



Taireni Association of Mijikenda v Cabinet Secretary Ministry of Finance & National Treasury & 3 others (Constitutional Petition 2 of 2023) [2023] KEHC 27039 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 2 OF 2023**

DKN MAGARE, J

DECEMBER 19, 2023

**IN THE MATTER OF: ARTICLES 1, 2, 3, 6, 10, 19, 20, 21, 22, 43,
73, 74, 94, 95,96, 109, 129, 130, 159, 152, 153, 201, 258 AND
259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: PUBLIC FINANCE ACT, LAWS OF KENYA,
IN THE MATTER OF: KENYA PORTS AUTHORITY ACT, CAP.**

391, LAWS OF KENYA

**IN THE MATTER OF: PUBLIC PRIVATE PARTNERSHIP ACT,
LAWS OF KENYA**

**IN THE MATTER OF: MERCHANT SHIPPING ACT, LAWS OF
KENYA**

**IN THE MATTER OF: PUBLIC PROCUREMENT AND ASSETS
DISPOSAL ACT**

BETWEEN

TAIRENI ASSOCIATION OF MIJIKENDA PETITIONER

AND

**HON CABINET SECRETARY MINISTRY OF FINANCE & NATIONAL
TREASURY 1ST RESPONDENT**

**HON CABINET SECRETARY, MINISTRY OF TRANSPORT,
INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT AND PUBLIC
WORKS 2ND RESPONDENT**

THE HON ATTORNEY GENERAL 3RD RESPONDENT



RULING

1. The petitioner filed an application dated 27/11/2023 craving for orders that:-
 - a. That, this Honourable Court be pleased to certify the instant application as urgent, service upon the respondents be dispensed with and the same be heard ex parte in the first instance; or
 - b. That in the alternative, this Honourable Court be pleased to certify the instant application as urgent and the same be heard on a priority basis;
 - c. That, pending the hearing and determination of the application and or the petition and or further Orders, this Honourable Court be pleased to issue conservatory orders to stop/stay and or suspend the implementation of the Tender Notice dated 17th October 2023 and or any other tender notice issued in the furtherance of either the concession and or leasing of the public assets held by the 4th Respondent of behalf of the citizens of the Republic of Kenya to the private investors;
 - d. That, the matter be certified as raising weighty legal issues and the same be remitted to the Chief Justice for empanelment of an uneven number of judges for hearing and determination of the petition;
 - e. That, costs of the application be provided for.
2. This was supported by the affidavit of Peter Ponda Kadzaha.
3. Upon the suit being filed, the matter was placed before Justice Mwita who gave interim orders and thereafter transferred this matter to Mombasa, given that the port is situate in Mombasa. I was on duty and the matter was placed before me. Being aware of limitations under the [public procurement and disposal Act](#), I gave a short period for ruling on whether the court has jurisdiction.
4. I have since noted that this matter is a dispute whether the public private partnership Act applies. Consequently, the [Public Procurement and Disposal Act](#) does not apply. I gave directions for the matter on the question of a preliminary objection raised. I have addressed the question of preliminary objections being raised in many cases.
5. The Application is grounded on the following grounds: -
 - a. Section 16 of the [Merchant Shipping Act](#), shipping lines are prohibited from offshore operations and without citizenry involvement, the adherence to the provisions cannot be guaranteed.
 - b. The whole process is tainted with substantive and constitutional impropriety and in furthering justice in the spirit of the Constitutionalism, meeting the objects and principles in the [Constitution](#) for the establishment of the offices of the Honourable judges as the guarantor of justice and as the protector of the rights of the people and their properties, we urge you to consider this application in the light of protecting public assets and the public capital investment from any plunder, whatsoever.



- c. The 4th Respondent is equally is a going concern with an annual net profit of between 20 and 30 billion Kenya Shillings.) By the 4th Respondent’s letters dated 6th September 2023 and 17th October, 2023.
- d. The Government of the Republic of Kenya through the Respondents herein have commenced the process of transferring/disposing the public assets held by the 4th Respondent to private investors purposely to operate the berths 1-3 at the Port of Lamu, berths 11-14 of container terminal 1 at Port of Mombasa and the whole of the container terminal 1 at port of Mombasa.
- e. The tender documents have equally roped in the Special Economic Zones which are public lands either compulsorily acquired by the Government and owners of those lands compensated from the consolidated funds and or lands which were already held by the 4th Respondent as public lands
- f. These transfers are being carried out in the disguise of either concession on one hand or Public Private Partnerships, on the other.
- g. It is estimated that the berths 16-18 at Container Terminal 2 of Mombasa port costed the public a whopping 30 billion Kenya Shillings to construct and it is estimated that the Lamu berths, which was constructed recently. By Section 4 of the [Public Private Partnership Act](#), it is so provided *inter Alia* that;
 - “(1) This Act shall apply to every project agreement for the financing, design, construction, rehabilitation, operation, equipping or maintenance of a project or provision of a public service undertaken as a public-private partnership.”
- h. The provisions of the [Public Procurement and Asset Disposal Act](#), 2015 (No. 33 of 2015), shall not apply to a public private partnership.
- i. (3) Without prejudice to the generality of subsection (2), the provisions of the [Public Procurement and Asset Disposal Act](#), 2015 (No. 33 of 2015) shall not apply to a public-private partnership project, if all the monies for the project are from the private party;
- j. Apply if there is counterpart funding that is, including public funds, for the public private partnership project”.
- k. By Section 3 of the [Public Private Partnership Act](#), the law contemplated that the Government would only undertake projects and basically this should have excluded operating public assets which are not ongoing projects.
- l. By extending the same to already existing assets, the same would be tantamount to leasing of public assets or contracting of public services to private entities contrary to the [Public Procurement and Asset Disposal Act](#), 2015.
- m. The berths which have been targeted for transfers/disposals are fully developed from the public funds and are fully operational.
- n. It is evidently clear that there are clear public contributions as the said investors are coming to takeover already developed/ constructed berths and because of these capital contributions, the [Public Procurement and Assets Disposal Act](#), 2015, was meant to apply and thus the provisions of Section 4(3)(b) the [Public Private Partnership Act](#), which the respondents have tactically failed consider



- o. It is equally the presumption of the law that when Parliament enacted the [Public Private Partnerships Act](#), 2022, it was well aware of the existence of the provisions of the [Public Procurement and Assets Disposal Act](#), 2015, which require that whenever a contract of service or goods are being is carried, the same must be subjected to the public participation.
- p. The [Public Private Partnerships Act](#), 2022 has not limited the application of values and principles of good governance as a general principle for conducting the business of Government. The fact that the tendering process is being carried against the principles outlined in Article 10 of the [Constitution](#), should indeed raise alarm and or suspicion.
- q. The 4th Respondent "The Kenya Ports Authority" is a public entity and established as such as a State Corporation pursuant to [Kenya Ports Authority Act](#), Cap.391, Laws of Kenya as provided under Section 2 of [Public Procurement and Asset Disposal Act](#), 2015 and the disposal of any of its assets must comply with Article 227 of the [Constitution of Kenya](#) 2010.
- r. Article 227(1) of the [Constitution](#), provides for the principles which define the procurement of public goods and services to include a system that is fair, equitable, transparent, competitive and cost-effective and Sub Article (2) decreed parliament to enact an Act of parliament, which prescribes policies relating to procurement and to asset disposal.
- s. By Article 227(2) of the [Constitution](#), the Parliament is/was decreed to enact an Act, meaning only one Act of Parliament and the [Public Procurement and Asset Disposal Act](#), No. 33 of 2015 was enacted pursuant to the dictates of the Constitution.
- t. By Section 3 of the [Public Procurement and Asset Disposal Act](#), 2015, it is so provided the values and principles to be considered by a public entity whenever it considers to dispose of any of its assets; and amongst them are the national values and principles provided for under Article 10, principles of integrity under the [Leadership and integrity Act](#) (Chapter 6 of the Constitution), values and principles under Article 232, principles under Article 201 and promotion of local industry, sustainable development and protection of environment; and promotion of citizen contractors.
- u. The Government of the Republic of Kenya through the respondent has commenced the disposal of the berths at both Ports of Mombasa and Lamu vides the tender offer dated 17th November, 2023 through the provisions of Section 4(3) (a) & (b) of the [Public Private Partnership Act](#), 2022. The 4th Respondent in offering tender for operations of the berths is purposely relying on the provisions of Section 12(k), (n) and (o) of the [Kenya Ports Authority Act](#). This Act was enacted by Parliament in 1978, long before the dictates of Article 227 of the Constitution, which only became effective after 27th August, 2010. By the dictates of Article 227 of the Constitution, the Parliament enacted the [Public Procurement and Asset Disposal Act](#), 2015, which is a constitutional appendage to operationalize Article 227 of the Constitution as provided in Article 227(2) of the [Constitution](#), outlining the procedures to be adopted in procuring services and goods and disposal of assets of a public entity.
- v. The 4th Respondent has no power under the law and constitution to dispose any of the public assets, except as provided in Article 227 of the Constitution and the law specifically enacted to operationalize Article 227.
- w. The 4th Respondent has purported to dispose of the public assets held by it under the provisions of Section 4 of the [Public Private Partnership Act](#), 2022, which Act, was not intended by the dictates of Article 227(2) of the [Constitution](#), to be applicable for the disposing



of public assets, rather to guide on the procedures of controlling and contracts between the Government on projects which are undertaken and financed exclusively by private investors.

- x. The 4th Respondent is purporting to elevate the said Act over and above the *Public Procurement and Asset Disposal Act*, 2015 and purports to exempt the operations of Section 3 of the *Public Procurement and Asset Disposal Act*, 2015 on the assets which it has embarked on disposing to the private investors pursuant to the Tender No. KPA/052/2023-2024/CPS, dated 17th October, 2023.
- y. By allowing the provisions of Section 4 of the *Public Private Partnership Act*, 2022 to apply to the public assets concurrently with the provisions of the *Public Procurement and Asset Disposal Act*, 2015, the mischief was intended to be addressed by the drafters of the Constitution under Article 227 of the *Constitution* will be lost and the previous status quo reinstated, where the public assets were disposed at will takes a center stage.
- z. The applications of the *Public Private Partnership Act*, 2022 and the *Public Procurement and Asset Disposal Act*, 2015, must clearly and distinctly set apart so that the Government does not apply them whimsically and to defeat the spirit and letter of the *Constitution*.
- aa. The earlier must remain applicable to projects undertaken by the private investors and the latter for disposal of public assets, but not the two Acts to be applied alternately.
- ab. By Article 227(2) of the *Constitution*, the Parliament was only decreed to enact one Act of Parliament to operationalize the procedures of procuring goods and services of public entities and therefore *Public Private Partnership Act*, 2022 is not an Act of parliament anchored on Article 227 of the *Constitution*. In the circumstances, Section 4 of the *Public Private Partnership Act*, 2022 is purporting to suspend the Act, which is specifically enacted pursuant to operationalize the disposal of public assets contrary to the Constitution. Therefore, the provisions of Section 4 of the *Public Private Partnership Act*, 2022, are contrary to Article 227 of the *Constitution* and therefore unconstitutional.
- ac. By Section 12 of the *Kenya Ports Authority Act*, Parliament enacted the functions of the 4th Respondent and the operations and development of berths are some of those statutory functions and unless, those contracts of services are carried out in terms of Article 227 of the *Constitution*, they still remain the functions of the 4th Respondent.
- ad. The concept of Public Private Partnership is not a new business philosophy in governments. They are what are referred to “B.O.T”, (build-operate-transfer). In this concept, the investor identifies a project, commissions feasibility study on the same to consider its viability and thereafter the Government offers approval thereby leases/grants land for the project, in which is generally referred to concession for agreed period. After the agreed period, the project is transferred and or reverts to the public. The Act, relates to projects and not operating the already developed public assets. The familiar ones are SGR and Express Way.
- ae. The 4th Respondent has to date developed 3 ports which are fully functional in Mombasa, Kisumu and Lamu with asset base running into hundreds of Billion Kenya Shillings. These include lands, machinery, equipment and infrastructural developments.
- af. The 4th respondent has also employed nearly ten thousand staff which enable it to meet its obligations to the public and other business enterprises across the Eastern parts of Africa, such as Uganda, Rwanda, Burundi, Congo DRC and South Sudan, amongst others.
- ag. The 4th Respondent is equally is a going concern.



6. The Petitioner stated that in the circumstances, the processes which have been adopted by the Respondents on behalf of the Government are both unlawful and unconstitutional and the following orders will a petition seeking the following orders.
- a. An order of declaration is hereby issued that it is only the *Public Procurement and Asset Disposal Act*, 2015, which provides for the procedures for procuring public services, goods and disposal of public assets pursuant to Article 227 of the *Constitution*;
 - b. An order of declaration is hereby issued that berths 1-3 at Port of Lamu, berths 11-14 at the Port of Mombasa and container terminal 1 at Port of Mombasa contained in the Tender No. KPA/052/2023-2024/CPS are public assets and not projects and hence cannot be disposed in accordance with the *Public Private Partnerships Act*, 2022;
 - c. An order of declaration is hereby issued that if the parliament intended to prohibit the application of values and principles of good governance as decreed by Article 10 of the *Constitution* in Section 4 of the *Public Private Partnerships Act*, 2022, the same is declared as unconstitutional;
 - d. An order of declaration is hereby issued that the processes leading to the issuance of the offer of Tender No. KPA/052/2023-2024/CPS were unconstitutional;
 - e. An order of declaration is hereby issued that, where an employer intends to sell part/proportion, whether substantial by way of mortgage, lease and or complete transfer, the employer shall notify its employees as a matter of rights;
 - f. An order of prohibition is hereby issued stopping and or suspending the tender processes for the disposal of berths and container terminal at the ports of Lamu and Mombasa or any other port operated by the 4th respondent to anybody/person and or entity through a Public Private Partnership arrangements;
 - g. An order of quashing is hereby issued to quash the Tender No. KPA/052/2023-2024/CPS or any other tender issued in respect of the facilities contained in the Tender No. KPA/052/2023-2024/CPS;
7. As usual in these kind of matters, the respondents raised a preliminary objection to the petition on the grounds set out in the grounds of opposition.
8. The 4th Respondent contends that matters in issue are not ripe for adjudication. They do not say when they will be ripe for adjudication.
9. Listening to the parties and seeing the documents on record it came out clear that some of the parties were puppets for forces far greater than themselves. The documents filed by one party were being amended by another party. This was evidenced by the nature of trailing I suffered from state operatives.
10. The case has a dark history. While I was penning this ruling, I took my time to go and vote in the president of KMJA, Justice Radido. There were uncomfortable moments that I had to document in this ruling. These forces however, have not dealt with the mettle that we are made of. I wish to recall that the 2017 presidential elections judgment. In *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions)



(20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ), the supreme court stated as doth: -

“It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution.

395. And as Soli J Sorabjee,¹ a former Attorney General of India once wrote, the rule of law

“is the heritage of all mankind “and” a salutary reminder that wherever law ends, tyranny begins.” Cast the rule of law to the dogs, Lutisone Salevao once observed and government becomes a euphemistic government of men... He adds:²

“History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.” The moment we ignore our Constitution the Kenyans fought for decades, we lose it.”

11. I must add that the best and well-documented atrocities are always hidden in the black letter of the law. From the apartheid regimes in the world, to the 4th Reich in Germany, all the actions were hidden in the black letter of the law. The questions raised in the petition are of great constitutional nature. The questions as I understand them is whether, Kenya Port Authority its leaders and including the Appointing Authority and highest offices in the executive offices of the Country have power to tender for disposal, not of projects but of Kenya Port Authority itself. The question goes to the very sovereignty of the country. Though the respondents are contending that they are not selling the port, the petitioners are alleging and with documents to back the story that the government of Kenya, is using Public-Private Partnership to loot and plunder a profit-making public organization which means surrender of sovereignty to foreigners or foreign puppets of the members of the government.

12. The respondents seek to differ. That may well be so. It may be that they are best-intentioned. However, this gives rise to two sets of disputed facts.

1. The petitioner submitted that the issues raised in the Grounds of opposition are akin to a preliminary objection. They state that there are two positions which have emerged as fronted by the Respondents: -

a. The first position is fronted by the Grounds of opposition taken by the 3rd Respondent that the petitioner failed to comply with the doctrines of exhaustion as provided under Section 75 of the [PPPA](#). Further, the petitioner has misconstrued the provisions of Section 4 of the [PPPA](#).

b. The second position is fronted by the affidavit of the 4th Respondent, the doctrine of ripeness and misconception of the [PPPA](#).

¹ Soli J Sorabjee, 'Rule of Law; A Moral Imperative For South Asia and the World,' Soli Sorabjee Lecture, Brandeis University Massachusetts, April 14, 2010 at page 2. Available at www.brandeis.edu/programs/southasianstudies/pdfs/rule_of_law_full_text.pdf.

² Lutisone Salevao, '*Rule of Law, Legitimate Givernance and Development in the Pacific*' (ANU Press, 2005) page 2.



2. They state that the petitioner is neither a tenderer/tenderer nor did it question the tendering process/procedure as is provided under the PPPA, which was undertaken by the institutions established either under Sections 6 or 15 of the PPPA. It is a general rule that internal mechanisms apply to a party who has invoked the procedures in that institution in furtherance of his/her specific interest. Which is not the case with the petitioner, herein?
3. In the Grounds of opposition by the 3rd Respondent and replying affidavit by the 4th Respondent, they both admit that the Petitioner is questioning applicable law for disposing of the public assets, whether it is supposed to be through PPDA or PPPA and whether PPPA was the statute contemplated under Article 227(2) of the Constitution. These questions go into the roots of the interpretation of the Constitution and PPDA and PPPA as provided under Article 165(3) (d) of the Constitution. See the petitioner's grounds as on the face of the Notice of Motion Application and Petition.
4. They state that the Ground of opposition majorly is anchored in Section 75 of the PPPA. The 1st, 2nd, and 3rd Respondents allege that the petitioner ought to have submitted to the tribunal as established in the PPPA. The petitioner submits that Part VII (Project Companies, Disclosures, and Project Agreements) of the Act establishes a project company with the successful bidder and the contracting authority. This is after registering agreements on various parts of the project. It is therefore these parties to the project company who are required to submit to the Petition Committee in case of any disagreement. The issues as pleaded in the Constitution do not relate to the Project Company established under Part VII of the Act and thus were not within the powers of the Petition Committee as established under Section 75 of the Act.
5. They placed reliance on the case of the case of Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR, from paragraphs 27-37 of the said Judgment. The petition also seeks the interpretation of the Constitution and the law. We rely in the case of Kamau v Kenya Accreditation Services (Petition No. E053 of 2021) [2021] KEELRC 8 9KLR) (30 July 2021) (Judgment). In this case, it was further held that the separatist approach of initiating a suit is inappropriate as the 3rd Respondent has urged in its grounds of opposition that the matters relating to employment ought to have been filed in the ELRC Court.
6. They further argued that the respondents raised the doctrine of ripeness in commencing this petition. There are specific Project Management tools, such as Gantt Charts and or Business Model Canvas (BMC), which could better explain the activities, their durations, and when they fall due. Pleadings are not evidence and the respondents can only succeed if they comply with Section 107 of the Evidence Act. By Section 61 of the Act, if the bid succeeds, the assets should be passed over to the bidder and the tender notice dated 17th October 2023, had invited the bidders. I was invited to see the pre-tender bids conference held on 21st November 2023, from page 120 of the petitioner's bundle.
7. The petitioner submitted that by Article 258(1) of the Constitution, the petition needs not to succeed because of the doctrine of ripeness, but even a threat of the contravention of any provisions of the Constitution will fall within the purview of this court.
8. They relied on the case of Isaiah Luyara Odando & another versus Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party) [2022] eKLR, on the aspect of what the court considers before granting or refusing conservatory orders. This was said also to have been settled in the case of Florian Emmeric v Director of Immigration Services [2022]



eKLR and [Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others \(Interested Parties\)](#) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling).

9. In the same case of [Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others \(Interested Parties\)](#) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling) where from paragraphs 80-91 the court laid down principles for consideration.
10. It is their submission that the case is made in public interest. The 4th Respondent is at the tail end of its procedure to transfer the public assets to private persons. The petition questions whether Section 4 of the [PPPA](#) is not in contravention of Article 227 of the [Constitution](#) and whether the values and principles as outlined in Articles 10, 73, 74, 201, and 232 should be inapplicable under the [PPPA](#). The court should therefore as a matter of public interest preserve the substratum of this suit, by confirming the conservatory order issued on 27th November, 2023.
11. Had the respondents conceded that they intend to loot KPA by disposing of the same to themselves, then and only then would the preliminary objection have been. A preliminary objection is applicable when the facts in the plaint or petition are not contested. For example, a preliminary objection on limitation can only succeed when the date the cause of action is admitted.
12. It will have also been different if for example a port was being opened in Malindi and a Public Private Partnership is entitled to build operate and transfer.
13. The second question raised is whether Kenya Port Authority can surrender its core mandate to a private entity, it does not matter that the private entity is owned by members of government. It remains private entity which governs disposal of already existing Public Assets.
14. The next question is the nature of the port. Operation of ports, roads, airways, and pipelines are evidence of existence of a state. A state that cannot run the four strategic component misses the elements of statehood and has no right to operate. Even banana republics remain states because they can control these components. If these are surrendered, a country becomes a colony. The Montevideo convention on Rights, Responsibilities and Duties of state, article 1 thereof, provide for what constitutes a state. These include a defined territory, population, government and capacity to enter into relations with other states.
15. The Court addressing the issue of surrender sale/lease concession, of ports to foreign/local political interests affects the sovereignty of Kenya to act as one state with territorial integrity. This has a more profound effect, when the court notes that in the last 4 weeks, the disputes in the Commercial division, in Mombasa have been handling cargo related to military equipment transport to neighbouring countries. I am not wrong to note that the issues raised are not idle.
16. The Respondents decided to imagine what the case before the court was, and in the process raised a preliminary objection based on their perception of the case before the court. The issues raised are pure constitutional issues. One of them is applicability of the [public Private Partnership Act](#) to disposal of existing assets of the port. The next is the surrender of a custom zone or tax collection for excise duty to a person other than the commissioner of customs.
17. We have to proceed on an understanding that what is pleaded in the petition is true. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit*



Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

18. In a Tanzanian case of hammers incorporation co. ltd versus the board of trustees of the cashewnut industry development trust fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the *Mukisa biscuit case*(Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the “improper practice” never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & Others V The Attorney General*, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the *Mukisa Biscuit case* (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

19. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd*(supra): -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

20. A Tanzania Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & Others vs Attorney General* (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda,



J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“ At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

21. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

22. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution and no contestation of fact. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to the Constitution. The impugned law, the petition and the preliminary objection. If you have to refer to the Defence or responses, then the preliminary objection is untenable.

23. The issue is whether this court has jurisdiction to hear this petition. The issue of jurisdiction, Justice Nyarangi stated in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth: -

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part



with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order.”

24. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, THE supreme court stated as doth:-

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

25. The Court is clothed in jurisdiction in two articles in regard to hearing this matter. Article 22 of the [Constitution](#) provides as doth: -

“ 22. Enforcement of Bill of Rights

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.



26. Article 23 of the Constitution, provides as doth: -

“23. Authority of courts to uphold and enforce the Bill of Rights

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.

29. The power of the court is provided for under Article 165 of the Constitution.

“Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;



- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.

27. Article 165(4) of the Constitution provides as follows: -

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

28. I find and hold that the preliminary objection is based on disputed facts. The questions dealt with are not only constitutional but substantive constitutional issues under Article 165(3) d.

29. To be able to proceed from where the matter reached, it is important that I also deal with certification to be able to deal with the substantive question of conservatory orders.



30. Having found that there is a substantive question of law under article 165(b and (d), I direct that this matter be placed before the Chief Justice to impanel and assign such number of judges of the high court not less than three to hear this matter.
31. In the meantime, I agree that there is a real danger that the subject matter may disappear people the matter is heard and directions on the notice of motion is heard.
32. I therefore direct that conservatory orders issued by Justice Mwita and extended by myself last week be extended pending determination of the Application dated 27/11/2023 the parties shall take the matter for hearing of the said in the new term. The matter shall be mentioned before the presiding judge on 5/2/2024 to confirm whether a three-judge bench will have been assigned by the Chief Justice.

Determination

33. I make the following determination.
 - a. The preliminary objection raised on the competence of the Court to hear this matter in favour of the procedure under the Public-Private Partnership Act is untenable and dismissed for lack of merit
 - b. The matter is certified as raising a substantial question of Law under Article 163(3)(b) and (d) of the Constitution.
 - c. I, therefore, direct that this matter be placed before the Chief Justice to assign such uneven number of judges, being not less than three, to hear and determine this case.
 - d. Conservatory orders issued in terms of prayer 3 are extended pending hearing and determination of the application dated 27/11/2023.
 - e. The matter shall be placed before the Presiding Judge, Mombasa High Court on 5/2/2024 for directions and confirming whether the Chief Justice will have issued assignment of the bench to hear this matter.
 - f. Costs be in the petition.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 19TH DAY OF DECEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Nura and Issah Mansur and Michael Chege for the 4th Respondent

Mr. Nura for Mrs Janet Langat for the 1st, 2nd and 3rd Respondents

Miss Njenga for the Petitioner

Court Assistant- Brian

