



Pepe Limited v Kenya Railways Corporation & 3 others; Kenya Revenue Protection Services & another (Interested Parties) (Environment & Land Petition 29 of 2018) [2022] KEELC 4880 (KLR) (19 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 29 OF 2018
CA OCHIENG, J
SEPTEMBER 19, 2022**

BETWEEN

PEPE LIMITED PETITIONER

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

KENYA PORTS AUTHORITY 3RD RESPONDENT

HOUSING AND URBAN DEVELOPMENT 4TH RESPONDENT

AND

KENYA REVENUE PROTECTION SERVICES INTERESTED PARTY

**COMMISSIONER INTELLIGENCE AND STRATEGIC OPERATIONS,
KRA INTERESTED PARTY**

JUDGMENT

1. Through a Petition dated the 19th February, 2018, the Petitioner prays for Judgment against the Respondents for:
 - a. A declaration be and is hereby declared that the use and occupation of L.R. No. 337/196 with Grant No. I.R. 26166 is as defined under statutory Gazette Notices 6972 of 13th December 1996 and 171 of 23rd January, 1998 and that for the land to meet its statutorily appointed user, it must be connected by both rail and road.
 - b. A declaration be and it is hereby declared that L.R. No. 337/196 with Grant No. I.R. 26166 is an inland port operating as an internal container depot and as customs area with an



approved transit shed for offloading uncustomed goods, place of examination of goods with designated entries and exits connected to rail and road in accordance with terms of approval and appointment.

- c. A declaration that the Government of Kenya and the Respondents having caused the Petitioner to acquire L.R. No 337/196 with Grant No. I.R. 26166 and to develop and improve it for use as an inland container depot, the Petitioner as a result of the acquisition, development and improvement of L.R. No 337/196 with Grant No. I.R. 26166 has acquired rights over and interests in the use and occupation of the parcel of land, which rights and interests the Constitution protects and prohibits the Respondent from depriving the Petitioner of the same arbitrarily, unreasonably, irrationally, whimsically, capriciously, without notice or opportunity to be heard, and without compensation and it is hereby so ordered and declared.
- d. A declaration be and it is hereby declared that prior to the construction of the standard gauge railway line, the 1st and 4th Respondent were under mandatory duty to undertake public participation involving the stakeholders who would be adversely affected by the project, and the 1st and 4th Respondent were required to provide mitigating remedies for any environmental and economic factors.
- e. A declaration be and is hereby declared that the 1st and 4th Respondent did not conduct an Environmental Impact assessment involving stake holders and deliberately failed to hold public meetings, consultation or seek views of the Petitioner as a major affected party and stakeholder.
- f. A declaration be and is hereby declared that the development by the 1st and 4th Respondent of constructing the standard gauge railway without public participation or consultation with the stakeholder was unreasonable, in bad faith, unconstitutional and unlawful and such gravely affected and prejudiced the rights of the Petitioner.
- g. A declaration be and it is hereby declared that the Respondents in the performance of their duty are under a constitutional and statutory obligation to act fairly, in good faith, without discrimination or preferential treatment in favour of any person or authority.
- h. A declaration be and is hereby declared that the obvious covert activities and conspiracy of the 1st, 2nd, 3rd and 4th Respondents of diverting import cargo to the standard gauge railway and Embakasi ICD's L.R. No. 209/11340 is non-transparent, discriminatory, unlawful, unconstitutional and prejudicial to the accrued rights and interests of the Petitioner and it is hereby ordered that the Respondents, individually or severally, shall not interfere with the already accrued rights and interests of Pepe ICD's L.R. No 337/196 as the government policy and approval where the investment is huge is legitimately expected to have permanency.
- i. A declaration be and is hereby declared that the conspiracy by the 1st, 2nd, 3rd and 4th Respondents, jointly and individually of covertly directing the shipping lines not to manifest cargo to Pepe ICD's L.R. No 337/196 without prior notice, information or opportunity to be heard by the Petitioner is contrary to right fair administrative action under Article 47 of the Constitution and such acts were deliberately intended to harm and injure the Petitioner rights and interest of the Petitioner over the use of L.R. No 337/196.
- j. A declaration be and is hereby declared that the acts of 2nd and 3rd Respondents, whether individually or jointly of deliberately failing to nominate cargo to the Petitioner's L.R. No 337/196 is unlawful, unconstitutional, non-transparent and in bad faith.



- k. A declaration be and is hereby declared that the failure of the 1st and 4th Respondent either individually or in concert to connect the standard gauge railway and or the cutting of the use of the already existing railway for cargo destined to L.R. No 337/196 without reason, notice or consultation is lawful, unconstitutional, and is prejudicial to the rights and interest of the Petitioner.
- l. A declaration be and is hereby declared that the covert conspiracy involving the Respondents and the interested parties of diverting all uncustomed goods L.R. No 209/11340 ICD Embakasi in order to promote its use and occupation purpose and to preclude the Petitioner's L.R. No 337/196 is malicious, unjust, unlawful and unconstitutional.
- m. A declaration be and is hereby declared that the acts of the 2nd Respondent of subjecting the Petitioner to a new application for designation of L.R. No 337/196 with discretion of approval or denial is malicious, unfair, and discriminatory, contrary to fair administrative action, is unlawful and unconstitutional and is intended to benefit L.R. No 209/11340 ICD Embakasi
- n. A declaration be and is hereby declared that the 2nd Interested Party is not proper officers as envisaged under the *Customs and Excise Act*, and the *East Africa Community Customs Management Act* to warrant him to interfere with uncustomed goods or the use and occupation of L.R. No 337/196, a customs area.
- o. A declaration be and is hereby declared that the interference with the use and occupation of L.R. No 337/196 by the Interested Parties of deliberately and intentional holding uncustomed cargo inordinately or over a long period of time in order to discourage the users of L.R. No 337/196 is in bad faith, procedurally unfair, unlawful and unconstitutional.
- p. A declaration be and is hereby declared that though the Government has entered into movement of uncustomed cargo by investing Kshs 21 billion at ICD Embakasi's L.R. No. 209/11340 it shall be immoral, unjust, unfair, unlawful and unconstitutional to kill the Petitioner who also has invested billions of shillings in improving and developing L.R. No 337/196 and has been sustaining the government in cargo movement from Mombasa to Athi river for over 20 years when the Government has no capacity to achieve this movement.
- q. The Honourable court be pleased to and hereby orders the Respondents, individually or severally, to permanently suspend and stay the arbitrary directives by the Respondents, individual and severally, made to the shipping lines not to manifest cargo to L.R. No 337/196, Pepe ICD, Athi River.
- r. The Honourable Court be pleased to issue an order directed at the Respondents to permanently rescind and waive their directives and/or communicate this Honourable Court's orders permanently staying the directives to all whom the offending directive had been made with the same prominence the directives were issued and to inform them to continue manifesting cargo to Petitioner's L.R. No 337/196 with Grant No. I.R. 26166 with immediate effect and it is hereby so ordered.
- s. The Honourable Court be pleased to and hereby issues a permanent order directing the Respondents, individually and severally to immediately issue directive and/or communication to all the shipping lines that they are at liberty or are entitled to continue manifesting cargo to Pepe ICD's L.R. No 337/196.
- t. The Honourable Court be pleased to and is hereby ordered that the Respondents, individually or severally to provide the Petitioner with the copy of the notice rescinding the directives issued



to shipping lines and importers not to manifest cargo to Pepe ICD's L.R. No 337/196 and to provide the Petitioner with a copy of the communication to the shipping lines to continue manifesting cargo to Pepe ICD's L.R. No 3337/196 with immediate effect.

- u. The Honourable Court be pleased to and hereby issues a permanent order directed at the Respondents, individually or severally, prohibiting them from stopping or interfering with the movement of uncustomed cargo by road from the 3rd Respondents premises to the Petitioner's Pepe ICD's L.R. No 3337/196.
 - v. The Respondents, individually and severally, be and are hereby permanently ordered to continue implementing customs form C10, manifesting and/or releasing cargo by road or rail to Pepe ICD's L.R. No 3337/196 without undue delay.
 - w. The Respondents, individually and severally, be and are hereby permanently order to facilitate the use of Pepe ICD's L.R. No 3337/196 by connecting it the Standard Gauge Railway and/or providing L.R. No 3337/196 with cargo rail service.
 - x. The 2nd Respondent be and is hereby permanently ordered to ensure that the use and occupation of Pepe ICD's L.R. No 3337/196 is without interference through unnecessary delays under pretext of valuation and in any event after customs entry, the cargo should be removed not more than 4 days in order to preserve the environment though it is ordered that the 2nd Respondent has liberty to impose fees which shall not be unreasonable concerning the Petitioner's operation, use and occupation of L.R. No. 337/197.
 - y. The Honourable Court be pleased to and hereby issues an order permanently prohibiting the Respondents, their employees, agents, servants and persons acting through them from in any way interfering with, thwarting, stopping, delaying, or prohibiting the manifesting of uncustomed goods to the Petitioner's L.R. No 337/196 with Grant No. I.R. 26166 for entry for home use or in any adversely interfering with or thwarting the designated use and occupation of L.R. No 337/196 with Grant No. I.R. 26166.
 - z. An order be and is hereby issued permanently prohibiting the Respondents, their employees, staff, agents, servants and persons/agencies acting through individually and severally or whomsoever from in any way stopping, interfering with, thwarting, impeding, or fettering the manifesting, transport by rail or road or processing of uncustomed goods to or at the Petitioner's L.R. No 337/196 with Grant No. I.R. 26166 or the use of the land as gazetted in gazette Notice 6972 of 13th December 1996 as enhanced by Gazette Notice No. 171 of 23rd January, 1998.
 - aa. The Honourable Court be pleased to grant any other appropriate reliefs it deems fit and just to protect the Petitioner's rights over and interests in the sue and occupation of L.R. No 337/196 with grant No. I.R. 26166.
 - bb. The Petition be and is hereby awarded the costs of this Petition together with compounded interests.
2. The Petition was opposed by the Respondents who filed their respective Replying Affidavits. They contended that the Petitioner's rights had not been violated. They insisted that the Petitioner was not a Container Freight Service (CFS) but an inland depot for uncustomed goods, and had not demonstrated how the Respondents had violated its rights. Further, that it had not produced adequate material to prove its averments in the Petition.

The Petition was then canvassed by way of written submissions.



Submissions

3. The Petitioner in its submissions reiterates its averments as per the Petition and contends that the Respondents have violated, threatened or infringed on its rights as per Articles 10, 27, 40, 42, 47 and 69 (1)(b) and (d) of the *Constitution*. It claims its parcel of land L.R. No. 337/196 hereinafter referred to as the 'suit land' is designated as an inland port, and hence it cannot use another land as a custom area or inland port other than the said suit land. Further, upon acquisition of the suit land as an inland port, it was forced to develop it, in accordance to its designated user. It explains that the first designation of the user of the suit land was in 1996 by Gazette Notice No. 6972 of 13th September, 1996, which user was enhanced in the year 1998 by Gazette notice No. 171 of 23rd January, 1998, and while acquiring it, in the year 2002, the user passed with the land. Further, that the cause of action in this matter arose out of the arbitrary, unconstitutional, procedurally unfair, unlawful, illegal, unreasonable, irrational and unjust acts of the Respondents including the Interested Parties herein, which acts interferes with and threatens to thwart the use as well as occupation of the suit land. It further submits that the Respondents' jointly and clandestinely directed the users of the suit land, not to use it for its designated use and informed shippers not to accept cargo destined to it, for clearance. It reiterates that the user of the suit land was designated under a statutory order pursuant to Section 9 of the *Customs and Excise Act*. Further, that such user cannot be substituted or replaced by clandestine and covert directives. It argues that the Respondents have also intimated that they will stop transportation of cargo by road, which in essence, will cut off the suit land from any road and rail access, causing huge losses to it due to investments made thereon. It avers that the authority and designation of the suit land as customs area and inland port was granted to the Petitioner by the government with the full knowledge that the investments on improving the said suit land would be approximately over Kshs. 2 billion shillings and at a time when the Government as well as the Respondents had no capacity or funds to establish such customs area or inland port. Further, that neither the government nor any of its agencies should arbitrarily destroy or irreparably injure such investments including improvements thereon without compensation, notice or reasons. It challenges the argument that the use and occupation of suit land is purely a commercial matter and contends that the government itself confirmed at the Cabinet level that the dominant use of the said land was public in nature and not a private one, being customs point for entry and handling of goods whose taxes had not yet been collected, while in furtherance it provided police officers plus a police station therein free of charge. It further submits that the Respondents' acts of adversely interfering with the user of suit land constitutes administrative action which are adverse to its interests on the use of said land. Further, that the acts, conspiracies and directives of the 3rd Respondent to third party shipping lines and cargo importers not to manifest goods to the suit land for entry for home use, were in bad faith, without prior notice to it and neither was it given an opportunity to be heard, hence a glaring violation of the Petitioner's rights to fair administrative action as protected under Article 47 and 50(1) of the *Constitution*. It claims that by several letters produced as annexure 'DG6', it enquired as to the reasons for the interference with the user of the suit land but the Respondents never provided any reasons thereto. It contended that it legitimately expected that the Respondents, jointly or severally, would not take any adverse action to interfere with, threaten or thwart the designated use of the suit land as inland port and customs area, which legitimate expectation has been violated by the Respondents' acts of issuing adverse directives to third parties without prior notice to it. Further, that the Respondents have openly and demonstrably given undue preference to Nairobi Embakasi ICD's L.R. No. 209/11340 by connecting the property to the Standard Gauge Railway (SGR) and directing all uncustomed goods for entry for home use, import, or transshipment to be transported to L.R. No. 209/11340 but subjected suit land, to undue disadvantage hence depriving it, of equal protection and benefit of the law as envisaged under Article 27(1) of the *Constitution*, Section 8(2)(e) of the *Kenya Railways Act* as well as Section 8(2)(e) of the *Kenya Ports*



Authority Act. It avers that it was not involved in Public participation on matters touching on the SGR especially during undertaking of the environmental impact assessment. Further, that having previously connected the suit land to the old meter gauge railway and being fully conscious of the prerequisite of rail connection to it, the 1st Respondent deliberately and intentionally failed to connect the said parcel of land to the SGR. It further reiterates that the excessive delays as well as arbitrarily withholding of cargo by persons who are not proper officers unnecessarily pose a threat to the right to clean including healthy environment to those using the suit land and to the environment at large, based on the fact that excessive delays cause expiry of goods, food including other products imported which expiry makes them hazardous to health and environment, especially before safe disposal.

4. To buttress its averments, the Petitioner relied on the following decisions: American Dry Fruit Stores vs Union of India And Others; Laker Airways v Department of Trade: CA 15 Dec 1976, the UK Court of Appeal; SN v Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General [2016] eKLR; SN v Cabinet Secretary for the Ministry of Interior and Co-ordination of National Management Services, Director General, Kenya Citizens & Foreign Nationals Management Services & Attorney General [2016] eKLR and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.
5. The 1st Respondent in its submissions contends that this matter ought to have been filed as an ordinary civil claim by way of a Plaint as the law is clear that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. Further, that the Petition omits to disclose when the cause of action against the 1st Respondent accrued. It contends that the claim as per the Kenya Ports Authority Act, is statute barred and that is the reason the Petitioner filed the instant Petition. Further, that the issues in this Petition, being commercial in nature, ought to have been presented in a Plaint. It insists that the Petitioner's allegations that its clients at PEPE ICD are being subjected to arbitrary tax uplifts are not only third-party claims for which it has no locus to argue but also claims which ought to be made by way of Plaint and or at the Tax Appeals Tribunal under the doctrine of exhaustion of alternative remedies. It avers that under the doctrine of exhaustion of alternative remedies, the Petitioner's plainly false claim that an EIA study was not done for the SGR ought first to have been brought before the Public Complaints Committee established under Section 31 of the Environmental Management and Coordination Act (EMCA) which has the jurisdiction to investigate any allegations or complaints against any person or against NEMA in relation to the condition of the environment in Kenya, or even before the National Environmental Tribunal pursuant to the provisions of Section 129 of EMCA before such a claim could be brought to this court. It insists that the Petitioner has not proved its case to the required standard of proof to warrant the orders sought being issued against it.
6. It insists that the Petitioner's ICD is connected to the meter gauge railway which operates to date and it has not demonstrated the annual estimates of how much freight it has conveyed by road in the past and how much it has transported by meter gauge railway since it began operating the said ICD. Further, it has failed to annex the alleged directives to shipping lines and third-party importers not to remit cargo to it and the annexed emails in the affidavit of David Githu reveal nothing, hence inadmissible. It further submits that Embakasi ICD is a government facility owned and operated by the 3rd respondent as an inland port (dry port) with the main objective to bring port services closer to customers, and Kenyans, in the hinterland in line with Article 6(3) of the Constitution. It reiterates that exhibit 'DG 2' on its face does not bear out the particulars of the allegation that cargo manifested to be cleared at PEPE ICD was forcefully hijacked and transported on the SGR to the 3rd respondent's Embakasi ICD. Further, that the question as to whether an Environmental Impact Assessment Study for the



entire SGR project was carried out or not has been heard and determined by a Court of law. It insists that a designed feasibility study was conducted and that Embakasi ICD is connected to rail network of the 1st Respondent based on assessment of the 1st Respondent on the most cost effective and efficient route of the SGR following a design report including engineering study. It avers that it will suffer severe prejudice should it be ordered to construct a railway line connecting the Petitioner's PEPE ICD to the SGR line when that is not in keeping with the principles of operation as provided in Section 24 of the [Kenya Railways Corporation Act](#) and moreover when to do so, is not financially feasible.

7. To support its arguments, it relied on very many decisions including: *Harrikisson V Attorney General of Trinidad & Tobago* (1980) AC265; *Sumayya Athmani Hassan V Paul Masinde Simidi & Another* [2019] eKLR; Nairobi ELRC Petition No. 145 of 2018: *Ernest Moturi Ogora Vs. National Cereals & Produce Board & Another*; *Communication Commission of Kenya & Others V Royal Media Services Limited & 5 Others* [2014] eKLR; *Salat Aden Mohamed & Another V Noor Aden Abdullahi & 4 Others* [2022] eKLR; *Kiambu County Tenants Welfare Association V Attorney General & Another* [2017] eKLR; *Rose Wangui Mambo & 2 Others V Limuru Country Club & 17 Others* [2014] eKLR; *Independent Electoral and Boundaries Commission (IEBC) V National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR; *Patrick Musimba V National Land Commission & 4 Others* [2016] eKLR; *Okiya Omtatah Okoiti & 2 Others V Attorney General & 3 Others* [2014] eKLR; *Peter K. Waweru v Republic* [2006] eKLR; *Independent Electoral and Boundaries Commission (IEBC) V National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR; *Patrick Musimba V National Land Commission & 4 Others* [2016] eKLR and *Okiya Omtatah Okoiti & 2 Others V Attorney General & 3 Others* [2014] eKLR.
8. The 2nd Respondent, 1st and 2nd Interested Parties in their submissions contend that they did not conspire in any manner to interfere with the operations of the Petitioner. Further, that the Petitioner has not tendered any evidence to support this claim. It argues that it has no mandate as to where the cargo is consigned as this is the obligation of the 3rd Respondent under the [Kenya Ports Authority Act](#). Further, no evidence has been provided to support the issue of delays in clearing consignment of cargo at the Petitioner's premises. In respect to the container No. CAXU9366653 which the Petitioner relied on, it argues that the court in JR No. 646 of 2017, *Konton Trading Limited Vs Kenya Revenue Authority & 3 Others* (2018) eKLR, found in their favour that nothing was undertaken outside the 2nd Respondent's mandate. On the issue of refusing to have the SGR Line to pass through the suit land, it avers that the Petitioner is challenging the decision that advised the routing of SGR which is a policy issue. It reiterates that the Petitioner has failed to discharge the burden of proof to demonstrate infringement of its rights as no documentary evidence was presented in court. Further, there is no infringement of the right to equality by the Respondent. They argue that the article on right to equality relates to persons and not items. They contend that there was no infringement of the Petitioner's right to fair administrative action by the 2nd Respondent as nothing has been placed before court to support the existence of any action. Further, Petitioner has not clearly demonstrated the violations in a precise manner. To buttress their averments, they also relied on very many decisions including: *Samson Gwer & 5 others Vs Kenya Medical Research Institute & 3 Others* (2020) eKLR; *Miguna Miguna V Luftbansa Group & 7 Others*; *Kenya Association of Stock Brokers & Investment Banks V Attorney General & Another* (2015) eKLR; *Kenya Airports Authority V Mitu – Bell Welfare Society & 2 Others*; *Ndora Stephen V Minister for Education & 2 Others* Nairobi High Court Petition No. 464 of 2012; *Evans Otieno Nyakwana V Cleophas Bwana Ongaro* (2015) eKLR; *African Highland Produce Ltd V John Kisono* (2001) eKLR; *Kariithi & Another v Attorney General & Another* (Constitutional Petition 30 of 2013) (2021) KEHC 308 (KLR) (23 November, 2021); *Republic V Minister for Finance & 2 Others* (2006) eKLR; *Waweru & 3 Others (suing as officials of Kitengela Bar Owners Association & Another V National Assembly & 2 others*; *Institute of Certified Public Accountants of Kenya (ICPAK) & 2 Others*



(Interested Parties) (Constitutional Petition E 005 & E 001 (Consolidated) of 2021) (2021) KEHC 58 (KLR) (20 September 2021) (Judgement); *Leonard Otieno V Airtel Kenya Limited* (2018) eKLR; *Okiya Omtatah Okoiti V Attorney General & Kenya Revenue Authority* (2020) eKLR; *Anarita Karimi Njeru* No. 1 of (1979) 1KLR as cited in the case of *Mumo Matemu Vs Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012* and *Dr. Rev. Timothy Njoya V The Hon. Attorney General & Kenya Revenue Authority* HC Constitutional & Human Rights Division Petition No. 479 of 2013.

9. The 3rd Respondent in its submissions insist it did not give a directive and further the Petitioner failed to produce a copy of the same which forms the fulcrum of the dispute herein. Further, that the emails and letters from third parties, who are not parties herein amount to hearsay evidence. It argues that there are numerous areas gazetted as customs areas including ICD's such as the Petitioner's, while consignment of uncustomed goods to those warehouses is a different issue. Further, consignment of goods is not synonymous with gazettement of a customs area. It insists that consignment of cargo arriving at the port of Mombasa is its statutory function and in absence of a contract, it has no obligation to consign cargo to the Petitioner's ICD. It further submits that it has not violated the Petitioner's right to equality and freedom from discrimination. Further, that it did not violate the Petitioner's rights as enshrined in Article 47 and 50(1) of the *Constitution*. It reiterates that there was adequate public participation and EIA studies prior to the construction of the SGR. To buttress its averments, it relied on the following decisions: *Coast Legal Aid & Resource Foundation (CLARF) V Coast Water Board Services & 3 Others* (2021) eKLR; *Monica Wangu Wamwere V Attorney General* (2019) eKLR; *Republic Vs Mwangi S. Kimenyi Ex parte Kenya Institute for Public Policy & Research Analysis (KIPPPRA)* (2013) eKLR; *Republic Vs Kenya Ports Authority & Another Ex parte Messina (K) Ltd* (2011) eKLR; *Cooperative Bank of Kenya Limited V Patrick Kangethe Njuguna & Others* (2017) eKLR; *Mohamed Fugicha V Methodist Church in Kenya & 3 Others* (2016) eKLR; *Commission for Human Rights & Justice V Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party)* (2020) eKLR; *Patrick Musimba Vs National Land Commission & 4 Others* (2016) eKLR and *John Omolo Oracha & 3 Others V Kenya Petroleum Refineries Ltd & 3 Others* (2017) eKLR.

Analysis and Determination

10. Upon consideration of the instant Petition, respective affidavits and rivalling submissions, the following are the issues for determination: Whether the Respondents including the Interested Parties have violated and or infringed upon the Petitioner's rights as per Articles 10, 27, 40, 42, 47 and 69 (1) (b) and (d) of the *Constitution*. Whether the Petitioner is entitled to orders sought in the Petition.
11. As to whether the Respondents including the Interested Parties have violated and or infringed upon the Petitioner's rights as per Articles 10, 27, 40, 42, 47 and 69 (1)(b) and (d) of the *Constitution*.
12. The Petitioner claims the suit land is designated as an inland port, and hence it cannot use another land as a custom area or inland port other than the said parcel of land. It contends that upon acquisition of the suit land as an inland port, it was forced to develop it in accordance to its designated user. Further, that the first designation of the user of the suit land was in 1996 *vide* Gazette Notice No. 6972 of 13th September, 1996, which user was enhanced in the year 1998 by Gazette No. 171 of 23rd January, 1998. It seeks to protect its interests against interference with the suit land as the Respondents and Interested Parties have arbitrarily, unconstitutionally, unprocedurally, unlawfully, illegally, unreasonably, and irrationally interfered with it, as well as threatened to thwart the use including occupation of suit land outside the bounds of the law. It explains that the Respondents clandestinely directed the users of the suit land not to use it, for its designated use and informed shippers not to accept cargo destined to it, for clearance. It argues that the user of the suit land was designated under a statutory order pursuant to Section 9 of the *Customs and Excise Act*. Further, that such user cannot be substituted or replaced



by clandestine and covert directives issued to users of suit land as a mere directive cannot have the force of law or substitute the user designated pursuant to Section 9 of the *Customs and Excise Act*. It avers that the Respondents intimated their intention to stop transportation of cargo by road, which will culminate in the cutting off the suit land from any road including rail access causing it huge losses due to investments made thereon. The Respondents including the Interested Parties insist that the Petitioner has not established a claim to warrant the orders sought. As per the arguments in their Replying Affidavits, they aver that the suit land is connected to the one metre gauge railway line. They contend that the Petitioner is not a CFS and the Embakasi ICD is a government facility. Further, that the Petitioner has not demonstrated by way of evidence, the allegations levelled against them. They contend that the Petitioner should have instituted a suit by way of Complaint instead.

13. In the case of *Anarita Karimi Njeru Vs Attorney General* [1979] KLR 54, it was held that any Petitioner seeking redress under the constitution must state his claim with precision, referring to the Constitutional provisions which have been violated.

14. Further in the case of *Mumo Matemo v Trusted Society of Human Rights alliance* [2014] eKLR, it was held that:

“...the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

15. On perusal of the Petition including the various documents supporting it, I note the Petitioner has annexed various letters including email correspondence whose makers have not sworn affidavits to confirm the authenticity of the facts contained therein. The Petitioner has not disputed that the suit land is not a Container Freight Station (CFS) but an inland depot for uncustomed goods. Except for the various correspondence to the 1st Respondent to clarify on the issue of siding of SGR to the suit land, the Petitioner has not annexed any document expressly indicating that there was a firm commitment by the government that the SGR would pass through its ICD as claimed that the Gazette Notices 6972 of 13th December 1996 and 171 of 23rd January, 1998 stated that for the land to meet its statutorily appointed user, it must be connected by both rail and road. Further, I note that the Petitioner admitted that there is already the one - metre gauge railway line siding the suit land. From the arguments in the Petition, I do not find any acts of discrimination that the Embakasi ICD which is a government facility was given undue preference to its ICD. Further, except for the gazette notices designating the suit land as an ICD, I find that there was no express fair administrative action as envisaged under Article 47 of the *Constitution* making the Respondents including Interested Parties liable to the Petitioner. It is my considered view that the Petitioner did not furnish this court with a Contract signed with the 3rd Respondent that cargo from shipping lines and or third parties would be passed through it. Except for correspondence from its customers complaining about the delay of clearing cargo, I further find that the Petitioner did not furnish this court with particulars of the alleged delay in respect to processing of cargo in its ICD. Further, it emerged that as for container No. CAXU9366653 which the Petitioner relied on in evidence, the court vide JR No. 646 of 2017, *Konton Trading Limited Vs Kenya Revenue Authority & 3 Others* (2018) eKLR, found that the 2nd Respondent acted within its mandate. To my mind, I am of the view that this Petition is based on imagined discrimination as no plausible evidence was tendered before the court to confirm delay in



processing of cargo nor stoppage of transmitting cargo to the Petitioner's premises. On the issue of discrimination on the basis of equality, it is trite that Article 27 of the Constitution is very explicit and applies to a person and not a premise as the Petitioner seeks orders from court in that respect. On the issue of directive to the Shipping Lines and Third Party Importers not to remit cargo to the Petitioner's ICD, I note the Petitioner failed to annex the alleged directives but produced emails annexed to the affidavit of David Githu which I do not find plausible. I opine that the Petitioner should have filed an ordinary claim as the issue of losses to its premises is purely a commercial matter. Further, there is already legislation enacted providing for operations of ICD's and CFS, hence it should have challenged the same instead of presenting the Petition as it is. I further note that Petitioner did not disclose when the cause of action arose and if the same still continues.

16. Based on the facts as presented while associating myself with the decisions cited above, I find that the Petitioner has failed to explicitly explain the violations meted upon it by the Respondents and the Interested Parties herein as required by law.
17. Further, on the issue of the route of SGR, the Petitioner argued that as a result of the two aforementioned gazette notices, it had legitimate expectation that the same would have a siding to the suit land which fact is opposed by the Respondents including Interested Parties who insist that there is already a one metre gauge railway line siding the ICD.
18. In the text book by; Pollard, Parpworth And Hugheswriting at page 583 in the 4th edition of Constitutional And Administrative Law: Text With Material the learned authors posited as thus:-

“Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, resile from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment.”

19. Further, in the 4th Edition, Vol. 1(1) at page 151, paragraph 81 of Halsbury's Laws of England, legitimate expectation is outlined as follows: -

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice.”

20. While in the case of Invollate Wacike Siboe v Kenya Railways Corporation & another [2017] eKLR, it was held that:-

“The same position applies to legitimate expectation; no legitimate expectation can arise if effectuating the expectation would result in violation of a statute. The contours of the doctrine are well mapped. Legitimate expectation arises where representation by a decision maker has created a genuine expectation that it is within his power to honour and make good. The law however does not protect every expectation; it protects only legitimate expectations. Where the representation is one, which the decision maker is not competent to make, reliance on it cannot in law give rise to legitimate expectation. Hence legitimate expectation cannot arise when the decision maker is acting ultra vires his or her powers.



In addition, where the words of a statute are clear and express, they must override any expectation to the contrary that a party may claim to have. On the same note, where a public authority has made a representation that it does not have power to make, it is not estopped from asserting the correct position in law.”

21. Based on the facts as presented while associating myself with the decision cited above, I note that the issue of the route of the SGR is a policy one. Further, I find that as a Court, I have no role in policy formulation as this is the preserve of the executive. I further find that there was no representation from the Respondents to give rise to legitimate expectation from Petitioner. On the allegation that there was no public participation while undertaking EIA for the SGR, I find that the Petitioner is not being candid since in the case of *Patrick Musimba Vs National Land Commission & 4 Others* (2016) eKLR the Court found that there was adequate public participation and EIA studies prior to the construction of the SGR.
22. In the circumstances, I find that the Respondents including the Interested Parties have not violated, threatened or infringed on the Petitioner’s rights as envisaged in Articles 10, 27, 40, 42, 47 and 69 (1) (b) and (d) of the *Constitution* and hence I hold that Petitioner is not entitled to the orders as sought.
23. It is against the foregoing that I find the Petition unmerited and will dismiss it with costs to the Respondents including Interested Parties.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

