



John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others (Petition 64 of 2013) [2024] KEHC 6648 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 64 OF 2013**

OA SEWE, J

MAY 30, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ARTICLES 2(1), (2), (3), (5) AND (6), 3, 22(1) AND 159 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 3, 20, 21, 23(1) & (3), 27, 31(B), 35, 40, 47, 48 AND 94 OF THE CONSTITUTION OF KENYA

BETWEEN

JOHN FLORENCE MARITIME SERVICES LIMITED 1ST PETITIONER

CONKEN CARGO FORWARDERS LIMITED 2ND PETITIONER

AND

CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

KENYA MARITIME AUTHORITY 3RD RESPONDENT

OFFICE DE GESTION DU FREIT MARITIME (OGEFREM). 4TH RESPONDENT



JUDGMENT

1. The petitioners, John Florence Maritime Services Limited and Conken Cargo Forwarders Limited, are limited liability companies duly registered in Kenya under the *Companies Act*, Chapter 486 of the Laws of Kenya. They are engaged in the business of import, export, agency, clearing and forwarding of goods within the region and have their offices in Mombasa in the Republic of Kenya.
2. They filed this Petition pursuant to Article 22(1) of the Constitution against the four respondents, the Cabinet Secretary for Transport and Infrastructure, the Attorney General, Kenya Maritime Authority and the Office De Gestion Du Freit Maritime (OGEFREM), contending that the Democratic Republic of Congo, through the Ministry of Transport & Communication, and the Government of Kenya, entered into a Bilateral Agreement on the 30th May 2000 on Maritime Freight Management. The Agreement was to remain in force for a period of 3 years with an option for renewal for one further period of 3 years.
3. The said Agreement expired on 29th May 2003, and, according to the petitioners, it is not clear whether or not it was renewed; but even if it was, the Agreement would have come to an end on 29th May 2006 anyway, as no further extension was permissible. The Agreement was accordingly gazetted on 30th August 2002 vide Gazette Notice No. 5625 of 2002 and all its pertinent terms set out in the gazettelement.
4. At paragraph 17 of the Petition, the petitioners averred that on the 26th October 2012 one Berthe Morisho Mwavuma, who identified herself as the DRC Commercial Attache & OGEFREM representative, issued a circular to all shippers (importers), owners (shipping Lines), Forwarders and all Shipping Agents, informing them that they had to comply with DRC Regulations as per DRC Prime Minister's Decree No. 011/18 Volume 1 Reference 5 dated 17th October 2012 with regard to Fiche Eletronique de Renseignement a l'Importation (FERI) Certificates and Certificates of Destination (COD).
5. The petitioners further averred that, on the same day Berthe Morisho Mwanvua, in her capacity as the DRC Commercial Attaché and OGEFREM Representative, once again issued a circular informing all clients that starting Monday 29th October 2012 payments for the Certificate of Destination would be paid to Account No. ...0004 at any Bank of Africa within Mombasa; and that such payments were to be made in US Dollars after all the documents had been submitted and validated at their offices.
6. Further to the foregoing, the petitioners contended that another undated notice was issued by OGEFREM's management office in Mombasa stating that from 1st November 2012, any cargo destined to DRC had to have a FERI Certificate before applying for a Certificate of Destination. They explained that the procedure for obtaining a FERI Certificate involved payment of money to a private individual, one Mr. Paolo Aste, through a bank in Italy identified only as Institutio Bancario San Paolo SPA – Sede Genova Via Fieschi 4 – Genova.
7. It was the contention of the petitioners that these notices were issued in complete ignorance of the fact that under the Agreement, the only payments authorized for assessment and collection were a commission of 1.8% of the gross freight charges on the imports for DRC on transit at the Port of Mombasa; which payments could only be collected by the 1st respondent and handed over to the DRC government. The petitioners complained that on or about the 18th December 2006, the OGEFREM office in Kenya began creating rules and procedures contrary to the terms of the Agreement dated 30th May 2000 by setting aside a yard for the separation of all Congolese cargo arriving at the Port



of Mombasa with a view of collecting the illegal levies and fees, with the help of the Kenya Maritime Authority (the 3rd respondent).

8. The petitioners therefore asserted that the respondents have, through themselves and/or their officers, agents and/or employees been in blatant contravention of the provisions of the Agreement as well as *the Constitution* and Laws of Kenya by implementing an illegal Agreement that had expired on 30th May 2003. They contended that, unless stopped by this Court, the respondents will continue to perpetuate an unacceptable and unlawful situation in which Congolese laws are being enforced right inside our country without domestication. They added that this is a manifest contravention of Articles 3 and 94(5) and (6) of the Constitution.
9. The petitioners further averred that the respondents through their officers, agents and/or employees have contravened their rights and the rights of the people of Kenya under Article 40(1)(a) and 40(2) (a) by threatening to arbitrarily deprive them of their goods and property unless they comply with the illegal provisions of a foreign jurisdiction relating to their forced taxation. Consequently, the petitioners prayed for the following orders:
 - (a) That a conservatory order be issued restraining the 1st, 2nd and 3rd respondents from levying any fees that are not provided for under the Bilateral Agreement dated 30th May 2000 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the DRC.
 - (b) That a declaration be made that any provisions not having the force of law in Kenya and which require the payment of anything over and above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the DRC are in contravention of the petitioners' rights and fundamental freedoms under Article 95 of *the Constitution* of Kenya.
 - (c) That a declaration be made that the Bilateral Agreement entered into on the 30th May 2000 is null and void and that its continued enforcement by anybody or person as part of the Laws of Kenya contravenes the petitioners' rights and fundamental freedoms under Articles 2, 40 and 95 of *the Constitution*.
 - (d) That a declaration be made that any and all provisions not having the force of law in Kenya and that contravene the petitioners' fundamental rights and freedoms under Article 95 of *the Constitution* be held to be null and void ab initio.
 - (e) That a declaration be made that any provisions of law that contravene the petitioners' fundamental rights and freedoms under Article 40 of *the Constitution* be held to be null and void ab initio.
 - (f) A declaration be made that any provisions of the Agreement that contravene the terms of Article 2 of *the Constitution* be held to be null and void ab initio.
 - (g) An award of compensation in General damages.
 - (h) An award of compensation in punitive damages.
 - (i) Such further and or other orders, directions or writs as the Court may deem fit, just and appropriate to grant.
 - (j) Costs of and incidental to the Petition.



10. The Petition was supported by the affidavits of Gilbert Ojwang, a director of the 1st petitioner, and Peter Matata Mutua, a director of the 2nd petitioner. In his affidavit, Mr. Ojwang reiterated their assertions in the Petition and annexed documents in proof thereof. The documents included copies of the Bilateral Agreement (Annexure “GO 001”), the Kenya Gazette Notice No. 5625 of 2002 (Annexure “GO 004”) as well as the various letters and notices referred to in the Petition. In the 2nd affidavit, Mr. Mutua simply adopted the contents of Mr. Ojwang’s affidavit.
11. The respondents opposed the Petition and filed their responses accordingly. On behalf of the 1st and 2nd respondents, Grounds of Opposition were filed herein on 18th November 2013 to the following effect:
 - (a) The Petition is an abuse of the court process as the issues raised therein are similar to the issues raised in Mombasa Judicial Review Application No. 130 of 2011.
 - (b) That this same division of the High Court entertained the issue and made a determination and therefore this Petition is res judicata and the Court is functus officio.
 - (c) That the Court has no jurisdiction to entertain the Petition as by so doing it would be usurping the jurisdiction of the Court of Appeal.
12. On behalf of the 3rd respondent, Kenya Maritime Authority, a Replying Affidavit sworn by John Odira Omingo, the Head of the 3rd respondent’s department of Commercial Shipping, was filed herein on 14th November 2013. The 3rd respondent similarly averred that the Petition is res judicata in that the issues raised herein were directly in issue in Mombasa Judicial Review Application No. 130 of 2011. The 3rd respondent further averred that it is a body established under the [Kenya Maritime Authority Act](#), 2006 with the mandate to regulate, coordinate and oversee maritime affairs in Kenya. It added that one of its functions is to administer and enforce the provisions of the [Merchant Shipping Act](#) and any other legislation relating to the maritime sector for the time being in force.
13. The 3rd respondent further averred that the Government of Kenya and the Government of the Republic of Congo have been extending the subject Agreement after every three years and none of the said governments have in their sovereign rights disputed this arrangement. It was further reiterated that cargo destined to the DRC are transit goods and the Government of the DRC has the right to raise requisite taxes on the goods headed to that country. Conversely, the 3rd respondent averred that the Government of Kenya has no rights over goods headed to the DRC save to ensure they are safely transited to the DRC.
14. The 4th respondent relied on the Replying Affidavit sworn by its Country Representative in Kenya, Berthe Morisho Mwamvua. The affidavit was filed on the 3rd December 2013; and the contention of the 4th respondent is basically that the Petition is bad in law and amounts to abuse of the court process in that the matters raised in the Petition were directly in issue in Judicial Review No. 130 of 2011 and have been determined. A copy of the Judgment in that matter was annexed to the 4th respondent’s affidavit as Annexure “BMM2”.
15. The 4th respondent further averred that it is a creature of the Congolese statute and is therefore sanctioned by [the Constitution](#) of the DRC. It therefore posited that the issues before the Court ought to be litigated in DRC, and then only by parties to the Bilateral Agreement. Thus, the 4th respondent was of the posturing that the Petition raises no constitutional issues under [the Constitution](#) of Kenya.
16. The Petition was urged by way of written submissions. In the petitioners’ written submissions dated 13th June 2022, several breaches of [the Constitution](#) were underscored as follows:



- (a) Taxation without representation or legislation: The petitioners submitted that none of the parties to the Agreement had any constitutional, statutory or any other legal authority to raise, establish, impose or enforce any taxation of any person within the jurisdiction of the Republic of Kenya.
 - (b) Breach of Article 201 of *the Constitution*: The petitioners submitted that there was neither openness nor any public participation in the decision and process of entering into the said Agreement as required by Article 201(a) of *the Constitution*. They added that the Agreement did not comply with the requirement of *the Constitution* demanding promotion of an equitable society and the fair distribution of the taxation burden as demanded by Article 201(b).
 - (c) Breach of Article 206 of *the Constitution*: The petitioners submitted that *the Constitution* creates the Consolidated Fund into which it demands all money should be paid; and therefore that failure to deposit the money illegally raised as taxes into the Consolidated Fund, and by depositing the same into a private bank account in Italy, the respondents acted in breach of Article 206 of *the Constitution*.
 - (d) Breach of Article 209 of *the Constitution*: It was the submission of the petitioners that the respondents imposed the taxes itemized in the Agreement and even went further to collect taxes not specified in the said Agreement yet by law only the national government may impose any income tax, value added tax, customs duties and other duties on import and export goods and/or any excise tax.
 - (e) Breach of Article 210 of *the Constitution*: The petitioners quoted Article 210 in their submissions and contended that for the impugned taxes and levies to be validly charged, they had to be provided for in law. They added that in this instance, the levies were illegally collected, not only on the ground that there was no legislation to under-guard their imposition but also because they were based on an agreement that had expired.
 - (f) Breach of Article 94 of *the Constitution*: It was the contention of the petitioners that the respondents' contravened their constitutional rights under Article 94(5) and (6) of *the Constitution* by allowing for the unprocedural amendment and renewal of the Bilateral Agreement dated 30th May 2000.
 - (g) Breach of Article 40 of *the Constitution*: The petitioners submitted that the respondents contravened their rights and the rights of the people of Kenya under Article 40(1)(a) and 40(2) (a) of *the Constitution* by threatening to arbitrarily deprive them of their goods and property unless they complied with the illegal requirements of a foreign jurisdiction.
17. Accordingly, the petitioners prayed that their Petition be allowed and the orders sought by them granted as prayed.
18. On behalf of the 1st, 2nd and 3rd respondents, written submissions were filed herein by Ms. Lang'at on 23rd September 2022. Their posturing was that the Bilateral Agreement dated 30th May 2000 is valid and as such the imposition of charges for the FERI and COD certificates was legal. They further submitted that the two Governments were of the understanding that the Agreement could be renewed every three years from the wording of Article 10 of the Agreement; and that it was to that end that they kept the Agreement alive. Reliance was placed on the work of Lord McNair, namely, *The Law of Treaties*, Oxford Press 1961 page 22 and Article 31 of the Vienna Convention of Treaties, 1969



to buttress the submission that a treaty must be interpreted in good faith and in accordance with its objective and purpose.

19. The 1st, 2nd and 3rd respondents also submitted that the petitioners failed to discharge the burden of proof; particularly in connection with their allegation that the monies collected under the Agreement were being deposited into a personal bank account in Italy. They relied on Sections 108 and 109 of the *Evidence Act*, Chapter 80 of the Laws of Kenya and the case of Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR in urging the Court to dismiss the Petition with costs.
20. From the foregoing, it is common ground that the Democratic Republic of Congo (DRC) through its Ministry of Transport and Communication and OGEFREM, the 4th respondent, entered into a Bilateral Agreement dated 30th May 2000 with the Government of Kenya through the Ministry of Transport and Communications to govern the handling of cargo destined for the DRC. The Agreement was initially for a period of 3 years and was duly gazetted vide Kenya Gazette No. 5625 dated 21st August 2002. It is also common ground that the 3rd respondent was thereby authorized to collect, on behalf of the 4th respondent, a commission of 1.8% of the gross freight charges on DRC bound cargo passing through the Kenyan Ports.
21. The Agreement provided for renewal in Article 10 in the following terms:

The present Agreement shall remain in force for a period of Three (3) Years following the day of coming into force of the Agreement and shall be renewable for a further period of Three (3) Years, provided both parties exchange notices of their intention to renew at least THREE (3) Months before the expiry of every three-year period.”
22. The evidence presented herein confirms that, although the Agreement provided for renewal “for a further period of Three (3) Years”, it was renewed severally, the last such renewal, according to the respondents lasting until 22nd October 2013.
23. In their pleadings before the Court, the parties made reference to Mombasa Judicial Review Application No. 130 of 2011: Republic v Kenya Ports Authority and Others, Ex Parte Office De Gestion Du Freit Maritime (OGEFREM) and the judgment delivered therein dated 27th September 2012. From the respondents’ standpoint, the issues raised herein were determined in that matter by a court of concurrent jurisdiction and therefore this Petition is res judicata and an abuse of the court process. Consequently, it is imperative to consider this technical point before getting into a merit consideration of the Petition.
24. A perusal of the record shows that the issue of res judicata was one of the points raised by the respondents in opposition to the petitioners’ interlocutory application dated 5th November 2013 for conservatory orders. A ruling was delivered in that regard on 31st July 2014 as follows:

...the matters raised in this petition are res judicata by virtue of the previous decision of the court in Judicial Review Case No. 130 of 2011. The petition and the Notice of Motion filed thereunder are therefore barred by section 7 of the *Civil Procedure Act*. In accordance with the decision of the Court of Appeal in Owners of the Motor Vessel Lilian S v Caltex Oil (Kenya) Ltd (1989) KLR 1, having determined that it has no jurisdiction in the matter, the court has no power to make one more step and it must lay down its tools. For this reason, the Notice of Motion for conservatory orders together with the petition both dated 5th November 2013 are struck out with costs to the respondents.”



25. Being aggrieved by that decision, the petitioner filed an appeal to the Court of Appeal in Malindi Civil Appeal No. 42 of 2014: *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & others*. The Court of Appeal upheld the decision of the High Court and dismissed the appeal; whereupon the petitioner appealed to the Supreme Court in Petition in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)* [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
26. Upon considering the appeal, the Supreme Court took the following view of the matter:
97. From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However the appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form part of Kenyan law and in failing to do so, the respondents contravened article 2. They further alleged that the respondents herein purported to usurp to the role of Parliament and in doing so contravened articles 94(5) and (6) of *the Constitution*. They further alleged that the FERI and COD certificates threatened to infringe their right to property under articles 40(1)(a) and (2)(a) when the respondents threatened to arbitrarily deprive them of their property. The court sitting in determination of a judicial review application did not have jurisdiction to render itself on these issues. We therefore find that the principle of res judicata was wrongly invoked on this ground.
- ...
108. We arrive at the inescapable conclusion that the High Court in determining a judicial review application, exercises only a fraction the jurisdiction it has to determine a constitutional petition. It therefore follows that a determination of a judicial review application cannot be termed as final determination of issues under a constitutional petition. The considerations are different, the orders the court may grant are more expanded under a constitutional petition and therefore the outcomes are different.
109. The court in hearing a constitutional petition may very well arrive at the same conclusion as the court hearing a judicial review application. However, the considerations right from the outset are different, the procedures are different, the reliefs that the court may grant are different, the court will be playing fairly different roles.
110. We consequently arrive at the conclusion that the Court of Appeal erred in holding that the doctrine of res judicata applied to the current case. The Court of Appeal should have at that point found that the High Court was wrong in its conclusion.
27. Consequently, the Supreme Court allowed the Petition of Appeal dated 9th September 2015 and issued the following orders:
- (i) The judgment and order of the Court of Appeal dated July 31, 2015 be and is hereby quashed and set aside.
 - (ii) The ruling and order of the High Court dated July 31, 2014 be and is hereby quashed and set aside.
 - (iii) For the avoidance of doubt, the ruling of the High Court is null and void.
 - (iv) The matter is remitted to the High Court for determination on its merits.
 - (v) Each party is to bear its own costs.



28. Accordingly, the parties moved the Court for the determination of this Petition. It is plain then that the issue of res judicata is untenable; having been conclusively resolved by the Supreme Court.
29. On the basis of the parties' pleadings, the evidence presented in respect thereof and written submissions filed herein by learned counsel, the issues for determination are:
- (a) Whether the Petition satisfies the requirement as to specificity; and if so,
 - (b) Whether the Bilateral Agreement was valid for all purposes and intents.
 - (c) Whether the violations alleged have been proved to the requisite standard.
 - (d) Whether the petitioner is entitled to the reliefs sought.

A. On the test of Specificity:

30. In the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, it was held:

...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

31. The principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as hereunder:

- (42) ...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

32. A perusal of the Amended Petition shows general compliance, in the sense that the petitioner provided the legal foundation of his case at paragraphs 6 to 22. He also furnished the factual basis thereof, including the alleged violations at paragraphs 23 to 39 of the Petition as amended. On the face of it, the contention that the Petition does not meet the requisite threshold appears to be ill-founded. Indeed, Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:



- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”
33. I therefore endorse the expressions of Hon. Odunga, J. in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* [2016] eKLR that:

On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in *Anarita Karimi Njeru vs. Attorney General* (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

34. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR, the Court of Appeal pointed out that:

...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

35. In this respect, the Court of Appeal was in agreement with the position taken by a 3-judge bench of the High Court in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2012] eKLR in which it was held that:

We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in



a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case...”

36. Thus, it is my considered finding that the Petition is indeed compliant as to specificity.

B. On the validity of the Bilateral Agreement and the ensuing FERA and COD certificates:

37. As to whether the Bilateral Agreement was valid after the first three years, a court of competent jurisdiction made a finding of fact in Judicial Review No. 130 of 2011. The Court was of the view that the use of the words “before the expiry of every three-year period” at the end of Article 10 of the Agreement may have caused the parties to believe that the agreement could be renewed every three years indefinitely. The Court held:

The two Governments assumed that the agreement could be renewed every three years and exchanged four communications for renewal. The last was a request by DRC to renew for a fresh term after May 2012. The signatories were quite happy to keep the agreement between them alive. They chose to do so by exchanging letters of renewal. It must be said that the first renewal was done outside the timelines imposed by the Clause on renewals and the subsequent renewals may not have been contemplated at all in the strict reading of the Clause. Nevertheless, the mutual exchange of letters kept the Agreement alive and the parties related in conformity with the terms thereof. Both GOK and DRC recognize the Agreement as existing and valid. It is my view therefore that at the time when the requirements of the two Certificates were imposed a valid Inter-Government agreement on freight management existed.”

38. I find no reason to depart from that conclusion. In terms of interpretation of treaties, Article 31.1 of the Vienna Convention on the Law of Treaties provides that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

39. In addition to the foregoing, the conduct of the parties can also be illuminative. The author of The Law of Treaties (Oxford Press, 1961) posits thus at page 22:

Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called ‘practical construction’) has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law.”

40. It is therefore my finding that from the conduct of the parties Article 10 can be construed to mean that the Agreement could be and was indeed renewed beyond six years; and therefore was valid for all intents and purposes.

C. On whether the alleged violations or threats of violations have been proved against the respondents:

41. Article 259 of the Constitution provides as follows in terms of its construction:

- (1) This Constitution shall be interpreted in a manner that—
 - (a) promotes its purposes, values and principles;



- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.
- (2) ...
- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—
- (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;
 - (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;
 - (c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and
 - (d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

42. Hence, in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others* [2015] eKLR it was held:

91. *The Constitution* has given guidance on how it is to be interpreted. Article 259 thereof requires that the Court, in considering the constitutionality of any issue before it, interprets *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.
92. We are also guided by the provisions of Article 159(2) (e) of *the Constitution* which require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of *the Constitution*.
93. Thirdly, in interpreting *the Constitution*, we are enjoined to give it a liberal purposive interpretation. At paragraph 51 of its decision in *Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011*, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of *S. vs Acheson*, 1991 (2) S.A. 805 (at p.813) where he stated that:

“*The Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and ... aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of *the Constitution* must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”



94. Further, the Court is required, in interpreting *the Constitution*, to be guided by the principle that the provisions of *the Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other: see *Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997* (1997 UGCC 3).
43. A similar position was articulated in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, as follows:

...In interpreting *the Constitution*, this court is bound by the provisions of Section 259 which requires that *the Constitution* be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. ...

...In interpreting *the Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of *the Constitution* must be read together in order to get a proper interpretation. In the Ugandan case of *Tinyefuza vs. Attorney General*, Constitutional Appeal No. 1 of 1997, the court held as follows:

“The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”

44. Needless to say that the legal burden of proof rests on the petitioner as provided for in Sections 107(1), (2) and 109 of the *Evidence Act*. Accordingly, in *Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019* (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) the Supreme Court held:

66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR.

67. In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act* on the burden of proof. The provision stipulates:

107.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In addition, section 109 of the *Evidence Act* elaborates on the onus of proof by stipulating 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.”



45. The Supreme Court further held:

69. It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred. See *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others*, SC Petition No 12 of 2019; PARA 2020. eKLR.

46. Likewise, in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR it was emphasized that:

It is a 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 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 unsupported hypotheses.”

47. With the foregoing in mind, I have given due consideration to the assertions made by the petitioners in their Petition, the responses thereto and the submissions presented by their counsel. In essence, the petitioners alleged violations of Articles 40, 94, 201, 206, 209, 210 of the Constitution of Kenya. The alleged violations are as hereunder:

- (a) Taxation without representation or legislation: The petitioners submitted that none of the parties to the Agreement had any constitutional, statutory or any other legal authority to raise, establish, impose or enforce any taxation of any person within the jurisdiction of the Republic of Kenya.
- (b) Breach of Article 201 of *the Constitution*: The petitioners submitted that there was neither openness or accountability, nor any public participation in the decision and process of entering into the said Agreement as required by Article 201(a) of *the Constitution*. They added that the Agreement did not comply with the requirement of *the Constitution* demanding promotion of an equitable society and the fair distribution of the taxation burden as demanded by Article 201(b).
- (c) Breach of Article 206 of *the Constitution*: The petitioners submitted that *the Constitution* creates the Consolidated Fund into which it demands all money should be paid; and therefore that failure to deposit the money illegally raised as taxes into the Consolidated Fund and instead depositing the same into a private bank account in Italy the respondents acted in breach of Article 206 of *the Constitution*.
- (d) Breach of Article 209 of *the Constitution*: It was the submission of the petitioners that the respondents imposed the taxes itemized in the Agreement and even went further to collect taxes not specified in the said Agreement yet by law only the national government may impose any income tax, value added tax, customs duties and other duties on import and export goods and/or any excise tax.
- (e) Breach of Article 210 of *the Constitution*: The petitioners quoted Article 210 in their submissions and contended that for the impugned taxes and levies to be validly charged, they had to be provided for in law. They added that in this instance, the levies were illegally collected,



not only on the ground that there was no legislation to under-guard their imposition but also because they were based on an agreement that had expired.

- (f) Breach of Article 94 of *the Constitution*: It was the contention of the petitioners that the respondents' contravention their constitutional rights under Article 94(5) and (6) of *the Constitution* by allowing for the unprocedural amendment and renewal of the Bilateral Agreement dated 30th May 2000.
- (g) Breach of Article 40 of *the Constitution*: The petitioners submitted that the respondents have contravened their rights and the rights of the people of Kenya under Article 40(1)(a) and 40(2) (a) of *the Constitution* by threatening to arbitrarily deprive them of their goods and property unless they comply with the illegal provisions of a foreign jurisdiction relating to their forced taxation.
48. All these allegations were premised on the false foundation that the applicable law was *the Constitution* of Kenya and that the taxes collected under the Bilateral Agreement were payable to the Consolidated Fund of the Government of Kenya. The agreement clearly provided, at Article 2 thereof, that one of the objectives was for the Merchant Shipping Office to:
- Calculate and collect on behalf of OGEREM a commission of one point eight per cent (1.8%) of the gross freight charges on the imports for the Democratic Republic of Congo on transit at the Port of Mombasa..."
49. Transit Cargo, in common parlance, refers to goods or cargo that is in the process of being transported through a specific location, such as a port, terminal, or customs zone, without being offloaded or undergoing any additional processing. It is in transit and not intended for consumption or local distribution at that particular location.
50. The agreement is explicit that Kenya was only acting as an enabler for the DRC and therefore none of the allegations set out in paragraph 48 above would lie because the acts are *jure imperii*. In *Barker McCormac (PVT) Ltd v Government of Kenya ZLR 1985 (1)*, a decision by the Harare High Court, which was applied in *Edna S. Ouma v The Government of the Arab Republic of Egypt [2009] eKLR*, it was held:
- The nature of the doctrine of sovereign immunity is a question of international law and international law is part of the law of Zimbabwe. The doctrine of restricted sovereign immunity applies to *acta jure imperii*, i.e. acts of purely governmental or public nature and not to *acta jure gestionis*, i.e. acts of a commercial or proprietary nature. The courts distinguish *acta 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."
51. It is therefore my considered finding that matters taxation are matters within the sole jurisdiction of the Government of the DRC and are therefore not open to challenge in Kenya in accordance with *the Constitution* and laws of Kenya. In this regard, I am in agreement with the position taken in *Twictor Investments Ltd v The Government of the United States of America [2003] eKLR* that:
- Sovereignty is an old concept of International persons within the Law of Nations, and these in turn are a body of rules agreed on by the civilized states of the World to legally regulate their intercourse OPPENHEIM in his *International Law A Treaties Vol. 1, 8th Ed.* Says:- at p.118 says that a state exists when the people is settled in a country under its own sovereign Government and one of the conditions which must exist is a sovereign Government which



that state must have”, and he says, “sovereignty is supreme authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies therefore independence all round within and without the borders of the country”

As a consequence of sovereignty the states are considered equal under international law hence no state can claim jurisdiction over another sovereign state. Severally there is comity or reciprocity among states that is to say that for a concession of immunity the recipient state or sovereign is granted by the other state it also makes mutual concessions of immunity for such other states and sovereigns, so judgment of a Municipal court cannot be enforced against a foreign state as this can interfere with the mutuality. Where a state has received another into its territory there is implied acceptance on the part of the receiving state that the sovereignty of the received state will not be affected disregarded or impugned...These are the principles that have been considered to support the principle of sovereign immunity.”

52. It is therefore my considered finding that the allegations of violations of the various provisions of *the Constitution* of Kenya are all misconceived and therefore untenable in respect of the Bilateral Agreement dated 30th May 2000. It follows that the reliefs prayed for herein by the petitioners are not available to them.

53. In the result, the Petition is devoid of merit and is hereby dismissed with an order that each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF MAY 2024

OLGA SEWE

JUDGE

