



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 125 OF 2019

IN THE MATTER OF: THE DIRECTIVE ISSUED BY THE HEAD OF THE PUBLIC SERVICE

ON THE 4TH JUNE ,2019 REGARDING OPERATION AND IMPROVEMENT OF CARGO

LOGISTICS AT THE PORTS OF ENTRY AND INLAND CONTAINER DEPOTS.

AND

CHARLES OWINO OGALLO..... PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE HEAD OF PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE KENYA PORTS AUTHORITY.....3RD RESPONDENT

KENYA RADIATION PROTECTION BOARD.....4TH RESPONDENT

KENYA BUREAU OF STANDARDS.....5TH RESPONDENT

AND

KENYA NATIONAL HUMAN RIGHTS & EQUALITY COMMISSION.....1ST INTERESTED PARTY

NATIONAL CANCER INSTITUTE OF KENYA.....2ND INTERESTED PARTY

MUSLIMS FOR HUMAN RIGHTS (MUHURI).....3RD INTERESTED PARTY

PORT HEALTH.....4TH INTERESTED PARTY

JUDGMENT

1. The Petition before the Court is dated 31/7/2019. The Petitioner is a freelance journalist and the Secretary General of Clean Mombasa, which is an environmental lobby group advocating for a clean and healthy environment in Mombasa. The Petitioner is also a Board Member Kenya Environment and Science Journalism Association whose objective is investigation of matters concerning environmental health.

2. The Petitioner asserts that as per the World Health Organization (WHO) the major cause of cancer in Kenya is radioactive materials, and that currently many Kenyans are losing their lives because of cancer. In order to protect the Kenyan public from radioation, the National Assembly passed the Radio Protection Act Cap 243 and pursuant to Section 14 of the said Act, the 4th and 5th Respondents have been granted power to among other things enter, inspect and examine any premises or any vehicle, vessel or aircraft or any other vehicle in or

upon which there is reasonable belief that an irradiating device, radioactive materials or any other source of ionizing radiation is stored, used, transported or disposed of.

3. The Petitioner avers that the 2nd Respondent through circular referenced OP/CAB 9/83A headed “Operationalization and improvement of cargo logistics at the port of entry and inland container depot,” directed the 4th Respondent among other state agencies, to operate outside the Port of Mombasa and that all the other state agencies will be sanctioned by the 3rd Respondent and Kenya Revenue Authority before they are allowed to undertake their mandate inside the port, and vide the guideline issued by the 2nd Respondent on the 1/7/2019, any intervention at the port of Mombasa should be formally made to the Head of the Lead Agency (the 3rd Respondent) through the 5th Respondent or Kenya Bureau of Standards (KEBS).

4. The Petitioner alleges that pursuant to the aforementioned directive, the Kenyan public is at risk since the mandate of the 4th and 5th Respondents has been compromised. Further, the said directive is contrary to Section 14 of the Radiation Protection Act, which provides the 4th and 5th Respondents with the requisite mandate in radioactive issues.

5. The Petitioner avers there have been calls to the National government to strengthen the 4th and 5th Respondents to fight cancer. Such calls included that of **Hon. Elisha Odhiambo** on 28/7/2019. Further, on 17/12/2017 the Daily Nation reported that milk which was contaminated with radioactive materials, was returned to London, and following that report KRA seized ethanol in spaghetti boxes in a vehicle which was being imported via the port of Mombasa. The Petitioner avers that the port of Mombasa is riddled with radioactive materials, and the 4th Respondent mandate in relation thereto cannot be wished away.

6. The Petitioner avers that immediately goods infected with radioactive are offloaded, the environment is affected by the same, which in turn affects the health of the residents of Mombasa and the Kenyan Public at large. Therefore, the directive issued by the 2nd Respondent has the effect of allowing imported cargo to mix with all other materials at a warehouse without screening beforehand whether the same is infected with radioactive materials and as a result the damage is already done.

7. The Petitioner also referred to undated alleged report released by former Emuhaya **MP. Wilbur Otchilo**, a scientist, who attributed the major cause of cancer in Kenya to radioactive materials, which goes undetected from imported used motor vehicles.

Violation or Threatened Violation of Petitioners Rights under the

Constitution

8. Consequent to the above, the Petitioner avers that the 2nd Respondent violated Article 10 and 259 of the constitution by passing a directive which is contra Section 14 of the Radiation Act, Cap 243 Laws of Kenya.

9. The Petitioner further alleges that the Respondents have violated Article 43 (1) (a) of the Constitution by failing to uphold the petitioner’s right to the highest attainable standard health and that of the Kenyan public at large. The Petitioner states that he is entitled to protection and to the exercise of fundamental constitutional rights and freedoms enshrined in the constitution and particularly: Article 10; 20 (1) (2) & (3) (b); 23(1) & (3); 25;47 and 48 of the constitution.

10. The Petitioner prays for the following orders:

a. A declaration that the directive issued by the 2nd Respondent on the 4th June, 2019 is contra Section 14 of the Radiation Protection Act, Cap 243 Laws of Kenya and in violation of Article 10,43,259 of the Constitution of Kenya, 2010.

b. An order of certiorari be issued to quash the directive issued by the 2nd Respondent on 4th June 2019 together with the circular dated 1st July, 2019.

c. A Conservatory order stopping the Respondent from further implementing the directive issued by the 2nd Respondent on the 4th June 2019.

d. An order directing the 4th and 5th Respondent to scan and/or examine the goods being imported in Kenya as per the Kenya Radiation Protection Act, Cap 243 Law of Kenya, before they are off loaded at the port of Mombasa.

e. The costs of the Petition.

f. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of Justice.

11. The petition is supported by the affidavit of the Petitioner sworn on the 31/7/2019.

The Response

12. The 1st 2nd and 4th Respondents opposed the Petition via Grounds of Opposition dated 31/10/2019. The grounds are summarized as follows:

a. That the Petition is misconceived, frivolous, and vexatious and an abuse of the Court process as the petitioner has failed to state with clarity how the circular dated 4/6/2019 by the Head of Public Service violates and/or threatens to violate any right and which part of the circular contravenes the Constitution and/or threatens the right of Kenyans.

b. That the circular dated 4/6/2019 was issued by the Head of Public Service pursuant to Article 129 of the Constitution. Therefore, the said circular does not contravene any statutory provision and/or impede functioning of the 2nd 3rd and 4th Respondents in any way.

c. That the directive and/or the circular does not deny the 4th and 5th Respondent access to any port of entry and therefore does not contravene Section 14 of the Radiation Protection Act.

d. That granting of the orders sought will lead to congestion at the port of entry and at the Inland Container Depots, hence the balance of convenience tilts against grant of the orders sought.

13. The 3rd Respondent opposed the Petition through Replying Affidavit sworn on the 13/9/2019 by **Francisca Simiyu** who is an Assistant Port Security Officer (Radiation), and a Response to Petition filed on the 10/12/2019. The 3rd Respondent's case is that the circular issued by the Government of Kenya through the head of Public Service on the 4/6/2019 does not in any way hamper the 4th and 5th Respondent's from undertaking their mandate since they are part of the Multi-Agency team that monitors the cargo on a 24 hours basis to detect if there is nuclear and radioactive materials. The 3rd Respondent denies that there was any violation of the Petitioner's constitutional rights as alleged under paragraphs 36, 37, 38, 39 and 40 of the Petition and stated that even though the Court by dint of Article 159 of the Constitution is endowed with the jurisdiction to advance fundamental rights and freedoms enshrined in the Constitution, the Petition herein does not raise any ground that warrant the interference by the Court as requested by the Petitioner.

14. The 3rd Respondent states that Government only seeks to enhance port operations and improve efficiency in cargo logistics which entail the entry, handling and evacuation of cargo from the port, whereby the mandate of various Agencies are sought to be streamlined and well-coordinated. The 3rd Respondent states that it has the mandate to manage and operate the port of Mombasa and all scheduled sea ports along Kenya's Coastline that include **Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimanzi and Vanga** and that under Section 12 of the Kenya Ports Authority Act, it has the mandate to maintain, operate, improve and regulate the scheduled sea ports, and to carry on the business of stevedore, wharfinger, lighterman, and acts of a warehouseman.

15. The 3rd Respondent's case is that in a bid to strengthen port security, international maritime trading system, and provide long term security benefits, the Government and the United States Department of Energy signed a Memorandum of understanding to construct Radiation Portal Monitors (RPMs) at the Port of Mombasa under the Mega Ports Initiative Programme. The main goal and purpose of the Mega Ports Initiative Programme is to detect, deter, and interdict illicit trafficking of special nuclear materials and other radiological materials using the Radiation Portal Monitors used to screen cargo. So far, eleven (11) Radiation Portal Monitors have been strategically installed and located along the berths and export entry gates for screening vehicles and cargo since the port is a border point facility. Further, there is a Central Alarm Station (CAS) located within the operations block at the headquarters, which is manned 24 hours by a Multi-agency team comprising Kenya Radiation Board, Kenya Ports Authority, KRA and Kenya Maritime Authority, and once import cargo is discharged from the vessel and export cargo arrives at the port of Mombasa, they are subjected to scanning using the Radiation Portal Monitors to detect if they have an abnormal level of nuclear and radiological materials. In the event that the cargo has high level of neutron, neutron gamma and gamma, then an alarm is triggered and sent to the Central Alarm Station where its profile is interpreted and analyzed by the operators consisting of the Multi-Agency. Containers generating high gamma sigma, neutron and neutron gamma are handled with a quick response. They are isolated and taken to a secondary inspection area where they are cordoned off and further inspection is done using special equipment comprising of the **survey meter identifier, ortec and a rad seeker**. The equipment is used to identify the type of isotope that generated the alarm as well as determine how harmful it might be to people. Upon identification of the level of danger, further safety measures are taken which may include interdicting and re-shipping the cargo that has illicit nuclear or radiological materials. In addition to RPMs, the 3rd Respondent states that all security staff at the gates and terminal area are provided with Personal Radiation Detectors and they report to the CAS for further investigations in case an alarm is generated.

16. The 3rd Respondent further avers that in respect to Motor vehicles, the 4th Respondent discharges its mandate by subcontracting private service providers who inspect the vehicles when they are still in the ship using a Radiation Detector and in the event that it has a nuclear contamination and/or radioactive materials, then the vehicle is not discharged from the ship but is instead reshipped back. Therefore, the 3rd and 4th Respondents have taken very substantial precautionary measures to ensure that no import cargo discharged at the port of Mombasa is released from the Port and exposed to the public in the event that it is infected with nuclear and radioactive materials.

17. It is the 3rd Respondent's case that the Petition does not meet the threshold for the principle set out for granting a conservatory order as well as an order of *certiorari* for reason that the Petitioner has failed to demonstrate how his rights have been infringed on or violated under Articles 10,43(1) (a) and 259 of the Constitution.

18. The 3rd Respondent also adopted the Replying Affidavit of **Captain William Ruto** deponed on the 9/12/2019 in respect to Petition 147 of 2019, which sought similar orders as the Petition herein.

19. The 4th Respondent never filed a response to the Petition. The Attorney General filed a Chamber Summons Application dated 13/9/2019 seeking to have the name of the 4th Respondent struck out this suit. Since the said Application was not opposed, the same is herewith granted with no orders as to costs.

5th Respondent's Case

20. The 5th Respondent opposed the petition through its Replying Affidavits sworn on 16/9/19 and 4/11/2019 by **Augustine Wachira** and **Bernard M. Nguyo** respectively. The 5th Respondent states that it's a statutory body established under the Standards Act Cap 496 and it is mandated to offer among other services, quality inspection of import based on Kenyan Standards or approved specifications, and that the directive issued by the circular dated 4/6/2019 was aimed at decongesting the Port, and improving efficiency, and has not compromised the 5th Respondent's role of inspection and standardization of goods.

21. The 5th Respondent avers that it has held stakeholder meetings with a view to developing procedures for implementation of the said directive, and it has in place contracts with international partners on pre verification of conformity (PVoC). Accordingly, all goods are inspected and verified for conformity at their point of origin before arrival at the Port of Mombasa. Upon verification and inspection by it and/or its partners, a certificate of conformity, and in the case of Motor vehicle, a roadworthiness certificate is issued. In the event there is any intelligence on goods not being fit for consumption, the 5th Respondent carries out a second verification at the point of destination as it has operational offices within the port and at every CFS and that all port agencies have access to it and its partners and therefore, any information of goods not inspected or harmful to human health will be known.

22. The 5th Respondent states that the Petition is speculative and presumptive, making unfounded allegations which are not factual, and an abuse of the court process as it has been brought to further private interests and an abuse of public interest litigation avenue.

Submissions

23. **Mr. Gikandi** Learned Counsel for the Petitioner narrowed down on three issues, which in his view would have determined the Petition. On whether the circular by the 2nd Respondent on the 4/6/2019 is contrary to Section 14 of the Radiation Protection Act, **Mr. Gikandi** submitted that the directive dated 4/6/2019 directed the 4th Respondent, among other State agencies, to operate outside the port of Mombasa and that all the Government agencies will be sanctioned by the 3rd Respondent and KRA, before they are allowed to undertake their mandate inside the port. Counsel submitted this contradicts Section 14 of the Radiation Protection Act, as the powers under Section 14 of the Radiation Protection Act can only be limited by an Act of parliament.

24. On whether the circular/directive issued on the 4/6/2019 violates the right to health of the residents of Mombasa as safeguarded under Articles 10, 43 and 259 of the Constitution, Counsel submitted that moving the 4th Respondent out of the port means that imported cargo will be offloaded before they undergo a radioactive scan. Therefore, this Court ought to take judicial notice of the increased cases of cancer, which is because of radioactive materials, and when making its decision, it ought to be guided by the prevention principle. For authority reliance was placed in the decision in **County Government of Kitui vs. Sonata Kenya Limited & other [2018] eKLR**.

25. **Mr. Makuto** Learned Counsel for the 1st, 2nd, 3rd 4th Respondents and the 2nd Interested Party submitted that the 4th Respondent is a semi-autonomous Government agency /department in the Ministry of Health, and under Section 4 of the Radiation Protection Act, it lacks the capacity to sue or be sued as it is not a body corporate or a State corporation.

26. On the issue of whether the directive issued on the 4/6/2019 by the 2nd Respondent has curtailed the mandate of the 4th and 5th Respondents, Counsel submitted that it is on record that the principal secretary has stated that the agents and/or employees of the 4th Respondent are part of a Multi-Agency team tasked to screen imported cargo to ensure compliance with the set standards which position was confirmed by **Francisca Simiyu** in her Replying Affidavit sworn on the 13/9/2019.

27. **Mr. Makuto** submitted that the Petitioner merely states without proof, that the 4th and 5th Respondents' power under Section 14 of the Radiation Protection Act has been curtailed and that the 2nd Respondent has breached Articles 10, 43, and 258 of the Constitution. This is not enough. There is no proof to the allegations contained in the Petition. The Petition deserves to be dismissed.

28. **Ms. Ikegu** Learned Counsel for the 3rd Respondent submitted that the 2nd Respondent's directive has not in any way hampered the 4th and 5th Respondents' mandate as they still have direct access to the port of Mombasa.

29. In respect to the order of *Certiorari* being sought by the Petitioner, Counsel submitted that there was indeed stakeholder consultative meetings held to gather the views of the relevant Government agencies that were affected by the circular. However, the Petitioner has failed to demonstrate that the directive offended the Wednesbury principles of irrationality, illegality and impropriety or that it went against the rules of natural Justice.

30. **Ms. Nyambura** Learned Counsel for the 5th Respondent on the issue of the 5th Respondent mandate being compromised by the 2nd Respondent's directive, submitted that the said directive/circular captures the importance of the 5th respondents mandate at the point of entry, by having the 5th Respondent as the lead agency for the purposes of coordinating inspection of goods at the country of origin and the issuance of enriched Certificates of Conformity and the 5th Respondent has access to all goods at the port of entry on a 24 hours basis. Counsel further submitted that in a bid to ensure sustainable development as provided under Article 10 of the Constitution, the directive sought to have the operation at the Port of entry run smoothly, efficiently and without delay.

Determination

31. A careful reading of all the issues raised in this Petition reveals that a preliminary issue needs to be addressed as to whether this Petition satisfies the prerequisite for a constitutional petition. The issue for consideration is whether the Petitioner has proved his case to the required standard. The starting point is **John Kimanu vs. Town Clerk, Kangema NBI Pet. No. 1030 OF 2007**, where the Court stated thus:

“Our Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must state the provisions of the Constitution allegedly infringed in relation to them, the manner of infringement and the nature and extent of that infringement. The reason for this requirement is twofold. First the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by Section 84 of the Constitution is a special jurisdiction to enforce specific rights, which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to men but specific rights defined and protected by the constitution. It is not sufficient to rely on a broad notion of unconstitutionality but, rather point to a specific provision of the Constitution that has been abridged”

33. The Petitioner’s case is that the 2nd Respondent’s circular/directive requiring the 4th Respondent to operate from outside the Port of Mombasa puts the public at risk of being infected with radioactive materials and is contra-Statute as Section 14 of the Radiation Protection Act gives the 4th and the 5th Respondent the mandate to enter, inspect and examine any premises upon which there is reasonable belief that an irradiating device, radioactive materials are stored, used or transported or disposed of. The Petitioner has made many allegations. Unfortunately, he brought little evidence to substantiate the allegations. First, the Petitioner claims that the 2nd Respondent vide guideline issued on the 1st July 2019 directed that any intervention at the port of Mombasa by the 4th Respondent should be formally made to the head of the lead agency (KPA) through the 5th Respondent or through KRA. However, the aforementioned Guidelines issued on the 1/7/2019 was never produced by the Petitioner in evidence or made available to the Court. Secondly in respect to the allegations that the 4th Respondent’s powers under Section 14 of the Radiation Protection Act have been limited by the circular/directive issued by the 2nd Respondent, **Ms. Francisca Simiyu** who is an assistant Port Security Officer in response averred that there is a Central Alarm Station (CAS) located within the operations block at the headquarters, and it is manned 24 hours by a Multi-agency team comprising Kenya Radiation Board, Kenya Ports Authority, KRA and Kenya Maritime Authority. Once import cargo is discharged from the vessel and export cargo arrives at the port of Mombasa, they are subjected to scanning using the Radiation Portal Monitors to detect if they have an abnormal level of nuclear and radiological materials. In the event that the cargo has high level of neutron, neutron gamma and gamma, then an alarm is triggered and sent to the Central Alarm Station where its profile is interpreted and analyzed by the operators consisting of the Multi-Agency. In my view, the issues raised by **Ms. Francisca Simiyu** in the Replying Affidavit sworn on the 13/9/2019, were so pertinent that the failure by the Petitioner to address the said issues and table evidence against the same rendered the Petition without factual proof. In **Christian Juma Wabwire vs. Attorney General [2019] eKLR**, the Judge relied on the decision in **Lt. Col Peter Ngari Kagume and 7 others vs. AG, Constitutional Application No. 128 of 2006** where it was held that: -

“23.[I]t is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is dead to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation...”

34. Further, there was reference to a report by **Hon. Elisha Odhiambo** and **Hon. Wilbur Otichilo**. These reports were cited as if they were verses in the Bible or Quran to be taken without question. There was no attempt either to urge the content of those reports in submissions, or to call their authors to affirm them. These reports proved valueless to the Petitioner.

35. With regard to the alleged violation of Articles 10 and 43(1) of the Constitution, save for merely mentioning the said Articles of the Constitution, the Petitioner did not demonstrate any nexus between the 2nd Respondent’s circular and the alleged violations of the Constitution. Further, other than the attached 2nd Respondent’s circular, The Radiation Protection Act, the Pvoc Program Operation Manual that were attached as evidence, the Petitioner’s evidence that sought to prove the violation of Article 10 and 43(1) of the Constitution was heavily gleaned from Newspaper cuttings, news websites and blogs. In the case of **Andrew Omtata Okoiti & 5 Others vs. Attorney General & 2 others [2010] eKLR** the Court held as follows: -

“This case however, can hardly go far because the petitioners have solely relied on newspaper cuttings in discharging their evidentiary burden which approach is rather flawed. The probative value of such cuttings is not in line with the requirements of the Evidence Act and most importantly, their probative value points to the direction of hearsay, which then impugns their admissibility. Without diluting the existing principles on the discharge of evidentiary burden, an allegation of such weight cannot be founded on opinion pieces written by authors who most likely sourced their information from 3rd parties.”

36. It is the finding hereof that the Petitioner has failed to discharge the burden of proof to the required standard. I find the Petition before me to be speculative and devoid of merits and is dismissed with no orders as to costs.

Orders accordingly

Dated, Signed & Delivered at Mombasa this 11th day of June, 2020.

E.K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Gikandi for Petitioner

Mr. Makuto for Attorney General

Mr. Makuto holding brief Ms. Nyambura for 5th Respondent

Mr.

Kaunda

Court

Assistant