L. <sup>1</sup>	611,591	559,695	650,052	304,141	549,192	619,260	596,029	579,402	629,406	693,395	851,000	700,928
Other Bulk Liquids	88,197	66,697	104,958	69,588	67,673	37,304	141,492	74,989	129,135	67,469	54,000	104,773
<b>Sub-Total</b>	<b>2,185,870</b>	<b>2,163,026</b>	<b>2,266,484</b>	<b>1,859,677</b>	<b>2,186,777</b>	<b>2,469,753</b>	<b>2,183,984</b>	<b>2,428,086</b>	<b>2,571,374</b>	<b>2,233,146</b>	<b>2,556,000</b>	<b>2,648,715</b>
<b>Exports</b>												
Dry General-Containerized	305,286	328,293	285,493	284,434	312,346	296,773	336,212	300,280	287,002	281,389	308,000	307,117
Dry General-Conventional	2,673	12,473	2,503	1,097	631	2,619	450	9,711	985	1,026	1,000	1,917
Dry Bulk	72,200	54,000	8,000	25,900	64,000	11,000	10,000	65,000	10,000	60,000	61,000	23,000
P.O.L. <sup>1</sup>	900	901	1,780	-	750	4,500	5,600	2,600	1,702	2,600	2,000	6,375
Bunkers	2,886	-	-	1,940	2,424	1,297	2,901	702	1,502	1,502	2,000	4,675
Other Bulk Liquids	-	-	-	-	-	-	-	-	-	-	-	-
<b>Sub-Total</b>	<b>383,745</b>	<b>395,667</b>	<b>297,776</b>	<b>313,371</b>	<b>380,151</b>	<b>316,189</b>	<b>355,163</b>	<b>378,293</b>	<b>301,191</b>	<b>346,517</b>	<b>374,000</b>	<b>343,084</b>
Transshipment	160,131	140,819	129,470	152,779	179,463	213,553	144,687	138,613	160,270	230,772	211,000	169,373
Residuals	5,208	8,282	9,712	13,749	6,019	12,650	6,007	8,397	10,028	8,402	11,000	8,564
<b>Grand Total</b>	<b>2,734,954</b>	<b>2,707,794</b>	<b>2,703,452</b>	<b>2,339,576</b>	<b>2,752,410</b>	<b>3,012,145</b>	<b>2,689,841</b>	<b>2,953,389</b>	<b>3,042,863</b>	<b>2,818,837</b>	<b>3,152,000</b>	<b>3,169,736</b>

Source: Kenya Ports Authority

<sup>1</sup>Refers to Petroleum, Oil and Lubricants

Chairperson: Hon. Florence Kajuju, MBS  
Vice-Chairperson: Mr. Washington Sali  
Commissioner: Mrs. Lucy Ndung'u, EBS, HSC



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THE  
COMMISSION ON ADMINISTRATIVE JUSTICE  
"Office of the Ombudsman"

Our Ref: CAJ/ATI/M.TRAN/004/7/20-SNK

17<sup>th</sup> January, 2020

**Principal Secretary**

State Department of Transport  
Ministry of Transport, Infrastructure, Housing  
Urban Development and Public Works  
Transcom House, Ngong Road  
P.O. Box 52692-00200

**NAIROBI**

Dear Sir,

**RE: REQUEST FOR INFORMATION/DOCUMENTS ON STANDARD GAUGE RAILWAY  
BY MR KHELEF KHALIFA TO YOUR OFFICE**

The Commission is the Oversight and Enforcement Agency of the Access to Information Act, 2016 (ATIA 2016).

The Commission received a letter from Mr. Khelef Khalifa dated 16<sup>th</sup> December 2019 addressed to your Office requesting for information/documents on Standard Gauge Railways (copy enclosed).

Kindly respond to the above request for information/documents in line with section 9(4) of ATIA 2016.

Your prompt response will be highly appreciated.

**LUCY NDUNGU, EBS**

**ACCESS TO INFORMATION COMMISSIONER**

**CC:**

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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO. 159 OF 2018**  
**CONSOLIDATED WITH**  
**CONSTITUTIONAL PETITION NO. 201 OF 2019**

**WILLIAM ODHIAMBO RAMOGI.....1<sup>ST</sup> PETITIONER**  
**ASHA MASHAKA OMAR.....2<sup>ND</sup> PETITIONER**  
**GERALD LEWA KITI.....3<sup>RD</sup> PETITIONER**  
**KENYA TRANSPORTERS**  
**ASSOCIATION LIMITED.....4<sup>TH</sup> PETITIONER**  

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE CABINET SECRETARY,**  
**MINISTRY OF TRANSPORT AND**  
**INFRASTRUCTURE.....2<sup>ND</sup> RESPONDENT**  
**KENYA PORTS AUTHORITY.....3<sup>RD</sup> RESPONDENT**  
**KENYA RAILWAYS CORPORATION.....4<sup>TH</sup> RESPONDENT**  
**COMPETITION AUTHORITY OF KENYA.....5<sup>TH</sup> RESPONDENT**  

**AND**

**MUSLIMS FOR**  
**HUMAN RIGHTS.....1<sup>ST</sup> INTERESTED PARTY**  
**MAINA KIAI.....2<sup>ND</sup> INTERESTED PARTY**  
**COUNTY GOVERNMENT**  
**OF MOMBASA.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

**I. Introduction and Procedural Posture**

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

contractual clause to violate various constitutional provisions including their various fundamental rights contained in the Bill of Rights.

2. The second Petition is ***Mombasa High Court Petition No. 201 of 2019***. This Petition was filed in Court on 27/11/2019. In the main, the Petition challenges two directives issued by the 3<sup>rd</sup> Respondent directed at the members of the 4<sup>th</sup> Petitioner respecting the consignment of cargo and location of clearance depot for cargo arriving at the Port of Mombasa. This Petition was filed by the association of all transporters who feel aggrieved by the two directives.
3. ***Mombasa High Court Constitutional Petition No. 159 of 2018*** was, upon arguments by all parties, certified as raising substantial questions of law warranting the appointment of an uneven number of Judges. Subsequently, the Honourable Chief Justice empanelled the present bench to hear and dispose that Petition.
4. Upon empanelment, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents raised a Preliminary Objection challenging the jurisdiction of the Court to hear ***Mombasa High Court Constitutional Petition No. 159 of 2018***. In a ruling dated 02/11/2018, this bench dismissed the Preliminary Objection and ruled that the High Court had jurisdiction to hear the Petition. An appeal to the Court of Appeal was unsuccessful paving way for the hearing of the Petition on its merits.
5. Meanwhile, the 4<sup>th</sup> Petitioner had filed ***Mombasa High Court Constitutional Petition No. 201 of 2019***. The Honourable Chief Justice empanelled the same bench to hear and determine that Petition. Subsequently, in directions dated 20/08/2020, the Court consolidated the two Petitions and gave directions on the hearing. The Consolidated Petitions were eventually canvassed through a combination of both written submissions and oral arguments over a scheduled three-day period.
6. For the sake of completeness, it is important to state that during the first day of oral arguments, the Honourable Attorney General sought to stay the proceedings pending the hearing and determination of an intended appeal to the Supreme Court by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the dismissal by the Court of Appeal of their objection to the jurisdiction of this Court. As earlier stated, the Court of Appeal dismissed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents challenge to this Court's jurisdiction and affirmed our determination that this Court has the requisite jurisdiction to entertain the matter. By the time we heard the oral arguments, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not yet filed an appeal to the Supreme Court but had sought extension of time to file the appeal out of time. We declined to stay the proceedings in a ruling dated 21/09/2020.
7. Oral arguments were concluded on 24/09/2020 and we reserved judgment.
8. In the next part of this judgment, we briefly provide an overview of the two Petitions and the responses thereto. We then identify the issues presented in the Consolidated Petitions before analysing the issues at length. We finally announce our disposition of the case.

## **II. The Consolidated Petitions**

9. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein, the Kenya Ports Authority and the Kenya Railways Corporation respectively, entered into an Agreement dated 30<sup>th</sup> September, 2014 wherein the 3<sup>rd</sup> Respondent is *inter alia* obligated to consign to the 4<sup>th</sup> Respondent as a carrier a set volume of freight and or other cargo pursuant to commencement of the operations of the Standard Gauge Railway (SGR) to the 3<sup>rd</sup> Respondent's Inland Container Depot (ICD) at Embakasi. This obligation is contained in Clause 3 of the said Agreement hereinafter referred to as the "Take or Pay Agreement" or "Impugned Agreement."
10. The Impugned Agreement was challenged in **Mombasa High Court Constitutional Petition No. 159 of 2018** which was filed on 23/05/2018. It was supported by an affidavit sworn on 2<sup>nd</sup> October, 2018 by William Odhiambo Ramogi. It contends that various constitutional, human rights and fundamental freedoms of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners and those of the people of Mombasa County have been infringed by the manner in which the agreement was concluded and implemented. They are further apprehensive that the contended infringements shall persist unless the Court intervenes.
11. The Petitioners urged the Court to issue:
- A declaration that the Agreement dated 30<sup>th</sup> September, 2014, between the 3<sup>rd</sup> and 4<sup>th</sup> Respondent threatens and/or contravenes the social and economic rights of the Petitioners and the residents of Mombasa County under Article 43 of the Constitution.*
  - An order that the 3<sup>rd</sup> Respondent's administrative decision requiring shippers, consignors, consignees, clearing and forwarding agents and owners of goods to deliver and collect freight and cargo from the 3<sup>rd</sup> Respondent's Embakasi ICD is unfair and contravenes the economic and social rights of the residents and business community of Mombasa County and is thus unconstitutional.*
  - A declaration that the 3<sup>rd</sup> Respondent's operation vide its Embakasi ICD and/or other existing ICD threatens and or contravenes the social and economic rights of the Petitioners and residents of Mombasa County under Article 43 of the Constitution on the grounds stated in the Petition and is thus unconstitutional; in the alternative, that an ICD be established within a reasonable radius from the port of Mombasa within a geographical area of Mombasa County in order to secure the source of livelihood of the people of Mombasa County and surrounding Coastal Counties arising from the port activities and functions.*
  - An order that the Mombasa Port services be assigned to the National Government and County Government of Mombasa in accordance with Paragraph 5(e) of Part 2 of the Fourth Schedule to the Constitution and particularly that the management and operations of the Port with respect to County transport harbour functions is a function of the Mombasa County Government.*

- e. *An order for enforcement and implementation of County transport harbour functions by the 3<sup>rd</sup> Interested Party.*
  - f. *An order that the Respondents' actions complained of herein contravene Articles 6, 10, 43(1), 47, 55, 174 and 186 of the Constitution.*
  - g. *Costs of the Petition.*
  - h. *Any further relief or orders that this honourable Court may deem just and fit to grant.*
12. Upon the completion of the SGR, the 3<sup>rd</sup> Respondent issued a directive on 15<sup>th</sup> March, 2019 notifying the general public that from the date of the directive, shipping lines would not be allowed to endorse a Bill of Lading to importers' Container Freight Station (CFS) of choice.
13. Thereafter, on 3<sup>rd</sup> August, 2019 the 3<sup>rd</sup> Respondent and the Kenya Revenue Authority issued another directive stating that all imported cargo for delivery to Nairobi and the hinterland shall be conveyed by the Standard Gauge Railway (SGR) and cleared at the Inland Container Depot – Nairobi.
14. The directives of 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 (hereinafter jointly referred to as "Impugned Directives") prompted the 4<sup>th</sup> Petitioner to file **Mombasa High Court Constitutional Petition No. 201 of 2019** in which it seeks to challenge the constitutionality and legality of the Impugned Directives. The Petition is supported by an affidavit sworn on 27<sup>th</sup> November, 2019 by Dennis Okumu Ombok, the National Chairman of the 4<sup>th</sup> Petitioner.
15. The 4<sup>th</sup> Petitioner seeks:
- a. *A declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo from the Port of Mombasa to as destination of their choice.*
  - b. *A declaration that the directives issued on 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 are in violation of Articles 1, 2(4), 10, 21, 22, 23, 43, 46, 47 & 174 of the Constitution of Kenya, 2010.*
  - c. *A declaration that the directives are in violation of sections 21 and 24 of the Competition Act No. 12 of 2010 and the Consumer Protection Act No. 46 of 2012.*
  - d. *A declaration that the directives infringe the social-economic rights of the residents of Mombasa and Kenya in general.*
  - e. *An order of certiorari quashing the directives.*
  - f. *A declaration that the 2<sup>nd</sup> Respondent has acted unlawfully and contrary to the Constitution of Kenya, 2010 in that he has deliberately violated Articles 1, 10, 28 and 47 of the Constitution.*
  - g. *A declaration that the 5<sup>th</sup> 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 15<sup>th</sup> August, 2019 with regard to the monopolistic tendencies with regard to the transportation of containers from the Port of Mombasa to other destinations.*
  - ii. *That the 5<sup>th</sup> 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 4<sup>th</sup> Respondent consequent to the unlawful directives issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 15<sup>th</sup> March, 2019 and 21<sup>st</sup> August, 2019.*
  - h. *General damages to be awarded to the members of the Petitioner against the Respondents jointly and severally.*
  - i. *Costs of the Petition.*
  - j. *Such orders and directions as the honourable Court may deem fit.*
16. M/s Nyambura Kihoro Advocate filed submissions dated 14<sup>th</sup> September, 2020 on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners in support of the Amended Petition.
17. M/s Gikandi & Company Advocates filed submissions dated 10<sup>th</sup> September, 2020 on behalf of the 4<sup>th</sup> Petitioner.

### **III. The Responses to the Consolidated Petitions**

18. Esther Koimett, the Principal Secretary, State Department of Transport swore a replying affidavit on 25<sup>th</sup> October, 2018 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in response to the ***Mombasa Constitutional Petition No. 159 of 2018***. She deposed that enormous public participation, consultative work and research had been carried out by the government before it embarked on the construction of the SGR. Further that the ICD – Nairobi was constructed and gazetted as a customs area in 1984 to decongest the Port of Mombasa; provide accessibility of cargo to the Kenyan people while bringing cargo closer to the main consumers of the goods and to act as a transit hub for cargo destined for other parts of the country and neighbouring countries. She averred that the claim that the ICD has been constructed to deny Mombasa residents their livelihoods is therefore false.
19. It was the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's argument that the orders sought by the Petitioners are not justiciable as they go against the constitutional mandate of the National Government to enter into loan and derivative agreements with other parties. That granting the orders would be tantamount to the Judiciary supervising the authority of the National Government to prepare financing for its budgeted programs which would be against the doctrine of separation of powers. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged the Court to dismiss the Consolidated Petitions, particularly the declaration that transporters have a right to choose their mode of transport, stating that to do otherwise would deal a strain on the National Transport Policy.

20. Turasha N. Kinyanjui swore affidavits on 25<sup>th</sup> October, 2018 and 16<sup>th</sup> September, 2020 respectively on behalf of the 3<sup>rd</sup> Respondent, in response to the Consolidated Petitions.
21. According to Mr. Turasha, the 3<sup>rd</sup> Respondent has a statutory duty to manage ports and this duty includes the power to “*consign goods on behalf of other persons to any places whether within Kenya or elsewhere.*” The main thrust of the 3<sup>rd</sup> Respondent’s case is that the impugned decisions are operational decisions by the 3<sup>rd</sup> Respondent which are not subject to the constraints the Petitioners desire to impose.
22. M/s Muriu Mungai & Company Advocates filed submissions dated 18<sup>th</sup> September, 2020 on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents in which they asked the Court to dismiss the Consolidated Petitions for lack of merit.
23. A. K. Maina swore an affidavit on 3<sup>rd</sup> July, 2018 in his capacity as the Managing Director of the 4<sup>th</sup> Respondent, in opposition to ***Mombasa Constitutional Petition No. 159 of 2018***. He deposed that the Government of Kenya, in its Transport Policy, identified transport as the critical enabler for the realisation of Vision 2030, which aims to make Kenya a middle income country by the year 2030. That it is in this respect that the Government has focused on the expansion of the road and railway transport system in Kenya. The thrust of Mr. Maina’s affidavit is that the 4<sup>th</sup> Respondent engaged in extensive public participation fora before SGR was constructed; and that the assertions that the SGR would occasion an economic meltdown in Mombasa County are untrue.
24. Hellen Mungania, the Corporation Secretary of the 4<sup>th</sup> Respondent swore a further affidavit on 2<sup>nd</sup> October, 2018 to augment the 4<sup>th</sup> Respondent’s case. She contended that due process was followed in concluding the Impugned Agreement and deposed that the Agreement was entered into for the benefit of the residents of Mombasa and its environs, upon consideration of the wider public interest.
25. M/s Miller & Company Advocates filed submissions dated 19<sup>th</sup> September, 2020 on behalf of the 4<sup>th</sup> Respondent in opposition to the Consolidated Petitions.
26. Wangómbe Kariuki, the Director General of the 5<sup>th</sup> Respondent swore an affidavit on 11<sup>th</sup> May, 2020 in response to ***Mombasa Constitutional Petition No. 201 of 2019***. He conceded that the 5<sup>th</sup> Respondent received a complaint from the 4<sup>th</sup> Petitioner on 15<sup>th</sup> August, 2019 regarding the directive issued by the National Government requiring all transportation of containers from the Port of Mombasa to other destinations in Kenya to be made through the SGR, but stated that the directive was withdrawn by the National Government on 6<sup>th</sup> August, 2019 and was never implemented.
27. The 5<sup>th</sup> Respondent stated that it held various meetings with various stakeholders including the 4<sup>th</sup> Petitioner with a view to have a better understanding of the issues raised in the complaint and as part of its investigations into the complaint. That at the time the Petition was filed, it was at an advanced stage of the investigations into the complaint. It urged that ***Mombasa Constitutional Petition No. 201 of 2019*** is therefore premature having been

filed before the 4<sup>th</sup> Petitioner exhausted the redress mechanisms set out under the Competition Act.

28. M/s Cootow and Associates filed submissions dated 18<sup>th</sup> September, 2020 on behalf of the 5<sup>th</sup> Respondent.
29. After **Mombasa Constitutional Petition No. 159 of 2018** was filed, Muslims for Human Rights (MUHURI) and Maina Kiai made formal applications to be enjoined as Interested Parties to the Petition. They were so allowed in a ruling dated 03/07/2018. Subsequently, the County Government of Mombasa was equally permitted to join the Petition as an Interested Party on 26/09/2018. The Court also granted orders enjoining the National Environment and Management Authority (NEMA) as an Interested Party to the Consolidated Petitions. By directions dated 20/08/2020, MUHURI was intitled as the 1<sup>st</sup> Interested Party; Maina Kiai as the 2<sup>nd</sup> Interested Party; County Government of Mombasa as the 3<sup>rd</sup> Interested Party; and NEMA as the 4<sup>th</sup> Interested Party.
30. Khelef Khalifa, the Chairman of the Board of Directors of the 1<sup>st</sup> Interested Party swore a replying affidavit on 6<sup>th</sup> November, 2018 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. Both Interested Parties work with communities within the coastal region and other parts of the country to empower them and build their capacity to actively engage in governance and improve their socio-economic welfare through sensitization and community action.
31. M/s Otieno Ogola & Company Advocates filed submissions dated 17<sup>th</sup> September, 2020 in support of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in which they asked the Court to find for the Petitioners and allow the Consolidated Petitions as prayed.
32. Elizabeth Kisingo, the 3<sup>rd</sup> Interested Party's Deputy Director of Legal Services swore an affidavit on 19<sup>th</sup> December, 2018 in reply to the Amended Petition in **Mombasa Constitutional Petition No. 201 of 2018** in support of that Petition. According to Ms. Kisingo, the Impugned Agreement is in contravention of Article 174 of the Constitution. She was also of the opinion that the Impugned Agreement violates Article 10 of the Constitution. Finally, Ms. Kisingo deponed that the Impugned Agreement violated the socio-economic rights of Mombasa residents guaranteed under Article 43 of the Constitution and the rights of youth to access employment under Article 55 of the Constitution.
33. M/s Paul Mwangi & Company Advocates filed submissions dated 14<sup>th</sup> September, 2020 on behalf of the 3<sup>rd</sup> Interested Party in support of the Consolidated Petitions.
34. The 4<sup>th</sup> Interested Party, NEMA, neither filed any responses nor participated in the hearing of the Consolidated Petitions.

#### **IV. Issues for Determination**

35. From our reading of the Court documents filed and consideration of the submissions of the Parties, we have identified the following seven issues for

determination. In delineating these issues we have noted that some of the remedies sought were repetitive, overlapped, or in some instances cited procedural articles of the Constitution in an “omnibus” fashion:

- (a) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties have impermissibly expanded the scope of the Consolidated Petitions in their presentations before the Court by pleading and submitting on issues related to Articles 6(2), 6(3) and 27 of the Constitution.*
- (b) Whether the complaints raised by the 4<sup>th</sup> Petitioner against the 5<sup>th</sup> Respondent (the Competition Authority of Kenya) are pre-mature and debarred by the doctrine of exhaustion.*
- (c) Whether the Impugned Directives contravene the Constitution by infringing on the 4<sup>th</sup> Petitioner’s freedom to freely choose their mode of transportation of cargo arriving at the Port of Mombasa.*
- (d) Whether the Take or Pay Agreement and Impugned Directives are in violation of Articles 10 and 47 of the Constitution for want of public participation, stakeholder consultations and administratively fair procedures.*
- (e) Whether the Take or Pay Agreement and Impugned Directives violate the Article 43 rights (social and economic rights) of the Petitioners.*
- (f) Whether the Take or Pay Agreement violates Article 174 of the Constitution as read together with paragraph 5(e) of part 2 of the 4<sup>th</sup> schedule of the Constitution and whether “an order for the enforcement and implementation of county transport harbour function by the 3<sup>rd</sup> Interested Party” should issue.*
- (g) What remedies, if any, should be granted.*

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

a. **Did the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties Impermissibly Expand the Scope of the Consolidated Petitions as Interested Parties?**

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

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

Article 6 (2)

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

Article 6 (3)

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

39. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties also sought to rely on Article 27 of the Constitution. Article 27 is the equal protection clause of the Kenyan Constitution which prohibits all types of discrimination.
40. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case is that Article 6 (2) and 6 (3) as well as Article 27 arguments were not pleaded in the Consolidated Petitions, and that the reliance thereon by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties had the undesirable effect of expanding the scope of the Consolidated Petitions to the prejudice of the Respondents. The issue, therefore, is whether an interested party may frame its own fresh issues, or introduce new issues for determination by a Court in a civil suit.
41. The Black's Law Dictionary 9<sup>th</sup> Edition, at page 1232 defines an interested party as "a party who has a recognizable stake (and therefore standing) in the matter." It also defines a "Necessary Party" as "a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings."
42. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 defines an interested party as "a person or entity that has an identifiable or legal interest or duty in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation."
43. In **Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others**, Supreme Court Petition No. 12 of 2013, [2015] eKLR (an application by Katiba Institute) the supreme Court stated:

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

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

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

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

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

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

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

*"A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules,*

*under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.*

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

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

46. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.
47. In the present case, it requires no belaboured analysis to conclude that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' submissions based on Article 6 (2) and 6 (3) as well as Article 27 of the Constitution and on any other non-pleaded articles of the Constitution cannot be entertained by this Court, and that the same is an unacceptable attempt to expand the scope of proceedings in the Consolidated Petitions. We will, therefore, not consider further any submissions based on alleged violations of Articles Article 6 (2); 6 (3) and Article 27 of the Constitution.

**b. Are the complaints raised against the 5<sup>th</sup> Respondent (the Competition Authority of Kenya) pre-mature and debarred by the doctrine of exhaustion?**

48. The next preliminary issue was raised by the 5<sup>th</sup> Respondent: the doctrine of exhaustion. The 5<sup>th</sup> Respondent pointed out that ***Mombasa Constitutional Petition no. 201 of 2019*** was filed three (3) months after the 4<sup>th</sup> Petitioner lodged its complaint with the 5<sup>th</sup> Respondent.
49. In the Petition, the 4<sup>th</sup> Petitioner argued that the Impugned Directives violate the provisions of sections 5, 20, 21, 50, 56 and 57 of the Competition Act.

Consequently, argued the 4<sup>th</sup> Petitioner, the Impugned Directives not only deny importers the freedom to choose their preferred mode of transport, but that they constitute restrictive trade practices prohibited under section 21 of the Competition Act and are, therefore, illegal. They asserted that to date the 5<sup>th</sup> Respondent has not acted upon their complaint.

50. In rebuttal, the 5<sup>th</sup> Respondent admitted that it received a complaint from the 4<sup>th</sup> Petitioner on 15<sup>th</sup> August, 2019 regarding the directive issued by the National Government requiring all transportation of containers from the Port of Mombasa to other destinations in Kenya to be made through the SGR, but stated that the said directive was withdrawn by the National Government on 6<sup>th</sup> August, 2019 and was never implemented. That it consequently held various meetings with various stakeholders including the 4<sup>th</sup> Petitioner with a view to have a better understanding of the issues raised in the complaint and as part of investigations into the complaint.
51. In sum the 5<sup>th</sup> Respondent's case was that at the time of filing the Petition, it was at an advanced stage of investigations into the complaint. It urged that the Petition is therefore premature, having been filed before the 4<sup>th</sup> Petitioner exhausted the redress mechanisms set out under the Competition Act.
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR***, where the Court opined thus:

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

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

*43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*

This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal stated that:

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

53. From the above extract, the question that arises is whether there are remedies available under Statute that the 4<sup>th</sup> Petitioner should have pursued before filing the Petition against the 5<sup>th</sup> Respondent.
54. Under the Competition Act, there are several remedies available to an aggrieved party. The Act provides the dispute resolution procedures to be pursued. Section 31 provides that the Authority may on its own initiative, or upon receipt of information, or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of: prohibitions relating to restrictive trade practices; or prohibitions relating to abuse of dominance. Upon receipt of the complaint, it is upon the Authority to make a decision on whether to proceed with the investigation, which decision should be communicated in writing to the aggrieved party as provided for under Section 32 of the Act.
55. The Competition Act also grants the Authority power to take evidence under oath and affirmation to reach a determination and grant appropriate relief either interim or permanent, which may include an award of damages to the Complainant, or any amount proposed to be imposed as a pecuniary penalty. Another remedy available is the right to Appeal to the Tribunal for persons aggrieved by a determination made by the Authority within 30 days of receiving the Authority's decision. A second Appeal to the High Court may be allowed for one dissatisfied by the decision within 30 days of the decision.
56. There is on record minutes of a meeting between the 5<sup>th</sup> Respondent and the 4<sup>th</sup> Petitioner held at the 4<sup>th</sup> Petitioner's offices on 25<sup>th</sup> October, 2019. Minute no.3 of the meeting which was to discuss the way forward, indicates that the 4<sup>th</sup> Petitioner was to share its data on the comparative transport costs charged by its members, in comparison to those charged by the SGR for the various sizes of containers. Further, the 5<sup>th</sup> Respondent was to give feedback before the next meeting. No such report is, however, on record.

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

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

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

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

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

sufficient reason to elevate the matter to a constitutional status, and confer jurisdiction to the High Court, to inquire, arbitrate, determine or in any manner deal with issues which are required to be dealt with through a clearly prescribed dispute resolution mechanism, that is provided for in a specific statute....

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

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

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in ***Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.***
62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere

“bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

63. Article 165(1) of the Constitution vests in the High Court vast powers including the power to *‘determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened’* and the jurisdiction *‘to hear any question respecting the interpretation of the Constitution.’*
64. Though the 4<sup>th</sup> Petitioner’s case against the 5<sup>th</sup> Respondent is largely with respect to the Competition Act, the ripple effect thereof is the subject of the alleged violation of their fundamental rights and freedoms. The issues are therefore intertwined. The statutory provisions available on dispute resolution under the Competition Act, cannot be construed in a very restrictive manner to oust this Court’s jurisdiction, to determine the issues in dispute which qualify under the exceptions set out herein. From the foregoing it is our considered view that the doctrine of exhaustion though relevant, is not applicable in this case having regard to the nature of the grievance, and the public interest involved.
65. Hence, while a party is required to exhaust its remedies under the Competition Act before bringing an action in Court claiming violations of that Act, the Consolidated Petitions involved polycentric issues and multiplicity of parties including questions related to the fundamental rights of the Petitioners to warrant an exception to the doctrine of exhaustion as developed in our jurisprudence.
66. It is noteworthy, however, that the 5<sup>th</sup> Respondent in this case already commenced investigations with respect to the issues raised in the 4<sup>th</sup> Petitioner’s letter of 15<sup>th</sup> August, 2019. There is on record minutes of a meeting between the 5<sup>th</sup> Respondent and the 4<sup>th</sup> Petitioner held at the 4<sup>th</sup> Petitioner’s offices on 25<sup>th</sup> October, 2019. There is therefore, no doubt that the 5<sup>th</sup> Respondent had before the filing of this Petition, commenced investigations in discharge of their mandate provided under section 31 of the Act. We therefore find that the 5<sup>th</sup> Respondent did not ignore the issues raised by the 4<sup>th</sup> Petitioner and ought not to have been sued in these proceedings.
67. Section 40 of the Competition Act provides an avenue through which a Complainant aggrieved by the decision of the 5<sup>th</sup> Respondent can obtain redress. The section provides that an aggrieved party may appeal to the Tribunal and if aggrieved by the Tribunal’s decision, appeal to the High Court, whose decision shall be final. This, the 4<sup>th</sup> Petitioner has not done.
68. Additionally, the 4<sup>th</sup> Petitioner sought an order of mandamus directing the 5<sup>th</sup> Respondent to take immediate action to demolish the monopolistic tendency with regard to the transportation of containers from the Port of Mombasa to other destinations in Kenya. This is tantamount to asking the Court to direct the

Competition Tribunal on what finding to make, an act which would amount to usurping the domain of the Tribunal.

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

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

70. One of the four substantive claims raised by the Petitioners is based on what the 4<sup>th</sup> Petitioner refers to as the "fundamental freedom to choose." The 4<sup>th</sup> Petitioner seeks a declaration that the importers of cargo at the Port of Mombasa have a right to choose the mode of transportation of their cargo from the Port of Mombasa to a destination of their choice.
71. The 4<sup>th</sup> Petitioner asserted that its case is centred on the freedom of choice and urged that freedom of choice is a fundamental right recognized under Articles 27, 28 and 46 of the Constitution. They also urged that freedom of choice is embedded in the Constitution by virtue of Article 6 of the International Convention on Economic Social and Cultural Rights (ICESCR) which, they argue, is part of the laws of Kenya by dint of Article 2(6) of the Constitution.
72. To buttress its arguments, the 4<sup>th</sup> Petitioner cited the decisions in **Association of Kenya Medical Laboratory Scientific Officers vs. Ministry of Health & another [2019] eKLR**; **Robert N. Gakuru and others vs. Governor Kiambu County and 3 others [2014] eKLR**; **Mistry Amar Singh vs. Serwano Wofunira Kulobya [1963] EA 408**; **Macfoy vs. United Africa Co. Ltd [1961] at 1172** and **Owners of Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd [1989] eKLR**.
73. On the other hand, in the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's view, both the Impugned Agreement and the Impugned Directives meet the constitutional threshold and they urge the Court to dismiss any contention to the contrary. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that the Impugned Agreement and the Impugned Directives seek to implement the policy decisions created by the 2<sup>nd</sup> Respondent with the aim of realizing the socio-economic rights envisaged under Article 43 of the Constitution. In this respect, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents asked the Court to interrogate Kenya's Vision 2030, Sector Plan for Transport, 2008 – 2012; the Integrated National Policy developed in 2009 and the May 2019 Policy Paper on Integrated National Transport Policy for Kenya under the theme "Moving a Working Nation."
74. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argue that in order to finance the development of the railway infrastructure, the National Government took a sovereign loan from

the Exim Bank. They further stated that the Impugned Agreement was geared to support the repayments to the Exim Bank and to help in the project management, finance and administration. It urged that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are the leading government agencies mobilizing resources to repay the colossal debt amount.

75. It was the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's argument that the orders sought by the Petitioners are not justiciable as they go against the constitutional mandate of the National Government to enter into loan and derivative agreements with other parties. They argue that granting the orders would be tantamount to the Judiciary supervising the authority of the National Government to prepare financing for its budgeted programs which would be against the doctrine of separation of powers. To this end the 2<sup>nd</sup> Respondent cited ***Ndora Stephen vs. Minister for Education & 2 others, Nairobi High Court Petition No. 464 of 2012.***
76. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged the Court to dismiss the Consolidated Petitions, particularly the declaration that transporters have a right to choose their mode of transport, stating that to do otherwise would deal a strain on the National Transport Policy.
77. Is there a fundamental freedom to choose one's mode of transport which has been infringed by the Impugned Directives? In essence, the 4<sup>th</sup> Petitioner argues that the Bill of Rights in our Constitution has such a right. It locates the provenance of the right primarily in Article 46 of the Constitution and argues that the right is accentuated by Articles 27 and 28 of the Constitution. Further, the 4<sup>th</sup> Petitioner locates the right to choose one's mode of transport in Article 6 of the ICESCR which, they point out, is part of the laws of Kenya by dint of Article 2(6) of the Constitution. This is because Kenya has ratified ICESCR.
78. Does Article 46 of the Constitution as read together with Articles 27 and 28 of the Constitution grant the freedom to choose one's mode of transportation as the 4<sup>th</sup> Respondent claims? Article 46 of the Constitution provides as follows:
  - (1) *Consumers have the right –*
    - a. *To goods and services of reasonable quality;*
    - b. *To the information necessary for them to gain full benefit from goods and services;*
    - c. *To the protection of their health, safety, and economic interests; and*
    - d. *To compensation for loss or injury arising from defects in goods or services.*
  - (2) *Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.*

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

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

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

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

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

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

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

83. The question presented is one of the extent to which the Constitution inherently limits the "liberty of contracts". Differently put, does the Constitution create a right for individuals to enter into any contracts on terms

of their own choice? And if so, is such a right fundamental? When is it constitutionally permissible to limit or abrogate such freedom to contract?

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

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

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

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

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

*The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labour in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal*

Constitution. **Allgeyer v. Louisiana**, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labour is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.

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

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

89. The position taken in **Lochner v New York** remained in vogue in the United States for at least three decades. Over that period, the Court would strike down numerous attempts by state governments to pass laws aimed at protecting consumers or improving working conditions or otherwise regulating the economy – all under the guise of a liberty the Court found in the Due Process Clause of the 14<sup>th</sup> Amendment as opposed to any specific text in the Constitution. The US Supreme Court was, in effect, impliedly reading into the Constitution a strong “liberty” or “freedom” clause in the Constitution which protected economic liberties which were not explicitly protected by the text of the Constitution. The impact of this jurisprudential trend was to severely limit the ability of the government to direct economic policy in order to protect or channel in a given direction the health, morals, safety; or the general welfare of the public.
90. In the United States, the Supreme Court changed course and backed away from its **Lochner** line of cases in the mid-1930s. This heralded a trend towards increasing deference to state regulation of economic matters out of the principle that the government generally has much leeway to direct economic matters and

policy as long as it does not use that power to enact oppressive and unjust laws.. The Supreme Court announced the departure in **West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)**. In this case, the majority, in a passage that heralds the modern day approach to the question of the constitutional freedom to contract, stated thus:

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

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

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

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

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

93. Therefore, while the 4<sup>th</sup> Petitioner faults the Respondents for denying them the freedom to choose the mode of transport that they want, the 4<sup>th</sup> Petitioner wrongly assumes that the State, through the Respondents, has no right or constitutionally-protected and legitimate governmental interest in regulating the mode of transport for containers as part of the Government's efforts to fulfil the collective social and economic rights of all citizens. The truth is that the State has legitimate governmental interests, permitted by the Constitution, to impose certain reasonable restraints on freedom of contract. However, while the State has much leeway to impose reasonable limitations to the freedom to choose economic activities in the common good, such limitations must be reasonable; non-discriminatory; non-oppressive; and procedurally imposed for them to pass constitutional muster.
94. A party who claims that his freedom or liberty under the Constitution has been impermissibly abrogated or limited, therefore has the onus to demonstrate the following four things.
95. *First*, to establish whether the allegedly violated right is an enumerated right or freedom under the Constitution. If the concerned freedom or right is a fundamental one enumerated under the Bill of Rights, the State is required to justify any abrogation or limitation under Article 24 of the Constitution. In such a case, the onus immediately shifts to the State to demonstrate that the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." In addition, the State must show that all the other requirements under Article 24 of the Constitution are satisfied.
96. *Second*, where the right or freedom allegedly violated or limited is not an enumerated right or freedom and is, instead, a non-fundamental right or a right generally covered under the general subtext of freedom or liberty under the Constitution or some other penumbral right or freedom as permitted under Article 19(3)(b) of the Constitution, a person claiming a violation is required to demonstrate that the abrogation or limitation is either unreasonable or oppressive. The Claimant can satisfy this requirement by showing two things:

- a. *One*, that the particular Policy or law in question does not serve any legitimate governmental interest; or
  - b. *Two*, that the particular Policy or law is not rationally related to the articulated governmental interest. Differently put, the means and goals of the Policy or law must be rationally related. A Claimant can succeed in showing that a law is unreasonable or oppressive if he can show that the means chosen to achieve the legitimate governmental interest is not rationally related to legitimate government goals.
97. *Third*, even where a policy or law passes muster under the rational basis test, it is incumbent for the State to demonstrate that the Policy or law limiting the non-fundamental right was crafted after a process of public participation or administrative fair hearing in which those most affected by the Policy or law have been given an opportunity to air their views and to have those views considered before the Policy or law is made final. This is a due process requirement.
98. *Fourth*, even where the impugned Policy or Law survives procedural scrutiny under the rational basis test and survives further scrutiny for public participation and administrative fairness, it must further survive a substantive scrutiny as to its impacts or effects on the rights of the Claimant. If the impugned Policy or Law otherwise violates an enumerated fundamental right or freedom in its effects (as opposed to its text and intent which must meet the requirements under Article 24 and is covered in the first requirement above), a Court would still find the impugned Policy or Law impermissible. For example, a Claimant can demonstrate that the specific Policy or Law being challenged has violated his or her social and economic rights under Article 43 of the Constitution as applied under Article 20 of the Constitution.
99. In the present case, on the basis of the pleadings and submissions, the 4<sup>th</sup> Petitioner did not claim or show that the Impugned Directives did not serve any legitimate governmental interests. Indeed, the Respondents consistently claimed, and it was not sufficiently controverted, that the Impugned Directives seek to implement the policy decisions created by the 2<sup>nd</sup> Respondent with the aim of realizing the socio-economic rights envisaged under Article 43 of the Constitution by directing economic activities in a way the Government believes is sustainable and equitable for the whole country. It can, therefore, be easily concluded that there is a legitimate governmental interest to be achieved.
100. Turning to the next question: Did the 4<sup>th</sup> Petitioner demonstrate that the means chosen (the Impugned Directives) to realize the legitimate government interests (to direct economic development in order to realize equitable and sustainable development in the region and the country as a whole) is not rationally related to the stated goals?
101. The onus was on the 4<sup>th</sup> Petitioner to demonstrate a disconnect between the means chosen and the articulated goals. In assessing whether the means

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

102. Applying this appropriately deferential rational basis test, we are unable to make a finding that the Impugned Directives are not rationally related to the expressed legitimate governmental goal of driving economic policy in Kenya through the Integrated National Transport Policy for Kenya. The 2<sup>nd</sup> Respondent tabled before the Court what it called Kenya's Vision 2030, Sector Plan for Transport, 2008 – 2012; the Integrated National Policy developed in 2009 and the May 2019 Policy Paper on Integrated National Transport Policy for Kenya under the theme "Moving a Working Nation" to demonstrate that the Government has a rational and holistic Transport Infrastructure Policy and that the Impugned Directives are a necessary part of operationalizing that policy.
103. Additionally, the 2<sup>nd</sup> Respondent argued that in order to finance the development of the railway infrastructure, the National Government borrowed from the Exim Bank and that the Agreement dated 30<sup>th</sup> September, 2014 and the Impugned Directives are therefore geared to support the repayments to the Exim Bank and to help in the project management, finance and administration. It urged that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are the leading government agencies mobilizing resources to repay the colossal debt amount.
104. In making these arguments, the 2<sup>nd</sup> Respondent easily met the threshold required under the rational basis test to demonstrate that the means chosen to accomplish the legitimate governmental interest is rationally related to the goals. Conversely, there has been no showing that the means chosen did not rationally advance legitimate governmental interests.
105. We, therefore, conclude that the Respondents were able to demonstrate that the Impugned Directives serve legitimate governmental interests and that the means chosen (limitations of transport choices) is rationally related to the stated governmental goals. However, this leaves two questions yet to be answered:
  - i. The first one is whether the due process requirements were met in coming up with the Impugned Directives. This is analysed next. A governmental policy which passes constitutional muster under the rational basis test as analysed above still has to survive a due process scrutiny. The key consideration in that scrutiny is whether the policy

was arrived at in a way which was administratively fair and after engaging in an appropriate program of public participation. This is a substantive issue raised in this Consolidated Petitions and it is analysed next.

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

**d. Did the Take or Pay Agreement and Impugned Directives violate Articles 10 and 47 of the Constitution for want of public participation and administratively fair procedures?**

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

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

- (a) *KPA shall consign to KRC as a carrier for transport to its Embakasi ICD (on "Take or Pay" basis) the minimum volume of freight and or other cargo stipulated in Schedule 1 hereto following the commencement of operation of the SGR.*
- (b) *KPA shall make available such additional volumes of cargo (over and above the volumes stipulated in Schedule 1 hereto) for transport by KRC on the SGR line to KPA's Embakasi ICD at its discretion or as requested by KRC subject to the mutual agreement of the parties.*
- (c) *KPA and KRC shall institute and publicize measures to require shippers, consignors, consignees, clearing and forwarding agents and owners of goods to make provision for the delivery and collection of goods which KPA has consigned or intends to consign to KRC from Embakasi ICD.*

108. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners averred that the directive of 15<sup>th</sup> March 2019 was issued by the 3<sup>rd</sup> Respondent and implemented the Take or Pay Agreement. Through the directive of 15<sup>th</sup> March 2019, the 3<sup>rd</sup> Respondent informed the necessary parties to collect their goods which the 3<sup>rd</sup> Respondent would consign to the 4<sup>th</sup> Respondent from the Embakasi ICD.
109. The directive of 3<sup>rd</sup> August, 2019 was jointly issued by the 3<sup>rd</sup> Respondent and Kenya Revenue Authority. It required all imported cargo for delivery to Nairobi and the hinterland to be conveyed by the SGR and be cleared at the Inland Container Depot in Nairobi.
110. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners as well as the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties challenged the Take or Pay Agreement. They contended that the Take or Pay Agreement was a public policy decision as it had the effect of transferring port services from Mombasa to Nairobi. To that end, it was submitted that the Respondents' decision was administrative in nature and by dint of being public bodies, the Respondents had a duty to give Mombasa residents and Port users written reasons for their decision. It was further submitted that the Respondents were bound by the provisions of Article 10 of the Constitution, particularly the participation of the people, human rights, good governance, integrity, transparency and accountability. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties also contended that the Respondents variously failed and/or neglected to comply with and as such violated Article 10 as read with Article 47 of the Constitution more particularly for lack of public participation.
111. The Impugned Directives were the main concern of the 4<sup>th</sup> Petitioner. The membership of the 4<sup>th</sup> Petitioner comprised of corporates variously engaged in the transport business. The 4<sup>th</sup> Petitioner contended that the decision to transport all cargo destined for Nairobi and the hinterland by SGR to Embakasi ICD was unilaterally reached by the 3<sup>rd</sup> Respondent. It was argued that the 4<sup>th</sup> Petitioner or any of its members', despite being key stakeholders in the transport industry, were not involved in the decision-making process. As a result, the 4<sup>th</sup> Petitioner strenuously contended that the Impugned Directives violated Article 10 as read together with Article 47 of the Constitution due to lack of public participation and consultations.
112. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents took great exception to the foregoing position. They posited that the Take or Pay Agreement and the Impugned Directives were purely operational decisions as opposed to public policy decisions or administrative actions. According to the Respondents the said decisions were duly sanctioned by Section 12(1)(g) of the Kenya Ports Authority Act and Section 13(1)(d) of the Kenya Railways Act and were only meant to enable the public entities to discharge their day-to-day operations.
113. The Respondents posited that the Petitioners and the Interested Parties could therefore neither expect to be involved in the operations of the public entities nor purport to dictate the manner in which the 3<sup>rd</sup> and 4<sup>th</sup> Respondents ought to

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

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

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

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

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

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

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others [2018] eKLR** quoted

with approval Ngcobo J in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** as follows: -

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

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

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

(emphasis added)

123. Consultation or stakeholders engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.
124. The importance of public participation cannot be gainsaid. The Court of Appeal in **Legal Advice Centre & 2 others v County Government of Mombasa & 4 others** (supra) while dealing with the aspect of public participation in law-making process stated as followed: -

*The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in*

*shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.*

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

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

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

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

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

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

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

- a) *First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official*

must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

- b) Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
- c) Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012)**. In relevant portion, the Court stated:

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

- d) Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
- e) Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The

*government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

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

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

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

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

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

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

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

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

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

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

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

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

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

*Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in Robert N. Gakuru & Others v. Governor Kiambu County & 3 others [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the Respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr. Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the Respondents, that the 1<sup>st</sup> Respondent is sufficiently representative of stakeholders of the KPA, and the*

*appointment of the Managing Director, is more of a technocratic decision-making process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1<sup>st</sup> Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1<sup>st</sup> Respondent to ensure the process meets the demands of transparency and accountability to the public.*

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

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

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

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

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

**16.** *THAT even at its peak, the SGR will only ferry a maximum of 700 containers per day to the ICD (approximately*

260,000 containers per year). The 3<sup>rd</sup> Respondent has received 393,182 import containers between January and August 2018. The total number of containers received at the port from January to August 2018 is 846,294. It is therefore obvious that the alleged death of the cargo transport business is a statement unsupported with any facts (I annex and mark as JT-4 a summary showing the container traffic at the port in 2018).

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

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

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

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

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

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

146. For avoidance of doubt, we hold that the Take or Pay Agreement, without more, belongs to the sphere of internal operations of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents

over which there was no need for constitutionally mandated public participation. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents are legally competent to conclude the Take or Pay Agreement without triggering the public participation requirement of the Constitution.

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

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

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

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

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

- 1. All imported cargo for delivery to Nairobi and the hinterland shall be conveyed by Standard Gauge Railway (SGR) and cleared at the Inland Container Depot – Nairobi.*
- 2. All imported cargo intended for Mombasa and its environs shall be cleared at the Port of Mombasa.*

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

152. While the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have legal authority to conclude an agreement on the minimum freight which must be conveyed by SGR, and may conclude such an agreement without the involvement of the 4<sup>th</sup> Petitioner and other stakeholders, the 3<sup>rd</sup> Respondent has no right to impose the decision resulting from that agreement on the 4<sup>th</sup> Petitioner's members and other stakeholders without involving them through public participation. As we analysed above (under issue (d)), the government has legitimate governmental

interests which it may choose to promote by trammelling on the freedom of choice of the 4<sup>th</sup> Petitioner and other importers. However, while the government has leeway to craft an appropriate economic policy which may limit the freedom of contract of citizens, the government or its agencies can only arrive at a Policy or decision so limiting the citizens' freedom to choose after meeting due process requirements. In Kenya, as our jurisprudence discussed above has established, the government agency must involve the public through public participation and any stakeholders specially affected by the Policy through stakeholder engagement or consultation.

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

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

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

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

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

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

- (2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- (3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
  - (a) *provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and*
  - (b) *promote efficient administration*

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

- (1) *In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—*
  - (a) *issue a public notice of the proposed administrative action inviting public views in that regard;*
  - (b) *consider all views submitted in relation to the matter before taking the administrative action;*
  - (c) *consider all relevant and materials facts; and*
  - (d) *where the administrator proceeds to take the administrative action proposed in the notice—*
    - (i) *give reasons for the decision of administrative action as taken;*
    - (ii) *issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and*
    - (iii) *specify the manner and period within which such appeal shall be lodged.*

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

*'administrative action' includes -*

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

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

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

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

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

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

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

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

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

*a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.*

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

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

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

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

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

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

- b. Afford an opportunity for the 4<sup>th</sup> Petitioner, importers, transporters, other Port users, and stakeholders to be heard on the question; and
- c. Give reasons for the decisions made – in this case, the Impugned Directives.

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

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

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

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

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

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

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

12 Million for one transaction, and that as a result of the foregoing the high costs of goods clearance has led to price increase of basic commodities.

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

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

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

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

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

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

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

container at the Embakasi ICD one will have to pay an extra sum of between Kshs. 150,000/= and Kshs. 250,000/=.

172. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, in their submissions, also annexed an undated and unsigned Report by the 1<sup>st</sup> Petitioner titled *Ownership of the Port of Mombasa & Its Implications to the Economy of Mombasa*. The Report was to support the submission that the operations of the 3<sup>rd</sup> Respondent through the Embakasi ICD would undermine the economic development of Mombasa County and its environs.
173. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, therefore, contend that the Respondents' actions threaten the Mombasa residents' right to the highest attainable standards of economic and social rights as guaranteed under Article 43(1) of the Constitution of Kenya. In addition, they contend that the Respondents' actions violate Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which, they say, protects individuals' right to choose their work, and guarantees that they will not be unfairly deprived of employment. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners argue that, having ratified the ICESCR, Kenya is obligated to uphold her citizens' economic right to work by dint of Article 2(6) of the Constitution.
174. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners argue that the right to work does not require that the State employs an individual, but rather seeks to protect an individual's right to choose their work, and guarantees that they will not be unfairly deprived of employment. They urge that despite the fact that the Impugned Agreement has adversely affected the residents of Mombasa County, the Respondents have not taken any mitigation measures to provide alternative means of livelihoods.
175. Reliance was also placed on Article 55 (c) of the Constitution which provides that the State should take measures to ensure that the youth access employment. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners cited the decision in **John Kabui Mwai and 3 others vs. Kenya National Examinations Council & others [2011] eKLR** for the position that inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uphold their human dignity.
176. The 4<sup>th</sup> Petitioner, on its part, also averred that the Respondents, by issuing the Impugned Directives, have violated Article 43 of the Constitution of Kenya by infringing on its members' rights to earn a living, and the rights to social and economic development of the residents of Mombasa. The 4<sup>th</sup> Petitioner contended that the members of the its Association and their employees and families have always sustained their livelihoods from the income that the said members lawfully used to make from undertaking transportation business of containers from the Port of Mombasa to other destinations out of Mombasa. However, that since the creation of the "monopolistic" arrangement which guarantees the said business solely to the 4<sup>th</sup> Respondent, the members of the 4<sup>th</sup> Petitioner's Association have literally been driven out of business which has led to a complete

destruction of the capacity to earn money for the sustenance of the said members, their employees and their families.

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

- a) Road truckers' redundancies and closure of trucking business as a result of making it mandatory that imported cargo will be transported to Nairobi using the SGR.
- b) Closure of Warehousing Businesses and Container Freight Stations in Mombasa as a result of the directive issued on 15th March, 2019 which notified the general public that shipping lines will not be allowed to endorse Bill of Lading to importers' CFS of choice.
- c) Roadside Business Activities closure and/or contraction, as the drivers of the trucks are a major source of income to the businesses along the Mombasa-Nairobi highway.
- d) Decrease in the Government revenue collection for Mombasa County and general job losses to residents of Mombasa County, which has large urban population as it is an industrial city, a port city and a major gateway to the East and Central Africa Region. As a result, many people who came to Mombasa in pursuit of employment opportunities, education, and investment opportunities, will be adversely affected by the closure of the transportation business and its related businesses which has been a major contributor in the housing business and other social services.
- e) Increase in unemployment and crime rates. Reliance was placed on World Bank surveys that the 4<sup>th</sup> Petitioner says project unemployment rate in Kenya to rise and the need to create at least 900,000 jobs annually between now and the year 2025 to absorb the high number of youth joining the market. Also cited was an unidentified Kenya National Bureau of Statistics document which the 4<sup>th</sup> Petitioner says made a finding that 562,000 youth in Mombasa are unemployed and that this represents 45% of the total population.

178. In addition to the submissions made by 1<sup>st</sup> to 3<sup>rd</sup> Petitioners, the 4<sup>th</sup> Petitioner submitted that even though the SGR is a good infrastructure for the country, the policy requiring all imported cargo at the Port of Mombasa to be railed to Nairobi does not meet the constitutional thresh-hold of progressive realization of

socio-economic rights. Further, that the employment benefits created by the use of the SGR are incomparable to the unemployment that will be caused by the Impugned Directives. Consequently, the 4<sup>th</sup> Petitioner urged that the Respondents have failed to give effect to Article 20(5)(b) of the Constitution which requires the state to ensure that the widest possible enjoyment of rights as a way to progressive achievement of socio-economic rights.

179. The Interested Parties supported the Petitioners' position on the socio economic effects of the Impugned Agreement and Impugned Directives. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties averred that the socio-economic impact of the on-going translocation of cargo logistics from the Port of Mombasa to Embakasi ICD as a result of the integration of the Port and SGR operations, will lead to massive loss of jobs and investments in Mombasa County, and the coast region in general, and that there was no evidence that Kenyans, and Mombasa people in particular, were informed that this would be one of the consequences of the SGR. Further, that it is also not evident that any mitigation measures have been put in place to provide alternative livelihoods to those that are adversely affected by the implementation of the Impugned Agreement.
180. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties also singled out the costs of using the SGR train services and averred that the Kenya Railways has published SGR Mombasa Nairobi freight tariff of US\$ 500 (Kshs 50,000) and US \$700 (Kshs. 70,000) for 20 foot and 40 foot containers respectively. Further, that the tariff does not include the last mile transportation from the ICD to and from the shippers' premises, which on average costs an additional Ksh. 20,000/=. They argue that this imposes an unfair cost burden on port users including importers and the ultimate consumers of imported goods; and that the cost is higher than that charged by road truckers. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties annexed various documents on the feasibility studies on, and procurement of the SGR in support of their averments.
181. The 3<sup>rd</sup> Interested Party on its part affirmed that containerization of cargo and increase in cargo traffic and trade in the region has brought about a significant redefinition of port services and demands for labour, thereby creating employment for the residents of the Mombasa County, and necessitated the establishment of firms and businesses within the county in a bid to provide specialized services. That consequently, the largest number of the residents of the County depend directly or indirectly on operations or activities emanating from the port, and any activities transferring the services from the Port of Mombasa would directly affect the employment and economic well-being of the residents of the County of Mombasa, and therefore prejudice the ability of the residents to enjoy socio-economic rights under the Constitution.
182. The 3<sup>rd</sup> Interested Party urged that the Impugned Agreement is in contravention of Articles 43 (1) as read with Article 55 of the Constitution of Kenya, 2010 as the said agreement has and will lead to an economic meltdown within Mombasa County and its environs thus undermining the economic and social rights of the

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

183. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response to the issue at hand was that the SGR stands to benefit the whole country, and its significance can be noted in the Kenya Policy Paper on Integrated National Transport Policy for Kenya under the theme "Moving a Working Nation" May 2009, a copy of which they attached. Further, that the said policy underscores that transport by trucks is expensive and deleterious to the environment, and that the SGR has brought benefits to the nation and the Mombasa region.
184. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents, on the other hand, contended that the consolidated Petitions contained "falsehoods, misrepresentation of facts and outright lies." In particular, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents argue that there is no evidence presented to show that the costs of clearing one container at the ICD is between Kshs. 150,000.00 to Kshs. 250,000.00, and that this cost is purely as a result of the container having been consigned to the ICD. Further, that the example of alleged charges of Kshs.12 million was not evidenced by any document. In addition, that the demurrage charges levied by the 3<sup>rd</sup> Respondent are levied in accordance with its Tariff Guide which is within the public domain and available for download from the 3<sup>rd</sup> Respondent's website at no cost. The 3<sup>rd</sup> Respondent annexed a copy of the Tariff Guide.
185. The 3<sup>rd</sup> Respondent further stated that it has clarified to all shippers that charges on containers consigned to the ICD will only accrue once the container has been issued by the 3<sup>rd</sup> Respondent. Further, that there is no evidence of the delay in clearing cargo at the ICD, and that even if it was proved that clearance of containers is delayed at the ICD, it could be a problem with the clearing agents not necessarily the ICD. In addition, that the change in price of goods or on the costs of importation is influenced by an infinite number of factors, and cannot be attributed to containers being consigned to the ICD.
186. The 3<sup>rd</sup> Respondent argued further that there is no evidence that clearing and forwarding companies or CFSs have lost employees due to the consignment of containers to the Embakasi ICD, and that the Petitioners' own documents confirm that CFSs are still operational and are in fact receiving containers from the 3<sup>rd</sup> Respondent. Furthermore, that the allegation that the consignment of cargo to the Embakasi ICD using the SGR will harm the clearing and forwarding agents, CFS and transport companies is unfounded and, is, in fact, contrary to available evidence.

187. According to the 3<sup>rd</sup> Respondent, the cargo transportation business is seemingly not affected, and the records from the Kenya National Bureau of Statistics show that there is an increase in the number of lorries and trailers that are being registered in Kenya. The 3<sup>rd</sup> Respondent annexed a copy of the Leading Economic Indicators Report of August 2018 issued by the Kenya National Bureau of Statistics as evidence. The 3<sup>rd</sup> Respondent stated that even at its peak, the SGR will only ferry a maximum of 700 containers per day to the Embakasi ICD (approximately 260,000 containers per year), while the total number of containers received by the 3<sup>rd</sup> Respondent at the port from January to August 2018 was 846,294. Therefore, the 3<sup>rd</sup> Respondent avers that the alleged death of the cargo transport business is a statement unsupported by any facts. The 3<sup>rd</sup> Respondent annexed a summary showing the container traffic at the Port of Mombasa in 2018.
188. On the socio-economic effects of the SGR, the 3<sup>rd</sup> Respondent averred that the Port of Mombasa is not the only income generator for Mombasa County, and that there are other options that can be explored to ensure the economic wellbeing of the people of Mombasa is guaranteed in sectors such as tourism. The 3<sup>rd</sup> Respondent listed various benefits of the SGR to the country at large, including the emergence of new towns and urban development along the stations, reduced road accidents brought about by reduced traffic flow of heavy commercial vehicles ferrying cargo to Nairobi, reduction in freight haulage and transportation time, reduced air pollution, improved tourism, and reduction of road maintenance costs as a result of the heavy commercial trailers causing wear and tear.
189. The 4<sup>th</sup> Respondent similarly contended that the Petitioners' allegations that the SGR will occasion an economic meltdown within Mombasa County are untrue, and asserted that the SGR has brought with it many benefits. That in any event, the inhabitants of the County are free to carry on their private business in spite of the Impugned Agreement. The 4<sup>th</sup> Respondent also enumerated additional benefits of the SGR, which included reduced congestion at Port of Mombasa enhancing efficiency, which would make it the preferred facility in the region; reduced cost of transportation in the country making Kenya attractive to investment; accelerated industrialization through easier and cheaper transport and establishment of new industries to service the SGR; and enhanced freight security in comparison to road transport. The 4<sup>th</sup> Respondent also averred that the SGR has triggered the creation of an estimated 10,000 new jobs in the hospitality industry, and an estimated new 15,000 jobs in the self-employment sector.
190. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents, accordingly, submitted that the Petitioners' case that the Impugned Agreement and the Impugned Directives violate Article 43 and 55 of the Constitution lack probative value, as they are not founded on any evidence. They cited the Court of Appeal's decision in **Monica Wangu Wamwere v Attorney General [2019] eKLR** for the proposition that a party who files a suit

bears the burden and obligation to tender evidence to prove the claims made, and on the probative value of newspaper reports which it held to be hearsay evidence. This was also the holding in ***Apollo Mboya vs. Attorney General & 3 others & Kenya National Commission on Human Rights (Interested Party) & another [2019] eKLR***.

191. The submissions by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents further faulted the introduction of the report prepared by the 1<sup>st</sup> Petitioner through submissions, a practice which, they submitted, was rejected in ***Maingi Celina v John Mithika M'Itabari suing as the Administrator of the Estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR***. Regarding the report dated August, 2019 by the University of Nairobi School of Business relied upon by the 4<sup>th</sup> Petitioner, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submissions observed that the letter dated 6<sup>th</sup> September, 2019 forwarding the said report to the 4<sup>th</sup> Petitioner, expressly declared that it was a draft which was subject to further views from stakeholders. Secondly, that the report was not signed by any of the persons alleged to have prepared it. In this regard, they cited ***Okiya Omtatah Okiiti & Another v Bidco Africa & 4 Others [2019] eKLR*** for the holding that such a report fails the admissibility test as the maker has not been disclosed and has not produced it.
192. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents therefore asked the Court to return a verdict that there are no contraventions of the Constitution as pleaded by the Petitioners, urging that the wider public interest of the SGR and the impugned agreement outweighs the narrow private interests of the Petitioners. Reliance was placed on the decision to this effect in ***Okiya Omtatah Okiiti & 2 others vs. Attorney General & 3 others [2014] eKLR***.
193. We have considered the rival arguments by the parties on the issue whether there was a violation of Article 43 of the Constitution. The Petitioners allege that their socio-economic rights as guaranteed by Article 43 have been infringed by the Impugned Agreement and Impugned Directives, specifically the decisions and directives by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents that inland cargo will be transported by SGR to the Embakasi ICD. The social and economic rights provided for in Article 43 of the Constitution include the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; to accessible and adequate housing, and to reasonable standards of sanitation; to be free from hunger, and to have adequate food of acceptable quality; to clean and safe water in adequate quantities; to social security; and to education. The Constitution further provides that a person is not to be denied emergency medical treatment and enjoins the State to provide appropriate social security to persons who are unable to support themselves and their dependants.
194. It is now a well settled principle that a Petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation – see ***Anarita Karimi***

**Njeru vs Republic (1976- 80) 1 KLR 1272 and Trusted Society of Human Rights Alliance vs Attorney General and Others Petition No.229 of 2012.**

It is evident in this respect that the Petitioners in their pleadings and arguments as outlined in the foregoing did not allege that there was infringement of the specific rights provided for in Article 43, but instead focused on demonstrating the infringements on their right to livelihood, as forming the basis for the infringement of the rights in Article 43.

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

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

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

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

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

*justice, human rights, non-discrimination, protection of the marginalized and sustainable development.*

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

*“(1) Every person has the right—*

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

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

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

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

*(e) to social security; and*

*(f) to education.”*

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

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

197. Therefore, in terms of proof of infringement, in order to succeed on this claim, the Petitioners need to prove that the Respondents have caused harm or injury to, or limited their work and related activities in cargo handling and transport, either by way of direct actions or by omission to take reasonable steps to prevent

such harm and injury. This burden of proof is provided under sections 107(1) (2) and 109 of the Evidence Act as follows:

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

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

and

**109. Proof of particular fact**

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

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

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

199. The Petitioners in this respect filed affidavits wherein they made various averments detailed in the foregoing as regards the manner of infringement by the Respondents in terms of the deleterious effects of the Impugned Agreement and Impugned Directives on the employment opportunities of the Petitioners' and of the residents of Mombasa in cargo handling and transport activities. They also annexed various documents, mainly research reports and newspaper reports on the said effects. The Respondents have in this respect contended that some of the evidence provided by the Petitioners is not admissible, and that it is also not of probative value to establish any such infringement on their part.
200. It is notable in this respect that the hearing of petitions filed under Article 22 of the Constitution are also regulated by Rule 20 (1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013*, which provides that such hearing shall be either by way of affidavits, written submissions or oral evidence, or as the Court may direct. The Evidence

Act is also clear on its application to constitutional petitions and affidavits in section 2 thereof, and provides as follows:

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

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

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

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

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

*(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—*

*(a) if the maker of the statement either—*

*(i) had personal knowledge of the matters dealt with by the statement; or*

*(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person*

*who had, or might reasonably be supposed to have, personal knowledge of those matters; and*

*(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.*

204. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners in this regard annexed various documents as Annexures WOR 5a, 5b and 5c and 5d to their affidavit in support of the Amended Petition, which they alleged were given to the deponent by the Kenya International Freight and Warehousing Association (KIFWA) after holding discussions with the Association on the effects of the Impugned Agreement on stakeholders.
205. It is notable in this respect that Annexure WOR 5a is an undated and unsigned document titled "*Challenges KIFWA Members are facing in Cargo clearance at the Port and ICDN*". It does not state who the maker of the document is. There is, therefore, no way of establishing the authenticity of the document. Further, the competence of the author is not disclosed. More importantly the document is not specific to the effects of the Impugned Agreement. Neither does it indicate the causes of the challenges enumerated therein. Due to these authenticity deficit and internal substance deficiencies, this document was of little evidential value.
206. The next document relied on by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners is Annexure WOR 5b. This is a letter dated 31<sup>st</sup> May, 2018 addressed to the 3<sup>rd</sup> Respondent's Managing Director on the transfer of empty containers ex-SGR to the CFS'. This letter expressly indicated that the 3<sup>rd</sup> Respondent's inefficiencies in handling the empty containers were leading to the backlog of the containers and increased costs experienced by the stakeholders. By its very text and context, this letter is unrelated to the Impugned Agreement. As such it had no probative value to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners' case.
207. Annexure WOR 5c is an undated press release by KIFWA Secretary General with requests to various Government actors to tackle the Cargo Clearance challenges faced by agents and importers. While the press release attributes the challenges to certain decisions made by the 3<sup>rd</sup> Respondent, it is unclear which directives or decisions are blamed for the challenges. Indeed, it is noteworthy that the Press Release calls for a meeting of the various stakeholders to be held on 13<sup>th</sup> and 14<sup>th</sup> September, 2018 – which predates the Impugned Directives. The document, therefore, lacks relevance to the litigated question. Beyond that, the probative value of the Press Release is itself decidedly low: the document not only suffers from authenticity deficits but also constitutes hearsay evidence: the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners invite the Court to accept as truth statements made

outside Court by a third party who neither came to Court nor signed an affidavit to the Court.

208. Lastly, Annexure WOR 5d is a letter dated 24<sup>th</sup> September 2018 from the Director General of the Kenya Maritime Authority addressed to, among others, KIFWA, on the "*Rapid Increase of Detention Charges by Shipping Lines*" and inviting stakeholders to discuss the matter. There is no specific reference to the Impugned Agreement indicated in the said document, or explanation on how the challenges and effects therein have been caused by the Impugned Agreement. The relevance of this document was, therefore, unclear to the litigated question.
209. Lastly all the annexures relied on by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners discussed above were copies which were neither certified, nor produced in accordance with the provisions of section 68 of the Evidence Act as regards production of secondary evidence.
210. On its part, the 4<sup>th</sup> Petitioner sought to rely on a report titled "*The Assessment Report of the Socio Economic Impact of the Operationalization of the Mombasa – Nairobi Standard Gauge Railway on Port City Mombasa*". This is the research report dated August, 2019 which is described as having been conducted by Dr. Kennedy Ogollah, Dr. Kingsford Rucha, Dr. Joshua Aroni and Mr. Gichiri Ndua of the University of Nairobi School of Business. The deponent of its affidavit in support of the Petition sought to lay a basis for the same and its source by annexing a letter dated 6<sup>th</sup> September 2019 sent to the 4<sup>th</sup> Petitioner's Chief Executive Officer by the Governor's Office of the County Government of Mombasa inviting him to a presentation and validation of the draft report, and which enclosed the said draft report.
211. While expert evidence forms an important part of litigation, and, under section 48 of the Evidence Act, the opinions of science or art are admissible if made by persons specially skilled in such science or art, there are rules as regards the admissibility of such evidence. A 4-Judge Bench of this Court considered the admissibility of expert evidence in ***Mohamed Ali Baadi and others v Attorney General & 11 Others [2018] eKLR*** and held as follows:

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

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

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

212. Although the 4<sup>th</sup> Petitioner states that the Research Report was forwarded to it by the Governor's Office, the Governor's Office of the County Government of Mombasa was not the author of the said report. Its role was merely to commission the research which resulted in the report. The Petitioners did not annex any affidavit by the authors of the report establishing their identities; expertise; the scientific basis of their methodology; the actual methods used to generate the data relied on and so forth. In short, by relying on this report, the 4<sup>th</sup> Petitioner sought to rely on an expert statement of a person who was not a party to the suit without laying a proper basis for such reliance.
213. Beyond the authenticity challenges of the report, as alluded to above, there are some substantive challenges as well: as presented, it is not possible to determine what probative value to assign to the expert opinion allegedly presented in the report. This is because, the expertise of the authors is not established in the report. Neither is an attempt made to justify the scientific basis of the methodology deployed in generating the data for the report or the specific methods used to collect the data. Without all these information, it is impossible to assess the credibility of the methods used to collect and analyse the data as well as the conclusions reached by the authors. In short, the research report has little or no probative value.
214. In the present case, the evidential problems of the research report are exacerbated by the fact that it is, in fact, a draft report. By the terms of the letter introducing the document, the draft report was yet to be validated.
215. At various points in support of their case, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners also sought to rely on various reports and surveys by the World Bank and Kenya National Bureau of Statistics. However, they did not annex the cited reports and surveys. Therefore, the Court could not place any reliance on the said reports and surveys.

216. Beyond the documents analysed above, the Petitioners also largely relied on newspaper reports for the quantitative data with which they hoped to establish a link between the increased costs of cargo transportation and losses caused by the Impugned Agreement and Impugned Directives. The newspaper reports relied on included: an article in the *Standard Newspaper* on 24<sup>th</sup> September, 2019 titled “*Monopoly of SGR freight derailing Coast economy*” and another one in the same newspaper of 27<sup>th</sup> March, 2018 titled “*Coast Seeks New Income as SGR Takes Over Cargo.*”
217. On the admissibility and credibility of the various newspapers report relied upon by the Petitioners as evidence, we adopt the position of the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] e KLR***, wherein it was held as follows:

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

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

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

We need not belabour the point.

219. In conclusion, the Petitioners failed to discharge the burden which the law places on them to prove with appropriate specificity the claims of violations of social and economic rights that they made in the Consolidated Petitions. While the Petitioners were successful in demonstrating that the right to a livelihood is inextricably linked to the social and economic rights enumerated in Article 43 of the Constitution, in their averments and arguments, the Petitioners alternately failed to present relevant evidence probative of the claimed violations or presented evidence which was not only inadmissible, but also of no probative value in proving the allegations made that the Impugned Agreement and Impugned Directives made by the Respondents affected and infringed the Petitioners' right to livelihood.
220. We must emphasize the importance of adherence to the rules of evidence – both in terms of presentation (authenticity and foundation) and quality of evidence (credibility and probative value) required to establish violations of fundamental rights and freedoms especially in Public Interest or Strategic Litigation. The rules of evidence apply with equal force to this species of litigation as they do in run-of-the-mill litigation. This is especially true for cases where claimed violations are most appropriately proved by empirical evidence. Such evidence and data are often generated by experts and must be presented in adherence with the rules on presentation of expert evidence. Of course, reliance on empirical data does not detract from the need, in appropriate cases, to present direct evidence of the lived realities of the affected people on whose behalf the Public Interest Litigation has been filed.

**f. Did the Take or Pay Agreement violate Articles 174 of the Constitution as read together with paragraph 5(e) of part 2 of the 4<sup>th</sup> schedule?**

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

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

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

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

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

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

*(3) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.*

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

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

226. Under Part 1 of the Fourth Schedule, the functions of the National Government are set out at paragraph 18(f) which provides that the National Government is tasked with transport and

communications, including marine navigation. The functions and powers of the County Governments under Part 2 of the Fourth Schedule at paragraph 5(e) is County Transport, including–

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

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

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

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

- 
- “5. County transport including
- – (c)
  - (d) ferries and harbours including development, maintenance and operation of ferries and
  - harbours operating in inland lakes and waters.”

*....The allocation of the function does not clearly include the operation of Likoni Channel Ferry. There is therefore no mistake in the Legal Notice transferring the ferry function in respect of lakes and inland waters but did not refer to the Indian Ocean, for example. The “grab” by the Respondent of the facilities and operations of the Petitioner in support of its core function of*

*operating the deep Likoni Ferry Channel is not only contrary to all the provisions of Transition to Devolved Government Act, 2012, but it is outright contrary to Article 40 of the Constitution of Kenya 2010....It needs no reminding that under Article 187(2)(b) constitutional responsibility for the performance of the function or exercise of the power remains with the government to which it is assigned by the Fourth Schedule. Transport and communications, including in particular "marine navigation" is a matter assigned to the national government under paragraph 18(f) of the Fourth Schedule to the Constitution. In the premises, I entirely agree with the conclusion reached by the Chairman of the Transition Authority in his letter dated 24<sup>th</sup> February, 2016 to the Respondents Governor that the actions of the Respondent in taking over the Petitioner's facilities which support its activities were against the letter and spirit of the Constitution of Kenya, 2010, and are therefore unconstitutional....*

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

229. It is, indeed, true that marine navigation, the constitutional power reserved for the national government, comes to an end once the ship is docked at the port and begins after the ship leaves the port. However, it is clear that under Part 2 of the Fourth Schedule paragraph 5(e) the county government's powers over ferries and harbours, do not include regulation of international and national shipping and matters related thereto. What has come to an end is marine navigation. Although the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners argue that once the marine navigation is complete, the county government should then take over the control of harbours, there was need for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners to distinguish whether the resultant powers presumably belonging to the county government were powers to operate harbour or powers to make policy. In the ***Ferries case (supra)***, the Court found that only harbours operating in inland lakes and waters were subject of county government powers, and that harbours operating on the Indian Ocean were not part of the functions approved for transfer by the Transition Authority as specified in the Schedule to the Legal Notice Number 152 of 2013 to the County Government of Mombasa.
230. The specific question presented by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners is, in a non-trivial sense, tautological. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners are asking the Court to "assign" to the two levels of government their various functions as delimited by the Constitution. That is not within the authority of the Court. That task was already undertaken by the Constitution. Paragraph 5(e) of Part 2 of the 4<sup>th</sup> Schedule of the Constitution is explicit. It states that the County Transport function includes "*ferries and harbours excluding the regulation of international and national shipping and matters related thereto.*" From this text, the county transport function is stated as including "ferries and harbours". The text is also explicit that the county function excludes "regulation of international and national shipping and matters related thereto" which belongs to the National Government.

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

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

**g. What remedies, if any, should issue?**

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

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

- a. That an Interested Party in a civil suit cannot expand the scope of the original suit as pleaded by the principal parties. In the present case, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties impermissibly expanded the scope of the Consolidated Petitions by pleading and submitting on Articles 6 (2) and 6 (3) as well as Article 27 of the Constitution.
- b. That a party is required to exhaust its remedies under the Competition Act before bringing an action in Court claiming violations of that Act. However, the Consolidated Petitions involved polycentric issues and multiplicity of parties including questions related to the fundamental rights of the Petitioners to warrant an exception to the doctrine of exhaustion as developed in our jurisprudence. This finding notwithstanding, the claims alleging infringement of the Competition

Act by the 4<sup>th</sup> Petitioner could not be entertained in this suit since the 4<sup>th</sup> Petitioner had commenced proceedings before the Competition Authority of Kenya but did not pursue those proceedings. Instead, the 4<sup>th</sup> Petitioner approached this Court with an expanded Petition seeking reliefs beyond the scope of the Competition Act.

- c. That the freedom to make choices in the economic sphere or the freedom to freely enter into contracts of one's choosing is a non-fundamental right. The government may limit that right if it satisfies the rational basis test: to demonstrate that the limitation is aimed at achieving a legitimate governmental interest and that the means chosen are rationally related to the goals. In addition, the government must satisfy the constitutional due process requirements as well as substantive scrutiny to confirm that the Policy or law in question does not otherwise violate any enumerated fundamental right – including the right to social and economic rights under Article 43 of the Constitution.
- d. That the Take or Pay Agreement dated 30<sup>th</sup> September, 2014 and the directives by the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 pass constitutional muster under the rational basis test but needed to undergo both the due process scrutiny and the substantive scrutiny test.
- e. That public bodies or agencies exercising authority granted under statutes do not have to engage the public and stakeholders when making decisions purely within their sphere of internal operations (internal operational decisions). However, such public bodies and agencies are obligated to craft a program of public participation and stakeholder engagement when making decisions which will affect the public or stakeholders.
- f. That the Take or Pay Agreement dated 30<sup>th</sup> September, 2014 between the 3<sup>rd</sup> and 4<sup>th</sup> Respondents was an internal operational decision authorized by the parent statutes of the two Respondents and did not require public participation or stakeholder engagement. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents are legally competent to conclude the Take or Pay Agreement dated 30<sup>th</sup> September, 2014 without triggering the public participation requirement of the Constitution.
- g. That the directive of 15<sup>th</sup> March, 2019 coercively removes the right of the importers to choose their CFS of choice while the directive of 3<sup>rd</sup> August, 2019 coercively requires all cargo which is not intended for Mombasa and its environs to be conveyed by the SGR and to be cleared at the Inland Container Depot in Nairobi. These directives potentially affect the interests and rights of the 4<sup>th</sup> Petitioner and, indeed, all importers who use the Port of Mombasa. As such the 3<sup>rd</sup> Respondent was obligated by the due process requirements of Article 10 of the Constitution to subject these two directives to a program of public participation and stakeholder engagement.

- h. That the 3<sup>rd</sup> Respondent failed to subject the directives dated 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 to public participation and stakeholder engagement as constitutionally required.
- i. That the directives by the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 were administrative actions because they affected the legal rights and interests of the 4<sup>th</sup> Petitioner, importers, transporters, other Port users, and stakeholders. As such they had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness laid out in Article 47 of the Constitution and Fair Administrative Actions Act.
- j. That the directives by the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act.
- k. That the right to earn a livelihood is inextricably intertwined with the social and economic rights enumerated in Article 43 of the Constitution. A claimant can prove violation of Article 43 of the Constitution by demonstrating an impermissible infringement of their right or ability to earn a livelihood.
- l. That a Petitioner claiming a violation of his or her Article 43 rights bears the burden to prove such violation on a preponderance of evidence and by using legally admissible evidence.
- m. That the Petitioners failed to sufficiently discharge the burden of proof on their claims that the Take or Pay Agreement dated 30<sup>th</sup> September, 2014 and/or the directives by the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 violated their social and economic rights enshrined under Article 43 of the Constitution because they failed to avail legally admissible and credible evidence.
- n. That no sufficiently precise controversy was framed for the Court to pronounce itself on the question of delimitation of functions between the National Government and the County Government of Mombasa respecting the harbour functions.

## **V. Disposition**

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

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

- b. The claim that the Take or Pay Agreement dated 30<sup>th</sup> September, 2014 was in violation of Articles 10 and 47 of the Constitution failed and is hereby dismissed.
- c. The claim that the directives by the 3<sup>rd</sup> Respondent dated 15<sup>th</sup> March, 2019 and 3<sup>rd</sup> August, 2019 were in violation of Articles 10 and 47 of the Constitution for want of public participation and for non-compliance with fair administrative procedures succeeded. The Court declares the Impugned Directives constitutionally infirm. The Impugned Directives are hereby quashed.
- d. Given the potential of order (c) above to disrupt the orderly operations of the port and the operationalization of the National Transport Policy, the effect of that order is hereby suspended for one hundred and eighty (180) days to afford the Respondents an opportunity to regularize the situation.
- e. All the other prayers in the Consolidated Petitions fail and are hereby dismissed.
- f. This being a public interest litigation, each party will bear its own costs.

Dated. Signed and Delivered at Malindi this 6<sup>th</sup> day of November, 2020.

HON. L. ACHODE  
JUDGE

HON. J. NGUGI  
JUDGE

HON. P. NYAMWEYA  
JUDGE

HON. E. OGOLA  
JUDGE

HON. A. MRIMA  
JUDGE

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



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 13 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI.....1<sup>ST</sup> APPELLANT

WYCLIFE GISEBE NYAKINA.....2<sup>ND</sup> APPELLANT

AND

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT

THE PUBLIC PROCUREMENT

OVERSIGHT AUTHORITY.....3<sup>RD</sup> RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION.....4<sup>TH</sup> RESPONDENT

LAW SOCIETY OF KENYA.....5<sup>TH</sup> RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 10 OF 2015

BETWEEN

THE LAW SOCIETY OF KENYA.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT

THE PUBLIC PROCUREMENT

OVERSIGHT AUTHORITY.....3<sup>RD</sup> RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION.....4<sup>TH</sup> RESPONDENT

OKIYA OMTATAH OKOITI.....5<sup>TH</sup> RESPONDENT

NYAKINA WYCLIFFE GISEBE.....6<sup>TH</sup> RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, J.) dated 21<sup>st</sup> 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 27<sup>th</sup> 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 21<sup>st</sup> November 2014, the High Court (*Lenaola, J.* (as he then was)) declined an invitation by the appellants, Okiya Omtatah Okioti, Wycliffe 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 Okioti and Wycliffe 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 8<sup>th</sup> 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 5<sup>th</sup> February 2014, Omtatah and Gisebe invited the court *“to intervene and stop the contracting of the 4<sup>th</sup> 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 2<sup>nd</sup> respondent, Kenya Railways Corporation (hereafter KRC or the 2<sup>nd</sup> respondent) and the 4<sup>th</sup> respondent, China Road and Bridge Corporation (hereafter CRBC or the 4<sup>th</sup> 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 5<sup>th</sup> 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 1<sup>st</sup> respondent), KRC, and Public Procurement Oversight Authority (PPOA or the 3<sup>rd</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> respondents who were involved in the fraudulent procurement process as well as officers of the 4<sup>th</sup> respondent.

10. The petition by the LSK, in which KRC and the AG were named as respondents, was filed on 2<sup>nd</sup> 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 10<sup>th</sup> July 2012 and contract agreement dated 4<sup>th</sup> 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 14<sup>th</sup> 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 13<sup>th</sup> 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 12<sup>th</sup> 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 26<sup>th</sup> 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 AG's office; that the contract for civil works was signed by KRC on 11<sup>th</sup> July 2012 while that for the supply and installation of facilities, locomotive and rolling stock was signed on 4<sup>th</sup> 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 24<sup>th</sup> 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 27<sup>th</sup> June 2014. On 1<sup>st</sup> 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 7<sup>th</sup> 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 21<sup>st</sup> 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 11<sup>th</sup> 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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. Petition 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 Techniquiz & others vs. Vivian Inerman, 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 1<sup>st</sup> to 3<sup>rd</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> 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 1<sup>st</sup> to 3<sup>rd</sup> 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*, 8<sup>th</sup> 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 1<sup>st</sup> 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 4<sup>th</sup> 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 deposed 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 12<sup>th</sup> 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 10<sup>th</sup> 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 Kuruma Son of Kanju vs R [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. 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. 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 Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR.

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 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and to an extent, the 3<sup>rd</sup> 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 2<sup>nd</sup> 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 7<sup>th</sup> 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.*

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(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 12<sup>th</sup> 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 26<sup>th</sup> 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 11<sup>th</sup> July 2012 and 4<sup>th</sup> 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 19<sup>th</sup> day of June, 2020.*

M.K. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

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J. MOHAMMED

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JUDGE OF APPEAL

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**



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Your Ref: CAJ/ATI/M/TRA/004/6/20 - SNK  
Our Ref: KRC/CS/MD/3/207

Date: 17<sup>th</sup> April, 2020

Mrs. Lucy Ndung'u  
Commissioner  
Commission of Administrative Justice  
West End Towers, 2<sup>nd</sup> Floor  
Waiyaki Way, Westlands  
P.O. Box 20414 - 00200  
**NAIROBI**



Dear Madam,

**RE: REQUEST FOR ACCESS TO INFORMATION/DOCUMENTS BY MR.  
KHELEF KHALIFA ON STANDARD GAUGE RAILWAY (SGR) TO  
KENYA RAILWAYS**

We refer to the above matter and your letter of even reference dated 12<sup>th</sup> March, 2020.

We have perused the letter from Mr. Khelef Khalifa on the Request for information under Article 33 and 35 of the Constitution of Kenya and the Access to Information Act, 2016 with particular reference to Agreements entered between the Government of Kenya (GoK) or any Kenyan State or public agency with all service providers and or third parties (including foreign government/state) in regard to Standard Gauge Railway (SGR) and noted the contents therein.

Kindly note that the projects to which information is being requested in clauses 1a - 1d are projects between the Government of the People's Republic of China and the Government of Kenya with Kenya Railway's mandate solely being as an implementing agency of the said contracts. The custody of the said contracts is with the Office of the Hon. Attorney General.

With regard to the Agreements in Clause 1e, the same have non-disclosure clauses and therefore would be in breach of the Contractual terms of the same upon submission of the said Agreements.

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We thank you for your continued cooperation.

Yours Sincerely



PHILIP MAINGA  
MANAGING DIRECTOR