REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Mwilu; DCJ & VP, Ibrahim, Wanjala, Njoki & Ouko SCJJ)

PETITION NO.13 OF 2020
as consolidated with
PETITION NO.18 (E019) OF 2020

—BETWEEN—

KENYA RAILWAYS CORPORATION ..... 1ST APPELLANT
THE ATTORNEY GENERAL ..... 2ND APPELLANT
THE PUBLIC PROCUREMENT
OVERSIGHT AUTHORITY..... 3RD APPELLANT

AND

OKIYA OMTATAH OKOITI..... 1ST RESPONDENT
WYCLIFE GISEBE NYAKINA ..... 2ND RESPONDENT
THE LAW SOCIETY OF KENYA ..... 3RD RESPONDENT
CHINA ROAD AND BRIDGE CORPORATION ..... 4TH RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal at Nairobi (Koome (as she then was), Gatembu & J. Mohammed, JJ.A.) delivered on 19th June, 2020 in Civil Appeal No. 13 of 2015 as consolidated with Civil Appeal No. 10 of 2015)*

Representation:
Prof. Albert Mumma SC, Mr. Charles Agwara & Ms. Lilian Koech for the 1st appellant
(Prof. Albert Muma & Co. Advocates)

Mr. Thande Kuria for the 2nd & 3rd appellants
(Office of the Attorney General)

Mr. Okiya Omtatah, the 1st respondent
(In person)

Ms. Christine Nkonge & Mr. Ochiel Dudley, for the 2nd respondent

Mr. Philip Omoiti for the 3rd respondent
(Kosgey & Masese Advocates)

Mr. Kiragu Kimani, SC for the 4th respondent
(Hamilton Harrison & Mathews Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court are two appeals, as consolidated by the consent order dated 7th December 2020.The first appeal is by Kenya Railways Corporation, *the 1st appellant* herein (KRC) and the second one is by the Attorney General and the Public Procurement Oversight Authority *(the 2nd and 3rd appellants respectively)*. Both appeals are anchored on Article 163(3)(b)(1) and 163 (4)(a) of the Constitution as well as Section 15 (2) of the Supreme Court Act, 2011.

[2] The appeals challenge a portion of the judgment of the Court of Appeal delivered on 19th June, 2020 in ***Civil Appeal No. 13 of 2015 as consolidated with Civil Appeal No. 10 of 2015***. In particular, the appellants are aggrieved by the finding by the appellate court that the 1st appellant failed to comply with and violated Article 227(1) of the Constitution and Sections 6(1) and 29 of the repealed Public Procurement Disposal Act, 2005 *(PPDA, 2005)* in the procurement of the Standard Gauge Railway (SGR) project.

[3] The 1st and 2nd respondents Okiya Omtatah Okoiti and Wyclife Gisebe Nyakina, cross appealed challenging portions of the impugned judgment principally relating to documentary evidence that was expunged by the High Court as affirmed by the Court of Appeal.

B. BACKGROUND

[4] On 28th October, 2008 the then President of Kenya, H.E. Mwai Kibaki, and the President of Uganda, H.E. Yoweri Museveni, issued a joint communiqué committing that both countries would replace the Mombasa-Kampala metre gauge

railway line constructed during the colonial period and dubbed, "*the lunatic express*." The *lunatic express* was facing a number of technical and capacity challenges and limitations. The communiqué intentioned the change of the outdated metre gauge system with a high-capacity railway system, that is, Standard Gauge Railway (SGR) line linking the Port of Mombasa to Kampala, with a branch line to Kisumu and Pakwach in Uganda.

[5] This commitment was based on the understanding that each country would develop the portion of the SGR line falling within its border under unified technical standards and identify financing for the construction of its portion. About a year later, the two countries reduced their commitment into a bilateral agreement signed on 1st October, 2009. Kenya's portion of the SGR line was to be constructed in two phases - phase 1 covering Mombasa to Nairobi while phase 2 would extend to Malaba from Nairobi with a branch line to Kisumu.

[6] On 12th August, 2009 the Ministry of Transport executed a Memorandum of Understanding (MOU) with China Road and Bridge Corporation (CRBC), a state-owned corporation of the People's Republic of China. Under the MOU, CRBC was to undertake, at its own cost, a feasibility study of the construction of phase 1 covering 500 kilometres and come up with a preliminary design for the project. This included consideration of the technical details, the financing required and the legal implementation of the project. In the event the results of the study were approved, CRBC would be the sole agent to design, construct and supervise all works of the project. Further, upon agreement of the design, parties were to negotiate a commercial contract with CRBC required to source funding for the project.

[7] CRBC submitted the feasibility study report in February 2011, which KRC, the statutory body mandated with the responsibility of the railway network in the country, being tasked with the responsibility to review. The feasibility and preliminary design report was approved by KRC with revisions on 26th June, 2012. The approved scope of works included construction of a single-track railway, stations, workshops and freight exchange depots as well as supply and installation of facilities (signalling, communication for trains control, electricity and water supply to each station), locomotives and passenger coaches.

[8] According to KRC, following numerous deliberations between the Government of Kenya through the National Treasury and the Government of China, it was agreed that the Government of China would finance the project through Exim Bank of China, a state-owned financing institution. Thus, Exim Bank would finance 85 % of the costs for the project while Kenya would meet the remaining 15% as a counterpart funding. Additionally, part of the financing by Exim Bank would be issued as a concessional loan while the other part would be a commercial loan.

[9] KRC and CBRC executed commercial contracts. The first one was executed on 11th August, 2012 for the construction of the SGR line (civil works). A subsequent commercial contract was executed on 4th October, 2012 for the supply and installation of facilities, locomotives and rolling stock. The totality of the two contracts was that CRBC was engaged as an engineering, construction and design contractor for the project.

[10] In a bid to meet its portion of the funding of the project, the government introduced a railway development levy at the rate of 1.5% of the customs value of imported goods to be charged on all imports. This levy was introduced by the Finance Bill of 18th June, 2013, which is currently provided for under Section 117A of the Customs and Excise Act.

C. LITIGATION HISTORY

i. Proceedings at the High Court

[11] Two petitions were filed at the High Court challenging the procurement process for the construction of the SGR and the resultant contracts in favour of CRBC. The 1st and 2nd respondents filed ***High Court Petition No. 58 of 2014*** on 5th February, 2014 while the Law Society of Kenya (LSK), the 3rd respondent, filed ***High Court Petition No. 209 of 2014*** on 14th May, 2014.

[12] In their petition, the 1st and 2nd respondents urged that there was lack of due diligence on the part of the government as, firstly, it failed to independently carry out a feasibility study and design of the project before seeking a contractor to implement it. As such, it had no independent benchmarks against which to assess whether it was getting value for money. Secondly, that the government entered into

contracts with CRBC which had been blacklisted by the World Bank in January, 2009 from participating in any road and bridge projects financed by the bank for a period of 8 years. The embargo was based on CRBC's implication in collusive practices in a roads project financed by World Bank in the Philippines.

[13] The 1st and 2nd respondents argued that single sourcing or direct procurement for a mega project such as the SGR was illegal. In their view, at the very least, the government ought to have issued a restricted/limited tender inviting other Chinese firms with requisite expertise to bid. They urged that even procurements under concessional loans are not exempted from competitive bidding and gave examples of previous procurements involving concessional loans between Kenya and China. In that regard, they referred to a concessional loan for the Kenya Rural Telecommunication Development Project Phase II 2007 and the 2011/2012 concessional loan for the supply, installation, testing and commissioning of the national surveillance communication, command and control system in the National Police Service which were awarded on competitive restricted bidding basis.

[14] It was their further case that awarding the contracts to CRBC which had conducted the feasibility study and developed the preliminary design for the project gave rise to a conflict of interest contrary to Section 87 of the PPDA, 2005. They contended that construction of railways was not within CRBC's expertise. To them, it was not only ill-advised but also wasteful to source for locomotives and other rolling stock from CRBC, which does not manufacture the same as opposed to purchasing directly from the manufacturer.

[15] They added that there were violations of the provisions of the Public Finance Management Act on two fronts. Firstly, that Parliament's approval was not obtained prior to execution of the commercial contracts and secondly, that the National Treasury was not involved in the management of funds committed to the project as funds were paid to CRBC directly instead of the Consolidated Fund. Moreover, that the loan from Exim Bank had not been included in any national budget or Appropriation Act.

[16] The 1st and 2nd respondents were unconvinced that the then ongoing probe of the SGR project by two parliamentary committees (the Public Investments Committee and the Departmental Committee on Transport and Infrastructure) would yield any useful results. This is due to the fact that the President's unequivocal statement of 28th January, 2014 that the project would be implemented, pre-empted the outcome of the probes. Besides, in the unlikely event the probes yielded a different outcome, they argued that the Executive was known to ignore recommendations from Parliament.

[17] Their sum contention was that the appellants' actions and omissions were a collusive scheme designed to procure the construction of an SGR line at artificial and non-competitive price levels, with the procurement and contracting of CRBC to implement the SGR project in flagrant violation of Articles 10, 73(2), 201, 227(1), (2)(d) and 232 of the Constitution as well as Statute. Consequently, the 1st and 2nd respondents sought *inter alia*:

a) *A declaration that there is no valid contract between the Government of Kenya and CRBC.*
b) *A declaration that the appellants were required to but failed to safeguard the public interest and the common good by ensuring the procurement for the railway was done according to the law.*
c) *A declaration that the Government should not conduct business with CRBC because it is an entity blacklisted along with its subsidiaries by the World Bank.*
d) *A declaration that the railway should be procured through competitive bidding as required by the Laws of Kenya.*
e) *An order of injunction restraining the appellants, by themselves or through their agents or representatives or any persons claiming through them, from transacting any business with CRBC until the Chinese corporation is cleared by the World Bank.*
f) *An order of injunction restraining the appellants, by themselves or through their agents or representatives or any persons claiming through them, from continuing with the contract awarded to CRBC.*

g) *A mandatory order directing the police to investigate and if found culpable, criminally prosecute any public officers and officers of the appellants and CRBC's officers who were involved in the procurement process.*
h) *A mandatory order directing the appellants to ensure that there will be no single sourcing in the procurement of the Mombasa-Nairobi-Malaba/Kisumu standard gauge railway.*

[18] The petition by LSK, likewise, challenged the procurement process of the SGR project on largely similar grounds as those raised by the 1st and 2nd respondents, the only addition being that KRC should have ensured public participation in the procurement since it involved expenditure of a colossal amount of public funds and secondly, that the change from an electric powered to a diesel engine for the SGR, as had been proposed by KRC and accepted in the revised feasibility report, posed a danger to the environment contrary to Articles 42 and 69 of the Constitution. Equally, LSK relied on correspondence between public institutions and officers which it annexed to its pleadings. On its part, LSK sought the following orders:

a) *A declaration that KRC as a state entity is subject to the provisions of Article 42, 46 and 70 of the Constitution.*
b) *A declaration that the award of contract for the supply and installation of facilities and diesel-powered engines which are outdated and pollute the environment violates Articles 42 and 49 of the Constitution.*
c) *A declaration that the award of the contract for the supply and installation of facilities, locomotives and rolling stock for the SGR to CRBC violates Articles 10, 201 and 207 of the Constitution.*
d) *An order of certiorari to remove to the High Court and quash the award of contract No. KRC/PLN/31/2012 for the supply and installation of facilities, locomotives and rolling stock for the SGR or any agreement for the supply of the same.*

[19] By consent of the parties, the petitions were consolidated on 27th June, 2014.

[20] In response to LSK's petition, KRC averred that following the joint communiqué, it developed a master plan from the beginning of the year 2009 and

embarked on the procurement of consultants to undertake a feasibility study for the project through an open international tender, Tender No. KR/PLM/28/10. Unfortunately, the process was frustrated by litigation before the Public Procurement Administrative Review Board and the High Court for a period of two years. By the time the litigation was concluded, the Ministry of Transport had entered into an MOU with CRBC. The Ministry of Transport and the Attorney General approved the two commercial contracts which were subsequently executed between itself and CRBC.

[21] According to KRC, Kenya had entered into a financing agreement with Exim Bank within a Government-to-Government framework. Thus, the engagement of CRBC was on the basis of a negotiated loan between the two countries and exempted from the provisions of PPDA, 2005 by section 6(1) thereof. Moreover, that the commercial contracts in favour of CRBC were a pre-condition to the financing agreement and only became effective upon execution of the said financing agreement. Plus, prior to the engagement of CRBC, the Government of Kenya had taken all the necessary steps to ascertain the technical, financial and legal capacity of CRBC to undertake the implementation of the project and had also compared the costs of the project with other current railway projects in the country as well as in the region (Ethiopia and Uganda) and found the costs of the project to be reasonable.

[22] KRC contended that while an electric powered railway is more efficient and environmentally friendly, it was certainly not cheap, and Kenya does not generate sufficient electricity to run an electric railway. Additionally, KRC averred that in awarding CRBC the contract, it ensured that the project design complied with all the environmental requirements and concerns addressed in an environmental and social impact assessment study for the project that had been carried out in 2012.

[23] KRC challenged the competency of the petitions as, firstly, the matters raised therein were subject of ongoing investigations and inquiries by constitutionally established bodies namely, the Parliamentary Investments Committee, Departmental Committee on Transport and infrastructure, the Auditor General, and the Ethics and Anti-Corruption Commission. For this reason, the 1st, 2nd and 3rd

respondents ought to have exhausted the afore-mentioned avenues before lodging their petitions. KRC urged that the two committees of Parliament subsequently cleared the procurement process of the SGR project. Secondly, KRC contended that the consolidated petitions did not set out the manner in which the rights of the 1st, 2nd and 3rd respondents were allegedly threatened to be violated.

[24] KRC also lodged a cross petition on 7th July, 2014 challenging the reliance by the 1st, 2nd and 3rd respondents on documents that were produced contrary to Articles 31 and 35 of the Constitution and section 80 of the Evidence Act.

[25] The Attorney General and PPOA joined KRC in opposing the consolidated petition on similar grounds and supported the cross petition. They added that allowing the orders sought would violate the doctrine of separation of powers. To them, the prayers were tantamount to asking the court to interfere with powers vested in the executive arm of Government.

[26] On its part, CRBC averred that it had undertaken several railway construction projects and had established itself as a top international contractor. It urged that it had not been barred or disqualified by PPOA from participating in procurement under Part XI of the PPDA, 2005. In any case, the blacklisting covered projects funded by the World Bank and not a blanket debarment against all its undertakings. CRBC justified its award of the contract for the supply of locomotives and rolling stock on the fact that the project was being undertaken under the Engineering Procurement and Construction (EPC) model, which ensures that the final product is delivered to the owner in a fully functional state. It also urged that it was issued with an Environment Impact Assessment (EIA) license by the National Environment and Management Authority (NEMA) upon satisfaction that the SGR project was environmentally friendly.

[27] In response to the cross petition, the 1st, 2nd and 3rd respondents maintained that the documents in issue had been lawfully obtained from conscientious citizens and public officers who were in lawful possession of the same. Besides, KRC had not established that the documents were false, the makers of the same had denounced them or that the information therein is protected under the Official Secrets Act.

They further argued that exposing the source or identity of persons who availed the documents would silence whistle blowers who act in public interest and good faith. Consequently, they asked the court to admit the documents as they would give a candid exposition of the issues in dispute and enable the court to determine lawfulness of the procurement.

[28] The High Court (*Lenaola, J.*, as he then was) in a judgment dated 21st November, 2014 dismissed the consolidated petitions and allowed the cross petition to the extent of expunging documents it had found inadmissible. The court held that it had jurisdiction, the petitioners having invoked Article 165(3) of the Constitution, to interpret and determine whether the acts of the appellants violated the Constitution. The argument that the complaints ought to have been lodged before the Public Procurement Administrative Review Board was therefore irrelevant. The court found that the appropriate body to undertake investigations into the allegations of corruption in the SGR project is the Ethics and Anti-Corruption Commission.

[29] On whether the consolidated petitions were supported by valid documentary evidence, the court noted that while Article 35 of the Constitution grants every citizen the right to information held by the State, the right is not absolute and there is a procedure for obtaining such information. It found that the manner in which the 1st, 2nd and 3rd respondents obtained the documents relied on violated KRC's right to privacy and privacy of communication between KRC and Exim Bank provided under Article 31 of the Constitution. The court also found that the public servants who availed the documents to the 1st, 2nd and 3rd respondents acted in violation of their Code of Conduct and the Public Officers Ethics Act. Consequently, the court held that the 1st 2nd and 3rd respondents could not rely on such documents and proceeded to expunge them from the record.

[30] The court found that the project was funded by a loan from China through Exim Bank and as such, the procurement in question was not subject to the PPDA, 2005 by dint of Section 6(1), but was governed by the terms of the negotiated loan. The court held that the Public Finance Management Act had not been violated since Parliament was involved in the budgeting of the funds to be utilized in the SGR

project, and as evinced by the introduction of the railway development levy in Section 117A of the Customs and Excise Act. The Court also held that apart from alleging violation of the provisions of the Public Officer Ethics Act, the 1st and 2nd respondents had not established the manner of violation.

[31] On environmental considerations in undertaking the project, the court found that an autonomous environmental impact assessment was conducted by the Government and an Environmental Impact Assessment license issued. The court noted that upon publication of the feasibility study report in the Kenya Gazette as well as a newspaper of wide circulation in Kenya, as required by the Environment Management and Co-ordination Act (EMCA), members of the public were invited to give their comments or complaints within 60 days. However, the 1st, 2nd and 3rd respondents did not do so. Further, that they failed to challenge the EIA license issued to CRBC for the project at the National Environment Tribunal.

[32] As to whether the appellants had put in place mechanisms to ensure value for money, the court found that this was an argument related to policy and not clear issues of law, hence beyond the court's mandate to direct the Executive on the manner in which the project is to be managed. The court's further view was that the SGR was not a World Bank funded project and therefore the blacklisting of CBRC is not an automatic bar to participation of CRBC in any other project. Additionally, that CRBC had not been debarred by the Director General of PPOA in line with Sections 115 and 116 of the PPDA, 2005.

ii. At the Court of Appeal

[33] Aggrieved, the 3rd respondent filed ***Civil Appeal No. 10 of 2015*** at the Court of Appeal raising five grounds of appeal. Likewise, the 1st and 2nd respondents lodged ***Civil Appeal No. 13 of 2015***, raising a total of fifty-one grounds of appeal. Both appeals were consolidated on 8th November, 2016 with ***Civil Appeal No. 13 of 2015*** designated as the lead file. In considering the grounds of appeal, the appellate court condensed the issues for determination to four: *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; and whether the learned Judge erred in holding that the PPDA, 2005 did not apply to the procurement.

[34] The Court of Appeal, in its judgment delivered on 19th June, 2020 partly allowed the appeal and set aside a portion of the decision of the High Court. *On mootness,* the Court of Appeal held that 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 were no longer within reach. The court, however, found that the issues relating to the constitutionality of the procurement; the interpretation and applicability of Section 6 of the PPDA, 2005; and expungement of annexures to the petition remained for consideration by the court.

[35] *On the expunged documents*, the court agreed with the High Court that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to countenance illicit actions by admission of irregularly obtained documents. The appellate court was also not persuaded that the procurement process of the SGR project, was unconstitutional. The court held that the absence of competition in a direct procurement does not, in itself, render that procedure unconstitutional.

[36] *On the applicability of the PPDA,* the appellate court held that Section 6 of the PPDA, 2005 did not intend 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. It found that it was the procurement procedure that dictated the terms of the loan and not vice versa. Consequently, the appellate court, unlike the High Court, found that Section 6(1) PPDA, 2005 did not oust the application of that Act from the procurement in issue.

[37] The Court of Appeal therefore upheld the High Court's decision save for setting aside the finding that the procurement of the SGR project was exempt from the provisions of PPDA, 2005. It substituted the same with a declaration that KRC, as the procuring entity, failed to comply with, and violated the provisions of Article 227 (1) of the Constitution, Sections 6(1) and 29, of the PPDA, 2005 in the procurement of the SGR project.

D. PROCEEDINGS BEFORE THE SUPREME COURT

[38] KRC on the one hand and AG and PPOA on the other hand filed before us **Petition No. 13 of 2020**, and **Petition No. 18 of 2020**, respectively, against the decision of the Court of Appeal. By consent of the parties, the two appeals were consolidated. The appellants seek the following orders:

i. *The appeal be allowed.*
ii. *The declaration by the Court of Appeal that KRC 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 PPDA, 2005 in the procurement of the SGR project be vacated and/or set aside.*
iii. *The judgment and decree of the High Court delivered on 21st November, 2015 be hereby reinstated.*
iv. *The 1st, 2nd and 3rd respondents do bear the costs of the proceedings before the superior courts below and this Court.*

[39] The 1st and 2nd respondents filed a cross appeal on 23rd September, 2022 faulting the learned Judges in:

i. *Finding that Parliament played its role in the consideration of the SGR project.*
ii. *Failing to find that contrary to Articles 10(2), 201(a), 221(5) and 232 (1)(d) of the Constitution and other laws, KRC failed to engage the public on the decision to acquire, install and implement the SGR project.*
iii. *Failing to hold that to the extent the SGR project was procured in a secretive manner, it violated the duty of the State to provide information to the public and the rights of the 1st and 2nd respondents as well as other Kenyans to information.*
iv. *Failing to hold that the SGR project was procured with scant regard for environmental rights of Kenyans.*
v. *Failing to find that by dint of Article 1 and 2 of the Constitution as read with Article 3, the 1st and 2nd respondents had a right to receive whistle blower evidence and to act upon it as they did.*

vi. *Failing to find that since the documents in issue were in free circulation, including having been tabled in Parliament, it was impossible for the documents to still be confidential and for the 1st and 2nd respondents to acquire them illegally.*

vii. *Failing to find that the High Court was biased in the manner it expunged the documents from its record which had been formally given to the 1st and 2nd respondents by NEMA and been sourced from extracts of newspapers.*

viii. *Finding that proceedings commenced under Articles 22 and 258 can be limited by the rules of evidence.*

[40] Accordingly, the 1st and 2nd respondents urge the Court to issue the following reliefs:

i. *Dismiss the consolidated appeal and allow the cross appeal.*

ii. *Set aside paragraphs 83, 84, 110 and 111(a) of the impugned judgment.*

iii. *Direct each party to bear its own costs.*

[41] Paragraphs 83, 84, 110 and 111(a) of the Court of Appeal Judgment state as follows:

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

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.

[42] The 1st and 2nd respondents also filed a notice of preliminary objection dated 10th August, 2020 whose tenor is that the orders sought in KRC's appeal are not available in the absence of the certification process stipulated under Article 163(4)(b) of the Constitution.

[43] The 1st appellant opposes the cross petition contending that whereas Article 35 of the Constitution guarantees the right of access to information held by the State, the manner of acquiring the said information should conform to the law. Further, that proceedings commenced under Articles 22 and 258 of the Constitution need to adhere to rules of evidence as prescribed in various Statutes including the Evidence Act.

a. 1st Appellant's submissions (KRC)

[44] KRC filed two sets of submissions dated 15th March, 2022 and 10th January, 2023. It reiterates that the procurement in issue was based on a negotiated loan between Kenya and China. Therefore, the Court of Appeal erred in finding that Section 6(1) of the PPDA, 2005 did not oust the application of the Act to the procurement of the project.

[45] KRC submits that the Court of Appeal failed to take into account that firstly, following the approval of the feasibility study, the Cabinet approved the project on a Government-to-Government framework and directed the Ministry of Transport to request the National Treasury to approach China for financing. This rendered otiose the provisions in the MOU obligating CRBC to source for funding. Secondly, that the National Treasury was informed by Exim Bank that it required evidence of an executed contract between the Government of Kenya and a designate Chinese contractor prior to the appraisal of the financing/loan request. Thirdly, in fulfilment of the said condition, KRC executed two commercial contracts with CRBC for civil works and for supply of locomotives and rolling stock for the project. Nonetheless, the execution of the said contracts was on the condition that they would come into effect upon execution of the financing agreement. Accordingly, in considering these facts, the Court of Appeal would have concluded differently.

[46] KRC urges that obligations arising from an MOU as well as commitments and undertakings of government officials in the course of negotiations leading to the conclusion of a loan agreement fall within the meaning of the words, "*any obligations of the Republic of Kenya arising from a treaty or other agreements*" used under Section 6 (1) of the PPDA, 2005. Further, it contends that a procurement undertaken pursuant to bilateral/multilateral agreements as envisioned under Section 6 (1) could not be termed as unconstitutional.

[47] It submits that the 2010 Constitution could not be applied retrospectively as the Court of Appeal did, and that the applicable law at the time was the repealed Constitution and the PPDA, 2005. It relies on this Court's decision in ***Samuel***

Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, Sup. Ct. Application No. 2 of 2011; [2012] eKLR to support this argument.

[48] KRC takes issue with the Court of Appeal quoting at the onset of the impugned judgment an article published in the Daily Nation of 27th May, 2020. This is because the article was not produced in court by any party and its reproduction suggested that the procurement in issue was illegal, giving rise to a reasonable apprehension in the mind of a reasonable fair minded and informed member of the public that the article influenced the appellate court in determining the appeal before it.

[49] Relying on the doctrine of mootness, the 1st appellant contends that the declaration issued by the Court of Appeal was erroneous particularly, taking into account that the project had been implemented and the Government's obligation to repay the loan from Exim Bank had crystalised.

[50] Lastly, with respect to the expunged documents, it submits that Articles 31, 35 and 50(4) of the Constitution, Section 80 of the Evidence Act as well as Sections 8 and 9 of the Access to Information Act proscribe the production of illegally obtained public documents as evidence before a court. In that regard, reliance is made on this Court's decision in ***Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 others***, Presidential Petition No. 4 of 2017; [2017] eKLR.

b. The 2nd and 3rd appellants' submissions (Attorney General and PPOA)

[51] In their written submissions dated 7th March 2022, the Attorney General and PPOA contend that the appellate court failed to consider their submissions on the issue of mootness. They aver that no practical significance was served by the issued declaration since the project had been completed. Further, according to them, the Court of Appeal offered no cogent reasons for overturning the High Court's finding on the applicability of the PPDA to procurement of the SGR project, which they deemed was the correct position.

c. The 1st respondent (Okiya Omtatah Okoiti)

[52] The 1st respondent submits that the feasibility study was the preserve of KRC as the procuring entity, and not CRBC; and that the direct procurement of CRBC to implement the SGR project was to avoid competition. He submits that the date CRBC was procured as the EPC contractor of the SGR project is critical in determining the legal framework governing the procurement process at the time. In his view, the project commenced on 12th August, 2009 when the MOU was executed and CRBC, contrary to the PPDA, 2005, was sourced directly as the contractor. However, as funding was yet to be identified at the MOU stage, there was no negotiated loan or grant that could trigger the exception under Section 6(1), which ousts the application of the PPDA, 2005. The 1st respondent contends that the exception only applies where there is conflict between Kenya's obligations under a negotiated loan or grant and the provisions of the PPDA, 2005. Towards that end, the 1st respondent urges that the appellants did not provide any evidence of the conditions imposed by the external funding agencies, being Exim Bank of China, that they would only fund the SGR project if it was executed by the CRBC, to justify the single sourcing.

[53] It followed therefore, as per the 1st respondent, that the procurement of CRBC to implement the SGR project by KRC was in violation of Article 227 of the Constitution and the PPDA, 2005. In any event, he submits, that the conditions under a negotiated grant or loan cannot override the provisions of the Constitution. Further, that the 2010 Constitution applies to the matter at hand because it was already in force at the time the commercial contracts and the financing agreement were executed. He submits that the introduction of the railway development levy by the Finance Act of 2013 did not cure the Government's failure to seek approval by Parliament and the people for the loan financing the SGR project.

[54] The 1st respondent, in faulting the court for expunging the documents, reiterated, as he did at the appellate court, that the expunged documents were not confidential since they had not only been tabled before open sittings of two Committees of Parliament but also the reports of the said Committees were publicly debated. Moreover, some of the documents had been officially given to them by

NEMA. In his view, the conduct of the two superior courts below was indicative of a deliberate mission to allow KRC's cross petition in the High Court.

[55] He argues that whenever a court is called upon to uphold the Constitution it can never be termed as a moot process by dint of Articles 2(4) and 3(1) of the Constitution and adds that a court cannot cause a constitutional crisis in upholding the Constitution. Rather, a constitutional crisis would occur where the Court fails to uphold the rule of law. To that extent, he submits that the matter at hand could not be considered moot as it concerned the interrogation of misuse of public funds in the SGR project.

[56] In conclusion, the 1st respondent claims that nothing turns on KRC's allegation of bias on the part of the Court of Appeal. To him, the court's reference to the article in question was to simply point out that at the time of writing the impugned judgment, the SGR project was still of great interest in the public domain.

d. 2nd respondent's submissions (Wycliffe Gisebe Nyakina)

[57] The 2nd respondent supports the Court of Appeal's findings on the applicability of the PPDA, 2005 to the procurement in issue and violation of Articles 227 of the Constitution and the PPDA, 2005 by KRC. Like the 1st respondent, the 2nd respondent urges that the 2010 Constitution is applicable to the procurement in issue for the reason that the agreements central to the dispute were executed after its promulgation. He urges that the doctrine of mootness is inapplicable to the matter at hand since the issues in dispute are of substantial public importance and are likely to arise again. He points to exceptions to the doctrine of mootness which include when its application would cause injurious consequences to continue and that the doctrine should not prohibit a court from ruling on a case that is of substantial public interest. To buttress his argument, he cites the decision of the United Nations Appeals Tribunal in ***Kallon vs. Secretary General of the United Nations***, Judgment No. 2017-UNAT-742 and ***United States Supreme Court in Williams vs. Shaffer***, 385 U.S. 1037, 1040.

[58] On the expunged documents, the 2nd respondent contends that the case of ***Njonjo Mue case*** *(supra)* is distinguishable with the matter at hand. In the

alternative, the 2nd respondent states that even if the decision is applicable, it represents the general rule which should be applied on a case-by-case basis. In his view, if courts were to hold that evidence that had not been obtained through prescribed legal channels was inadmissible in court, it would provide an untenable incentive for the State to hide information.

E. ISSUES FOR DETERMINATION

[59] Having carefully considered and evaluated the consolidated appeals, cross petition, the responses, submissions filed and arguments by counsel, we are of the considered view that the following issues suffice to dispose of the appeal:

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

F. ANALYSIS AND DETERMINATION

(i) Whether the appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution

[60] The 1st and 2nd respondents filed a Notice of Preliminary Objection dated 10th August, 2020 in response to the appeal filed by the 1st appellant, on the grounds that the orders sought are not available in the absence of a certification process stipulated under Article 163(4)(b) of the Constitution. We, however, note that during the hearing, counsel for the 1st appellant and the 1st respondent indicated that there was no preliminary objection. Be that as it may, this Court must satisfy itself of its jurisdiction to hear and determine the issues raised in the matter, in this case, under Article 163(4)(a) of the Constitution.

[61] As we stated in ***Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 Others*** (supra) and several other decisions, a court's jurisdiction emanates from either the Constitution or legislation or both, and a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. A court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by Law.

[62] Under Article 163(4)(a) of the Constitution, appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. The guiding principles when invoking this provision were set out in cases that include ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*** Sup Ct Petition No. 3 of 2012 [2012] eKLR***, Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*** Sup Ct Petition No. 10 of 2013 [2014] eKLR***,*** where we held that for a litigant to invoke this Court's appellate jurisdiction, it must be demonstrated that the matter in issue revolves around constitutional contestation that have come through the judicial hierarchy, and requiring this Court's final input. Further, that at the very least, an appellant must demonstrate that the court's reasoning and conclusions which led to the determination of the issue, can properly be said to have taken a trajectory of constitutional interpretation or application. Each case must, however, be evaluated on its own facts.

[63] The present appeals and cross appeals raise a multiplicity of issues. To determine whether this Court has jurisdiction or not, we must establish whether each issue raised concerns the interpretation and application of the Constitution.

[64] The appellants seek a determination on *compliance with the provisions of Article 227(1) of the Constitution and Sections 6(1) and 29 of the PPDA,2005* in the procurement of the SGR project. We note that at the High Court, the 1st and 2nd respondents alleged that the appellants were in violation of Articles 2, 3(1), 19, 46, 47, 201, 206, 214, 220, 221, 227 and 259 of the Constitution. The 3rd respondent on the other hand urged that the actions of the appellants were in violation of Articles 201 and 227 of the Constitution in the award of the SGR contract to CRBC. This is an issue that transcended through the court hierarchy with the superior courts

below making a determination on the allegation of contravention of the Constitution and the resulting statute, the Public Procurement and Asset Disposal Act 2015. In the same breadth, the question of the environmental considerations of the SGR project under Articles 42, 69 and 70 of the Constitution arose before the superior courts below and is now rightly before us, on appeal.

[65] The issue raised by the 1st and 2nd respondents in their cross petition relating to *expunging documents in support of the petitions filed at the High Court also arose before the superior courts below*. Its determination involved the application of Articles 31 and 35 of the Constitution as well as Section 80 of the Evidence Act. The appellate court affirmed the High Court's decision and considered its detrimental effect to the administration of justice against the principle underlying Article 50(4) of the Constitution.

[66] It is apparent that the aforementioned issues revolve around the interpretation and application of provisions of the Constitution. In the premises, the issue of certification under Article 163(4)(b) of the Constitution does not arise. Having found that we are clothed with jurisdiction under Article 163(4)(a) of the Constitution to determine the three identified issues, we now proceed to address them.

~~(iii)~~(ii) *Whether the appeal before the Court of Appeal was moot*

[67] The mootness of this matter first arose at the Court of Appeal. The appellants, as they did at the Court of Appeal, insist that the appeal is overtaken by events and is therefore an academic exercise. This is because the construction of the SGR was substantially completed and commissioned, and the Government's obligation to repay the loan from Exim Bank had crystallised by the time of hearing the appeal, leaving no live controversy to be determined by this Court.

[68] The 1st respondent on the other hand argues that the matter cannot be considered moot as the SGR project contracts still impose a huge financial burden on Kenyans to-date comprising 15% of the cost of the railway and repayment of the loan used to finance the project. He asks the Court to make a determination on the matter for the long-term especially concerning the imposed financial burdens. He

submits that the contracts are tainted with illegality and are unconstitutional. He submits that by virtue of Article 226(5) of the Constitution, the inquiry into the misuse of public funds in the SGR project by holders of public office cannot be moot and maintains that the matter remains live as the construction of the SGR did not resolve the dispute and the prayers sought at the High Court. On his part, the 2nd respondent points out that the issues being of such substantial public importance and likely to arise again, it is incumbent on the Court to address the Constitutional and statutory questions.

[69] The ***Black's Law Dictionary***, 9th edition defines a "moot case" 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"*. Mootness of a matter therefore arises where a live controversy no longer exists between parties to a suit and the decision of the court, in such instance, would have no practical effect. The doctrine of mootness enquires whether events subsequent to the filing of a suit would have eliminated the controversy between the parties. This therefore begs the question, did the completion of the construction of the SGR make the issues raised by the parties to be beyond the reach of the court or is there still a live controversy?

[70] A perusal of the orders sought by the 1st and 2nd respondents on the one hand and by the 3rd respondents on the other hand, as enumerated earlier in this judgment, reveals that they sought declaratory, injunctive, directive and an order of *certiorari* to quash the award of the contract to CRBC. The SGR project is now complete and was commissioned. It is for this reason that the appellate court appreciated that some of the reliefs that the 1st, 2nd and 3rd respondents sought before the High Court were no longer available. At the time the petitions were presented to the High Court, the construction was yet to commence. Parties, however, opted to forego applications seeking interim conservatory relief aimed at stopping the construction.

[71] In focusing on instead, pursuing the hearing of the substantive petitions, it only means that the respondents were alive to the fact that execution of the contract

would have an impact on their pending petitions. The orders sought at the High Court, seeking to restrain the appellants from contracting with CRBC, and to ensure that there was no single sourcing in the procurement of the SGR are moot as they were overtaken by events, the contracts having been executed, and we so find.

[72] Completion of the construction of the SGR project, however, did not render moot the consideration and determination of the remaining issues as to whether the SGR project complied with Article 227 of the Constitution and Section 6(1) of the PPDA; whether the 1st, 2nd and 3rd respondents could rely on evidence provided by whistle blowers in support of their petitions, and the environmental considerations under the Constitution. As noted by the Court of Appeal, these are live issues that remain available for the court's consideration. Further, they raise matters of public importance owing to the sheer enormity of the project, the public finance expended and the project being for public use. In any event, the operative law surrounding the litigation remains unsettled.

[73] The Supreme Court of Canada in ***Re Opposition by Quebec to a Resolution to amend the Constitution***, [1982] 2 S.C.R. 793 held that in certain circumstances where desirable, the court may entertain an appeal which has become moot. It stated as follows:

> *"While this Court retains its discretion to entertain or not to entertain an appeal as of right where the issue has become moot, it may, in the exercise of its discretion, take into consideration the importance of the constitutional issue determined by a court of appeal judgment which would remain unreviewed by this Court. In the circumstances of this case, it appears desirable that the constitutional question be answered in order to dispel any doubt over it and it accordingly will be answered."*

[74] Similarly, the Constitutional Court of South Africa in ***AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another*** (CCT51/05) [2006] ZACC 9 held that in deciding whether an issue is moot, what needs to be brought into the equation is whether deciding the matter is in the interests of justice. It held that whereas the issues may be moot, it would be necessary to proceed to hear the

matter as it may have implications on governance and future regulations particularly where the law on a particular issue is not settled.

[75] This Court interrogated the issue of mootness in ***Institute for Social Accountability & another v National Assembly & 3 others & 5 others*** (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) where we held at paragraph 56 that whereas a new legislation was enacted, being the National Government Constituency Development Fund Act 2015, there was still live controversy between the parties arising out of the Constituency Development Fund Act 2013 that had been the subject of court challenge and therefore, it was in the public interest to have the questions that were still raging adjudicated and determined by the Court of Appeal.

[76] The SGR project, though completed continues to raise questions especially in relation to the constitutionality of the project and the surrounding procurement process. We therefore have no hesitation in finding that the matters which the Court of Appeal dealt with are not moot. These are the matters that we shall quiz in the appeal and cross appeal before us.

(iii) Whether the learned Judges erred in expunging documents in support of the petitions filed by the 1st, 2nd and 3rd respondents at the High Court

[77] The 1st and 2nd respondents, in their cross-appeal, fault the superior courts' decision to expunge the documents annexed to the affidavits of Okiya Omtatah and Apollo Mboya in support of the petitions. The expunged documents comprised various correspondence between: officers of government institutions and Exim Bank of China; Ministry of Transport and CRBC; CRBC and the then Prime Minister's office; the Embassy of the People's Republic of China and Ministry of Transport; the Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People's Republic of China; the Attorney General's Office and the Ministry of Transport; KRC and Public Procurement and Oversight Authority; KRC and CRBC; the Ministry of Transport and KRC; Public Procurement and Oversight Authority and the Attorney General's office; and between the Office of the Deputy

President and the Attorney General's Office. Apart from the correspondence, the additional documents expunged were Memorandum of Understanding between Ministry of Transport and CRBC; the feasibility study relating to the project; 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; requests for, and legal advice from the Attorney General and the Solicitor General on the contracts and the SGR project and Cabinet Memorandum.

[78] In expunging the documents, the High Court found that the public servants who provided the expunged documents to the 1st, 2nd and 3rd respondents did not fit the legal definition of whistle blowers under Article 33 of the United Nations Convention Against Corruption. This provision requires such persons to make reports in good faith and on reasonable grounds to competent authorities any facts of corrupt conduct. Secondly, it found the public servants who provided the documents to have breached the Public Officer Ethics Act, 2003 as the documents were confidential in nature. Further, that the documents were inadmissible under the Evidence Act and that admitting stolen or irregularly obtained documents infringes on the appellant's rights under Article 31 of the Constitution. The High Court was of the position that the 1st, 2nd and 3rd respondents ought to have properly compelled the Government to provide the documents under Article 35 of the Constitution. This position was affirmed by the Court of Appeal which added that admitting such documents would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution.

[79] The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st, 2nd and 3rd respondents in support of their petitions at the High Court. We note from the pleadings filed at the High Court that the 1st, 2nd and 3rd respondents did not disclose their source for the documents. They averred that exposing the source or identity of persons who availed the documents would silence whistle blowers who act in public interest and good faith. They instead asked the court to admit the documents which they believed would give a candid exposition of the issues in dispute and enable the court to determine whether the procurement was lawful.

[80] The Evidence Act Cap. 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that:

> *Application.*
>
> *(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.*

[81] The Evidence Act provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states:

> *Certified copies of public documents.*
>
> *(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that 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.*
>
> *(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.*

[82] This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the Evidence Act allows the production of *certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.*

[83] From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly

certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby outrightly rendered inadmissible.

[84] Article 35 of the Constitution of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The Access to Information Act No. 31 of 2016 was enacted to give effect to Article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency. In ***Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others*** Nrb. Petition No. 25 of 2013 [2013] eKLR, the High Court stated as follows:

> *"However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. ... In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized."*

[85] The right to institute an action in court only crystallizes once a citizen has requested for the information from the State and the request has been denied or not provided. The 1st, 2nd and 3rd respondents herein did not make a request to be provided with the information relied on.

[86] The Court of Appeal in ***Nicholas Randa Owano Ombija v. Judges and Magistrates Vetting Board*** Civil Appeal No. 281 of 2015 [2015] eKLR held as follows, on illegally obtained evidence:

> *"What does the law state regarding illegally obtained evidence? In the case of Karuma, Son of Kaniu v. 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. V. Leatham (1861) 8 Cox C.C.C 498 which was referred to in the judgment. In Re. V. 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 V. 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 V. 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."

[87] This Court has previously addressed the question of admissibility of unlawfully or improperly obtained evidence in ***Njonjo Mue case*** *(supra)*. In that case, we recognised 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. We further observed that a duty is imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information.

[88] 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. Applying that test to the obtaining facts, we summed up the position as follows:

"[24] The Petitioners, using the above test, do not show how they were able to obtain the internal memos … 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."

[89] The 2nd respondent submitted that the ***Njonjo Mue case*** *(supra)* is distinguishable from the instant case as it was an election petition wherein the IEBC Act and the Elections Act are the applicable laws unlike the case before this Court. We note that the ***Njonjo Mue case*** (*supra*) concerned an application to expunge from the record various identified internal communication correspondence and memoranda between members of the Independent Electoral and Boundaries Commission. In the ***Njonjo Mue case*** (*supra*) it was urged that the memoranda were obtained unlawfully, contrary to Section 27 of the IEBC Act which provides, *inter alia,* that the IEBC may decline to give information to an applicant where the information requested is at a deliberative stage by the Commission and Article 50(4) of the Constitution which requires such evidence to be excluded.

[90] Whereas the ***Njonjo Mue case*** related to an election petition, the issue before court, as is in the present case, is whether the evidence obtained in an unlawful manner may be admitted as evidence. The Court interrogated the provisions of Article 35 of the Constitution, the Access to Information Act and the IEBC Act, recognising at paragraph 22 that, whereas information held by the State ought to be freely shared except in exceptional circumstances, such information should flow from the custodian of such information to the recipients in a manner recognised under the law. The mere fact that the provisions of IEBC Act are not in issue in the present appeal, the legal principle enunciated in the ***Njonjo Mue case*** remains the same. We disagree with the 2nd respondent's contention that the present case is distinguishable. The High Court found that it was unacceptable to use 'self-help' or clandestine means to obtain information whereas there were clear constitutional mechanisms. To use such methods would indeed make otiose the provision of Article 35 of the Constitution and why such provision was enacted as a mechanism for citizens to access information which is held by the State.

[91] We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the

provisions of Article 50(4) of the Constitution. Allowing such documents is akin to sanitising illicit actions of the 1st, 2nd and 3rd respondents of irregularly obtaining evidence, in violation of Article 31 of the Constitution on the right to privacy including privacy of communication. Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under Sections 80 and 81 of the Evidence Act or requested for information under Article 35 of the Constitution, the documents are inadmissible, we so declare.

[92] It does not matter, in our view, that some of the documents in issue had been readily tabled before Parliament and were subjected to debate at the different committees. It is trite that parliamentary processes are subject to certain privileges and immunities. Article 117 of the Constitution provides for powers, privileges and immunities. The objective of the powers, privileges and immunities as set out in Article 117(2) is for the purpose of the orderly and effective discharge of the business of Parliament. These powers, privileges and immunities extend to the Parliamentary Committees, the chairpersons of committees and members of parliament. In the same breadth, Parliament is empowered under Article 125 to call for evidence including the production of documents. Having said so, it cannot be that documents obtained pursuant to parliamentary processes mutate into public documents just because the respondents somehow are in possession of the said documents through an otherwise opaque process. The 1st to 3rd respondents have not demonstrated how they gained possession of the impugned documents that were otherwise within a constitutionally sanctioned parliamentary process, to which the said respondents have not explained their role.

[93] The respondents have also alleged that some of the impugned documents were obtained from NEMA. Again, NEMA, just like any other statutory regulator, was only seized of the documents in furtherance of its statutory mandate to grant a

licence. As we shall address later, there exists a specific mechanism of dealing with and/ or relying upon information and documents availed to NEMA, bearing in mind the context within which NEMA receives such documents. It is not difficult to note that NEMA was not party to the court proceedings now subject to this appeal. It is not enough for the 1st to 3rd respondents to allege that the documents were obtained from NEMA without the attendant contextualisation especially when the respondents failed to invoke the mechanism provided under EMCA.

[94] The 1st to 3rd respondents also submitted that the evidence through newspaper reports and cuttings should be admissible. We reiterate that the burden of proof always lies with the claimant, that it to say, he who asserts. Indeed, the reading of sections 35, 107 and 109 of the *Evidence Act* together with rules 15 and 20 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 reveals that newspaper articles are inadmissible as evidence in law. This is because facts contained in newspaper articles are merely hearsay, as enunciated in ***Laxmi Raj Shetty and Another v State of Tamil Nadu*** 1988 AIR 1274, 1988 SCR (3) 706. In **Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment)** we were not persuaded to interfere with the superior courts' disregard of newspaper cuttings to prove allegations of violations of constitutional rights beyond the evidential prism set out in the *Evidence Act*. In doing so, we stated as follows:

> "*69. It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See Samson Gwer & 5 Others v Kenya Medical Research Institute & 3 Others, SC Petition No 12 of 2019; [2020] eKLR.*"

[95] The 1st respondent urges that whistle blowers who enable others or work with the civil society or with public spirited members of the public to cause the courts to be moved by dint of Article 22 and 258(1) of the Constitution to discharge the obligation under Article 3(1) of the Constitution, must be deemed to have made reports in good faith and on reasonable grounds to competent authorities. He further states that if the High Court judgment is allowed to stand, it means that, *"an exposed public servant unless s/he puts his/her neck on the guillotine, cannot discharge his/her duties under Article 3(1) of the Constitution through tipping off a 'secure' member of the public to take action to prevent cascading of a crime."* He also expresses fears that if the courts are to render evidence that had not been obtained through specifically prescribed legal channels as inadmissible, it would provide an untenable incentive for the State to hide information.

[96] It is imperative to note that in respect of corruption allegations complained of by the 1st and 2nd respondents, there are constitutional and statutory mandated bodies to address those. The Ethics and Anti-Corruption Commission Act No.22 of 2011 enacted pursuant to Article 79 of the Constitution provides for the functions of the EACC at Section 11(1) to include receiving complaints on the breach of the code of ethics by public officers, investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to Chapter Six of the Constitution. Further, the Witness Protection Agency established under section 3A of the Witness Protection Act No.16 of 2006 has its purpose set out under Section 3B(1) as to provide the framework and procedure for giving special protection on behalf of the State, persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

[97] We find it necessary to caution that, whereas Article 22 of the Constitution entitles every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and Article 258 entitles every person to institute court proceedings claiming that the Constitution has been contravened or is threatened with

contravention, these provisions ought not to be abused in the name of 'public interest.' This is, more so, where the litigants seek to advance private or political interests or other considerations through proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law, and must be aimed at addressing genuine public interests and not used for personal gain or vendetta.

[98] The Indian Supreme Court in ***Ashok Kumar Pandey v. State of West Bengal*** (2004) 3 SCC 349 stated as follows concerning public interest litigation:

> *"Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "private interest litigation" or "politics interest litigation" or the latest trend "paise income litigation". If not properly regulated and abuse averted it becomes also a tool in unscrupulous hands to release vendetta and wreck vengeance, as well. There must be real and genuine public interest involved in the litigation and not merely an adventure of a knight errant or poke ones nose into for a probe. It cannot also be invoked by a person or a body of persons to further his or their personal causes or satisfy his or their personal grudge and enmity. Courts of justice should not be allowed to be polluted by unscrupulous litigants by resorting to the extraordinary jurisdiction. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the Court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration... The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."*

[99] As noted by the Supreme Court of India in ***Sachidananda Pandey vs State of West Bengal & Ors*** *1987 AIR 1109, 1987 SCR (2) 223,* per *Khalid J. (concurring)* today public-spirited litigants rush to courts to file cases in profusion under the attractive name of public interest litigation. They must however inspire

confidence in courts and amongst the public, and most importantly, be above suspicions. Easy access to courts under Article 22 and 258 should therefore not be misused as a license to file frivolous claims disguised as public interest. Articles 22 and 258 of the Constitution are not open-ended panacea or bogey provisions to be resorted to as a panacea to any person under the guise of public interest. Like any other well intended provision of the constitution, it is bound to be abused and when that happens, the courts should not hesitate to rein in such abuses. We think that the litigation herein in the guise of Public Interest Litigation fits in the above description. How else would one explain blatant non-compliance with the clear dictates of procedures of obtaining information in the possession of the State or State organs.

(v) Whether there were environmental considerations by the appellants in the SGR project

[100] The 1st and 2nd respondents urge in their cross-appeal that this Court sets aside paragraph 110 of the appellate court's judgment and instead find merit that there were no environmental considerations by the appellants in the SGR project. The 1st respondent's case is that the SGR project was procured with scant regard to environmental rights, including, in procuring polluting diesel locomotives and a sloppy Environmental Impact Assessment.

[101] In response, the 1st appellant maintains that the SGR project was implemented with due regard to environmental rights and the 4th respondent was issued with an Environmental Impact Assessment license on 5th February 2013 in accordance with Section 58 of the Environmental Management and Coordination Act (EMCA). It adds that the Government conducted an autonomous environment impact assessment on the project and allowed it to proceed. Additionally, it urges that the procuring entity engaged the public in the decision to implement the SGR, and that the 1st and 2nd respondents had sixty days to lodge complaints and or comments upon publication of the SGR study report in accordance with Section 59 of EMCA. It postulates that any concerns by the said respondents ought to have been ventilated in the statutory mandated bodies. In support of this argument, it

cites this Court's decision in ***Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others*** Sup Ct. Petition No. 3 of 2020 [2020] eKLR. The 1st appellant further posits that the SGR has been in full operation for the past seven years and no major environmental concerns have arisen from its continued operations.

[102] Article 42 of the Constitution entitles every person to the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 and to have obligations relating to the environment fulfilled under Article 70 of the Constitution.

[103] Article 69 sets out the obligations of the State which include, to eliminate processes and activities that are likely to endanger the environment and establishing systems of environmental impact assessment, environmental audit and monitoring of the environment. Article 70 provides for the enforcement mechanism and provides that where there are allegations of violations of the rights under Article 42, or there is a likelihood of being denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available. The court may then make orders or directions appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment; compel the public officer to take measures to prevent or discontinue any act or omission that is detrimental to the environment or provide compensation for victims of violation of the right.

[104] The Environmental Management and Co-Ordination Act No. 8 of 1999 (EMCA) is the legislation enacted to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Section 58 of EMCA, makes provision for the application of an Environmental Impact Assessment. Every proponent of a project specified under the Second Schedule of EMCA is required to conduct an environmental impact assessment (EIA). Under Regulation 4 of the Environmental (Impact Assessment and Audit) Regulations of 2003, no licensing authority shall issue any license, permit or approval prior to the issuance of an EIA.

[105] The 1st respondent's environmental concerns relate to the procurement of highly polluting diesel locomotives and a 'shoddy' Environmental Impact Assessment done for the SGR project. He also states that key stakeholders such as the Kenya Wildlife Service were not involved in the study.

[106] From the EIA report on record, we note that the scope of the report included the identification and discussion of any adverse negative impacts to the environment anticipated from the proposed project and mitigation measures set out therein, on the possible impacts on the environment including emissions to air and exhaust emissions. We are persuaded that a notice of the EIA study report of the SGR project in accordance with the provisions of EMCA was published in the Kenya Gazette and a similar publication in a newspaper of wide circulation in Kenya. The Gazette Notice and the newspaper publication invited members of the public to give comments and/ or complaints within sixty days as required under EMCA. The 1st to 3rd respondents have neither rebutted this proposition nor indicated any attempts to react to this notice. Kenya Wildlife Service being a statutory body mandated to conserve and manage wildlife in the country, was at liberty to engage its appropriate mechanism. As it is not a party to the present proceedings, we need not discuss the issue further.

[107] The National Environmental Management Authority (NEMA) granted an Environmental Impact Assessment (EIA) Licence to the CRBC. Pursuant to Section 129 (1) of EMCA, any person aggrieved by the grant of a license or permit or a refusal to grant a license or permit or the transfer of a license or permit under the Act may within sixty days appeal to the Tribunal established under Section 125 of EMCA. The 1st and 2nd respondents' grievances on the issuance of the license and the EIA therefore fell within the jurisdiction of the Tribunal. They did not avail themselves their day before the Tribunal, thereby taking a fatal step to the courts.

[108] The superior courts have on several occasions held that challenges to licenses issued and the EIA ought to be made before the National Environment Tribunal (NET) including in, ***Patrick Musimba v National Land Commission & 4 others*** [2016] eKLR and **Republic *v* *National Environmental Management Authority*** [2011], eKLR and not to the regular courts and that the

NET should be accorded the first opportunity to consider the matter. The Court of Appeal in ***Republic –vs- NEMA ex parte Sound Equipment Ltd*** CACA No. 84 of 2010 [2011] eKLR on the same issue reiterated the position noting that the Tribunal is the *specialized body with the capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licences."* This doctrine of exhaustion of existing statutory mechanism is the import of our decision in ***Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** Pet.3 of 2016 [2019] eKLR where we stated as follows:

> *"[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."*

[109] We note that the High Court succinctly addressed this grievance and see no reason to disturb the finding in this regard. The complaints by the 1st and 2nd respondents relating to the EIA and the issuance of the license issued by NEMA fall squarely within the jurisdiction of the NET pursuant to Section 129 of EMCA which clearly spells out the appellate functions of the Tribunal. The 1st and 2nd respondents having failed to invoke it, we find no merit in this ground of appeal and the same is declared lost.

(vi) Whether the procurement of the SGR complied with Article 227 of the Constitution as read together with the provisions of the PPDA, 2005

[110] The appellants' contention is that the MoU which conceptualized the SGR preceded the 2010 Constitution, having been signed in 2009. That, the language in Article 227(1) of the Constitution does not imply retrospective application of the constitutional provision. This interpretation is refuted by the 1st and 2nd respondents who instead submit that section 2 of the PPDA, 2005 provides governing principles and values that are in tandem with Article 227(1) of the Constitution. These respondents further argue that the appellants have not disproved that the SGR contracts and financial agreement were signed in 2012 and 2014 respectively bringing them within the ambit of the Constitution, 2010.

[111] As we perceive it, this issue involves two facets: (i) the applicability of Article 227 of the Constitution 2010; and (ii) If in the affirmative, whether the procurement of the SGR complied with Article 227 of the Constitution as read together with the provisions of the PPDA, 2005.

(a) Whether Article 227 of the Constitution 2010 is applicable?

[112] To put the issue in perspective, interrogation of the series of events that led to the signing of the contracts suffices. From what is before us, we decipher that following the joint communique by the presidents of Kenya and Uganda on the commencement of the SGR project, the first phase, covering Mombasa and Nairobi, started with the signing of the MoU on 12th August 2009. This MoU was between the government of Kenya through the Ministry of Transport (hereinafter the *Ministry*) and the CRBC. Under the MoU, the Ministry agreed to CRBC's proposal to undertake *a feasibility study including the preliminary design of the project at no cost to the Ministry*. The study was to include, but not limited to, the assessment of the financial and legal viability of the project including technical feasibility and cost estimates taking into consideration the requirements of related financial institutions and/or the 4th respondent. On completion of the feasibility study, the MoU indicates that:

"Completion of the Study. After completion of the study, the parties hereto will conduct consultation on the result of the study and explore in good faith the possibilities of the parties having a meaningful participation in undertaking the Project in accordance with laws of Kenya. If the Study was approved by Ministry of Transport, CRBC would be the sole agent to design (Engineering, Procure and Contract), construct and supervise all the works of the Project."

[113] KRC and CRBC then executed a commercial contract for the construction of the SGR line on 11th August, 2012. Subsequently, a second commercial contract was executed between the two for the supply and installation of facilities, locomotives and rolling stock on 4th October, 2012. From the MoU, the government had agreed to accept technical and financial assistance offered by various financial institutions through CRBC to undertake design, construction and supervision of the project.

[114] Following deliberations between the Government of Kenya through the National Treasury, and the Government of China, it was agreed that the Government of China would finance the project through Exim Bank of China, a state-owned financing institution. The extent of the financing was that Exim Bank would finance 85% of the costs for the project while Kenya would meet the other 15% of the costs as a counterpart funding. In addition, the terms of the financing from Exim Bank were that part of it would be issued as a concessional loan while the other part would be a commercial loan. This agreement was reduced into a financial agreement and signed on 10th May 2014.

[115] It is evident that the Bilateral Agreement and the MoU were executed in 2009 prior to the promulgation of the Constitution of Kenya, 2010, while the commercial contracts were signed in 2012. The question that now begs response is, what is the effect of that MoU in relation to the procurement process? The ***Black's Law Dictionary*** 11th Edition at page 1180 elucidates an MOU under *letter of intent* as:

"A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; a noncommittal writing preliminary to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with

a third party. Business people typically mean not to be bound by a letter of intent, and courts ordinarily do not enforce one; but courts occasionally find that commitment has been made."

[116] From the above definition, an MoU is preliminary to a contract and or agreement between parties and is characterized as non-binding and unintended to create any contractual obligations on either party. This does not mean that courts are not faced with the question of establishing the binding nature of an MoU. When that happens, a court considers the wording and the apparent intention of the parties. In stating so, we are persuaded by the findings of HH Humphrey Lloyd QC in ***ERDC Group v Brunel University*** [2006] EWHC 687 (TCC) in the following words:

"Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letter of intent' have or have not been used. The phrase 'letter of intent' is not a term of art. Its meaning and effect depend on the circumstances of each case."

[117] In establishing the intent of the parties, we are further persuaded by the Supreme Court of the United Kingdom in ***RTS Flexible Systems v Molkerei Alois Muller GmbH & Co. KG*** [2010] UKSC 14 & 38 where it expressed itself as follows:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of

legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

[118] Back to the MoU at hand. The intention of the parties can be inferred from the wording. The first task was for CRBC to undertake a feasibility study. At that point, this was but a non-binding intention by the parties as any resulting obligations would only be firmed up once the report was undertaken and approved. The study was duly undertaken and submitted by CRBC in February 2011. Once the report was approved, as was the case on 26th June 2012, the MoU stipulated that CRBC *"would be the sole agent to design (Engineering, Procure and Contract), construct and supervise all the works of the Project."* This condition in our view paved way for the preparation and execution of the commercial contracts between KRC and CRBC.

[119] We take cognizance of our findings in ***Samuel Kamau Macharia & Another v KCB & 2 others***, SC Application No. 2 of 2011 [2012] eKLR where this Court did not indubitably rule out the retrospective application of the Constitution 2010. It is our considered opinion therefore that the MoU was a precursor to the parties entering into legally binding agreements depending on the results of the feasibility study. It is these commercial contracts, once entered into, that, in our view, operationalized the SGR project. The contracts, signed in 2012 and 2014 created legally binding obligations and not the MoU. This was after the Constitution of Kenya 2010 had been promulgated and operationalized.

[120] However, from our findings above, we are of the further considered opinion that the issue of retrospective application of the Constitution as raised by the appellants does not arise, as first, the operationalization of the SGR project occurred under the dispensation of the Constitution of Kenya, 2010. Secondly, the petitions before the High Court were filed in 2014, four years into the new constitutional dispensation invoking the High Court's jurisdiction under Article 165 of the Constitution and thirdly, under the Sixth Schedule to the Constitution, 2010,

section 7 thereof allows all law in force immediately before the effective date to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

[121] Accordingly, Article 227, just like any other provisions of the Constitution of Kenya 2010 were applicable in any of the manners explained above. We reject the appellant's argument to the contrary and add that the applicability of the Constitution of Kenya 2010 is not pegged on when and how the SGR project was conceptualized or the timing of the documents. We note that the execution of the MoU was before the Constitution of Kenya 2010 while the commercial agreements and the financing agreement were executed after the Constitution of Kenya had already come into force. With this finding, we now proceed to examine whether the SGR project complied with the constitutional and statutory imperatives in view of the findings by the superior courts below.

(b) *Whether procurement of the SGR complied with Article 227 of the Constitution as read together with the provisions of the PPDA, 2005*

[122] The appellants fault the appellate court's declaration that the 1st appellant violated Article 227 of the Constitution and sections 6 (1) and 29 of the PPDA, 2005. They submit that the assumption that there must be an already negotiated treaty or agreement prior to procurement for section 6(1) to apply, ousting the provisions of PPDA, 2005 is, in our view, misguided. The 1st appellant contends that it was just but an implementing entity of the Cabinet's decision directing it to enter into contractual agreements with CRBC. Moreover, it argues that owing to insufficient funds to carry out a competitive tendering process, it would be in breach of section 26 (6) of the PPDA, 2005. CRBC supports the appellant's position and affirms that the procurement of the SGR complied with Article 227 of the Constitution and the PPDA, 2005. It adds that its procurement, as the contractor, happened after the financing agreement between Kenya and Exim Bank was executed.

[123] On their part, the 1st and 2nd respondents affirm the findings of the appellate court. They assert that the procurement process was flawed by single-handedly

selecting CRBC to conduct the feasibility study, design and implement the project, instead of undertaking a competitive bidding.

[124] Article 227 (1) of the Constitution provides that:

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

Article 227 (2) of the Constitution provides for the enactment of a statutory framework within which policies relating to procurement and asset disposal may be implemented to give effect to Article 227 of the Constitution. This resulted in the enactment of the Public Procurement and Disposal Act, No. 33 of 2015 which commenced on 7th January 2016, after procurement processes for the SGR. The effect of this enactment is that it repealed the PPDA 2005. Needless to state, despite its repeal, the PPDA 2005 applies to the present dispute as it was the law in force as at the time the petition was filed at the High Court.

[125] Section 29 of the PPDA, 2005 deals with choice of procurement procedure and allows a procuring entity to use open tendering or an alternative procurement procedure under Part VI which includes restricted tendering, direct procurement, request for proposals, request for quotations, low-value procurement, and specially permitted procurement procedure. And, section 26 sets out the threshold matrix and segregation of responsibilities which any procurement entities need to have in place for the purpose of ensuring that its decisions are made in a systematic and structured way. Part of such responsibilities is to ensure sufficient funds have been set aside in the budget to meet the obligations. Section 26 (6) of the PPDA 2005 stipulates that:

> *"(6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract."*

[126] However, the provisions of the PPDA 2005 could be ousted under section 6(1) of the PPDA, 2005 "w*here 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****."* (Emphasis ours) The appellate court found that to invoke section 6(1) of the PPDA 2005, the identification of a supplier of goods and services would have to precede the loan agreement. According to the appellate court, CRBC was contracted long before the financing agreement was entered into by virtue of the MoU.

[127] The appellant maintains that it was not the procuring entity but merely an implementing entity. This is because it only followed directives issued to it by the Executive. We find this correct in several respects. First, the appellant conceded that while it had initially attempted to competitively secure firms to undertake feasibility studies before the commencement of the project sometimes in the beginning of 2009, the process was frustrated by the ensuing litigation. The procurement was challenged through litigation both at the Public Procurement and Administrative Review Board and at the High Court. The litigation took about two years to conclude.

[128] By the time the litigation was concluding, the government had through the Ministry of Transport intervened by entering into an MoU with the CRBC- owing to the urgency of the project. This is well captured in the recital of the MoU which provides:

> "*WHEREAS, the Kenyan Government* ***realizes the urgency and necessity*** *of the construction and completion of the Project and* ***has agreed to accept the technical and financial assistance*** *offered by various financial institutions and/or China Road and Bridge Corporation* ***through CRBC to undertake Design, Construction, and supervision of the Project***;" (Emphasis ours)

It is based on the terms of the MoU that CRBC was tasked to undertake a feasibility study, and if the same was approved (by the Ministry) then CRBC would be procured as the sole party to undertake the SGR project. This in our view is the import of the relationship of the Government of Kenya vide the Ministry and the CRBC.

[129] Secondly, the commercial agreements entered into between the 1st appellant and the CRBC could only have been in furtherance of the directive by the Ministry of Transport. The 1st appellant had abandoned the procurement process and was now engaging with CRBC at the behest of the Ministry under which the appellant resides. KRC is a state-owned corporation charged with the mandate, *inter alia,* of planning and development of rail transport systems and promotion, facilitation and implementation of national railway network development in Kenya.

[130] Thirdly, the 1st appellant was no longer financing the project as CRBC had been tasked to source for financing from China. This was aptly captured in the MoU, at sub clause III 'Financing of the Project' which states:

> *"After the signing of the commercial contract of the Project, CRBC shall try its best to look for the sources for the funding of the Project*

In this regard, the supply and installation of the facilities, locomotives and rolling stocks agreement dated 4th October 2012, states 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."*

This financing arrangement was actualized in the financing agreement executed on 10th May 2014.

[131] The local financing on the other hand was done by the Government through the Railway Development Levy, introduced by the enactment of section 117A of the Customs and Excise Act CAP 472. KRC was therefore, despite being a state corporation, never allocated funds towards this project directly from the consolidated funds as the government itself opted to implement the financing model. KRC could not and did not therefore qualify as a procurement entity under the provisions of section 26(6) of the PPDA 2005.

[132] The above state of affairs demonstrates that the procurement and contractual agreements between the 1st appellant and the 4th respondent, who are both state corporations, were done by the two entities in furtherance of government to government understandings for an on behalf of those two governments. This squarely brings the arrangement within the realm of a government to government transaction that is not subjected to the provisions of the PPDA, 2005 as stipulated by section 6 (1) of PPDA, 2005. The 1st to 3rd respondents, perhaps appreciating the nature of the procurement- as being government to government, never challenged the Ministry's actions before the 3rd appellant.

[133] This is not the first time that the government has intervened and undertaken direct government to government procurement. In 2013, with the impending general election and due to constitutional timelines, Independent Electoral and Boundaries Commission (IEBC) was embroiled in legal battles over the procurement of voting materials. This led to government intervention as was eventually argued in the resulting presidential election petition in ***Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others*** (Petition Nos.5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment). For instance, the 1st petitioner's argument in this regard was captured as follows:

> *"108. On the BVR, the 1st petitioner makes the claim that due to a botched procurement process, procurement was taken over by Government. This, he states, led to the loss of independence from the Executive by IEBC. With regard to EVID (Electronic Voter Identification), he claims that the procurement of the kits was the result of an illegal procurement process; …"*

[134] This is also reported in ***International Commission of Jurists (2023): Election Technology and Electoral Justice in Kenya*** p.77 in the following manner:

> *"63. In 2013, the IEBC's failure to procure the election technology led it to ceding the procurement to the Kenyan executive…This act resulted in the*

'government to government' deal between Kenya and Canada to purchase the election materials through a Canadian company - Safran Morpho."

The merits of that action by the government is beyond the scope of the present case.

[135] The 1st respondent put up the case that KRC should have undertaken limited tender inviting other Chinese firms with the necessary expertise to bid. They gave the example of the tender for the Kenya Rural Telecommunication Development Project Phase II 2007 and 2011/2012 concessional loan for supply, installation, testing and commissioning of the national surveillance communication, command and control system in the National Police Service. In our view, this position is untenable as it was no longer upon KRC to undertake any tender process, the government having intervened and done government to government agreements.

[136] Again, we note that the procurement of CRBC was not undertaken by KRC but by the Government through the Ministry of Transport. As the Ministry was not included in the proceedings both before the 2nd appellant and before us, it would be academic for the Court to interrogate the issue further. In any event, we have already established that the provisions of the PPDA 2005 were ousted in the SGR project, for the reasons stated earlier herein.

[137] At any rate, procurement must still conform to the provisions of Article 227 even when done pursuant to the obligations of a treaty or agreement or any other procedure. The use of any procurement method including direct procurement does not exclude the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness as provided for under Article 227 (1) of the Constitution. As we expressed in ***Re the Matter of Interim Independent Electoral Commission*** SC Constitutional Application No. 2 of 2011 [2011] eKLR and in ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another*** SC Petition No. 32 of 2014 [2017] eKLR, legality of the Executive's actions and directives can only be interfered with by the Courts when it is in breach of the Constitution.

[138] In these circumstances we find, that it has not been demonstrated how the 1st appellant, acting not as the procuring entity, but on the directives of the Executive,

failed to comply with the provisions of Article 227 (1) of the Constitution. In any event, government to government procurement is permissible under section 6 of the PPDA 2005. We did not understand any of the respondents to be challenging the constitutionality of the said statutory provision because that they did not do. There were avenues such as public participation during the enactment of section 17 of the Customs Tax Act that introduced the Railway Development Levy; the challenge of the constitutionality of the provision of section 6 of the PPDA 2005, and challenge of the environmental concerns at the licensing stage of the project before the National Environment Tribunal pursuant to EMCA to name just but a few of them. None of the respondents and/or the members of the public pursued such avenues before resorting to court litigation.

[139] In addition, the SGR project was subject to interrogation before Parliament in two committees and none of the respondents opted to be involved. The said parliamentary process, which is open to the public, cleared the projects. Under our constitutional design, the people have the power to exercise their oversight power through elected representatives who are domiciled in Parliament. Whether a citizen agrees with or was satisfied with what was undertaken is a matter of conjecture provided that the laid-out procedure was followed. Like in every democracy, the concept of representing the people or public interest remains a hydra headed mongrel which cannot be defined with certainty as it is never possible to get a homogenous view point from the populace.

[140] In the premises, we respectfully disagree with the appellate court and hold that the procurement process for the SGR project met the requirements of Article 227 of the Constitution as read together with the provisions of the PPDA, 2005.

[141] As for costs, while we appreciate the general principle that costs follow the event, we are satisfied that the nature of the dispute warrants each party to bear its own costs, even if we raised our concern as to the genuineness of the reasons for bringing the instant litigation. The appellants being public bodies were merely defending their obligations as we expressed in ***Kenya Revenue Authority v Export Trading Company Limited*** (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment).

ORDERS

[142] In the end, we find merit in the appeal to the extent set out here below and issue the following orders:

i) The Court of Appeal judgment dated 19th June, 2020 is hereby set aside.

ii) The Cross Appeal dated 23rd September, 2022 be and is hereby dismissed.

iii) We affirm the superior courts' decision on the expunging of documents.

iv) The procurement process for the Standard Gauge Railway project was undertaken in conformity with the provisions of Article 227 of the Constitution.

v) The Standard Gauge Railway procurement was undertaken as a government to government contract hence exempt from the provisions of the Public Procurement Disposal Act, 2005 by virtue of section 6(1) of the said Act.

vi) Each party bears their own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 16th **day** of June, **2023.**

.....

P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME COURT

.....	.....
M. K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA