



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 38 OF 2015

ABEID HASSAN MWAZANZORI.....1ST PETITIONER

SWALEH AHMED HERO.....2ND PETITIONER

MWADZAME MWACHIPULI.....3RD PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....1ST RESPONDENT

MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioners herein filed a petition on 22nd June, 2015 on their own behalf and on behalf of members of the Beach Management Units in Mtongwe, Likoni and Old Town, seeking the following orders:-

- (i) A declaration that the contracts entered into between the petitioners and 1st respondent are unconstitutional, illegal, null and void;
- (ii) A declaration that the Petitioners have an inalienable right to full and adequate compensation;
- (iii) A permanent injunction restraining the respondents from any further construction works for expansion of the Mombasa Port which directly or indirectly affects the petitioners without reviewed, adequate and full compensation of the petitioners herein;
- (iv) An order directed at the respondents to review the initial contract on compensation awards and adequately involve the fisher folk in the negotiation and computation of compensation with due regard to the length of the dredging project and or other construction works using the daily income generated by the fisher folk prior to the construction works;
- (v) An order for compensation in favour of the petitioners by the respondents at prevailing market rates;

(vi) An order that the 1st respondent complies with the NEMA Environmental Impact Assessment Reports dated 2010 (sic); and

(vii) Costs of the petition.

2. The petition is supported by the joint affidavit of Abeid Hassan Mwaganzori, Swaleh Ahmed Hero and Mwadzame Mwachipuli sworn on 4th June, 2015 and the bundle of documents attached to the said affidavit. It is also supported by the supplementary list of documents filed on 4th April, 2016 and the supplementary affidavit filed on 6th April, 2016. The 1st respondent filed a replying affidavit on 18th December, 2015. On 29th February, 2016, the 3rd respondent filed a notice of preliminary objection/grounds of opposition. On 4th April, 2016 four witness statements were filed by the petitioners herein. The hearing commenced on 7th April, 2016 with three witnesses adducing *viva voce* evidence before Judge Emukule (as he then was). The 4th witness did not testify.

3. PW1, Abeid Hassan Mwaganzori, the 1st petitioner informed the court that he is a resident of Likoni and works as a fisherman. On a good day, he would earn Kshs. 2,000/= and on a bad day his earnings would be Kshs. 500/=. At times he would earn as little as Kshs. 200/=. He testified that after the dredging of the fishing area, it has become difficult for him to earn anything beyond 100kg (sic). He stated that fishermen were not involved in the project design. They were promised compensation in the year 2008 at Bandari College where they were told that the project would take 12 months but as of the day of testifying, work was continuing. He was compensated with Kshs. 10,500/= and he also took Kshs. 8,000/=. He testified that they had tried to negotiate with the respondents without success. In his view, the amount of Kshs. 10,500/= for a period of 5 years was inadequate compensation as he was earning Kshs. 2,000/= per day.

4. On cross-examination by Counsel for the 1st respondent, PW1 indicated that he was the Chairman of the Fishermen's Association but he was not the Chairman at the time of compensation. He was referred to the contract with KPA which states in clause 7 that parties willingly signed the contract. He said he did not know how to read hence he did not know if his contract was in the bundle (of documents). He was not aware of the Compensation Action Plan document. He heard about it.

5. On cross-examination by Counsel for the 2nd and 3rd respondents, PW1 stated that his catch fluctuated and he could not say what his total income would be. He informed the court that there are no restricted fishing areas, they fish anywhere. There was no document showing their total income. He could not recollect signing the supplementary affidavit.

6. On re-examination, PW1 stated that they no longer fish in their former fishing grounds. They need modern boats to move along the sea even to the shores of Pemba Island, Tanzania.

7. PW2, Swaleh Ahmed Hero, the 2nd petitioner informed the court that he was a resident of Old Town and is a fisherman. He was the Chairman of their group. He stated that in the older days they could fish anywhere but not anymore. They have to move far and wide as the fish and fishing grounds have disappeared. He testified that previously he used to earn Kshs. 10,000/= per day, but today one is lucky to earn Kshs. 5,000/=. He attended a meeting at Bondeni market once where they were asked to sign against areas marked "X". They waited for compensation that never came until he decided to join these proceedings. He stated that some people working in the same dhow were paid differently, some were paid 20,000/=, others 30,000/= and some 10,000/= but no explanations were given.

8. On cross-examination by Mr. Obinju, PW2 stated that he signed the affidavit in support of the petition. He was paid Kshs. 55,000/= which was not adequate compensation. His claim was for adequate compensation.

9. On cross-examination by Ms. Lutta, PW2 stated that his income used to be Kshs. 18,000/= at times but it has now gone down to Kshs. 2,000/= to 3,000/=

10. On re-examination the said witness informed the court that he was only asked to sign on dotted lines on the supplementary affidavit and attached delivery notes of fish and the amounts paid to the said affidavit.

11. PW3 was Mwadzame Mwachipuli, the 3rd petitioner herein, He informed the court that he was a fisherman from Mtongwe and was the Chairman of Mtongwe Fishermen Association. He used to earn between Kshs. 3,000/= to 18,000/= before the dredging project but he was earning less than Kshs. 200/= per day at the time he testified. He stated that they were informed about the dredging and compensation. They were called to Bandari College once and told to open accounts with National Bank. No payment was made until they held a demonstration before the Fisheries department. They were called to the said department and asked to sign contracts prepared by KPA. They were paid differently. He was paid Kshs. 59,000/=. Upon inquiry he found that others were paid as low as Kshs. 9,000/=. They complained at Maji house but they were referred to Mombasa. They signed contracts and payments were by way of cheques. They asked KPA to explain the method used in paying but they were not told of the same. He stated that they could not object to a Government project but KPA hurt them.

12. On cross-examination by Mr. Ouma, PW3 explained that he used to keep records of delivery notes of 36kg from Mohamed, Tallawuli 26kg and Mohamed Kibwanga 22kg. He signed a contract with KPA for Kshs. 59,400/=. There was no negotiation as stated in clause 4 of the said standard contract. He added that they did not understand the terms and could not complain. He indicated that they were not parties to the compensation plan.

13. On cross-examination by Ms. Lutta, PW3 informed the court that he was not aware of the project action plan. His income had gone down since the year 2008 till now. He admitted that delivery notes were in the name of Kibwanga.

PETITIONERS' SUBMISSIONS

Counsel for the parties on record had filed their written submissions which they highlighted as hereunder.

14. Mr. Kitonga Learned Counsel for the petitioners submitted that the petitioners are small scale fisher folk working with Likoni, Mtongwe and Old Town Beach Management Units. He explained that the 1st respondent had undertaken a port expansion project which had seriously affected the livelihoods of the petitioners. He stated that PW1, PW2 and PW3 had testified that their livelihoods had been negatively impacted as they have to sail further into the deep sea to fish. The 1st respondent had initially caused the petitioners to accept some compensation for works that were to be undertaken in a time span of 11 months, but six years down the line the work was still ongoing, hence the petitioners were unable to fish adequately.

15. Counsel submitted that the petition was anchored on Articles 15 (1), 159 (2) (d) and 165 (b) of the Constitution of Kenya that outlines the jurisdiction of this court. With regard to Section 62 of the Kenya Ports Authority Act (KPA Act) that provides for such matters to be determined through arbitration or out of court dispute resolution mechanisms, Counsel contended that under Article 22 (1) of the Constitution, every person has a right to institute a complaint of breach of fundamental rights. He added that the petitioners testified that they were illiterate thus did not understand the standard form agreements they signed. They prayed for fair and adequate compensation.

16. Mr. Kitonga cited the case of **Multiple Hauliers East Africa Limited vs Attorney General and 10 Others** [2013] eKLR and Nairobi HCC Petition No 54 of 2011, **Isaac Gathungu Wanjohi vs AG and Others** to buttress his arguments. He invited the court to read his written submissions and the precedents cited in the petitioner's list of authorities.

1ST RESPONDENT'S SUBMISSIONS

17. Mr. Ouma, Learned Counsel for the 1st respondent informed the court that a petition based on the

same facts was filed as petition No. 36 of 2015, in **Abdalla Kombo Abdalla & 3 Others vs KPA & 3 Others**, Mombasa High Court Petition No. 36 of 2015. In his view, the said case should have been consolidated with the current petition as the facts are similar. He stated that the Judgment in the said petition was delivered on 13th May, 2016. A copy thereof was attached to their further written submissions filed on 27th July, 2016.

18. Counsel referred to the provisions of Sections 12 (1) (a) and (d) of the KPA Act which state that Kenya Ports Authority (KPA) has powers to clear, clean, deepen, improve or alter the port. It was further submitted that if it appears that any person may suffer damage pursuant to the discharge of the foregoing powers, KPA may enter into negotiations under Section 62 (1) of the KPA Act as agreed between him and KPA. In default thereof, the Chief Justice shall appoint an arbitrator.

19. Counsel submitted that this court has no jurisdiction to hear the petition. He relied on the case of **Kenya Ports Authority vs African Line Transport Co. Ltd.** [2014] eKLR at p.10, where the Court of Appeal held that the provisions of Section 62 of the KPA Act touch on the jurisdiction of the superior court. It was further stated that Emukule J. (as he then was) in Mombasa HCC Petition No. 36 of 2015 (supra) cited the former case with approval.

20. Mr. Ouma contended that the present petition does not meet the constitutional threshold of the case of **Anarita Karimi Njeru vs Attorney General** [1979] KLR 154. In the Counsel's view, the basis of the petition is not the contract that was signed, as there were negotiations subsequent to which they executed the contracts, but the compensation plan was the cause of the matter. He submitted that the said plan did not create a contract between the petitioners and the 1st respondent.

2ND AND 3RD RESPONDENTS' SUBMISSIONS

21. Mr. Makuto Learned Counsel for the 2nd and 3rd respondents associated himself with the submissions of the 1st respondent. He relied on his grounds of objection and written submissions. He stated that the court's jurisdiction has been ousted by the provisions of Section 62 of the KPA Act, more so because the subject matter of the present suit vests on the powers under Section 12 of the KPA Act. He added that the ouster of jurisdiction also has constitutional underpinnings. He invited the court to look at the provisions of Article 50 (1) of the Constitution of Kenya, which grants a right to fair hearing and recognizes other modes of dispute resolution, one of which is as set out under the provisions of Section 62 (1) of the KPA Act which provides that any dispute arising will be resolved by agreement or will be referred to arbitration for determination by a person appointed by the Chief Justice. Mr. Makuto submitted that no particulars of duress was cited in the pleadings and supported by the testimony of witnesses.

22. He relied on the decision in Mombasa High Court Petition No. 36 of 2015 (supra) cited by Mr. Ouma. He implored the court to find that it has no jurisdiction and if it so finds, to down its tools. He cited the case of **the owners of the Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited** [1989] KLR 1 to fortify his argument on the issue of jurisdiction.

23. He also relied on the case of **the Speaker of the National Assembly vs Njenga Karume** [1992] KLR 21, in arguing that where a specific mode of dispute resolution has been set out in a statute, it has to be followed. He submitted that Section 62 (1) of the KPA Act sets out the mode for dispute settlement in this case. He prayed for dismissal of the petition.

PETITIONERS' REJOINDER

24. In response to the submissions on the issue of jurisdiction, Mr. Kitonga submitted that ultimate judicial authority is vested in the courts and nothing estops the petitioners from seeking a redress in a court of law. In his view, the provisions cited by the respondents' counsel are used more or are inclined towards commercial transactions.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If this court has jurisdiction to hear the present petition; and
- (ii) If it has jurisdiction, have the constitutional rights of the petitioners been infringed?

25. The bone of contention is, firstly, that pursuant to a dredging exercise that was undertaken by the KPA to expand the port of Mombasa, the livelihoods of the petitioners who are fisher folk have been disrupted in that they can no longer fish in their previous fishing grounds. They have to go further into the deep sea or to other fishing areas which have not been affected by the dredging project. The petitioners claim that as a result of the foregoing, their earning capacity has dwindled drastically. Their argument is that although they were compensated by the respondent, the said compensation was meagre and does not go far into alleviating their current situation.

26. Secondly, although they signed agreements with the 1st respondent in which they accepted the amounts of money proffered, the said compensation is grossly inadequate. They did not understand the terms of the agreements they signed as they are illiterate. Thirdly, they were informed that the project would only take 11 months but it has been ongoing since the year 2008 up to the time they testified in court in the year 2016. In their written submissions, they refer to the said agreements as illegal contracts. Fourthly, they have not been given the equipment that was agreed upon as part of the compensation, including 4 fishing boats to facilitate them sail further at sea to fish.

27. The respondents on the other hand cited the provisions of section 62 (1) of the KPA Act which provides for other modes of dispute resolution through arbitration and submitted that the High Court is not the correct forum for hearing the dispute herein. The court therefore lacks jurisdiction and it should not move one more step to hear this petition. Secondly, they argued that the petition herein lacks the precision required of a constitutional petition, due to failure on the part of the petitioners to cite the provisions of the Constitution of Kenya that have been violated and the effect that they have had on the petitioners. Thirdly, the petitioners still have access to other fishing grounds thus their socio-economic rights under Article 43 of the Constitution have not been violated. Fourthly, the petitioners signed the agreements in issue willingly and the allegations of fraud, undue influence and duress have not been proved.

28. I have considered the detailed written submissions filed in this case, the oral submissions made and the authorities cited by counsel on record. With regard to the submission by the respondents that the present petition lacks precision, I find precision in the contents of paragraph 23 of the petition. It states that the actions of the respondents were unconstitutional in that they have deprived the petitioners of their fundamental right to work and have a secure source of livelihood and adequate standard of living under the provisions of Articles 10 (2) (d), 26 (1), 40 (3) (b) (i) and 40 (4), 41 (2) (a) and (b), 43, 47 of the Constitution of Kenya. Paragraph 24 of the said petition has precision in that it states that the respondents failed, refused and/or neglected to adequately involve and engage the petitioners in the consultation on compensation, including providing them with access to information on the dredging and/or other construction works that was to be undertaken by the respondents, which would impact on their fishing activities as provided under Articles 10 (2) (a), (b) and 35 (1) and (2) of the Constitution of Kenya, 2010.

29. Another paragraph that is precise is paragraph 25 where the petitioners aver that the meagre compensation payments ranging from Kshs. 6,000/= to 157,000/= that were assessed by the respondents were a huge disparity from the actual possible income of the petitioners and a gross violation of their right to have their inherent dignity respected and protected as provided under Article 28 of the Constitution and the right to access and/or realize their economic and social rights as provided under Article 43 of the Constitution of Kenya, 2010.

30. As a result of the foregoing averments, I hold that the decision in the case of **Anarita Karimi Njeru vs Attorney General** (supra) and **Mumo Matemo vs Trusted Society of Human Rights Alliance &**

others, Nairobi Civil Appeal No. 290 of 2012 which were cited by Counsel for the respondents cannot come to their aid. Although the petition is not picture perfect with regard to precision of the rights that have been violated under the Constitution of Kenya and how they have negatively impacted on the petitioners. My understanding of the above two decisions is that the courts were not looking for military precision but for elucidation of the points in issue to the extent of comprehension by the respondents, so as to enable them to respond fully to the issues raised. In the present case, Counsel for the respondents addressed at length the issues raised by the petitioners. I therefore find that the petition herein was not drafted so poorly as to be considered as being beyond redemption.

31. I now move to the agreements that were signed by the petitioners and the 1st respondent, copies of which are attached to the petition. They are generic with similar provisions save for the amount that was to be paid as compensation to the petitioners. The agreements were signed on different dates. Clause 2 of the agreement states as follows:-

“The fisherman is a member of a beach Management unit as defined in the fisheries (Beach Management Unit) Regulations 2007 and was enumerated in the compensation Action plan dated February 2010.” (emphasis added).

32. Clause 4 thereof states that the 1st Respondent entered into negotiations with the petitioners **with the aim of compensating them from all types of all losses** to enable the 1st respondent embark on a project to dredge the Port of Mombasa. (emphasis added).

33. Clauses 5 and 6 thereof provide that the compensation is in refund to:-

(i) Temporary loss of fishing grounds; and

(ii) Temporary loss of fishing ground and the fisherman has agreed to such compensation. (emphasis added).

34. A look at clause 7 however reveals that the compensation so made was for **permanent loss of the fishing area leading to loss of income from fishing, permanent loss of landing site, possible loss of income due to disturbance, loss of income from trading as a result of the project taking off.** (emphasis added).

35. Clause 9 of the said agreements states that both the fishermen and the 1st respondent agree that the amounts set out in the schedule form a fair and reasonable approximation of the loss to be suffered as a direct consequence of fishing and the same is a reasonable basis for compensating the fishermen in the circumstances.

36. Clause 10 thereof provides that the fishermen and 1st respondent have agreed on the eligibility of the compensation as fishermen **within proposed (sic) dredging site taken as at 25th November, 2008 and that the compensation shall cater for complete loss of fishing grounds, complete loss of landing site, temporary loss due to dredging or access, loss of income, source or means of livelihood and loss of trading benefits.** (emphasis added).

37. On the execution part of the agreements, paragraph 3 provides that **the fishermen undertake upon receipt of the compensation from the 1st respondent that they shall not make any claim(s) whatsoever against the 1st respondent** and in paragraph 7 thereof that both parties have willingly entered into the agreement without any undue influence or representation or warranty. (emphasis added).

38. The agreements were attested to, by the District Fisheries Officer, signed by each affected fisherman, signed for and on behalf of the 1st respondent by its duly authorized officer and witnessed by Advocates.

39. I have taken the liberty of highlighting the above provisions with a view to determining if this court has jurisdiction to hear the present constitutional petition or if it should lay down its tools as held in the

case of **the Owners of the Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited** (supra). The High Court undeniably has jurisdiction conferred upon it by the provisions of Article 165 (3) (b) of the Constitution to hear and determine applications of denial, violation or infringement of or threat to, a right or fundamental freedom in the Bill of rights. Article 22 of the Constitution gives every person a right to institute court proceedings claiming a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 23 of the Constitution provides the nature of relief that a court can grant.

40. The petitioners claim that they were denied access to information as regards the duration the project in issue would take as they were informed that the project would last for 11 months in Mtongwe Beach Management and 5 months in Likoni and old Town Beach Management units, yet according to them, the dredging lasted for 6 years. Furthermore, the compensation that was awarded was for dredging works alone. The petitioners claim that the compensation was not fair or adequate thus the provisions of Articles 40(3) and 40(4) of the Constitution were contravened.

41. The respondents were of the view that the open sea area was available for the petitioners to venture into for fishing. The petitioners in that regard stated that their boats are small and much as they were promised equipment for fishing and boats that can venture further into the sea, these have never been handed over to them. They also state that the boats offered by the 1st respondent have never been inspected and tested.

42. The replying affidavit of the 1st respondent is to the effect that dredging works were completed on 11th May, 2012 as per the certificate of works attached and marked as annexure 1 to the affidavit of Caroline Mbote, sworn on 16th December, 2015. The said deponent states that various consultative meetings were held in which the petitioners' leaders attended, whereby they were apprised of the benefits of the expansion project and the impact it would have on the socio-economic development of fishing activities at the coast.

43. The deponent further states that an Environmental Impact Assessment study for the proposed dredging works and container terminal modernization was undertaken. It is the said report that informed the Compensation Action Plan which provides an explanation and guide of the mitigation and compensation process for fishermen and traders who would be directly affected by the capital dredging works. In paragraph 25 thereof, the deponent states that compensation per fisherman was determined by experts in the department of fisheries based on various factors such as loss of income, sources or means of livelihood, loss of fishing ground, loss of landing site and loss of trading benefit in line with the Compensation Action Plan.

44. The evidence adduced by PW1, PW2 and PW3 showed that their daily earnings varied from day to day and none produced receipts in their names to show the amount of money they used to make on a daily basis prior to the commencement of the dredging.

45. It is the finding of this court from the foregoing analysis that the issues that are the subject of the present petition stem from agreements signed between the petitioners and the 1st respondent. Compensation was duly paid but it is said to be inadequate as the dredging took longer than the duration for which they were compensated. There are also problems that have arisen from execution of the agreement with regard to the provision of boats and equipment as agreed upon between the 1st respondent and the leaders of the Beach Management Units. For the said reasons, I find the submissions of counsel for the respondents to be valid in that that the petition raises matters that are contractual in nature.

46. Section 62 (1) of the KPA Act provides as follows on compensation:-

“In the exercise of the powers conferred by sections 12, 14, 15 and 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.” (emphasis added)

47. In the case of **Kenya Ports Authority vs African Line Transport Co. Ltd.** [2014] eKLR, cited by Mr. Ouma for the 1st respondent, the Court of Appeal adopted the holding of the same court in **Kenya Port Authority Versus Kustron (Kenya) Limited** Civil Appeal No. 315 of 2005 where the court stated 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 on the business of stevedore, wharfinger and warehousemen. Thus section 62 of the Kenya Ports Authority Act was applicable and the jurisdiction of the court was statutorily ousted. In this regard we can do no more than adopt what this court (differently constituted) said in Kenya Ports Authority versus Kustron (Kenya) Limited Civil Appeal No. 315 of 2005 (unreported)-

“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 on illegality.”

The court went further to state:

“Needles to state that the parties could not through their pleadings confer jurisdiction upon the High Court where jurisdiction had been specifically ousted by statute.” emphasis added)

48. This court is of the considered view that the petitioners have under the guise of infringement of their rights, brought to this court a dispute that is contractual in nature. It is not disputed that when the 1st respondent entered into agreements with the petitioners, it was exercising its powers as conferred upon it by section 12 of the KPA Act. It therefore follows that in the event of a dispute arising therefrom, the provisions of section 62 (1) of the said Act would kick in. Although no dispute arose immediately after payments were made to the petitioners, the duration of time the project took and the non-implementation by KPA of part of the bargain has resulted in the petitioners feeling shortchanged. In my considered view, the current dispute still lies within the realm of the provisions of section 62 (1) of the KPA Act. In the case of **the Speaker of the National Assembly vs Njenga Karume** (supra), the court held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

49. Mr. Makuto for the 2nd and 3rd respondents in his written submissions relied on the case of **Rich Productions Ltd vs Kenya Pipeline Company and another** [2014] eKLR where Mumbi Ngugi J., stated thus:-

“The reason why the constitution and the law establish different institutions and mechanism for dispute resolutions in different sectors is to ensure that disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the court retains the inherent and wide jurisdiction under article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that the court cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issue in dispute into constitutional issues when it is not.”

50. Inasmuch as I agree with Counsel for the petitioners that no Act of parliament can override constitutional provisions, it needs no saying that the Constitution must be read as a whole. The provisions of Article 22(1) of the Constitution that give a right to every person to institute court proceedings claiming a right or fundamental freedom in the Bill of rights has been denied violated or infringed or is

threatened, must in the circumstances of this case to be read together with the provisions of Article 159 (2) (c) of the Constitution which state as follows:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).”

51. The Constitution therefore through the foregoing provisions takes cognizance of the fact that disputes can be settled in other forum and not necessarily in court. I hold that the present case falls in the category of the cases that can benefit from the provisions of Article 159 (2) (c) of the Constitution. In so stating, I pay heed to the case of **Mutanga Tea & Coffee Company vs Shikara Limited and another** [2015] eKLR, where the Court of Appeal stated as follows:-

“The basis for that view is first that Article 159 (2)(c) of the constitution has expressly recognized alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that the constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by article 165 (3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.”

The court continued to state:

“Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and the disputes are resolved much more expeditiously and in a more cost effective manner.”

52. Similarly, in the case of **Jimmy Mutinda vs the Independent Electoral and Boundaries Commission and 2 others** *Exparte* **Shailesh Kumarnata Verbai Patel and 2 others** [2013] eKLR, Odunga J. stated thus:-

“In the result, I however associate myself with my learned brother Justice Majanja, in his view expressed in Dickson Mukweluine vs Attorney General & 4 others Nairobi High Court Petition No. 390 of 2012 that alternative dispute resolution processes are complementary to the judicial process and by virtue of article (159) (2) (c) of the constitution of Kenya 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realizing, promoting and protecting certain rights. Accordingly, the court is entitled to either stay the proceedings until such time that the alternative remedy has been pursued or bring an end to the proceedings before the court and leave the parties to pursue the alternative remedy. In the result I am of the view and I hold that the court’s jurisdiction under article 165 can be limited and/or restricted by an Act of Parliament.”

53. Counsel for the 1st respondent urged the court to consider Mombasa HC Constitutional Petition No 36 of 2015, **Abdalla Kombo Abdalla & 3 others vs KPA & 3 others** where the subject of the claim was similar to the present case. Emukule J. (as he then was) dismissed the petition after finding that he had no jurisdiction to hear the petition. In the present petition, this court has said enough to show that it has no jurisdiction to hear the petition before it as another forum for redress is provided for under the provisions of Section 62 (1) of the KPA Act. This court will not therefore delve into the merits or demerits of the petition but will offer recourse to the petitioners to address the dispute through the proper forum.

54. Having taken cognizance that the Chief Justice is empowered by the provisions of Section 62 (1) of the KPA Act to appoint an arbitrator if a dispute arises under the provisions of Section 12 of the said Act, and noting that the dispute herein arises from agreements made in the execution of KPA's mandate in the dredging of the Port of Mombasa, I herewith make orders for transmission of the court file herein to the Hon. Chief Justice for him to appoint an arbitrator to hear and determine the dispute raised by the petitioners.

55. The petitioners herein are fisher folk whose earnings are low, I therefore order that each party shall bear its own costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of April, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mbogo for the Petitioners

Mr. Obinju for the 1st respondent

No appearance for the 2nd and 3rd respondents

Mr. Oliver Musundi - Court Assistant