



**Okoti v National Transport and Safety Authority & 6 others (Petition E463 of 2022)  
[2025] KEHC 13 (KLR) (Constitutional and Human Rights) (9 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 13 (KLR)

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

**PETITION E463 OF 2022**

**LN MUGAMBI, J**

**JANUARY 9, 2025**

**BETWEEN**

**OKIYA OMTATA OKOITI ..... PETITIONER**

**AND**

**NATIONAL TRANSPORT AND SAFETY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION  
OF NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION  
OF NATIONAL GOVERNMENT STATE DEPARTMENT OF CORRECTIONAL  
SERVICES ..... 3<sup>RD</sup> RESPONDENT**

**COMMISSIONER GENERAL, KENYA PRISONS ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL TREASURY ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**M/S CHALBI INDUSTRIES LIMITED ..... 7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petition dated 29<sup>th</sup> September 2022 is supported by the Petitioner's affidavit of even date. The Petition is similarly supported by the Petitioner's further affidavit dated 7<sup>th</sup> February 2023.
2. This Petition challenges the 1<sup>st</sup> Respondent's introduction and procurement process of the second generation securitized number plates in Kenya, which is the Petitioner alleges is wasteful, against the legislative requirements and is also unconstitutional.



3. Consequently, the Petitioner seeks the following relief against the Respondents:
- a. A declaration that the direct procurement of M/S Chalbi Industries Limited to supply the 2<sup>nd</sup> generation number plates for motor vehicles is unreasonable, wasteful and unlawful and, therefore, it is unconstitutional null and void.
  - b. A declaration that the Respondents should utilise the idle but serviceable equipment and materials the Government has already procured and which is lying idle at Kamiti Main Prison Industry.
  - c. A declaration that the decision to require motorists with old number plates to acquire new number plates not for free but at a cost of KES 3000 per vehicle, or at any cost for that matter, is both unlawful and unconstitutional.
  - d. An order annulling and quashing the procurement of M/S Chalbi Industries Limited to supply the 2<sup>nd</sup> generation number plates.
  - e. An order compelling the Respondents to utilise the idle but serviceable equipment and materials the Government has already procured, which is lying idle at Kamiti Main Prison Industry.
  - f. An order compelling the Respondents to bear the costs of this suit.
  - g. Any other relief the Court may deem just to grant.

#### **Petitioner's Case**

4. The Petitioner states that sometime in 2013, the government commenced the process of upgrading the number plate production equipment with the goal of introducing new generation number plates.
5. In effect, responsive Tender No. KPS/T/8/2013-2014 for supply, delivery, installation, testing, training and commissioning of modern number plate production machines was announced.
6. This Tender was awarded to Tropical Technology Limited which signed the contract on 4<sup>th</sup> April 2014. The requisitioned and delivered machines were namely: two embossing machines and tools, two hot stamping machines and one pneumatic press machine. Once the prisons personnel were trained on the use of these machines they were then commissioned at Kamiti Prison.
7. Soon after, in 2015, the government initiated another process to purchase required materials to be used by those equipment. This was through Tender No. KPS/ICB/T/10/2014/2015-2016/2016-2017 for supply and delivery of motorized vehicle number plate blanks and Tender No. KPS/ICB/T/11/2014/2015 – 2016/2016-2017 for supply and delivery of motorized vehicle number plate hot stamping foil.
8. This Tender faced with numerous court cases including Judicial Review Application No. 491 of 2016, Republic v Public Procurement Administrative Review Board & another Ex parte J Knierem BV(2017)eKLR was eventually once again awarded to Tropical Technologies Limited. It is averred that blank number plates worth millions of shillings were delivered to Kamiti Prison in readiness for the launching of the new generation number plates.
9. What is more, these machines stationed at Kamiti Main Prison are said to have been inspected by various government officials in February 2017 and March 2019. Upon commissioning of the Machines, it is alleged that the prison staff produced 10,000 new generation number plates currently in use.



10. The Petitioner asserts that following the appointment of new persons at the Ministry of Interior, without any reasonable justification or regard to the ready to roll out existing project, there was secret floating of a restrictive Tender No. SDC/50/2019-2020, for supply, delivery, installation, testing, training and commissioning of integrated and securitized license plates production facility and start u-up raw materials.
11. The Petitioner challenged the floating of the said tender in Constitutional Petition E261 OF 2020 – Okiya Omtatah Okoiti vs Cabinet Secretary, Ministry of Interior and Coordination of National Government & 4 others before this Court. He states that in the matter was placed Hon. Justice Makau on 8<sup>th</sup> September 2020 who issued conservatory orders to the effect that: ‘an interim order be and is hereby issued pending hearing and determination of the Application interpartes by issuance of a temporary order suspending the restricted Tender No. SDC/50/2019-2020, for supply, delivery, installation, testing, training and commission of integrated and securitized license plates production facility and start-up raw materials’ and that this Order is still in force.
12. On 30<sup>th</sup> August 2022, the government launched a sample of the second generation, securitized number plates. These plates were to be officially introduced with the ‘KDK...’ number plate on 1<sup>st</sup> October 2022. He notes that this announcement was made by the then Cabinet Secretary, Dr. Fred Matiang’i who indicated that these plates are in compliance with the Vienna Traffic Convention on global standards for number plates.
13. He further makes known that after the securitized plates are issued, every person with the old generation non- securitized number plates is required to replace the same at the cost of Kshs. 3000. He states that failure to do so within 18 months, will see a person being fined up to Ksh.20,000 or serve a 6 – month jail term under Section 14 of the [Traffic Act](#). He argues that this is both unlawful and unconstitutional.
14. The Petitioner avers that on 6<sup>th</sup> September 2022, the 1<sup>st</sup> Respondent’s Director of Registration and Licensing wrote to their Director General requesting for approval to use the direct procurement method to procure these plates. He went on to recommend the 7<sup>th</sup> Respondent for this purpose. Primarily the justification was inter alia that this Company had produced highly classified goods for the National Security Agencies thus equipped to produce the securitized number plates.
15. The Petitioner takes issue with the direct procurement as is both unreasonable and wasteful. This is in light of the equipment and machinery that had already been procured in the cited Tenders which costed colossal sums of money and are lying idle at Kamiti Prison. He contends that this is not prudent utilization of public resources and against public interest. He also insinuates that the specific selection of the 7<sup>th</sup> Respondent was done in self-interest and a corrupt fashion.
16. He is aggrieved that it is the taxpayers who will bear the burden of the millions of shillings that will be utilized in this procurement process. Furthermore, that the direct procurement of the 7<sup>th</sup> Respondent runs afoul Article 220(1) and 221 of [the Constitution](#) as was not introduced through the national budget. Equally that the procurement process was not subjected to public participation in line with the dictates of [the Constitution](#). For this reason, he claims that the Respondents’ actions are in violation of Articles 1(1), 2(1) & (2), 3(1), 10(1) & (2), 27, 40, 46, 47, 73, 75, 201, 227, 232, and 259(1) of [the Constitution](#).



## **Respondents' Case**

### **2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondent**

17. The 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents' responses are not in the Court file or Court Online Platform (CTS).

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

18. In reaction to the Petition, the 1<sup>st</sup> Respondent through its Director General, George Njao, filed a Replying Affidavit sworn on 9<sup>th</sup> December 2022.
19. He states that the 1<sup>st</sup> Respondent is mandated under the *National Transport and Safety Authority Act* to inter alia issue registration number plates. Further that owing to the Traffic Registration Rules, 2016, the 1<sup>st</sup> Respondent was required to issue new generation securitized number plates.
20. He faults the Petition as being premature as the 1<sup>st</sup> Respondent contrary to the Petitioner's allegation has not engaged the 7<sup>th</sup> Respondent for supply of securitized plates as alleged in the Petition. He nevertheless asserts that the 1<sup>st</sup> Respondent is a State Corporation capable of legally entering into contracts for performance of various functions within the law.
21. He states that the old generation number plates were inadequate and susceptible to being duplicated by fraudsters. Moreover the plates were not compliant with international standards as envisaged under the Vienna Convention.
22. He asserts that the internal Memo dated 6<sup>th</sup> September 2022 relied on by the Petitioner was acquired illegally. He points out that the Petitioner who adduced it as part of his evidence is neither the author nor recipient of the communication. As such he contends that this document should be expunged from the record as is privileged official communication. He asserts moreover that despite there being legal ways to access this information the Petitioner failed to utilize the same.
23. He further condemns the Petitioner's challenge to payment of Ksh.3000 to acquire the new plates. He states that this is irrational as the 1<sup>st</sup> Respondent incurs production costs of the plates and thus cannot be issued for free. To this end, he contends that the Petitioner has not demonstrated how the 1<sup>st</sup> Respondent violated his constitutional rights.

### **3<sup>rd</sup> Respondent's Case**

24. The 3<sup>rd</sup> Respondent, through the Safina Kwekwe Tsungu, the Principal Secretary in the State Department for Correctional Services, Ministry of Interior and National Administration in the replying affidavit sworn on 30<sup>th</sup> November, 2022 swore that the 3<sup>rd</sup> Respondent complied with the order of 8<sup>th</sup> September, 2020 stopping implementation of restricted tender number SDC /50/2019-2020 and has neither awarded the suspended tender nor participated in the subsequent tendering process.
25. That further, the 3<sup>rd</sup> Respondent has no statutory mandate to award any tender relating to securitized vehicle number plates that mandate is vested with the 1<sup>st</sup> Respondent hence the Petition does not disclose any breach/violation by the 3<sup>rd</sup> Respondent.



#### 4<sup>th</sup> Respondent's case

26. Peter Njoroge, an Assistant Commissioner of Prisons and the Deputy Director, Prison Enterprise swore in the replying affidavit of 7<sup>th</sup> December, 2022 that the 4<sup>th</sup> Respondent had been at all material times the sole producer and supplier of non-securitized motor vehicle number plates through its production unit located at Kamiti Maximum Prison and would only act as per instructions of the National Transport and Safety Authority (1<sup>st</sup> Respondent) done through Local Purchase Orders (LPOs). That at no point has the 1<sup>st</sup> Respondent approached the 4<sup>th</sup> Respondent to produce integrated securitized licence plates.
27. The 4<sup>th</sup> Respondent has been complying with the conservatory order issued in HCCHPET E261 of 2020 suspending restricted tender no. SDC/50/2019-2020 and has never implemented the said tender nor in any way participated in the production of securitized number plates and thus the Petition discloses no cause of action on the part of the 4<sup>th</sup> Respondent.

#### Parties' Submissions

##### Petitioner's Submissions

28. The Petitioner filed submissions dated 11<sup>th</sup> February 2023 in support of his Petition. He also filed supplementary submissions dated 13<sup>th</sup> November 2023. He sought to discuss the following subjects: the secretive and opaque procurement of securitized number plates was unlawful and unconstitutional; the Respondents should utilise the idle but serviceable equipment and materials the Government has already procured, and which lie idle at Kamiti Main Prison Industry; the non-securitised number plate owners should not pay for replacing them; the memo dated 6<sup>th</sup> September 2022 is no longer in issue and the reliefs that should issue.
29. The Petitioner in the first issue submitted that indeed the procurement process was unlawful and unconstitutional. He submitted that Respondents' response, the 1<sup>st</sup> Respondent had already procured the securitized number plates through an unknown supplier. He argued that this was done in an opaque and unaccountable manner contrary to Articles 10, 35(3), 47(1), 201(a), 227(1), 232(1)(d) (e) & (f) of *the Constitution*.
30. Reliance was placed in Republic vs. Cabinet Secretary For Transport & Infrastructure & 5 Others Ex-Parte Kenya Country Bus Owners Association (Thro Paul G. Muthumbi Chairman) Samuel Njuguna Secretary Joseph Kimiri Trasurer & 8 Others (2014) eKLR where it was held that:
- “Under Article 10(1) of *the Constitution* all State organs, State officers, public officers and all persons are bound by the national values and principles of governance enumerated thereunder whenever they apply or interpret *the Constitution*, enact, apply or interpret the law or make or implement public policy decisions...”
31. Like dependence was also placed in Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] eKLR, Robert N. Gakuru & Others vs. Governor, Kiambu County [2014] eKLR, Matatiele Municipality and Others v President of the Republic of south Africa and Others [2006] ZACC 12, Doctors for Life International v Speaker of the National Assembly & Others [2006] ZACC 11, Ng Ka Ling and others v Director of Immigration (Final Appeal No. 14, 15, 16 Of 1998 (Civil) and Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR.



32. The Petitioner argued as well that the 1<sup>st</sup> Respondent’s procurement process was in violation of the *Public Procurement and Asset Disposal Act* that outlines the principles to be adhered to while carrying out a public procurement process.
33. He asserts that whereas direct procurement of goods and services is provided for, the same should be in line with the dictates of Section 103 and 104 of the Act, furthermore, Regulation 90 of the Public Procurement and Asset Disposal Regulations, 2020. Owing to the machinery at Kamiti Maximum Prison and availability of suppliers of the same, he argued that the conditions did not warrant the use of direct procurement. He contends that the 1<sup>st</sup> Respondent not only violated these provisions but did so to avoid competition.
34. Moreover, the Petitioner submitted that Article 220(1) (a) of *the Constitution* requires that the procurement process as envisaged under the *Public Procurement and Asset Disposal Act* be guided by the budgeting process under Article 221 of *the Constitution*. He asserted that this procedure was also not adhered to.
35. Turning to the next issue, Counsel referring to the Report of the Auditor-General on Prison Industries Revolving Fund for the Year Ended 30 June, 2019 observed that it had been noted in the Report that stalled project for production of modern motorized vehicle number plate blanks did not constitute a lawful and effective use of public resources. The Petitioner echoing this argued that it was unacceptable that the already procured machines had now been abandoned by the government. Accordingly the same is in direct violation of Articles 47(1), 201(d) and 232(1)(b) of *the Constitution*.
36. The Petitioner also submitted in the next issue that the non-securitized number plate owners should not pay to replace them as is in violation of Article 40(3) of *the Constitution*.
37. The Petitioner moving on and relying on the 1<sup>st</sup> Respondent’s averments in its Replying Affidavit noted that the impugned memo was no longer in issue. This is because the 1<sup>st</sup> Respondent denied having procured the securitized number plates from the 7<sup>th</sup> Respondent. Nonetheless he argued that the memo had not been procured illegally.
38. In closing the Petitioner submitted that having established his case, the 1<sup>st</sup> Respondent should be condemned to pay the costs of this suit as matter was filed in public interest. He argued however that if the Petition failed, not to be condemned to pay costs. Reliance was placed in John Harun Mwau and 3 Others vs. Attorney General and 2 Others [2012]eKLR where it was held that:

“The intent of Articles 22 and 23 of *the Constitution* is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming *the Constitution* has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights...In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.”

39. Like dependence was placed in EWA and 2 others v. Director of Immigration and Registration of Persons & another (2018) eKLR and Fose v. Minister of Safety and Security (CCT 14/96) 1997, ZACC 6, 1997.



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

40. The 1<sup>st</sup> Respondent through its Counsel, Judith Opili – Sirai filed submissions dated 24<sup>th</sup> April 2023. Counsel sought to discuss the following issues: whether the 1<sup>st</sup> Respondent's internal memo should be expunged from the record; whether the orders sought by the Petitioner have been overtaken by events; whether the Petitioner can compel the 1<sup>st</sup> Respondent through this Court to engage the Kenya Prisons Service to produce the New Generation Plate; whether the 1<sup>st</sup> Respondent directly procured M/S Chalbi to produce the New Generation – Plate and whether the 1<sup>st</sup> Respondent was to conduct public participation before engaging in any tender process.
41. Counsel stressed on the first issue that the annexed 1<sup>st</sup> Respondent's internal memo was obtained illegally. For this reason it should be expunged from the record. In support of this argument reliance was placed in *Susan Wariara Kariuki v Diakonie Katastrophenhilfe* [2016] eKLR where it was held that:
- “This Country now has a Constitution that enables parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods to do so.”
42. Similar dependence was placed in *Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 others* [2014] eKLR.
43. On the second issue, Counsel submitted that the orders sought had already been overtaken by events as the impugned process has already been rolled out. In addition, the 1<sup>st</sup> Respondent had received numerous applications to replace the old generation number plates to the new generation number plates. Accordingly, stopping the new process at this juncture would be detrimental yet in compliance with the 2016 Rules.
44. Counsel on the next issue submitted that the 1<sup>st</sup> Respondent is empowered under the *National Transport and Safety Authority Act* in Section 3(2) (d) to enter into contracts with any person. Consequently Counsel argued that the Petitioner cannot compel the 1<sup>st</sup> Respondent to enter into a contract with anyone he so desires including the 4<sup>th</sup> Respondent. In this regard, it was noted that the 1<sup>st</sup> Respondent had engaged another security government agency not the 7<sup>th</sup> Respondent as alluded to. Hence the Petitioner's case against the 7<sup>th</sup> Respondent in this regard will also be an academic exercise.
45. Counsel contends that the Petitioner herein pursued the instant matter without the full facts of the case. That is, the production of the securitized number plates was not done by the 7<sup>th</sup> Respondent as alleged. Nonetheless, it was argued that the Petitioner being dissatisfied with the procuring process ought to have lodged a complaint with the Public Procurement Review Board not the Court.
46. On public participation, Counsel stressed that to do so for every government activity would bring its operations to a standstill. According to Counsel this principle is not applicable in this context as the Public Procurement Review Board was created to primarily address all issues concerning procurement processes.

## 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents' Submissions

47. State Counsel, Jackline Kiramana for these Respondents' filed submissions dated 19<sup>th</sup> April 2023 and identified the issues for determination as: whether the orders issued in Nairobi High Court Petition E261 of 2020 dated 8<sup>th</sup> September, 2020 were violated; whether the right to access to information was violated in the roll-out of the new number plates; whether the Petitioner's orders seeking to stop the



roll-out of the new number plates have been overtaken by events and whether the Petitioner has proved that his rights under *the Constitution* have been violated.

48. On the first issue, Counsel answered in the negative. This is because the Order issued on 8<sup>th</sup> September 2020 specifically addressed the restricted Tender No. SDC/50/2019- 2020 which was suspended as a result. Counsel noted that the Court order was not issued in view of the scheduled roll out of the securitized number plates as alleged. Thus the same did not violate this Court's orders. Counsel also stressed that the new generation number plates are in line with the law and international standards as contained in the Vienna Convention.

49. It is further stated in the second issue that access to information is governed through the requisite procedures set out in the *Access to Information Act*. This is provided under Section 8 and 9, that is the procedure a party should employ to acquire the sought information.

50. In this regard, Counsel argued that the Petitioner failed to adduce evidence that he utilized this procedure to access information on the new generation securitized number plates. Counsel contended as a result that the Petitioner had failed to exhaust the mechanisms set out in this Act. Reliance was placed in *Anthony Miano & others v Attorney General & others* [2021] eKLR where it was held that:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

51. Like dependence was placed in *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR.

52. Counsel further argued that the sought orders had been overtaken by events as the new generation securitized number plates had already been rolled out. For this reason, this issue was argued to be moot at this instance. Reliance was placed in *Nadeem A Kana v Lucy Wambui Mwangi* [2021] eKLR where it was held that:

“A matter overtaken by events cannot be tenable anymore and if it proceeds to success the victory would be pyrrhic.”

53. Comparable reliance was placed in *Evans Kidero v Speaker of Nairobi City County Assembly & Another* (2018) eKLR.

54. In conclusion, Counsel stressed that the Petitioner had failed to prove violation of his constitutional rights as alleged. This failure was attributed to the Petitioner's failure to set out his submissions with clarity and precision as stressed in *Anarita Karimi Njeru v Attorney General* [1979] KLR 154. Moreover that the burden to prove the said allegations was not discharged. Reliance was placed in *Leonard Otieno Vs. Airtel Kenya Limited* [2018]eKLR where it was held that:

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues.



Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

### 7<sup>th</sup> Respondent’s Case

55. The 7<sup>th</sup> Respondent’s submissions are not in the Court file or Court Online Platform (CTS).

### Analysis and Determination

56. In light of the averments and arguments made herein, it is my considered view that the issues that arise for determination are:
- i. Whether the Petition invokes the Doctrine of exhaustion in light of the dispute mechanisms set out in the PPAD Act, 2015 and the [Access to Information Act](#).
  - ii. Whether there was direct procurement of the 7<sup>th</sup> Respondent by the 1<sup>st</sup> Respondent for the award of contract for the securitized number plates against the law and further, whether the Petitioner has established cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
  - iii. Whether the option of undertaking direct procurement by the 1<sup>st</sup> Respondent rendered the process unlawful and unconstitutional.
  - iv. Whether the Petitioner is entitled to the reliefs sought.

### Whether the Petition invokes the Doctrine of exhaustion in light of the dispute mechanisms set out in the PPAD Act, 2015 and the [Access to Information Act](#).

57. Under the exhaustion doctrine, a Court is barred from adjudicating a dispute in which a statute or a regulatory regime has provided other alternative ways or means of pursuing a remedy instead of directly seeking the relief from the Court. This principle given Constitutional backing under Article 159 of [the Constitution](#) which requires that in exercising judicial authority, courts and tribunals shall be guided by the principles stipulated thereunder among them ‘alternative forms of dispute resolution...’
58. This principle was restated by the Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 Others* (2015) eKLR observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of [the Constitution](#) which commands Courts to encourage alternative means of dispute resolution.”

59. Correspondingly in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others*(Interested parties) (2020)eKLR it was held that:

“52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the



protection of his own interest within the mechanisms in place for resolution outside the Courts...”

60. It is therefore critical to consider the procedure applicable under the Public Procurement and Disposal Act, 2015. This Act provides that a person who is aggrieved by the procedure undertaken in a procurement process is at liberty to report the same to the Public Procurement Regulatory Authority established under Section 8. Among the Authorities functions under Section 9 (h) is to:
- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
61. Correspondingly, Section 35 of the Act on this issue provides as follows:
- Investigations
1. The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.
  2. An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.
  3. Investigation shall be conducted by an investigator appointed for the purpose by the Authority.
62. Upon conclusion of the investigations, if breach is found to have occurred Section 38 states as follows:
1. If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the Regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—
    - a. direct the procuring entity to take such actions as are necessary to rectify the contravention;
    - b. terminate the procurement or asset disposal proceedings;
    - c. prepare and submit a summary of the investigator's findings and recommendations to the relevant authorities for action; or
    - d. require the procuring entity to transfer procuring responsibilities of the subject procurement to another procuring entity.
  2. Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—
    - a. the procuring entity; and
    - b. any other person whose legal rights the Director-General believes may be adversely affected by the order.



63. If a party is aggrieved by the Orders issued may seek judicial review under Section 39 as follows:

The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38 (2) may request for Judicial Review against an order of the Director-General to the High Court within fourteen days after the order is made.

64. In the present case, the main complaint against the 1<sup>st</sup> Respondent is that it has procured the supply of securitized number motor vehicle number plates clandestinely using the direct procurement method. The Petitioner however did not take up the issue with the first port of call provided by Section 35 (2) of the Public Procurement Act, 2015 by reporting complaint to the Public Procurement Regulatory Authority to initiate an investigation into the matter with a view to ‘determining whether there has been a breach of this Act or the Regulations made thereunder’.

65. Under Section 9 (h) of the Act, one of the functions of the Public Procurement Regulatory Authority is to ‘investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review’.

66. Approaching this Court directly thus was in breach of the doctrine of exhaustion of remedies. In *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR the Court disapproved the obsession with court cases even when there were clear procedures provided in the legislation for settlement of such disputes. The Court stated:

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

67. In the instant case, the petitioner ought to have utilized this route before instituting this Petition. He did not.

68. The Petitioner also accused the 1<sup>st</sup> Respondent of working in an opaque and secretive manner by awarding a direct tender but again, it is evident that before arriving at this conclusion and making the accusation, the Petitioner did not even attempt to use the procedure provided for in the [Access to Information Act](#) to obtain information relating the alleged procurement from the 1<sup>st</sup> Respondent.

69. The [Access to Information Act](#) (No. 31 of 2016) which was enacted to give effect to Article 35 of *the Constitution* provides the procedure to be followed when seeking any information held by the State or another person.

70. A party seeking to access information held by the state or private body is first required to address the request to the designated information access officer under Section 7. This Section provides as follows:

- (1) A chief executive officer of a public entity shall be an information access officer for purposes of this Act.
- (2) A chief executive officer of a public entity may delegate the performance of his or her duties as an information access officer under this Act to any officer of the public entity.

71. To access this request the party under Section 8(1) of the Act is required to make an application to access the information in writing either in English or Kiswahili and to provide details and sufficient particulars for the public officer to understand what information is being requested. The public officer



will under Section 9 process the application and make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application.

72. Once the party receives a response on the request but is disgruntled, the Act under Section 14 provides the following procedure:

- (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—
  - (a) a decision refusing to grant access to the information applied for;
  - (b) a decision granting access to information in edited form;
  - (c) a decision purporting to grant access, but not actually granting the access in accordance with an application;
  - (d) a decision to defer providing the access to information;
  - (e) a decision relating to imposition of a fee or the amount of the fee;
  - (f) a decision relating to the remission of a prescribed application fee;
  - (g) a decision to grant access to information only to a specified person; or
  - (h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.
- (2) An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

73. The Commission on Administrative Justice in performance of this function and the others listed under Section 21 is empowered by the Act under Section 23 to act as follows:

- (1) In the performance of its functions under this Act, the Commission shall have the power to—
  - (a) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
  - (b) question any person in respect of any subject matter under investigation before the Commission; and
  - (c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
- (2) The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
  - (a) the release of any information withheld unlawfully;
  - (b) a recommendation for the payment of compensation; or
  - (c) any other lawful remedy or redress.
- (3) A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.



- (4) An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
- (5) If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.
74. The Petitioner’s accusation that the 1<sup>st</sup> Respondent acted clandestinely is baseless as there is no proof that he sought the information under the procedure set out above and the same was withheld from him.

**Whether there was direct procurement of the 7<sup>th</sup> Respondent by the 1<sup>st</sup> Respondent for the award of contract for the securitized number plates against the law and further, whether the Petitioner has established cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.**

75. The general principle under the law of evidence is that one who alleges must prove applies in Constitutional Petitions as well. It is incumbent upon the Petitioner marshal evidence of the allegations he makes in the Petition. The Supreme Court affirming this position in *Gwer & 5 others v Kenya Medical Research Institute & 3 others* (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) guided as follows:

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

(50) This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

76. Similarly, in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015)eKLR it was held thus:

“15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

77. In the present case, the Petitioner was assertive that the 1<sup>st</sup> Respondent had given direct procurement to the 7<sup>th</sup> Respondent to supply securitized motor vehicle number plates. In fact the Petitioner seeks two (2) out of the five (5) reliefs sought in this Petition against the 7<sup>th</sup> Respondent. The orders



are: A declaration that the direct procurement of M/S Chalbi Industries Limited to supply the 2<sup>nd</sup> generation number plates for motor vehicles is unreasonable, wasteful and unlawful and, therefore, it is unconstitutional null and void. An order annulling and quashing the procurement of M/S Chalbi Industries Limited to supply the 2<sup>nd</sup> generation number plates.

78. The 1<sup>st</sup> Respondent denied awarding any tender to the 7<sup>th</sup> Respondent. The Petitioner did not substantiate this allegation with any evidence. Further despite dragging the 3<sup>rd</sup> and 4<sup>th</sup> Respondent in this Petition, there was no iota of evidence that was tendered implicating them with the allegations made herein.

**Whether undertaking direct procurement by the 1<sup>st</sup> Respondent rendered that process unlawful and unconstitutional.**

79. *The Constitution* with reference to the procurement of public goods and services under Article 227 of *the Constitution* provides as follows:

- i. 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.
- ii. 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—
  1. categories of preference in the allocation of contracts;
  2. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
  3. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
  4. 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.

80. Consequently, the *Public Procurement and Asset Disposal Act*, 2015 was enacted to give effect to this Article. In its preamble the Act provides as follows:

An Act of Parliament to give effect to Article 227 of *the Constitution*; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

81. The Act under Section 3 highlights the guiding principles of the procurement process as follows:

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation—

- a. The national values and principles provided for under Article 10;
- b. The equality and freedom from discrimination provided for under Article 27;
- c. Affirmative action programmes provided for under Articles 55 and 56;
- d. Principles of integrity under the *Leadership and Integrity Act* (Cap. 185C);
- e. The principles of public finance under Article 201;



- f. The values and principles of public service as provided for under Article 232;
- g. Principles governing the procurement profession, international norms;
- h. Maximization of value for money;
- i. Promotion of local industry, sustainable development and protection of the environment; and
- j. Promotion of citizen contractors.

82. In *Okoiti v Kenya Ports Authority & 5 others; Portside Freight Terminals Limited & 8 others (Interested Parties) (Petition E045 of 2021 & E018 of 2022 (Consolidated)) [2023] KEHC 20571 (KLR) (18 July 2023) (Judgment)* the Court held as follows:

“137. Article 227 of *the constitution*, in my view, provides the minimum threshold when it comes to public procurement and asset disposal. Being the minimum threshold, it is my view that in public procurement and asset disposal, the starting point must necessarily be *the constitution*. Any procurement must therefore, before considering the requirements in any legislation, rules and regulations, meet the constitutional threshold of fairness, equity, transparency, competitiveness and cost-effectiveness. In other words, any other stipulation whether in an enactment or in the tender document can only be secondary to the said constitutional dictates.

138. In the case of *PPRB v KRA Misc. Civil Application No. 540 of 2008, eKLR* the court had this to say:

“To my mind, failure by the Respondents to have regard to mandatory provisions of the Act concerning procurement procedures...violated the purpose of the Act which is clearly stated in Section 2...I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives... Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence. There cannot be greater prejudice to the applicant than failure by the decision maker to comply with positive law. Failure to adhere to the applicable law, gives rise to a presumption of bias and prejudice contrary to the argument put forward by the Respondent’s counsel.”

83. With regard to direct procurement process Section 103 of the Act provides as follows:

When direct procurement may be used

- (1) A procuring entity may use direct procurement as allowed under sub-section (2) as long as the purpose is not to avoid competition.
- (2) A procuring entity may use direct procurement if any of the following are satisfied:



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

(3) A public officer who contravenes the provisions of subsection (2) commits an offence.

84. The procedure for direct procurement is set out under Section 104 as follows:

An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement—

- a. Issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.
- b. Appoint an ad hoc evaluation committee pursuant to Section 46 to negotiate with a person for the supply of goods, works or non-consultancy services being provided;
- c. Ensure appropriate approvals under this Act have been granted;
- d. Ensure the resulting contract is in writing and signed by both parties.

85. Furthermore, Rule 90 of the Public Procurement And Asset Disposal Regulations, 2020 states as follows on direct procurement:



- (1) In addition to direct procurement requirements set out under section 103 of the Act, the following shall apply—a procuring entity shall conduct procurement using the direct procurement method subject to threshold matrix set out in the Second Schedule;
  - a. where an accounting officer uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 103 of the Act has been satisfied;
  - b. an accounting officer shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority in a format provided by the Authority;
  - c. an accounting officer shall not enter into a contract under section 104 of the Act unless it is satisfied that the offer—
    - i. meets the requirements of the procuring entity as specified under paragraph (1)(b) above; and
    - ii. is at the prevailing real market price;
  - d. a procuring entity shall negotiate with a person for the supply of the goods, works or services being procured in accordance with the provisions of the Act and these Regulations; and
  - e. a procuring entity shall not use direct procurement in a discriminatory manner.
- (2) Any direct procurement bid shall be evaluated in accordance with the provisions of the Act and these Regulations.
- (3) The negotiations shall be conducted by the ad hoc evaluation committee appointed in accordance with section 104 (b) of the Act.
- (4) The ad hoc evaluation committee responsible for negotiation under paragraph (3) may negotiate on terms that include—
  - a. price;
  - b. terms of contract;
  - c. terms of delivery;
  - d. scope of work or service.
- (5) On completion of negotiations, the committee under paragraph (3) shall prepare a report and submit it to the head of procurement function for professional opinion and for onward submission to the accounting officer for approval and award of the contract.
- (6) Any direct procurement shall require the prior approval of the accounting officer in writing except under urgent need where approval shall be granted in line with section 69(3) of the Act.
- (7) For greater certainty, the fourteen days window period between the notification of award and signing of the contract provided for under section 135(3) of the Act shall not apply for direct procurement method.
- (8) The resulting contract shall be in writing and signed by both parties as provided for under section 104(d) of the Act.



86. The Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR in this regard concurred as follows:

“ 170. In the instant appeal from which this appeal is proffered, the trial court correctly stated at paragraph 195 of its judgment that:

“.....We however hasten to clarify that direct procurement does not necessarily violate the constitutional requirement of competitiveness as long as the constitutional and statutory threshold is met in the process and proper procedure followed.”

87. The Superior Court went on to find as follows:

“ 181. We have considered the provisions of Sections 103 and 104 of the *Public Procurement and Asset Disposal Act*, 2015 and submissions by all parties. The architecture of procurement methods stipulated in Part IX of the *Public Procurement and Asset Disposal Act*, 2015 promotes public participation and competitiveness in procurement process in a progressively decreasing manner. The scope and degree of competitiveness and public participation is progressively reduced as one approaches the direct procurement method. Section 91 (1) of the *Public Procurement and Asset Disposal Act*, 2015 stipulates that Open Tendering shall be the preferred procurement method for procurement of goods, works and services. Section 91 (2) stipulates that the procuring entity may use alternative procurement procedure only if that procedure is allowed and satisfies the conditions under the *Public Procurement and Asset Disposal Act*, 2015 for use of that method. While Section 92 of the *Public Procurement and Asset Disposal Act*, 2015 identifies the methods of procurement, Sections 103 and 104 provide detailed procedures on when direct procurement may be used and the procedure for direct procurement. It is categorical that a procuring entity may use direct procurement so long as the purpose is not to avoid competition.”

88. Further in Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR the Court of Appeal observed that:

“ 95. It is not the appellants’ case, as we understand it, that the provision of alternative procurement procedures in the Act negates the requirements under Article 227 of *the Constitution* to the effect that procurement by public entities should accord with a system “that is fair, equitable, transparent, competitive and cost effect.”

In other words, the absence of “competition” in direct procurement in our view does not, in itself, render that procedure unconstitutional. We are therefore not persuaded, as contended by the appellants, that because the procurement of the SGR was not taken through a competitive bidding process, that in itself renders it unconstitutional.”

89. I am guided by the above reasoning. The fact that direct procurement has been used for purposes of procuring does not necessarily translate into the process being unlawful and unconstitutional. It is lawful method of procuring goods and services as long as the prescribed legal conditions are met



and the process is done in good faith. The burden of proving lack of good faith is on the person that alleges. Bare allegations that the process was undertaken purely to avoid competition without any iota of proof does not suffice to make a finding of bad faith. In the instant case, the Petitioner merely makes allegation without substantiation.

90. In the overall analysis and in view of my findings on each of the issues that I have isolated and addressed specifically in this judgment; I do not find any merit in this Petition which I hereby dismiss.
91. Being a Petition filed that the Petitioner does not seek any direct personal benefit, I make the order that each Party shall bear its own costs.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF JANUARY, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

