



**Autoports Nairobi Freight Terminal Limited & another v Cabinet Secretary,
Ministry of Roads & Transport & 3 others (Commercial Petition E002 of 2023)
[2023] KEHC 21623 (KLR) (Commercial and Tax) (18 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL PETITION E002 OF 2023
A MABEYA, J
AUGUST 18, 2023**

BETWEEN

AUTOPORTS NAIROBI FREIGHT TERMINAL LIMITED 1ST PETITIONER

COMPACT FREIGHT SYSTEM LIMITED 2ND PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF ROADS & TRANSPORT 1ST
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INDUSTRIALIZATION, TRADE AND
ENTERPRISE DEVELOPMENT 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

KENYA PORTS AUTHORITY 4TH RESPONDENT

RULING

1. Before Court is an amended Notice of Motion dated 23/1/2023. It was brought under sections 1A, 1B and 53(e) of the *Civil Procedure Act*, and Order 22 Rule 22 of the *Civil Procedure Rules*.
2. The application sought orders that pending the hearing of the petition, a conservatory order be issued restraining the respondents from interfering with the current existing arrangement whereby cargo destined for South Sudan passing through the Port of Mombasa is handled, stored and warehoused by either of the petitioners.



3. The grounds of the application were set out on the face of the Motion and on the supporting affidavit sworn by Salim Juma and Peter Ng'ang'a on 19/1/2023. Further grounds were set out in the supplementary affidavit of Peter Ng'ang'a sworn 18/4/2023.
4. It was contended that the petitioners were duly authorized agents of the Kenya Revenue Authority (KRA) to operate Container Freight Stations (CFS). That they serve as customs bonded warehouse areas with regard to the handling, storage and warehousing of any cargo that is entrusted to the petitioners by Kenya Ports Authority (KPA) for storage in the petitioners' premises pending clearance and removal by the importers of such cargo.
5. That the petitioners were appointed in 2013 by the 1st and 4th respondent to handle, store and warehouse all the imported and containerized cargo destined for South Sudan which is landlocked pending clearance by KRA.
6. That management of exports and imports of marine cargo was under the exclusive domain of the Ministry of Roads and Transport. That vide a letter dated December 13, 2022, the 1st respondent instructed the 4th respondent that all cargo destined to the Republic of South Sudan passing through the Port of Mombasa would be handled, stored and warehoused by either of the petitioners.
7. That the appointment was pursuant to a letter dated 9/11/2022 from the Ministry of Transport of the Republic of South Sudan wherein it was indicated that the petitioners had been thoroughly vetted including vetting by parliament of that country and were found to be competent to discharge such mandate. The petitioners were thus retained to offer such services to that country.
8. That after the appointment, the petitioners effected huge investment and entered into contracts with other third parties as they had a reasonable and legitimate expectation that the appointment would last for a long time unless they did something wrong to warrant interference with the arrangement. They also invested largely to develop and enhance efficiency of their warehouses over time since 2013 and made further investments after their such appointment in 2022.
9. That the 2nd petitioner had invested over Kshs. 1 billion to put in place the necessary infrastructure to carry out the mandate. That the infrastructure development related to the transportation services, loading and offloading services of containers, expansion of the warehousing space for cargo, maintenance of the state-of-the-art data processing system and generally improved security on the warehousing facility to ensure that the cargo was safely secured.
10. That however, the 2nd respondent had threatened to direct the 4th respondent not to honour the said arrangement which would deny the petitioners the opportunity of warehousing cargo destined for South Sudan passing through the Port of Mombasa.
11. That the past when the 4th respondent appointed the petitioners, the 4th respondent entered into a 5-year contract. That the appointment had run for lengthy periods to give the 2nd petitioner adequate opportunity to obtain a fair return on investment and any period less than 7 years would not be adequate. That the current appointment would need a period of 10 - 15 years considering the colossal investment made by the petitioners.
12. It was averred that the 2nd respondent's actions were in violation of the *Constitution* and were not accountable, credible nor transparent. That the petitioners had acted on the basis of the appointment of December 13, 2022 and the intended termination of the appointment was a degradation of the principle in fair administrative action contrary to Article 47 of the *Constitution*.



13. That the intended termination would breach the petitioner's social and economic rights enshrined in Article 43 of the Constitution. That the petitioners' board of directors, shareholders and employees would also suffer losses and would lose their personal dignity should they lose their means of survival.
14. That the Government upheld the principle of collective responsibility and any action of the Cabinet was deemed to be the collective action of the entire Government. That upon the Cabinet Secretary for Roads and Transport appointment of 13/12/2022, it was not open for the Cabinet Secretary for the Ministry of Industrialization, Trade and Enterprise Development to thereafter undo what another Cabinet Secretary had done. That the Government was estopped from such action under Section 120 of the Evidence Act and the intended termination would further breach Article 10 of the Constitution on the principles of credibility, accountability and transparency.
15. That allowing the Government to make decisions which are dusted in a week or two on capricious and whimsical basis would encourage an environment of arm-twisting, blackmailing and corruption. That unless the conservatory orders were issued, the petitioner's would suffer losses.
16. The 1st, 2nd and 3rd respondents opposed the application vide the replying affidavit sworn by Mohamed Daghar on 7/3/2023. He is the Principal Secretary, State Department for Transport within the Ministry of Roads and Transport (the 1st respondent). It was contended that the 1st respondent had ministerial responsibility over the 4th respondent.
17. That the Government of Kenya had ratified the United Nations Convention on the Law of the Sea (UNCLOS) under which landlocked states such as South Sudan had the right to access to and from the sea and enjoyed the freedom of transit though the transit states by all means of transport. That consequently, Kenya gave its neighboring land locked countries such as South Sudan the right to access the sea and freedom of transit.
18. That the Government of Kenya had no mandate to appoint any clearing and forwarding agents or CFS for an importer or exporter of transit goods. That South Sudan had designated the petitioners as its preferred CFS for its imports vide a letter dated 9/11/2022 and the same was acceptable to the Government of Kenya and the same was communicated to South Sudan vide the 1st respondent's letter dated 13/12/2022.
19. That under UNCLOS, the Government of Kenya had the right to take necessary measures to ensure that the right and facilities for land-locked countries did not in any way infringe their legitimate interests. That it was part of Kenya's legitimate interest that land-locked states continue to use the inland container depots in Nairobi and Naivasha as has been the case over the last couple of years before the presidential directive of September 2022 that the same reverts to the Port of Mombasa.
20. That on that basis, the Government of Kenya recommended to the Government of South Sudan that it continues to use the Nairobi and Naivasha Inland Container Depots. That the same was only a recommendation and under International Law, South Sudan had the freedom to choose its preferred cargo clearance point. That South Sudan could seek to enforce its internationally guaranteed rights if the Government of Kenya was to act in a manner suggested that it was not willing to abide by its international obligations.
21. That there was no such breach of international obligations that had been brought by South Sudan against Kenya nor had the petitioners demonstrated such breach. That the petitioners had also failed to demonstrate that the Government of Kenya had acted in a manner amounting or likely to amount to a breach of the petitioner's constitutional rights as alleged. That the petitioner's case was founded on rumours whose source had not been disclosed. That the application had not met the conditions for



granting of conservatory orders and ought to be dismissed having failed to disclose a cause of action against the Government of Kenya.

22. The 4th respondent did not file any response.
23. The parties canvassed the application by way of submissions which the Court has considered. The issue for determination is whether the application has met the conditions for granting conservatory orders.
24. In Civil Application No. 5 of 2014 *Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others* (2014) eKLR, the Supreme Court discussed the nature of conservatory orders as follows: -

“Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.”

25. In Nairobi Civil Appeal No. 151 of 2011 *Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR, the court observed that: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

26. In *Judicial Service Commission vs. Speaker of the National Assembly & Another* [2013] eKLR, the Court stated thus: -

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

27. Going by the nature of conservatory orders as outlined above, there is need for a court to exercise caution when dealing with any request for such prayers. It then follows that matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage. See *Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others* (2011) eKLR wherein the court observed that: -

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”



28. In *Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR the court set out three principles to be applied while considering whether or not to grant a conservatory order as follows: -
- “a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
 - b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c) The public interest must be considered before grant of a conservatory order.”
29. Have the petitioners established a prima facie case? Their case was that they were appointed in 2013 by the 1st and 4th respondent to handle, store and warehouse all the imported and containerized cargo destined for South Sudan. That this was further confirmed by a letter dated December 13, 2022 from the 1st respondent to the 4th respondent. That was pursuant to a letter dated 9/11/2022 from the Ministry of Transport of the Republic of South Sudan by which it indicated that the petitioners had been thoroughly vetted and found to be competent to discharge such mandate.
30. That after the appointment, the petitioners effected huge investments and entered into contracts with third parties as they had a reasonable and legitimate expectation that the appointment would last for a long time.
31. That however, the 2nd respondent had threatened to direct the 4th respondent not to honour the said arrangement thereby deny the petitioners the opportunity of carrying the aforesaid mandate. The basis of this was the 2nd respondent’s letter dated December 22, 2022 addressed to the 1st respondent which the petitioner’s alleged was intended to cancel their appointment.
32. The 1st, 2nd and 3rd respondents did not deny the petitioner’s appointment. They indeed confirmed that the Government of Kenya had no mandate to appoint any clearing and forwarding agents or CFS for an importer or exporter of transit goods. That South Sudan had designated the petitioners as its preferred CFS for its imports vide letter dated 9/11/2022 and the same was acceptable to the Government of Kenya and the same was communicated to South Sudan vide the 1st respondent’s letter dated December 13, 2022.
33. The respondents submitted that the Government of Kenya only recommended to the Government of South Sudan that it continues to use the Nairobi and Naivasha Inland Container Depots. That the same was only a recommendation and under International Law, South Sudan had the freedom to choose its preferred cargo clearance point.
34. That the recommendation was to support the Kenyan Government’s legitimate interest which was that land-locked states continue to use the inland container depots in Nairobi and Naivasha as has been the case over the last couple of years before the presidential directive of September 2022 that the same reverts to the Port of Mombasa.
35. That the 2nd respondent’s letter dated December 22, 2022 addressed to the 1st respondent could not be relied on to conclude that there was a threat to the petitioner’s appointment since by dint of section 11 of the Kenya Ports Authority Act, only the 1st respondent had the statutory mandate to give directions to the Kenya Ports Authority (4th respondent) concerning any matter involving the interests of any other country such as South Sudan.



36. It was also submitted that the letter dated December 13, 2022 was a letter of no objection to the appointment of the petitioners by South Sudan thus the appointment was agreed to by both the Government of Kenya and of South Sudan. It was therefore submitted that the alleged threats of termination were based on rumours whose source had not been disclosed.
37. This Court has seen the letter of December 22, 2022. From the foregoing, it is evident that this letter forms the basis of the dispute and petition. This is so because the petitioners alleged that the same constituted a threat to terminate their appointment whilst the respondents deny that fact.
38. Whether or not the contents of that letter constitutes a threat to terminate the petitioners' appointment is a matter that cannot be dealt with at this interim period. This will doubtless go against the nature of conservatory orders. It is at the hearing of the petition that the Court can determine, after hearing witnesses and taking evidence, whether there is a threat of termination and whether such threat is likely to infringe the petitioners' various constitutional rights as alleged.
39. The Court notes that, the petitioners were able to establish that they were indeed appointed by the Government of Sudan as its CFS vide letter dated 9/11/2022. That such appointment was agreed to by the Government of Kenya vide letter dated December 13, 2022. There was also evidence that the petitioners had been previously appointed by the Government of South Sudan as its CFS and the petitioners had run the operations without complaint for 8 years.
40. As it stands, the petitioners' appointment was regular and had been confirmed by the Government of Kenya through the 1st respondent. The 1st-3rd respondents also confirmed that position and also confirmed that the 2nd respondent had no legal mandate to instruct the 4th respondent not to honor such appointment.
41. In the circumstances, the petitioners were able to establish a prima facie case with a probability of success.
42. The second requirement for the granting of conservatory orders dictates that the petitioners must demonstrate that if the orders are not granted, the substratum of the petition will be lost and as such the main claim will be rendered nugatory. Put differently, the petitioners will suffer prejudice.
43. The petitioners must thus show that albeit on the face of it, that if conservatory orders are not granted, the objective of the petition to forestall the continued or threatened violation of the rights and fundamental freedoms or the Constitution will irredeemably be lost and there would be no need to further pursue to main petition.
44. The petitioners submitted that, acting on their appointment of 9/11/2022 and December 13, 2022, they had proceeded to make colossal investments to be able to efficiently undertake the said mandate. Documentary evidence was availed to support this contention.
45. It was further submitted that considering the colossal investment made after the appointment, the petitioners would require to execute the mandate over a long period of time to have a return on their investment. That cancellation of their appointment would lead to huge losses for the petitioners, their shareholders and employees.
46. This Court is inclined to accept the petitioners' submissions. Having established that the petitioners' appointment was regular and having considered the evidence tendered to support the various investments undertaken by the petitioners subsequent to their appointment, the petitioners would suffer prejudice should they be stopped from undertaking their mandate.



47. The petitioners have been handling, storing and warehousing South Sudan's cargo since the appointment and there is need to protect that status quo before the petition is heard on merit. It will be unfair to the petitioners, their shareholders and employees and in extension to the Government of South Sudan if the operations were interfered with without justification.
48. Turning to the public interest test, 'Public interest' is defined by the *Black's Law Dictionary* 10th Edition at page 1425 as: -
- “The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.”
49. In *Isaiab Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party)* [2022] eKLR, the court held: -
- “Generally speaking, Constitutions and laws are passed for the orderly governance of the people. As such, the laws are always presumed to be constitutional until the contrary is proved. In a matter, therefore, where the *Constitution* is alleged to be violated or is threatened with violation, the Court must tread carefully since the allegation is yet to be subjected to legal scrutiny.
- Further, where the constitutionality of a statute is impugned, Courts must weigh, with care, the alleged breaches against the doctrine of presumption of constitutionality of statutes. It is the case that unless proved otherwise, statutes are deemed constitutional and may only be suspended in the clearest of cases and where the statute is a threat to life and limb.”
50. It is in public interest that the *Constitution* and the law are respected and followed. It is trite that our Constitution recognizes international law as part of the Kenyan Legal System.
51. As submitted by the 1st - 3rd respondent, the Government of Kenya has ratified the *United Nations Convention on the Law of the Sea* (UNCLOS) under which locked states such as South Sudan have the right to access to and from the sea and enjoyed the freedom of transit through the transit states by all means of transport. That Kenya has given its neighboring land locked countries such as South Sudan the right to access the sea and freedom of transit.
52. It is not in dispute that under *UNCLOS*, the Government of South Sudan freely appointed the petitioners as it preferred CFS for its imports vide letter dated 9/11/2022 and the same was acceptable to the Government of Kenya and communicated to South Sudan vide the 1st respondent's letter dated December 13, 2022.
53. It would be against public interest to go against such an agreement between the two governments and interfere with the petitioners' appointment without justification. Though this Court cannot at this point determine whether or not the respondents have threatened such appointment and consequently threatened the petitioners' fundamental rights, it is foreseeable that unless conservatory orders are issued, there would be likely conflict between the two governments. That is prejudicial to the people of Kenya and goes against public interest.
54. From the foregoing, the conclusion arrived at by this Court is that the petitioners have laid a basis for the grant of the orders sought in the application.
55. Accordingly, the application is hereby allowed as prayed.



56. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

A. MABEYA, FCIArb

JUDGE

