



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**CONSTITUTIONAL PETITION NO. 6 OF 2011**

**IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER FOUR OF THE CONSTITUTION**

**- AND -**

**IN THE MATTER OF: THE RIGHTS AND FUNDAMENTAL FREEDOMS**

**- AND -**

**IN THE MATTER OF: INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS**

**- AND -**

**IN THE MATTER OF: ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS**

**- AND -**

**IN THE MATTER OF: ARTICLE 3, 10, 19, 20, 21, 22, 23, 27, 47 AND 165 OF THE CONSTITUTION OF KENYA**

**- AND -**

**IN THE MATTER OF: THE LOCAL GOVERNMENT ACT (CAP 265, LAWS OF KENYA)**

**- AND -**

**IN THE MATTER OF: THE RESTRICTIVE TRADE PRACTICES, MONOPOLIES AND PRICE CONTROL ACT (CAP.504, LAWS OF KENYA)**

**- AND -**

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 (CAP. 412c, LAWS OF KENYA)**

**- AND -**

**IN THE MATTER OF: THE ENERGY ACT, 2006 (ACT NO. 12 OF 2006)**

**- BETWEEN -**

**KENYA TRANSPORT ASSOCIATION (*acting in the interest of its members, to the exclusion of those who PETITIONER may have sought reliefs in their own right*) .....**

**AND**

**1. THE MUNICIPAL COUNCIL OF MOMBASA**

**2. SUMMIT COVE LINES COMPANY**

**LIMITED.....RESPONDENTS**

**JUDGMENT**

## **A. INVOKING CONSTITUTIONAL RIGHTS TO STOP A PUBLIC/PRIVATE SERVICE - PARTNERSHIP**

By this petition, dated **29<sup>th</sup> January, 2011** and filed on **31<sup>st</sup> January, 2011**, members of a registered society, Kenya Transport Association, moved the Court through the said society, seeking the following remedies under the **Constitution of Kenya, 2010**:

(i) *declaration as unlawful, null and void the existing public-private partnership between 1<sup>st</sup> and 2<sup>nd</sup> respondents, regulating motor vehicle parking, collection of parking fees/charges, and clamping of motor vehicles within Mombasa County – for having been obtained/secured in breach of the law and for being unconstitutional;*

(ii) *an Order prohibiting the respondents, their servants, employees, agents or otherwise howsoever, from collecting parking charges/fees on account of the existing public/private partnership recorded in **Gazette Notices Nos. 4728 of 11<sup>th</sup> July, 2003, 5727 and 5728 of 15<sup>th</sup> August, 2003, 1594 of 12<sup>th</sup> February, 2010 and 11859 of 1<sup>st</sup> October, 2010.***

## **B. PETITIONER'S PLEADINGS**

The Kenya Transport Association states that its members are business persons/entities who own and operate numerous and assorted transport motor vehicles – lorries, trailers/semi-trailers, fuel tankers and trucks. The 1<sup>st</sup> respondent is a local authority established in accordance with s.5 of the Local Government Act (Cap. 265, Laws of Kenya); and 2<sup>nd</sup> respondent is a private limited-liability company established under the provisions of the Companies Act (Cap. 486, Laws of Kenya).

The petitioners state that the 1<sup>st</sup> respondent, purporting to exercise powers conferred by s.148 of the Local Government Act, published **Gazette Notices Nos. 4728 of 11<sup>th</sup> July, 2003, 5727 and 5728 of 15<sup>th</sup> August, 2003** notifying members of the public of designated parking areas, parking fees/charges, and of its intention to post collectors of parking charges. Subsequently, by **Gazette Notices No. 1594 of 1<sup>st</sup> February, 2010** and No. 11859 of **1<sup>st</sup> October, 2010**, 1<sup>st</sup> respondent notified the parking fees/charges for the various areas: Kibarani; Magongo; Changamwe; Miritini; and all areas within the jurisdiction of the Municipality of Mombasa.

The petitioners' gravamen is that, on the basis of the parking-charges plan as drawn out, 1<sup>st</sup> respondent has "*in secrecy and without transparency...., partnered with 2<sup>nd</sup> respondent to be the collector of the parking charges/fees*". As a basis for enforcing their rights, as against the alleged secret parking-charge scheme, the petitioner unsuccessfully sought relevant information from 1<sup>st</sup> respondent. Believing that 1<sup>st</sup> respondent's failure to provide the information (sought by applicant's letter of **12<sup>th</sup> April, 2010**) was impeding the enforcement of fundamental rights, the petitioner states that 1<sup>st</sup> respondent is in breach of Article 35 of the Constitution which relates to "*access to information*". The alleged failure to provide information is also stated to be a signal of want of *fair administrative action, of good governance, transparency and accountability* contrary to the terms of Articles 10, 21 and 47 of the **Constitution of Kenya, 2010**.

The applicant states that the public/private partnership entered into by the respondents herein did not comply with the terms of the Public Procurement and Disposal Act, 2005 (Cap. 412C, Laws of Kenya) and so was contrary to the terms of the Constitution.

The petitioner states that "the 1<sup>st</sup> respondent's action of designating parking yards at Kibarani, Magongo, Changamwe and Miritini operated by 2<sup>nd</sup> respondent *without inviting bidders, or expression of interest by competitors* – among them the petitioner's members – is inconsistent with the Constitution [and] infringes

the petitioner's rights to equal protection and equal benefit of the law as contemplated by Article 27 and, therefore, void." On this point, it is further stated:

***"The 1<sup>st</sup> respondent's actions of according undue preference and unfair enrichment to 2<sup>nd</sup> respondent is unreasonable, unjustified, [and] in breach of the law and inconsistent with the spirit of Article 27 of the Constitution of Kenya".***

The petitioner states that:

***"...the 2<sup>nd</sup> respondent continues to enjoy.....beneficial interest conferred inequitably by 1<sup>st</sup> respondent, in breach of the law, and contrary to Article 27 of the Constitution".***

The petitioner states that the respondents' action is in violation of the Constitution, and is an infringement of the petitioner's rights and of the principle and spirit of Articles 3, 10, 19, 20, 21, 27, 35 and 47 of the Constitution.

### **C. SUPPORTING EVIDENCE**

**Paul Maiyo**, the Chairman of the Kenya Transport Association, swore an affidavit on **29<sup>th</sup> January, 2011** averring, *inter alia*, that *"the 1<sup>st</sup> respondent's action of designating privately-owned land as parking yards at Kibarani, Magongo, Changamwe and Miritini operated by the 2<sup>nd</sup> respondent without inviting bidders or expression of interest by competitors, amongst them the petitioner's members, encourages monopoly and is inconsistent with fair play...."*; that the designated parking yards at Kibarani, Magongo, Changamwe and Miritini are privately owned and operated and have not been acquired for use in the public interest; that the plot numbers of the designated plots have not been disclosed, and this defeats the conduct of official search to establish ownership details; that, contrary to the notification that the designated Kibarani and Changamwe yards were to be used for the parking of **oil tankers**, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in breach of s.99 of the Energy Act, 2006 (Act No. 12 of 2006), caused these yards to be used for parking **trailers, lorries and oil tankers**.

### **D.1<sup>ST</sup> RESPONDENT'S PLEADINGS**

The 1<sup>st</sup> respondent filed its pleadings in the form of an answer-to-petition, dated **7<sup>th</sup> February, 2011**, and stating, for the significant part, as follows:

(i) *the basis of the impugned public-private partnership between the respondents was a meeting of 21<sup>st</sup> April, 2010 at the Kenya Ports Authority, chaired by the Kenya Maritime Authority as arbiter, at which "all issues as [pertain] to levies and designated parking bays were discussed"; thereafter the services in question were gazetted by 1<sup>st</sup> respondent; and so the petitioner had an obligation to pay for such services;*

(ii) *the respondent had not failed to provide information to the petitioner, and had not impeded the petitioner in accessing public information held by 1<sup>st</sup> respondent;*

(iii) *"due to congestion and traffic jams within the Central Business District and in the residential areas, 1<sup>st</sup> respondent approached 2<sup>nd</sup> respondent to [allow the use of 2<sup>nd</sup> respondent's] facilities for parking since [these facilities] fell within the operation areas of the stakeholders including truck and fuel-tanker owners, instead of [asking] the Central Government to acquire the said facilities which were already developed and which would have taken time [to construct so as to solve] the parking problem within the jurisdiction of the 1<sup>st</sup> respondent";*

(iv) *the petition "is brought in bad faith by the petitioner", just for the purpose of frustrating the operations of 1<sup>st</sup> respondent in the public interest;*

(v) *the petitioner being an agent of several persons/entities, has not brought the petition as a representative, and has failed to publish the names of the members or to show the authority to represent them.*

## E. 1<sup>ST</sup> RESPONDENT'S EVIDENCE

The 1<sup>st</sup> respondent's chief officer, the Town Clerk, **Tubmun Otieno**, swore a replying affidavit on **7<sup>th</sup> February, 2011** averring as follows:

- (i) that, on **1<sup>st</sup> February, 2011** the petitioner served upon 1<sup>st</sup> respondent a Court order dated **31<sup>st</sup> January, 2011** annexed to the instant petition, restraining the respondents from collecting parking fees from the designated parking areas until the matter is heard and determined;
- (ii) that, 1<sup>st</sup> respondent has powers under **s.143** of the Local Government Act (Cap. 265, laws of Kenya) **“to enter into contracts necessary for the discharge of any of its duties and [functions] to the public”**; and 1<sup>st</sup> respondent, by a resolution of **12<sup>th</sup> November, 2009** and **24<sup>th</sup> December, 2009** **“resolved to enter into [a] parking partnership on trucks and petrol tankers to avoid parking the same within residential areas and road reserves to ensure the safety of the public”**;
- (iii) that, the said partnership with 2<sup>nd</sup> respondent received the approval of the Ministry of Local Government on **13<sup>th</sup> January, 2010** – and consequently 1<sup>st</sup> respondent published the designated parking areas for trucks and petrol tankers – **Kenya Gazette** of **12<sup>th</sup> February, 2010** (Gazette Notice No. 1594);
- (iv) that, a stakeholders meeting was held on **21<sup>st</sup> April, 2010** at the Kenya Ports Authority, under the arbitration of Kenya Maritime Authority, and attended by the parties herein, including the petitioners; and it was agreed that –
  - (a) **there would be no clamping of trucks and fuel tankers at all parking depots and designated parking areas except where there was obstruction or double-parking,**
  - (b) **there would be no parking at the Central Business District, in the residential areas, at hospitals, schools, or road reserves,**
  - (c) **a certain entity known as KAPS had no authority to collect fees in respect of commercial motor vehicles;**
- (v) that, the arbiter reported the successful resolution of the dispute on **23<sup>rd</sup> April, 2010**; and 1<sup>st</sup> respondent sought approval from the parent Ministry on **28<sup>th</sup> July, 2010**, which approval was given on **28<sup>th</sup> September, 2010**; and in consequence, 1<sup>st</sup> respondent published revised parking fees/levies as agreed;
- (vi) that, it is well known to the petitioner that 1<sup>st</sup> respondent lacks sufficient parking bays and **“had to resort to private ones”**; **“it happened that the 2<sup>nd</sup> respondent had parking space at the designated parking areas”**, and **“this made the 1<sup>st</sup> respondent approach the 2<sup>nd</sup> respondent for its facilities to be used as parking bays to ease congestion in the CBD and residential areas instead of applying to the Central Government for acquisition of the same”**;
- (vii) that, **“the partnership between the 1<sup>st</sup> and the 2<sup>nd</sup> respondents was lawful as it was duly approved by the parent Ministry”**; and **“the public being served by the 1<sup>st</sup> respondent were suffering including the petitioner due to congestion and traffic jams owing to double-parking or obstruction by trucks and fuel tanks.....”**
- (viii) that, **“the 1<sup>st</sup> respondent could not enter into [any agreement] or advertise for parking spaces from interested parties while it had located privately-owned properties/stakeholders/petroleum firms”** and.... [these] private arrangements were made before the promulgation of the Constitution”;
- (ix) that, **“the private arrangement entered [into] between 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent has actually served, and saved the 1<sup>st</sup> respondent from expenses of employing additional staff to manage the designated areas”**;
- (x) that, **“the 1<sup>st</sup> respondent cannot order its parent Ministry to rescind a decision reached by the Council, by the people's representatives, and approved”**;
- (xi) that, the instant proceedings have stalled the operations of 1<sup>st</sup> respondent **“as concerns parking and collection of parking levies and which have now made the 1<sup>st</sup> respondent [lose] in excess of Kshs. 850,000/= per day [as] from 2<sup>nd</sup> February, 2011”**.

## F. 2<sup>ND</sup> RESPONDENT'S EVIDENCE

**David K. Rimberia**, the General Manager of 2<sup>nd</sup> respondent, swore a replying affidavit on **18<sup>th</sup> March, 2011** deponing (for the material part) as follows:

- (i) 1<sup>st</sup> respondent has power under s.143 of the Local Government Act (Cap. 265) to enter into contracts necessary for the discharge of its functions;
- (ii) 1<sup>st</sup> respondent by **its resolutions of 12<sup>th</sup> November, 2009 and 24<sup>th</sup> December, 2009** agreed to enter into a parking partnership on trucks and petroleum tankers, in order to avoid the parking of trucks and petroleum tankers in residential areas and road reserves, “to ensure the safety of the general public and other road users in order to comply with the law, in particular the Energy Act and the 1<sup>st</sup> respondent’s by-laws”;
- (iii) “the 1<sup>st</sup> respondent sought...the approval of the Deputy Prime Minister and Minister for Local Government, for the public-private partnership with the 2<sup>nd</sup> respondent, which was [given] on **13<sup>th</sup> January, 2010**”;
- (iv) “the 1<sup>st</sup> respondent duly published Gazette Notice No. 1594 of **12<sup>th</sup> February, 2010**.....specifying the designated parking yards and the parking fees/charges”;
- (v) “the petitioner raised concerns with the 1<sup>st</sup> respondent about the partnership and the parking fees that had been imposed, at the Kenya Ports Authority stakeholders’ meeting where both the petitioner and respondents are members, upon which the petitioner and the 1<sup>st</sup> respondent conducted negotiations .....arbitrated by Kenya Maritime Authority...”;
- (vi) the said negotiations ended on **21<sup>st</sup> April, 2010**, with agreement in respect of the clamping of parked trucks; parking in the Central Business District, the residential areas, hospitals, schools, and road reserves; abolition of the collection of parking fees by an entity called KAPS;
- (vii) the petitioner was fully represented in the discussions relating to the collection of parking fees by 2<sup>nd</sup> respondent in partnership with 1<sup>st</sup> respondent;
- (viii) the petitioner’s letter of **12<sup>th</sup> April, 2010** was duly addressed in the discussions between the petitioner and 1<sup>st</sup> respondent; and so 1<sup>st</sup> respondent did not fail to provide information as alleged;
- (ix) the public-private partnership between 1<sup>st</sup> and 2<sup>nd</sup> respondents was lawfully entered into and “did not breach any of the provisions of the Public Procurement and Disposal Act;
- (x) “due process was followed in entering into the public-private partnership, in accordance with the Local Government Act and there was due approval by the Minister for Local Government”; “the need for services for the parking of trucks, trailers and fuel tankers in safe areas was urgent and the provisions of the Public Procurement and Disposal Act were duly complied with”;
- (xi) “it is due to the efforts of the respondents that there are now no trucks parked on road shoulders and road reserves especially along the road towards the airport and other roads in Changamwe and Magongo thus improving the safety of all persons within the Municipality”;
- (xii) “upon entering into a contract with 1<sup>st</sup> respondent for [the] provision of parking yards and collection of parking fees, the 2<sup>nd</sup> respondent had at the commencement of the partnership invested over Kshs. 106 million and employed over 160 people to ensure the effective running of 2<sup>nd</sup> respondent and meet its obligations under the private-public partnership...”;
- (xiii) “as a result of the [Court] order 2<sup>nd</sup> respondent has suffered and continues to suffer immense loss in revenues and is likely to lose its investment in infrastructure and other amenities which has now grown to over Kshs. 406 million and may have to lay off its 160 employees”;
- (xiv) “the respondents are collectively losing Kshs. 850,000/= per day as the petitioner has advised its members not to pay any parking fees to 2<sup>nd</sup> respondent even from authorized areas where the order issued herein does not apply”.

## **G. THE PETITIONER’S CASE: SUBMISSIONS**

### **(1) The Gravamen**

Learned counsel, **Mr. Mogaka**, submitted that the factual situation giving rise to the constitutional petition was the contracting of a public-private partnership on urban parking, between the two respondents: that such an arrangement had been entered into “in breach of the right of the petitioners as enshrined in both the former and the current Constitution”; both Constitutions had outlawed discrimination; all parties are to be treated equally, by a public authority exercising its powers; there is to

be equality before the law, and the benefits issuing out of the law must devolve equally to each party. Counsel relied on Article 27 of the Constitution of Kenya, 2010, which provides for “*equality and freedom from discrimination*”, for the relevant part, in the following terms:

**“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**“(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”**

Counsel submitted that all the statutes bearing on the mandate of 1<sup>st</sup> respondent, such as the *Local Government Act* (Cap. 265, Laws of Kenya), and the *Public Procurement and Disposal Act* (Cap. 412C, Laws of Kenya), presuppose that in the operation of the public bodies affected, *contracting for supplies and services* will be involved, and the same will carry certain financial *benefits*: such benefits, by the terms of Article 27 of the Constitution, must be dispensed on the basis of **equality**; hence, in the contracting of the public-private partnership between the respondents herein, the petitioners had been treated unequally, by simply being excluded. To demonstrate the alleged exclusion of the petitioners, counsel set out to show that the governing laws were not complied with by the respondents.

(2) *Non-compliance with the Governing Law*

Counsel submitted that 1<sup>st</sup> respondent, in entering into the said public-private partnership, did no *procurement* as required by law; and the evidence to this effect was in the Minutes relied on as the basis of that partnership. The said Minutes are annexed to 1<sup>st</sup> respondent’s replying affidavit and are thus headed: “*MINUTE No. 04/09 OF THE 2<sup>ND</sup> PUBLIC TRANSPORT COMMITTEE MEETING HELD ON 12<sup>TH</sup> NOVEMBER, 2009 IN THE COMMITTEE ROOM, TOWN HALL, MOMBASA AT 9.30A.M*”. The relevant part of the Minute reads:

*“The Town Clerk reported that the Council was approached by a private investor, the Summit Cove Lines Company Limited [i.e., 2<sup>nd</sup> respondent] to enter into [a] parking partnership of trucks and petroleum tankers within the Municipality; he said that the idea was very noble, given the spirit of public-private partnership”.*

The Town Clerk, on that occasion, made a statement which has been treated as relevant evidence by the petitioner: “[The Town Clerk] said that the Company [2<sup>nd</sup> respondent] had developed land at Kibarani, Miritini, Changamwe, Bangladesh and Magongo areas where **the parking facilities had been constructed**. He reported that the investor had proposed revenue sharing [at] 37.5% and 65.5% for the Council and the Company respectively.....”

After 2<sup>nd</sup> respondent’s “**approach**” aforesaid was considered, one **Councillor Rashid Bedzimba** proposed adoption, and this was seconded by His Worship the Mayor, **Councillor A. A. Mohdhar**; and the ensuing resolution is thus minuted:

**“(i) That the proposal for partnership be accepted.**

**“(ii) That from the charges of Kshs. 800/= the Council would benefit by receiving Kshs. 300/= only and Kshs 500/= for investors [i.e., per motor vehicle parked].**

**“(iii) That the above proposed charges be approved by the Council.**

**“(iv) That the Council seek Ministerial approval for the partnership.”**

The Council’s approval was later given, as recorded in “**MINUTES OF THE 7<sup>TH</sup> ORDINARY FULL COUNCIL MEETING HELD ON THURSDAY, 24<sup>TH</sup> DECEMBER, 2009 IN THE COMMITTEE ROOM, TOWN HALL STARTING FROM 9.00AM**”; the relevant Minute reads:

**“RESOLVED That Minutes of the 1<sup>st</sup> and 2<sup>nd</sup> Public Transport Committee Meeting as contained in**

***Minute 01/09 to 06/09 be adopted without amendments”.***

**Mr. Mogaka** submitted that the foregoing record-entries “[do] not show that the Council was procuring; it is [merely] an approach from the private investor”.

By the **Public Procurement and Disposal Act** (Cap. 412C, Laws of Kenya) [original version (2005); current version (2009)], the term “**procurement**” is thus defined (s.3):

**“ ‘procurement’ means the acquisition by purchase, rental, lease, hire-purchase, licence, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination”.**

**“Procuring entity”** is defined as **“a public entity making a procurement to which this Act applies”**; and **“public entity”** is so defined as to include: **“a local authority under the Local Government Act”**.

The general procurement rules are set out in s. 29 of the Act; and subsection (1) thereof requires **“open tendering”**; there is a significant qualification in subsection (3):

**“A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if before using that procedure, the Procuring entity –**

- (a) obtains the written approval of its tender committee; and
- (b) records in writing the reasons for using the alternative procurement procedure.”

Counsel submitted that 1<sup>st</sup> respondent had provided no evidence of fulfilment of the condition for resorting to an alternative method of procurement, in place of *open tendering*. Indeed, counsel urged that such evidence did not exist, as 1<sup>st</sup> respondent’s Town Clerk has already been arraigned in Court on a criminal charge, for *failure to comply with the Public Procurement and Disposal Act*.

Section 74 of the Act provides further condition to the use of a direct procurement procedure by a procuring entity: “(1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long **as the purpose is not to avoid competition**”. Counsel submitted that 1<sup>st</sup> respondent, in this instance, was **“trying to avoid competition”**; for the issue of any alternative person offering the service required **“was not considered [at all]”**. Learned counsel urged that, **“this was sheer preference or discrimination”**, for his clients are asking that they too, be given an opportunity.

Counsel urged that, by s.75 ( c) of the Public Procurement and Disposal Act, any excepted contract for a direct procurement **“must be in writing and signed by both parties”**; but in this case, **“there was no proper contract; it was a contract of secrecy, in breach of the spirit of the Constitution; such a contract is “even hidden from the Court, it is not part of the annexures to the [replying affidavit].”** Such a contract, counsel submitted, was an illegal contract; and in any event, the non-production of the same should lead to an inference unfavourable to the respondents.

**Mr. Mogaka** submitted that the action taken by the respondents could not claim protection under the *Local Government Act* (Cap. 265, Laws of Kenya); for that Act entered into force on **30<sup>th</sup> April, 1963**, whereas the *Public Procurement and Disposal Act* entered into force on **1<sup>st</sup> January, 2007**: and thus, Parliament was aware of the terms of the *Local Government Act* when it enacted the **later statute**, which gave a definition of **“procuring entity”** incorporating a local authority such as 1<sup>st</sup> respondent; and consequently, 1<sup>st</sup> respondent was required to undertake a **“public procurement”**. The superseding of the earlier statute, moreover, had been expressly provided for in s.5 (1) of the *Public Procurement and Disposal Act*, which thus stipulates:

**“If there is a conflict between this Act or the regulations made under this Act and any other Act or**

**regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail”.**

Counsel urged that the process by which 2<sup>nd</sup> respondent was taken on as partner to 1<sup>st</sup> respondent in relation to the service of parking for motor vehicles, was contrary to the Public Procurement and Disposal Act, and so, was illegal; and that 1<sup>st</sup> respondent’s attempts to accord that arrangement the appearance of regularity, through gazettment and through Ministerial approval, would not restore the lost legality; in the words of counsel: “*If the arrangement gazetted is so gazetted illegally, or in breach of statute law, it cannot stand; for parties cannot waive the law*”; the Public Procurement and Disposal Act only provides for use of alternative modes of procurement, but such modes were not used. Counsel urged that anything agreed upon, such as the agreement between 1<sup>st</sup> and 2<sup>nd</sup> respondent, outside the framework of the governing statute law, “*is void ab initio, and does not even require a Court order to declare it such*”; in ***Benjamin Leonard MacFoy v. United Africa Co. Ltd*** [1962] A.C. 152 (a privy Council decision from the West African Court of Appeal) it was held (***Lord Denning***, at p. 160):

***“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad [emphasis supplied].”***

Learned counsel discounted the respondents’ contention that the effect of injunctive orders given at the interlocutory stage, in favour of the petitioners, has been to render many employees of 2<sup>nd</sup> respondent jobless: the Court is not to be asked to sanction an illegality; and there can be no estoppel against the requirements of statute law – ***Francis Mogaka Maranya v. National Bank of Kenya Limited and Another***, Civil Appeal No. 60 of 1997. Counsel invoked, from ***Official Receiver and Provisional Liquidator, Nyayo Bus Service Corporation v. Firestone E.A. (1969) Limited***, Civil Appeal No. 172 of 1998 the pertinent passage on principle, that:

***“It is trite that once an act is a nullity ab initio no amount of argument can render it correct”.***

This principle was reflected in ***Paramount Bank Limited v. Mohammed Ghias Qureishi and Another***, Civil Appeal No. 239 of 2001 [2005] eKLR, in which the Court stated that “***Courts do not sanction illegality***”.

(3) *The Constitution’s Proscription of Discrimination, and Related Provisions*

Counsel urged that the impugned private-public partnership was arrived at discriminatorily, and thus, in violation of Article 10 (2) (b) of the ***Constitution of Kenya, 2010***, which thus provides:

***“(2) The national values and principles of governance include –***

**(a)** .....

**(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination...”**

Counsel urged that the respondents had also been in breach of Article 10(2) (c) of the Constitution which prescribes as part of the “*national values and principles of governance, “good governance, integrity, transparency and accountability*”. There was no ***transparency*** because, “*up to now, the purported contract is [still] being hidden from the Court*”.

The said rights, and in particular those against discrimination (more specifically provided for in Article 27 of the Constitution), counsel urged, “*shall not be limited except by law*” (Article 24(1) ): yet 1<sup>st</sup> defendant’s acts, not based on law, had denied the petitioners’ rights. By not complying with the terms of the Public Procurement and Disposal Act, counsel submitted, 1<sup>st</sup> respondent had contravened the

petitioners' rights under the Constitution; and the relevant terms of that Act are set out in s. 2:

***“The purpose of this Act is to establish procedures for [the] procurement and ....disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives –***

- (a) to maximise economy and efficiency;***
- (b) to promote competition and ensure that competitors are treated fairly;***
- (c) to promote the integrity and fairness of those procedures;***
- (d) to increase transparency and accountability in those procedures....”***

Counsel urged that 1<sup>st</sup> respondent, in its arrangement with 2<sup>nd</sup> respondent, had not invited, nor encouraged any competition; and there has been want of transparency which is required under the Constitution.

Counsel submitted that the subject of *procurement*, which is provided for in detail in the *Public Procurement and Disposal Act*, has such a close bearing to the *fundamental rights of the individual*, that it has been accorded a special provision (**Article 227**) in the *Constitution*, as follows:

***“(1) 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.***

***“(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –***

- a. categories of preference in the allocation of contracts;*
- b. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;*
- c. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and*
- d. sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices”.*

## **H. 2<sup>ND</sup> RESPONDENT'S CASE: SUBMISSIONS**

### **(1) Defining Issues**

Learned counsel, **Mr. Asige** set up a six-point structure for addressing the issues of fact and law canvassed for the petitioner:

- (i) is this a proper constitutional petition?***
- (ii) do breaches of the various statutes entitle the petitioner to claim on the basis of constitutional rights?***
- (iii) has the petitioner locus to institute these proceedings in its name?***
- (iv) does this Constitutional Court have jurisdiction to grant the prayers sought?***
- (v) is the constitutional petition an abuse of the process of the Court?***
- (vi) are the alleged breaches of the Public Procurement and disposal Act an infringement of Bill-of-Rights provisions of the Constitution?***

(2) *Is this a Constitutional Petition founded on Bill-of-Rights Issues?*

**Mr. Asige** urged it to be noteworthy that, of the nine rubrics that mark the beginning of the petition, five made specific reference to the Constitution, while four referred to ordinary statutes: the Local Government Act (Cap. 265, Laws of Kenya); the Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504, Laws of Kenya); the Public Procurement and Disposal Act, 2005 (Cap. 412C, Laws of Kenya); and the Energy Act, 2006 (Act No. 12 of 2006).

**Mr. Asige** urged, firstly that, the design of the rubrics did not show this cause as a constitutional one, as the gravamen should be solved entirely within the terms of the ordinary statutes named. But, in the second place, an “association”, such as Kenya Transport Association, “cannot institute a constitutional petition, it can only do so in the interests of one or more of its members.....[and] only those **interests** of one or more [of the members] are being urged, in a constitutional petition”. Counsel urged that the litigant had not disclosed the one or more members in whose interest the action had been lodged – and, therefore, there was no valid constitutional petition, in the terms of Article 22 (2) (d) of the Constitution.

Counsel urged that in Chapter 4 of the Constitution (which is devoted to the Bill of Rights), the interest being protected is a **personal interest**; for under that Chapter, Article 22 (1) thus provides:

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.**

Counsel submitted that the right created by Article 22 for laying a claim “is a personal right, not a group right”; he gave as examples Article 19(2) and 19(3), and urged that “fundamental rights belong to each individual”. And his next question was whether the instant petition complies with such a construction of the Constitution.

According to learned counsel, the cause herein is not a proper constitutional petition: because the aggrieved individuals have not been identified; and because those rights of theirs alleged to have been infringed, have not been identified. Counsel submitted: “If [it is] a competent petition, then its focus must be the fundamental freedoms of one or more of its members”. Counsel urged that the petition had failed to bring out the individual interest of one or more of the members. Counsel relied on a High Court decision, **Alphonse Mwangemi Munga and Ten Others v. African Safari Club Limited**, Nairobi H.C. Petition No. 564 of 2004 (*Nyamu & Wendoh, JJ.*), in particular on the following passage:

**“The right to move [a] Constitutional Court under s.84 [of the Constitution of Kenya, 1969] for redress is of a personal (individual) nature and there is only one exception to that provision. There is no evidence that the other petitioners who were not before the Court were detained so that those before the Court could represent them.”**

In that case, counsel also invoked the passage which carried the import that a claim under fundamental-rights claims related to things “public”, and which touched on “Government”; the relevant passage thus reads:

**“In the instant case the petitioners are trying to enforce their rights under contracts of service. Those are the rights personal to themselves and have nothing to do with the public. Their claims fall within the private law realm”;**

and **Mr. Asige’s** apprehension of that passage was set out as follows:

**“[A constitutional petition] has a personal, individual nature. There can be no common claim.....Fundamental rights are only enforceable against the Government.”**

From that foundation, which related to the 1969 Constitution, learned counsel made analogies with the terms of the Constitution of Kenya, 2010, and urged that “no allegation has been made that 2<sup>nd</sup> respondent has infringed any rights vested in the petitioner, [in the terms of] Chapter 4 of the Constitution [i.e., the Bill of Rights].”

**Mr. Asige** invoked in aid of his client’s case, a passage in the **Alphonse Mwangemi Munga** case which was drawn from the Privy Council case from Trinidad and Tobago, **Harrikisson v. Attorney-General of Trinidad and Tobago** [1980] A.C. 265:

**“The notion that whenever there is a failure by an organ of Government or a public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution [similar to Chapter V of the Constitution of Kenya, 1969] is fallacious. The right to apply to the High Court under Section**

**6 [similar to s.84 of the Constitution of Kenya, 1969] of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard [for] those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action [emphasis supplied].”**

Counsel urged that the instant petition fully vindicates the apprehension expressed by the Judicial Committee of the Privy Council: “A [fundamental] freedom under Chapter 4 [of the Constitution of Kenya, 2010] [is] being used to redress statutory breaches”. Such, **Mr. Asige** urged, was “improper use of the constitutional provisions”.

Counsel submitted that “breach of the Public Procurement and Disposal Act is not a constitutional question; when there is a legal mechanism of redress, then any issue of breach of the statute is to be resolved through [the statutory] mechanism of redress. He urged that the Public Procurement and Disposal Act “has a full and complete mechanism of redress”. Counsel submitted that a proper constitutional petition would not entail the several statutes set out in the petition’s rubric.

**Mr. Asige** submitted that since the petition was based on the terms of Article 22 of the Constitution, which thus provides:

**“(1)Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”,**

only the rights enumerated under the Bills of Rights could be prosecuted by virtue of that provision, and that the instant proceedings lacked a proper basis; and he urged that for any other category of claim, one must resort to Article 258(1), which provides that:

**“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”**

### (3) Jurisdiction

**Mr. Asige** submitted that the petition had no legal basis, and so the Court lacked the jurisdiction to entertain it. He urged that the Court’s jurisdiction, in relation to fundamental freedoms was conferred by Article 23(1) of the Constitution, which provides:

**“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”.**

Counsel submitted that the petitioner had moved the Court in relation to a host of statutes which were not related to fundamental freedoms, and therefore the jurisdictional provision was inapplicable; in counsel’s words:

**“This Court, sitting as a Constitutional Court, has no jurisdiction to hear and determine this matter beyond the rights and freedoms identified in the Bill of Rights”.**

**Mr. Asige** submitted that such interim orders as had earlier been issued in favour of the petitioners lacked jurisdiction, and consequently should be discharged immediately.

### (4) Questions of Evidence

**Mr. Asige** contested the claim that the respondents were in breach of the fundamental freedoms of the individual provided for in Article 27 of the Constitution [equality and freedom from discrimination]; and of the fundamental freedom regarding access to information [Article 35]; and the right to fair administrative action [Article 47]; he urged that there was no evidence to that effect.

Counsel submitted that the evidence on record did not show 1<sup>st</sup> respondent to have been in breach of the Public Procurement and Disposal Act: for whereas “open tendering” was provided for in Part 5 of the Act, provision was also made (Part 6) for alternative procedure; s. 72(a) of the Act provided for alternative tendering, and there were still other procedures – such as in ss.73(b), 75(c), 87(d), 89(e) and 90(1)(f); counsel urged that the use of any of these procedures did not entail breach of fundamental freedoms under the Constitution.

Counsel urged that the procedure of procurement adopted by the respondents had been approved at formal meetings which were attended also by the representative of the Kenya Transport Association [petitioner], and the resolutions of which later had the approval of the Minister for Local Government acting by virtue of the Local Government Act (Cap. 265). Counsel urged that there were practical justifications to the manner of entering the impugned public-private partnership, between the respondents herein: it would achieve the decongestion of the town, the residential areas, the road reserves; it would decongest the Central Business District; it would enhance 1<sup>st</sup> respondent's revenue-base; 1<sup>st</sup> respondent would benefit from "the already developed facilities of the investor". Counsel submitted that 1<sup>st</sup> respondent's Public Transport Committee, which first generated the scheme of partnership, later approved wholly by the Municipal Council, *was the tender committee*.

### **I. 1<sup>ST</sup> RESPONDENT'S CASE: SUBMISSIONS**

Learned counsel, **Mr. Malombo** for 1<sup>st</sup> respondent, fully adopted **Mr. Asige's** submissions, and urged that the petition raised no constitutional issue relating to fundamental freedoms. Counsel also contended that the petitioner lacked *locus standi* to institute the instant proceedings: for an unincorporated body cannot sue in its own name. Counsel invoked the High Court decision (**Ibrahim, J**) in **Simu Vendors Association v. The Town Clerk, City Council of Nairobi & Another**, Nairobi H.C. Misc. Appl. No. 427 of 2005 [2005] eKLR in which the following passage appears: "*This is a case where the applicant could not in law bring any proceedings in its name. The institution of the proceedings was null and void, ab initio.*" **Mr. Malombo** urged that this was not a true constitutional petition: because it was only seeking the nullification of a contract, whereas a constitutional cause would have sought declaration of rights.

### **J. CONCLUDING PETITIONER'S CASE: RESPONDING SUBMISSIONS**

#### *(1) The Basis of the proceedings*

Learned counsel, **Mr. Mogaka** urged that the controlling framework-consideration for the instant proceedings is that the Court, after looking at the pleadings, the evidence and the provisions of the Constitution, will do justice; and that neither drafting technicalities, nor any anomalies in the pleadings, should prejudice the respondents; and counsel urged that the respondents had not pleaded that their case had been prejudicially affected.

Counsel submitted that the petitioner was not just the Kenya Transport Association; but it was acting in the interests of its members – other than those members who had commenced proceedings in their own right; and so, if it were to be held that there is a misdescription of the parties, this would not go to jurisdiction.

Counsel invoked Article 159 (2) (d) of the Constitution, which thus provides [Article 159 is devoted to "judicial authority"]:

**"justice shall be administered without undue regard to procedural technicalities",**

and he urged that this matter be determined on the merits; he further submitted that on this question, the respondents had sought to rely on authorities established prior to the **Constitution of Kenya, 2010**; besides, those authorities had been concerned with ordinary proceedings. Although the earlier Constitution [of 1969] had not provided for suits by "associations", the position under the current Constitution is different.

Article 22 (2) of the Constitution thus provides:

**"In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –**

**(a).....**

(b).....

(c).....

**(d) an association acting in the interest of one or more of its members.”**

Therefore, counsel urged, “an association is now expressly accorded [**locus standi**].”

## *(2) Jurisdiction to lodge a Constitutional Petition*

Counsel submitted that, showing even a single breach of the Bill of Rights will demonstrate this to be a “*constitutional petition*”, and therefore a matter in respect of which the Court has *jurisdiction* as a “*Constitutional Court*”.

Article 27 of the Constitution, which relates to “*equality and freedom from discrimination*”, provides in the first two clauses as follows:

**“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**“(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”**

“*Equal protection and equal benefit of the law*”, counsel urged, refers to the State’s body of laws which are expressed in **statutes**; and one of such statutes is the **Public Procurement and Disposal Act**; the Constitution is protecting that law, as the **source of rights and benefits to all**, without any discrimination.

Now counsel urged that the petitioners **had** been discriminated against, and someone else [2<sup>nd</sup> respondent] was accorded undue preference; the law was disregarded. This, counsel submitted, “*is not only a breach of the law, the constitutional right to benefits of the law, was [also] violated*”.

Breach of the law, counsel submitted, came in the form of avoiding **procurement**, and conferring contractual benefits on the basis of “an approach” by 2<sup>nd</sup> respondent: and this was in breach of the safeguard against **discrimination**, in the terms of **Article 27 of the Constitution**.

In this connection, counsel raised a relevant evidentiary matter: by the time 2<sup>nd</sup> respondent “*approached*” 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent **already had** developed parking yards; this raises the question: did they already know they would be awarded a contract by 1<sup>st</sup> respondent? This question underlines the unequal condition attending the creation of the public-private partnership between the two respondents. Besides, if indeed, 2<sup>nd</sup> respondent already had developed parking yards prior to the inauguration of the public-private partnership, then on what basis have they estimated their losses which they urge to have been occasioned by this Court’s interim orders in favour of the petitioner?

## *(3) Void Decision owing to Breach of Law*

Counsel submitted that the respondents’ sole colour of “*regularity*” is that 2<sup>nd</sup> respondent’s “*approach*” which led to the public-private partnership, was approved by the Minister for Local Government and was published in the **Kenya Gazette**: but the Minister had no competence to *waive the law*; and the gazettment could not have the effect of waiving the law.

Counsel submitted, in agreement with **Mr. Asige** for 2<sup>nd</sup> respondent, that under the Public Procurement and Disposal Act, 1<sup>st</sup> respondent could have contracted in respect of parking services, *other than through open tendering*: but the conditions for resorting to such alternative processes were not met, and so there was no procurement, in the terms of the Public Procurement and Disposal Act.

**Mr. Mogaka** contested the submission made for 2<sup>nd</sup> respondent, that the approvals for the said public-private partnership came in the wake of deliberations and approval by the Public Transport Committee of 1<sup>st</sup> respondent: because this Committee was not a “*tender committee*” as contemplated under the Public Procurement and Disposal Act. The said Act thus provides (s.26 (4)):

**“A public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations”.**

The membership of the tender committee is provided for in s.26(5) of the Act; it shall –

**“(a) consist of not less than five members;**

**“(b) have as its secretary, the procurement professional in charge of the procurement unit.”**

By 2<sup>nd</sup> respondent’s replying affidavit, the Public Transport Committee which first recommended the public-private partnership, by no means complied with the foregoing provisions.

The procurement unit established under s.26 (4) is required to be staffed by “*procurement professionals*”, a term which is defined in s.26 (8); and, as counsel urged, 1<sup>st</sup> respondent’s Public Transport Committee did not fulfil this requirement.

Counsel submitted that 1<sup>st</sup> respondent had been in breach of Article 27 of the Constitution, by conferring a benefit upon 2<sup>nd</sup> respondent without following the constitutional process; the law was disregarded, and this occasioned prejudice to members of the Kenya Transport Association.

## **K. ANALYSIS**

### **(1) Petitioner’s Case, and the Objection on Jurisdiction**

Although the respondents urged that the petitioner, as an unincorporated body, lacked **locus standi**, learned counsel, **Mr. Mogaka** has shown that, by virtue of **Article 22(2) of the Constitution** it is open to an **association** (such as the petitioner herein) to institute proceedings based on the Bill-of-Rights, “*in the interest of one or more of its members*”. Although the petitioner’s members have not been individually named, the rubric of the petition states that it is “*acting in the interest of its members*”. In view of the importance of any Bill of Rights claim, and as no convincing reason has been shown such as would bar the petitioner from instituting action on behalf of its members, I hold that there is no impropriety in the joinder of parties, in this matter, and, consequently, I hold that the petitioner has **locus standi**.

A further issue on jurisdiction is raised by the respondents, who contend that no proper constitutional question has been laid; and therefore the Court acting as a Constitutional Court, lacks *jurisdiction*. This contention rests on the argument that the several statutes listed in the petition’s rubric, are the basis of the grievance, and provide all the redress avenues for the same, and, therefore, there is no constitutional case. But I think this objection cannot be sustained, firstly, because the petition’s rubric also refers to the individual rights and fundamental freedoms of the Constitution; and secondly, because the petitioner has named specific rights forming the gravamen – equality and freedom from discrimination; and right to “*fair administrative action*”. It follows that this Court has jurisdiction as a Constitutional Court to hear and determine the petition herein.

### **(2) The Constitution, and the Public Procurement and Disposal Act – Organic Law**

The claim of discrimination contrary to Article 27 of the Constitution is integrally linked to the functioning of the **Public Procurement and Disposal Act**; only by due compliance with that enactment, would 1<sup>st</sup> respondent as a public authority, give fulfilment to the safeguards of that Article, with regard to the contract for parking services. But the petitioner has shown by evidence that 1<sup>st</sup> respondent had

rendered the contract to 2<sup>nd</sup> respondent without complying with the Public Procurement and Disposal Act. In *parity with the Constitution*, the Act regulates procurement procedure in detail, guided by the principle that unequal, preferential treatment is not to be accorded to a particular person, to the prejudice of others; and even where open tendering is not required, any alternative method of procurement must comply with certain rules. I am not in agreement with counsel for the respondents, that 1<sup>st</sup> respondent had used such alternative tendering procedures; 1<sup>st</sup> respondent employed no organ charged with procurement processes, and simply adopted the untransparent “*approach*” of 2<sup>nd</sup> respondent, and awarded to 2<sup>nd</sup> respondent a lucrative contract which, it is not even clear, was for the public interest represented by 1<sup>st</sup> respondent. It was a discriminatory process which, without lawful cause, entirely excluded those such as the members of the petitioner. As against these members of the petitioner, their fundamental rights and freedoms under Article 27 of the Constitution had been infringed, and their rights to fair administrative action, under Article 47, had been contravened. Although counsel for the respondents urged that the petitioners should have sought a redress by invoking the administrative processes provided for under the Public Procurement and Disposal Act, such a position is not to be upheld, where constitutional rights have been, as in this case, infringed, and the aggrieved persons have opted for enforcement by Court process.

Although counsel for the respondents contended that the impugned public-private partnership between them had been conceived in accordance with the Local Government Act (Cap. 265), this will not spare their act from the mandatory obligations created by the *Constitution*, which are well reflected in the procedures of the ***Public Procurement and Disposal Act*** (Cap. 412C). This statute, in relation to the Local Government Act, is superior in its operation, for it faithfully reflects the terms of the highly progressive Constitution of 2010, and on this account, is in every sense an ***organic law*** to the Constitution: compliance with the safeguards of the Constitution is, simultaneously, compliance with the procedures of that Act. It is clear that the respondents herein are in breach of both documents, and the proper orders must be made.

### *(3) Insufficient Defences*

The respondents have contended that the petitioner had been represented during the preliminary discussions leading to the making of the impugned public-private partnership; they have urged that the said partnership has served the public interest, by eliminating the widespread parking problem in Mombasa, and by enhancing 1<sup>st</sup> respondent’s revenue base; they say the partnership idea was “*very noble*” and beneficent for members of the public – but all these claims, which are not even supported by evidence, have no significance in legal terms and, especially, in view of the violation of the fundamental-rights guarantees of the Constitution.

## **L. DECLARATIONS AND ORDERS**

The foregoing analysis leads to a clear outcome, which is reflected in the following Declarations and Orders:

**(1) *I declare as unlawful, null and void the existing public-private partnership between 1<sup>st</sup> and 2<sup>nd</sup> respondents, regulating motor vehicle parking, collection of parking fees/charges, and clamping of motor vehicles within Mombasa County for having been secured in breach of the Constitution and the law.***

**(2) *An Order is hereby issued prohibiting the respondents, their servants, employees, agents, or otherwise howsoever, from collecting parking charges/fees on the basis of the existing public-private partnership recorded in Gazette Notices Nos. 4728 of 11<sup>th</sup> July, 2003; 5727 and 5728 of 15<sup>th</sup> August, 2003; 1594 of 12<sup>th</sup> February, 2010; and 11859 of 1<sup>st</sup> October, 2010.***

**(3) *The respondents shall bear the costs, jointly and severally.***

**DATED and DELIVERED at MOMBASA this 20<sup>th</sup> day of May, 2011.**

.....

***J. B. OJWANG***

**JUDGE**

Coram: *Ojwang, J*

Court Clerk: *Ibrahim*

For Petitioner: *Mr. Mogaka*

For 1<sup>st</sup> Respondent: *Mr. Malombo*

For 2<sup>nd</sup> Respondent: *Mr. Asige*