



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 11 OF 2017**

**IN THE MATTER OF: ARTICLES 22 (1), 23, 165 (3) (a) (b) AND (b) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: FAILURE TO COMPLY WITH THE RULE OF LAW PRINCIPLE AND DENIAL OF ACCESS TO JUSTICE AND DENIAL OF RIGHT TO FAIR ADMINISTRATION ACTION AND CONSUMER PROTECTION**

**AND**

**IN THE MATTER OF: THE INTERPRETATION, IMPLEMENTATION AND ENFORCEMENT OF THE CONSTITUTION OF KENYA UNDER ARTICLE 259**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 40, 46, 47 AND 48**

**AND**

**IN THE MATTER OF: RULES 3, 4(1), 10, 11, 13 AND 23(1) OF THE CONSTITUTION OF KENYA (PROTECTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTISE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF: SECTION 62 OF THE KENYA PORTS AUTHORITY ACT, CHAPTER 391 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 7 OF THE TRANSITIONAL AND CONSEQUENTIAL PROVISIONS (SCHEDULE 6 OF THE CONSTITUTION OF KENYA, 2010)**

**BETWEEN**

**REDINGTON (UGANDA) LIMITED.....PETITIONER**

**AND**

**THE OFFICE OF THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By a Petition dated 15<sup>th</sup> February, 2017 brought under Section 62 of the Kenya Ports Authority Act, Articles 22, 23, 40, 46, 47, 48, 165 and 258 of the Constitution and Rules 3, 4 (1), 10, 11, 13 and 23 (1) of the Constitution of Kenya (Protection of the Rights and Fundamental Freedoms Practice and Procedure Rules) 2013, the Petitioner seeks the following orders:

- a) A declaration that Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and invalid for unjustifiably being in violation of the Rule of law as a national value and principle of governance under Article 10 of the Constitution of Kenya, 2010.
- b) A declaration that Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and invalid for unjustifiably violating the Petitioner's right to property under Article 40 of the Constitution of Kenya, 2010.
- c) A declaration that Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and invalid for unjustifiably violating the Petitioner's consumer rights under Article 46 of the Constitution of Kenya, 2010.
- d) A declaration that Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and invalid for unjustifiably violating the Petitioner's fair administrative action rights under Article 47 of the Constitution of Kenya, 2010.
- e) A declaration that Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and invalid for unjustifiably violating the Petitioner's right to access to justice under Article 48 of the Constitution of Kenya, 2010.
- f) A declaration that any continued enforcement of Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and/or a violation of the Rule of Law under Article 10 of the Constitution of Kenya, 2010.
- g) A declaration that any continued enforcement of Section 62 of the Kenya Ports Authority Act, Cap 391 Laws of Kenya is unconstitutional and/or a violation of the Petitioner's rights under Articles 40, 46, 47 and/or 48 of the Constitution of Kenya, 2010.
- h) A declaration that the Petitioner is entitled to damages and compensation for infringement of its rights under (a) and/or (b) and/or (c) and/or (d) and/or (e) above.
- i) Assessment of quantum of damages to be awarded by the Respondents to the Petitioners.
- j) Further and such other orders that the Honourable court deems fit.

The Petition is premised upon the grounds set out therein and those in the affidavit of **THYGARAJULU KADIYALA** sworn on 15<sup>th</sup> February, 2017.

2. The Petitioner alleges that it instituted two suits against the 2<sup>nd</sup> Respondent in the Chief Magistrate's Court being: **Mombasa Chief Magistrate's Court Civil Suit No. 1705: Redington (Uganda) Ltd v. Kenya Ports Authority and Mombasa Chief Magistrate's Court Civil Suit No. 1706: Redington (Uganda) Ltd v. Kenya Ports Authority**. The Petitioner claims that the cause of action arose as a result of the 2<sup>nd</sup> Respondent's negligence while handling the Petitioner's goods at the Port of Mombasa. Further, the Petitioner contends that the 2<sup>nd</sup> Respondent seeks to dismiss the suits under Section 62 of the Kenya Ports Authority Act.

3. The Petitioner alleges that section 62 of the Kenya Ports Authority Act offends the Rule of Law under Article 10 of the Constitution for the following reasons:

- i. It is ambiguous and intelligible thus providing for a lacuna for the 2<sup>nd</sup> Respondent to act arbitrarily and as whimsical as it deems posit.
- ii. It purports to elevate the 2<sup>nd</sup> Respondent to an autocratic status by providing for allegedly absolute statutory immunity against the 2<sup>nd</sup> Respondent.
- iii. It imposes limitation to the Petitioner's constitutional rights without providing for countervailing societal interest in a clear and irresistible manner.
- iv. It contradicts Section 22 as read with sections 64, 65 and 66 of the Kenya Ports Authority, Cap 391, which Sections confer liability on the 2<sup>nd</sup> Respondent.
- v. It purports to barricade the Petitioner's right to seek court redress as the classical medium of dispute resolution.
- vi. It is unreasonable, illegitimate, invalid and contrary to the Petitioner's legitimate expectation.

4. With regard to section 62 of the Kenya Ports authority Act being in violation of Article 40 of the Constitution, the Petitioner claims that the Section permits the 2<sup>nd</sup> Respondent to arbitrarily deprive the Petitioner of its lawfully acquired property.

5. The Petitioner contends that Section 62 of the Kenya Ports Authority Act violates its consumer rights under Article 46 of the Constitution as it permits the 2<sup>nd</sup> Respondent to offer services of poor quality to the Petitioner and diminishes the Petitioner's right to compensation for loss from defects of the Respondent's services.

6. In relation to violation of the Petitioner's right to fair administrative action, the Petitioner alleges that Section 62 of the Kenya Ports Authority Act extinguishes the Petitioner's right to institute a suit against the 2<sup>nd</sup> Respondent and does not give the Petitioner written reasons

for violation of the Petitioner's rights in the course of the 2<sup>nd</sup> Respondent's functions.

7. On the issue of violation of the Petitioner's right of access to justice, the Petitioner contends that Section 62 of the Kenya Ports Authority Act gives a blanket provision that the 2<sup>nd</sup> Respondent cannot have a suit instituted against it and calls for statutory arbitration which is not based on any procedural rules or practice directions.

8. For the above reasons the Petitioner prays that Section 62 of the Kenya Ports Authority be declared unconstitutional.

### **Response**

9. The 2<sup>nd</sup> Respondent opposed the Petition by way of a replying affidavit sworn by **STEPHEN KYANDIH** on 13<sup>th</sup> March, 2017. The 1<sup>st</sup> Respondent did not respond to the Petition.

10. The 2<sup>nd</sup> Respondent admitted the existence of the aforementioned suits before the lower court and also admitted that it had filed application in both suits seeking to strike out the suits on the basis that the court lacked the jurisdiction to deal with the cause of action under Section 62 of the Kenya Ports Authority Act.

11. The 2<sup>nd</sup> Respondent states that Section 62 of the Kenya Ports Authority Act does not grant the 2<sup>nd</sup> Respondent immunity from all forms of judicial intervention or dispute resolution processes. The 2<sup>nd</sup> Respondent contends that disputes under section 62 of the Kenya Ports Authority Act are subject to arbitration and proceedings similar to judicial review pursuant to Article 47 of the Constitution and the Fair administrative Action Act.

12. The 2<sup>nd</sup> Respondent states that in providing for certain disputes to be resolved by way of arbitration, the 2<sup>nd</sup> Respondent is upholding and promoting the principles espoused in Article 159 of the Constitution.

13. It is the 2<sup>nd</sup> Respondent's case that lack of procedural rules and/or practice directions under Section 62 of the Kenya Ports Authority Act does not invalidate the applicability and enforceability of a substantive provision of a statute or render the provision unconstitutional.

### **Submissions**

14. The Petitioner filed its submissions on 26<sup>th</sup> May 2017 while the 2<sup>nd</sup> Respondent filed its submissions on 13<sup>th</sup> June 2017. The 1<sup>st</sup> Respondent did not file any submissions but instead adopted the submissions by the 2<sup>nd</sup> Respondent. The parties highlighted their submissions on 25<sup>th</sup> July 2017 and 3<sup>th</sup> October 2017. Mr. Mogeni appeared for the Petitioner, Mr. Ngare for the 1<sup>st</sup> Respondent and Mr. Nurani for the 2<sup>nd</sup> Respondent.

15. Mr. Mogeni, learned Counsel for the Petitioner submitted that Section 62 of the Kenya Ports Authority Act is inconsistent with Article 46, 47, 48, 50 and 159 of the Constitution. Counsel contended that the said Section has been used by the 2<sup>nd</sup> Respondent to shield itself from any form of liability. To support this assertion, Counsel cited the case of **Threeways Shipping Services (K) Limited v. Kenya Ports Authority & Another, Commercial Civil suit No. 28 of 2010** where Odero J held as follows:

**“From the pleadings on both sides, it is clear that a serious controversy, with implications for parties' rights and duties, exists. Issues of such a kind generally fall to the judicial process for fair hearing and resolution under the adjudicative authority which has been entrusted with a specific mandate, under Article 159 of the Constitution of Kenya 2010. Against this principle, the court must adopt a strict interpretation of any ordinary statutory dispensation tending to confer differential favours- such as Section 62 of the Kenya Ports Authority (CAP 391) is clearly clang. By Article 159 (2) (a) of the Constitution, the court in exercising judicial authority, is required to ensure that “Justice shall be done to all, irrespective of status...”**

16. Mr. Mogeni submitted that the provisions of Section 62 force a party to go through arbitration without any rules or procedure thus contravening the Petitioner's right to a fair hearing.

17. Mr. Mogeni contended that the Petition herein emanated from suits in which the Petitioner sought compensation for goods lost while in the 2<sup>nd</sup> Respondent's custody and the move by the 2<sup>nd</sup> Respondent to have the suit dismissed would leave the Petitioner with no other remedy. Counsel insisted that Section 62 does not give guidelines or procedures for seeking redress.

18. Mr. Mogeni submitted that Section 62 of the Kenya Ports Authority Act violates Article 40 of the Constitution as it enables the 2<sup>nd</sup> Respondent to deprive the Petitioner of its property.

19. As regards Article 46 of the Constitution, Counsel submitted that the petitioner as a consumer of the 2<sup>nd</sup> Respondent's services is entitled to protection of its consumer interests. Additionally, Counsel submitted that Section 84 of the Consumer Protection Act gives a consumer a right to approach court in the event of damage.

20. Mr. Mogeni submitted that there is a misconception that Article 159 (2) (a) of the constitution gives authority to the 2<sup>nd</sup> Respondent to resort to arbitration. Counsel argued that Section 62 does not have an existing tribunal, judicial or otherwise, nor are there rules or procedure as to how a tribunal is to be established or how to approach the tribunal thus limiting a litigant's access to justice.

21. Mr. Mogeni submitted that a statutory provision which contradicts a constitutional guarantee should not be allowed to stand.

22. Mr. Nurani, learned Counsel for the 2<sup>nd</sup> Respondent submitted that in considering whether a statute is constitutional, the courts should be governed by the principles espoused in the case of **Institute of Social Accountability & Another v. National Assembly [2015] eKLR** which include the general presumption that every statute is constitutional and the burden of proof lies with the person who alleges otherwise; determining the object and purpose of the impugned statute to discern the intention expressed in the Act itself; giving the Constitution a purposive; liberal interpretation and reading the provisions of the Constitution as whole without any particular provision destroying the other but each sustaining the other.

23. Mr. Nurani submitted that Section 62 of the Kenya Ports Authority Act has been applied and upheld by the courts citing the case of **Kenya Ports Authority v. Africa Line Transport Co. Ltd [2014] eKLR** where the Court of Appeal observed as follows;

**“From the pleadings and evidence, the appellant was said to have been exercising its powers under Section 12(1) of the Kenya Ports Authority Act of carrying out the business of stevedore, wharfinger and warehousemen. Thus section 62 of the Kenya Ports Authority Act was applicable and jurisdiction was statutorily ousted. In this regard we can do no more than adopt what this court (differently constituted) said in Kenya Ports Authority v. Kuston (Kenya) Limited;**

**“We agree with Mr. Gachuhi... that the provisions of section 62 touches on the jurisdiction of the superior court and that the parties could not in the face of the Act providing for compulsory statutory arbitration, contract out of a statute and bring the suit instead. The court’s jurisdiction has been ousted by statute and the parties could not confer jurisdiction on the superior court. There cannot be any waiver just because both parties took part in the suit. Parties cannot as a matter of public policy be allowed to circumvent a statute and once an illegality always an illegality.”**

Counsel submitted that this was also the position in the case of **Abeid Hassan Mwazanzori & 2 others v. Kenya Ports Authority & 2 others [2017] eKLR**.

24. Mr. Nurani submitted that Section 62 does not by itself constitute an ouster of the 2<sup>nd</sup> Respondent’s liability as there is an alternative forum-arbitration by which the 2<sup>nd</sup> Respondent can be held liable and to the same extent were the matter to be brought to court. Further, Counsel argued that the Petitioner had not given compelling reasons as to why Section 62 should be regarded as an unreasonable ouster clause.

25. Mr. Nurani submitted that having the dispute between the Petitioner and the 2<sup>nd</sup> Respondent heard by an arbitrator is constitutional and promotes alternatives forms of dispute resolution. It is reasonable as it provides the advantage of quick resolution of the dispute and it is proportional as it is restricted to claims which may give rise to unique issues requiring specialist attention.

26. Mr. Nurani pointed out that the Petitioner had not explained how Section 62 violates Article 10 of the Constitution. Further, Mr. Nurani submitted that Section 62 does not deal with the 2<sup>nd</sup> Respondent’s liability but enforces its liability to compensate a person who suffers damage in the exercise of the 2<sup>nd</sup> Respondent’s powers.

27. With regard to Section 22, 62, 64, 65 and 66 of the Kenya Ports Authority Act, Mr. Nurani submitted that the Petitioner had not shown how these Sections are contradictory as between each other or how they result in any ambiguity.

28. Mr. Nurani submitted that Article 40 of the Constitution was inapplicable as there is no provision that allows the 2<sup>nd</sup> Respondent to arbitrarily deprive a person of its property. On the contrary, Counsel stated that the 2<sup>nd</sup> Respondent has at all times avoided causing damage and where damage does occur, the 2<sup>nd</sup> Respondent has to compensate for the damage.

29. Mr. Nurani submitted that Section 62 does not offend Article 46 of the Constitution as it does not in any way diminish the Petitioner’s right to compensation for loss or defects occasioned by the 2<sup>nd</sup> Respondent’s services.

30. With regard to violation of Article 47 of the Constitution, Mr. Nurani submitted that Section 62 does not constitute an administrative action. Alternatively, Counsel contended that arbitration provided in Section 62 meets the threshold of an administrative action under Article 47 of the Constitution as it is fair, expeditious, efficient, lawful, reasonable and procedurally fair.

31. Mr. Nurani submitted that the Petitioner had not been denied access to justice under Article 48 of the Constitution as an alternative form of dispute resolution-arbitration- had been provided under Section 62. Counsel contended that the lack of procedural rules for effecting Section 62 does not by itself make the provision invalid and unconstitutional.

32. In relation to violation of Article 50 of the Constitution, Mr. Nurani submitted that compulsory statutory arbitration cannot be said to deny a person the right to a fair hearing simply because the hearing did not take place before a court.

33. Mr. Nurani submitted that the Petition herein is not precisely drafted and does not sufficiently inform this court of the exact manner in which the Petitioner’s rights were infringed. Counsel cited the case of **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where the court held;

**“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although**

**precision must remain a requirement is important, it demands neither formulaic prescription of the factual claims nor formulaic prescription of the constitutional provisions alleged to have been violated...”**

34. As to the issue of award of damages, Mr. Nurani submitted that the Petitioner had not suffered any loss that is capable of redress by way of damages nor had the Petitioner proved to the satisfaction of this court that its constitutional rights were violated to warrant a remedy.

#### **Analysis and Determination**

35. Having carefully examined the Petition and the submissions therein, the following issues arise for determination by this court;

a) Whether the Petition before this court has been drafted with precision

b) Whether Section 62 of the Kenya Ports Authority Act should be declared unconstitutional and invalid for unjustifiably violating the Petitioner’s fundamental rights and freedoms under the Constitution

#### **a) Whether the Petition before this court has been drafted with precision**

36. This issue arose during the submissions stage of these proceedings. The 2<sup>nd</sup> Respondent submitted that the Petition as drafted is not precise and it does not sufficiently inform the court of the exact manner in which the Petitioner’s rights were infringed upon by the 2<sup>nd</sup> Respondent. The Petitioner did not respond to this issue.

37. It is trite law that Petitions must be drafted with a reasonable degree of precision so as to meet the ends of justice by enabling the court to discern the provisions that are alleged to be violated and the manner in which the provisions were violated. This was the position espoused in the famous case of **Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272** where the court observed as follows:

**“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves the reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”**

38. A court must be able to identify the specific rights alleged to have been infringed and the particulars as to how these rights were alleged to be infringed. Did the Petitioner meet this requirement? I have carefully perused through the Petition dated 15<sup>th</sup> February, 2017. On the first page, the Petitioner identifies Articles of the Constitution being Articles 40, 46, 47 and 48 which he alleges were violated. At page 7 of the Petition under the subheading “*Grounds for Violation of Constitution of Kenya*”, the Petitioner systematically details the alleged manner in which each of the rights was violated by the 2<sup>nd</sup> Respondent. This court can easily discern the rights complained of by the Petitioner and the alleged manner in which the rights were allegedly infringed.

39. The 2<sup>nd</sup> Respondent, with the approval of this court, cited the case of **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where the Court of Appeal held as follows;

**“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement is important, it demands neither formulaic prescription of the factual claims nor formulaic prescription of the constitutional provisions alleged to have been violated.” (emphasis added)**

40. I agree with the expressions above. As stated by the court precision does not entail a formulaic prescription of the constitutional provisions alleged to have been infringed. A Petitioner, by whichever method, in his or her pleadings needs only identify the rights complained of and provide particulars of the rights which entails detailing the manner in which the alleged rights were infringed. I should think that this would sufficiently amount to precision. I therefore find that the Petitioner did draft this Petition with a reasonable degree of precision.

#### **b) Whether Section 62 of the Kenya Ports Authority Act should be declared unconstitutional and invalid for unjustifiably violating the Petitioner’s fundamental rights and freedoms under the Constitution**

41. The Petitioner submitted that section 62 of the Kenya Ports Authority Act is unconstitutional and invalid as it infringes on the Petitioner’s rights under Articles 40, 46, 47 and 48 of the Constitution. In summary, the Petitioner contended that Section 62 of the Kenya Ports Authority Act limits the Petitioner’s access to justice as it shields the 2<sup>nd</sup> Respondent from liability.

42. The 2<sup>nd</sup> Respondent, on the other hand, contended that Section 62 is constitutional and does not in any way go against the spirit of the Constitution. According to the 2<sup>nd</sup> Respondent, Section 62 of the Act merely provides an alternative dispute resolution method, arbitration, in cases of disputes such as those between the 2<sup>nd</sup> Respondent and the Petitioner in the lower court. The 2<sup>nd</sup> Respondent argued that Section 62 limits the jurisdiction of the courts in certain disputes involving the 2<sup>nd</sup> Respondent in the first instance and instead gives preference to arbitration.

43. To better understand this claim, I will give a brief summary of its genesis. The Petitioner claims that it filed two suits before the Chief Magistrate’s Court being; **Civil Suit No. 1705 of 2016: Redington (Uganda) Ltd v. Kenya Ports Authority and Civil suit No. 1706:**

**Redington (Uganda) Ltd v. Kenya Ports Authority.** As I understand it, the Petitioner who is the Plaintiff in those suits, alleges that its consignment was delivered to the Port of Mombasa operated by the 2<sup>nd</sup> Respondent, the Defendant in the suits, and upon clearance of the consignment, one of the containers holding the consignment was found to be damaged and part of the consignment was missing, while in the other container the entire consignment was found to be missing. The Plaintiff, now the Petitioner, is seeking compensation for the value of the lost consignment. In its defence, the Defendant, now the 2<sup>nd</sup> Respondent, denies the claim and invokes the provisions of Section 62 of the Kenya Ports Authority Act to oust the jurisdiction of the court.

44. Section 62 of the Kenya Ports Authority Act provides;

**(1) In the exercise of the powers conferred by Sections 12, 14, 15, 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.**

**(2) Nothing in this section shall be construed as entitling any person to compensation-**

**(a) for damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or**

**(b) for any damage suffered as a result of the user of any works authorized under this Act unless damage results from negligence in such user.**

45. The Petitioner submitted that this Section gives the 2<sup>nd</sup> Respondent immunity from being prosecuted for compensation for damage occasioned by the 2<sup>nd</sup> Respondent's actions. By being shielded from liability, the Petitioner claims that the 2<sup>nd</sup> Respondent then infringes on its right to property. Further, the 2<sup>nd</sup> Respondent infringes on the Petitioner's right to access to justice as the Petitioner has no other way to seek compensation against the 2<sup>nd</sup> Respondent.

46. Section 62 (1) of the Act provides that where a person suffers damage, he or she shall be entitled to compensation as may be agreed upon as between the person and the Authority or in default of the agreement as may be determined by a single arbitrator appointed by the Chief Justice. This Section does not deny the Petitioner access to justice, if anything it provides two mediums through which the Petitioner may be compensated. First, the Petitioner can engage the 2<sup>nd</sup> Respondent and agree on the compensation. Second, if there is no agreement, an arbitrator is appointed by the Chief Justice to determine the compensation. The Petitioner does not claim that it did try engaging the 2<sup>nd</sup> Respondent on the compensation nor does it claim that it subjected the dispute to arbitration.

47. Article 165 of the Constitution provides that the High Court shall have unlimited original jurisdiction in criminal and civil matters. However, the Constitution should be interpreted as a whole with each provision sustaining the other. Article 159 (2) (c) provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted unless the traditional dispute resolution mechanisms is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or is inconsistent with this Constitution or any written law.

48. I should think that Section 62 of the Kenya Ports Authority Act seeks to support Article 159 (2) (c) of the Constitution. By providing for arbitration this Section does not seek to limit the liability of the 2<sup>nd</sup> Respondent nor to take away the Petitioner from the seat of justice. On the contrary, arbitration is merely an alternative to the courts and also a forum through which a person can access justice.

49. Section 62 of the Kenya Ports Authority Act does not infringe on the Petitioner's right to property as entrenched under Article 40 of the Constitution nor its right to access to justice under Article 48 of the Constitution. Section 62 of the Kenya Ports Authority Act merely provides other modes of dispute resolution by which the Petitioner can access justice and in turn safeguard its right to property. Under the said Section, the Petitioner can approach the 2<sup>nd</sup> Defendant and agree on the settlement/compensation. If there is no agreement, the compensation is determined by an arbitrator appointed by the Chief Justice. No proof has been tendered by the Petitioner to show that it has attempted to comply with the requirements of Section 62 of the Kenya Ports Authority. The Petitioner did not try to reach an agreement with the 2<sup>nd</sup> Respondent on the compensation. Further, no arbitrator was appointed to determine the amount of compensation.

50. Section 62 of the Kenya Ports Authority Act was discussed in the case of **Kenya Ports Authority v. Modern Holdings (EA) Limited [2017] eKLR** where the Court of Appeal observed as follows;

**“Section 62 aforesaid only provides a simpler, faster and cost-effective avenue of disputes resolution. The parties, must in the first place, themselves explore a settlement on the quantum of compensation, failing which the Chief Justice is required to appoint a single arbitrator to determine the quantum. The award of the single arbitrator is subject to the High Court's supervisory jurisdiction or to an appeal. In other words court adjudication is treated in this instance as the final stage in the dispute resolution process.**

**We do not think, from what we have said that the promulgation of the Constitution in 2010 changed the law in terms of the application of section 62 of the Kenya Ports Authority Act. As recent as 2012, Mwera, J as he then was, after hearing arguments about the constitutionality of section 62 found in Safmarine Container N.V of Antwerp V Kenya Ports Authority, HCCC No. 263 of 2010, thus;**

**“In the view of this case the course open to the plaintiff under the Act to seek compensation from the defendant is set out in S.62 of the Act not through this court. Yes, this court has unlimited jurisdiction in matters civil but where a statute has**

**excluded it from entertaining certain matters, then that exclusion must be respected. It was legislated for good cause- not to deny a wronged party a remedy, but to go by the laid out procedure to seek it. In this case the Legislature in its wisdom, considered that damage that results from the acts of the defendant while exercising its powers under S. 12, getting compensation is by way of agreement between the claimant and the Authority (defendant). And if that does not work, and the plaintiff stated here that it had not attempted the method of agreement, then the Chief Justice shall appoint an arbitrator to resolve the issue. We are here not asked to answer why the Act settled on the Chief Justice to appoint the arbitrator or even why the procedure of such appointment was not set out. But suffice is to say that the facility to pursue compensation under S. 62 is open to the claimant. It cannot suffer prejudice simply because this court has not adjudicated over his claim”.**

51. The Court of Appeal in the above case appreciated the efficiency of arbitration as an alternative dispute resolution method and not a hindrance to justice. Further, the Court of Appeal in the said case of **Kenya Ports Authority v. Modern Holdings (EA) Limited (supra)** explained the reasoning behind section 62 advocating for arbitration stating that some disputes may be complex and require technical skills thus making courts less preferable to handle such disputes.

52. The Petitioner further submitted that Section 62 of the Act does not create a tribunal, judicial or otherwise or provide rules as to how the tribunal will approach the dispute. Therefore, the Petitioner argued that the Section limits the Petitioner’ access to justice and if the Petitioner is locked away from the courts, it may not have any other remedy. The 2<sup>nd</sup> Respondent, on the other hand, admitted that the Section does not provide any rules or procedures for resolving the dispute. However, the 2<sup>nd</sup> Respondent contended that this should not be a reason to invalidate Section 62 and deem it unconstitutional.

53. Section 62 of the Kenya Ports Authority Act only states that if a person does not reach an agreement with the Authority on the compensation, the compensation shall be determined by a single arbitrator appointed by the Chief Justice. This Section does not provide the criteria for selection of the arbitrator or the rules and procedure to be followed during the arbitration. On this issue I wish to borrow the words of Mwera J espoused in **Safmarine Container N.V of Antwerp V Kenya Ports Authority, HCCC No. 263 of 2010** while discussing the constitutionality of Section 62. He stated as follows;

**“...We are here not asked to answer why the Act settled on the Chief Justice to appoint the arbitrator or even why the procedure of such appointment was not set out.”**

I do not find this to be reason enough to invalidate section 62 of the Kenya Ports Authority Act.

54. From the foregoing analysis, it is evident that Section 62 of the Kenya Ports Authority Act does not infringe on the Petitioner’s constitutional rights and freedoms hence it is not unconstitutional. The Petition dated 15<sup>th</sup> February, 2017 is hereby dismissed. Parties shall bear their own costs.

**Dated, Signed and Delivered in Mombasa this 14<sup>th</sup> day of June, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mrs. Onyango for 2<sup>nd</sup> Respondent

Mr. Mkok for 1<sup>st</sup> Respondent

Mr. Kaunda Court Assistant