REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI, MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 532 OF 2017

In the matter of Articles 22 (1) & (2) (c), 50 (1) and 258 (1) & (2) of the Constitution of Kenya 2010

In the matter of alleged contravention and violation of the National Values and Principles of Governance enshrined in Articles 1 (1), 2 & (3), 10 (2), 69, 70, 73 (10 (b), 129 (1) & (2), 153 (4), 232 (10 (d), (e) & (f) and 259 (10 & (3) of the Constitution

In the matter of the alleged violation of Rights and Fundamental Freedoms under Articles 24, 27, 40, 43, 46 and 47 of the Constitution

In the matter of alleged abuse of Section 234 of the Customs and Excise Act

In the matter of the alleged violation of Sections 3, 4 and 5 of the Fair Administrative Action Act; and Section 4, 5, 6, 7 and 8 of the Statutory Instruments Act

In the matter of the Constitutional validity of Legal Notice No.110 of 18 June 2013 and Gazette Notice No. 12856 of 5 September 2013 imposing the Excisable Goods Management System by Kenya Revenue Authority

In the matter of the Constitutional and Legal Validity of Taxes Imposed by the Executive without the involvement of Parliament nd without the Participation of the Public

In the matter of the abuse of Delegated Legislation by the Executive and the Regulatory Burden Imposed on the People of Kenya

In the matter of the Doctrine of Legitimate Expectation, *Delegatus Delegare Non Potes* and *Void Ab Initio*

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY.....1STRESPONDENT

THE CABINET SECRETARY,

NATIONAL TREASURY.....2NDRESPONDENT

SICPA SECURITIES SOL. SA.....3RDRESPONDENT

JUDGMENT

The Parties

1. The Petitioner is the executive Director of Kenyans for Justice and Development Trust, a legal trust incorporated in Kenya whose object is promoting democratic governance, sustainable economic development and prosperity. He filed this Petition in public interest.

2. The first Respondent is the Commissioner General, Kenya Revenue Authority (KRA), a body corporate with a common seal and perpetual succession established under Section **3** of the Kenya Revenue Authority Act.[1] KRA is a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to provide for connected purposes.[2]

3. The second Respondent is the Cabinet Secretary, National Treasury in charge of the national government's department which formulates financial and economic policies and oversees effective coordination of national government financial operations.

4. The third Respondent is a Switzerland based firm with a branch in Kenya.

Facts relied upon

5. The Petitioners' case is enumerated in the amended Petition filed on **1st** December 2017. He avers that he sued the first Respondent for allegedly disregarding public interest and acting to achieve an alleged undisclosed collateral purpose by irregularly issuing Gazette Notice No. **12856** of **5th** September 2013 prescribing the price of an excise stamp to be **Ksh. 1.50**; seeking to enforce void laws; and undermining the authority of Parliament's Public Investments Committee (PIC) by disregarding the PIC's directive suspending the implementation of Excisable Goods Management System (EGMS) to allow the PIC to finalize its investigations into alleged irregularities in the award of Kenya Revenue Authority tender number **KRA/HQS/DP-423/2014-2015** .

6. He also avers that he has sued the Cabinet Secretary for *inter alia* irregularly issuing Legal Notice No. **110** of **18th** June 2013 to achieve an alleged undisclosed collateral purpose, by expanding the scope of items to be covered under the EGMS to include all excisable goods except motor vehicles manufactured or imported into Kenya and for irregularly issuing Legal Notice No. **53** of **30th** March 2017. Further, he avers that the third Respondent is the beneficiary of KRA's and Treasury's impugned five years contract for the supply of EGMS at a minimum sum of **Ksh. 15,909,293,482**/= and a maximum of **Ksh. 17,15,333,818**/=

7. He also avers that on **3rd** October 2017, the first Respondent published a public notice in the national press and other media titled *"Excise Stamps on Bottled Water, Juices, Soda, other Non-Alcoholic Beverages and Cosmetics"* announcing that with effect from **1st** November 2017, all the affected goods manufactured or imported into Kenya shall be affixed with excise stamps in accordance with the regulations. Also, he avers that the notice stated that manufacturers and importers of bottled water, juices, soda, packed in plastic bottles, energy drinks and other non-alcoholic beverages, food supplements and cosmetics will, from **1st** November 2017 be required to affix new generation exercise duty stamps/stickers to their products. Further, the notice invited manufacturers and importers to follow up consultations on **12th** and **27th** October 2017, where they were told that they must comply with the directive in the notice.

8. He further avers that the excise tax is a duty imposed on goods and services manufactured in Kenya or imported into the country, pursuant to the Excise Duty Act[3]and that excisable goods are those that can pose harm to the consumer, hence, excise taxes are selective taxes imposed on the sale or use of specific goods and services that pose harm to the consumer, such as gambling, alcohol, tobacco and sugar products. He avers that charging excise duty on bottled water and fruit and vegetable juices is a deliberate violation of Article **43 (1) (a) (c) & (d)** of the Constitution.

9. The Petitioner contents that the excise duty was imposed without public participation and that the additional **Ksh. 0.5** per litre over and above the existing **Ksh. 5** per litre is burden to the manufacturers and consumers. He asserts that the duty is punitive as the tax will account for some **70%** of the cost of packaging and **700%** more than what the majority of small businesses make as margins for their effort. He also states that the tax on water will put access to safe drinking water out of reach for majority of Kenyans and that the tax is discriminative on grounds that other products like milk and soda are not subjected to similar tax.

10. The Petitioner also avers that the first Respondent requires that excisable goods and services be affixed with excise revenue stamps bought from the third respondent as evidence of payment of the excise tax. Further, between 2003 and 2010,the first Respondent relied on a manual system of affixing excise and revenue stamps on excisable goods that was limited to tobacco, wines, spirits and beer a system the Petitioner avers experienced rampant counterfeiting of stamps leading to under collection of taxes. He contends that as a consequence, the first and second respondents decided to implement at the expense of manufacturers and consumers an integrated control and tracking system known as the EGMS, and that the e-tax system affixes a stamp to track and trace each bottle or package coming off a production line and that the cost is passed to the manufacturers who in turn pass it to the consumers.

11. He also states that the third Respondent, a foreign company was corruptly procured, that the EGMS duplicates the work of other government agencies such as Kenya Bureau of (KBS) and the Anti-Counterfeit Agency, hence, the decision to pursue counterfeits is *ultra vires* its mandate.

12. The Petitioner also states that in June 2016, industry players under the auspices of the Kenya Private Sector Alliance (KEPSA) sought to get the National Assembly's PIC to annul the EGMS implementation on grounds that there was insufficient consultation, inappropriateness of the system for low priced excise products and lack of a valid justification for collecting stamp fees at **Ksh. 1.50** per unit. The Petitioner also states that KEPSA contended that any cost of tax compliance and administration borne by the manufacturer would be passed over in price increase of consumer goods in addition to installation and operational costs. Further, he avers that on 7th August 2016,the Kenya Association of Manufacturers (KAM) raised the concerns enumerated in paragraph **13A** of the Amended Petition among them failure to cater for needs of manufacturers, that it was not contacted prior to the introduction of EGMS, failure to address challenges raised by KAM and that the increase in revenue collection is designed to benefit the third Respondent and adds that ideally the administrative costs ought to be borne by the first Respondent.

13. The Petitioner also avers that sometimes in September 2016, the PIC asked the first Respondent not to implement the EGMS until a suitable pricing model was agreed upon with the manufacturers but not withstanding the above the first Respondent announced it will proceed with the implementation without widely consulting industry players and the general public. The Petitioner states that Tender number

KRA/HQS/06/1CB-037/2011-2012 (EGMS 11) commenced in March 2012 and concluded in December 2012.Thus, the first and third Respondents' entered into a five year contract for the supply of security printed revenue stamps, track and trace software and integrated production accounting system at a sum of Euros **42,471,464** the equivalent of **Ksh. 4,808,134,887.**

14. He also avers that vide Legal Notice **110** of 18th June 2013, the C.S. National Treasury, expanded the scope of items to be covered under the EGMS to include all excisable goods except motor vehicles manufactured into Kenya.

15. Also, he avers that on 15th May 2015, KRA Tender Committee approved the termination of the contract on grounds that it could not cover the extended scope of excisable goods provided for under the above legal notice and also the variation of the legal notice could have extended the scope of excisable goods provided for under the said legal notice could have exceeded the **25 %** threshold allowed under Section **9** of the Public Procurement Amendment Regulations, 2013. He avers as a consequent of the above, the first Respondent initiated tender number **KRA/HQS/DP-423/2014-2015 (EGMS 111)** a direct procurement involving negotiation with the third Respondent, which expanded the scope of the cancelled contract to accord with Legal Notice No. **110** of 10th June 2013. He adds that the five year contract was at a minimum sum of **Ksh. 15,909,293,482** and a maximum of **Ksh. 17,156,333,818**. Also, he avers that vide Gazette No.**12856** of **5th** September 2013, the first Respondent prescribed the price of an excise stamp to be **Ksh. 1.50**

16. He also avers that contrary to Section **5** of the Statutory Instruments Act[4] the first and second Respondents did not conduct public participation involving stakeholders including manufacturers and importers prior to issuing Legal Notice No.**110** of **18th** June 2013 and Gazette Notice no. **12856** of **5th** September 2013 nor were the legal notices presented to the National Assembly for scrutiny as required under Section **11 (1)-(4)** of the Statutory Instruments Act[5] and the repealed Section **34** of the Interpretation and General Provisions Act.[6]

17. The Petitioner also avers that the following concerns raised by the Public before the PIC and which were under active investigations by the National Assembly:-

i. Direct procurement of the third Respondent was laced with procedural illegalities;

ii. that the third Respondent was accused of corrupting tax agencies in Brazil, Albania, Morocco and the Philippines;

iii. Failure to conduct feasibility study on the impact of the EGMS to ensure mitigation measures are undertaken to shield manufacturers and consumers from any adverse effects;

iv. Implementing the tax system without conducting public participation;

v. Failure to table Gazette Notice Number 12856 of 5 September 2013 to Parliament or approval as required under Section 11 of the Statutory Instruments' Act.

18. The Petitioner also avers that the Auditor General made significant findings among them that Legal Notice Nos. **110** of **18th** June 2013 and **12856** of **5th** September 2013 were not presented to Parliament contrary to Section **11 (1)** of the Statutory Instruments Act[7] and that there was no evidence of advertisement and public participation. The Petitioner also avers that the Second Respondent erred in delegating his regulation making power to the first Respondent. He also avers that Legal Notice No. **53** of **30th** March 2017 is also void in that it was not submitted to Parliament for scrutiny and approval as the law demands.

19. As a consequence of the foregoing, the Petitioner cited violation of various Constitutional and statutory provisions and sought the following reliefs from this court:-

a. The 1st and 2nd Respondents have threatened and violated the Constitution of Kenya 2010, the Statutory Instruments Act 2013, the Fair Administrative Action Act 2015, and the Public Procurement Act 2005.

b. Parliament's suspension of the implementation by the Respondents of the Excisable Goods Management System is valid and stays in force until further directions by the National Assembly.

c. Legal Notice No. 110 of the 18thJune 2013, Gazette Notice No. 12856 of 5th September 2013, and the Legal Notice No. 53 of 30th March, 2017 are invalid, null and void and of no legal effect.

i. The standards and counterfeiting of the Excisable Goods Management System are unnecessary since they duplicate the work of the Kenya Bureau of Standards and the Anti- Counterfeit Agency, which have their own monitoring and authentication systems for fighting counterfeits and ensuring standards.

ii. The decision to impose excise duty on bottled water, fruit juices, and vegetable juices, is contrary to Article 43(1)(a), (c) and (d) of the Constitution.

iii. The decision to have manufacturers and consumers bear the administrative and compliance costs associated with the implementation and operation of the Excisable Goods Management System is unreasonable and contrary to Article 40(2) and (3) of the Constitution and, therefore, invalid, null and void.

iv. The procurement of the Excisable Goods Management System from the 3rdInterested Party was irregular, unlawful and

unconstitutional and, therefore, invalid, null and void.

v. Pursuant to Article 226(5) of the Constitution, public officers who directed or approved the use of public funds contrary to law in the procurement of the EGMS from the 3rd Respondent are liable for any loss arising from that use and shall make good the loss, whether they remain in public or not.

i. An order:-

*a..**Permanently prohibiting** the 1st, 2nd and 3rd Respondents from implementing the Excisable Goods Management System.*

***b. Quashing** Legal Notice No. 110 of 18th June 2013, Gazette Notice No. 12856 of 5th September 2013, and Legal Notice No. 53 of 30th March, 2017 for being invalid, null and void.*

***i. Quashing** the award by the Kenya Revenue Authority to the 3rd Respondent of **Tender Number KRA/HQS/DP-423/2014-2015** for the provision of the Excisable Goods Management System.*

***c. That** the costs of this suit be provided for.*

First Respondents' Replying Affidavit

20. **Mr. Caxton Masudi Ngeywo**, an officer appointed in accordance with Section **13** of the Kenya Revenue Authority Act[8] and chief manager in charge of Market Surveillance and the EGMS Project avers that excise tax is charged not only on goods that can pose harm to the consumer but also on products that can raise significant revenue, hence the introduction of the tax to the goods in question. He also stated that prior to the enactment of the Excise Duty Act,[9] water was excisable as provided under the fifth schedule to the Customs and Excise Act.[10] Also, he stated that implementation of EGMS on non-alcoholic beverages started in 2015 and it has been subjected to stakeholder engagement.

21. He further states that the issues on costs of stamps were raised during various stakeholder engagements and specifically by KAM, and it was submitted to the CS treasury and was addressed in Legal Notice No. **53** of 2017 in accordance with the recommendations of the stakeholders. Also, he averred the cost of **Ksh.0.5** was arrived at after consultations with the industry and that the petitioner has not demonstrated that the cost will affect access to water.

22. He also averred that EGMS was expected to combat illicit trade in excisable goods and arrest declining tax revenue on the items in question and to serve as proof that duty has been paid and account for production/importation and enhance tax compliance.

23. He further averred that EGMS was introduced by Section **116B** of the Customs and Excise Duty Act[11] (Repealed) and Legal Notice No. **110** of 2013. Further, he stated Section **28** of the Excise Duty Act 2015 maintained the requirements of Section **116 B** of the Repealed Act and Section **28** of the Excise Duty Act[12] and the effect of Legal Notice number **53** of 2015 was to continue implementation of the EGMS in place of Legal Notice No. **110** of 2013.

24. **Mr. Ngeywo** also stated that the first Respondent consulted representative organizations such as KAM, Alcoholic Beverages Association of Kenya and Tobacco Manufacturers and all issues of concern were addressed and the implementation schedule was agreed with the industry, and that the EGMS was to be implemented in two phases, phase one covering wines, spirits, beer and cigarettes was implemented with effect from 2013 while phase two covering the goods now affected in these proceedings was to start from 1. 11. 2017 and that phase one has improved excise duty collection to **43%** in 2015/16 from **10%** 2010/11.

25. He also averred that a public body can under justifiable reasons opt for direct procurement and that the first respondent did not violate any law in awarding the tender to the third respondent. He stated this court has no jurisdiction to hear public procurement matters which fall under the Procurement Administrative Review Board.

26. **Mr. Ngeywo**, also stated that Legal Notice No.**53** of 2017 was properly tabled before the National Assembly as per the provisions of the Statutory Instruments Act[13] and that the first Respondent engaged the public in various forums. Lastly, he averred the Auditor General endorsed the implementation of the EGMS.

Second Respondents' Grounds of opposition & Replying Affidavit

27. The second Respondent filed grounds stating that:- **(i)** *the Petitioner has not demonstrated violation of the constitution and the Statutory instruments Act;**[14]* **(ii)** *the Regulations were tabled before National Assembly in accordance with standing order number **210** and Section **12** of the Statutory Instruments Act;**[15]* **(iii)** *the National Assembly Delegated Legislation Committee did not make adverse report on the impugned Regulations;* **(iv)** *the Regulations do not fall within the purview of the mandate of the PIC;* **(v)** *the Auditor General's Report is subject to Parliamentary approval;* **(vi)** *and the Petition is premature.*

28. **Mr.Henry Rotich**, the C.S. The National Treasury, averred that the legislative proposals were forwarded to the National Assembly vide a letter dated **11th** April 2017, that they were tabled before the National Assembly on **10th** May 2017. He avers that the same were referred to the relevant house Committee which invited him for a meeting, but due to his other official engagements, the meeting was postponed, but ultimately did not take place. Hence, he avers, by dint of operation of the law, in absence of a report by the Committee, the instrument is deemed to be in conformity with the law. He avers the Regulations were legally promulgated.

Third Respondents' Replying Affidavit

29. **Mr. Benedict Sapin**, the third Respondent's regional counsel swore the Affidavit filed on **18th** December 2017. He avers that the third Respondent is an international company of repute, with expertise in high technology security inks and security features that protect the majority of the world's banknotes, security and value documents from the threat of counterfeiting and fraud and that the company's expertise includes identification and verification systems designed for an integrated approach to identify border control and sophisticated technologies to tackle problems related to illicit trade.

30. He also avers that the company participated in tender No. **KRA/HQS/060/2010-2011 (EGMS 1),** won and was duly awarded the tender. Also, he avers that the company was awarded the contract for installation of EGMS system under tender number **KRA/HQS/060/KB-037/2011-2012** and it was awarded both tenders upon meeting the conditions set out in the tender. He denied that the process was tainted with illegalities.

Petitioners' supplementary affidavit

31. In a supplementary affidavit filed on **31st** January 2018, the Petitioner insisted that the changes in the legislation do not affect the sub-strum of the petition, and that the Regulations violated constitutional provisions and provisions of the Fair Administrative Action Act [16] and that the decision to charge excise duty on water violates Article **43 (1) (d)** of the constitution.

Issues for determination

32. I find that the following issues fall for determination, namely:-

i. Whether the Court is divested of jurisdiction under the doctrine of exhaustion of remedies.

ii. Whether there was adequate public participation in the enactment of the impugned Gazette notices and in the decision to acquire and implement the EGMS.

iii. Whether the first Respondent violated the law governing direct procurement in awarding the tender to the third Respondent.

iv. Whether the impugned legal instruments are null and void on grounds that they were enacted in a manner that violated the constitution and/or the Statutory Instruments Act.

*v. Whether the imposition of the tax creates an unfair tax burden on the public and the manufacturers and or whether it offends Article **43 (1) (a),(c), & (d)** rights.*

vi. Whether the EGMS system it duplicates functions of KBS and the Anti-Counterfeit Agency.

vii. Whether the Petitioner is guilty of material non-disclosure.

Whether the Court is divested of jurisdiction under the doctrine of exhaustion of remedies.

33. The question here is whether the Petitioner ought, first, to have filed his grievance before the **Public Procurement Administrative Review Board.**

34. Counsel for the first Respondent submitted that the petitioners first port of call ought to have been the Public Procurement Administrative Review Board. He argued that where there exists a procedure for redress of any grievance, that procedure ought to be followed under the doctrine of exhaustion. To fortify his arguments, he cited *Speaker of National Assembly vs Karume*[17] and *Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others*.[18] He argued that since the Petitioners had failed to follow procedures laid out by statute with regard to procurement processes, and it was improper to invoke the court's jurisdiction to question either the procedural propriety or substantive merits of the procurement process.[19]

35. In support of the same argument, counsels for the second and third Respondents cited the doctrine of exhaustion and argued that this court's jurisdiction has been prematurely invoked.

36. The Petitioner argued that this court has jurisdiction to entertain cases were violation of the Constitution is raised. He cited *Erick Okeyo vs County Government of Kisumu & 2 Others*[20]where the High Court assumed jurisdiction in a Petition filed by a member of the Public in public interest to challenge public procurement process that violated Article **10** and **227 (1)** of the Constitution[21]and urged the court to protect rights under Article **48.**

37. A similar objection was raised in *Republic vs Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others**[22]*** where a bench comprising of myself and two other judges of this court extensively addressed the same subject. It is necessary to mention that even though decision was appealed against, the finding on jurisdiction was not challenged. Because of its relevancy to the issue under consideration, I will quote extensively from the said decision.

***41.** The issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The Court must decide whether to review the agency's*

action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.

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

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

43. *While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court of Appeal stated that:-*

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

45.*We have read these cases carefully and considered the salutary decisional rule of law they announce. It is important to pay attention to the rationale and policy justification for the doctrine in order to determine its outer limits. As the High Court announced in the In the Matter of the Mui Coal Basin Local Community [2015] eKLR, the rationale is thus:*

> *The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system. The dispute resolution mechanism provided under the Public Procurement and Disposal Act represents the first category of dispute resolution mechanism created under a statute envisaged by the Constitution while the procedures by the Commission on the Administration of Justice established under Article 59(4) of the Constitution would represent the latter category.*

46. *What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the* ***Shikara Limited Case (supra)****, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.*

47. *This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. …*

48. *This approach … is same one suggested by the Court of Appeal in R vs National Environmental Management Authority [2011] eKLR where the Court explained that:*

> *The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it….*

49. *Additionally, this Court, in* ***Misc App No. 637 of 2016*** *…, held that a person who feels that a public procurement does not meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness under Article 227 of the Constitution, and who has no other recourse known to law,… must in our view find recourse in the High Court which is the Court entrusted under Article 165(2)(d) with the mandate of hearing any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. In our view, to bar a person from carrying out his constitutional obligation and mandate of upholding and defending the Constitution would amount to abdication by this Court of one of its core mandate under Article 165(2)(d) of the Constitution. This was the view of the Court of Appeal in Al Ghurair Printing and Publishing LLC vs. Coalition for Reforms and Democracy & 2 others [2017] eKLR in which Musinga, JA relied on Communications Commission of Kenya & 5 Others [2014] eKLR, Anisminic vs. Foreign Compensation Commission [1969] 2 AC 147 and Habre International Co. Ltd vs. Kassam and Others [1999] 1 E.A. 125 and opined that:*

> *"In our view, if the 1st Respondent's application had been filed under the provisions of PPAD Act only, simply challenging the decision by the Review Board and no more, then perhaps the 1st respondent would qualify to be referred to as an "aggrieved party". However, the Board and IEBC acknowledged that some of the issues raised by the 1st Respondent were outside the jurisdiction of the Review Board. Only the High Court was able to determine them…The mode of procurement of public goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, perhaps out of the realization that huge amounts of public resources are spent in procuring goods and services."*

50. *The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.*

51. *Firstly, section 165(1) of the PPAD Act provides that the persons who may seek administrative review are a candidate or a tenderer, 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. Section 2 of PPAD Act defines a "candidate" as meaning "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" while a "tenderer" is defined by the same section as meaning "a person who submitted a tender pursuant to an invitation by a public entity". As the subject of this application was a direct procurement, clearly the Applicant did not fit the definition of either a "candidate" or a "tenderer" and therefore could not seek administrative review. It follows that the alternative remedy of making a request for review was unavailable to the Applicant in this case.*

52. *We agree with the decision in Misc. Application No. 637 of 2016 – Republic vs. Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reform and Democracy that where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. We are therefore of the view that the alternative remedy provided under the PPAD Act would be a mirage in so far as the Applicant is concerned. In those circumstances the provisions of section 174 of the PPAD Act comes into play. The said provision provides that the right to request a review under the Act is in addition to any other legal remedy a person may have.*

53. *It follows that a person who is not competent to request for review, has an avenue of other legal remedies including an application for judicial review and constitutional petition. In our view a person who would otherwise be locked out from invoking the provisions of the PPAD Act is not barred from seeking alternative remedy under other provisions of the law. Indeed, this was the position adopted by this Court in Elias Mwangi Mugwe vs. Public Procurement Administrative Review Board & 5 Others [2016] eKLR where the Court explicitly expressed itself thus:"…any person who has no automatic right to participate in the review proceedings may properly resort to other available modes of ventilating his rights."*

54. *Therefore, looking at our case law on the doctrine of exhaustion, the statutory schema provided under the PPAD Act and especially the wordings on which parties have a right to file a review application thereunder; the public interest involved and the polycentricity of the issues involved in this case, we find that the suit is properly filed before the Court. We do so on the basis of two mutually reinforcing grounds: First that Applicant who had valid concerns regarding the impugned tender process was **not** an "aggrieved party" within the meaning of section 174 of PPAD and could therefore not invoke the jurisdiction of the Review Board suo motto to ventilate its concerns. Hence, the only avenue open to the Applicant was to approach the Court. This situation needs to be contradistinguished from the position in R v IEBC & Another Ex Parte Coalition for Reform and Democracy & 2 Others Misc. Application No. 637 of 2016 – the earlier case that is related to the present dispute. In that earlier case, the Ex Parte Applicant had been able to gain audience at the Review Board as an Interested Party only because an aggrieved party within the meaning of PPAD had appropriately invoked the jurisdiction of the Review Board.*

55. *The second reason we have concluded that the suit is properly filed before us is based on our analysis of the case, context and circumstances of the case. We are persuaded that the Application raises issues that are centrally outside the application of PPAD Act and which are bequeathed to the High Court namely the proper interpretation and application of certain Articles in the Constitution and how they intersect with the PPAD Act. As the Public Procurement Administrative Review Board stated in the **Ex Parte Cord Case**, these are issues that are outside its mandate and which, therefore, have to be raised before the High Court.*

38. The above excerpt addresses the issue under consideration fully. I can only adopt it. Section **165(1)** of the PPAD Act provides that the persons who may seek administrative review are a candidate or a tenderer, 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 the Act or the Regulations. Section **2** of the Act defines a "candidate" as meaning "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" while a "tenderer" is defined by the same section as meaning "a person who submitted a tender pursuant to an invitation by a public entity." The Petitioner does not fall under the above categories and therefore could not seek administrative review before the Board. It follows that the alternative remedy of making a request for review was unavailable to the Petitioner in this case.

39. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. The alternative remedy provided under the PPAD Act would be a mirage in so far as the Petitioner herein is concerned. In the circumstances the provisions of Section **174** of the PPAD Act which provides that the right to request a review under the Act is in addition to any other legal remedy a person may have comes into play.

Whether there was adequate public participation in the enactment of the impugned Gazette notices and in the decision to acquire and implement the EGMS.

40.The petitioner submitted that Kenyan courts have severally held that public participation[23] is a mandatory pre-condition to administrative action[24]and that it is not a mere venture or a public relations exercise but a constitutional and legal imperative. He submitted that the first and second Respondents have not demonstrated that there was sufficient public participation in the decision to acquire and implement the EGMS.

41. Counsel for the first Respondent submitted that members of the public were invited for consultations on **19th** October 2017 and **27th** October 2017. Key among them was KAM who made representations which were taken to the CS and were considered. He relied on the attendance sheets **marked CNN 7 & 3**. He further submitted these two were preceded by various stakeholder forums, hence he submitted there was adequate public participation. To buttress their argument, he cited *R vs IEBC ex parte NASA*[25]and argued that the parameters of what constitutes public participation are not cast on stone[26]and argued that the first Respondent met the constitutional threshold.

42. Counsel for the second Respondent argued that there was sufficient public participation. Citing local[27] and foreign decisions, he argued that all that the court is required to do is to interrogate the entire process to determine whether there was adequate public participation.

43. Counsel for the first Respondent submitted that members of the public were invited for consultations on **19th** October 2017 and **27th** October 2017, and that KAM made representations which are said to have been taken to the CS and are said have been considered. He submitted the meetings were preceded by various stakeholder forums.

44. The **C. S. Mr. Henry Rotich's** affidavit essentially addressed compliance with the Statutory Instruments Act[28] but insisted that the Regulations were legally promulgated.

45. The Petitioners' argument that there was no public participation is premised on a bundle of documents annexed to his Supporting Affidavit. These include:-

> *i. The June 2017 "Special Audit Report of the Auditor-General on Tender For Exercisable Goods Management (EGMS) System for Printing, Supply, and Delivery of Security Revenue Stamps Complete with Track and Trace System, and an Integrated Production Accounting System." Pages 33-69*
>
> *ii. Exit Report of the Eleventh Parliament's Investments Committee (May 2013 to June 2017).*
>
> *iii. Memorandum on the Consequences of Excisable Goods Management System (EGMS) to the Manufacturers in Kenya by Kenya Association of Manufacturers' on 7 August 2016.*

46. Relevant to the issue under consideration is the observations by the Auditor General in the above report that there was no consultation between KRA and National Treasury on one hand and the Manufacturers and importers on the other hand prior to the implementation and before issuing the statutory instrument contrary to Section **5** of the Statutory Instruments Act.[29]

47. In its Memorandum presented to the PIC of the National Assembly, KAM stated that the association was not involved during the introduction of the system and that challenges identified were never addressed. It is important to mention that the attendance sheet annexed to the Replying Affidavit of **Ngeywo** are dated **20**th November 2015 and **6th** October 2015 respectively while the documents in support of engagement with non-alcoholic sector are dated **11th** February 2016. The Memorandum by KAM is dated **7th** August 2017.

48. The second Respondent dismissed the Auditor-General's Report as not "applicable" arguing that the lawfully mandated person to address the issue is the Clerk to the National Assembly, and that the said report is subject to approval by the National Assembly and argued that the report has never been adopted by the National Assembly.

49. In a recent decision of this court, I observed that "my analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government."[30] Both local and foreign jurisprudence are awash with decisions holding that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.[31]

50. The question that follows is, is whether the first Respondent undertook public participation that in any meaningful sense meets the threshold appropriate for public participation. Differently put, what was the threshold for public participation which would have been appropriate for this exercise? Justice Sachs in the South African case of *Minister of Health and Another vs New Clicks South Africa(Pty) Ltd and Others**[32]*** at para. 630, noted that *"... What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*

51. In the ***Mui Basin Case**[33]* a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and culled the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:-

*a) **First,** it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in*

their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

*b) **Second**, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

*c) **Third,** whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See **Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya** (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

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

> *d) **Fourth**, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*

> *e) **Fifth**, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

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

52. There are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In the *Doctors for life case*,[34] the court went on to hold that "in determining whether there was public participation in any particular case, the Court will consider what has been done in that case. The question will be whether what has been done is reasonable in all the circumstances.

53. When legislation enacted by Parliament or subsidiary legislation enacted pursuant to delegated powers is challenged on the grounds that it was not adopted in accordance with the provisions of the Constitution, courts have to consider whether in enacting the law in question Parliament or the person exercising delegated authority gave effect to their constitutional obligations.

54. The primary duty of the courts is to uphold the Constitution and the law "which they must apply impartially and without fear, favour or prejudice."[35] What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament or the person exercising delegated legislative powers is required to fulfil.

55. Article **10 (1)** of the constitution provides that "The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them— *(a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions*.

56. Sub-article **(2) (a)** and **(c)** provides that "The national values and principles of governance include— **(*a*)** patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; **(*c*)** good governance, integrity, transparency and accountability. Article **10** expressly provides that public participation is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

57. Kenyans were very clear in their intentions when they entrenched Article **10** in the Constitution.[36] They were singularly desirous of insisting on certain minimum values and principles to be met in constitutional, legal and policy framework and therefore intended that Article **10** be enforced in the spirit in which they included it in the Constitution. It follows, therefore, that all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions must adhere to Article **10** of the Constitution. In order to justify their exclusion in matters falling under Article **10**, the burden is indeed heavy on the person desiring to do so considering that Article **10** is one of the provisions protected under Article **255** of the Constitution whose amendment can only be achieved by way of a referendum.

58. The essence of public participation was captured in the case of ***Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 Others***,[37] in the following terms:-

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

59. Considering the above Constitutional and statutory dictates, I expressly find that public participation must apply to enactment of all legislations and policy decisions though the degree and form of such participation will depend on the peculiar circumstances of the case.

60. Legal Notice Number **110** of 2013 was repealed by Legal Notice No. **53** of 2017. However, I must point out that there is no evidence that the repealed Legal Notice and Gazette Notice Number **12856** were subjected to public participation. To that extent, the Repealed legal Notice and Gazette Notice number **12856** were not enacted in a manner consistent with the Constitution and therefore cannot be said to have been valid. It follows that any decisions taken pursuant to the said legal notice and Gazette notice cannot be said to be valid.

61. On the constitutionality or legality of Legal Notice Number **53** of 2017 I must point out that when the constitutionality of legislation or process leading to enactment of a legislation is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[38] the impugned legislation or the enactment process is capable of being read in a manner that is constitutionally compliant.

62. Annexure **CMN 5** to the Affidavit of **Mr. Ngeywo** are attendance sheets dated **20th** November 2015 and **6th** October 2015 respectively. Annexure **CMN 6** to the same affidavit is a report on by KRA. Paragraph three of the report refers to meetings held on **10**th May 2016 and 17th May 2016. The issues allegedly discussed as per the said document are costs and exports. There is no mention of the intended Legal Notice Number **53** of 2017 and the regulations stated therein.

63. Further, documents in support of engagement with non-alcoholic sector beverages are dated **11**th February 2016. The memorandum by KAM to the PIC is dated **7th** August 2016. The C.S. Henry Rotich at paragraph 22 of his affidavit states that adequate public consultations were undertaken. No details are provided on the nature and extent of the consultations. In particular, no details have been provided that prior to promulgating the Legal Notice, stakeholders were engaged. KAM denies having been engaged in the consultations.

64. **I have considered the nature of the legislation in question, its effect on the manufacturers and the public. The nature and impact of the Legal Notice undoubtedly plays a key role in determining the degree of public participation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. The goal of the Legal Notice is to impose a tax burden upon certain products. There is a financial cost element created by this burden. The burden will be borne by manufacturers who state that it will inevitably be passed to the consumers. There is no mention that the general public who are the consumers were consulted at any stage.**

65. **It is not enough to rely on attendance sheets for two meetings attended by a few persons with no supporting minutes to help the court to appreciate the nature and crux of the discussions. More fundamental is the fact that the alleged meetings took place in Nairobi, yet the impugned legislation affects the citizens of Kenya. In crafting a meaningful public participation program, the decision make should deliberately as much as possible design the program to reach a reasonably wide population in the country. Two board meetings held in Nairobi, (one county out of forty-seven counties) cannot be said to be adequate, nor can it be safely assumed to have reached Kenyans in all the counties in the Republic. The rationale for holding such meeting in Nairobi is highly questionable. The taxation burden will affect the entire Republic, and it cannot be imposed on the citizens yet they were totally excluded from the process.**

66. **What matters is whether the first Respondent acted reasonably in the manner it facilitated public involvement in the particular circumstances of this case. The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. Taxation or any legislation or policy that creates a financial burden upon citizens must as of necessity be subjected adequate public participation wide enough to cover a reasonably high percentage of population in the country. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Respondents to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.**[39] **In the circumstances of this case and applying the above considerations, the conclusion becomes irresistible that there was absolutely in adequate public participation prior to the promulgation of the impugned Legal Notice.**

Whether the first Respondent violated the law governing direct procurement in awarding the tender to the third Respondent

67. The Petitioner submitted that the first Respondent abused the law on direct procurement by irregularly acquiring the EGMS from the third Respondent and that the system was implemented in a manner inconsistent with Article **10, 11, 47, 129,153 (4) (a),201 (a)** and **232 (1) (d)** of the Constitution. He submitted that the direct procurement was invalid, null and void *ab initio* because the direct tender locked out other firms that would have participated had the tender been open, and invited the court to hold the public officers personally liable. He urged the court to bar the respondents from implementing the EGMS for the above grounds and added that it violated the Petitioners right to legitimate expectation.

68. Counsel for the first Petitioner submitted that the tender process was competitively floated, and the third Respondent was awarded having met the conditions. He also submitted that in **2014/15,** tender ref: **KRA/HQS/DP-423/2014-2015** was made as a direct procurement owing to the presence and existing platform for the system from tender **KRA/HQS/ICB-037/2011-2012** because the work to be done was an extension of the previous work. This, counsel submitted, was in accordance with Section **103 (2) (d)** of the Public Procurement and Asset Disposal Act[40]

69. Counsel for the third Respondent submitted that there was no dispute that the third Respondent had a valid contract and maintained that there was adequate public participation.

70. To appreciate the entire process so as to determine whether or not the applicable tests for direct procurement discussed below were satisfied, it is imperative to trace the history of the process as captured in the Auditor-General's Report at the following paragraphs:-

1.4.4 *Procurement of EGMS commenced in the year 2010 and was done at three levels as noted below:*

1.4.5 *The first procurement, tender number, KRA/HQS/060/2010-2011 (EGMS 1) commenced in August 2010 when expression of interest was advertised by KRA. Tenders were subsequently issued in June 2011 where SICPA Security Solutions SA emerged as the only qualifying bidder.*

1.4.5 *The special audit established a case where the then Deputy-Commissioner, Procurement and Supplies Services interfered with the independence of the Evaluation Committee by issuing a memo to the Chairman of the Evaluation Committee requesting a review of EOI evaluation report "to eliminate the aspect of digital solutions" with an aim to increase the number of potential applicants. This raised doubt on the objectivity of the evaluation report.*

1.4.7 *Further, the action by the then Deputy-Commissioner, Procurement and Supplies Services to alter the EOI tender by eliminating the aspect of digital solutions amounted to change of substance of a tender contrary to Section 59 (3) of PPDA,2005 that prohibits procuring entities from attempting to have the substance of a tender changed after the deadline of submitting tenders.*

1.4.8 *The tender was thereafter terminated in September 2011 due to budgetary limitations, an indication that KRA commenced the procurement process without confirming that sufficient funds were available contrary to Section 26 (6) of the PPDA, 2005, that prohibits procuring entities from commencing any procurement procedure until it is satisfied that sufficient funds have been allocated for such purpose.*

1.4.9 *The second procurement (EGMS 11) tender number KRA/HQS/ICB-037/2011-2012 commenced through an International Competitive Bidding process in March 2012.The tender process concluded in December 2012 with the award of the contract to SICPA Security Solution SA.*

1.4.10 *Consequently, KRA and SICPA Security Solution SA entered into contract for supply of Security Printed Revenue Stamps, Track and Trace Software Solution and Integrated Production Accounting System for a period of five years at a contract sum of Euros* ***42,471,464*** *the equivalent of* ***Ksh. 4,808,134,887***

1.4.11 *On 18 June 2013, the Cabinet Secretary in charge of the National Treasury issued Legal Notice number 110 (L.N. 110) that expanded the scope of items to be covered under the EGMS to include all exercisable goods except motor vehicles manufactured in or imported into Kenya.*

1.4.12 *On 15 May 2015,the KRA Tender Committee approved the termination of the contract between KRA and SICPA Security Solution SA, on the premise that the contract could not cover the extended scope of excisable goods provided for under L.N. 110 of 18 June 2013.Variation of the existing contract could have exceeded the twenty-five (25) percent threshold allowed under Section 9 of the Public Procurement Amendment Rgulations,2013*

1.4.13 *Consequently, KRA initiated the third procurement (EGMS 111) tender number KRA/HQS/DP/423/2014-2015 as a direct procurement involving negotiation with SICPA Security Solutions SA.*

1.4.14 *The negotiations sought to expand the scope of the contract awarded in December 2012 (EGMS) to include additional items introduced by the Cabinet Secretary in charge of the National Treasury vide Legal Notice 110 of 18 June 2013.Legal Notice 110 of 2013 required every package of the excisable goods except motor vehicle, manufactured in or imported into the country be affixed with excise stamp.*

1.4.15 *The negotiations culminated into a contract between KRA and SICPA Security Solutions SA for supply of the EGMS at a contract sum of a minimum* ***Kshs. 15,909,293,482*** *and a maximum of* ***Kshs. 17,156,333,818*** *(depending on number of orders made by KRA) for a period of five (5) years.*

71. From the above history, it is clear that the tender under challenge was actually the third one but not the second as indicated by the first and second Respondents. Secondly, the first two tenders were terminated for reasons stated in the above report. Of significance to this determination is the finding by the Auditor-General that the tender committee terminated the second contract on the premise that the contract

could not cover the extended scope of excisable goods provided for under Legal Notice No. **110** of **18th** June 2013. Further, it was the committees finding that variation of the contract could have exceeded the **25%** threshold allowed under Section **9** of the public Procurement Amendment Regulations, 2015. The foregoing information casts doubts on the assertion by the first and second Respondents that the contract awarded to the third Respondents was "an extension of previous work done."

72. Section **3** of the PPAD Act[41] provides that public procurement and asset disposal by State organs and public entities shall be guided by the values and principles of the Constitution and relevant legislation and proceeds to expressly identify the national values and principles provided for under Article **10**.

73. Courts have severally held that public participation is not a mere cosmetic venture or a public relations exercise. This is more so where what is sought to be undertaken is a direct procurement in which case Section **103(1)** of the PPAD Act[42] allows direct procurement only where that method is not resorted to for the purpose of avoiding competition. The Respondents were under a duty to demonstrate to the court that there were no other interested competitors and that the direct procurement was not resorted to avoid competition. This must be so since Article **227(1)** of the Constitution requires that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Transparency, competitiveness and cost effectiveness are at the core of a procurement process and must be infused in any process of procurement with the degree depending on the nature of the procurement in question. These principles cannot be ignored as being inconsequential.

74. Article **227** empowered Parliament to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented. In the exercise of that power Parliament enacted the PPAD Act[43] under which section **3(a)** mandatorily decrees that Public procurement and asset disposal by State organs and public entities be guided by *inter alia* the national values and principles provided for under Article **10.** Therefore whether one looks at the issue from the constitutional point of view or from a statutory angle, the values and principles of national governance must guide any public procurement and asset disposal by State organs and public entities.

75. It is important to point out that in its wisdom, Parliament imposed restrictions on circumstances under which direct procurement may be undertaken. The first caveat is to be found in Section **103 (1)** which provides *"A procuring entity may use direct procurement as allowed under sub-section **(2)** as long as the purpose is not to avoid competition."* It is therefore a legal imperative that the burden for the first Respondent to discharge in this case was to demonstrate to the court that they were not avoiding competition or that there were no other interested bidders or candidates. This is a statutory dictate that must be demonstrated.

76. The second test to be satisfied is provided under Section **103 (2)** which provides that:-

> *"**A procuring entity may use direct procurement if any of the following are satisfied—***
>
> *(a) the goods, works or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists;*
>
> *(b) due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;*
>
> *(c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;*
>
> *(d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;*
>
> *(e) for the acquiring of goods, works or services provided by a public entity provided that the acquisition price is fair and reasonable and compares well with known prices of goods, works or services in the circumstances.*

77. The first respondent sought refuge in Sub-Section **(2) (d)** above. A close look at the said sub-section leaves no doubt that the key elements stipulated therein must be proved for a party to find refuge in the said provision. These are ***(i)*** *the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or***,*** ***(ii)*** *because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement***, *** ***(iii)*** *the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;*

78. From the report by the Auditor General, I find that it cannot be said with some degree of certainty that the direct procurement was an extension of the previous contract that was terminated. The position is complicated by the fact that neither of the Respondents deemed it fit to avail the contract document(s) at least to justify their allegation that indeed the contract was an extension of the previous contract and therefore met the requirements under sub-section **(d)** above. Such documents could have demonstrated the goods or services procured, the terms of the contract, its relationship with the previous contract, the nature of the goods or services supplied and whether the test of standardization prescribed in the above provision or any of the tests under sub-section **(d)** above applies. Absence of such crucial documents gives weight to the assertions by the Petitioner that indeed the direct procurement was undertaken in violation of the law. There is no evidence that the guidelines set out in Section **102 (1) & (2)** were satisfied in this case.

79. It is my view that since direct procurement method, which was the method adopted herein, was a restriction on the scope of the application of the principle of competitiveness and as the law expressly bars the adoption of such a method if the intention is to defeat competition, before such a method is adopted, the procuring entity must involve the public in its decision to opt for direct procurement. I must point out that direct procurement does not necessarily violate the constitutional requirement of competitiveness as long as the constitutional and statutory threshold is met in the process and proper procedures are followed.

80. It is therefore my finding that a proper analysis of applicable Articles of the Constitution including Articles **10, 201** and **227** as well as the provisions of the PPAD Act[44] including Sections **3** and **103 (1) & (2)** thereof lead to the conclusion that the first Respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process of tendering the subject of this Petition. Further, the first Respondent was obliged to ensure that the direct procurement met the strict statutory requirements of any of the requirements of Section **103 (2) (a)** to **(e).**

81. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.[45] There is nothing in the evidence before me to demonstrate that the omission to undertake public participation was justifiable or necessary. It is therefore my conclusion that the first Respondent has not demonstrated that the direct procurement and the resultant award of the tender to the third Respondent satisfied the tests prescribed under Section **102 (1) & (2)** of the Act discussed above.

82. I will now turn to the next issue, i.e. the legality of the statutory instruments under challenge.

Whether the impugned legal instruments are null and void on grounds that they were enacted in a manner that violated the constitution and/or the Statutory Instruments Act

83. The Petitioner challenged the validity of the impugned legal instruments on grounds that they were enacted in disregard of Articles **10, 47, 129, 153 (4) (a), 201 (a) and (1) (d)** and Sections **4, 5, 6, 7** and **8** of the Statutory Instruments Act[46] and Sections **3, 4, 5** of the Fair Administrative Action Act.[47] In particular, the Petitioner argued that they were enacted without public consultations[48] which requires persons likely to be affected to be consulted and sets out the process and the minimum threshold to be met.

84. The Petitioner also submitted that the Regulatory Impact Statements were not prepared as required under Section **6** of the Statutory Instruments Act.[49] Further, he submitted that there was no Parliamentary Scrutiny of the Statutory Instruments contrary to Section **11(4)** of the Act,[50] hence the initial implementation and the second phase were void *ab initio.* Further, the Petitioner submitted that the power to make subsidiary legislation was delegated to the second Respondent who irregularly sub-delegated some power to the first Respondent in violation of the maxim *delegatus delegare non potest*.

85. Counsel for the first Respondent acknowledged that Section **5 (1)** of the Statutory Instruments Act[51] requires regulation making authority to conduct appropriate consultations with the persons who are likely to be affected by the proposed instrument. He cited the *Mui Basin case* and argued that the first Respondent consulted players in the industry and argued that the issues raised were resolved. He further submitted that there was no evidence that the first Respondent acted outside its statutory mandate and urged the court to guard against the distortion or manipulation of the constitutional rights regime.[52]Counsel also submitted that the impugned regulations were forwarded to the National Assembly for consideration by the committee on Delegated Legislation and were subsequently tabled in the National Assembly and considered. In any event, he argued, Legal Notice No. **110** of 2013 was revoked by Legal Notice No. **53** of 2017 hence, the challenge before the court is a mere academic exercise.

86. Counsel for the second Respondent submitted that Legal Notice No. **110** of 2013 was enacted pursuant to the provisions of Section **234** of the Customs and Excise Act (Repealed) by the Excise Duty Act,[53] and by dint of Section **46** of the Excise Duty Act,[54] he submitted that the said Legal Notice stood repealed pursuant to the enactment of Legal Notice No.**53** of 2017, hence the argument on the legality of Legal Notice No. **110** of 2017 is an academic exercise.[55]

87. Counsel also submitted that the second Respondent acted strictly in accordance with the Constitution, the Public Finance Management Act,[56] the Excise Duty Act[57] and the Statutory Instruments Act[58] and argued that the regulations were forwarded to Parliament as required, hence the legal notice is constitutional.[59] He argued that it is a serious legal and constitutional step to suspend the operations of statutory provisions because every statute enjoys a presumption of constitutionality[60]and that the court ought to consider the objects and purpose of the legislation.[61] He also urged the court to consider public interest.

88. Indisputably, there exists a presumption as regards constitutionality of a statute. The Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles.[62] But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its limits. The question now for determination is whether or not the Petitioner has demonstrated the unconstitutionality or illegality of the Legal notices.

89. Article **94 (5)** of the Constitution precludes all other persons or bodies, other than Parliament from making provisions having the force of law in Kenya except under authority conferred by the Constitution or delegated by the legislature through a statute. The National Assembly may, therefore delegate to any person or body the power to make subsidiary legislation, which require approval of the House before having the force of law. Subsidiary legislation made by persons or bodies other than Parliament are commonly known as Statutory Instruments.[63]

90. Section **2** of the Statutory Instruments Act[64] and the Standing Orders of the respective Houses define Statutory Instrument as **"** *any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."*

91. Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, e.g. a Commission, authority or a Board. Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act,[65] The Parent Act, The Statutory

Instruments Act[66] in that the Act requires:- **(a)** Consultation with stakeholders, **(b)** preparation of regulatory Impact Statement,[67] preparation of explanation memorandum, tabling of statutory instrument in the House,[68] consideration of the statutory instrument by the National Assembly,[69] Committee on Delegated Legislation.

92. Section **13** of the Act provides for guidelines for the committee. These guidelines focus on the principles of good governance; the Rule of Law and the Committee considers whether the Statutory Instrument conforms with the Constitution; the parent Act or other written laws; whether it infringes the Bill of Rights or contains a matter that ought to be dealt with by an act of Parliament, and whether it contains taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the Consolidated Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights liberties or obligations unduly dependent upon non-reviewable decisions; makes rights liberties or obligations unduly dependent insufficiently defined administrative powers; inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to parliamentary scrutiny; and accords to any other reason that the Committee considers fit to examine. The criteria set out in Section **13** is replicated in standing Order number **210 (3)** on the procedure for considering statutory instruments.

93. Section **15 (2)** of the act provides that where the Committee of Delegated Legislation does not table its report within **28** days following the date of referral of the Statutory Instrument or such other period as the House may, by a resolution approve, the statutory instrument shall be deemed to have fully met the relevant considerations referred to in Section **13.**

94. Responding to this issue on behalf of the first Respondent is the affidavit of **Mr. Ngeywo** referred to earlier. He avers that Legal Notice No.**53** of 2017 was properly tabled before the National Assembly as per the provisions of the Statutory Instruments Act.[70]Annexed to his affidavit in support of the said averment is annexure **CMN 6 A.** He also averred that the first Respondent engaged the public in various forums and that the Auditor General endorsed the implementation of the EGMS as shown by annexure **CMN 8.**

95. Addressing the same issue **Mr. Henry Rotich**, the C.S., National Treasury in his Replying Affidavit avers *inter alia* that in compliance with the Statutory Instruments Act,[71] the National Treasury prepared the relevant legislative proposals relating to the budget statement for **FY 2017/2018** relating to taxes and duties, which provisions had become effective on **3rd** April 2017 pursuant to the Provisional Collection of Taxes and Duties Act.[72] He exhibited a letter dated **11th** April 2017 forwarding the proposals to the National Assembly and a letter from the National Assembly acknowledging receipt of the same from the Clerk of the National Assembly. The letter shows that the National Assembly referred it to the committee on delegated legislation for consideration. He also avers that the committee invited him for a meeting which did not take place due to his other commitments. He further avers that the meeting never took place due to his other engagements. More fundamental is his averment that the committee did not make a report on the issue as provided under Section **15 (2)** discussed above, hence, he avers that where the committee does not make a report, the same is deemed to have satisfied the relevant statutory provisions.

96. It was a constitutional and statutory imperative that sufficient public participation be undertaken prior to enacting the Legal Notice No. **53** of 2017 and prior to implementation of the system. The first Respondent has annexed attendance sheets showing some consultations were held on **27th** October 2017 and **19th** October 2017. As earlier pointed out, minutes of the meetings would have gone a long way to shed light on the nature and extent of the consultations to enable the court to appreciate the nature, adequacy or otherwise or the consultations. As mentioned earlier, in determining the adequacy of public participation, the court is entitled to examine the nature and scope of the legislation, its impact on the citizens, the people likely to be affected and the method of public participation adopted.

97. While this court cannot prescribe the methods to be adopted, all that it is required to do is to determine the reasonableness of the method adopted taking into account relevant factors such as discussed above.*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*[73]

98. The impact of the Legal Notice is impose a tax burden upon the citizens, in this case the consumers of the products since the tax burden will inevitably affect the prices. As pointed out earlier, it was necessary to widen the public participation to include the public who are the consumers. Two meetings with a few people in Nairobi are in my view not resonable. Absence of minutes of the said meetings makes it difficult for the court to determine the extent and scope of the consultation. As stated earlier, the two meetings were held at a Boardroom in Nairobi. There is no evidence that any meeting took place in the remaining **46** counties in the Republic of Kenya, yet the impact of the Legal Notice will affect all the citizens of Kenya

99. It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid. This Court not only has a right but also has a duty to ensure that the law-making process prescribed by the Constitution is observed. And if the conditions for law-making processes have not been complied with, it has the duty to say so and declare the resulting statute invalid.[74] Accordingly, I find and hold that Legal Notice No.**53** of 2017 was adopted in a manner inconsistent with the constitutional and statutory requirements that prescribe public participation.

100. The argument that the Committee on Delegated Legislation never made a report within **28** days and therefore the instrument is to be deemed to have complied with the statutory provisions can only hold sway where all the statutory and constitutional provisions were adhered to. The moment violation of the Constitution or breach of the statutory requirements becomes evident as in this case, such a rebuttable presumption cannot be held to stand, and the court will be constitutionally bound to find, as I hereby do, that Legal Notice Number **53** of 2017 was enacted in manner that violated the Constitution and the Statutory Instruments Act.[75]

101. I now address the next issue on whether the imposition of the tax creates an unfair tax burden on the public and whether it offends

Article 43 (1) (a), (c) & (d) Rights.

Whether the imposition of the tax creates an unfair tax burden on the public and the manufacturers and or whether it offends Article 43 (1) (a),(c), & (d) rights.

102. The petitioner submitted that the excise duty on bottled water, fruit juice and vegetables offend Article **43 (1) (a), (c) & (d)** of the Constitution and cannot be justified under Article **24**. He also submitted that having the manufacturers and consumers to bear costs of the EGMS is an infringement of property rights of manufacturers/importers as well as consumers.

103. Counsel for the first Respondent submitted that excise duty can be levied on products that can raise significant revenue and argued that the imposition of the tax is not a violation of Article **43 (1).** He argued the tax was levied prior to the enactment of the Excise Duty Act under the fifth schedule to the Customs and Excise Duty Act.[76]

104. Article **43 (1)** of the Constitution guarantees every person Economic and Social rights which includes the right to clean and safe water in adequate quantities. Access to water implies that water should be both economically and physically accessible. Physical accessibility means that water should be available within a distance accessible to everyone including vulnerable individuals such as children, elderly persons and persons with disabilities.[77] Economic access refers to the financial costs associated with accessing water.

105. General Comment No. 15 (2002) of the United Nations Committee on Economic, Social and Cultural Rights' Twenty-ninth Session, Geneva 11-29 November 2002 ("General Comment No. 15') emphasizes, amongst others, the following aspects to the right to water: availability and accessibility. Availability means that the water supply must not only be sufficient for each person for personal and domestic use but must also be continuous. Accessibility means both physical and economic accessibility on a non- discriminatory basis. The effect is that the right to water must be accessible equally to the rich as well as to the poor and to the most vulnerable members of the population.

106. In terms of paragraph **18** of General Comment No. **15** the State has a constant and continuing duty to the progressive realization of the right to water. Retrogressive measures taken by the State with regard to the right to water are prohibited. If such retrogressive measures are taken, the onus is on the State to prove that such retrogressive measures are justified with reference to the totality of the rights provided for in the Covenant. The State is obliged to respect, protect and fulfill the right to water.

107. In its General Comment No. 15 (2002) the United Nations' Committee on Economic, Social and Cultural Rights, commenting on the right to water in Chapter 1, paragraph 3 regarding the interdependence of most rights to the right of water, says the following:

> "*Article 11 paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living 'including adequate food, clothing and housing'. The use of the word 'including' indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is core of the most fundamental conditions of survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11 paragraph 1C. See General Comment No. 6 (1995). The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1) and the rights to adequate housing and adequate food (art 11, para. 1). The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity."*

108. The imposition of the excise duty is bound to have an impact on the rights under Article **43 (1).** Tax inherently infringes the right to property, being an expropriation of one's hard-earned money. It follows that for the tax to lawful, the law introducing it must not only be lawful, but it must meet the Article **24** analysis test in that it must be reasonable and justifiable in a open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

109. It is also important to point out that the constitution enjoins Parliament to impose taxation only in accordance with the national values and principles of governance among them equity and fairness in the distribution of tax burden, equality and non-discrimination, equal protection before the law, sanctity of property, good governance, integrity, transparency, and accountability.

110. Also, the court is required to be guided by the principles of taxation, namely, certainty, equality, equity, legality.[78] Also, is a Constitutional imperative under Article **201 (b) (i)** that the burden of taxation must be shared fairly.

111. I have already held that the Legal Notice Number **53** of 2017 was not enacted in a manner consistent with the Constitution and the Statutory Instruments Act, hence, the same is null and void. I have also stated that the court is required to be guided by the principles of taxation which include legality. It follows that the imposition of excise duty premised on the said Legal Notice which was not promulgated in a manner that conforms to the law has no legal basis.

112. Despite the argument by the Petitioner assaulting the Legal Notice on grounds that it violates Article **43** Rights, no serious argument was advanced before me by the first and second Respondents to demonstrate that the Legal notice under challenge meets the Article **24** analysis test. Article **24 (3)** of the Constitution places the burden on the State or a person seeking to justify a particular limitation to demonstrate to the court that the requirements of Article **24** have been met.The Legal Notice under challenge is bound to impact on the constitutionally guaranteed rights under Article **43** and also property rights. Hence, it was imperative for the Respondents justify the limitation.

113. The House of Lords in the case of *Partington vs. Attorney General**[79]*** stated:-"*As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the*

judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

114. As Lord Russel of Killowen in *Inland Revenue Commissioner vs. Duke of Westminister* [80] stated that:-*"…The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case."*

115. It is my finding that Article **43** rights should not be hindered by a tax burden created by a Legal Notice that has been promulgated without strict adherence to the constitutional and statutory principles and values. On the other hand, hold that for such rights to be limited, then it must be demonstrated that the law satisfies the Article **24** Analysis test which has nit been done in this case. I find and hold that it would be unfair burden to impose the excise duty in the circumstances of this case.

I now turn to the next issue, namely, whether EGMS system duplicates functions of KBS and the Anti-Counterfeit Agency.

Whether EGMS system duplicates functions of KBS and the Anti-Counterfeit Agency.

116. The Petitioner submitted that the capacity of EGMS duplicates functions of the KBS and Anti-Counterfeit Agency, hence the functions are *ultra vires*. Counsel for the first Respondent submitted that the EGMS is not a duplication of roles performed by KBS or Anti-counterfeit Agency as alluded by the Petitioner because it aims at identifying and isolating illicit products both locally and internationally.

117. The functions of KRA, KBS and that the Anti-counterfeit Agency are stipulated in the founding statutes. If there is any interplay or overlap in the exercise of their statutory mandates, then so long as it is permitted by the founding statutes, it is permissible. However, no argument was advanced by the Petitioner to demonstrate that the alleged interplay, if any falls outside the statutory competencies of the three bodies, hence, the said argument fails.

118. Next is the issue whether the Petitioner is guilty of material non-disclosure.

Whether the Petitioner is guilty of material non-disclosure

119. Counsel for the third Respondent submitted that the amended Petition is an abuse of court process on grounds that the Petitioner cited a non-existence legal Notice no. **110** of 2013 the basis upon which interim orders were obtained and urged the court to find that there was material non-disclosure while obtaining the orders.

120. It is settled law that a person who approaches the Court or a Tribunal for grant of a relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing or suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person..***[81]***

121. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the petitioner, but also to any additional facts which it would have known if it had made inquiries.

122. The question that inevitably follows is whether citing the above Legal Notice which had apparently been repealed by a subsequent legal notice amounted to non-disclosure, in the sense that the fact was not known to the petitioner or that its relevance was not perceived. The Petitioner cited the legal notice that appeared in the documents in support of the case. Upon learning of the subsequent gazette notice he promptly applied to the court to amend the petition and the amendment was allowed. The facts disclosed in this case do not in my view disclose willful non-disclosure to attract a sanction by the court.

123. Now I proceed to address the last issue, that is whether there grounds for the court to strike off paragraphs in the affidavit casting aspirations on the integrity of the third Respondent.

Whether paragraphs in the Petitioners affidavit casting aspirations' on the reputation of the third Respondent ought to be struck off

124. Counsel for the third Respondent urged the court to strike off some paragraphs in the Petitioner's Affidavits which cast aspirations' on the third Respondent. In my view, the alleged offensive paragraphs are matters of fact averred by the Petitioner which the third Respondent had occasion to refute and did refute in his Response to the Petition.

125. In fact, issues of credibility are in my view relevant matters in cases of this nature because if proved, they can have an impact in the final determination. It is not for nothing or cosmetic purposes that the Constitution stipulates in Article **10 (2) (c)** that the national values and principles of government include integrity. These principles bind all State organs, State officers, public officers and all persons whenever any of them *inter alia* makes or implements public policy decisions. A person is defined in Article **260** to include a company.

126. Chapter six of the Constitution is dedicated on Leadership and Integrity while Article **232** stipulates Values and Principles of public service. The Constitution gives prominence to national values and principles of governance, Leadership and Integrity.[82] Values and Principles of Public Service.[83] The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order.

127. Section 3 of the PPAD Act[84]prescribes the guiding principles to apply. It reads, Public procurement and asset disposal by State organs

and public entities shall be guided by the following values and principles of the Constitution and relevant legislation— *the national values and principles provided for under Article 10; the equality and freedom from discrimination provided for under Article 27; affirmative action programmes provided for under Articles 55 and 56; principles of integrity under the Leadership and Integrity Act;* ***[85]*** *the principles of public finance under Article 201; the values and principles of public service as provided for under Article 232; principles governing the procurement profession, international norms; maximization of value for money; promotion of local industry, sustainable development and protection of the environment; and promotion of citizen contractors.* These guiding principles were not included in the legislation for cosmetic purposes. A close examination of all of them will reveal that they all converge at the point of integrity. In my view, the averments complained of considered in the context of this case and the applicable constitutional and statutory provisions are relevant matters. I find no basis to strike off the said paragraphs from the pleadings.

Summary of findings

a. Section ***165(1)*** *of the PPAD Act provides that persons who may seek administrative review are a candidate or a tenderer, 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 the Act or the Regulations. The Act****[86]*** *defines a "candidate" as meaning "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity" while a "tenderer" is defined by the same section as meaning "a person who submitted a tender pursuant to an invitation by a public entity." The Petitioner does not fall under the above definitions, hence he could not seek administrative review before the Board.*

b. Public participation must apply to enactment of all subsidiary legislations and policy decisions though the degree and form of such participation will depend on the peculiar circumstances of the case issue.

c. A proper analysis of applicable Articles of the Constitution including Articles ***10, 201*** *and* ***227*** *of the Constitution as well as the provisions of the Public Procurement and Asset Disposal Act including Sections* ***3*** *and* ***103 (1) & (2)*** *thereof lead to the conclusion that the first Respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process of the tendering the subject of this Petition and to ensure that the direct procurement meet the strict statutory requirements of any of the requirements of Section* ***103 (2) (a)*** *to* ***(e).***

d. A proper analysis of the clear provisions of Section ***103 (2) (d)*** *of the PPAD Act and the evidence tendered by the Respondents leads to the irresistible conclusion that no evidence was tabled to demonstrate that Tender Number* ***KRA/HQS/DP-423/2014-2015*** *falls anywhere within the ambit of section* ***103 (2) (d)*** *cited above or any of the requirements that permit direct procurement.*

e. Subsidiary legislation must conform to the Constitution, the parent Act and the Statutory Instruments Act in terms of both its content and the manner in which it is adopted. Failure to comply with manner and form requirements in enacting legislation renders the subsidiary legislation invalid.

f. The imposition of the excise duty is bound to have an impact on the rights under Article ***43 (1) (d).***

g. A tax inherently infringes the right to property, being an expropriation of one's hard-earned money. Hence, the law imposing it must not only be lawful, but it must meet the Article ***24*** *analysis test*

Appropriate reliefs

128. In view of my above analysis of the issues and the law and my conclusions, I find that this Petition succeeds. Indeed this Court is empowered by Article **23 (3)** of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others*[87]thus:-

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

129. I fully adopt this definition of "appropriate reliefs" and shall deploy it in my disposition of this suit.

130. Arising from the findings of evidence, conclusions of facts and law, constitutional and statutory interpretations and various pronouncements of law, I have reached above, I make the following orders:-

a. ***A declaration*** *be and is hereby issued that Public participation must apply to enactment of all subsidiary legislations and policy decisions though the degree and form of such participation will depend on the peculiar circumstances of the case.*

b. ***A declaration*** *be and is hereby issued that subsidiary legislation must conform to the Constitution, the parent Act and the Statutory Instruments Act in terms of both its content and the manner in which it is adopted and failure to comply renders the legislation invalid.*

c. ***A declaration*** *be and is hereby issued decreeing that the Repealed Legal Notice* ***110*** *of* ***18th*** *June 2013 and Gazette Notice No.****12856*** *of* ***5th*** *September 2013 were enacted in a manner inconsistent with the provisions of the Constitution and the Statutory*

Instruments Act, hence they were null and void for all purposes.

*d.. **A declaration** be and is hereby issued decreeing that Legal Notice Number **53** of **30th** March 2017 was enacted in a manner inconsistent with the Constitution and the Statutory Instruments Act in that there was no adequate public participation prior to its enactment, hence the same is null and void for all purposes.*

*e. **An order of certiorari** be and is hereby issued quashing Legal Notice Number **53** of **30th** March 2017 to the extent that it seeks to impose or introduce excise duty on bottled Water, Juices, Soda and other Non-Alcoholic Beverages and Cosmetics.*

*f. **A declaration** be and is hereby issued decreeing that the first Respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process of the tendering Tender Number **KRA/HQS/DP-423/2014-2015** and or to ensure that the direct procurement meet the strict statutory requirements of any of the requirements of Section **103 (2) (a)** to **(e).***

*g. **An order of certiorari** be and is hereby issued quashing the award of Tender Number **KRA/HQS/DP-423/2014-2015** for the Excisable Goods Management System awarded by the first Respondent to the third Respondent.*

h. No orders as to costs.

Orders accordingly.

Dated at Nairobi this 12th day of March, 2018

John M. Mativo

Judge

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[1]Act No. 2 of 1995

[2] See the preamble to the Act

[3] Act No. 23 of 2015

[4] Act No.23 of 2013

[5] Act No. 23 of 2013

[6] Cap 2, Laws of Kenya

[7] Supra

[8] Cap 469, Laws of Kenya

[9] Ibid

[10] Cap 472,Laws of Kenya, Repealed

[11] Ibid

[12] Supra

[13] Supra

[14] Supra

[15] Ibid

[16] Act No. 4 of 2015

[17]{1992}KLR 21

[18]{2015}eKLR

[19]In the in the Matter of the Mui Basin Local Community {2015}eKLR

[20] {2014}eKLR

[21] Petitioner cited Cohens vs Virginia 19 U.S.264 (1821)

[22]{2017}eKLR

[23]Petitioner cited several decisions among them Doctors for Life International vs The Speaker National Assembly and Others (CCT12/05) {2006} ZACC 11 and Minister of Health and Another No vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311(CC)

[24] Petitioner cited R vs IEBC ex parte National Super Alliance (NASA) Kenya & 6 Others {2017} eKLR, In the Matter of the Mui Coal Basin Local Community {2015} eKLR, Robert N.Gakuru & Others vs Governor, Kiambu County & Poverty Alleviation Network & others vs President of the Republic of South Africa & 19 Others

[25]{2017} eKLR

[26]Counsel cited Minister of Health vs New Clicks South Africa (Pty) Ltd and George Ndemo Sagini vs A.G & 3 Other {2017}eKLR

[27]Law Society of Kenya vs A.G Pet. No. 318 of 2012

[28] Ibid

[29] Supra

[30] Pevans East Africa Limited vs Chairman Betting Control and Licensing Board & Others, Pet No. 353 of 2017 consolidated with Pet No 505 of 2017

[31] See e.g. Daly v SSHD [2001] UKHL 57 §§24-32 and ACCC/C/2008/33

[32] 2006 (2) SA 311 (CC)

[33] In the Matter of the Mui Coal Basin Local Community {2015} eKLR

[34] Infra note 54

[35] Section 165(2) of the Constitution.

[36] Trusted Society of Human Rights Alliance vs. The Attorney General & 2 Others, Petition No. 229 of 2012

[37] CCT 86/08 [2010] ZACC 5

[38] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[39]See **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)**

[40] Act No. 33 of 2015

[41] Supra

[42] Ibid

[43] Ibid

[44] Ibid

[45] See e.g. Daly v SSHD [2001] UKHL 5724-32 and ACCC/C/2008/33

[46]Act No. 23 of 2013

[47] Act No. 4 of 2015

[48] Contrary to Section **5** of the Statutory Instruments Act

[49] Supra

[50] Ibid

[51] Ibid

[52] Counsel cited East African Portland Cement Company Limited vs A.G & Another {2013}eKLR

[53] Act No. 23 of 2015

[54] Ibid

[55] Counsel cited National Conservation Forum vs A.G {2013} eKLR

[56] Act No. 18 of 2012

[57] Supra

[58] Supra

[59] Counsel cited Ndyanabo vs A.G {2001}ea 495 on presumption of constitutionality

[60]Counsel cited Mak Ngaywa vs Minister of State for Internal Security and Provincial Administration and Another , Pet.No.4 of 2011 and Susan Wambui Kaguru & Others vs A.G. & Another {2012} eKLR

[61] Counsel cited Muranga Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security & Others, NBI Pet. No. 3 of 2011 {2011}eKLR & Samuel G.Momanyi vs A.G & Another, H.C Pet.No.341 of 2011

[62] See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869

[63]Statutory Instruments, Fact Sheet No. 21, Published by the Clerk of the National Assembly,2017

[64]Supra

[65]Cap 2, Laws of Kenya

[66] Supra

[67]Sections **6,7,** & **8** of the Act

[68] Section **11**

[69] Standing Order number **210**

[70] Supra

[71] Ibid

[72] Cap 415,Laws of Kenya

[73] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* ***2006 (2) SA 311 (CC)*** *at para. 630, Sachs J.*

[74]See Doctors for life case

[75] Supra

[76] Cap 472, Laws of Kenya

[77] UN General Comment 12 (1999) para 13.

[78]Counsel cited Yonas Girma Admassau & Prof. Dr. Umit Ustun, A Review of Constitutional Principles Regarding Taxation: Ethiopian and Turkish Perspective, P. 13, www.preprints.org, posted on 18 April 2017

[79] {1869}:- 4 HL 100, 122

[80] {1936} AC 1 24

[81]This position was well captured in one of the earliest decisions on the subject rendered in 1917 in R. v. Kensington Income Tax Commissioner {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[82] Chapter six of the Constitution

[83] Chapter thirteen of the Constitution

[84] Act No. 33 of 2015

[85] No. 19 of 2012;

[86] Section **2**

[87] (2002) 5 LRC 216 at page 249