REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 82 OF 2019

IN THE MATTER OF: THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: ARTICLES 1; 2; 12; 10; 19; 21; 22; 23; 27; 35; 40; 43; 46; 47; 54; 55; 56; 57; 73; 118; 174; 201; 227; 232; AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE MERCHANT SHIPPING ACT NO. 4 OF 2009; THE KENYA PORTS AUTHORITY ACT, CHAPTER 391 OF THE LAWS OF KENYA; THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2019

THE DOCK WORKERS UNION...1ST PETITIONER

TAIRENI ASSOCIATION OF MIJIKENDA ....2ND PETITIONER

MUSLIMS FOR HUMAN RIGHTS (MUHURI) ....3RD PETITIONER

VERSUS

HON. ATTORNEY GENERAL ....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF

TRANSPORT AND INFRASTRUCTURE.................................2ND RESPONDENT

AND

KENYA PORTS AUTHORITY .... 1ST INTERESTED PARTY

MEDITERRANEAN SHIPPING COMPANY..............2ND INTERESTED PARTY

KENYA SEAFARERS WELFARE ASSOCIATION... 3RD INTERESTED PARTY

SEAFARERS UNION OF KENYA .... 4TH INTERESTED PARTY

MOHAMED MWAWIRA .... 5TH INTERESTED PARTY

R U L I N G

1. The Petitioners herein filed a Petition dated 15th July,2019 seeking the following declaratory orders:-

> ***1. A DECLARATION does issue that the Memorandum of Understanding entered into between the Government of Kenya, vide the Ministry of Transport and Infrastructure and the Mediterranean Shipping Company over part of the Terminal at the Port of Mombasa is illegal and unconstitutional and contrary to Articles 10; 12 (1); 21; 27, 35; 40; 43; 46; 47; 54; 55; 56; 57; 73; 118; 174; 201; 227; and 232 of the Constitution of Kenya, 2010.***

2. A DECLARATION does issue that the new amendments to the Merchant Shipping Act vide the Statute Law (Miscellaneous Amendments) Act 2019 is illegal and unconstitutional and contrary to Articles 10; 12 (1); 21; 27, 35; 40; 43; 46; 47; 54; 55; 56; 57; 73; 118; 174; 201; 227; *and* ***232*** *of the* ***Constitution; of Kenya, 2010.***

3. An order awarding costs of the Petition to the petitioners.

4. Any other or further orders, writs and directions this courts considers appropriate and just to grant for the purpose of the enforcement of the petitioners fundamental rights and freedoms.

2. Together with the Petition was filed a Notice of Motion of even date seeking: -

a) THAT the Application be certified urgent and heard ex parte in the first instance.

b) THAT interim conservatory Orders be and is hereby issued suspending the operations and/or implementation of Section 16 (1A) of the Statute Law (Miscellaneous Amendments) Act, 2019 and the implementation of the Memorandum of Understanding entered into between the Ministry of Transport and Infrastructure and the Mediterranean Shipping Company on the control and operation of the part of the Terminal of the Port of Mombasa i.e Terminal 2, at the Kenya Ports in Mombasa, pending the inter-partes hearing and determination of the instant Application.

c) THAT interim conservatory Orders be and is hereby granted suspending the operations and/or implementation of Section 16 (1A) of the Statute Law (Miscellaneous Amendments) Act, 2019 and the implementation of the Memorandum of Understanding entered into between the Ministry of Transport and Infrastructure and the Mediterranean Shipping Company on the control and operation of part of the Port of Mombasa i.e. Terminal 2, at the Kenya Ports in Mombasa, pending the inter-partes hearing and determination of the present Petition.

d) THAT the Honourable Court be pleased to certify the instant Petition as raising substantial questions of law under Article 165 sub-clause (3) (b) and (d) of the Constitution and to transfer the file to the Honourable Chief Justice for empanelment of a bench of an uneven number of Judges to hear and determine the same.

e) The Cost of this Application be borne by the Respondents.

3. On 18th July,2019, the matter came up before Otieno, J. who upon being addressed by the parties on the preliminary issues made orders to the effect that: -

i) The 3rd Petitioner, Muslims for Human Rights (Muhuri) was struck out from the Petition.

ii) The withdrawal of the 1st Petitioner, The Dock Workers Union from the Petition was allowed.

iii) Seafarers Union of Kenya and Mohamed Mwawira were joined in the Petition as the 4th and 5th Interested Parties, respectively.

iv) The National Assembly was joined in the Petition as the 3rd Respondent.

4. The Court then proceeded to grant prayer (b) of the application dated 15th July, 2019 (the Conservatory Order). In granting the order, the Court observed: -

"14. An important point I picked form (sic) the petitioner is the fact that even though the law was assented to by the President, the same is yet to be published in accordance with Article 116 of the Constitution. To that contention, none of the respondents including the National Assembly's Advocate was willing to assert that the law has come into operation.

15. On that account and the provisions of Article 116(2) I direct that an interim conservatory order issues to halt the operationalization of Section 6(2A) (sic), statute law (Miscellaneous Amendment) Act, 2019 as far as it anchors the memorandum of understanding between the 2nd Respondent and the 2nd interested party pending the hearing and determination of the Notice of Motion dated 17/7/2019 interpates (sic)".

5. It is this Conservatory Order that has prompted the present application dated 22nd July, 2019 (the Application) that is before us for consideration. In the application, the Hon. Attorney General (the Applicant) seeks the review and setting aside of the Conservatory Order. The grounds are that the Conservatory Order was issued on an incorrect factual basis, *to wit*, that the Statute Law (Miscellaneous Amendment) Act 2019 (the Amendment Act) had not been published as required by Article 116(2) of the Constitution of Kenya, 2010. The applicant claims that the Amendment Act was published on 9th July, 2019 in the Kenya Gazette Supplement No. 14 (Acts No. 12). The Applicant further claims that the Conservatory Order was issued for the sole reason that the Amendment Act had not been published which reason was not pleaded in the application dated 15th July, 2019. That the said ground was advanced by the Petitioners' counsel whilst on his feet thereby ambushing the Applicant who had no opportunity to adduce evidence that the Amendment Act had indeed been published. The Court was therefore misled to make an order to suspend legislation made in accordance with the Constitution and in a manner inconsistent with the doctrine of separation of powers. To the Applicant therefore, there is an error apparent on the face of the record to the extent that the Court stated that the Amendment Act had not been published as of 18th July,2019. That it is in the interest of justice the Conservatory Order be reviewed and set aside. That the Petitioner will suffer no prejudice if the orders sought are granted.

6. The remaining Petitioner, Taireni Association of Mijikenda, in its grounds of opposition dated 30th July, 2019 opposes the application. The first three (3) grounds are overtaken by events as they relate to the constitution of the current bench which is now in place. The remaining ground is that the order sought to be reviewed has not been attached to the application and has not been placed before this Court. The other ground is that the Applicant has also not pleaded with precision the order to be reviewed.

7. The application was heard by way of oral submissions on 1st August, 2019. It was submitted for the Applicant that the Conservatory Order was solely premised on the incorrect fact that the Amendment Act had not been published whereas the same had in fact been published on 9th July, 2019. According to the Applicant, the Petitioner had misled the Judge that there had been no publication. Further, no pleading to that effect had been made by the Petitioner in its application. It was submitted that the Conservatory Order having been made on a mistaken premise should not benefit any party. Additionally, it was contended that all laws made by Parliament are presumed to be constitutional and any conservatory order to suspend legislation should not be made before parties are heard. The Applicant submitted that no prejudice will be suffered by the Petitioner and no risk to society has been demonstrated. On the contrary, many arrangements have been made including training of seafarers who were waiting to take up jobs in the subject facility.

8. For the 2nd Respondent, it was submitted that the Conservatory Order stayed amendment of Section 16 of the Act in respect of a Memorandum of Understanding between the 2nd Respondent and the 2nd Interested Party (MOU). However, that MoU was not before the Court. For the 1st Interested Party, it was argued that the Court curtailed its right to be heard on its preliminary objection challenging the jurisdiction of the Court. Further, that the Petitioner has not stated in what manner the law is unconstitutional.

9. While supporting the Application, the 2nd Interested Party submitted that the Conservatory Order violated its right to be heard.

10. Similarly, the 3rd Interested Party supported the application and submitted that its members were to gain employment pursuant to the Amendment Act. That the Amendment Act should remain unless the Court found that the same contravenes constitutional provisions.

11. For the 4th Interested Party, the Court was urged to consider where the public interest lies. It was submitted that the Conservatory Order has affected the 2nd Terminal as well as its members who derive income from the terminal. All these parties urged the Court to allow the application.

12. The Petitioner and the 5th Interested Party opposed the Application. The Petitioner submitted that the alleged MoU is shrouded in secrecy and was entered into without the involvement of the Petitioner. All its effort at getting a copy of the same was fruitless. As regards the publication of the Amendment Act, the Petitioner contended that the issue had been raised by the 2nd Interested Party in paragraph 2 of its grounds of opposition. As such, the issue was live before the Court and the Court could not shut its eyes to it. It was further argued that parties are bound by their pleadings. The Petitioner submitted that the Applicant is therefore confined to grounds raised in the application and cannot refer to other matters. The Petitioner contended that an application for review is not for introducing new evidence. The rule provides that the error must be self-evident and should not require elaborate evidence to be established. Where there are 2 opinions, there cannot be said to be an error on the face of the record. An erroneous view of the law is not a ground for review but can be a ground for appeal.

13. On publication, it was submitted for the Applicant that there are 2 gazette notices, the parent notice published on 19th July, 2019 and another notice of 9th July, 2019. It was further argued that the Conservatory Order did not affect the existing law and therefore no prejudice will be suffered. Finally, that the preliminary objection cannot be a ground for review.

14. The 5th Interested Party in opposition to the application submitted that the Conservatory Order was merited based on the material placed before the Court, and that the issue of publication was live before the Court having been raised by the 2nd Interested Party. The 5th Interested Party submitted that beyond publication, the Court in granting the Conservatory Order considered other issues which were equally important. The Court was urged to dismiss the application.

15. We have carefully considered that submissions by learned Counsel and the authorities relied on. The jurisdiction of the Court to review its own orders is provided for in Section 80 of the Civil Procedure Act stipulates:-

> ***"Any person who considers himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

16. Order 45 Rule 1 of the Civil Procedure Rules is couched in similar terms and goes on to provide the procedure and the conditions that an Applicant must satisfy as follows: -

> ***"45(1) Any person considering himself aggrieved—***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for***

any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

17. In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.

18. In the instant case, the Conservatory Order was made on 18th July, 2019 and the application was filed on 22nd July, 2019. The application was therefore filed timeously.

19. The Applicant has premised the application on there being an error on the face of the record. The error is that the Conservatory Order was issued on the mistaken belief that the Amendment Act had not been published at the time the order was given. According to the Applicant, the Petitioner had misled the Court that there had been no publication. Further, the Applicant avers that no pleading to that effect had been made by the Petitioner in its application. In response to this, the Petitioner contended that the issue of publication had been raised by the 2nd Interested Party in paragraph 2 of its grounds of opposition. As such, the issue was live before the Court and the Court could not disregard the same.

20. The Applicant and those supporting the application complained that the impugned Order was made without the parties being heard first. Nothing can be further from the truth. The record shows that when the matter came up *ex-parte* on 15th July, 2019, the Court directed that all parties be served first. When all parties appeared on 18th July, 2019 the Court directed learned Counsel to specifically address the issue of the Conservatory Order which they did. The fact that some of them opted not to address the Court on the issue does not give them the right to complain. The complaint is therefore without any basis, and is not merited.

21. The Applicant complains that the issue of non-publication of the Amendment Act had not been raised. We note that whilst the Petitioner had not specifically pleaded the same in its pleadings, nevertheless we find that it was a live issue before the Court. The 2nd Interested Party had stated in ground 1 of its Grounds of Opposition thus:-

> ***"THAT the Statute Law (Miscellaneous Amendment) Bill 2019 is yet to be published in the Kenya Gazette and has therefore not become an Act of Parliament. Therefore there is nothing urgent about the Application as filed by the Petitioners and the interim conservatory orders sought are in this regard not available at this stage of the petition."***

22. To our mind, since that was an issue which was before the Court, the Court cannot be faulted for having considered it.

23. This brings us to the crux of the matter before the Court *to wit*, that there was an error apparent on the face of the record. The alleged error is that the Court was of the mistaken belief that the Amendment Act had not yet come into operation.

24. What constitutes an error on the face of the record is well settled. The error must be evident on the face of the record and should not require an elaborate argument to be established. This was the holding of the Court of Appeal in the case of **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR**, which stated: -

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review"***

25. In the application, the Applicant produced a copy of the Kenya Gazette Supplement No. 114 (Acts No. 12), which indicated that the Amendment Act was published on 9th July, 2019. It is therefore clear that through the subject Gazette supplement, the Amendment Act had been published by the time the Court gave the Conservatory Order.

26. We note that in its directions of 18th July, 2019, the Court noted that the Petitioner had asserted that the Amendment Act had not yet been published in accordance with Article 116 of the Constitution of Kenya, 2010 and that none of the Respondents had contended otherwise. This may have been factually incorrect as it has turned out that the Amendment Act had been published on 9th July, 2019.

27. We have looked at paragraphs 14 and 16 of the directions made on 18th July, 2019. Although the Court may have been of the mistaken belief that the Amendment Act had not been published, the Court did not grant the Conservatory Order on that ground alone. The Court granted the order on another account. In paragraph 15 of the directions, the court expressed itself thus:-

> ***"On that account and the provisions of Article 116(2) I direct that an interim conservatory order issues…"***

28. To our minds, the use of the words ***"and the provisions of Article 116(2)"*** meant that, apart from the non-publication of the Amendment Act, the provisions of Article 116(2) also persuaded the Court to grant the Conservatory Order. The use of the conjunction ***"and"*** meant that, in addition to or together with the first reason, the Conservatory order was to issue. In this regard, we are of the view that apart from the reason of non-publication, the Court granted the Conservatory Order because of the provisions of ***Article 116(2) of the***

Constitution, to wit, that the Amendment Act had not yet come into effect.

29. Article 116(2) of the Constitution provides:

> ***"Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force."***

30. From the record, the Amendment Act was assented to on 4th July, 2019. By dint of ***Article 116(1)***, it had to be published within 7 days of the assent and come into force 14 days thereafter. The Court was alive to the fact that between the date of assent i.e. 4th July, 2019 and 18th July, 2019 when the Court was making its order, only 14 days had lapsed. The Amendment Act had not yet come into effect in view of the provisions of ***Article 116(2) of the Constitution.*** It is with this in mind, that is, that the Amendment Act had not come into effect, that the Court granted the Conservatory Order to suspend its operationalization.

31. Before Court was a petition which had alleged very serious constitutional issues. It is because of the said serious constitutional issues that a 3 Judge bench was empaneled. It was clearly within the discretion of the Court to issue a Conservatory Order to safe guard these alleged serious constitutional issues against any prejudice.

32. On our part, we have looked at the petition and are satisfied that not only does it raise serious constitutional issues, but also that unless the Conservatory Order is maintained *in situ*, serious prejudice may be occasioned.

33. Likewise, the continued suspension of the operationalization of the section may have serious financial implications to the suit interests. For this reason, an expedited determination of the petition is called for.

34. In view of the foregoing, we find the application to be without merit and dismiss the same with costs.

35. For the avoidance of any doubt, we order that an interim order issues to halt the operationazation of Section 16 (1A) of the Merchant Shipping Act 2009 as contained in the Statute Law (Miscellaneous Amendments) Act, 2019 as far as it anchors the memorandum of understanding between the 2nd Respondent and the 2nd Interested Party pending the hearing and determination of the Petition in this matter.

36. It is so ordered.

Dated, Signed and Delivered in Mombasa this 26th Day of August, 2019

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ERIC OGOLA	**ALFRED MABEYA**	**M. THANDE**
JUDGE	**JUDGE**	**JUDGE**

In the presence of: -

Mr. Nyandieka & Mr. Oginga for the Petitioner

Mr. Wachira also h/b Mr. Gatonye for the 1st Respondent

Mr. Nyamodi & Ms. Ndong for the 2nd Respondent

Mr. Mwendwa & Mr. Mohamed for the 3rd Respondent

Mr. Khagram, Mr. Miller & Ms. Kaguri for the 1st Interested Party

Ms. Ndong h/b Mr. Melly for the 2nd Interested Party

Mr. Mungai Kibe for the 3rd Interested Party

Mr. Owino for the 4th Interested Party

Mr. Gikandi & Ms. Murage for the 5th Interested Party

Kaunda, Aziza & Grace Court Assistants