



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 84 OF 2017

ELECTRONIC CARGO TRACKING SYSTEM (ECTS)

PROVIDERS ASSOCIATION OF KENYA.....	1ST PETITIONER
SGS KENYA LIMITED	2ND PETITIONER
I SPY AFRICA LIMITED	3RD PETITIONER
RIVERCROSS TRACKING LIMITED	4TH PETITIONER
AUTOMATED LOGISTICS CO. LIMITED	5TH PETITIONER
NAISAT TELEMATICS	6TH PETITIONER
BORDERLESS TRACKING.....	7TH PETITIONER
TRACK & TRACE LIMITED.....	8TH PETITIONER
OAK & GOLD LIMITED.....	9TH PETITIONER
SOLTIC/TECHNOBRAIN.....	10TH PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

1. The 2nd to 10th Petitioners are limited liability companies and members of the 1st petitioner. They are electronic tracking system providers (ECTS) whose core mandate is provision of wireless sensing solutions that capture real-time locations of Cargo in transit thus they are able to provide suitable and secure conditions on information regarding cargo in transit The respondent on the other hand is the Kenya Revenue Authority an institution established pursuant to section 3(1) of the Kenya Revenue Act (the Act). It is a body corporate whose core mandate is revenue collection on behalf of the government.

2. The respondent had for some time faced challenges relating to transportation of Cargo in transit including theft, delays, regulation and compliance with regulations which contributed to significant loss of revenue to the government. In order to address these challenges, the respondent introduced single custom temporary requirement that goods destined to Uganda, Rwanda Burundi Democratic Republic of Congo (DRC) and Southern Sudan (Northern Corridor) be transported only in trucks filled with ECTS that meet KRA standards.

3. The petitioners were thus encouraged to invest in the system and did so after which they were allowed by the respondent to provide ECTS services to transporters. The petitioners state that they had a good working relationship with the respondent but on 28th February 2017 they were informed that the intended to introduce Regional Electronic Cargo Tracking System (RECTS) which was to replace ECTS offered by the petitioners but when the petitioners raised concerns, they were assured that ECTS would not be replaced.

4. The petitioners aver that in a meeting of 1st Marcy 2017, they were informed that RECTS would replace the one they were offering (ECTS). They were also made to understand that the RECTS would be free of charge and transporters were encouraged to use it instead of that offered by the petitioners. According to the petitioners, this has led to many of their customers not to renew their contracts with them despite the petitioners having heavily invested in the ECTS system before they were allowed by the respondent to offer that service.

5. The petitioners stated that they believe the new system (RECT) is being pushed by foreigners and politically correct individuals with the aim of frustrating the petitioners and push the ECTS system they offered out of business. The petitioners averred that due to the respondent's conduct, they are apprehensive of losing business and the heavy investment they put into their business before they were allowed to offer that service. They state that by virtue of the said acts, their fundamental rights and freedoms under Articles 26, 27, 28, 35, 40, 43, 46, 47 and 50 of the constitution have been breached. The petitioners further aver that their legitimate expectation had been violated due to the said actions.

6. On the basis of the above stated facts, the petitioners filed a petition dated 13th march 2017 and sought the following reliefs.

a) A declaration that the respondent's decision to replace the current multi-vendor Electronic Cargo transportation system(ECTS) with the new Regional Electronic Cargo Transportation system (RECTS) is a violation of Articles 26, 27, 28. 35, 40, 41, 47, 48 and 50 of the Constitution and therefore null and void.

b) A declaration that the respondent's decision of replacing the current multi-vendor Electronic Cargo Transportation system (ETCS) system with the new RECTS system borrowed from another Country and supplied by a foreign entity is a clear violation of the petitioners' rights to equal protection and benefit of the law as provided for under Article 27 of the Constitution.

c) A declaration that the respondent's Action of willfully concealing details and material information surrounding the new RECTS system and its implementation and blatant lies and misrepresentation on the RECTS system amounts to violation of Article 35 of the Constitution which guarantees the right to access information.

d) A declaration that the respondent's decision to replace the current multi-vendor electronic Cargo Transportation system (ECTS) system with the new RECTS system is in violation of the petitioners' rights to fair administrative action guaranteed by Article 47 of the Constitution as read together with sections 4(1)(2)(3) & (4) of the Fair Administrative Action Act.

e) A declaration that the respondent's decision of replacing the current multi-vendor Electronic Cargo Transportation System (ECTS) system with the new RECTS system borrowed from another country and supplied by a foreign entity is a clear violation of the petitioners' rights to enjoy property as enshrined under Article 40 of the Constitution.

f) A declaration the Respondent's haphazard conduct of replacing the current multi-vendor Electronic Cargo Transportation system (ECTS) system with the new RECTS system is a violation of the Statutory Instruments Act and in particular sections 2, 5, 6, & 7 and the entire Part 11 of the Act by neither consulting the petitioners nor carrying out the mandatory Impact Assessment before the implementation of the RECTS system.

g) A declaration that the Respondent's action of approving and adopting an electronic Cargo Transportation system (ECTS) system from another Country supplied by a foreign entity without conducting standard tender procedure requirements is in violation of the Public Procurement Act of Kenya.

h) An order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent to introduce and replace the current multi-vendor Electronic Cargo Transportation System (ECTS) system with the new RECTS system.

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

j) In the alternative and without prejudice to the foregoing, an order of Compensation to be made against the respondent in favour of all the petitioners namely: ELECTRONIC CARGO TRACKING SYSTEM (ECTS) PROVIDERS ASSOCIATION OF KENYA; SGS KENYA LIMITED; 1 SPY AFRICA LIMITED; RIVERCROSS TRACKING LIMITED; AUTOMATED LOGISTICS CO. LIMITED; NAVISAT TELEMATICS; BORDERLESS TRACKING; TRACK & TRACE LIMITED; OAK & GOLD LIMITED, AND; SOLTIC/TECHNOBRAIN for the payment of the value of their business investments and all other resultant losses likely to be suffered by all the petitioners in the unlikely event the RECTS system is implemented.

k) In the event order (j) above is granted parties proceed for formal proof.

l) An order of compensation by way of aggravated damages to be made against the respondent in favour of all the petitioners for the arbitrary manner in which the respondent carried out the entire process of purporting to replace the current multi-vendor electronic Cargo Transportation system (ECTS) system with the new RECTS system.

m) Costs of this petition.

n) Any other relief or orders that this Honourable court shall deem just and fit to grant to defend and uphold this constitution.

Response

7. The respondent opposed the petition through an affidavit sworn by **Susan Wanjohi**, Chief Manager of Projects in the customs and Border control department in the Respondent's office. The affidavit was sworn on 24th May 2017 and filed on the same day.

8. In her deposition the **M/s Wanjohi** stated that the respondent had over the years faced challenges in managing and accounting for transit and export good imported and exported through the port of Mombasa to the Northern corridor countries of Uganda, Rwanda, Burundi Southern Sudan and Democratic Republic of Congo.

9. It was deposed that under section 187 of the East African Community customs management Act (EACC MA) 2004, the commissioner of customs services and Boarder control has mandate to prescribe customs formalities or procedures such as ICT and ECTS for purposes of monitoring transit or export goods passing through Kenya.

10. It was also deposed that under section 224 of the Act as read with regulation 104 made under the Act, the commissioner has power to license any vehicle carrying goods that are subject to customs control (whose taxes have not been paid); that it is the respondent's desire to ensure that all stakeholders are involved and that best practices are put in place to remove tariffs and barriers including delays in the movement of cargo in transit through Kenya with a view to stamping out corruption among other vices.

11. *M/s Wanjohi* deposed that since 2004 the respondent has been undertaking reforms and modernization of programmes within her departments with a view to improving service delivery and revenue collection leading to installing various ICT based programmes such as *Simba 2005 systems, document processing data centre offices, X-ray scanners ECTS and RECTS*, all aimed at expediting movement of legitimate cargo and facilitating movement of transit cargo through simplified processes and procedures aimed at ensuring transparency and predictability of customs controls, standardization and simplification of goods declaration and supporting documents among others.

12. It was deposed that the need to come up with RECTS was informed by the many challenges and difficulties experienced by the respondent in monitoring and supervising goods under customs control such as dumping and diversion of transit cargo, lack of facilities for effective monitoring and accounting of cargo. Another problem identified was that ECTS was being offered by different parties at a fee which increased the cost of doing business and the fact that data on cargo was being kept by different people making it vulnerable to adulteration.

13. According to the deponent, the introduction of RECTS has benefits to the respondent and stakeholders including transporters, manufactures and importers. Prior to the introduction of RECTS it was deposed, the respondent had introduced ECTS which had been in operation since 2006 when the respondent gave certificates to the petitioners to provide transporters with ECTS service which was done on a trial basis but the respondent did not have a preferred provider.

14. However, according to *M/s Wanjohi*, the respondent was not in control of some critical data management an aspect that continued to affect business environment with cargo diversion being one of the challenges experienced.

15. It was deposed that RECTS was conceived as one of the ways of implementing the single customs union by facilitating secure cargo supply, reduction of the cost of doing business within the region, making the region competitive and attractive to investors, Thus the respondent intended to adopt RECTS which was free of charge just like her counterpart URA had done and offer cargo owners, transporters and clearing agents real time visibility, rapid response capability and feed back to stakeholders which has proved effective.

16. *M/s Wanjohi* went on to depose that due to that success, both the respondent and URA signed a bilateral agreement replicating RECTS system in Kenya through with unlimited access by the respondent and as such the respondent did not undertake any procurement for RECTS services providers. RECTS was thus deemed the perfect measure for addressing complaints, losses and at the same time facilitating faster cargo movement within the region.

17. The deponent stated that the reason why it was found necessary to replace ECTS with RECTS was because of the many cases of theft, vandalism, cargo diversion and fuel adulteration reported by stakeholders, shortcomings that undermined the country's port, pipeline company and general business competitiveness within the region. The respondent denies that it licenses transporters of transit goods.

18. It is *M/s Wanjohi's* contention that RECTS will effectively monitor goods under customs control based on joint revenue Authority risk assessment programme and that the introduction of RECTS does not exclude other service providers from offering their services to customers of their choice.

19. It was deposed that since 7th February 2017 when RECTS was introduced on pilot basis, it has proved efficient and effective in the management and administrations of cargo under custom control and in the respondents view, it is providing real time visibility and alerts of transit goods violation, rapid response

capability to deal with transit violations as they happen by providing minutes by minute audit detail from start of the journey in Kenya to the final destination in the participating countries.

20. According to *M/s Wanjohi*, this gives the respondent independent assurance that transit goods have arrived at their intended destination before bond cancellations, providing simultaneous visibility for all revenue authorities who have interest in the consignment under custom control.

Petitioner's Submissions

21. *Mr. Arwa*, learned Counsel for the petitioners, submitted that the petition hinged on the abuse of regulatory process by the respondent in violation of the constitution. Learned counsel submitted that the respondent while using its regulatory authority encouraged petitioners to heavily invest in vehicle tracking system, ECTS, but before they could recoup their investment, the system was abruptly charged. It was submitted that the process leading to the changes charge was not subjected to public participation as provided for under the constitution and Statutory Instruments Act.

22. *Mr. Arwa* further contended that it was unlawful for the respondent as the regulatory authority to use its regulatory powers to procure services outside the Public Procurement and Assets Disposal Act and the Competition Act. Learned counsel argued that the respondent was estopped from changing the system having encouraged the petitioners to invest in it and therefore could not change it abruptly without the petitioners' participation. Counsel contended that these acts amounted to violation of the petitioner's rights under the Bill of Rights.

23. *Mr. Arwa*, went on to contended that the respondent had written letters to the petitioners allowing them to establish the business which required that the petitioners take steps invest in the system and which steps applied across the board. In learned counsel's view, the petitioners followed the respondent's letters, established businesses and in the process acquired equipment thus incurring a lot of expenses in excess of 5 billion.

24. Counsel submitted as soon as the petitioners had established their business and were starting to recoup their investment, they learnt through the media that the respondent was introducing a new system (RECTS) to replace the ECTS provided by the petitioners. According to counsel, when the petitioners sought to know why this was happening, they were informed by the respondent that is wanted to go regional in terms of transit cargo management.

25. Learned Counsel submitted that although at one point the respondent had informed the petitioners that it was dropping the idea, they were taken by surprise when the respondent went ahead to implement the plan without informing them. According to counsel, the petitioners had been made to believe that the system was for purposes of East African community integration but that did not require replacement of the system operated by the petitioners but only enhancement.

26. Learned counsel referred to Article 1(2) of the constitution submitting that petitioners were not consulted and or involved in the changes. Counsel further referred to sections 4, 5 and 11 of the statutory instruments Act on making regulations and or policies and argued that those provisions were violated.

27. Regarding public procurement, counsel submitted that the respondent was using regulatory power to procure services without following the Public Procurement and Asset Disposal Act (PPADA). Learned Counsel submitted that the provider of the new service is a private entity known as B' Smart Technologies and argued that **B 'Smart Technologies** is not the same as URA as contended by the respondent that RECTS was being adopted through URA.

28. Counsel submitted therefore, that the respondent's conduct and actions violated the petitioner's constitutional rights. He prayed that the petition be allowed, and if the respondent is to continue with the policy, it be made to compensate the petitioners. He relied on a number of authorities to support his client's case.

Respondent's Submissions

29. **Mr. Ontweka**, learned counsel for the respondent, submitted that although the petitioners had been engaged to provide cargo tracking services, they were not providing services directly to the respondent. According to counsel, the petitioners were engaged by transporters to ensure cargo is not diverted and for the respondent that was ensure that there would be no dumping of transit goods in to the local market. Counsel submitted that even before introduction of ECTS the petitioner were already offering the service to their own clients.

30. **Mr Ontweka** contended that after the petitioners were evaluated and the ECTS capability approved after which they were allowed to proceed and install ECTS system but this was not a procurement because they were not rendering service to the respondent hence they cannot claim that procurement rules were violated when RECTs was adopted.

31. In Counsels view PPADA is not applicable in this case and so is the competition Act. Learned counsel went on to contend that the respondent was applying the EAC custom management Act in the introduction of RECTS an act domesticated by virtue of Article 2(6) of the Constitution. Counsel argued that in the meeting of 25th May 2016, the petitioners were informed that Uganda Revenue Authority (URA) had instructed Kenyan clearing agents to use URA's tracking system in all cargo transport destined for Uganda through Kenya because they would not be charged. This was after concerns had been raised that cargo was being diverted into the Kenyan market despite use of ECTS system.

32. Learned Counsel argued that RECTS was more tamper proof than ECTS. He submitted that RECTS was introduced in October 2016 and had been running on full time basis since 1st March 2017 before the filing of this petition. Learned Counsel contended that it is not true that the respondent made the decision to adopt RECTS without involving the petitioners since there were meetings held between the respondent and the petitioners who were fully informed about the changes.

33. Counsel relied on the case of ***Independent Electoral and Boundaries Commission v National Alliance & others [2017]*** eKLR and other decisions. He also relied on section 187 of EAC customs management Act, 2004 on the use of ***ICT***, In particular, counsel relied on the case of ***LSK v Minister to Finance & 2 Others CA No 90 of 2006*** for the proposition that there is an element of public participation in installing ICT. In counsel's view, the new system (RECTS) was to ensure that there was no diversion of transit goods into the local market and that the need to have a single regional tracking system. He submitted that the petitioners did not establish the alleged loss of 5 Billion due to the introduction of RECTS in place of ECTS

Determination

34. I have considered this petition, the response thereto submissions by counsel for the parties and the authorities relied on. From these three issues arise for determination namely: whether the respondent's decision to transit from ECTS to RECTS system violated the principle of public participation, whether it violated Public Procurement and Asset Disposal Act and Statutory Instruments Act, and whether petitioners' legitimate expectation was violated.

Whether implementation of RECTS violated the principle of public participation

35. The petitioners have contended that they were allowed by the respondent to install and provide ECTS services to transporters transporting transit goods from the port of Mombasa to the exit point into the northern corridor countries including Uganda, Rwanda, Burundi, Democratic Republic of Congo and Southern Sudan.

36. According to the petitioners, they invested a lot of money in coming up with the system which was meant to help monitor transit cargo movement and ensure that there is no diversion of these goods into the local market and other related offences, However, petitioners contend that they were surprised when the respondent introduced the new system (RECTS) which is intended to push them out of business they

have also contended that the system was introduced without consultation and public participation thus violated the constitution.

37. The petitioners relied on Article 10(2) of the Constitution stating that implementation of RECTS without involvement of the petitioners amounted to violation of the principle of public participation hence is unconstitutional. *Mr Arwa* referred to the case of **Robert N Gakuru & Others v Governor of Kiambu County & 5 Others [2014] eKLR** on the principle of public participation.

38. Public participation is now a constitutional principle that engenders decision making process by Public bodies so that members of the public participate in the process leading to decision making, more so where such decisions have a direct or indirect effect on them. It is a process whereby interested or affected people are consulted and involved with a view to reaching a better and more acceptable decision. Where Public participation is applied it is likely to prevent and or minimizes disputes subsequent to that decision.

39. Article 10(1) of the constitution states that **National values and principles of Governance shall bind all state organs, state officers, public officers and all persons wherever any of their (c) makes or implements public policy decisions.** Article 10(2)(a) states that **national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law democracy and participation of the people.** Public participation therefore, has a critical role to play in public affairs and decision making process.

40. Public participation takes many forms such as political, legislative and decisional public participation. In order to achieve public participation the public body involved in the decision making process has a duty to facilitate public participation. What is meant by facilitation of public participation was stated by *Ngcobo J* in the case of **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** as follows;

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.”

41. And on what amounts to effective public participation the Constitutional Court of South Africa stated in the case **Minister of Health & Another v New Clicks South Africa (pty) Ltd and others [2006] (2) SA 311 (CC)** stated-

“The forms of facilitating an effective degree of public 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 these issues and to have adequate say. What amounts to a reasonable opportunity depends on the circumstances of each case.”

42. In **Robert N. Gakuru & others v Governor Kiambu County & 3 Others** (supra) which was dealing with legislative process in the county Assembly, the court observed that Public participation ought to be real and not illusory and should not be a mere formality to simply fulfill Constitutional dictates. While what standard should be applied to public participation was stated in **Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of**

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”

43. Although all the decisions above relate to public participation in the legislative making process, the essence of public participation in any decision making process is to give the public an opportunity to have a say in decision making so that at the end of the day they feel they had an input in the process leading to the making of the eventual decision even if they may not agree with the final outcome from that process.

44. The respondent is an entity established under section 3(1) of the KRA Act and its main functions are spelt out under section 4 of the Act as follows:-

1) The Authority shall, under the general supervision of the Minister, be an agency of the Government for the collection and receipt of all revenue.

2) In the performance of its functions under subsection (1), the Authority shall—

a) administer and enforce—

i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;

ii) the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;

b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and

c) to perform such other functions in relation to revenue as the Minister may direct.

3) The Minister may, by notice in the Gazette, amend the First Schedule.

45. The main functions of the respondent as seen above are to collect and receive revenue on behalf of the government in an agency capacity. In the course of performing its agency role, the respondent is required to administer some legislation for effective and efficient discharge of those functions. According to the respondent, ECTS was introduced with a view to sealing loop holes that had been identified through which transit goods were being diverted into the local market without paying import duty and other taxes hence depriving the government revenue. It was also aimed at ensuring that there was no vandalism and or stealing of transit goods. The system was meant to aid in curbing these shortcomings so that the respondent could improve on its core mandate of revenue collection and administration of the relevant statutes for that purpose.

46. It was submitted and admitted by the petitioners that they were not contracted by the respondent to render services to it. They were providing services to transporters who are hired by importers of transit goods to transport those goods to their destinations and in return, transporters pay them for ECTS service. The primary role of ECTS therefore was not only to eliminate cheating in revenue collection in the

country but also assure transporters, importers and other stakeholders including countries within the Northern Corridor of safety of transit goods thus good business environment.

47. The respondent contended, however, that ECTS service provided by the petitioners was not for proof due to the fact that it was open to manipulation and therefore, encouraged the same problems it was supposed to prevent. The respondent argued that the system still allowed diversion of transit goods into the local market, stealing of transit goods and adulteration of fuel among other vices. This did not only deny the country revenue but also affected business competitiveness including the port and pipeline facilities. It was also argued that since the goods were on transit, URA pioneered the introduction of RECTS and had asked transporters to use that system since, according to URA, it was more efficient and real time thus did not allow diversion of transit goods.

48. Section 3(1) of the Kenya Revenue Authority Act, establishes KRA as body corporate and an agency of government for purposes of collection and receipt of revenue. Under section 4(2) of the Act, the authority is to administer and enforce other laws including The Customs and Excise Act (Cap. 472). The Value Added Tax Act (Cap. 476). Road Maintenance Levy Fund Act, 1993 (No. 9 of 1993), East African Community Customs Management Act, 2004 and the Annexes to the Protocol on the Establishment of the East African Community Customs Union.

49. The preamble to the Act is also clear on the mandate of the respondent. It states that it is **to establish the Kenya Revenue Authority as 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.** As can be seen from both section 4 and the preamble, the main function of the authority to assess, collect and receive revenue on behalf of the government. In coming up with ECTS the respondent's intention was to put in place mechanisms to ensure that there was maximum revenue collection on behalf of the government and less or no diversion of transit goods at all into the local market without paying duty and or tax.

50. In so far as this petition is concerned therefore, it is not in dispute that the petitioners do not provide service to the respondent and are not paid by the respondent for any service. The petitioners only allow the respondent access to their platform for purposes of monitoring movement of transit goods. The question here is not that the respondent's action is intended to deny the petitioner's revenue paid to them by the respondent, but rather to ensure that there is maximum revenue collection through prevention of tax evasion. The petitioners still have an opportunity to offer the service to customers who require it.

51. The petitioners' complaint as I understand it is that in deciding to replace ECTS system with RECTS, they were not consulted and therefore, they did not participate in making the decision on whether or not ECTS should be done away with and the adoption of RECTS as the new system. I have perused the record, including the petition, response and submissions by counsel for the parties. What is clear is that although the petitioners were offering ECTS, this was a service they offered to their customers as opposed to the respondent. The system however, fell short of achieving the desired result that is; to ensure that there was no diversion of transit goods into the local market which the petitioner did not deny, but argued that they should nonetheless have been consulted before introduction of RECTS.

52. In my respectful view, the adoption of the new system, (RECTS) though a shift from the system that was in use, did not violated the principle of public participation. The respondent stated, and it is not in dispute, that transit goods, whose duty is not paid, are destined to countries such as Uganda, Rwanda, Burundi, Democratic Republic of Congo and Southern Sudan (the Northern Corridor) through Uganda. The respondent's duty is limited to ensuring that goods on transit do not end up in the local market and for that reason it was not initiating a system to lock out the petitioners from business. What it was doing, if anything was to prevent businessmen who would declare goods as transit cargo but somehow divert those goods into the market without paying duty and other taxes to the government a vice the petitioners' system had failed to do despite being given a chance.

53. The respondent contended that URA is the one that pioneered RECTS because it wanted to monitor goods destined to that country and beyond right from the port of Mombasa up to when the goods enter

and leave Uganda in the case of cargo destined to other countries. Just like the respondent, URA would want to ensure that transit cargo to other countries through her borders does not find its way into the Ugandan market. That being the case, I do not see how the respondent could be blamed for the introduction of such a system. The petitioners' system having failed to solve the problem it was meant to, the respondent could not fail to act and protect interests of the larger public and the country. In such a situation private interest must give way to public interest.

54. Furthermore, it was contended on behalf of the respondent that the respondent is required by the regional customs protocol to adopt ICT with the aim of facilitating faster clearance and movement of goods within the region. The reason for adopting the new system is to facilitate efficient and safer movement of cargo on transit to its destination while avoiding diversion into local markets of the concerned countries. That being the case, I am unable to agree with the petitioners that the introduction of the new system, RECTS, violated the principle of public participation.

Statutory Instruments Act

55. The other contention raised by the petitioners was that the respondent violated provisions of the Statutory Instruments Act (No 23 of 2013) when it introduced RECTS, According to the petitioners, the respondent introduced a policy in the form of RECTS but did not follow the procedure required by this Act rendering the new system unlawful and invalid.

56. The Statutory Instruments Act applies to every statutory instrument made directly or indirectly under any Act of Parliament or other written law.(section 3(1)). The purpose of the Act as stated in the preamble is ***to provide for the making, scrutiny, publication and operation of statutory instruments and for matters connected therewith.***

57. The objects of Act are stated in section 4 thus;

“The object of this Act is to provide a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments by—

- a) requiring regulation-making authorities to undertake appropriate consultation before making statutory instruments;***
- b) requiring high standards in the drafting of statutory instruments to promote their legal effectiveness, clarity and intelligibility to anticipated users;***
- c) improving public access to statutory instruments;***
- d) establishing improved mechanisms for parliamentary scrutiny of statutory instruments; and***
- e) establishing mechanisms to ensure that statutory instruments are periodically reviewed and, if they no longer have a continuing purpose, repealed.”***

58. Section 5 is important and states that before making regulations, the regulation making authority should make appropriate consultation especially where the statutory instrument has a direct or a substantial indirect effect on business, or restrict competition. As to the meaning of a statutory instrument, Section 2 of the Act defines a 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.***

59. From the above definition, can one say the decision to implement RECTS in place of ECTS amounted to making a statutory instrument? In my view, the answer is in the negative. This is because what the

respondent did, if at all, was to adopt a system that is suitable for monitoring movement of cargo on transit that would allow it to be on top of things in so far as diversion of transit goods into the local market and evasion of duty and tax are concerned.

60. The adoption of a new ICT system did not amount to a statutory instrument or policy that required compliance with The Statutory Instruments Act. I say so because a statutory instrument is required to go through a number of processes including regulatory impact assessment where such an instrument is likely to impose significant costs on the community or section thereof. If that were to be the case, section 11 would require some steps to be taken including the Cabinet Secretary concerned laying that particular statutory instrument before Parliament.

61. However, in the case of RECTS, the respondent was merely implementing the law for purposes of enhancing revenue collection thus prevent commission of crime, by ensuring that transit goods are not diverted into the Kenyan market without payment of duty. I am unable to agree with the petitioners that the respondent violated provisions of the Statutory Instruments Act since the petitioners are normally contracted to provide services to transporters and not the respondent and for that matter the respondent is merely implementing the law.

Public procurement procedures

62. The petitioners also raised the issue of the respondent's failure to comply with procurement procedures thus violated Articles 10, 73, 75 and 227 of the Constitution and the Public Procurement and Asset Disposal Act. (PPADA) According to the petitioners, RECTS is provided for by a private company known as ***B' Smart Technology*** contrary to the respondent's claim that the system was being implemented by URA. The petitioners contended that URA does not have its own RECTS platform. IT was the petitioners' submission RECTS is offered by B' Smart Technologies a private enterprise which was being sneaked into Kenya through the back door to push the petitioners out of business. According to the petitioners, it was improper and against the law for the respondent, a state agency, to obtain services from B'Smart Technologies without following procurement procedures.

63. Article 10(2) (c) of the constitution advocates for goods governance, integrity transparency, openness and accountability. To that extent, the petitioners contend that by contracting B' Smart Technologies to render RECTS service, the respondent violated transparency, integrity and accountability as provided for in Article 10(2). Article 227(1) of the constitution, on the other hand, demands that when a state organ or any other public entity contracts for goods or services, it should do so in accordance with **a system that is fair equitable, transparent, competitive and cost effective.**

64. According to Public Procurement and Asset Disposal Act (PPADA) public procurement means **procurement by procuring entities using public funds.** There must be a procuring entity usually a public body. "**Procurement**" is defined to mean the **acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system.** Again, for there to be procurement, there must be use of public funds to pay for procured services.

65. Section 91 of PPADA advocates for open tendering by government agencies and provides that (1) **Open tendering shall be the preferred procurement method for procurement of goods, works and services,** and (2) **The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.** In contending that the respondent should have called for tendering, the petitioners relied on the cases of **Kenya Transport Association v the Municipal Council of Mombasa & another Petition No 6 of 2011** and **Eric Okeyo v County government of Kisumu Petition No 1 "A" of 2014.**

66. The issue raised here is that of procurement of services by a public entity, namely the respondent. For procurement to be complete there must be a procuring entity and a tenderer or service provider. Simply put, there must be an exchange of goods or services for money by a public entity. In this case, the

petitioners were required to show to the satisfaction of the court, that there was procurement of Goods and or services by the respondent and that the respondent was paying for those goods or services using public resources.

67. However, what is before Court are mere allegations of procurement. The petitioners themselves were rendering ECTS service before it was abandoned and did not go through tendering or say they were being paid by the respondent for offering that service. They only allowed the respondent access to its platform for purposes of monitoring the movement of transit goods while on Kenyan territory to avoid diversion of transit cargo and or evasion of duty. It therefore cannot be argued without tangible evidence, that the respondent procured services in violation of the constitution and the law while implementing RECTS system. There is no evidence that the respondent, a public entity, had procured goods and or services from B'smart Technologies, an action that would amount to violation of the law or that the respondent was using public funds for procuring that service which would amount an illegality. I am not persuaded that the respondent violated procurement law.

Legitimate expectation

68. Finally, the petitioners have argued that their legitimate expectation was violated. According to them, the respondent is estopped from asserting a position different from what it had made the petitioners believe that they would continue to offer ECTS service. They relied on the decision in the case of ***Serah Njeri Mwobi v John Kimani Njoroge CA and 314 of 2009*** where the court stated that the doctrine as estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied in a previous action or statement by that person.

69. The petitioners also relied on the doctrine of legitimate expectation submitting that they had a legitimate expectation that they would offer the ECTS service since the respondent had laid down the procedure to be followed in offering ECTS and set standards applicable which the petitioners had complied with.

70. It is the petitioners' case that by that legitimate action by the respondent they expected to continue to carry on with their business for a substantiation period of time and that respondent's official had made it clear to them that there were no plans to replace ECTS system, but despite that promise, the respondent went ahead to effect changes and replacement of ECTS. They relied on the decision in the case of ***Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others Petition No 14 of 2014***.

71. Legitimate expectation is a principle of law and a ground on which judicial administrative actions can be challenged for purposes of protecting procedural or substantive rights especially where a public body changes its position from a representation earlier made by that public body to the person. The principal aim of the doctrine of legitimate expectation is to ensure that principles of natural justice and fairness are adhered to in order to prevent public or administrative bodies from abusing power.

72. When called upon to determine whether a legitimate expectation exists, the court should address its mind on whether the representation made was clear, unambiguous, and was made without any relevant qualification, the representation was made by someone who had actual or apparent authority and the representation is applicable to the aggrieved parties and does not violate the law. (***Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others*** (supra))

73. The requirements of legitimate expectation were expounded by the ***Supreme Court*** of Canada in the case of ***Canada (Attorney General) v Mari*** [2011] 2 SRC504 where the Court stated:

“[68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a

requisite.”

74. This was also stated by the Supreme Court of Appeal of South Africa in the case of **South African Veterinary Council & another v Creg Szymanski** (Case No. 79/2001,) thus;

“The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J, in National Director of Public Prosecutions v Philips and others 2002 (4) SA 60. He said- ‘The law does not protect every expectation but only those which are legitimate. The requirements for legitimacy of the expectation include the following;

i) “the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification,

ii) The expectation must be reasonable.

iii) The representation must have been induced by the decision maker.

iv) The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.”

73. The Constitutional Court of South Africa added its voice on the issue in **President of the Republic of South Africa and others v South Africa Rugby Football Union and Others** 2000(1) SA I CC stating-

“Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

74. **Lord Diplock** on his part stated in **Council of Civil Service Unions v Minister of the Civil Service** [1985] AC 374 that;

“A legitimate expectation may arise from an express promise given on behalf of public authority and some benefit or advantage which... [the applicant] had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment”

75. From the above decisions, what is clear is that one must consider not only the reasonableness of expectation but also the nature of the representation said to have given that expectation. Taking into account the legal position espoused in the above decisions, the court has to look at the facts of the case to determine whether really the circumstances pleaded are such that they would give rise to legitimate expectation.

76. The petitioners contended that they were made to incur expenses in installing ECTS and therefore, expected to continue in that business for sometime to enable them recover their investment. They also stated that the respondent’s officers had assured them that ECTS would not be replaced. These circumstances, they contended, gave rise to legitimate expectation and therefore, the respondent is estopped from changing from that position.

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

goods destined to that Country.

78. Where a system has failed to achieve its primary purpose, any expectation that the system would remain in force is not legitimate anymore and cannot be the basis for a legitimate claim. If the system was allowed to remain in use, it would mean that traders would continue to break the law by diverting transit cargo into the local market in violation of the law. In short, a promise to continue with a faulty system would be in breach of the law and as stated by the **Supreme Court** in ***Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others (supra)***, ***there cannot be a legitimate expectation against a clear provision of the law or the constitution.***

79. For the above reason, I find and hold that there was no legitimate expectation in favour of the petitioners capable of sustaining a legitimate claim in this petition.

80. In conclusion therefore, having taken into account the totality of the facts of this case, the evidence and the law, and considering decisions relied in by the parties and those referred to by the Court, my view of the matter is that the petitioners have failed to establish that the respondent violated the constitution and the relevant law on public participation, the Statutory Instruments Act and or procurement laws. They have also failed to establish that they had a legitimate expectation in this matter.

81. Regarding the claim that they invested over 5 billion in coming up with ECTS, all I can say is that there was no evidence to prove the same. In any case the petitioners had prayed that upon succeeding, they would proceed to formal proof. Consequently the petition dated 13th March 2017 is declined and is hereby dismissed. Each party will bear their own costs.

Dated and Delivered at Nairobi this 8th Day of December 2017

E C MWITA

JUDGE