



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 159 OF 2018

WILLIAM ODHIAMBO RAMOGI.....1ST PETITIONER
ASHA MASHAKA OMAR.....2ND PETITIONER
GERALD LEWA KITL.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
THE CABINET SECRETARY,
MINISTRY OF TRANSPORT AND INFRASTRUCTURE.....2ND RESPONDENT
KENYA PORTS AUTHORITY.....3RD RESPONDENT
KENYA RAILWAYS CORPORATION.....4TH RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS.....1ST INTERESTED PARTY
MAINA KIAL.....2ND INTERESTED PARTY
COUNTY GOVERNMENT OF MOMBASA.....3RD INTERESTED PARTY

CONSOLIDATED WITH PETITION NO. 201 OF 2019

KENYA TRANSPORTERS ASSOCIATION LIMITED.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....1ST RESPONDENT
KENYA REVENUE AUTHORITY.....2ND RESPONDENT
KENYA RAILWAYS CORPORATION.....3RD RESPONDENT
JAMES MACHARIA, CABINET SECRETARY,
MINISTRY OF TRNSPORT, INFRASTRUCTURE,

RULING

1. On the second day of the hearing of the Consolidated Petitions herein, Mr. Nguyo, Counsel for the Honourable Attorney General made an application for the admission of a document which he described as a Statement by Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works. The Statement is dated 2nd December, 2019.

2. Mr. Nguyo explained that he had emailed the document to the Court earlier in the morning. Mr. Nguyo did not explain why he had not filed the document in advance given that it is dated 2nd December, 2019.

3. Ms. Nyambura Kihoro, Counsel for the 1st to 3rd Petitioners; Mr. Willis Otieno, Counsel for the 1st and 2nd Interested Parties; Mr. Arnold Oginga, Counsel for the 3rd Interested Party and Mr. Nani Mungai, Counsel for the 3rd and 4th Respondents and Mr. Wafula, Counsel for the 5th Respondent opposed the Application. While Mr. Oginga, Mr. Nani Mungai and Mr. Wafula were categorical in their objection, Ms. Kihoro and Mr. Otieno were somewhat modulated in their objection – indicating that if the document was admitted, the Court would be obliged to give the other parties an opportunity to submit orally on the document.

4. Mr. Gikandi, Counsel for the 4th Respondent did not oppose the application by Mr. Nguyo but indicated that he would be satisfied if he were given an opportunity to comment on the document. Ms. Kagure, Counsel for the 4th Respondent, took no position on the application.

5. We listened to the oral representations by the parties and have considered them. We will not rehash the arguments here.

6. The application to admit the document is declined for the following reasons.

a. First, the mode of introduction of the document is problematic in a substantive sense. The Honourable Attorney General merely emailed the document to the Court and the parties without annexing it to an affidavit. This is substantively un-procedural. Rule 11(2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* is quite clear in its prescription on how documents in Constitutional Petitions should be filed. Such documents can only be filed as annexures to filed affidavits or to the Petition where there is no Supporting or Replying Affidavit. As explained below, this is not merely a formal objection; it impacts on the fair trial rights of the other parties to the case.

b. Second, the Honourable Attorney General seeks to introduce the document after the close of the Petitioners' and Interested Parties' cases. Admission of this document would be a drastic breach of the right to fair trial for the Petitioners and Interested Parties. To truly balance the equities in the case if the application is granted, the Court would be required to re-open the case and allow the Petitioners and Interested Parties to respond to the new evidence being introduced. This would not only undermine efforts to complete this five-judge bench expeditiously but also introduce a dangerous precedent for parties in future suits.

c. Third, the Honourable Attorney General offered no reason whatsoever why the Court should exercise discretion to allow admission of the document at this very late stage. It is clear that the document was in the possession of the 1st and 2nd Respondents since December, 2019 – more than ten months ago. Directions on the hearing of this Consolidated Petitions were given on August 20, 2020. There is no justifiable reason why the Honourable Attorney General did not file the document in Court before trial had already began. All along the Honourable Attorney General was aware of the hearing dates. Indeed, the Honourable Attorney General filed an Application for Stay of Proceedings in the Consolidated Petitions on 11th September, 2020. He later filed his written submissions in the Consolidated Petitions on 21st September, 2020. There is no explanation why he did not file a formal application for the admission of the document along with these other filings.

7. The upshot is that the application by the Honourable Attorney General to admit as evidence the Statement by Cabinet Secretary in the Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works dated 2nd December, 2019 is declined.

Dated, Signed and Delivered at Mombasa this 23rd day of September, 2020.

L. ACHODE J. NGUGI P. NYAMWEYA

JUDGE JUDGE JUDGE

E. OGOLA A. C. MRIMA

JUDGE JUDGE