



**Autoports Nairobi Freight Terminal Ltd & another v Cabinet Secretary
 - Ministry of Roads & Transport & 5 others; Focus Container Freight
 Station & 2 others (Interested Parties) (Commercial Petition E002 of 2024)
 [2024] KEHC 10671 (KLR) (Commercial and Tax) (13 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10671 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
 COMMERCIAL AND TAX
 COMMERCIAL PETITION E002 OF 2024**

**A MABEYA, J
 SEPTEMBER 13, 2024**

BETWEEN

**AUTOPORTS NAIROBI FREIGHT TERMINAL LTD 1ST PETITIONER
 COMPACT FREIGHT SYSTEMS LIMITED 2ND PETITIONER**

AND

**CABINET SECRETARY - MINISTRY OF ROADS &
 TRANSPORT 1ST RESPONDENT
 CABINET SECRETARY - MINISTRY OF INDUSTRIALIZATION TRADE AND
 ENTERPRISE DEVELOPMENT 2ND RESPONDENT
 ATTORNEY GENERAL 3RD RESPONDENT
 KENYA PORTS AUTHORITY 4TH RESPONDENT
 SIGINON GROUP LIMITED 5TH RESPONDENT
 MOMBASA ISLAND CARGO TERMINAL 6TH RESPONDENT**

AND

**FOCUS CONTAINER FREIGHT STATION INTERESTED PARTY
 MAKUPA TRANSIT SHADE LIMITED INTERESTED PARTY
 BOSS FREIGHT TERMINAL LIMITED INTERESTED PARTY**



The restriction of container freight stations handling cargo destined to South Sudan through the port of Mombasa cannot be challenged in Kenyan courts

In the instant case the petitioners prayed for declarations that the directive issued by the Cabinet Secretary - Ministry of Industrialization Trade and Enterprise Development, which sought to alter the arrangement whereby the petitioners warehoused cargo destined for South Sudan, should be deemed irregular and a violation of their fundamental rights. The court held that the decision of the Government of South Sudan appointing the petitioners as the legitimate companies designated to offer handling, storage and warehousing services for cargo bound for South Sudan through the Port of Mombasa could not be challenged in the proceedings or in Kenyan courts.

Reported by Kakai Toili

Jurisdiction – jurisdiction of Kenyan courts – jurisdiction to determine disputes arising from actions of foreign country – claim that the Government of South Sudan restricted the number of container freight stations (CFSs) handling cargo destined to South Sudan - whether the decision of a foreign government to restrict the number of CFSs handling cargo destined to that country could be challenged in Kenyan courts - whether the decision of a foreign government to restrict the number of container freight stations handling cargo destined to that country was subject to Kenya's Competition Act - whether a country could intervene in or question the sovereign decision of another country through its own legal system – Constitution of Kenya, articles 10, 43 and 47.

Evidence Law – evidence – documentary evidence - whether strict proof of documents was required where the party to whom the documents were addressed did not dispute their authenticity.

Words and Phrases - exhaustion of remedies – definition of exhaustion of remedies - the doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary - Black's Law Dictionary 10th Edition.

Brief facts

The petitioners' case was that they were fully authorized by the Kenya Revenue Authority (KRA) to operate container freight stations (CFSs) and that the 2nd respondent, Cabinet Secretary - Ministry of Industrialization Trade and Enterprise Development, lacked the authority or capacity to control or issue directives regarding the handling, storage and warehousing of cargo. Since 2013, the 1st and 4th respondents, Cabinet Secretary - Ministry of Roads and Transport, and the Kenya Ports Authority (KPA) respectively, appointed the petitioners to manage and warehouse all imported general and containerized cargo destined for South Sudan, pending clearance by KRA.

Additionally, a letter from the Ministry of Transport of the Government of South Sudan dated November 9, 2022, officially confirmed that the petitioners were to continue with the provision of handling, storage and warehousing services for cargo passing through the Port of Mombasa destined for South Sudan. The 1st respondent reaffirmed that appointment. However, shortly thereafter, the petitioners discovered that the 2nd respondent was considering instructing KPA to disregard the petitioners' appointment.

The petitioners contended that they had invested heavily in infrastructure, machinery and human resources in order to carry out the duties bestowed upon them by the appointment and they intended to do so for over a period of 10 years. The petitioners therefore contended that the 2nd respondent's actions would infringe upon their fundamental rights and disrupt their ability to discharge their mandate effectively. The petitioners therefore prayed for declarations that the directive issued by the 2nd respondent, which sought to alter the arrangement whereby the petitioners warehoused cargo destined for South Sudan, should be deemed irregular and a violation of their fundamental rights.



Issues

- i. Whether a country could intervene in or question the sovereign decision of another country through its own legal system.
- ii. Whether the decision of a foreign government to restrict the number of container freight stations handling cargo destined to that country was subject to Kenya's Competition Act.
- iii. Whether the decision of a foreign government to restrict the number of container freight stations handling cargo destined to that country could be challenged in Kenyan courts.
- iv. Whether strict proof of documents was required where the party to whom the documents were addressed did not dispute their authenticity.

Held

1. The 5th respondent's motion dated May 30, 2024 was brought so late in the day as to amount to an abuse of the court process and was meant to displace and delay the hearing of the petition. The application sought to call the deponents of the affidavits in support of the petition for cross-examination. Calling of deponents of affidavits was in the discretion of the court. It must be shown that there existed special circumstances and that it was necessary to call a deponent of an affidavit. In the instant case, there were no special circumstances leave alone any reason to summon the deponents. The same was only meant to scuttle the hearing of the petition.
2. Under the *Mutunga* Rules, constitutional petitions were to be heard by way of affidavits. In any event, directions had been given way back in March, 2024 that the petition would be heard by way of affidavits and there had been no application to vary those directions.
3. The documents that were sought to be expunged had not been challenged. None of the parties had denied the authenticity of those documents right from the date of filing of the petition. Indeed, all the parties were relying on the documents to challenge the actions of KPA. The party to whom the documents were addressed, the 1st respondent did not dispute the documents. He had actually acknowledged and responded to them.
4. Strict proof of documents was only required where they were denied, their authenticity was denied or challenged and such challenge should be at the earliest stage of the proceedings. In any event, the documents were not documents that fell under section 80 of the Evidence Act. Accordingly, the documents were admissible before court.
5. The issue on jurisdiction did not arise for determination as the court had conclusively dealt with it in its ruling of March 8, 2024. Having made the determination that the court had jurisdiction for reasons contained in that ruling, the issue was *res-judicata* and there was no jurisdiction to re-look at it.
6. The doctrine of exhaustion demanded that parties first use the administrative procedures laid out by statute before approaching the courts. The purpose was to enable the administrative agencies, who were well versed in the areas of expertise, to address the gravamen of the parties before the courts could make a pronouncement on the same. It also freed the courts from dealing with all manner of disputes and only dealt with them on appeal thereby reducing backlog of cases.
7. Section 9 of the Competition Act outlined the powers and functions of the Competition Authority of Kenya. It granted the Authority the authority to investigate anti-competitive practices, enforce compliance with competition laws, advise on competition matters, promote public and business awareness and regulate and monitor market conditions to ensure fair competition. Section 21 of the Act detailed the restrictive trade practices. It prohibited restrictive trade practices that hindered competition, such as collusion and price-fixing. It granted the Authority, the power to investigate and take enforcement actions against such practices. The section aimed at preventing agreements or conduct that distorted market competition. However, it also provided for potential exemptions if the restrictive practices led to significant economic benefits, such as improved efficiency or enhanced production and distribution.



8. The implication of the letter dated November 9, 2022, by the Ministry of Transport of the Republic of South Sudan was to preclude any other CFS from engaging in the same business concerning cargo destined for South Sudan. In light of that, the dispute did not pertain to matters governed by the Competition Act. Rather, the issue at hand challenged a decision by the Executive branch to alter an established arrangement between the petitioners and the Republic of South Sudan.
9. The doctrine of exhaustion, which typically required parties to exhaust all available administrative remedies before seeking the court's intervention, was not relevant in the case. The matter involved a direct contestation of an Executive action that violated international law, that was, the sovereign decision of the Government of South Sudan how cargo destined to that country should be handled. The contention that the issue should have been referred to the Competition Authority was therefore rejected.
10. One country could not intervene in or question the sovereign decision of another country through its own legal system. That principle underscored the respect for national sovereignty and jurisdictional limits, preventing one country's courts from adjudicating matters that involved the internal or official actions of another sovereign state. In that regard, according to that doctrine, any disputes or decisions made by the Government of South Sudan regarding the cargo were considered beyond the reach of Kenyan judicial authority.
11. The letter dated September 9, 2022, by the minister in charge of transport in South Sudan and reiterated by another letter dated February 6, 2023 should be recognized and considered as an official request from a sovereign state. It was worthy to note and respect the South Sudanese Government's social and political situation and its crucial role of oversight in managing imports to its country.
12. The court took judicial notice that the security situation of South Sudan required effective management of goods and cargo destined there. In restricting the number of CFSs to handle cargo destined to that country, the Government of South Sudan was concerned by its own internal considerations including security as a government. That was a decision that must be respected. It could only be dealt with or challenged through diplomatic channels and not judicial process.
13. The decision of the Government of South Sudan appointing the petitioners as the legitimate companies designated to offer handling, storage and warehousing services for cargo bound for South Sudan through the Port of Mombasa could not be challenged in the proceedings or in Kenyan courts. The attempt by the 1st and 2nd respondents to counter that arrangement was a violation of articles 10, 43 and 47 of the Constitution. The same guaranteed the national principle and values that include rule of law. By acting contrary to the wishes of a foreign state, it violated international law. There was also the infringement of the petitioners' economic rights and to administrative actions that were prompt, efficient, legal, fair and followed due process. The decision was made without any reference to the petitioners or the Government of South Sudan.

Amended petition partly allowed.

Orders

- i. *Amended petition allowed as prayed in prayer nos. i), ii), iii) and v) of the amended petition with costs.*
- ii. *The suits that were consolidated with the petition were dismissed.*
- iii. *The period in v) was capped at 7 years.*

Citations

Cases

1. Ramogi , William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) ([2020] KEHC 10097 (KLR)) — Explained
2. REPUBLIC v NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY Ex-parte SOUND EQUIPMENT LIMITED ([2010] KEHC 3736 (KLR)) — Explained
3. Barker McCormac (PVT) Ltd -v- Government of Kenya (ZLR 1985(1)) — Explained
4. S.a Dhellelmes Ef Masurel Vs Banque Centrale De Turquie ([1963] 45 I LR 85) — Explained



Statutes

1. Access to Information Act (cap 7M) — Cited
2. Civil Procedure Act (cap 21) — section 15(c) — Cited
3. Competition Act (cap 504) — section 9,21,25,26,40(2) — Cited
4. Constitution of Kenya — article 10,28,43,47,48,50 — Cited
5. Evidence Act (cap 80) — section 35,80(1) — Cited
6. Judicature Act (cap 8) — section 3 — Cited
7. Kenya Ports Authority Act (cap 391) — Cited

Texts

1. Black's Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)

Advocates

None mentioned

JUDGMENT

1. The amended petition before court is dated 18/4/2023. The petitioners are limited liability companies incorporated under the Companies Act carrying on their business in Kenya. The 1st and 2nd respondents are Cabinet Secretaries for Ministries in the Government of Kenya. The 3rd respondent is the Attorney General and the Chief Legal Advisor to the government. The 4th respondent is a state corporation created pursuant to the [Kenya Ports Authority Act](#). The 5th and 6th respondent as well as the 3 interested parties are limited liability companies operating as Container Freight Stations in Mombasa.
2. The petition was supported by the affidavits sworn by Salim Juma on 18/1/2023 and Peter Ng'ang'a on 18/4/2023, respectively. Their case was that they were fully authorized by the Kenya Revenue Authority to operate Container Freight Stations (CFSs) and that the 2nd respondent lacked the authority or capacity to control or issue directives regarding the handling, storage and warehousing of cargo.
3. That since 2013, the 1st and 4th respondent had appointed the petitioners to manage and warehouse all imported general and containerized cargo destined for South Sudan, pending clearance by KRA. Additionally, a letter from the Ministry of Transport of the Government of South Sudan dated 9/11/2022, officially confirmed that the petitioners were to continue with the provision of handling, storage and warehousing services for cargo passing through the Port of Mombasa destined for South Sudan.
4. Consequent thereto, the petitioners invested substantial sums of money to fulfill that mandate. *Vide* a letter dated 13/12/2022, the Cabinet Secretary for the Ministry of Roads and Transport from the Kenya government reaffirmed that appointment.
5. However, shortly thereafter, the petitioners discovered that the 2nd respondent was considering instructing the 4th respondent ("KPA") to disregard the petitioners' aforesaid appointment.
6. The petitioners contended that they had invested heavily in infrastructure, machinery and human resources in order to carry out the duties bestowed upon them by the said appointment and they intended to do so for over a period of 10 years. To be selected for such services, significant investment was required, including over one billion Kenya Shillings for infrastructure, transportation, loading, offloading, storage and technological improvements.



7. They further contended that previously, similar appointments by the KPA were granted for 7 years, but the petitioners argued that a period of between 10 to 15 years was necessary to achieve a reasonable return on their investment. If this period was reduced, the petitioners would struggle to recoup their capital expenditure and would face irreparable losses. The petitioners therefore contended that the 2nd respondent's actions would infringe upon their fundamental rights and disrupt their ability to discharge their mandate effectively.
8. The petition was grounded on several constitutional provisions including article 10 on the national values and principles, article 43 on state obligation to ensure enjoyment of socio-economic rights; article 46(1) on consumer protection and article 48 on access to justice.
9. The petitioners therefore prayed for declarations that the directive issued by the 2nd respondent, which sought to alter the current arrangement whereby the petitioners warehoused cargo destined for South Sudan, should be deemed irregular and a violation of their fundamental rights under articles 43, 47 and 50 of the Constitution.
10. Further, that the conduct of the 2nd respondent be declared to be in breach of articles 10, 28, 47 and 50 of the Constitution of Kenya. A prohibitory order to prevent the respondents and their agents from issuing any directives that could undermine the existing directive from the 1st respondent dated 13/12/2022, regarding the handling, storage, and warehousing of cargo bound for South Sudan via the Port of Mombasa. Additionally, that the petitioners be declared to be entitled to a 10 to 15-year period to continue providing these services as granted by the 1st, 3rd and 4th respondent. The costs of the petition were also sought.
11. The 5th respondent opposed the amended petition through a replying affidavit sworn by Evalyne Odongo on 30/5/2024. She stated that the 5th respondent was licensed by KRA to operate a customs bonded warehouse known as Siginon CFS Miritini, Mombasa. That in the normal course of business, customers of goods or their agents contact the 5th respondent to store their cargo at its warehouse. That the government of South Sudan is not the owner of the goods as indicated in the documents, instead, the 5th respondent is contracted by the importers for warehousing.
12. That a notice issued by the KPA on 23/4/2023, directed all shipping lines to facilitate the endorsement of bills of lading at the loading port to any point of clearance chosen by the importer, which was intended to ease the evacuation of cargo from the port. That however, the orders sought in the petition would infringe upon the 5th respondent's constitutional rights by potentially causing the loss of clientele, damaging its business, and leading to financial ruin. That the government of South Sudan had not entered into any agreement with the petitioners to handle or warehouse all cargo destined for South Sudan passing through the Port of Mombasa.
13. The 5th respondent further contended that the letters dated 9/11/2022, 22/12/2022, 12/9/2013 and 13/12/2022, issued by various officers of the Republic of South Sudan and relied on by the petitioners, were inadmissible as evidence under section 80(1) of the Evidence Act as they were not certified true copies and did not identify the public officer with custody of the letters. That the affidavits also failed to demonstrate that the deponents had custody of the documents as required by the Access to Information Act.
14. That according to section 82(g) of the Evidence Act, the documents were inadmissible because they were not original and lacked proof of their authenticity. The documents, purportedly from South Sudanese officers, were neither notarized nor accompanied by an affidavit sworn by any officer of the South Sudanese government.



15. The 5th respondent also contended that under section 40(2) of the [Competition Act](#), the High Court lacked jurisdiction to hear the dispute at first instance and could only entertain appeals from the Competition Tribunal. Further, that the petitioners lacked standing to file the petition or any proceedings to protect or challenge the decisions or policies of the Government of South Sudan.
16. Simultaneous with the replying affidavit, the 5th respondent filed grounds of opposition dated 3/6/2024. It contended that in violation of section 35(1), the documents filed by the petitioners were not original, that the deponents of the affidavits were not the authors of the documents and lacked personal knowledge of the circumstances, policies, decisions and processes of the Republic of South Sudan attributed to its officers. That the individuals who created the documents had not been called as witnesses and the deponents did not demonstrate that the said individuals were deceased, unavailable, or otherwise incapable of providing testimony as required by section 35(1)(b).
17. The 1st interested party filed a replying affidavit in opposition to the petition, by Abbas Abdibasid Jamaludin sworn on 4/6/2024. It was contended that the interested party was a limited liability company licensed to operate a CFS in Mombasa County. That the petition did not satisfy the criteria for a constitutional petition as there was no evidence demonstrating how the petitioner's constitutional rights had been infringed.
18. It was argued that the documents supporting the petition did not meet the necessary evidential standards for document production and were therefore inadmissible. That the petition contravened section 15(c) of the [Civil Procedure Act](#), which mandates that petitions be filed within Mombasa. That the orders sought would create a monopoly in the handling of cargo destined for South Sudan. That these orders would undermine the contractual agreements between importers and clearing agents, such as the 1st interested party, by compelling KRA to assign cargo to the petitioners despite importers having nominated the 1st interested party as the handler.
19. That the petitioners should not interfere with or override the consignee's choice of CFS. That the re-assignment of the interested party's cargo would cause prejudice and financial loss to the interested party which would violate article 27 of the Constitution on the right to equal protection and equal benefits under the law.
20. The 2nd and 3rd interested parties filed grounds of opposition dated 4/6/2024. They argued that the petition was improperly filed in Nairobi as the Commercial Court in Mombasa had jurisdiction over the matter. The petitioners were accused of forum shopping, which amounted to an abuse of court process, in violation of article 165 of the [Constitution](#) as well as sections 12 and 15 of the [Civil Procedure Act](#) 2010 and section 3 of the [Judicature Act](#).
21. It was contended that the court lacked jurisdiction under sections 21, 25, 26 and 40(2) of the [Competition Act](#). That the petition did not meet the threshold for a constitutional petition as it failed to demonstrate how the petitioners' constitutional rights had been infringed. The petitioners were accused of not meeting the longstanding principle requiring a petitioner to clearly identify a constitutional right that is threatened, infringed or violated.

Submissions

22. The petitioners submitted that the replying affidavit sworn by Hon. Onesimus Kipchumba Murkomen did not dispute the fact that, according to the letter dated 13/11/2022, the government of South Sudan had officially directed that all sea-borne cargo destined for South Sudan be handled and warehoused by the petitioners. That this directive demonstrated that it was South Sudan's official policy that such cargo, passing through the Port of Mombasa, be managed exclusively by



- the petitioners. That the evidence not only supported this directive but also built upon an existing arrangement in place since 2013, which had led them to invest a significant amount of money in infrastructure.
23. The petitioners further submitted that, based on the doctrine of *acta jure imperii*, the South Sudan government's position could not be challenged in the Kenyan Courts. That the interested parties' claims about the petition potentially creating a monopoly had not been submitted to the Competition Authority. Additionally, it was argued that under the [KPA Act](#), the decision on how cargo passing through Kenyan Ports is to be handled and warehoused falls exclusively under the authority's jurisdiction, not that of the importer.
 24. The petitioners also contended that the court should take judicial notice of the social and political issues affecting the South Sudan government, including its concerns about cargo that could potentially include instruments of warfare and therefore security concerns. That the petitioners had outlined how their constitutional rights, particularly under article 43 regarding socio-economic rights, would be threatened to be infringed by the 2nd respondent's actions.
 25. It was further submitted that under articles 10 and 47 of the [Constitution](#), all respondents should adhere to national values and principles, ensuring that their actions are credible, accountable and transparent. That based on the letters dated 13/11/2022 and 6/2/2023, there was a legitimate expectation that their mandate to handle and warehouse all sea-borne cargo destined for South Sudan would be respected for a reasonable period.
 26. Counsel submitted that any challenge to a potential monopoly should be addressed with the Competition Authority of Kenya and not this court. That the issues in the petition transcended private commercial interests and arose from a decisive action by the South Sudan government. That failure to regulate cargo passing through Mombasa could lead to weapons of war entering South Sudan, which falls under the political domain of Kenya-South Sudan relations. Therefore, they asserted that the 2nd respondent or any other government entity had no right to interfere with the decisions of a sovereign South Sudan.
 27. The 5th and 6th respondent submitted that the amended petition should be struck out for lack of jurisdiction and dismissed for lack of merit. That section 25 of the [Competition Act](#) established the Competition Authority which receives complaints from interested persons that wish to be exempted from competition. That the Competition Tribunal is established under section 71 of the [Act](#) to determine disputes arising from exemptions from competition and decisions on the complaints.
 28. The interested parties submitted that pursuant to the provisions of section 15(c) of the [Civil Procedure Act](#), the court had no jurisdiction as the litigants in choosing the proper forum should be limited to place of residence of the defendants or the place where the subject matter was performed. That jurisdiction was demarcated in three categories namely the subject matter jurisdiction, the territorial jurisdiction as well as the pecuniary jurisdiction. That in the absence of the three there are enough grounds to extinguish a court's jurisdiction or invalidate proceedings.
 29. Counsel submitted that the importers were at liberty to nominate CFS of their choice to handle their cargo. That the status quo in favour of the petitioners created a monopoly status in breach of the provision of sections 3,9,50,56 and 57 of the [Competition Act](#). Counsel submitted that KRA was solely bound by the wishes of the importer as to which CFS should handle an importer's cargo.
 30. I have considered the pleadings on record, the submissions by learned counsel together with the authorities relied on. I find the main issues for determination to be three namely; whether the court



has the jurisdiction to hear the petition, whether the petition is barred from the doctrine of exhaustion and finally, how the cargo destined to South Sudan should be handled.

31. Before dealing with the main petition, I need to give reasons for the dismissal of the 5th respondent's motion dated 30/5/2024. Firstly, the application was brought so late in the day as to amount to an abuse of the court process. The dates for the hearing of the petition were fixed on 8/3/2024 for 27th through May 29, 2024. Those dates were subsequently vacated on 7/5/2024 and the date of 7/6/2024 fixed.
32. Barely 6 days before the hearing of the petition, the 5th respondent filed that application on 30/5/2024. The application was heard on 4/6/2024 and dismissed on the date of hearing of the petition. Therefore, the application was clearly meant to displace and delay the hearing of the petition. On that ground alone, the application was but clearly an abuse of the court process.
33. On the merit, the application sought to call the deponents of the affidavits in support of the petition for cross-examination. Calling of deponents of affidavits is in the discretion of the court. It must be shown that there exist special circumstances and that it is necessary to call a deponent of an affidavit. In the present case, it was not demonstrated that there were special circumstances leave alone any reason to summon the aforesaid deponents. As already stated, the same was only meant to scuttle the hearing of the petition.
34. Further, under the Mutunga Rules, constitutional petitions are to be heard by way of affidavits. In any event, directions had been given way back in March, 2024 that the petition would be heard by way of affidavits and there had been no application to vary those directions.
35. The second argument was that the documents relied on and annexed to the affidavits in support of the petition be expunged for allegedly being in breach of sections 35 and 80 of the *evidence Act*. Firstly, the documents that were sought to be expunged had not been challenged. None of the parties had denied the authenticity of those documents right from the date of filing of the petition. Indeed, all the parties were relying on the documents to challenge the actions of KPA.
36. It is also note worth that the party to whom the documents were addressed, the 1st respondent did not dispute the documents. He had actually acknowledged and responded to them. My understanding of the law of evidence is that, strict proof of documents is only required where they are denied, their authenticity is denied or challenged and such challenge should be at the earliest stage of the proceedings.
37. In any event, the said documents were not documents that fall under section 80 of the *Evidence Act*. Accordingly, i hold that the said documents were admissible before court.
38. On jurisdiction, the interested parties argued that the court did not have territorial jurisdiction to hear and decide the petition. That the petition be dismissed as it was filed outside the jurisdiction where the cause of action arose and where the defendants were located in light of section 15 of the *Civil Procedure Act*.
39. I do not think this issue arises for determination as this court had conclusively dealt with it in its ruling of 8/3/2024. Having made the determination that this court had jurisdiction for reasons contained in that ruling, the issue is *res-judicata* and there is no jurisdiction to re-look at it again.



40. The second issue is whether the court is barred by the doctrine of exhaustion from entertaining the petition. The Doctrine of Exhaustion is defined in Black's Law Dictionary 10th Edition as follows –

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”

41. The doctrine was aptly captured by the Court of Appeal in *Republic v National Environment Management Authority ex parte Sound Equipment Ltd*, [2011] eKLR, wherein it observed: -

“... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”

42. In *Mombasa High Court Constitutional Petition No. 159 of 2018* consolidated with Constitutional Petition No. 201 of 2019, *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR, the court stated 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. This encourages alternative dispute resolution mechanisms in line with article 159 of the Constitution and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, where the court opined thus:

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

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

While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 *Constitution*. We can do no better in this regard than cite another Court of Appeal decision which provides the constitutional rationale and basis for the doctrine.”



43. In view of the foregoing, it is clear that the doctrine of exhaustion demands that parties first use the administrative procedures laid out by statute before approaching the courts. The purpose is to enable the administrative agencies, who are well versed in the areas of expertise, to address the gravamen of the parties before the courts can make a pronouncement on the same. It also frees the courts from dealing with all manner of disputes and only deals with them on appeal thereby reducing backlog of cases.
44. In this case, the respondents and interested parties submitted that the petitioners ought to have first exhausted the available remedies found in the Competition Act of Kenya. Section 9 of the [Competition Act](#), No 12 of 2010 (“the Act”) outlines the powers and functions of the Competition Authority of Kenya. It grants the Authority the authority to investigate anti-competitive practices, enforce compliance with competition laws, advise on competition matters, promote public and business awareness and regulate and monitor market conditions to ensure fair competition.
45. Section 21 of the [Act](#) details the restrictive trade practices. It prohibits restrictive trade practices that hinder competition, such as collusion and price-fixing. It grants the Competition Authority, the power to investigate and take enforcement actions against such practices. The section aims at preventing agreements or conduct that distorts market competition. However, it also provides for potential exemptions if the restrictive practices lead to significant economic benefits, such as improved efficiency or enhanced production and distribution.
46. In this petition, the petitioners’ gravamen emanated from the 2nd respondent’s decision to instruct KPA not to honour the petitioners’ appointment with respect to handling, storing and warehousing of cargo destined to the republic of South Sudan. The petitioners stated that the respondent’s actions if allowed would be a violation of articles 10, 43, 47 of the [Constitution](#).
47. According to the petitioners, vide a letter dated 9/11/2022, the Ministry of Transport of the Republic of South Sudan confirmed that the petitioners were retained to offer handling, storage and warehousing services. The letter clearly stated that due to the sensitivity of the situation in South Sudan, the goods destined to the country need to be closely monitored by the country’s customs officers and in order to avoid them being overstretched it was prudent to have the two CFSs which had undergone vetting handle the same.
48. The implication of this letter was to preclude any other CFS from engaging in the same business concerning cargo destined for South Sudan. In light of this, it becomes evident that the dispute does not pertain to matters governed by the [Competition Act](#). Rather, the issue at hand challenges a decision by the executive branch to alter an established arrangement between the petitioners and the Republic of South Sudan.
49. Given the foregoing, the doctrine of exhaustion, which typically requires parties to exhaust all available administrative remedies before seeking courts intervention, is not relevant in this case. The matter involves a direct contestation of an executive action that violates International Law, that is, the sovereign decision of the government of South Sudan how cargo destined to that country should be handled. The contention that the issue should have been referred to the Competition Authority is therefore rejected.
50. The final issue is how the cargo destined for the Republic of South Sudan should be handled. The petitioners contended that the decision by the South Sudanese government on the handling of cargo destined to that country cannot be contested in the Kenyan courts. They invoked the doctrine of *acta jure imperii*. The doctrine is to the effect that acts performed by a sovereign state in the exercise of its government authority cannot be challenged or reviewed by the courts of another sovereign state.



51. In *Barker McCormac (PVT) Ltd v Government of Kenya* ZLR 1985(1), the court held that: -
- “The nature of the doctrine of sovereign immunity is a question of international law and intentional law is part of the law of Zimbabwe. The doctrine of restricted sovereign immunity applies to act *a jure imperii*, ie acts of purely governmental or public nature and not to acta jure gestionis, ie acts of a commercial or proprietary nature. The courts distinguish act *a jure imperii* from *acta jure gestionis* by referring to the nature of the State transaction or the resultant legal relationships, and not to the motive or purpose of the State activity.”
52. Further, in *Sa Dhlellemes Ef Masurel v Banque Centrale De Turquie* [1963] 45 I LR 85, it was held that: -
- “Immunity from jurisdiction depends upon the nature of the act rather than upon the character of the body responsible for it. Whether it emanates from the Foreign State itself or from one of its organs, or from a public body in form of a cooperation acting on behalf of the state, the act is covered by immunity from jurisdictions only when it constitutes an act of Government or of executing power, or as it is also put, when it is done *Jure Imperii*, on the other hand it loses immunity when it is done *Jure Gestionis*”.
53. Essentially, it means that one country cannot intervene in or question the sovereign decision of another country through its own legal system. This principle underscores the respect for national sovereignty and jurisdictional limits, preventing one country’s courts from adjudicating matters that involve the internal or official actions of another sovereign state. In this regard, according to this doctrine, any disputes or decisions made by the government of South Sudan regarding the cargo are considered beyond the reach of Kenyan judicial authority.
54. In the letter dated 9/9/2022, the Minister in charge of transport in South Sudan addressed the 1st respondent, inter alia, as follows: -
- “Hon. CS as you may be aware goods to South Sudan are extremely sensitive and therefore closely monitored by our custom officers stationed at the port of Mombasa and the two mentioned CFS’s. Our understanding is that our custom officers can be overstretched if our cargo is to be handled in more than two facilities. This could create diversion of cargo and loss of revenue and even security gaps.” (Emphasis provided).
55. This position was reiterated by another letter dated 6/2/2023. This, for all purposes and intents, should be recognized and considered as an official request from a sovereign state. It is worthy to note and respect the South Sudanese government’s social and political situation and its crucial role of oversight in managing imports to its country.
56. Further, the documents show that there were certain considerations that led to the selecting the two CFSs. The court takes judicial notice that the security situation of that country requires effective management of goods and cargo destined there. It is clear that in restricting the number of CFSs to handle cargo destined to that country, the government of South Sudan was concerned by its own internal considerations including security as a government. That is a decision that must be respected. It can only be dealt with or challenged through diplomatic channels and not judicial process.
57. In the premises, the court finds that the decision of the government of South Sudan appointing the petitioners as the legitimate companies designated to offer handling, storage and warehousing



services for cargo bound for South Sudan through the Port of Mombasa cannot be challenged in these proceedings or in the Kenyan Courts.

58. Further, it's the court's finding that the attempt by the 1st and 2nd respondent to counter this arrangement was a violation of article 10, 43 and 47 of the *Constitution*. The same guarantees the national principle and values that include rule of law. By acting contrary to the wishes of a foreign state, it violates International Law. There is also the infringement of the petitioners economic rights and to administrative actions that are prompt, efficient, legal, fair and follow due process. The decision was made without any reference to the petitioners or the government of South Sudan.
59. In the premises, the court finds the amended petition to be meritorious and allows the same as prayed in prayer nos. i), ii), iii) and v) of the amended petition with costs. The suits that were consolidated with the petition are hereby dismissed. The period in v) however, is capped at 7 years.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF SEPTEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

