



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 58 OF 2016**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF  
CERTORARI PROHIBITION AND MANDAMUS**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**EXPARTE:**

- 1. CONAUGHT GENERAL SUPPLIERS LIMITED**
- 2. GALGAMESH ENTERPRISES LIMITED**
- 3. AL-AZLAM SOLUTIONS LIMITED**
- 4. AFRIASIA MARINE LIMITED**
- 5. EAST COAST LOGISTICS LIMITED**
- 6. DEBNAR SHIPPING SERVICES LIMITED**
- 7. RAPHEX LOGISTICS LIMITED**
- 8. ALIGTEECH LIMITED**
- 9. SAIMBOT SHIP CONTRACTORS**
- 10. PORTRITE SHIP CONTRACTORS**
- 11. OCEAN NIGHT CONTRACTORS**
- 12. PEARSON AGENCIES**
- 13. RUNYU AGENCIES.....EXPARTE APPLICANTS**

## JUDGMENT

1. The *ex parte* applicants were on 3<sup>rd</sup> August, 2016 granted leave to file a substantive application under the provisions of Order 53 of the Civil Procedure Rules. On 4<sup>th</sup> August 2016, they filed an application by way of Notice of Motion under the provisions of Order 53, rules 1, 2 and 3 of the Civil Procedure Rules, 2010, Sections 1A,1B and 3A of the Civil Procedure Act, Cap 21 and all other enabling provisions of the law and the inherent jurisdiction of the court.

2. They seek the following orders:-

a. That the decision by the Respondent whereby it has refused to approve the condemnation of container Nos. PCIU2172945, PCIU2883270, PCIU1624531, PCIU2976115, CAIU3247700, CLHU9040264, TGHU9183173, CLHU9103249, DRYU934577, MAGU5116240, TEMU6907566, BMOU5558764, MSCU7186803, MSCUKA055389, CAXU812610, HJCU1705934, HJCU1707726, FSCU9785850, FSCU9383580, DFSU2914159, BMOU5250684, HJCU1077714, CAXU7404461, HJCU2276095, TRLU9133953, TGHU1059886, SEGU4117674, TSLU6216655, TSLU6212860, DVRU1481900, FCIU2653220, CMAU0200657, MSKU3861440, MSKU5466928, MSKU7675110, MSKU3050042, MRKU9526540, MRKU8782614, TGHU2385439, MRKU8157941, MRKU6656052, MRKU6984982, MSKU7171422, MRKU9414659, MRKU8878341, MSKU5845243, MSKU5464463, MRKU9061588, MRKU8966519, MRKU8754037, MRKU8216746, MRKU7890168, MRKU7215642, MRKU7098185, MRKU8189677, MRKU9372450, IPXU3981013, MEDU2177913, CATU1259823, MEDU1832230, MEDU38811320, MSCU3688531, MSCU2179925, MSCU6361537, TCKU2335391, TCKU2163883, MSCU6308240, MSCU6300969, TCKU3888196, TCKU3197173, TRLU8885874, CAXU8125610, HJCU1705934, HJCU1707726, FSCU9785850, FSCU9383580, DFSU2914159, BMOU5250684, HJCU1077714, CAXU7404461, HJCU2276095, TRLU9133953, TGHU1059886, SEGU4117674 and any other containers that may be condemned jointly by Kenya Ports Health Department, Kenya Bureau of Standards and National Environment Management Authority (N.E.M.A) be brought up before this court and the said decision be quashed for all purposes and the said goods therein be declared as condemned so that the containers thereof be released to the Applicants respectively;

b. That the Respondent be prohibited from henceforth refusing to approve the goods lying in the containers at the Port of Mombasa that have been jointly condemned by Kenya Ports Health Department, Kenya Bureau of Standards and National Environment Management Authority ( N.E.M.A) and the goods therein be deemed as condemned so that the containers thereof be released to the Applicants respectively;

c. That the respondent be directed by an order of mandamus to undertake its duty to approve the condemnation of the goods in container Nos. PCIU2172945, PCIU2883270, PCIU1624531, PCIU2976115, CAIU3247700, CLHU9040264, TGHU9183173, CLHU9103249, DRYU934577, MAGU5116240, TEMU6907566, BMOU5558764, MSCU7186803, MSCUKA055389, CAXU812610, HJCU1705934, HJCU1707726, FSCU9785850, FSCU9383580, DFSU2914159, BMOU5250684, HJCU1077714, CAXU7404461, HJCU2276095, TRLU9133953, TGHU1059886, SEGU4117674, TSLU6216655, TSLU6212860, DVRU1481900, FCIU2653220, CMAU0200657, MSKU3861440, MSKU5466928, MSKU7675110, MSKU3050042, MRKU9526540, MRKU8782614, TGHU2385439, MRKU8157941, MRKU6656052, MRKU6984982, MSKU7171422, MRKU9414659, MRKU8878341, MSKU5845243, MSKU5464463, MRKU9061588, MRKU8966519, MRKU8754037, MRKU8216746, MRKU7890168, MRKU7215642, MRKU709818, MRKU8189677, MRKU9372450, IPXU3981013, MEDU2177913, CATU1259823, MEDU1832230, MEDU38811320, MSCU3688531, MSCU2179925, MSCU6361537, TCKU2335391, TCKU2163883, MSCU6308240, MSCU6300969, TCKU3888196, TCKU3197173, TRLU8885874, CAXU8125610, HJCU1705934, HJCU1707726, FSCU9785850, FSCU9383580, DFSU2914159, BMOU5250684, HJCU1077714, CAXU7404461, HJCU2276095, TRLU9133953, TGHU1059886, SEGU4117674 and henceforth upon the goods in any containers that the Applicants have an interest in having been condemned by

Kenya Ports Health Department, Kenya Bureau of standards and National Environment Management Authority (N.E.M.A) and the Respondent to immediately thereafter approve the said condemnation;

d. That the grant of leave to apply for the Judicial Review orders sought herein do operate as a stay against the Respondent, its agents and servants from interfering with the Applicants right to retrieve the said containers upon the Respondent condemning the goods therein; and

e. That the costs of this application be provided for.

3. The application is supported by the grounds on the face of it and the verifying affidavit of Gilbert Kioko that was filed with the application seeking leave to institute the present proceedings. The application is also supported by the statement of facts accompanying the said application

4. On 19<sup>th</sup> September, 2016, the respondent filed its grounds of opposition to the following effect:-

(i) That the applicants' application is without merit, amounts to an abuse of the court process and is but a mere attempt at circumventing the court process;

(ii) That the applicants herein are persons with no *locus standi* to institute the suit herein or seek the order sought in the Application dated the 4<sup>th</sup> of August, 2016;

(iii) That the applicants are persons whose purported business or operations at the port of Mombasa are unknown or unrecognized in law as under the provisions of Sections 16 and 26 of the East African Community Management Act;

(iv) That the applicants are seeking the court to issue orders of certiorari to quash a decision where no such decision exists;

(v) That the applicants are thus seeking this court to act in a vacuum and to be moved by mere apprehension; and

(vi) That the respondent in carrying out the exercise of destruction of goods condemned at the port does not act in isolation but is dependent on verification and approval of other governmental bodies; hence for the applicants to ask the court to grant orders of mandamus against the respondent in the circumstances is seeking this court to issue orders that the respondent may not be able to comply with.

5. The respondent on 20<sup>th</sup> September, 2016 filed its replying affidavit sworn by Collins Bosire.

6. Counsel for the parties herein subsequently filed their written submission which they highlighted before this court.

#### **EXPARTE APPLICANTS' SUBMISSIONS**

7. Mr. Gikandi, Learned Counsel submitted that the *exparte* applicants are agents appointed by owners of the containers in issue which are stacked with overstayed goods, for purposes of retrieving them. He outlined the procedure used for condemning goods that are not cleared in time. He explained that once goods are condemned through a process involving different agencies, the owner of the container cannot use it until the goods therein have been destroyed. The agencies involved include Public Health Department, National Environment Management Authority (NEMA), Kenya Ports Authority (KPA) and Kenya Revenue Authority (KRA), the respondent herein. He informed the court that it is the respondent that determines the mode of destruction.

8. Counsel submitted that despite the other agencies having condemned the goods in the containers in issue, the respondent has refused to give the final authority for destruction of the goods. In his view, this

amounts to irrationality on the part of the respondent which is subject to the provisions of article 10 of the Constitution. He further argued that Article 47 of the Constitution requires the respondent to act fairly. He referred the Court to a letter dated 13<sup>th</sup> July, 2016 which he wrote to the respondent about the matter in issue but he received no response.

9. He cited the case of **Munyu Maina vs Hiram Maina** [2013] eKLR where the Court of Appeal held that it is the duty of the other party to controvert the evidence. He argued that the respondent has not rebutted the evidence that the goods have gone through the processes. He also referred to the case of **Nyongesa & 4 Others vs Egerton University College**, Civil Appeal No. 90 of 1989, where the court held that it is only reasonable to give the other party an opportunity to prepare for the hearing and to have his witnesses ready but not to hear one side of the story.

10. Counsel further stated that they had requested the respondent to destroy the goods so that the applicants can take their containers which are congesting the port, so as to ensure that products unfit for human consumption are removed therefrom. In his view, the holding of 200 containers at the port makes no good economical sense. He referred this court to the document numbered 60 attached to the verifying affidavit and submitted that it is meant to show the processes followed in destruction of condemned goods. He explained that the document shows that the 1<sup>st</sup> *ex parte* applicant had previously as an agent, made arrangements for a container stacked with condemned goods to be loaded aboard a truck from KPA.

## RESPONDENT'S SUBMISSIONS

11. Mr. Kirugi, Learned Counsel for the respondent in highlighting his written submissions stated that the *ex parte* applicants are neither the owners nor the agents of the owners of the containers as the owners are shipping lines that appoint agents for purposes of clearing goods. He submitted that with regard to the overstayed goods in issue, the *ex parte* applicants are not the official agents of the shipping lines as no document was availed to show that they have been authorized to remove the condemned goods from the port.

12. Counsel in his arguments stated that Section 16 (1) of the East Africa Community Customs Management Act, 2004 (EACCMA) places the responsibility over imported goods on shipping lines and the Commissioner of Customs. He stated that the goods in issue are under customs control. He indicated that the provisions of Section 25(5) of the EACCMA deals with goods that have not been cleared from the port within the required time and that destruction of goods is the responsibility of the shipping lines which are required to pay for the same. He submitted that it is an offence for owners of shipping lines not to pay for destruction of goods. He expounded on the foregoing by stating that there has to be procedural ownership of goods and the containers because of the responsibility placed on shipping lines and the Commissioner of Customs.

13. Counsel argued that the *ex parte* applicants have no *locus standi* to file the present application as the matter before the court is not a Constitutional Petition but a Judicial Review application. In his view, the orders of mandamus and certiorari being sought can only be issued if the *ex parte* applicants can show how the withholding of the containers has a direct bearing on them.

14. To reinforce his argument, he cited the case of **Priscilla Nyokabi Kanyua vs Attorney General & Another** [2010] eKLR, which addresses the implications of the provisions of Article 22 of the Constitution. He stated that the *ex parte* applicants are meddlesome interlopers as the owners of the shipping lines have not complained that their containers have overstayed at the port. He stated that the present application has been made prematurely as no decision has been made by the respondent for retrieval of containers at the port. Thus there is no decision for quashing.

15. Mr. Kirugi referred the court to the respondent's letter dated 8<sup>th</sup> September, 2016 attached to its replying affidavit, which contains a schedule of condemned goods and the dates they were scheduled for destruction. He emphasized that the respondent is carrying out its mandate. He cited the case of **Republic vs Mwangi S. Kimenyi Ex-parte Kenya Institute for Public Policy Research Analysis (KIPPRA)** [2013] eKLR, where the Court of Appeal held that it cannot issue an order to quash a non-existent

decision.

16. On the *ex parte* applicants' Counsel's submission that his clients have legitimate expectation that they would be allowed to retrieve containers from the port, Mr. Kirugi responded by stating that the *ex parte* applicants are unknown in law under EACCMA, as such no right legitimately accrued to them, hence there is no legitimate expectation on their part.

17. He referred the court to paragraphs 7-20 of the respondent's replying affidavit that explain the procedure for retrieval and destruction of goods and stated that it is the respondent that initiates the process of destruction of overstayed goods and not the other agencies.

### **EXPARTE APPLICANTS' REJOINDER**

18. Mr. Gikandi referred the court to Section 22 of the EACCMA which defines the word agent and stated that the *ex parte* applicants are agents within the meaning prescribed therein. He further indicated that the respondent have severally dealt with the *ex parte* applicants as agents of the shipping lines. He referred the court to pages 47 and 57 of the attachments to the *ex parte* applicants' verifying affidavit. He argued the court should not look at the application from a technical point of view.

### **ANALYSIS AND DETERMINATION**

The issues for determination are:-

1. If the *ex parte* applicants have *locus standi* to bring the present application;
2. If the *ex parte* applicants have a legitimate expectation from the respondent; and
3. If the *ex parte* applicants are entitled to Judicial Review orders of certiorari, prohibition and mandamus.

19. In this case the *ex parte* applicants in paragraph 4 of the verifying affidavit depose to have been appointed by various shipping lines to retrieve various containers from the port which contain overstayed goods due for destruction. A bundle of documents in support of the retrieval process was annexed thereto and marked as annexure GK3. The said paragraph further states that necessary approvals for the condemnation of the said overstayed goods had been approved by KPA, Health department, Kenya Bureau of Standards (KBS) and NEMA.

20. In Mr. Gikandi's written submissions on *locus standi*, he indicates that section 22 of the Constitution has made very generous provisions regarding the issue of *locus standi* in that every person has a 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. He also indicates that the *ex parte* applicants have a right to fair administrative action under article 47 of the Constitution.

21. On his part, Mr. Kirugi while citing the case of **Priscilla Nyokabi Kanyua** (supra) stated that while the court in the said case appreciated the provisions of Article 22 of the Constitution, that a party has a right to institute court proceedings alleging a violation of rights, the court also observed that it is important to guard against mere busy bodies or meddlesome interlopers.

22. The *ex parte* applicants attached to their verifying affidavit copies of their registration certificates marked as annexure GK2 to show that they are either duly registered under the Business Names Act or under the Companies Act. This leads the court to the important issue of whether the said documentation is sufficient to establish the element of *locus standi* or whether the *ex parte* applicants have no foot to stand on in this matter.

23. The issue of *locus standi* was addressed by Nyamu J (as he then was) in the case of **Mureithi & 2 Others (for Mbari ya Murathimi clan) vs Attorney General & 5 Others**, HCMCA No. 158 of 2005

*“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others.....Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law...The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue....Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of locus standi is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”.....Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest...In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”*

24. The above ruling was delivered a few years before the new constitutional order came into place, yet the learned Judge had seen that the issue of standing was not static but was evolving with the changing

times in public interest litigation. There is no doubt that standing of persons who can bring Judicial Review applications has been widened under the rubric of the current constitutional dispensation in cases of **public interest litigation** which unfortunately have no mirror effect on the case before me. The present case is one between the *ex parte* applicants who claim to have been appointed by shipping lines to retrieve containers that are stacked with overstayed goods that have been condemned and should have been destroyed, so as to release the said containers to shipping lines. It is my finding that Counsel for the *ex parte* applicants has failed to show how the present matter can be considered as public interest litigation. He has also failed to show how they have been denied fair administrative action under the provisions of Articles 22 and 47 of the Constitution of Kenya, respectively.

25. After perusing the documents attached to the verifying affidavit, this court cannot ascertain which companies undertake the business of shipping lines and whom they have appointed among the *ex parte* applicants to retrieve the containers in issue for them. This court would have expected the said shipping lines to have availed their registration certificates and annual licences issued by the Kenya Maritime Authority permitting them to operate as such, in Kenya. The court would also have expected to see letters whereby the said shipping lines have appointed the *ex parte* applicants as their agents to represent them during the destruction process so as to retrieve the containers in issue. The *ex parte* applicants' verifying affidavit lacks the precision that would be expected in a case of this nature where there are many applicants involved. There should have been precision in regard to which containers belong to which shipping lines and a specific indication of the agent that has been duly authorized to retrieve the said containers. The nexus between the said shipping lines and the *ex parte* applicants through letters appointing them to act as their agents or agency agreements is sadly lacking in the documentation availed before this court.

26. The matter in issue revolves around a business transaction wherein the *ex parte* applicants expect to be paid their fees for the role they will play in representing shipping lines in destruction of the cargo that has overstayed at the port of Mombasa. The respondent on its part expects to be paid by the shipping lines for destruction of the goods in the said containers. The matter herein, cannot be said to be public interest litigation. The only conclusion that this court can arrive at in view of the foregoing is that the *ex parte* applicants are no more that meddlesome interlopers. I therefore find that they lack *locus standi* to institute the present proceedings.

27. In the case of **Republic vs Mwangi S. Kimenyi** (supra), the Court of Appeal found that the remedy therein was in private law which covers disputes relating to contractual relationships. The Court of appeal held that the High Court erred in granting the orders of Judicial Review as the respondent did not have public law right and statutory underpinning capable of protection under the supervisory jurisdiction of the court. In the present case, having found that the *ex parte* applicants have not established *locus standi*, it will be an effort in futility to delve into the other issues of whether the *ex parte* applicants have a legitimate expectation from the respondent or if they are entitled to Judicial Review orders of certiorari, prohibition and mandamus.

28. The upshot of the foregoing is that that the application herein is struck out. Costs are awarded to the respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 22<sup>nd</sup> day of March, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Murage holding brief for Mr. Gikandi for the *ex parte* applicants

Mr. Mbaye holding brief for Mr. Kirugi for the respondent

Oliver Musundi - Court Assistant