



**Okoti v Kenya Revenue Authority & another (Petition 113 of 2020)  
[2023] KEHC 22822 (KLR) (Constitutional and Human Rights) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22822 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 113 OF 2020**

**LN MUGAMBI, J**

**SEPTEMBER 29, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**BSMART TECHNOLOGY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling relates to two preliminary objections dated 30<sup>th</sup> June, 2020 raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. The petitioner filed grounds of opposition to both preliminary objections. The ruling also applies to the petitioner's notice of motion application dated 30<sup>th</sup> November, 2020 which was argued together with the two preliminary objections.
2. Kinoti and Kibe Advocates for the 2<sup>nd</sup> respondent filed the notice of preliminary objection dated 30<sup>th</sup> June, 2020 relying on the following five (5) grounds: -
  - i. That the honourable court has no jurisdiction to determine the competitiveness, propriety and legality of the impugned procurement of the regional electronic cargo tracking system (ECTS) and Customs Electronic Cargo Trading seals by the 1<sup>st</sup> Respondent.
  - ii. Given that the primary and first beneficiaries of a positive outcome of this petition would be providers of ECTS, this petition is res-judicata in view of the court's judgment dated 8<sup>th</sup> December, 2017 in Nairobi High Court (Constitution and Human Rights Division) Petition No. 84 of 2017, Electronic Cargo Trading System (ECTS) Providers Association and 9 Others Vs Kenya Revenue Authority).



- iii. These proceedings are fundamentally defective as they are premised on the false assumption that the subject goods and services were not procured competitively.
  - iv. That the petitioner has not made out a case for the grant of conservatory orders sought.
  - v. The orders in the application and the petition will negate and compromise rather than advance public interest and benefit as their immediate effect would be to permit more diversion of transit goods thereby leading to loss of customs and revenue.
3. The 1<sup>st</sup> respondent, through its advocate, Mangi John equally filed a Notice of Preliminary Objection dated 30<sup>th</sup> June, 2020 citing the following grounds: -
- a. That this matter is res judicata having been litigated in High Court Constitutional Petition No. 84 of 2017 Electronic Cargo Tracking System (ECTS) Providers Association of Kenya & 9 Others vs Kenya Revenue Authority.
  - b. That this matter offends the principle of exhaustion of remedies under Section 9(2) of the Fair Administrative Actions Act, as there is established a Commission on Administrative Justice under the [Commission on Administrative Justice Act](#) to investigate disputes of this nature.
4. The two preliminary objections were ordered to be heard alongside the petitioner's notice of motion dated 30<sup>th</sup> November, 2020 whereby the petitioner sought orders against the 1<sup>st</sup> respondent requiring to be supplied with the following documents: -
- a. Minutes of the tender opening.
  - b. Award letter
  - c. Evaluation reports
  - d. Signed contract including delivery schedule
  - e. Demonstration that the RECTS system/Seals actually meet the specifications in the tender document and perform their intended functions.
5. That consequent to the grant of prayers above, the honourable court be pleased to issues such further directions and orders as may be necessary to give effect to the forgoing orders, and/or favour the cause of justice.
6. The application was supported by grounds on the face of the application and the affidavit of Okiya Omtatah Okoiti sworn on 30<sup>th</sup> November, 2020.
7. The applicant relied on the grounds that: -
- i. The documents and information in issue are relied upon by the respondents to urge their case in their replying affidavits but they are not produced or exhibited in evidence.
  - ii. It is materially evident that the Court will not be able to get to the root of this dispute unless the respondents furnish it with the said information and documents which they have relied upon to make their case in their replying affidavit but failed to produce in evidence.
  - iii. This Honourable Court has unfettered powers and jurisdiction to make the orders sought and that it is meet and just for purposes of justice and equity and overarching purpose of constitutional integrity and rule of law to grant the orders sought.
  - iv. The balance of convenience favours the granting of the orders sought in this application.



- v. The respondents will suffer no prejudice if the orders are granted.
  - vi. The orders are not determinative of the petition.
8. Other than the notice of motion application dated 30<sup>th</sup> November, 2020; the petitioner had earlier on filed a statement of grounds of opposition dated 19<sup>th</sup> November, 2020 which relies on the following stated grounds: -
- 1. The Preliminary objection is incompetent.
  - 2. The Preliminary objection is an abuse of court process.
  - 3. The parties before Court in the current petition are Okiya Omtatah Okoiti versus the Kenya Revenue Authority and B Smart Technology Limited. In Petition 84 of 2017, the parties before Court were the Association of the ECTS Vendors (EPAK) and its Membership and the Kenya Revenue Authority. For the principle of res judicata to apply, it has to be the same parties before Court over the same subject matter.  
  
Further, the 2<sup>nd</sup> Respondent was not a party before Court in Petition 84 of 2017 and they therefore cannot invoke the principle of res judicata.
  - 5. The assertion that the primary beneficiaries of a positive outcome of the present petition are the ECTS providers, though far-fetched, does not prevent any other interested parties bringing matters of public interest before Court for determination.
  - 6. The prayers in the application in Petition 84 of 2017 are different from the prayers in Petition 113 of 2020. The prayers in Petition 84 of 2017 were as follows:
    - a. A conservatory order restraining the Respondent from proceeding with further implementation of RECTS by arming, tagging, and monitoring trucks and other vehicles carrying goods in transit with the RECTS seals or implementing the RECTS system in any other way.
    - b. A conservatory order restraining the Respondent from proceeding with any further action of implementing the Regional Electronic Cargo Transportation System (RECTS system) by arming, tagging and monitoring trucks and other vehicles carrying goods in transit with the RECTS seals or implementing the RECTS system in any other way.
    - c. A conservatory restraining the Respondent from publishing, advertising, holding sensitization meetings or using any other way to promote the RECTS system in a way that undermines, ridicules or negatively refers to the Applicants.
    - d. A conservatory order restraining the Respondent from publishing, advertising, holding sensitization meetings or using any other way to promote the RECTS system in a way that undermines, ridicules or negatively refers to the Applicants.



- e. An order for production of documentary evidence in relation to the following:
- (1) Information on the RECTS service provider(s) and suppliers;
  - (2) the process in selecting the RECTS providers and/or suppliers (in 1 above)
  - (3) Information of the specification of the equipment being used by the RECTS service providers and whether the equipment meet the KRA minimum specifications for electronic seals;
  - (4) The testing and vetting process similar to the one the current ECTS providers were subjected to, and;
  - (5) Proof of sustainability of the "Free" RECTS system.
7. The present application seeks interim orders suspending the directive given at Paragraph 4 of the Notice on Transport of cargo issued on 22nd May 2020 by the Transport Cabinet Secretary with effect from 1st June 2020 directing that all transit cargo/containers transported on the Standard Gauge Railway (SGR) will be tracked by RECTS and an interim order prohibiting the Respondents from implementing and in any way giving effect to the said directive.
8. That it is clear that the prayers sought in the two matters are distinct. This Honourable Court therefore has the jurisdiction to hear and to determine the issues raised in the present petition as the same as not been heard and determined by any other court.
9. The allegation that the suit is defective as it is based on a false assumption that services were not procured competitively is premature and unfounded. At the hearing of the suit, the Applicant shall call upon the 2<sup>nd</sup> Respondent to demonstrate that the system was procured competitively as they seem to allege.
10. The allegation by the 2<sup>nd</sup> Respondent that the orders sought will negate public interest and permit diversion of transit goods leading to loss of customs revenue is also baseless and unfounded. This is a wild allegation that casts aspersions to parties not before Court and the applicant shall call upon the 2<sup>nd</sup> Respondent at the hearing of this matter to substantiate this allegation.
11. The claim that the matter offends the principle of exhaustion has no feet to stand upon since the reliefs sought herein cannot be granted by the Commission for administrative justice.

9. The parties filed written submissions and appeared in court physically to highlight the same on 26<sup>th</sup> June, 2023.



10. During the oral highlights, the petitioner, Mr. Okiya Omtatah Okoiti appeared in person.
11. M/s Nyakundi held brief for Mangi for the 1<sup>st</sup> respondent while M/s Nyabuto held brief for Mr. Munyororo for the 2<sup>nd</sup> respondent.

### **1<sup>st</sup> Respondent's Submissions**

12. The written submissions of the 1<sup>st</sup> respondent are dated 14<sup>th</sup> January, 2021. These are the submissions that M/s Nyakundi highlighted before the court.
13. In her submission, M/s Nyakundi argued that the petitioner was challenging the procurement of regional electronic Cargo Tracking System (RECTS) System and Customs Seals by the 1<sup>st</sup> Respondent alleging that the acquisition was unlawful and unconstitutional.
14. She submitted that prior to the roll-out of RECTS System in 2017; tracking was being done by private companies but their system had major loopholes that largely contributed to dumping of transit goods.
15. The revenue authorities in the East Africa Community underwent this particular challenge hence the development of a coordinated program of tracking cargo movement along the entire corridor through the introduction of RECTS system.
16. Private companies did not welcome the new arrangement hence filed Constitutional Petition No. 84 of 2016 – Electronic Cargo Tracking System (ECTS) Providers Association of Kenya Vs Kenya Revenue Authority (2017) eKLR seeking 14 prayers as per paragraph 6 of the judgment that was delivered on 8<sup>th</sup> December, 2017 by Hon. Justice E C Mwita. The 1<sup>st</sup> respondent attached the said decision in its replying Affidavit of 13<sup>th</sup> April, 2021. In that judgment, the court summarized the issues raised in the petition to 16 which it determined and dismissed the entire petition and to date no appeal has been preferred.
17. The 1<sup>st</sup> respondent quoted verbatim paragraph 77 of the said judgment which reads as follows:

“77. First and foremost, the respondent’s duty is to enforce the law through its mandate to collect and receive revenue. Second, the system that was installed by the petitioners was intended to ensure that transit cargo was not diverted into the local market. Thirdly, the petitioners were not rendering that service to the respondent but to their own customers. However, as seen earlier in this judgment, ECTS failed to achieve its primary objective raising issues of transit goods either being stolen or diverted into the local market. It was also contended by the respondent that URA was even more concerned and single handedly moved to have RECTS in place and advised transporters and clearing agents to use that system for any goods destined to that Country.”

18. Counsel then referred to the present petition which was filed on 16<sup>th</sup> March, 2020 and submitted that it is an attempt to re-litigate the issues covered in petition No. 84 of 2017. She contended:

“... through the petition dated 16<sup>th</sup> March, 2020, Mr. Omtatah has now approached this Honourable Court seeking the following orders against KRA and BSMART Technology Limited.

- a. Annul the KRA’s procurement of both the Regional Electronic Cargo Tracking System and Customs Electronic Cargo Tracking Seals Technology without competitive bidding.



- b. Quashing the contract awarded by KRA to Bsmart Technology Limited to supply Customs Electronic Cargo Tracking Seals without competitive bidding.
  - c. Prohibiting the KRA and its agents from making the regional Electronic Cargo Tracking System mandatory, and from giving out for free to trackers the Customs Electronic Cargo Tracking Seals howsoever acquired using public funds, including from Bsmart Technology Limited.
  - d. Compelling KRA to procure both the Regional Electronic Cargo Tracking System and Custom electronic Cargo Tracking Seals competitively in strict compliance with the constitution and National legislation.
  - e. Compelling the respondents to bear the costs of the suit.”
19. The 1<sup>st</sup> Respondent submitted that the present dispute is substantively similar to the dispute in the High Court Constitution Petition No. 84 of 2017 – Electronic Cargo Tracking System (ECTS) provider, Association & 9 others Vs Kenya Revenue Authority – and is thus res-judicata.
20. Counsel submitted that the High Court had substantively dealt with all the questions surrounding RECTS System in the previous matter hence the same should not be revived under the pretext that they were new yet the real intention is to defeat the 1<sup>st</sup> Respondent’s implementation of the system.
21. The 1<sup>st</sup> Respondent relied on the judgment of Okiya Omtatah Okoiti Vs Communications Commission Authority of Kenya & 14 Others (2015) eKLR, where in finding that the matter was res-judicata, the court stated thus: -
- “...it matters not that the Petitioner has framed different questions for determination or has sought slightly different orders from those in Petition No. 14 of 2014. To my mind, the core and crux forming the subject matter of the Petitioner's case is largely the issue of digital migration save the additional issue as regards the Board of the CAK. I am clear that the Petitioner is therefore trying to bring to this Court, in another way and in the form of a new cause of action, a suit that has already been placed before a competent court in earlier proceedings and which was adjudicated upon and judgment delivered.”
22. The Judge in that matter quoted following passage from the book, Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition:
- “...The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply...”
23. The 1<sup>st</sup> Respondent zeroed in on the prayer by the petitioner seeking to:
- ‘Prohibit the KRA and its agents from making the KRA Regional Electronic Cargo Tracking System mandatory, and from giving out for free to trackers the Customs Electronic Cargo Tracking Seals howsoever acquired using public funds, including from B-Smart Technology Limited’



and argued that it is an indication that the petitioner is attempting to undo Petition 84 of 2017 without appealing the decision by disguising it to be a fresh matter.

24. To buttress her submissions, counsel cited the case of Mohamed Dado Hatu Vs Dhadho Gaddae Godhana & Others (2017) eKLR, which held that the doctrine of re-judicata bars parties from litigating in bits from one forum to another and seeking the same remedy by giving their dispute a cosmetic uplift.
25. Also, the case of Henry Wanyama Khaemba Vs Standard Chartered Bank of Kenya Ltd, Civil Case No. 560 of 2006 where the Court held thus: -

“...I accept the submissions by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments...”

26. The 1<sup>st</sup> respondent contended that though the petitioner may contend that neither he nor Bsmart were parties in the former suit, the 1<sup>st</sup> respondent was party and thus it would be unfair if the 1<sup>st</sup> respondent were to be perpetually trapped in court defending a similar position against ‘new petitioners’ on what is substantially same dispute. The 1<sup>st</sup> respondent further contended that if this were to be allowed, nothing would stop others from ganging up later in the guise of public interest litigation. Counsel argued that it would be unconscionable to invite the 1<sup>st</sup> respondents to mount a fresh defence in a dispute whose effect is the same as the previous case.
27. Counsel submitted that in the former suit, Bsmart had been mentioned as a provider of RECTS Service with the allegation being that its engagement offended public procurement procedures although it was never enjoined as a party.
28. In respect of the petitioner’s notice of motion dated 30<sup>th</sup> November, 2020; the 1<sup>st</sup> respondent submitted that the petitioner is on a fishing expedition. Counsel argued that if it was the petitioner’s position that the seals do not work, it was the petitioner to prove that assertion and not turn it over to the 1<sup>st</sup> respondent and require him to do so.
29. In any case, the 1<sup>st</sup> respondent contention was that the petitioner had not demonstrated that he sought the information required from the 1<sup>st</sup> respondent and that the same had been denied. Counsel argued access to information is provided for under Article 35 of *the Constitution*; the manner of accessing the information is guided by the *Access to Information Act* by writing to the relevant institution under Section 8 of the *Access to Information Act* and certainly not by filing a petition in the High Court. Should the information not be provided, Section 14 of *Access to Information Act* kicks in by having the matter reported to the Commission on Administrative Justice.
30. Counsel submitted that the petitioner had not demonstrated that he had sought the information listed in his application from KRA and cannot thus come directly to the court for an order as it is against Section 9(2) of Fair Administrative Act that enjoined him to exhaust the statutory procedures before approaching the court for remedy.



31. Counsel for 1<sup>st</sup> respondent relied on the cases of Charles Apundo Obare & another Vs Clerk, County Assembly of Siaya & another (2020) eKLR and Savraj Singh Chana Vs Diamond Trust Bank (Kenya Limited) & another (2020) eKLR.

## **2<sup>nd</sup> Respondent's Submissions**

32. The 2<sup>nd</sup> respondent filed the 1<sup>st</sup> set of submissions dated 15<sup>th</sup> December, 2020 and further submissions dated 22<sup>nd</sup> June, 2021.
33. M/s Nyabuto appeared for the 2<sup>nd</sup> Respondent to highlight the two sets of submissions.
34. M/s Nyabuto's submissions took a similar trajectory as those of M/s Nyakundi submitting majorly on two issues: -
- i. res-judicata and
  - ii. doctrine of exhaustion of remedies.
35. M/s Nyabuto cited the Court of Appeal case of Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, Civil Appeal No. 105 of 2017(2017) eKLR, which elucidated the significance of the doctrine of res-judicata as follows: -
- “...The Doctrine of res judicata is designed as a pragmatic and common- sensical protection against wastage of the time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny, the foundations of res judicata thus rest in the public interest for swift sure and certain justice...”
36. Counsel submitted that res-judicata, or estoppel by record as held in the case of Mercy Munee Kingoo & Another Vs Safaricom Limited & another, Constitutional Petition No. 5 of 2016 (2016) eKLR is a rule of policy for it is in public interest that there be finality in litigation through acceptance of the decisions of competent tribunals.
37. On the doctrine of exhaustion of remedies, counsel for 2<sup>nd</sup> respondent submitted that it was imperative for the petitioner to comply with the mechanisms provided for under the Fair Administrative Actions Act.
38. Commenting on the petitioner's application dated 30<sup>th</sup> November, 2020; the 2<sup>nd</sup> respondent described it as baseless and lacking in merit and stated that the petitioner was using it to test the strength/ weakness of respondents' case and had also failed to comply with the law on discovery. Counsel relied on the cases of Leslie Okundo Akumu Vs National Bank of Kenya Ltd, Civil Case No. 105 of 2002 (2015) eKLR and Concord Insurance Co. Ltd Vs NIC Bank Ltd, Civil Case No. 175 of 2011 (2013) eKLR.

## **Petitioner's Submissions**

39. The petitioner relied on his written submissions dated 10<sup>th</sup> February, 2021 which he highlighted before this court on 26<sup>th</sup> June, 2023.
40. To begin with the petitioner affirmed the jurisdiction of the court to hear and determine the petition. He relied on Article 23 of *the Constitution* and Article 165 (3) (b) and also cited the case of Judicial



Service Commission Vs Gladys Shollei & Another (2014) eKLR which elaborated on the jurisdiction of the High Court and its power to grant reliefs specified in [the Constitution](#).

41. The petitioner also empathized on Article 258 of [the Constitution](#) which gives the court jurisdiction to determine disputes “claiming that [the constitution](#) has been contravened, or is threatened with contravention.”
42. The petitioner submitted that the petitioner’s claim is founded on Articles 1, 2, 3(1), 10(1) & (2), 19, 20, 21, 24, 73, 75, 129, 153(4)(a), 201(a), 227(1), 232(1) (a), (b), (c), (d), (e), (f) & (2)(a) & (b), and 259(1) of [the Constitution](#) the respondents violated. He argued that by dint of Article 165(3) (d) (ii) this court is clothed with jurisdiction “to hear any question respecting the interpretation of [the Constitution](#) including the determination of the question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of this constitution.”
43. Consequently, he asserted that this court’s jurisdiction to deal with this matter is further rooted in Articles 23, 165 (3) (b) and (d) (ii) and 258 of [the Constitution](#).
44. On the issue that the petition is res-judicata; the petitioner insisted that the parties in the suit are different from the parties in Petition 84 of 2017 and that for re-judicata to apply, the former suit must have involved the same parties before the court in respect of the same subject matter. He pointed out that neither the petitioner nor the 2<sup>nd</sup> respondent were parties in Petition No. 84 of 2017.
45. He relied on Section 7 of the [Civil Procedure Act](#) in highlighting the conditions that have to be met for one to successfully raise a plea of res-judicata.
46. He further relied on the Civil Appeal No. 105 of 2017, Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, (2017) eKLR where the court set out and discussed those conditions by stating thus:

“ ... Thus, for the bar of re-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

  - a) The suit or issue was directly and substantially in issue in the former suit.
  - b) That former suit was between the same parties or parties under whom they or any of them claim.
  - c) Those parties were litigating under the same title.
  - d) The issue was heard and finally determined in the former suit.
  - f. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
47. On the issue of exhaustion of remedies; the petitioner submitted on the provisions of the [Commission on Administrative Justice Act](#) No. 23 of 2011. He argued that section 8 sets out the functions of the Commission while Section 32 (1) and (2) deals with complaints before the Commission. He argued that the Commission on Administrative Justice has no capacity to grant the reliefs the petitioner was seeking before this court.
48. In any event, the petitioner argued that under Section 32 of the [Commission on Administrative Justice Act](#) No. 23 of 2011, the capacity to move the commission can only be by persons that are personally



or directly affected by the action complained of hence the petitioner would not have a standing before the Commission.

49. The petitioner argued that although dispute resolution provided for in a statute ought to be exhausted first; if the jurisdiction of the court is opposed on the basis of the existence of the statutory procedure, the court should carefully examine the dispute in question and reliefs being sought in order to determine if the reliefs can in fact be obtained through the said process. The petitioner insisted it was not possible in the instant case.
50. The petitioner cited the case of Erick Okeyo Vs County Government of Kisumu & 2 Others (2014) eKLR, where the High Court assumed jurisdiction in a matter in which the public procurement process was being challenged on the basis that it was inconsistent with Article 10 and 227 (1) of *the constitution* with the court reasoning that the statutory mechanisms under the Public Procurement Administrative Review Board specified in the Public Procurement and Disposal Act (2005) (now repealed) was inadequate to deal with the matter at hand.
51. He also cited Okiya Omtatah Okoiti Vs Nairobi City County & 5 Others (2016) eKLR, in which the court considered Section 25 of Public Procurement Act which establishes the Public Procurement Administrative Review Board to deal with disputes regarding procurement, and in particular, Section 93(1) of the Act which provides thus: -

‘1) Subject to the provisions of this part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.’ My understanding of the foregoing provision is that the Section is limited to candidates who participated in tendering process and not an outsider like the petitioner.”
52. Adopting this analogy, the petitioner submitted that the Commission on Administrative Justice does not have jurisdiction to determine violations of *the constitution* or issue remedies arising from constitutional violations, and if it purported to do so, it would be acting ultra-vires.
53. The petitioner further relied on Petition No. 22 of 2012 Mohamed Ali Baadi And Others Vs Attorney General & 11 Others (2018) eKLR, where it was held that even though the Environmental Management and Coordination Act avails a number of adjudicatory mechanisms in environmental matters that members of public can utilize to secure environmental rights and enforce environmental laws without necessarily having recourse to High Court, which includes the committee under Section 31 of the Act and National Environmental Tribunal under Section 129, the decisions of the committee under Section 31 were only useful as findings and recommendations to the National Environmental Council and as such the issues that were raised in the petition and remedies were not appropriate for a committee under Section 31.
54. Equally, the National Environmental Tribunal was found to be insufficient as the range and scope of issues in dispute surpassed the narrow question of conditions that can be imposed on a licence of Environmental Impact Assessment licence under Section 129(1) (b) to (e). The Court explained:

“... the design of the Tribunal is such that it does not envisage the participation of all interested parties, such as developers, government, the community, non-governmental organization and environmental groups in a joint effort aimed at restoring the environment and agreeing on their sustainable use. Differently put, the multiplicity of parties and the polycentricity of issues in a case such as this one makes it unsuitable for the tribunal...”



55. Placing heavy reliance on the above cited cases; the petitioner contended that the present petition requires authoritative interpretation of *the constitution* which goes beyond the mandate of the Commission arguing that the commission can only entertain disputes that directly affect the parties which was unlike the instant matter.
56. The petitioner submitted that Paragraphs 2, 3, 4 and 5 of the 2<sup>nd</sup> respondent's preliminary objection raised matters of fact that did not qualify to be raised in as preliminary objections. He argued that any point that raises mixed points of law and fact or requires proof by evidence cannot be a preliminary objection. He submitted that preliminary objection is only raised on assumption that all facts pleaded by the opposite side are correct and a preliminary objection cannot be raised if any fact is to be ascertained or if what is in issue would require exercise of judicial discretion. He relied on the case of Mukisa Biscuits Manufacturing Ltd Vs West End Distributors ltd (1969) EA 696.
57. Finally, the petitioner urged the court to allow the discovery as prayed in his application dated 30<sup>th</sup> November, 2020 stating the information sought is what the respondents relied on to make their case in the replying affidavit but had not provided the said information.
58. He contended that the respondents have the power and/or possession of those documents that the petitioner was seeking since they had relied on them in their replying affidavits and that unless the respondents are ordered to produce the same, the petitioner will be prejudiced. The Petitioner argued that those documents are necessary and relevant to the determination of the petition. He relied on the case of Oracle productions Limited Vs Decapture Limited & 3 Others (2014) eKLR as well as the case of Concord Insurance Co. Ltd Vs NIC Bank Ltd, 175 of 2011 (2013) eKLR.

### **Analysis And Determination**

59. After careful review of the parties affidavits and their submissions herein, I opine that the issues in dispute are as follows: -
  - a. Whether the issues raised herein are within the competence of this court's jurisdiction.
  - b. Whether the present suit is barred under the doctrine of res-judicata.
  - c. Whether the petitioners notice of motion application should fail on account of doctrine of exhaustion of remedies.
60. The 1<sup>st</sup> issue concerning lack of jurisdiction was raised by the 2<sup>nd</sup> respondent advocate. In the notice of preliminary objection dated 30<sup>th</sup> June, 2020 he framed this particular ground as follows: -
  - "i) that the honourable court has no jurisdiction to determine the competiveness, propriety and legality of the impugned procurement of the regional electronic Cargo Tracking seals by the 1<sup>st</sup> Respondent"
61. In response, the petitioner went to great length and quoting the relevant constitutional provisions extensively and relying on various judicial decisions to demonstrate that this court possess the requisite jurisdiction to hear and determine the current petition.
62. Jurisdiction literally means the authority that is given to a court or tribunal by either a statute or *the constitution* to hear or adjudicate over a legal dispute. Blacks Law Dictionary, Tenth Edition defines jurisdiction as "A court's power to decide a case or issue a decree'.
63. This understanding in my view suffices and I need not belabour the point through numerous descriptions of text-book quotations and judicial decisions.



64. The question, therefore is, does this court have jurisdiction to determine “the competitiveness, propriety and legality of impugned procurement of the Regional Electronic Cargo Tracking Seals by the 1<sup>st</sup> Respondent.”
65. To begin with, it is necessary to set out the principles that are laid down by *the constitution* concerning public procurement.
66. Article 227 (1) of *the constitution* provides: -  
“When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”
67. This is a constitutional benchmark/principle that *the Constitution* specifies which every public entity charged with procurement of goods and services must comply with.
68. In that regard, any citizen by dint of Article 258(1) of *the Constitution* can petition this court to inquire into any public procurement if it can be demonstrated this constitutional principle has been violated or threatened with violation.
69. Such a violation would be a direct affront to *the constitution* and a matter that that would squarely fall within the jurisdiction of this court under Article 165 (1) (d) of *the constitution* as this court is empowered deal with questions respecting the interpretation of this constitution including determination of: -  
“ii) the question of whether anything said to be done under the authority of *the constitution* or any law is inconsistent with, or in contravention of this constitution.”
70. It would therefore be within the purview of this court to weigh any procurement process against this constitutional threshold set out in Article 227(1). This court thus finds the contention by the 2<sup>nd</sup> respondent advocate that “it lacks jurisdiction to determine the competitiveness, propriety and legality of the impugned procurement of Regional Electronic Cargo Tracking System (RECTS) and Customs Cargo Tracking Seals” as misconceived and without sound legal basis.
71. The dispute as framed in this petition is perfectly within the jurisdiction of this court.
72. The next issue is on res-judicata. In the preliminary objection dated 30<sup>th</sup> June, 2020, counsel for the 1<sup>st</sup> respondent raised a plea of res-judicata by stating thus: -  
“that this matter is res-judicata having been litigated in High Court constitutional Petition No. 84 of 2017, Electronic Cargo Tracking System (ECTS) Providers Association of Kenya and 9 others Vs Kenya Revenue Authority.”
73. In summary, the 1<sup>st</sup> Respondent contended that the petitioner was simply re-litigating an issue that was conclusively determined in Petition 84 of 2017 by slightly modifying it so as to defeat the res-judicata bar. Counsel for the 1<sup>st</sup> respondent relied on various judicial decisions which I have already referred to in the course of reviewing the 1<sup>st</sup> respondent submissions.
74. The 2<sup>nd</sup> respondent supported the 1<sup>st</sup> respondent’s contention on this point.



75. The petitioner relied on Section 7 of the Civil Procedure Act that sets out the pre-requisites for raising a successful plea of res-judicata and also the case of Electoral and Boundaries Commission Vs Maina Kiai & 5 Others (supra) where the said conditions were discussed.
76. The petitioner referred to the Civil Procedure Act and the case law and urged this court to find that the respondent had not demonstrated that the conditions required to be met applied in the current petition as not even the parties that were the before the court previously are identical as neither the petitioner nor the 2<sup>nd</sup> respondent were parties in petition No. 84 of 2017.
77. At this juncture, it is important that I distinguish between jurisdiction and res-judicata. Jurisdiction deprives a court the capacity to try a matter. Res-judicata on the other hand is not about the competence or the power of the court to adjudicate over a dispute as the court possess jurisdiction over the suit, only that it is barred from trying it on account that there already exists a judgment of another competent court on the same issues and the parties therein. Res-judicata thus operates as a bar to the trial of a subsequent suit on the same cause of action between the same parties. Blacks Law Dictionary, 10<sup>th</sup> Edition defines it thus: “Res Judicata- An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction and that could have been-but was not-raised in the first suit. The three essential elements are i) an earlier decision on the issue ii) a final judgement on the merits, and iii) the involvement of the same parties, or in privity with original parties”
78. There are two Latin maxims that underly the principle of res-judicata namely: -  
 “Interest republicae ut sit finis litium” (that there must be an end to litigation) and Nemo debet bis vexari pro una cadem causa” (which means that no man should be vexed twice over the same cause).”
79. Section 7 of the Civil Procedure Act, sets out the conditions that must exist for res-judicata to apply. It states:  
 “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
80. Two explanations that are provided under the said Section which I find relevant in this determination being explanation number 4 & 6 which read as follows:  
 Explanation (4)  
 Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.  
 Explanation. (6)  
 Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating....”
81. Having, therefore set out the principles, it is therefore necessary to answer the question of whether or not the matter before the court is res-judicata.



82. It is also important to note that there are certain words used in that section that are very critical in this determination. The section refers to ‘suit or issue’, that no court shall try any “suit or issue.” It means that res-judicata encompasses what may be commonly referred to as the ‘cause of action estoppel’ and ‘the issue-based estoppel’.
83. For cause of action estoppel, it bars an identical suit from being re-litigated between the same parties or their representatives. The issue-based estoppel sets in if a particular issue that formed part of the former suit and which was decided in that suit is being reintroduced by a party or the representative of such party in a later claim/suit which though the suit may be different but the issue in the former suit is relevant and recurs in that later/subsequent suit. Such a party or his representative will be prevented from reopening the issue afresh.
84. The doctrine of res-judicata assert the finality and certainty of judicial decisions by preventing waste of judicial time and unnecessary harassment of the party through re-litigation.
85. Justice Lenaola in *Okiya Omutatah Vs Communication Authority of Kenya* (2015) eKLR appears to me to have applied issue-based estoppel in that case when he held thus-
- “In my view, he sued the officials of the 1<sup>st</sup> Respondent so as to disguise the proper parties who were in the first Petition and that attempt cannot affect my conclusions above and help him evade the doctrine of res judicata on the main issue of digital migration which is the common thread running through all the Petitions as can be seen above. I shall repeat for emphasis that the said issue cannot be re-opened merely by re-introducing the rights of viewers to migrate and re-packaging it differently as a violation of the provisions of *the Constitution* and that of the Bill of Rights so as to prevaricate the principle of res judicata.”
86. It is now necessary that I revert to the question of whether the doctrine has been successfully be raised in the present petition or not.
87. The present petition seeks to challenge the procurement process of a company known as BSMART (the 2<sup>nd</sup> respondent) whereby the petitioner alleges that it was single sourced without competitive bidding. Indeed, the prayers in the petition include prayer number (iv) which seeks the following: -
- “A Declaration That the KRA's procurement of both the Regional Electronic Cargo Tracking System and the Customs Electronic Cargo Tracking Seals from BSmart Technology Limited without competitive bidding was unlawful and unconstitutional and, therefore, invalid, null and void ab initio.”
- a. Annuling the KRA's procurement of both the Regional Electronic Cargo Tracking System and the Customs Electronic Cargo Tracking Seals from BSmart Technology Limited without competitive bidding.
88. Turning to the former suit, Petition number 84 of 2017 the reliefs in that petition included: -
- g) ) A declaration that the Respondent's action of approving and adopting an electronic Cargo Transportation system (ECTS) system from another Country supplied by a foreign entity without conducting standard tender procedure requirements is in violation of the Public Procurement Act of Kenya.
- h) An order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent to introduce and replace the current multi-vendor Electronic Cargo Transportation System (ECTS) system with the new RECTS system.



- i) An Order of Prohibition directed against the respondent prohibiting the respondent whether by themselves, servants and/or agent from implementing the new RECTS system in any way whether by advertisement, soliciting for customers, publication or tagging and arming trucks and other vehicles in transit with the RECTS seals.”

89. Even from a cursory glance and comparison of the reliefs in the two petitions, it is apparent that there is inescapable similarity in that the reason that informs the orders sought is because of alleged questionable procurement that relates to BSmart Technologies.

90. And to further demonstrate that the issues before the court were essentially litigated in the former petition; Justice Mwita in setting out the issues for determination in Petition 84 of 2017 titled them; ‘Public Procurement Procedures’. He then proceeded to introduce the paragraph that dealt with the matter in which the name of the 2<sup>nd</sup> respondent in the present proceedings featured prominently although it was not a party then. He said in Petition No. 84 of 2017: -

“The petitioners also raised the issue of the respondent’s failure to comply with procurement procedures thus violated Articles 10, 73, 75 and 227 of *the Constitution* and the *Public Procurement and Asset Disposal Act*. (PPADA)... According to the petitioners, RECTS is provided for by a private company known as B’ Smart Technology contrary to the respondent’s claim that the system was being implemented by URA. ...According to the petitioners, it was improper and against the law for the respondent, a state agency, to obtain services from B’Smart Technologies without following procurement procedures....

Article 227(1) of *the constitution* demands that when a state organ or any other public entity contracts for goods or services, it should do so in accordance with a system that is fair equitable, transparent, competitive and cost effective....”

91. The Judge then proceeded to synthesize the issue and by stating thus: -

“The issue raised here is that of procurement of services by a public entity, namely the respondent (when in that case was KRA)...In this case, the petitioners were required to show to the satisfaction of the court, that there was procurement of Goods and or services by the respondent and that the respondent was paying for those goods or services using public resources.

However, what is before Court are mere allegations of procurement.... It therefore cannot be argued without tangible evidence, that the respondent procured services in violation of *the constitution* and the law while implementing RECTS system.”

92. From the above analysis, it is apparent that the issue about single sourcing was a material question that arose in petition No. 84 of 2017 and the Judge spent considerable time in addressing his mind on the same. The name of the current 2<sup>nd</sup> Respondent arose in the Judge’s analysis then in connection with that procurement even though it was not a party unlike now. The reliefs that were sought in connection with the issue of alleged procurement irregularity in Petition 84 were declaratory reliefs which are orders in ‘in rem’ as opposed to orders in ‘in personam’ just like in the present petition hence they are for all practical purposes similar despite the parties appearing as different. The objective behind public interest litigation is to make good grievance of the public at large. Under explanation number 6 at section 7 of the *Civil Procedure Act*, ‘where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating’.



93. Looking at the nature of the orders sought, I do not think that the Petitioner would disassociate from the fact that the reliefs which he says he is seeking for and on behalf of the public are in any way different from those ahead of him though litigating as different parties. Moreover, I find it extremely prejudicial that the Respondent should be liable to be sued eternally in the pretext of public interest where parties will keep mutating as the respondent remain constant in matters that that the court has definitively concluded.
94. Indeed, the intention of the petitioner comes clean from the reading of paragraph 27 of the petition. It clearly reveals that he is aware that the issue featured previously in Petition 84 of 2017 but justifies the filing of this petition by providing the following excuse:
- “ 27. The petitioners lost the case largely on the grounds that because the RECTS system being acquired was not going to cost the Kenyan taxpayers any money, its acquisition was not a procurement in the strict sense of the word as defined under the Public Procurement and Asset Disposal Act, 2015 (PPADA); and that as a regulatory measure, it was not subject to the Statutory Instruments Act, 2013 (SIA) since the KRA had no direct contracts with the vendors but on certified the vendors' private contracts with individual transporters and owners of goods.”
95. In paragraph 33 the petitioner thus justifies and reveals the real intention behind this petition thus:
- “ 33. ...it has emerged that on 19th July 2019, or thereabouts, the KRA single-sourced and contracted Bsmart Technology Limited's Hong Kong Branch to supply Customs Electronic Cargo Tracking Seals for a five (5) year period at the cost. of some US\$13,440,280.00 (approximately Kshs.1.35 billion)...”
34. The revelation that the RECTS is not free, after all, voids the defence KRA successfully mounted in Nairobi High Court Constitutional Petition No. 84 of 2017, and now subjects both the procurement of the RECTS and the seals to Kenyan law on procurement of goods and services by public entities, including Articles 10, 27, 35, 47(1), 73, 75, 227(1) and 232 of the Constitution as read together with the PPADA, the SIA, and the Fair Administrative Action Act, 2015.”
96. Evidently, from the above pleadings, one can tell the actual reason for the petitioner to file this petition. It is because he considers that the court made the finding in Petition 84 of 2017 based on insufficient information which it was denied but now that the information is available hence the court should consider reaching a different conclusion.
97. As correctly observed by counsel for the 1<sup>st</sup> respondent, this fresh petition is a sneaky way of forcing a review or appeal of this court's own decision based on alleged discovery of important and new evidence which I find unacceptable. The present petition is an invitation to review the previous decision disguised as a fresh petition.
98. The Petition is totally misconceived and an abuse of this court's process.
99. I uphold the 1<sup>st</sup> respondent's preliminary objection and order that the petition be struck out.
100. As it is public interest litigation, I order that each party will bear its own costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**



.....  
**L N MUGAMBI**  
**JUDGE**

