



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO. 76 OF 2012
(Formerly Nairobi Petition 291 of 2011)

SDV TRANSAMI KENYA LIMITED AND 19 OTHERS..... PETITIONERS

VERSUS

THE ATTORNEY GENERAL & 2 OTHERS..... RESPONDENT

AND

CONTAINER FREIGHT ASSOCIATION OF KENYA..... INTERESTED PARTY

JUDGMENT

INTRODUCTION

[1] The Cabinet Minister for Transport in purported exercise of powers under section 8 of the Merchant Shipping Act, 2009 made Regulations called ***Merchant Shipping (Maritime Service Providers) Regulations, 2011*** for the control, regulation and oversight of the maritime service in Kenya. These Regulations were dated 18th April 2011 and published in the Kenya Gazette of 9th September 2011 when in accordance with section 9 (1) of Interpretation and General Provisions Act, cap. 2 of the Laws of Kenya, they would have entered into force upon publication in the Kenya Gazette. The Regulations were published as Legal Notice No. 112 of 2011 which is here-below set out in full [***marginal notes and Schedules omitted***]:

“Legal Notice No. 112

THE MERCHANT SHIPPING ACT (No. 4 of 2009)

IN EXERCISE of the powers conferred by section 8 of the Merchant Shipping Act, 2009, the Minister for Transport makes the following Regulations:—

THE MERCHANT SHIPPING (MARITIME SERVICE PROVIDERS) REGULATIONS, 2011

PART I—PRELIMINARY

1. *These Regulations may be cited as the Merchant Shipping (Maritime Service Providers) Regulations, 2011.*

2. (1) *These Regulations shall apply to—*

(a) the maritime service providers specified in the First Schedule whilst performing any of the services set out in that Schedule; and

(b) such other maritime service providers as the Minister may gazette under section 2 of the Act.

(2) A licence granted to a clearing and forwarding agent under section 145 of the East African Customs Community Management Act, 2004, shall, in so far as it provides services in respect of maritime cargo, be deemed to be a licence under these Regulations and the provisions of regulations 5, 6, 8, 9 and 10 shall not apply to clearing and forwarding agents.

3. In these Regulations, except where the context otherwise requires—

“bill of lading” means a document signed by an ocean carrier or his representative and issued to a shipper that evidences the receipt of goods for shipment, contract of carriage and ownership or title of goods;

“cargo consolidator” means a person who accepts less than container load shipments from individual shippers, and then combines them for delivery to the carrier as a full container load container for shipment;

“cargo manifest” means a document that lists in detail all the bills of lading issued by a carrier or its agent or master for a specific voyage or a detailed summary of total cargo loaded on board a vessel;

“charterer” means a person, firm or company hiring a vessel for the carriage of goods or other purposes;

“clearing and forwarding agent” means any person licensed to act as an agent under section 145(1) of the East African Community Customs Management Act, 2004;

“Commissioner” has the same meaning as in the East African Community Customs Management Act, 2004;

“consignee” means an agent, company or person receiving an import consignment; “consignor” means an agent, company or person sending or exporting a consignment; “container” means a metallic container for stuffing cargo in transit and which conforms to standards set by the International Standards Organization;

“container freight station” means a common user facility with cargo handling facilities licensed to offer services for handling and temporary storage of import laden containers, and motor vehicles under customs control;

“container handling facility” means a container freight station or an empty container handling and storage depot;

“freight manifest” means a manifest which shows particulars of freight and charges; “goods” includes all kinds of articles, wares, merchandise, livestock and currency;

“licence” means a licence issued under these Regulations;

“pad” means the addition by a ship’s agent of extra charges to an invoice to make it higher than the appropriate charge;

“port service provider” means a person, in Kenya, engaged in the business of providing services of port facility, quay side, warehouse or other terminal facilities in connection with a common

carrier or a water carrier;

“principal” means a person on whose behalf, another person acts as an agent in the business of maritime service provision;

“register” means the register maintained by the Authority under regulation 4 (e);

“restrictive trade practices” means the restrictive trade practices described under the Competition Act, 2010 or any other law for the time being in force in Kenya;

“service level agreement” means an agreement made in writing between a maritime service provider and a party which formally defines the level of service, performance and commitment by the parties to the terms thereof;

“shipper” means a consignor, exporter, or seller using shipping services to transport and deliver goods, or a non vessel owning common carrier that accepts responsibility for payment of all applicable charges under the service level agreement;

“shipping line” means any person who provides sea transport using his own or chartered vessels or hires slots or space from other vessels in operation or managing the business of shipping;

“ship’s agent” means a person licensed by the Authority and appointed by a ship operator, including a ship owner or charterer, to act as its agent in Kenya in providing any of the services specified under regulation 2;

“tariff” means the actual rates, charges and surcharges applied by a maritime service provider in providing the transportation service.

PART II—LICENSING

4. The functions of the Authority shall be to—

(a) license maritime service providers;

(b) promote fair competition among maritime service providers;

(c) promote and enforce high standards of professional and ethical conduct;

(d) formulate and promote the attainment of the highest standards of competence, and qualifications among respective maritime service providers;

(e) maintain a register for persons licensed to practice as maritime service providers, the various categories of maritime service providers and to publish from time to time information relating to such register;

(f) provide for a framework for consultations on the cost and quality of maritime transport services;

(g) monitor the standards of infrastructure, equipment, facilities and services as the Authority may specify by notice in the Gazette; and perform such other functions as specified under section 8(2) (h) of the Act.

5. (1) A person shall be eligible to be licensed as a maritime service provider if such person is a citizen of Kenya, or is a company incorporated under the Companies Act in which not less than fifty-one percent of the share capital is held directly by a citizen of Kenya.

(2) Notwithstanding paragraph (1) any company which holds a licence to operate as a maritime service provider shall within eighteen months from the date of commencement of these Regulations, comply with the provisions of that paragraph.

(3) The maritime service provider referred to in paragraph (2) may, at any time within eighteen months from the date of commencement of these Regulations, apply for, and upon satisfying the requirements of regulation 11, be entitled to the grant of a licence under these Regulations.

(4) A ship's agent or cargo consolidator shall be eligible to be licensed under these Regulations if such agent or consolidator, is of good standing and its reputation as evidenced by a letter of recommendation from the principal.

(5) A container handling facility shall be eligible for licensing if it is located in an area where it does not inhibit accessibility to other users.

(6) A person shall in addition to the foregoing paragraphs, be eligible for licensing if the person-

(a) has complied with the requirements of regulations 7 and 11; and

(b) is financially sound evidenced by—

(i) financial resources adequate to its business evidenced by references from banks, financial institutes, auditors and reputable credit reference companies, to the satisfaction of the Authority; and

(ii) a minimum paid-up share capital as may be specified under paragraph (7).

(7) The Authority shall specify by notice in the Gazette, the minimum paid-up share capital to be maintained by a maritime service provider that is a body corporate.

(8) A maritime service provider shall, whenever requested to do so by the Authority, demonstrate that it has complied with paragraph (1).

(9) A person shall be not eligible for a licence or any renewal thereof if such person-

(a) has been convicted of corruption, an economic crime or other criminal offence that amounts to a felony under the law of Kenya; or

(b) has not complied with any of the provisions of this Act or any other law.

(10). Paragraph (1), (5), (6), (7) and (8) shall not apply to shipping lines.

6. (1) An application for a licence as a maritime service provider shall be made to the Authority in the form set out in the Second Schedule.

(2) The Authority may approve or reject an application and shall notify the applicant of its decision together with reasons within sixty days from the date of receipt of the application. (3) Where the Authority approves an application for a licence or the renewal of a licence, the Authority shall, upon payment of such standard fee as it may determine, issue to the applicant the appropriate licence or renewal of the licence.

(4) A licence issued under these Regulations shall—

(a) be in the form set out in the Third Schedule;

(b) be valid for one year and shall, in any case, expire on the 31st of December, of each

year; (c) be limited exclusively to use by the named licensee and shall not be transferred to any other person without prior approval of the Authority; and

(d) be issued upon such other conditions as may be specified by the Authority in the license.

(5) Any person who carries on the business of a maritime service provider without a valid licence commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding three years, or both such fine and imprisonment.

7. (1) A maritime service provider, other than a shipping line, who is licensed under Regulation 6 shall within sixty days of the issuance of the licence apply to join an association.

(2) For purposes of paragraph (1), an association shall be approved by the Authority if such association has filed with the Authority certified copies of its—

(a) constitution;

(b) certificate of registration;

(c) register of members ;

(d) disciplinary procedures; and

(e) details of registered office.

(3) An Association shall have the primary responsibility of providing and monitoring a code of conduct and standards of competence for the particular category of maritime service providers through service level agreements and the Authority may revoke its recognition if in its opinion the Association is not carrying out its primary responsibility.

(4) This regulation shall come into operation after the expiration of twelve months after the commencement of these Regulations.

8. (1) Any person who holds a licence may apply for its renewal subject to the requirements set out under this regulation.

(2) The application under paragraph (1) shall—

(a) be made not later than sixty days before the date of expiry of the licence;

(b) be accompanied by a non-refundable application fee as may, by notice in the Gazette, be specified by the Authority; and

(c) be in the form set out in the Second Schedule.

(3) The Authority may approve or reject the application for the renewal of a license and shall notify the licensee of its decision before the expiry of sixty days from the date of lodging the application.

9. (1) A maritime service provider who—

(a) fails to comply with the terms and conditions of the grant of the licence;

(b) ceases to hold any of the qualifications specified in these Regulations;

(c) fails to renew the licence within the period specified under regulation 8; or

(d) fails to meet any of the standards specified in these Regulations; commits an offence and shall be liable on conviction to a fine of not more than three million shillings.

(2) If despite the fine imposed under paragraph (1), a maritime service provider continues committing the offences mentioned in paragraph (1), the Authority may, subject to these Regulations, suspend or revoke the licence.

(3) Where the Authority suspends or revokes a licence issued under these Regulations, the Director-General shall notify the licensee of the decision of the Authority within fourteen days of the date of the decision.

10. (1) Any person whose application for a licence or renewal has been denied or whose licence has been suspended or revoked may, within twenty one days of receipt of the notice of such refusal, suspension or revocation, appeal to the Minister.

(2) Any person aggrieved by the Minister's decision may within fourteen days of such decision, make a further appeal to the High Court.

11. (1) A maritime service provider other than a shipping line shall have among its staff professionals qualified in accordance with paragraph (2).

(2) A person shall be deemed to be professionally qualified, if such person—

(a) demonstrates competence in executing the tasks related to their area of maritime service; and

(b) has passed such professional examinations relevant to the maritime service as offered by a professional institution of national or international repute as the Authority may from time to time publish in the Gazette.

(3) A maritime service provider shall, within five years from the date of its first licensing under these Regulations, ensure that at least sixty percent of its management staff have successfully sat and passed the professional examinations referred to in paragraph (2).

PART III—DISCIPLINE

12. (1) It shall be professional misconduct for any maritime service provider—

(a) to fail to abide by a code of conduct set out by the recognized association;

(b) to fail to apply a standard of competence set by the maritime providers association and approved by the Authority;

(c) to fail to observe all laws and other regulations relevant to his duties;

(d) to fail to exercise due diligence to guard against fraudulent and corrupt practices; (e) to engage in restrictive trade practices;

(f) to fail to discharge his duties to his clients or customers with honesty, integrity and impartiality;

(g) to fail to exercise due care when handling cargo on behalf of the customers or shippers;

(h) to fail to exercise due care when handling monies on behalf of his principal;

(i) to attempt to influence the conduct of any official of the port, customs or any other person in any matter pending before such official or person or his subordinates by the use of threat, false accusation, duress or the offer of any inducement or promise of advantage or by the bestowing of any gift or favour or other thing of value;

(j) to attempt to bribe or provide other illegal benefits to influence the behaviour of port, container freight station, customs personnel or functions of customs officers;

(k) to fail to observe any other professional conduct as may be prescribed by the Authority.

(2) The Authority may, where it deems appropriate, suspend the licence of any person charged with a criminal offence pending the outcome of the proceedings.

13. (1) Whenever a company holding a licence undergoes any change in its directors, company name, location or its shareholding, such a change shall be communicated by the company to the Authority within fourteen days of such change. Provided that any change in shareholding shall be subject to regulation 5(1).

(2) The provisions of this regulation shall not apply to a shipping line.

(3) A person who contravenes the provisions of this regulation commits an offence and shall be liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.

14. (1) A service level agreement for a maritime service provider under these Regulations shall contain the minimum standard terms specified in the Fourth Schedule.

(2) A service level agreement may, where necessary, in addition to the matters specified in paragraph (1), contain an undertaking as to the minimum facilities and equipment necessary for the delivery of maritime services in line with the service provider's operations.

15. (1) A maritime service provider shall—

(a) provide its services in accordance with the relevant written laws and international standards pertaining to the maritime service;

(b) observe business ethics and professional integrity;

(c) inform the Authority in writing of any changes in the information provided in the application form, annexes thereto or authorization certificates within thirty days of the date of such change; and

(d) have in place adequate liability insurance to cover all its professional liabilities.

(2) A person who contravenes the provisions of this regulation commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.

16. (1) **Whenever the Authority—**

(a) is of the opinion that a marine service provider has committed a professional misconduct; or

(b) receives a complaint or allegation that a marine service provider has committed an act of misconduct,

(c) the Authority shall commence an inquiry by issuing a notice in writing to that maritime service provider.

(2) The notice issued by the Authority under paragraph (1) shall—

(a) state the Authority's opinion, or the complaint or allegation of misconduct received, as the case may be; and

(b) require the maritime service provider to submit, within such time not being longer than thirty days, as may be specified in the notice, a response in writing.

(3) Upon receipt of the written response, or where no such a response has been received, within the time limit set out under paragraph (2)(b), the Authority shall inquire into the grounds set out in its notice under paragraph (1) or such of the grounds not admitted, as the case may be.

(4) The Authority may, in the course of the inquiry, consider such documentary evidence and take such oral evidence as may be relevant or material to the inquiry, and may put any questions to any person tendering evidence for or against the maritime service provider.

(5) The maritime service provider shall be entitled to cross examine any person on the grounds forming the basis of the proceedings but where the Authority declines to examine any person on the ground that his or her evidence is irrelevant or immaterial, it shall record its reasons in writing.

(6) At the conclusion of the inquiry, the Authority shall prepare a report of its findings with appropriate orders.

(7) The Authority shall subject to paragraph (9) furnish the maritime service provider with a copy of its report and the maritime service provider shall within a period of not more than thirty days from the date of receipt of the report, submit, in writing, any representations which it may have against the findings.

(8) The Authority, in making the report under paragraph (6), may—

(a) caution the maritime service provider; or

(b) suspend the licence of the maritime service provider; or

(c) revoke the licence of the maritime service provider; or

(d) if there is a finding of an offence as provided in regulation 9 (2), apply the sanctions provided thereunder.

(9) Where the maritime service provider is a clearing and forwarding agent, the Authority shall make such recommendations as may be appropriate to the Commissioner.

(10) The Authority may make any such order as to payment by any party of any costs or witness expenses and of the expenses of the Authority or the members thereof in connection with the hearing of any complaint as it may think fit.

(11) Any maritime service provider aggrieved by any decision or order of the Authority, may appeal to the Minister, with a further appeal to the High Court.

PART IV—MISCELLANEOUS PROVISIONS

17. (1) *The Authority may require a maritime service provider to file with the Authority its tariffs showing the actual rates, charges and surcharges applied in providing all services rendered and the maritime service provider shall comply with such requirement within seven days of such requirement being made.*

(2) *A maritime service provider shall not amend the tariff as provided under paragraph (1) without notifying the Authority.*

(3) *No maritime service provider shall pad customs or other statutory fees charged to customers.*

(4) *Charges for services delivered locally shall be raised and paid for in Kenyan currency.*

(5) Any person who contravenes the provisions of this regulation commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.

18. (1) *The Authority may require or order **any** maritime service provider to file with it **any report, cargo manifest, freight manifest, answers to questions, documentary material or other information that the Authority finds appropriate; and may require the response to such order to be made in such form and within such time as may be specified by the Authority.***

(2) *A maritime service provider shall submit copies of annual returns to the Authority within one month after the deadline for the filling of the annual reports.*

(3) *A maritime service provider who fails to file a report or document when required to do so by the Authority under paragraph (1) or who contravenes paragraph (2) commits an offence and **shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.***

19. (1) *The Authority may inspect the premises of a maritime service provider for the purposes of promoting commitment to the advancement of excellence, professionalism as well as ethical standards of trade in all aspects of the business of the maritime service provider.*

(2) *Such visits shall focus on standards of customer care, complaints handling, supervision and management of the maritime service provider's facility.*

(3) *The maritime service provider shall allow free entry and exit to the premises of the maritime service provider and access to all records pertinent to the handling of cargo, ledgers, details of complaints received, copies of the maritime service provider's complaints procedure, terms of business, details of any risk management measures, contract documents and any other details which may be relevant for the visit.*

(4) *At the end of every visit, the Authority shall meet with the maritime service provider and summarize its findings.*

(5) *The Authority shall keep records of each visit undertaken under this regulation, which shall include the particulars, description and recommendations made after each visit.*

(6) *Where any recommendations are made under this regulation, the Authority may within such time and in such manner as it shall specify, require the maritime service provider concerned to implement or cause to be implemented the recommendations contained in the record of visit.*

(7) *The Authority may suspend a maritime service provider's licence for any failure to implement a requirement as contained in paragraph (6) above.*

(8) Any person who—

(a) obstructs or hinders the Authority in the exercise of its powers or performance of its duties under this regulation; or

(b) furnishes information or makes a statement to the Authority which he or she knows to be false or misleading; or

(c) without good and reasonable excuse fails to implement the recommendations made pursuant to this regulation, commits an offence and shall be liable, on conviction, **to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.**

20. (1) The movement of cargo into any container freight station shall, subject to paragraph (2), be in accordance with the instructions of the shipper as contained in the bill of lading.

(2) The relevant port authority shall nominate the container freight station for movement of cargo where the bill of lading does not contain the instructions of the shipper.

(3) The nomination under paragraph (2) shall have due regard to an equitable, transparent and fair distribution of cargo, and the port authority shall, before making the nomination, take steps to ensure that the receiving container freight station has the capacity to receive the cargo having regard to space, personnel and equipment.

(4) Any person who contravenes this regulation commits an offence and is liable, on conviction, to a fine not exceeding five million shillings and shall in addition be liable to the affected cargo owners for all losses, fines, penalties, demurrage, storage charges or any other charges arising from such failure to comply. **Authority may impose penalty upon admission of guilt.**

21. If a maritime service provider—

(a) admits to the Authority that he has contravened any provisions of these Regulations or the Act, or that he has failed to comply with any provision with which it was his duty to comply; (c) deposits with the Authority such sum as may be required of him, but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question, the Authority may, after such enquiry as it deems necessary, determine the matter upon such enquiry and **may, without legal proceedings, order by way of a penalty the whole or any part of the said deposit to be forfeited.**

22. (1) Any action or thing done in respect of licensing of a maritime service provider immediately before the coming into force of these Regulations, shall be deemed to have been done under the corresponding provisions of these Regulations.

(2) Every person who immediately before the commencement of these Regulations, was a holder of a licence authorizing him to carry on the business of a maritime service provider shall, upon payment of the prescribed licence fees, continue carrying on such business for a period of six months from the date of commencement of these Regulations.

(3) The maritime service provider referred to in paragraph (2) may, any time within six months from the date of commencement of these Regulations, apply for, and upon satisfying the requirements of regulation 5 be entitled to the grant of a licence under these Regulations.

(4) Any person carrying on the business of a maritime service provider pursuant to paragraph (1) who elects not to apply for a licence or having applied for a licence has not satisfied the requirements of regulation 5 shall cease to carry on the business of a maritime service provider on the expiration of the period referred to in paragraph (2).

[Schedules Omitted]

Made on the 18th April, 2011.

AMOS KIMUNYA,

Minister for Transport.

[2] The Petitioners considered that the Regulations had the effect of violating the constitutional rights to equal protection of the law, association and to property, among others, and they, accordingly, filed this petition on behalf of themselves as legal entities, their individual shareholders, their senior management and maritime service providers in their own interests, the interests of their shareholders, interests of their employees and interests of the maritime service providers and employees for declaration of invalidity of the Regulations, among other reliefs.

THE PETITION

[3] By the Petition dated 1st December 2011, which was originally filed in the High Court at Nairobi as (Petition No. 291 of 2011 and subsequently transferred to Mombasa for hearing and disposal), the petitioners who describe themselves as ‘limited liability companies incorporated in Kenya [and] all maritime service providers operating within Kenya’ seek orders of the Court as follows:

- i. A declaration that Regulation 5(1) requiring 51% Kenya shareholding in a maritime service provider is discriminatory and unconstitutional as being inconsistent with Article 27 of the Constitution and is void to the extent of its inconsistency.*
- ii. A declaration that Regulation 5(1) denies the Petitioners their right to equal protection and benefit of the law as guaranteed by Article 27 of the Constitution and the Foreign Investment Protection Act and is void to the extent of its inconsistency with the Constitution.*
- iii. A declaration that the rights of the Petitioners’ and the Petitioners’ shareholders, individually or in association with others, to acquire and own property without being arbitrarily deprived of the same as guaranteed by Article 40 of the Constitution have been and will be contravened by Regulation 5(1) and Regulation 22 of the Regulations which Regulations are void the extent of their inconsistency with the Constitution.*
- iv. A declaration that the Petitioners’ right, individually or in association with others, not to be compelled to join an association of any kind as guaranteed by Article 36 of the Constitution have been and will be contravened by Regulation 7(1) of the Regulations, which Regulation is void to the extent of its inconsistency with the Constitution.*
- v. A declaration that Regulations 5, 7,11,13,14,15,17,18 and 19 and the Application Form for a License as a Maritime Service Provider as set out in the Second Schedule to the Regulations infringe the Petitioners right to a fair administrative action as guaranteed under Article 47 of the Constitution, are arbitrary and unjust in a democratic society, and are void to the extent to their inconsistency with the Constitution.*
- vi. A declaration that Regulations 6, 7, 9, 13, 15, 17, 18, 19 and 20 of the Regulations are inconsistent with Article 29 of the Constitution by reason of prescribing cruel, oppressive and disproportionate punishment and are void to the extent of their inconsistency.*
- vii. A declaration that Regulation 17 and 19 of the Regulations infringe on the Petitioners’ right to privacy as guaranteed by Article 31 of the Constitution, are unconstitutional and are void to the extent of their inconsistency with the Constitution.*
- viii. A declaration that Regulation 11 of the Regulations infringes the Petitioners’ right to fair*

labour practices under Article 41, is unconstitutional and is void to the extent of its inconsistency with the Constitution.

ix. A declaration that the Regulations are contrary to and in breach of the international treaties and conventions ratified by Kenya contrary to Article 2(6) of the Constitution and are void to the extent to their inconsistency with the Constitution and in particular, a declaration that the Regulations are contrary to and are in breach of provisions of the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights pursuant to Article 2 of the Constitution and are invalid.

x. A declaration that the Minister for Transport does not have the power or legal authority to create offences or impose penalties as purported under the Regulation and all references to offences and penalties under the Regulations are invalid and ultra vires the powers of the Minister and ultra vires the Act.

xi. A declaration that the Regulations are generally inconsistent with the Constitution and are void to the extent of their inconsistency.

xii. A declaration that the Regulations are ultra vires the Merchant Shipping Act (Act No. 4 of 2009).

xiii. An order of prohibition or injunction restraining the implementation or coming into force or continuing of the operation of the Regulations.

xiv. An order of prohibition restraining the Respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the impugned Regulations.

xv. An order of prohibition restraining the Respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from declining to issue or renew to the Petitioners the various requisite licenses on expiry of their current year 2011 licenses or otherwise preventing the Petitioners from operating in their normal course of business to date when their current year 2011 licenses expire on the grounds of non-compliance with of the requirements of the impugned Regulations.

xvi. The Honourable Court do issue orders and give such directions as it may deem fit to meet the ends of justice.

xvii. The costs of the Petition be awarded to the Petitioners.”

[4] The petitioners based their Petition upon averments set out in Part C of the Petition as follows:

“C. THE MATTERS COMPLAINED OF

Your Petitioners are aggrieved by the Regulations as they are both unconstitutional and ultra vires the Act itself.

In making and formulating the Regulations, the Respondents jointly or any of them separately, have given little or no consideration to the rights and fundamental freedoms of the Petitioners as guaranteed by the Bill of Rights in the Constitution of Kenya 2010 (“**the Constitution**”), or to the principles of Governance set out in Article 10 of the Constitution in making the Regulations. Specifically, the Respondents have acted in breach of, infringed on, or have threatened to infringe various provisions of the Constitution.

12. Article 27 – Equality and Freedom from Discrimination

Article 27(1) of the Constitution provides that “every person is equal before the law and has the right to equal benefit of the law”. A “person” is defined in Article 260 of the Constitution to include a company, association or other body of persons whether incorporated or unincorporated. No distinction is made between persons who are Kenyans and non-Kenyans. Crucially, nowhere in the Constitution is there any indication that any of the rights and fundamental freedoms under the Bill of Rights are reserved only for Kenyans. Rather, it is amply clear that all persons, irrespective of their nationality, are entitled to the full protection of our Constitution once they are within the territorial limits of the Republic of Kenya. The Constitution does not tolerate or countenance the concept of individuals and corporations being lesser beings because they are somehow “foreigners” or “outsiders”. The people of Kenya in formulating and promulgating this Constitution have made it clear that they have no tolerance for xenophobia of the kind that these Regulations, and particularly Regulation 5, indulge in. Regulation 5 prevents the Petitioners from being equal before the law and denies the Petitioners equal benefit of the law in the right to apply for and obtain the requisite licences to operate as Maritime Service Providers under the Maritime Shipping Act, for which they are all more than amply qualified. Regulation 5 is therefore in breach of Article 27(1).

Article 27(2) of the Constitution provides that “equality includes the full and equal enjoyment of all rights and fundamental freedoms”.

Applying for a licence and carrying on the business of a Maritime Service Provider is the right of all qualified companies and individual and the concept of equality means that everyone is entitled to the full enjoyment of such a right. Yet Regulation 5(1) denies such right to the Petitioners and is therefore in breach of Article 27(2).

Article 27(4) states that “The State shall not discriminate directly or indirectly against any person on any ground, **including** race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.” (emphasis added).

Clearly, Article 27(4) prohibits discrimination on all grounds and that must include the ground of nationality, even if it is not one of the specific examples given of grounds of discrimination. The provisions of Article 27 are applicable to and are to be enjoyed by all persons, and are not restricted to citizens of Kenya only, for Article 27(4) does not say that the State shall not discriminate against a Kenyan person; it clearly prohibits discrimination against “any person”. Yet, contrary to Article 27, the State through Regulation 5(1) denies Maritime Service Providers, including the Petitioners, the licences for carrying on business in Kenya as Maritime Service Providers if 51% of their shares are not owned by Kenyan citizens.

These provisions contravene the Constitution and grossly infringe upon the Petitioners’ rights and fundamental freedoms enshrined and guaranteed by Article 27 of the Constitution in that the Petitioners and their shareholders:

- a) Have not been treated equally before the law (Article 27(1)) because of the discrimination between Kenyans and non Kenyans.
- b) Have been denied the right to equal protection and benefit of the law (Article 27(2)) in that they will be denied the licence required for operating as Maritime Service Providers and thus be forced to shut down.
- c) Have been blatantly discriminated upon by the State on grounds of nationality (Article 27(4)) and their shareholders stand to be coerced into selling or transferring to Kenyan citizens the majority control of their companies. Obviously, they will be at the mercy of the limited available market and will be compelled to sell their shares at throw away prices as well as hand over control and benefit of the Petitioners companies.

13. Article 40 – Right to Property

Article 40(1) of the Constitution guarantees the right of every person to freely own and dispose of property. It provides that “Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property (a) of any description and (b) in any part in Kenya”.

Article 40(3) prohibits the State from depriving a person of property of any description, or of any interest in, or right over, property of any description.

By the provisions of Regulations 5(1), the State has infringed and violated the Petitioners’ and their shareholders’ right to ownership of property and more specifically under Article 40(1) which allows every person to acquire and own property of any description and in any part of Kenya. Through Regulation 5(1), the Minister has not only deprived your Petitioners and their shareholders of their ownership of a Maritime Service Provider but also deprived them of the right to freely enjoy their shareholding interests in their businesses which is clearly prohibited under Article 40(2).

The violation of your Petitioners’ right to property is exacerbated by the strict and short timelines that your Petitioners, other Maritime Service Providers and their shareholders are required to comply with attaining the shareholding requirements. The effect of Regulation 5(1) will be to compel the Petitioners’ shareholders to divest and sell their shares at throw away prices and hand over control of their companies in the very limited Kenyan market within the 6 month time limit set out in Regulation 22 if the Petitioners are to avoid being forced to close down their substantial businesses in Kenya.

Article 40(2) prohibits Parliament from enacting a law that permits the State or any person to (a) arbitrarily deprive a person of property, or of any interest in, or right over any property of any description or (b) limit or in any way restrict the enjoyment of any right under this Article (Article 40) on the basis of any of the grounds specified or contemplated in Article 27(4) (Discrimination).

By Regulation 5(1), the Minister has arrogated himself a power which is clearly inconsistent with the mandatory provisions of Article 40 of the Constitution and has, in exercise of the unlawful and unconstitutional power, arbitrarily deprived and restricted the enjoyment by the Petitioners and their shareholders their right to acquire, own, have the benefit of stand freely dispose of shares in a Maritime Service Provider company by reason solely of their nationality, which discriminatory.

The action by the Minister to purportedly and unlawfully limit the two fundamental rights of ownership of property and freedom from discrimination is not saved by the provision in Article 24 of the Constitution which allows for the restricted limitation of rights and fundamental freedoms, because the power to make a law limiting the fundamental rights and freedoms in the Bill of Rights:

- a) Is a preserve of Parliament through an Act of Parliament, and cannot therefore be exercised by any of the Respondents through subsidiary regulations;*
- b) If Parliament chooses to exercise the power, it must expressly state that the purpose of the law is to limit a specified right and set out the reasons, extent and nature of the limitation.*
- c) The power can only be exercised if the limitation is justifiable in a civilized and democratic society and where the proposed limitation is discriminatory, it must be aimed at addressing past or historical injustices to a class of persons. Clearly, there are no historical injustices to any class of persons affected by the Regulations.*

14. Article 36 – Freedom of Association

Regulation 7(1) requires the Petitioners and Maritime Service Providers licensed under the Regulations to join and be governed by rules of an unspecified association and on terms to be set by the Authority. The primary responsibility of the association is to provide and monitor a code of conduct and standards through service level agreements and the Authority may revoke its recognition if in its opinion the association is not carrying out its primary responsibility.

The effect of Regulation 7(1) is to unnecessarily, unreasonably and unlawfully compel the Petitioners to compulsorily be members of an association contrary to the provisions of Article 36(1) which provides that “Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind” and Article 36(2) which provides that “A person shall not be compelled to join an association of any kind”.

The Petitioners, as with other persons in Kenya, should be at liberty to choose to join or not to join an association. Further, the association referred in Regulation 7 is unspecified and does not exist.

The concern is that the association will be one established or appointed by and thereafter controlled by the Authority since it can withdraw its recognition, and the Regulation is thus viewed as a means of direct control and potential intimidation of the Petitioners and other Maritime Service Providers by the Authority.

To require the Petitioners to compulsorily join an association is to directly infringe on their freedom of association under Article 36 and cannot be allowed in a democratic society governed by the rule of law.

15 Article 47 – Fair Administrative Action

The effect of Regulations 5, 7, 11, 13, 15, 17, 18 and 19 of the Regulations is to give the Authority arbitrary, unchecked and unreasonable powers including unnecessary control of trade, unspecified required standards and qualifications among others which is a blatant contravention of Article 47(1) of the Constitution which provides that “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

Clearly, the Regulations are unreasonable, unlawful and unfair, particularly when inadequate consultation has been carried out by the Minister or the Authority with the Maritime Service Providers and where no regard has been given to the views and opinions of the Maritime Service Providers or the industry expressed in such consultation if any. Rather it has been a unilateral imposition of the views and whims of the Minister and the Authority.

a) Regulation 5(7) allows the Authority to specify the minimum share capital to be maintained by a Maritime Service Provider, Regulation 5(8) allows the Authority to require a Maritime Service Provider to show that it has complied with the 51% requirement and Regulation 5(9) allows the Authority to decline to issue a licence to a Maritime Service Provider.

b) Regulation 7 compels a Maritime Service Provider to join an association which is to be approved by the Authority and whose recognition can be revoked by the Authority at its own discretion.

c) Regulation 9 creates criminal offences and outrageous penal sanctions of imprisonment for three (3) years or a fine of Kshs. 10 million or both for failure to comply with the terms and conditions of a license, ceasing to hold required qualifications, failure to renew a license within the period set out in Regulation 8 or meet the standards specified in the license.

d) Regulation 11 compels Maritime Service Providers to ensure that their staff are professionally qualified based on unspecified educational standards and also ensure that

within five (5) years of the Commencement Date, 60% of the management staff will have successfully sat and passed unspecified professional examinations.

e) Regulation 12 provides for professional misconduct of Maritime Service Providers and allows the Authority come up with other issues that it may deem to be unprofessional.

f) Regulation 13(3) creates a criminal offences and penal sanction for failure by a Maritime Service Provider to notify the Authority within 14 days of change in its particulars including change in directors, company name, location or shareholding.

g) Regulation 15 creates a criminal offence and penal sanction if a Maritime Service Provider fails to inform the Authority of any change in the information provided in the application form.

h) Regulation 16 gives the Authority arbitrary, unnecessary, unreasonable and unchecked powers to commence a disciplinary enquiry and mete out sanctions on Maritime Service Providers.

i) Regulation 17(1) and (2) gives the Authority the arbitrary, unreasonable and unchecked power to require a Maritime Service Provider to file its tariff details and deprives a Maritime Service Provide freedom to amend its tariff without notifying the Authority. Under Regulation 17(4), a Maritime Provider is compelled to charge in Kenya shillings for services delivered locally only.

j) Regulation 18 gives the Authority the arbitrary power to compel a Maritime Service Provider to file any reports, freight manifests, answers to questions or any other information which the Authority finds appropriate including confidential issues.

k) Regulation 19 gives the Authority arbitrary and unchecked sweeping powers of entry in a Maritime Service Providers' premises.

l) The form for **Application For A Licence To Operate As A Maritime Service Provider**, appended as the Second Schedule to the Regulations is wholly invasive and demands particulars which are unnecessary and inappropriate, including details such as "foreign shareholding", the academic qualifications, professional qualifications and years of experience of directors and shareholders (as opposed to that of the management), photographs of directors duly notarised and confidential agency agreements, as well as proposed tariffs in an obvious bid to control tariffs, none of which are an objective of the Act.

Clearly, the above Regulations and the invasive application form for the licence are contrary to the right to a fair administrative action as they give the Authority arbitrary, unchecked and unnecessary powers to control trade contrary to the freedom of trade.

Fair administrative action requires the decision making process to be expeditious, efficient, lawful, reasonable and procedurally fair. In making the Regulations, the Petitioners were barely consulted and important decisions touching on the maritime service sector were made without their input. The Respondents have shown every intention of enforcing the Regulations without affording the Petitioners an opportunity to air their concerns or give input on the important processes which gravely affect their businesses.

Further, Article 47(2) specifies that a person has the right to be given written reasons for the action where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action. None of the Respondents have informed the Petitioners or informed other Maritime Service Providers in writing why the Regulations are necessary or the reasons for them.

16. Article 31 – Right to Privacy

Regulation 17 requires a Maritime Service Provider to file tariff details showing the actual rates, charges and surcharges applied in providing services failing which it is an offence punishable by a term of not more than three (3) years or to a fine of KShs. 10 million or both. Regulation 18 allows the Authority to compel a Maritime Service Provider to file reports regarding any matter that it finds appropriate and failure thereof attracts similar sanctions.

Article 31 of the Constitution guarantees to every person the right to privacy of their affairs and of their communications and information. It provides that “Every person has the right to privacy which includes the right not to have (c) information relating to their family or private affairs unnecessarily required or revealed: or (d) the privacy of their communications infringed”.

Regulations 17 and 18 are inconsistent with Article 31 of the Constitution as they seek to compel the Petitioners and Maritime Service Providers to provide information relating to their confidential business affairs in matters that only concern them and their customers but not the Authority or the State. They allow the Authority the discretion to require any information that it deems appropriate. This is a direct infringement of the Petitioners’ right to privacy, or more appropriately business confidentiality, which is totally unjustified and unreasonable. Customers are not compelled to accept the tariffs of any single Maritime Service Provider – the tariffs are those of a willing buyer and willing provider. The Respondents have expressed no reason or lawful purpose for requiring such disclosure.

The Petitioners have the right to privacy including the right not to have information relating to private or business affairs unnecessarily required or revealed.

17. Article 41 – Fair labour practices

Regulation 11 requires 60% of management staff of a Maritime Service Provider to have unspecified educational qualifications within five years of the Commencement Date. If implemented as drafted, it will force the Petitioners and Maritime Service providers to lay off their employees in order to recruit new ones who have held the unspecified educational qualifications. This fails to take into account that fact that currently there are large numbers of management employees including senior officers who have risen to their positions by reason of experience and ability and not paper or academic qualifications. Whilst encouraging staff to obtain qualifications would be good for the industry, jeopardising the careers of senior experienced managers is uncalled for, unnecessary, disruptive and unfair.

It would be unfair to lay off permanent employees on the basis that even though the employer is satisfied with their services, they have not attained the unspecified educational qualifications.

Article 41 (1) states that “every person has the right to fair labour practices.” Fair labour practices include being afforded the protection of the labour laws and contracts of employment. To require a Maritime Service Provider to have a certain specification for its staff would be to infringe on this right.

18 Article 29 – freedom and Security of the Person

Article 29 of the Constitution states:

“Every person has the right to freedom and security of the person, which includes the right not to be:

.....

(f) treated or punished in a cruel, inhuman or degrading manner.”

The Regulations have introduced stringent, grossly disproportionate and oppressive punishment for minor infractions of regulatory procedures. For instance, the Regulations prescribe a penalty of Kshs. 10 million and/or a prison sentence for 3 years for:

a) Failure to notify the Authority of a change of directors or other corporate details (Regulations 13(3) and 14(2)); or

b) Failure to report with the Authority in time tariffs, cargo manifest or other documentary materials that the Authority may require (Regulation 18(3)); or

c) Flouting simple cargo handling procedures (Regulation 20(4)).

It is inexplicable that there can be such oppressive and stringent criminal punishments for failure or delay in complying with such simple regulatory reporting functions, which in any event do not affect the substance of maritime services.

The punishments set forth in the Regulations being oppressive, harsh, cruel, disproportionate and unreasonable are therefore in breach of Article 29 of the Constitution.

*In addition, in formulating the penalties under the Regulations, the Minister acted ultra vires his powers. Parliament did **not** by the Act delegate, vest in or authorise the Minister to impose or prescribe criminal sanctions for breach of the Regulations. Accordingly, the Minister had no capacity or authority for imposing such criminal sanctions which impact on and deprive the liberty of the individual and impose severe financial penalties for all persons.*

Section 31 of the Interpretation and General Provisions Act which provides for sanctions is of no assistance to the Minister. The Section provides that “there may be annexed to the breach of subsidiary legislation a penalty, not exceeding six thousand shillings or such term of imprisonment not exceeding six months, or both, which the authority making the subsidiary legislation may think fit.” By prescribing a penalty which is way above the statutory maximum prescribed in an Act of Parliament, the Minister acted illegally and in excess of his powers and as a result infringed upon the constitutional rights of your Petitioners. This provision would not assist either if the sanctions actually prescribed were in any case so excessive as to be in breach of Article 29 of the Constitution.

19. Permissible Limitation of Rights and Fundamental Freedoms – Article 24

The Regulations purport to limit the Petitioners, Maritime Service Providers and their shareholders their constitutional rights and fundamental freedoms guaranteed by the Bill of Rights. Under Article 19(3) of the Constitution, “the rights and fundamental freedoms in the Bill of Rights (a) belong to each individual and are not granted by the State and (c) are subject only to the limitations contemplated in this Constitution”.

Under Article 20(2) of the Constitution, “Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right of fundamental freedom.”

Article 24(1) of the Constitution it is amply clear that a right or a fundamental freedom cannot be limited except by law and only then to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.

More importantly, a provision in legislation limiting a right or a fundamental freedom is invalid unless the legislation specifically expresses the intention to limit the right, the nature and the extent of the limitation. This is under Article 24(2) (a) of the Constitution.

The Minister has purportedly sought to unlawfully limit the rights and fundamental freedoms of the Petitioners, Maritime Service Providers and their shareholders including the right to property, freedom from discrimination, right to privacy, right to a fair administrative action, and right to protection of the law among others by using subsidiary regulations.

Clearly, the Minister cannot and does not have the power to limit any of the power to limit any of the rights and fundamental freedoms guaranteed by the Constitution. No such powers have been delegated to the Minister under Section 8 of the Act and an attempt to limit the rights and fundamental freedoms would be unconstitutional and usurpation of the doctrine of separation of powers.

20. Article 2(6) of the Constitution – International Treaties

Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.

Declaration of Special Arrangement for the Reciprocal Promotion and Protection of Investments.

*In exercise of the powers conferred under section 8B of the Foreign Investment Protection Act (Chapter 518, Laws of Kenya), the Government of Kenya has entered into bilateral treaties known as Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments (the “**Treaties**”) with France, the Islamic Republic of Iran, the Republic of Burundi the OPEC Member States (that is, Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates And Venezuela), the Swiss Confederation and the Republic of Finland (hereinafter collectively referred to as the “**Contracting Parties**”).*

The Treaties contain a provision for the fair and equitable treatment of investments by investors of the other contracting party. Specifically, each contracting party is to accord investors of the other contracting party and their investments, a treatment no less favourable than the treatment it accords to its own nationals and their investments.

Regulation 5 is in breach of these Treaties in that it seeks to positively discriminate against and bar investors from the Contracting parties from continuing to operate as Maritime Service Providers or entering the industry in Kenya. It is submitted that Regulation 5 is therefore invalid as being in contravention of the Treaties and in contravention of Article 2(6) of the Constitution.

The 1st Petitioner (SDV Transami Kenya Limited) being a wholly owned subsidiary of Bollore, a major international French group, further relies on Articles 3, 4 and 6 of the Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments between the Government and the Government of the Republic of France entered into on 4th December, 2007, to petition that Regulation 5 be declared unconstitutional. Article 3 of the Declaration provides for the fair equitable treatment of investors but more importantly Article 4 states that each contracting party shall accord to investors of the other contracting party and to their investments, a treatment no less favourable than the treatment it accords to its own investors and their investments

Similarly Article 6(1) states “The investments made by investors of one Contracting Party shall enjoy full and complete protection and safety in the territory of the other Contracting Party” while articles 6(2) states “Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures depriving directly or indirectly, an investor of the other Contracting Party of an investment unless the following conditions are complied with:

- i) the measures are taken in the public or national interest and in accordance with the law*
- ii) the measures are not discriminatory*

iii) provisions for the payment of prompt and full compensation to accompany the measures.”

The International Convention on Civil and Political Rights

Article 1 of the International Covenant on Civil and Political Rights (acceded to by Kenya on 1st May 1972) (the “**ICCPR**”) provides as follows:

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

Article 2 of the ICCPR states:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

Article 26 of the ICCPR provides that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Regulation 5 clearly breaches the ICCPR which has the constitutional force of law through Article 2(6).

African Charter on Human and People’s Rights

Article 3 of the African Charter on Human and People’s Right (ratified by Kenya on 10th February, 1992) (the “**ACHPR**”) provides that every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law. Regulation 5 which discriminates between different individuals of different nationalities and does not offer equal protection to all individuals infringes the Charter.

Article 10 of the ACHPR every individual shall have the right to free association provided that he abides by the law. Paragraph 2 states that “Subject to the obligation of solidarity provides for in article 29 no one may be compelled to join an association”.

Regulation 7 contravenes the provisions of Article 10 of the ACHPR and therefore Article 2(6) of the Constitution.

21. The Regulations are Ultra Vires the Act.

Under the Act, the Minister is given power to **(a)** administer and implement the Act **(Section 4)**, **(b)** give directions to the Authority **(Section 7)**, and **(c)** make regulations generally for the better carrying out into effect the provisions of the Act **(Section 8)**.

The objective of the Regulations cannot be said to be in tandem with the provisions of the Act and they are ultra vires as:

- a) The Act does not seek anywhere to limit the rights and fundamental freedoms of Maritime Service Providers nor is the Minister empowered to make any law that purports to limit the rights and fundamental freedoms of Maritime Services Providers.
- b) Nowhere does the Act promote or seek to restrict or control the shareholding in Maritime Service Providers based on nationality as purported by Regulation 5, or to “Kenyanise” the Maritime Service industry by requiring a 51% ownership by Kenyan citizens. This is a hark back to the discredited nationalization policies of the 1970s but more important it is unconstitutional. Parliament itself, let alone the Minister, does not have the power to limit ownership in Maritime Service Providers as purported.
- c) There is no indication that it is the Act’s objective to compel Maritime Service Providers to join associations as purported by Regulation 7.
- d) There is no indication that the Act seeks to punish a Maritime Service Provider which is a company for failure to notify the Authority of changes in its particulars as purported by Regulation 13 as there are other sanctions in the Companies Act, or to punish a Maritime Service Provider with imprisonment of three years for failure to inform the Authority of any change in the information provided in the application form as purported by Regulation 15.
- e) There is no indication that it is the objective of the Act to give the Authority arbitrary, unnecessary, unreasonable and unchecked powers to commence disciplinary enquires and mete out sanctions on Maritime Service Providers as purported by Regulations 16.
- f) There is no indication that it is the objective of the Act to give the Authority arbitrary, unnecessary, unreasonable and unchecked powers to unnecessarily and unreasonably control the business of Maritime Service Providers as purported by Regulation 17 especially in respect of the mandatory use of the Kenyan currency for local services.
- g) There is no indicating that it is the objective of the Act to give the Authority arbitrary, unnecessary, unreasonable and unchecked powers to compel a Maritime Service Provider to file any reports, freight manifests, and answers to questions or any other information which the Authority finds appropriate including confidential issues under Regulation 18.
- h) There is no indication that it is the objective of the Act to give the Authority arbitrary, unnecessary, unreasonable and unchecked powers sweeping powers of entry in a Maritime Service Providers’ premises under Regulation 19.
- i) The Minister has no power to authority to create criminal offences and impose penalties such as fines and imprisonment, and particularly not such harsh criminal sanctions contained in these Regulations, by means of subsidiary legislation. Further, new offences other than those set out in the Act have been purportedly created by the Minister under Regulation 9.
- j) The Minister does not have the power to make any regulations which are contrary to other laws including the interpretation and General Provisions Act (providing for maximum offences in subsidiary legislation) and the Companies Act.

Clearly, in making these Regulations it appears that the Respondents have run amok.

22. *The Regulations are so intertwined and interconnected such that the illegality and unconstitutionality of the various Regulations specified above renders the other regulations illegal and unconstitutional, or at least unworkable.*

23. *The Regulations are therefore unlawful, illegal, and further constitute an infringement and/or a threatened infringement of the Petitioners constitution rights and fundamental rights and freedoms under the Bill of Rights as pleaded above. The Regulations will cause undue hardship to the Petitioners which cannot be compensated by way of damages.*

24. *The High Court has the jurisdiction under Article 23 of the Constitution, to enforce the protection of the rights guaranteed under the Bill of Rights in the Constitution.”*

[5] The petition was supported by the affidavit of Samson Ndegwa, chairman of the Board of Directors of the 1st Petitioner, on behalf of the petitioners setting out the petitioners' complaints as follows:

1. The Requirement by virtue of Regulation 5(1) of the Regulations that the maritime service providers be citizens or a company incorporated under the Companies Act with 51% shareholding by citizens will deny the petitioners who do not have a 51% Kenyan shareholding the renewal of licences as maritime service providers in the country;

2. There is inconsistency in the Act where Regulation 5(3) gives 18 months for those companies which do not have a 51% Kenyan shareholding to 'rectify' this state of ownership while Regulation 22 gives a grace period of 6 months only from the date that the Regulations come into force on 5th September 2011.

3. The petitioners as a group were the leading maritime Service Providers in the region who had invested heavily in Kenya with substantial assets, employees and they generate huge incomes for the Country, and a large number of them were subsidiaries of large global companies with capital, infrastructure and expertise in logistics and if denied licences for lack of the 51 % Kenyan shareholding, there would be a huge disruption of the maritime service. In addition this measure would drive away the foreign investors and force those who choose to remain to sell their controlling stakes at throwaway prices to a limited number of qualified purchasers.

4. There were no historical injustices or economic disadvantages in the industry as a result of which some maritime service providers were owned by non-Kenyan citizens.

5. The global trend in other fair and democratic societies across the world is towards the direction of free market and liberalization rather than nationalization of economies especially the maritime service which is a global industry.

6. The views of the Petitioners and other maritime service providers though presented before the Regulations were published were not taken into account, and the regulations do not reflect the views of the stakeholders in the industry.

7. The Regulations may breach confidentiality through demand for full disclosure to the 3rd Respondent Authority under the pain of criminal sanctions.

8. The Regulations unreasonably impose compulsory association on the petitioner while there is voluntary association under Kenya Shipping Agents Association.

9. The Regulations requirement that 60% of the management staff do attain unspecified professional standards will cause discrimination, hardship and compulsory redundancies among senior management professionals who have advanced in their careers by long experience thus affecting competence in the industry.

10. The Regulations give arbitrary power on the Authority as a regulator to impose grossly

disproportionate penalties such as fines up to Ksh,10,000,000/- and imprisonment for minor inconsequential infractions such as failure to notify or report information on directors and tariffs of the maritime service providers.

11. The Regulation 5 on the 51% Kenyan shareholding is, with respect to the 1st petitioner a wholly owned subsidiary of the French international group **Bollere**, a breach of the Declaration of Special Arrangements for Reciprocal Promotion of Investments between the Government of Kenya and the Republic of France entered into on 4th December 2007, Articles 3 and 4 whereof guarantees investors of the one contracting party and their investments, fair and equitable treatment, and treatment by the other contracting party that is no less than favourable than the treatment that other contracting party accords to its own investors and their investments.

12. The petitioners contended that the Regulations are contrary to the Constitution of Kenya 2010 in the manner shown in the Petition, as set out above.

RESPONSE

[6] In response to the Petition, the 3rd Respondent filed a Replying Affidavit sworn on 29th March 2012 by Nancy Wakarima Karigithu (Mrs.), then Director General of the Kenya Maritime Authority in which it is detailed the 3rd Respondent's case in the matter, as follows:

1. No authority is given by 2-20 petitioners for the 1st Petitioner's Chairman of the Board to make an affidavit on the facts on their behalf, and accordingly seeks the expunction of the said petitioners from the proceedings.

2. The 2nd Respondent Minister has a very broad statutory mandate under section 8 of the Merchant Shipping Act, 2009 to enact appropriate subsidiary legislation reasonably necessary for the better carrying out into effect of the overriding objectives of the Act including control, regulation and orderly development of merchant shipping and related services and that such powers conferred all powers reasonably necessary to enable the Minister to enforce or secure compliance with the Regulations.

3. The 3rd Respondent also relied on section 4 of the Merchant Shipping Act which gives the minister in addition to any other power under the Act a responsibility to for administration and implementation of the Act, the purposive interpretation of which gives the Minister legal authority and power to take any reasonable action for the control, regulation and orderly development of the Merchant Shipping and related Services.

4. Paragraphs 20 - 26 of the Replying Affidavit set out the background and rationale for the Regulations as being to establish fair competition, high standards of professional and ethical conduct and competence, and qualification of maritime service providers in the interests of stability and sustainability of the sector as follows:

“Replying Affidavit of 3rd Respondent Nancy Karigithu (Mrs.) dated 1st December 2011

20. That the Kenya Maritime Authority was established by the Government of Kenya way back in 2004, for the purpose of transferring areas of responsibility over shipping concerns from the Merchant Shipping Department of Kenya Ports Authority to an independent Governmental Authority (parastatal). Thus KMA, under the Incorporation Order, was responsible for Port and Flag State implementation of various international Instruments relating to maritime transport. The creation of Kenya Maritime Authority in June 2004 marked a defining moment in the maritime history of Kenya. It formally signaled the country's commitment and readiness to the development of all aspects of the maritime sector with particular emphasis on, among other things, the creation maintenance and regulation of the Kenyan maritime industry in which maritime services could be provided in an orderly,

fair and efficient manner.

21. *That despite this new and important statutory role, it soon became apparent that due to the lack of a strong legal, institutional and administrative framework contained in the **Merchant Shipping Act of 1967** (a derivative of the United Kingdom Shipping Act of 1894 which underwent numerous amendments in keeping with modern developments while the Kenyan Act remained largely the same), the administration of the maritime sector was still inadequate, and that a national maritime legislation was a necessary tool for attaining not only international standards but also a proper and efficient regulatory regime relating to all waters under its jurisdiction for security and safety, protection against pollution and promotion of local participation.*

22. *That it is against this background that the **Kenya Maritime Authority** was formally established under Section 3 of the **Kenya Maritime Authority Act, 2006** as a successor in title to the parastatal. The principal object of the authority under **Section 4** of the **Kenya Maritime Authority Act, 2006** is to regulate, coordinate and oversee maritime affairs. For these reason, the Kenya Maritime Authority has, under Section 5 of the Kenya Maritime Authority Act, 2006, been specifically mandated with the duty to administer and enforce the provisions of any legislation relating to the maritime sector for the time being in force.*

23. *That of much significance to these proceedings is that the Merchant Shipping Act of 1967, Cap. 389 was a derivative of the United Kingdom Shipping Act of 1894, and as at the time of repeal, was over 30 years old, outdated and was grossly inadequate to cover not only the important international shipping and maritime conventions to which Kenya was a party, but did not in any way provide a legislative framework to enable proper regulation and administration of maritime services and their providers. It simply was not relevant and responsive to the needs of not only the industry itself and its public stakeholders.*

24. *That while Kenya continued to operate under the grossly outdated Merchant Shipping Act of 1967, Cap 389 which was not relevant and responsive to the needs of not only the industry itself and its public stakeholders, other countries had over the years put in place a statutory regulatory framework formulated for the purposes of regulating maritime operations, protecting fair competition, maintaining order in their respective jurisdictions in respect of international maritime transportation market and safeguarding the lawful rights and interests of all relevant parties and stakeholders involved in international maritime transportation.*

25. *That in the context of these proceedings, the real impact of the unresponsive nature of the Merchant Shipping Act of 1967, Cap 389 can only be properly understood, by considering what would naturally result in a country that had a grossly outdated and weak legislative framework vis-à-vis maritime operations in an increasingly global environment:-*

(i) It is common knowledge that shipping is a highly internationalized industry, being operations in an increasingly globalized environment, this globalization brings with it particular challenges to developing countries that seek to convert from a weak and unresponsive regulator system to one which safeguards the lawful rights and interests of all relevant parties and stakeholders, and Kenya is no different.

(ii) while continuing to operate under archaic laws for the past 32 years, the nature of competition in the maritime and port industry gradually changed from a competitive struggle between individual shipping companies and other maritime providers to one involving maritime logistic chains connecting origin and destination, which more often than not, are controlled by few players.

(iii) By reason of stronger regulatory controls in other countries, a county such as Kenya with a weak regulatory system or lax enforcement measures, provided a

*hospitable environment for both local players and global chains to profit without **the incentive** to promote and enforce high standards of professional and ethical conduct, or indeed promote the attainment of the highest standards of competence, and qualifications among respective maritime service providers. Even where the service providers could be said to have put in place individual regulatory standards, there was no systematic, objective or rational basis for the assessment or improvement of such measures at an industry level made up of hundreds of entities in the various categories of maritime service provers.*

26 That the situation stated hereabove discloses, in summary, the context in which the KMA addressed the important questions of **(1)** where the maritime industry was at the time **(2)** where the wider interests of not only the industry itself and its public stakeholders required it to be; and **(3)** how to reconcile the gap between an industry that had operated for years without any proper or meaningful administrative or regulatory framework and the need to have an administrative and regulatory framework within which the service providers could aggressively pursue their interests in an orderly, fair and efficient manner that promoted, among other things, fair competition, high standards of professional and ethical conduct, the attainment of the highest possible standards of competence, and qualifications among respective maritime service providers, in the wider interests of a stable and sustainable maritime services sector.”

5. At paragraphs 27 - 29, the Director General of the 3rd Respondent blames resistance to change on the part of the petitioners, who have over long period benefitted from loose self-regulation under the regime of the predecessor Merchant Shipping Act, 1967, in opposition to the 3rd Respondent’s mandate to promote growth and regulate the Maritime industry pursuant to the Merchant Shipping Act of 2009.

6. The Regulations were clearly authorized within the 2nd Respondent legal authority to make regulations for the control, regulation and orderly development of merchant shipping and service and related service and were *reasonable* in the context of the weak legal framework of the former Merchant Shipping Act, 1967 under which the petitioners had operated for the past 32 years and in order to further the objects of the Merchant Shipping Act, 2009, and were justified under Article 24 limitation of rights and could not be said to amount to *unreasonableness*.

7. Accordingly, the Director General of the 3rd Respondent concluded that **“the Merchant Shipping (Maritime Service Providers) Regulations 2011, have in my view appropriately bridged the gap mentioned in Paragraph 26 hereabove, in a manner that ensures that the enjoyment of rights and fundamental freedoms by the petitioners do not prejudice the rights and fundamental freedoms of others.”**

The replying Affidavit then separately responds to each contention by the petitioners of breach of constitutional rights.

SUBMISSIONS

[7] The 1st and 2nd Respondents indicated through Counsel that they would rely on the pleadings and affidavits filed by the 3rd respondent as the Responsible agency of the Government.

The Petitioners filed a further affidavit of 27th May 2012 and submissions dated 14th June 2012.

The 3rd Respondent filed its Submissions dated 15th May 2014, and a Reply thereto by the petitioners dated 30th June 2014 was filed. Counsel for the parties – Mr. Oraro appearing with Mr. Asige for the Petitioners, Mr. Eredi for the 1st and 2nd Respondents and Mr. Moya for the 3rd Respondent - then made oral submissions highlighting their written submissions, which concluded on 16th January 2015 and

Judgment was reserved.

[8] However, Judgment was delayed and before it was delivered, by Notice of Motion dated 4th June 2015, the Container Freight Association of Kenya (CFSA) successfully moved the Court to be joined as Interested Party and by its ruling of the Court dated 21st December 2015 gave directions for it to file submissions in the matter with leave to the Petitioners and the Respondents to file submissions in reply thereafter upon service. The Interested Party filed its submissions dated 13th January 2016. For the Petitioners, Submissions in Reply dated 2nd February 2016 were filed in response to the submissions of the Interested Party.

[9] In apparent error, as pointed out in the Petitioners' Replying Submissions dated 2nd February 2016, it appears the Interested Party's Counsel, Mr. Buti, made elaborate and substantive submissions on **Petition No. 18 of 2010**, which is pending before the Court and not the Petition No. 76 of 2012 which is the subject of this Judgment. The Interested Party's brief submission on the subject of **this** Petition is set out in the Submissions of 13th January 2016 as follows:

“Submission by Interested Party dated 13th January 2016

F. Comment on Petition NO. 76 of 2012

(Formerly Petition No. 291 of 2011)

27. *In terms of the orders of this Court referred to earlier, this petition is to await the outcome of the determination in **Petition No 91 of 2011** (formerly No 18 of 2010). Submissions on this Petition (**91 of 2011**) have been fully tendered above.*

28 *By Paragraph 7 of **Petition No 76. of 2012**, the petitioners therein also predicate their claim on the alleged unconstitutionality of **Section 16** of the Act. They then reproduce in that paragraph the complaints raised by the Petitioners (some of whom are the same in both petitions) that are set out in paragraph 13 in **Petition No 91 of 2011** (formerly no 18 of 2010).*

29 *For reasons of similarity outlined in paragraph 28 above it is here submitted that the reasons advanced by the Interested Party in these submissions urging for the dismissal/striking out of **Petition No 91 of 2011** similarly apply to **Petition No 76 of 2012**. In the result, it is submitted that such dismissal should similarly be extended to petition No 76 of 2012, together with all other complaints concerning the inappropriateness of the Regulations made under the Act, as sought by the said petitioners in **Petition No 91 of 2011** (formerly no 18 of 2010).*

This latter calamity on the complaints concerning the regulations must follow as a necessary consequence of dismissing the petitioners' complaints levelled against section 16 of the Act.

In a nutshell, the complaint directed at the Regulations cannot be sustained, when the main complaint against the substantive section of the Act has itself been found of to be of no merit.”

ISSUE FOR DETERMINATION IN THE PETITION

[10] The Issue for determination in the petition is whether the Regulations made by 2nd Respondent Cabinet Minister for Transport and published as L.N. No. 112 of 2011 on the 9th September 2016 are unconstitutional and **ultra vires**, and therefore null and void for contravening the Constitution of Kenya 2010 and the enabling Act, the Merchant Shipping Act, 2009.

[11] The Court cannot in this Judgment make any determination on the pending Petition No. 18 of 2010 which challenges the constitutionality of section 16 of the Merchant Shipping Act, 2009 in order to avoid prejudging the merits of the Petition, which has not been argued before the Court.

DETERMINATION

[12] For good order, the preliminary issues of expunction of the 2-20 Petitioners for alleged want of authority to sue and that of limitation, or otherwise, by *sub-judice* rule of consideration of Regulation 5 of the Regulations by virtue of the previous suit in Petition No. 18 of 2010, will be considered at the out-set. Thereafter, an enquiry whether the Regulations were constitutional ***in terms of content*** shall be made before examination of the Minister's delegated legislative powers to make the Regulations under challenge because there can never be authority to make unconstitutional law.

[13] In considering the constitutionality of the Regulations as against the Bill of Rights provisions, the Court will adopt the constitutional test on rights and fundamental freedoms shaped by the limitation-of-rights clause under Article 24 of the Constitution, with the result that ***violation of the Bill of Rights without reasonable justification in accordance with the Constitution is unconstitutional***. The Court will, therefore, undertake a two-staged inquiry: firstly, whether there is a violation of a constitutional right and, secondly, whether the violation is justified under the criteria for limitation of Rights under Article 24 of the Constitution.

[14] It is convenient for exhaustive analysis of the Regulations as against the Constitutional or statutory provisions to discuss the different allegations of the breach of the constitution or statute one after another under the relevant rubric.

Preliminary Issues

Expunction of the 2nd – 20th Petitioners from the Proceedings.

[15] Objection was taken in the Replying Affidavit that the 1st Petitioner's deponent of the supporting Affidavit to the Petition did not demonstrate any authority to swear affidavit on behalf of the 2 -20 petitioners, and to make statements of facts in relation to them in support of the Petition. Counsel for the Petitioners urged Article 22 of the Constitution, which gives ***locus standi*** to present a petition even in public interest, and contended that the said Petitioners had sued in their own right but that they had, to save the Court's time, sent letters of authority to the Chairman of the 1st Petitioner's Board of Directors who had made the supporting affidavit to the Petition, and attached the same in the said deponent's Supplementary Affidavit of 28th May 2012.

[16] Article 22 of the Constitution of Kenya 2010 is in the following terms:

“22. (1) Every person has the 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.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;***
- (b) a person acting as a member of, or in the interest of, a group or class of persons;***
- (c) a person acting in the public interest; or***
- (d) an association acting in the interest of one or more of its members.”***

[17] It would appear that there was misunderstanding between Counsel as to the authority sought of the 2 - 20 Petitioners. The 3rd Respondent sought letters of authority from the petitioners 2-20 on the basis of the averment by the Chairman of the Board of Directors of the 1st Petitioner that he had authority to make the affidavit in support of the petition on behalf of the said petitioners. The Counsel for the Petitioners objected that there was no requirement for such authority as the petitioners 2 - 20 sued on their own

behalf. It is true that a person including a legal person such as the petitioners may sue on behalf of others who cannot sue in the names, or as a member or in the interest of a group or class, or in public interest in accordance with Article 22 of the Constitution. The Petitioners indicated that they sued in their own behalf and on behalf of other Maritime Service Providers.

[18] However, when a petition depends on facts as well as the law, a suitable affidavit should be filed. The confusion here appear to have arisen because, the Chairman of the board of Directors of the 1st petitioners appeared to depose to matters of fact on behalf of the Petitioners and a question of his authority to make statements of fact on behalf of the 2-20 Petitioners arose and the only way to demonstrate this was by affidavit. I agree with the 3rd Respondent that there are matters of fact stated by the deponent of the supporting affidavit, such as his being aware that some of the companies will close their operations in Kenya if the Regulations are implemented, the correctness and reliability of which can only be verified by the particular petitioners

[19] However, there are also matters of pure law such as the validity of the Regulations with regard to certain constitutional or statutory provisions, which do not require any averment on the facts. For instance, the question whether the Cabinet secretary had power under the Act to make certain the regulations is a question of true construction of the Act and does not depend on any factual deposition of the petitioners. Therefore, the challenge as to the constitutionality and legality of the 3rd Respondent's Regulations could be mounted even without any affidavit of facts, in accordance with procedure for litigation of Bill of Rights causes under ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013***.

[20] Rule 11 of ***The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*** provides as follows:

“11. (1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”

[21] In determining the constitutionality and ***ultra vires*** of the Regulations under challenge, the Court will consider the general effect of the Regulations in relation to the constitutional and statutory provisions and on the persons in the position, group or class of the Petitioners, and their specific circumstances will not matter so much. Indeed, from the Respondent's Replying Affidavit, which is improperly in my view, laden with matters of law and legal argument, which should have been filed as submissions, there appears to be little disputed facts in the circumstances of the case.

[22] If there is need to consider matters of fact, the Court will deal with the evidence given in support of the Petition on the basis of its quality, cogency and completeness with regards to the facts of the Petition in accordance with the rule of Evidence under the Civil Procedure Act that affidavit should be confined to matters of positive knowledge except where matters of information and or belief, sources and grounds where are disclosed, are admissible. Moreover, the Supplementary Affidavit of the Chairman of the Board of the 1st Petitioner of 25th May 2012 encloses authority letters to swear the affidavit to the Petition. The Court also noted two affidavits in support of the Petition filed for the 2nd and 8th Petitioners.

[23] Accordingly, the Court does not agree that the Petitioners nos. 2-20 should be struck out from the proceedings for want of letters of authority to the deponent of the Supporting Affidavit to sue and swear an affidavit on their behalf because the petition in their names would still be valid without affidavit and having themselves not indicated - as in the case of ***Patrick Njuguna & 9 Ors. v. Attorney General & 2 Ors.***, Nairobi Constitutional Petition No. 31 of 2001 cited by the 3rd Respondent - that they had not instructed the 1st Petitioner's Chairman to make the supporting Affidavit on their behalf.

Whether the consideration of Regulation 5 of the Regulations is barred by sub judice rule.

[24] The rule on **sub judice** is set out in section 6 of the Civil Procedure Act as follows:

“6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

[Act No. 10 of 1969, Sch.]”

[25] The Petitioners acknowledged the existence of the previous suit in Paragraph 7 of the Petition as follows:

“7. By Constitutional Petition No. 18 of 2010, a number of the Petitioners herein petitioned this Honourable Court to declare section 16 of the Act as unconstitutional and void on the grounds that section 16:

a) seeks to appropriate the Petitioners’ investments and existing rights as service providers in established and licensed businesses of ship agents and without compensation.

b) has created several penal provisions and offences which are unclear and which are retrospective in nature that are gravely prejudicial in operation and application given that the petitioners herein were established and licenced to carry on the trade as service providers in maritime industry well before the enactment of section 16 of the said Merchant Shipping Act, 2009.

c) is a violation of and runs contrary to the liberal services market economy and access commitments of the Republic of Kenya under the provisions of Agreement establishing the World Trade Organisation to which the Republic of Kenya is a signatory.

d) Seriously violates the Petitioners Constitutional and Fundamental Rights and Freedoms under the Constitution of the Republic.

e) The Petitioner/Applicants’ Fundamental Rights and Freedoms under the Bill of Rights in the Constitution of the Republic of Kenya have been violated, continue to be violated and are likely to be further violated with impunity by the Respondents.”

[26] The Respondents contended that the consideration of constitutionality of section 16 of the Merchant Shipping Act, 2009, which is the subject of Petition No. 18 of 2010 has a direct bearing on the determination of the validity of Regulation 5 of the Regulations made by the Minister herein. For the petitioners, it was submitted that the causes of action in the two petition were different, the Petition 18 of 2010 relating to the constitutionality of section 16 of the Act and the present petition being concerned with Regulations which were published after the institution of the earlier petition and the central question herein being discrimination of companies that do not have their majority shareholding held by Kenyan citizens and deprivation of their property rights as well as oppressive regulations with excessive punishments, which are not in issue in the earlier Petition No. 18 of 2010.

[27] Section 16 of the Merchant Shipping Act is in the following terms:

“16. Restriction on ship owner

(1) No owner of a ship or person providing the service of a shipping line shall, either directly or indirectly, provide in the maritime industry the service of crewing agencies, pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service as the Minister may appoint under section 2.

(2) Any person who contravenes the provisions of subsection (1) commits an offence and shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

[28] Regulation 5 (1) of the Merchant Shipping (Maritime Service Providers) Regulations 2011 provides as follows:

“5. (1) A person shall be eligible to be licensed as a maritime service provider if such person is a citizen of Kenya, or is a company incorporated under the Companies Act in which not less than fifty-one percent of the share capital is held directly by a citizen of Kenya.”

[29] Under the Merchant Shipping Act, **“maritime Service Provider”** is defined in section 2 thereof as follows:

““maritime service provider” means any person providing in the maritime industry the service of crewing agencies, pilotage services, clearing and forwarding agents, port facility operator, shipping line, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, ship broker, ship breaker, ship chandler, cargo consolidator, ship repairer, maritime training or such other service as the Minister may, by notice in the Gazette, appoint;”

[30] By section 16 of the Act, the ship owners and shipping lines operators cannot be maritime service providers within the meaning of section 2 of the Act.

[31] The Court agrees with the counsel for the Petitioners that on a true and technical construction the **sub judice** rule does not apply to this matter. Only some of the petitioners herein are parties in Petition No. 18 of 2010; the previous petition is a challenge on section 16 of the Act by owners of ships and shipping lines for the prohibition therein from undertaking the business of maritime service providers; and the present petition was filed after the promulgation of the Regulations in September 2011 giving rise to a different cause of action for the petitioners in discrimination, deprivation of the property and allegedly oppressive regulations and excessive punishments which were not in issue in the Petition No. 18 of 2010.

Whether Regulations in L.N. 112 of 2011 are Unconstitutional

[32] The Court will now examine the specific Regulations challenged by the Petitioners on the allegations of breach of constitutional rights. If the contents of the Regulations are **unconstitutional**, then Parliament, let alone the Minister who acts on delegated legislative powers, can never enact the laws and the Minister’s authority to make regulations for the better carrying out of the Act would not avail him in the circumstances, as no law shall be inconsistent with the Constitution because, in terms of Article 2 (4) of the Constitution, such a law would be void:

“(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

[33] The determination of the powers of the Minister to make Regulations and whether they are **ultra vires** the Act will, accordingly, be made after the determination of constitutionality of their content because despite valid delegated authority there can be no power to make **unconstitutional** laws or

regulations.

PRINCIPLES FOR INTERPRETATION OF THE CONSTITUTION

Construction in purposive manner

[34] Generally, the Constitution as a whole is to be interpreted in accordance with principles set out in Article 259 thereof, which requires a purposive interpretation as follows:

“259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.”

[35] In *Attorney General of The Gambia v. Jobe* (1985) LRC 556, the Judicial Committee of the Privy Council (Lord Diplock, Lord Elywyn-Jones, Lord Keith of Kinkel, Lord Scarman and Lord Brightman) held that –

“A Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons are entitled, is to be given a generous and purposive construction.”

[36] This coincides with the view taken in *NDYNABO vs. ATTORNEY GENERAL* [2001] 2 E.A. 485 where the court said:

“The Constitution is a living instrument, having a soul and consciousness of its own it must be construed in line with the lofty purpose for which its makers framed it. A timorous and unimaginative exercise of the judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document.”

[37] In exercise of its interpretative role, the Court may adopt the technique of reading provisions into (or out of) a Statute to give effect to the intention of Parliament or curing unusual ellipsis as in the case of *Attorney General of The Gambia v. Jobe*, supra, where the Privy Council held that a court had a *judicial duty* of incorporating by necessary implication provisions which prevent portions of an Act from contravening provisions of the Constitution, subject to severability of sections of the Act which are *ultra vires* and therefore void:

“The draftsmanship of those provisions of section 8 and 10 of the Act which their Lordships have just been examining, is characterised by an unusual degree of ellipsis that has made it necessary to spell out explicitly a great deal that is omitted from the actual words appearing in the sections and has to be derived by implication from them. In doing so their Lordships have applied to a law passed by the Parliament in which, by the Constitution itself, the legislative power of the Republic is exclusively vested, a presumption of constitutionality. This presumption is but a particular application of the canon of construction embodied in the Latin maxim **magis est ut valeat quam pereat** which is an aid to resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations. In passing the Act by the procedure appropriate for making an ordinary law for the order and good government of The Gambia without the formalities required for a law that amended Chapter III of the Constitution the intention if Parliament cannot have been to engage in the futile exercise of passing legislation that contravened provisions of Chapter III of the Constitution and was thus

incapable of creating the legal obligations for which it purported to provide. Where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect.

With notable exception of section 8(5) their Lordships have found no difficulty in construing section 8 and 10 of the Act as incorporating by necessary implication provisions which prevent these portions of the Act from contravening any of the provisions of the Chapter III of the Constitution.”

Principle of Severability of ultra vires or void sections of a law

[38] In **Jobe** at p.567, the Privy Council said:

“Section 8(5) of the Act contravenes the Constitution; it is ultra vires and therefore void.

*It is however, in their Lordship's view severable from the remaining provision of the Act. It complies with the test of severability laid down in **Attorney General for Alberta v. Attorney General for Canada**, [1947] AC 503, 518:-*

“The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair view of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.”

Section 8 (5) of the Act is odd man out both in the section itself and in the Act as a whole. It can in their Lordships' view be confidently assumed that the Parliament of the Gambia would have enacted the remainder of the Act without enacting section 8 (5) at all.”

Appropriate Relief

[39] The High Court decision of **Kenya Country Bus Owners Association. v. Cabinet Secretary for Transport and Instructure** (2014) eKLR per Odunga, J., relates to the position in law after the Statutory Instrument Act no 23 of 2023 whereby subsidiary legislation became void upon expiry of 7 days for the date of publication in accordance with section 11 (4) thereof and to that extent has no application to the regulations herein which were made in 2010. However, in discussing Article 23 remedies the Court held, and I agree, that it could fashion a remedy as appropriate for the circumstances of the case as follows:

“137. Where the Court finds that a person's constitutional rights have been contravened, the remedies available are not limited to the one specified under Article 23 of the Constitution. In determining allegations of contraventions of the Bill of Rights, Article 20(3) of the Constitution, provides that the Court is enjoined, to the extent that it does not give effect to a right or fundamental freedom, to develop the law and adopt an interpretation which favours the enforcement of a right or fundamental freedom.

*138. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security** [1977] ZACC 6:*

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

Ibid at paragraphs 142-143, the court said:

“142. In this case to declare the Regulations invalid would have the effect of exposing Kenyans to unsafe and unregulated mode of public transport and that would be contrary to the Court’s mandate of upholding the dignity of the same people the Court is meant to protect.

143. **Therefore where there are minor breaches which can be remedied, it would be appropriate that the principle of proportionality be adopted so as to give the relevant authorities a chance to remedy the defects rather than to invalidate the whole enactment and thereby deprive the society of some useful provisions contained in the enactment. As was recognised in Republic vs. The Minister for Transport & Communications & Others ex parte Gabiel Limion Kaurai & Another (supra),**

“the Court, in coming to its decision, must strike a balance between the two scenarios described above – the public yearning for an effective, humane and civilised passenger transport sector, and the juridical imperatives of compliance with the law as it has been enacted. Such an attempt to find a balance will show that there are no cut and dried borderlines between the social purpose, on the one side, and the sacrosanct law, on the other. Social purposes are more dynamic, sometimes feeding into the domain of legal norms, and their earning acceptance and sanctification by the jurist; but sometimes not getting quite there, and so remaining pre-legal, even though they still represent part of normal human venture and endeavours towards improved quality of life.”

Presumption of Constitutionality of Statutes

[40] I respectfully agree with Majanja, J. in **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) v. Kenya Revenue Authority & 3 others** [2014] eKLR, where he set out the presumption of Constitutionality of Statutes as follows:

“25. The principles upon which the court determines the constitutionality of statutes are now well settled. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. In considering whether an enactment is unconstitutional, the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see *Ndyanabo v Attorney General of Tanzania* (2001) 2 EA 485, *Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009* [2010] eKLR, *Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)*), *Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*.”

[41] However, in my respectful view, the presumption of constitutionality of statutes, as a common law principle, must give way to express textual provisions of the Constitution which establish the threshold requirements of constitutionality such as the express limitation of rights and freedoms under Article 24 (2) of the Constitution and the requirement under Article 94(6) for specification in an enabling Statute of delegated legislative authority in terms of *“the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority”*.

[42] Moreover, while the presumption of validity may easily be bestowed upon Statutes enacted by Parliament and County Assemblies which have legislative authority under the Constitution, legislation by delegated authorities must be shown, at the prerequisite level, to comply with the limits of their delegated remit.

[43] Learned authors H.W.R. Wade and C. Forsyth in *Administrative Law*, 10th ed. at p. 753 compares the legislation by Parliament and subsidiary legislation and makes this significant distinction in the context of the ***purposes of legislation***, as follows:

*“An Act of Parliament is immune from challenge on the ground of improper motives or bad faith, even in the case of a private Act allegedly obtained by Fraud. **But subordinate legislation is necessarily subject to the principle of ultra vires. Since delegated powers of legislation are nearly always given for specific purposes, their use for other purposes will be unlawful. One clear case of legislation being condemned for improper purposes was the Western Australian decision that regulations prescribing bus routes were invalid since their object was to protect the state owned trains from competition.** In Canada municipal bye-laws have been set aside where they were made with the object of restricting or penalising some individual owner of property rather than for the general benefit.”*

INTERPRETING THE BILL OF RIGHTS

[44] With reference to the Bill of Rights, the Court is enjoined under Article 20 (3) and (4) of the Constitution to promote values of an open and democratic society, the enforcement of the Bill of Rights and to develop the law towards giving full effect to the rights or fundamental freedoms, as follows:

“20 (3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.”

[45] The object and purpose of the Bill of Rights is to place the rights and fundamental freedoms as integral part of democratic life in Kenya and to grant to universal application and effect of the Bill of Rights to all and to bind all persons and state organs under the Constitution Articles 19 and 20, and the State is particularly enjoined to respect rights under Article 21 (1) as follows:

*“19. (1) The Bill of Rights is an **integral part of Kenya’s democratic state** and is the framework for social, economic and cultural policies.*

*(2) The purpose of recognising and protecting human rights and fundamental freedoms **is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.”

Under Article 20 (1) and (2)”

“20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.”

Under Article 21. (1)

“21 (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.”

Limitation of the rights and fundamental freedoms in the Bill of Rights

[46] The Bill of Rights, except the rights set out in Article 25 of the Constitution, may be limited in accordance with Article 24 (1) of the Constitution, which apart from permitting limitation of rights provides strict criteria for reasonableness and justification of the limitation as follows:

“24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

[47] Other than Article 25 Rights which are **illimitable**, the only **exception** to Limitation of Rights is Article 24 (5) which provides that rights and fundamental freedoms in the Bill of Rights may be limited with regard to **persons serving armed forces and police service**, as follows:

“(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.”

Nature of Limiting Legislation

[48] As testimony of the entrenched integrity of the provisions on the Bill of Rights and to check the specter of mutability of rights in the Bill of Rights, Constitutions usually prescribes an unusually high caliber quality of the law that qualifies to limit the Bill of Rights. Under the former Constitution, section 70 thereof provided as follows:

“70. Fundamental rights and freedoms of the individual.

*Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, **but subject to respect for the rights and freedoms of others and for the public interest**, to each and all of the following, namely—*

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

*(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms **subject to such limitations of that protection as are contained in those provisions**, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”*

[49] The High Court (Simpson, CJ, Cockar and Mbaya, JJ.) decision which considered section 70 in ***Ngui v. Republic*** (1986) LRC 308 of 21st March 1985, is inapplicable in view of the expanded scope of the instrument of limitation of rights and freedoms to include ‘**a law**’. ***Ngui*** had held that the limitation to the Chapter 5 of the Former Constitution on fundamental rights and freedoms could **only** be limited by **provisions made by Parliament in the Constitution**:

*“The amendments to section 123 [of the Criminal Procedure Code] he suggested were the legislature’s concern for the public interest. The Constitution, however, gives the legislature no power to make such amendments unless enacted under the provisions of and embodied in the Constitution. **The limitations referred to in section 70 are limitations contained in the provisions of Chapter V and there is no limitation qualifying the mandatory provisions of section 72(5).***

We hold that section 123(3) of the Criminal Procedure Code is inconsistent with the Constitution, not only section 72 (5) but also section 60 (1) and is accordingly void to the extent that this is so. It must accordingly be read as if the words “save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence” were deleted.”

[50] However, about a year earlier, on 26th March 1984, the Privy Council in ***Attorney General of The Gambia v. Jobe*** (1985) LRC 556, had construed “**law**” to include **provisions in a Statute outside the Constitution**.

[51] Under the Constitution of Kenya 2010, limitation of rights and fundamental freedoms is expressly provided for under Article 24 of the Constitution. Article 24 (2) provides as follows:

“Article 24 (2)

Despite clause (1), a provision in **legislation** limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

[52] The Petitioners herein contend that the legislation for purposes of limitation of rights under Article 24 must be an Act of Parliament and not subsidiary legislation under an Act which does not authorize such limitation. The dictum of Chanan Singh, J. in *Shah Vershi Devshi & Co. Ltd. v. The Transport Licencing Board*, (1971) EA 289, is cited in supports this contention, see paragraph 80 of this Judgment. For reasons that follow, the Court does not accept the argument.

[53] By Article 24 of the Constitution of Kenya 2010 it is contemplated that a limitation to rights may be made in provisions of a **legislation**, that is **legislation** within the meaning of Article 24 (2). The word “**legislation**” is defined in Article 260 of the Constitution as follows:

““**legislation**” includes—

(a) an Act of Parliament, or **a law made under authority conferred by an Act of Parliament;** or

(b) a law made by an assembly of a county government, or under authority conferred by such a law;”.

[54] Therefore, there can be no doubt that Subsidiary Legislation is **law** for purpose of Article 24 of the Constitution and I do not, therefore, accept the submission by the Petitioners that **subsidiary legislation**, having not been **enacted** as by Parliament as suggested by reference in Article 24 (2) (a), is **not** a law for purposes of Article 24 of the Constitution capable of limiting rights. The reason for this is that Article 24 (1) provides that rights and fundamental freedoms may only be limited by **law** and sub-Article (2) relates to ‘a provision in **legislation** limiting a right or fundamental freedom’ and Article 260 of the Constitution defines “**legislation**” to include subsidiary legislation being “**a law made under authority conferred by an Act of Parliament**”.”

[55] In addition, the Interpretation and General Provisions Act, Cap 2 defines “**written law**” as follows:

“**written law**” means—

(a) an Act of Parliament for the time being in force;

(b) an applied law;

(c) any subsidiary legislation for the time being in force; or

(d) any county legislation as defined in Article 260 of the Constitution;”

[56] However, the place of the rights and fundamental freedoms in our democratic way of life and open society is entrenched under Article 19 (3) in compelling language as follows:

“(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

The limitations in the new Constitution of Kenya 2010 are such as are “**contemplated in this Constitution**” not “**limitations of that protection as are contained in those provisions** [of Chapter V on Fundamental Rights and Freedoms]”, as in the former Constitution which was the subject of *Ngui*, supra.

[57] The Constitution of Kenya 2010 itself recognizes that a subsidiary legislation made under delegated legislative authority is **law** (Article 260) for purposes of limitation of rights, subject to the strict content requirements of such legislation under Article 24 (2) and the delimitation of extent and scope of the delegation of the legislative mandate in accordance with Article 94 (5) and (6) of the Constitution. The requirements of tabling of the subsidiary legislation in Parliament provides opportunity for Parliament to scrutinize the subsidiary legislation for constitutionality and ultra vires. This must be a function of the growth and development where many regulatory rules require to be made to govern the ever increasing facets of modern living, most times in ways that may impact on the rights and freedoms in the Bill of Rights such that Parliament is not be able efficiently and comprehensively to cope with the avalanche of legislative demands. I would, therefore, conclude that although subsidiary legislation is **law** for purposes of Article 24 of the Constitution, legislation affecting or limiting the rights and fundamental freedoms in the Bill of Rights is of great moment and it must require the careful consideration by Parliament as the supreme constitutional organ responsible for the sovereign mandate of with the law-making. Ideally, the law limiting rights and freedoms should be enacted by Parliament itself through Statute. Where exigencies of the particular matter does not allow, in view say of the urgency of the matter, detail and length of the content, or other sufficient reason, subsidiary law may be used subject to strict compliance with the provisions on law making by delegated authority under Articles 24 (2) and 94 (5) and (6) of the Constitution and with stakeholder consultations, in accordance with the right of people participation under Article 10 (2) of the Constitution.

The high caliber of limiting legislation

[58] Such high caliber legislation for the limitation of rights and fundamental freedoms is a requirement of Article 24 (1) which provides that limitation of rights and freedoms can only be effected by law and that the limitation must be **reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom**. The burden of proof of **reasonableness and justification** of limitation of rights lies with the person relying on the same as provided under Article 24 (3) as follows:

“(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”

See also the decision of the High Court (Odunga, J.) in *Kenya Country Bus Owners Association, supra*, at paragraph 115.

[59] As regards the formal validity of the limiting legislation, I interpret the provisions of Article 24 (2) of the Constitution 2010 to mean that a **legislative** provision made after the coming into effect of the Constitution of Kenya is **invalid** if it seeks to limit any of the rights and freedoms in the Bill of Rights **without such legislation expressly stating both its intention so to limit the right or fundamental freedom and the nature and extent of the limitation**, and even where such intention and nature and extent is expressly stated, **the legislation shall not be construed as limiting the rights and freedoms in the Bill of Rights unless the legislation is clear and specific about the right or freedom to be limited and the nature and extent of the limitation**, and in any event, **the limitation of right as effected by the legislation shall not derogate from the core or essential content of the right**.

[60] In other words, a limiting legislation must **expressly state intention** to limit a right and **the nature**

and extent of limitation, be **clear and specific about the right affected**, and the **nature and extent of limitation**, and the limitation must **not** go as far as to wholly **destroy the essential content of the right, emphasis being on limit rather than derogate**. For instance, in respect to the right of protection of property, a law may express intention to limit the property right by limiting the user of the property for a specified area or period of time, but it may not take away or grab the property so as to wholly take away the right to use the property at all, which is at the core of the right to property, without paying compensation for compulsory acquisition which is a permitted appendage of the right to property.

[61] It is against this constitutional framework of rights and fundamental freedoms of the Constitution of Kenya 2010 that the Court must now examine the impugned Regulations for violation of the Constitution and *ultra vires*.

Formal constitutional validity of the Limitation of Rights by the Regulations in this Petition

[62] Before making a determination as to whether the Regulations are constitutional the Court must examine whether the Regulations meet the formal ***constitutional*** requirements with regard to law that limits fundamental rights and freedoms. Having determined that Article 24 Limitation of Rights by **law** includes **subsidiary legislation**, and having examined the Regulations herein published as Legal Notice No. 112 of 2011, I find that there is no provision in the subsidiary legislation that ***expresses the intention to limit the rights and freedoms affected by the Regulation and give the nature and extent of the limitation***. Additionally, there is no indication in any provision of the Regulations ***as to the right or freedom to be limited or the nature or extent of the limitation***. For lack of the express provision of intention to limit named rights or freedoms and for lack of any information as to the nature and extent of limitation, the Regulations wholly fail the test of a limiting legislation set out in Article 24 (2) and the Court is **not** entitled to construe the Regulations as limiting any right or freedom in the Bill of Rights. Accordingly, any provisions in the Regulations purporting to limit the petitioners' rights and freedoms in the Bill of Rights are invalid.

[63] Against this background, the Regulations having not met the formal constitutional validity of Article 24 (2) must upon examination be declared **null and void to any extent that they purport to limit the rights and freedoms in the Bill of Rights in contravention of Article 24 of the Constitution**.

The specific Rights allegedly violated by the Regulations

Particularity of pleading constitutional cases.

[64] The requirement for the setting out with specificity the particulars of the complaint under the Bill of Rights (and indeed any pleading before the court) is a requirement of common sense that a claimant's case should be clear and elaborate to enable the respondent know the case it has to meet and the court the question it will be asked to determine. The context of the oft-cited holding of the High Court (Travelyan J. and Hancox, JJ.) in ***Anerita Karimi Njeru v. Republic*** (No. 1) (1979) KLR 154, 156 shows the motivation of the directions for precision in pleading constitutional infringement cases:

“On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr. Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant's defence, that the only evidence the defence wished to call was that of Mr. Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means “reasonable facilities” under section 77(2) (e) of the Constitution) is as respects Mr. Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr. Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was

a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr. Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr. Mwirichia abandoned the position he had previously taken up under paragraph (c). **We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a 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.**”

[65] Pleadings should not leave the Court guessing the case before it, as the Court in *Anerita Karimi Njeru*, supra, did or the respondent the case he has to answer. The Court’s discretion must help reconcile the requirements of *Anerita Karimi Njeru* with the provisions of Article 22 (3) (b) and (d) of the Constitution that the Chief Justice shall make Rules of Court for enforcement of the Bill of Rights, which shall satisfy the criteria that—

“(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that **the court shall, if necessary, entertain proceedings on the basis of informal documentation;**

(d) the court, while observing the rules of natural justice, **shall not be unreasonably restricted by procedural technicalities.**”

[66] The Court does not find that the Petition herein falls short of the degree of particularity required of pleadings in constitutional litigation as prescribed in *Anerita Karimi Njeru*. To the contrary, as shown in the quoted parts of the Petition on the facts relied on and the reliefs sought, the petitioners were meticulous in their effort to comply with the principle. It is the 3rd Respondent who must be criticized for breaking all the laws on affidavits by setting out legal arguments and submissions in an affidavit and evidence in submissions – the rules are that affidavits shall not set forth the law or be argument (Order 19 rule (2) of the Civil Procedure Rules and there shall be **no evidence by submissions** – that is, attaching to the written submissions filed in a matter evidence which ought to have been put in evidence by affidavit or oral testimony is invalid way of production of evidence. See decision of the Court of Appeal (*Nambuye, Ouko and Kiage, JJA.*) in *Douglas Odhiambo Apel & Anor. v. Telkom Kenya Limited* [2014] eKLR. Pursuant to the Article 159 principle of substantial justice, these sins are forgiven.

Right to equality and protection from discrimination and right to property - Regulation 5 of the Regulations

[67] The Petitioners challenged Regulation 5 on the basis of violation of right to equality and right to protection of property, under Articles 27 and 40 of the Constitution and sought declarations as follows:

1. A declaration that Regulation 5(1) requiring 51% Kenya shareholding in a maritime service provider is discriminatory and unconstitutional as being inconsistent with Article 27 of the Constitution and is void to the extent of its inconsistency.
2. A declaration that Regulation 5(1) denies the Petitioners their right to equal protection and benefit of the law as guaranteed by Article 27 of the Constitution and the Foreign Investment Protection Act and is void to the extent of its inconsistency with the Constitution.
3. A declaration that the rights of the Petitioners’ and the Petitioners’ shareholders, individually or in association with others, to acquire and own property without being arbitrarily deprived of the same as guaranteed by Article 40 of the Constitution have been and will be contravened by Regulation 5(1) and Regulation 22 of the Regulations which Regulations are void the extent of their inconsistency with the Constitution.”

[68] Article 27 of the Constitution provides as follows:

“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

5(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

[69] The right to equality and non-discrimination in the Constitution is a right to every person including a legal person such as a company and it is a right to the enjoyment of all rights and fundamental freedoms under the Bill of Rights. The discrimination may be direct or indirect and on any ground including those set out in Article 27 (4). The State is prohibited from such discrimination.

[70] It is trite law that a company has a distinct existence from its shareholders and directors. The House of Lords decision in *Salomon v. Salomon & Co., Ltd.* [1895-9] ALL ER 33 (H.L.) held, as set out in the headnote, that-

“A company which has complied with the requirements relating to the incorporation of companies contained in the Companies Act is a legal entity separate and distinct from the individual members of the company. It matters not that all the shares in the company are held by one person, excepting one share each held by the persons who, as required by the Acts, have subscribed their names to the memorandum of association to enable the company legally to be formed, nor does it matter that those persons are merely the nominees of the principal shareholder. Once a company has been legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and the motives of those who promote the company (e.g., to enable them to trade with the benefit of limited liability) are absolutely irrelevant in discussing what those rights and liabilities are. A company is not the agent of the shareholders to carry on their business for them, nor is it the trustees for them of their property.”

[71] It is also clear that a company has nationality and never *citizenship*. See US Supreme Court decision in *Pembina Consolidated Silver Mining and Mining Company v. Pennsylvania* 125 US 181. The US decision was applied in *Nairobi Law Monthly Company Ltd v. Kenya Electricity Generating Company & 2 Ors.* (2013) eKLR, by Mumbi Ngugi, J. where following *Pembina*, the Judge agreed with decision of Majanja J. in *Famy Care Ltd.* that a body corporate is not a citizen for purposes of Article 35 (1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article:

“79. The petitioner has asked the court to depart from the decision of *Majanja, J* and attempted to distinguish the *Famy Care Ltd* case from the present one because the applicant in that case, *Famy Care Ltd*, was incorporated in India and the shareholders and directors were all non-citizens, while the petitioner is a Kenyan company with Kenyan shareholders. The petitioner sought support in this regard from the decision of the Supreme Court of the United States in ***Pembina Consolidated Silver Mining and Milling Company –v- Pennsylvania* 125 U.S 181; 8 S Ct. 737;31 L. Ed. 650; 1888 U.S. LEXIS 1926** and contended that a corporation is a ‘citizen’ for the purposes of Article 35.

80. However, my reading of the decision of the Supreme Court in *Pembina* shows that it accords with the decision of *Majanja J* in ***Famy Care Ltd***. In interpreting the clause of the United States Constitution that the ‘**citizens of each State shall be entitled to all privileges and immunities of citizens in the several states,**’ the Supreme Court observed that ‘**Corporations are not citizens within the meaning of that clause.**’ Later on in the judgment, the Supreme Court cited its decision in ***Paul v. Virginia*** where it had held that:

‘..corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed...’

81. While it is true that the petitioner is a Kenyan company and its directors and shareholders are Kenyan citizens, the petitioner itself is a legal person created under the provisions of the Companies Act. As a legal ‘person’, it may enjoy the rights conferred by Article 35 (2), which are conferred on all ‘persons’ but it is not a ‘citizen’ that may have a right of access to information as contemplated under Article 35 (1). In my view, the petitioner is a company with Kenyan nationality, but not Kenyan citizenship. See the case of ***State Trading Corporation of India v Commercial Tax Officer 1963 AIR 1811*** in which the special bench was confronted with the question as to whether a corporation incorporated under the Indian Companies Act was a citizen within the meaning of the Indian Constitution. The majority opinion of the bench was that ‘**the fact that corporations are regarded in some circumstances as possessing nationality does not make them citizens.**”

82. I therefore fully agree with the decision of *Majanja J* in ***Famy Care Limited*** that a body corporate or a company is not a citizen for the purposes of Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article.”

[72] As regards what constitutes discrimination, it is agreed that not all differentiated treatment is discrimination but differentiation in treatment must have a legitimate purpose in accordance with the Constitution. In ***Hersi Hassan Gutale & another v Principal Registrar of Persons & Another*** [2004] eKLR, P.J. Kamau, Ag. J. (as he then was) cited an Indian author on Discrimination as follows:

“The above South African experience on differentiation and categorization has broadly also been analysed in ***Introduction to the Constitution of India*** by Durga Das Basu at pp. 82-89. On equal protection of the laws the said writer opines at page 85;

"None should be favoured and none should be placed under any disadvantage, in circumstances that do not admit of any reasonable justification for a different treatment".

In the same page he continues;

"The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance in the same position as the varying needs of different classes of persons often require separate treatment. The principle does not take away from the State the power of classifying persons for legitimate purposes. A Legislature which has to deal with diverse problems arising out of an infinite

variety of human relations must of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate."

[73] Similarly, the Constitutional Court of South Africa, in **JACQUES CHARL HOFFMANN vs. SOUTH AFRICAN AIRWAYS**, CCT 17 OF 2000 stated:

*"This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: **first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose.** If the differentiation bears no such rational connection, there is a violation of Section 9(1). **If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination.** If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger **the third enquiry, namely, whether it can be justified under the limitations provision.** Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application."*

[74] See also **President of the Republic of South Africa & Anor v. John Philip Hugo** (1997) (4) SAICC and **R. v. Turpin** (1989) 1 SCR 1296 both which emphasize the importance of the context of the distinction alleged to constitute discrimination in determining whether it is discriminatory under the Constitution.

[75] Our own Constitution of Kenya, 2010 contemplates that that there could be different treatment of different persons for purposes affirmative action under Article 27 (6) or where discrimination is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*, under Article 24(1) of the Constitution. There is a total prohibition on unjustifiable discrimination in the words of Article 27 (4) so far as material that "the State shall **not discriminate directly or indirectly against any person on any ground,**" including those set out in the Article.

[76] The 3rd Respondent contends that not all differentiated treated is discriminatory and that in any event the requirement for 51% shareholding is against the shareholders of the petitioners and the petitioners cannot therefore be heard to complain in this Petition for alleged discrimination against their shareholders who in law are different persons from the company. It was also contended that there was a legitimate purpose to be achieved by the Regulations 5 in protecting independent non-shipping operators majority of whom were Kenyan and to enact laws to strengthen local capacity in the Maritime industry and correct disadvantage faced by non-shipping competitors the majority of whom were Kenyans.

[77] The Petitioners brought these proceedings on behalf of themselves, shareholders and employees. I, therefore, do not find merit in the objection based on the differentiation between the company as a legal person and its shareholders who are required to obtain the 51% shareholding before licensing to operate as Maritime Service Providers. Moreover, discrimination under Article 27 (4) may be committed on a person either ***directly*** to person itself or ***indirectly*** through its shareholders.

[78] This must be the sense in which to understand the decision of the High Court (Chanan Singh and Simpson JJ.) **Shah Vershi Devshi & Co. Ltd. v. The Transport Licensing Board** (1971) EA 289 where Chanan Singh J. said –

"[A] company is a "person".... If a right is given to a "person" and is from its nature capable of being enjoyed by a "corporation" then a "corporation" can claim it".

The Court held in a case of denial of transport licences on account of the non-Kenyan shareholding of applicant company, ***per curiam***:

"The Board had discriminated between different classes of citizens, this is to say, Kenyan

citizens of African origin and Kenya Citizens of Asian origin, and the company had thus been discriminated by reason of having no African shareholders and Asian shareholders and the Board decision refusing some 5 transport licences of the company was revoked.”

[79] While I consider such an objective as advanced by the 3rd Respondent for the protection of non-shipping operators and creation of local capacity in the Maritime Industry, the treatment of the petitioners differently by requiring them to obtain a 51% citizen shareholding before they can be licensed to operate as maritime service providers to be a lawful purpose or affirmative action measure under the permissive Article 27 (6) of the Constitution and I would not find such differentiation to be discriminatory of the petitioner companies indirectly or directly to the shareholders whom they avowedly represent as permitted by Article 22 of the Constitution.

[80] This is the effect of the acknowledgment of Chanan Singh, J in ***Shah Devshi***, case at p. 296 C that:

“It makes no difference I think whether the basis of distinction is race or citizenship, if the parent legislation is generally applicable and envisages no distinction between sections of the population.

I am not saying that no distinction between citizens and non-citizens can be made. Indeed, it can be made. The Constitution itself sanctions this. *But it cannot, in my opinion, be made by subsidiary legislation under an Act which does not authorize, or even envisage, any distinction.”*

[81] With respect, it is not **then** a question solely of whether the **content** of the Regulation is unconstitutional but whether the provisions for differentiated treatment of the Petitioners who do not have a 51% Kenyan shareholding may constitutionally be made by a Minister through subsidiary legislation. That question is dealt with hereinbelow.

Regulation 5 and Article 40 of the Constitution

[82] With respect, the ruling of Musinga, J. (as he then was) in ***Murang’a Bar Operators & Another v. Minister For State For Provincial Administration and Internal Security & 2 Others*** [2011] eKLR while considering an interlocutory application for conservatory orders to restraining the interference by government officers of their licenced alcoholic drinks business in a challenge on newly enacted ***The Alcoholic Drinks Control Act 2010***, where he declined the order sought, is no authority for the proposition **that Article 40 rights cannot be affected by licensing law or regulations made under a law and that the remedy of the aggrieved person is in compliance with the law.** In the said ruling, the Learned Judge said:

*“As regards the provisions of Article 40 of the Constitution which guarantees protection of right to property, I did not find any merit in the petitioner’s argument that **the impugned Act** or any section thereof **is an infringement to their right to acquire and own property.** Any applicant whose establishment complies with the licensing regulations will continue to be licenced as there before. As earlier stated, the control mechanisms set out in the Act are necessary.”*

[83] With respect, the holding must be understood in the context of finding in that case that the Act was constitutional within the mandate of Article 21(2), that -

*“The State has Constitutional obligation to take legislative and policy measures to ensure that there is progressive realization of each and every right guaranteed under **Article 43** of the Constitution and that includes the right to health care, accessible and adequate housing, reasonable standard of sanitation, freedom from hunger, adequate food of acceptable quality, clean and safe water, social security and education.”*

I take the view that if the law is shown to be **unconstitutional** and or **ultra vires**, it must necessarily be taken as a breach of the person’s right to enjoy his relevant property.

[84] As I understand it, the ratio in *Murangá Bar Owners Association* case is not that there cannot be any violation of the right to property by licencing or other regulatory law, but that where the licensing law or Regulations are made pursuant to a control mechanism which is necessary [and I daresay, in the words of the Constitution itself, **reasonable and justifiable**], the law or Regulations will not be construed as violating the Constitution. That is plain, and the question then becomes whether the Regulations herein are a necessary control mechanism and or reasonably justifiable, and that is the province of Article 24 limitation of rights and fundamental freedoms!

[85] The Petitioners' shareholders have a right to property in the widest meaning of the term as accepted in *Jobe*, supra, in the ownership of shares (and in the dividends that accrue thereon from time to time) in the petitioner companies. *Jobe* held that the term property is to be interpreted widely as follows:

““property” in section 18(1) is to read in a wide sense. It includes choses in action such as a debt owed by a banker to his customer. The customer’s contractual right against his banker to draw on his account (ie. to claim repayment of the debt or any part of it on demand) is embraced in the expression “right over or interest in” the debt while compulsory “acquisition” of any right over or interest in property includes (as is evident from section 18(2) (a) (vii)) temporary as well as permanent requisition. To confer upon a member of the public service, in the exercise of the executive powers of the State, a power at his own discretion to prevent the banker’s customer from exercising his contractual right against the bank to draw on his account on demand would, in their Lordships’ view, amount to compulsory acquisition of a right over or interest in the customer’s property in the debt payable to him by his banker, and a law which provided for the exercise of such an executive discretion would contravene section 18 of the Constitution. It would be ultra vires and therefore void.”

[86] The petitioner companies themselves have proprietary interests in the business of maritime service providers for which licence will not be granted under the Regulation if their shareholding is not 51% Kenyan, and that is clearly a limitation on their right to property under Article 40 of the Constitution. The requirement of 51% Kenyan shareholding will necessarily call for the disposal of the commensurate shares in the petitioners for which a period of 18 months is given by regulation no. 5. I would agree with the 3rd Respondent that the requirement of 51% Kenyan shareholding is reasonable and justifiable in a democratic and open society for purposes of protecting and encouraging local participation in maritime service industry.

[87] It is contended for the petitioners, however, that the period given is so short as to compel them to dispose of the shares at throw-away prices. If it were proved that the nature of sale of company shares is such as to not to allow transfer at market value of shares in a company within a period of 18 months, the Court may have found that the regulation offended the shareholders' right to property by forcing them to sell their shares at lower than market value. The Court has no factual basis for that conclusion and is, therefore, not able to hold that the Regulation is unconstitutional for that reason alone.

[88] However, the constitutionality of the Regulation No. 5 on the requirement for 51% Kenyan shareholding in maritime service providers as with other Regulations in LN. No. 112 of 2011 depends both on the **substantive content** thereof and also whether the provision may be made by **an act of the Minister by way of Regulations**, and whether, in this particular case, **the said Minister had constitutionally valid delegated authority** to make the Regulations.

[89] On the alleged contradiction under regulation 5 (2) and 22 of the Regulations, the Court finds that the two provisions apply to different situations, in the former where the requirement of 51% Kenyan shareholding applies and the latter in all other situations of compliance with the Regulations.

Article 47 right to fair administrative action

[90] The Petitioners seek a declaration that Regulations 5, 7, 11, 13, 14, 15, 17, 18 and 19 and the Application Form for a License as a Maritime Service Provider as set out in the Second Schedule to the Regulations infringe the Petitioners right to a fair administrative action as guaranteed under Article 47 of

the Constitution, are arbitrary and unjust in a democratic society, and are void to the extent to their inconsistency with the Constitution.

[91] The Petitioners alleged that there was lack of adequate hearing prior to enactment of the Regulations by way of consultations and that no views of the providers in the industry were given due regard. See paragraph 12 of the Supporting Affidavit where the Chairman of the 1st Petitioner's Board of Directors:

“I am aware that the petitioners and other Maritime Service providers presented their views and expressed concerns at the Regulations prior to them being published and expected that their views would be taken into account in formulating the Regulations. The regulations as published do not reflect the views of the stake holders in the maritime industry and in particular, have not taken into account the views expressed by the petitioners.”

[92] The 3rd Respondent cited this paragraph of the Petitioners' supporting affidavit to show that there was indeed stakeholder consultation which was done pursuant to section 11 of the Act, through consultative meetings with various stake holders. Section 11 of the Merchant Shipping Act, 2009 provides as follows:

“11. The Director-General may communicate, co-operate and **consult** as necessary and appropriate with—

(a) departments and agencies of the Government;

(b) Governments of other States who are parties to the international conventions to which Kenya is a party;

(c) Governments of other states in the Indian Ocean region;

(d) international, inter-governmental and non-governmental organisations;

(e) ship-owners, seafarers associations, ship agents and other organisations involved or interested in shipping or in protection of the marine environment, for purposes of furthering the objects of this Act.”

[93] Article 47 of the Constitution on the right to fair administrative action is in terms as follows:

“47. (1) Every person has the right to **administrative action** that is expeditious, efficient, lawful, reasonable and **procedurally fair**.

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by **administrative action**, the person has the right to be given written reasons for the action.*

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

[94] The respondent contended that Article 47 applies only to matters of judicial adjudicative nature and not ministerial functions of rule-making process and the Minister has little, if any, quasi-judicial and adjudicative functions within the meaning of Article 47 (2) of the Constitution which provides that where **a decision affecting the rights in the Bill of Rights is contemplated reasons for the decision shall be given.**

[95] There is nothing in the Constitution to limit the principle of fair administrative action under Article 47 to quasi-judicial decisions. The only requirement for its application is an administrative action which must be taken in a process which is procedurally fair, and reasons given in writing where it affects rights in the Bill of Rights. Procedural fairness imports the concept of fair hearing and in the case of regulations which affect large sections of the society or industry through consultation with stakeholders being the providers and users of the industry products or services.

[96] I take the view that for consultation on the matter of a rule-making process to be meaningful there must be consultations with the stakeholders at all the levels of the rule making process from the conception stages where the problem sought to be addressed by the rules is discussed, the formulation of responses to the problems and finally the development of the rules to regulate the phenomenon. At all these stages the engagement with the stakeholders must be genuine discourse of proposed course of action including the deliberations on drafts of proposed legislation and policy direction as well as any change management necessary.

[97] Moreover, consultation is an aspect of participation of the people which is one of the national values and principles of governance under Article 10 (2) of the Constitution, which values and principles the Court is enjoined to give effect while interpreting the Constitution by Article 20 and 259 of the Constitution.

Principle of participation of the people under Article 10 (2) of the Constitution

[98] Participation of the People is one of the national values and principles of governance under Article 10 (1) (d) of the Constitution. As regards the legislative function at the national level, the constitution provides for people participation in parliamentary affairs as follows:

“118. (1) Parliament shall—

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.”

[99] A County Assembly has similar duty to facilitate public participation under Article 196 of the Constitution. Indeed one of the objects of devolution is to facilitate people participation in the affairs of government which affect them as follows:

“174. The objects of the devolution of government are—

(a)

(b)

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;”

[100] The requirement of stakeholder participation is a constitutional imperative at all levels of law making – at Parliament, County Assembly and by delegated authority of Parliament to the Minister under various Acts of Parliament. In my view, it is inconceivable that under the framework of the Constitution of Kenya 2010, there could be an exercise of public power especially of legislative character that did not involve public participation at the two levels of direct involvement of the people and at the level of

parliamentary scrutiny by laying before the people's representatives in Parliament under the Statutory Instruments Act, 2013, and previously by the requirement of section 34 of the Interpretation and General provisions Act, cap. 2 laws of Kenya.

[101] I have studied the **Report of the Third Stakeholders Meeting on Development of Regulations for Maritime Service Providers** of April 2010 which is a record of one of the consultative meetings presented by the 3rd respondent as compliance with the requirement of stakeholder consultations. I also noted the composition of the task Force for the Development of the Maritime Service Providers Regulations incorporated various stakeholders in the Industry and newspaper advertisement calling for input by members of the public for the development of regulations to steer operations of commercial maritime services with the object "to establish a mechanism for addressing service delivery in the maritime sector with regard to quality, standards, cost and efficiency."

[102] I have noted however, that in the Report, although reference is made to the object of the regulations to "provide measure for sustainability of competitive supply of services in maritime transport to enhance free and fair competition and encourage the development of domestic capacity in the supply of maritime transport services" and the government's intention to "develop a policy framework that would provide incentives to create national wealth and allow investments on a level playing ground in line with section 16A of the Merchant Shipping Act, 2009"[the Court did not trace a section 16A in the Act], no Draft Maritime Service Providers Regulations was not presented for discussion by the stakeholders. Indeed, it appears from the Report of 23rd April 2010 on the Third Stakeholders' Meeting that the Regulations that were discussed were **Draft Merchant Shipping (Shipping Agents Regulations) 2010, The Merchant Shipping (Container Freight Stations Operators CFS Regulations) 2010 and Merchant Shipping (Cargo Consolidators Regulations) 2010.**

[103] Consultation need not result in views of the person consulted carrying the day. Musinga, J. (as he then was) in **Centre For Rights Education and Awareness (Creaw) & 7 others v Attorney General** [2011] eKLR interpreted 'consultation' in the context of Article 10 as follows:

*"The second issue relating to the constitutionality of the nomination to the office of the Chief Justice is whether it was done after **consultation** between the President and the Prime Minister in accordance with the National Accord and Reconciliation Act. The Constitution does not define the word "**consultation**". Other than media reports that were annexed to the petitioners' affidavit, there is no other evidence relating to the consultations. What does the word "consultation" therefore mean? The Shorter Oxford English Dictionary defines "consult" as, inter alia, "take counsel together, deliberate, confer. "**Consultation**" is said to mean, inter alia, "the action of consulting or taking counsel together, deliberation, conference." Websters New Universal Unabridged Dictionary suggests that it means "consulting, a meeting of persons to discuss, decide, or plan something", while 'consult', in the relevant context means "to ask advice of, to seek the opinion of as a guide to one's judgment". In the Readers Digest Universal Dictionary, 'consult' is rendered in such context as "to exchange views, confer, and 'consultation' as "the act or procedure of consulting, a conference at which advice is given or views are exchanged."*

In the South African case of MAQOMA vs. SEBE & ANOTHER 1987 (1) SA 483 the meaning of consultation was considered in the context of the Administrative Authorities Act 37 of 1984, which like our Constitution, does not define 'consultation'. Pickard J observed:

"It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word "consultation" in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."

In AGRICULTURAL, HORTICULTURAL AND FOREST INDUSTRY TRAINING BOARD vs. AYLESBURY MUSHROOMS LTD [1972] 1 All ER 280 at 284 it was held that:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice. If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding there can be no consultation.”

From the definitions of the word ‘consultation’ as hereinabove stated and from the authorities cited and from the annexures to the petitioner’s affidavit, it appears to me that there was some consultation between the President and the Prime Minister. However, there was no consensus or agreement between the two principals, which I must state, is not a requirement under the provisions of Section 24(2) of Schedule Six of the Constitution. That notwithstanding, the values and principles stated under Article 10 and the spirit of the National Accord and Reconciliation Act ought to have been borne in mind in making the nominations.”

[104] However, there was no evidence of presentation of the Regulation on Maritime Service Providers in Draft for consideration and comment by the stakeholders as an ingredient of the consultation principle of **‘communication and the consequent opportunity of responding’**. Because of the specific character of law, consultation in matters of law-making must involve seeing the proposed law and having an opportunity to respond to the proposals in the law rather than a general communication on the matter. Although the petitioners’ complaint appeared to be that their views were not reflected in the final Regulations, I find that there was no sufficient consultation as the draft of the proposed Regulations was not put to them, and there was, therefore, a breach of the Article 47 right to fair administrative action. The entire Regulations are therefore unconstitutional for want of consultation in terms of the right to fair administrative action under Article 47 of Constitution.

[105] In particular, Regulation 16 on Disciplinary proceedings – while the 3rd Respondent contends that there exists procedural safeguards for fair administrative action ensuring administrative efficiency and economy of time and cost of the administrative process, the fact that the inquiry is commenced upon the Regulator’s opinion that the maritime service provider is guilty of professional misconduct and then calls for a response on the opinion, and the fact that the Regulator may refuse to hear witnesses it considers irrelevant or immaterial, clearly breaches the fair administrative action right to fair hearing.

Freedom of Association – Article 36 of the Constitution of Kenya

[106] The petitioners sought a “declaration that the Petitioners’ right, individually or in association with others, not to be compelled to join an association of any kind as guaranteed by Article 36 of the Constitution have been and will be contravened by Regulation 7(1) of the Regulations, which Regulation is void to the extent of its inconsistency with the Constitution.”

[107] The respondent contended that the petitioners freedom of association under Article 36 is not absolute and it can be limited by law under Article 24 by an enforced framework for self-regulation, subject the limitation being reasonable and justifiable in an open and democratic society, and the Regulation 7 was geared towards promoting good governance, integrity, transparency and accountability within the maritime industry.

[108] In **Shah Devshi** case, supra, Chanan Singh, J considered the question of denial to a company of the right to freedom of assembly and association held:

“[T]he freedom which is really given by ... section 80 [of the former Constitution] is the “right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.” The board’s decision does not

*deny any such right to the company. If the company feels that the refusal of 5 out of 18 transport licences compels it to go into liquidation, then **the members of the company can probably complain because it is they who are being stopped from remaining associated in a company. The company itself has no cause for complaint because it is not being stopped from joining, or remaining a member of an association.***”

[109] As I have observed above, the Petition was brought in the petitioners’ own behalf and on behalf of individual shareholders and their senior management employees and other maritime service providers in Kenya. See paragraph 2 of the Petition and Article 22 (2) of the Constitution. However, I agree with Chanan J. in *Shah Vershi Devshi* that it is the members of a company who may complain of denial of right of association and not the company. In being obliged to join an association in accordance with Regulation 7 of the Regulations, the right of association under Article 36 is clearly infringed, and it does not matter that the provision was inserted into the Regulations by insistence of the stakeholder meetings. In my view, Constitutional rights cannot be waived or infringed by acquiescence of the right holder or his consent with the State or other person.

[110] The Regulation 7 requirement for compulsory association of the maritime service providers also offends the constitutional right of the petitioner companies of fair labour practices under Article 41 (1) and (3) as follows:

“41. (1) Every person has the right to fair labour practices.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.”

[111] The rationale of the 3rd Respondent in limiting the right of association requirement for such professional association for such purposes even though a reasonable for purposes of the regulation of Maritime Industry as one whole in terms of standards of professional delivery of service can only be expressed in a valid law in accordance with Article 24 of the Constitution; otherwise, it is a violation of the right to freedom of association.

Article 41 – Right to Fair Labour Practises and Regulation 11

[112] Right to fair labour practices under Article 41 with respect workers is as provided for under Article 41(2) as follows:

“(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.”

[113] The Petitioners prayed for a declaration that Regulation 11 of the Regulations infringes the Petitioners’ right to fair labour practices under Article 41, is unconstitutional and is void to the extent of its inconsistency with the Constitution. The requirement of Regulation No. 11 is that maritime service providers ensure that their staff are **professionally qualified within 5 years from its first licencing under the Regulations**. The 3rd Respondent contended that the rule aimed at attaining professionally qualified staff in the industry, giving allowance for consultation on the levels of professional; qualification as regards different cadres of staff and allowing for time for acquisition of the necessary qualification

through training at the industry level, and there would be no need to lay off experienced members of the staff, as the Authority will in consultation with the stakeholders determine which jobs do not require professional training.

[114] I do not see how the content of Regulation 11 which requires staff to acquire professional qualification for improvement in the standards of service of the Industry, and with provision for adequate time to acquire the qualifications, would offend the right to fair labour practices under Article 41 of the Constitution. I think that the Regulation is constitutionally valid, subject to rule-making authority of the Minister.

Article 29 of Constitution – Freedom of Security of the person by offences under the Regulations

[115] The Petitioners sought a declaration that Regulations 6, 7, 9, 13, 15, 17, 18, 19 and 20 of the Regulations are inconsistent with Article 29 of the Constitution by reason of prescribing cruel, oppressive and disproportionate punishment and are void to the extent of their inconsistency. In response, the 3rd Respondent said that the offences set out in the Regulations were the general penalty prescribed for breach of the Act and relied on the provisions of section 429 of the Merchant Shipping Act which provides as follows:

“429. (1) A person who commits an offence under this Act, for which no specific penalty is provided, shall be liable, upon conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment.

(2) Where an offence under this Act is a continuing one, and no penalty is provided in respect of the continuance thereof elsewhere than in this section, every person who commits that offence, in addition to any other liability, shall be liable, upon conviction, to a fine not exceeding fifty thousand shillings for every day or part thereof during which the offence continues after conviction.”

[116] The 3rd Respondent cited section 33 of the Interpretation and General Provisions Act, and sought to justify the prescription of the general penalty under the Act arguing that ‘any act done in Regulations made under an Act of Parliament’ are deemed to have been done under the Act. Section 33 of the Interpretation and General Provisions Act provide as follows:

“33. Acts done under subsidiary legislation deemed done under Act which authorizes it

An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act.”

[117] The Petitioners contended that the Minister for Transport does not have the power or legal authority to create offences or impose penalties as purported under the Regulations and all references to offences and penalties under the Regulations are invalid and ultra vires the powers of the Minister and **ultra vires** the Merchant Shipping Act (Act No. 4 of 2009). This argument is desalt with below at paragraph 153 of this Judgment.

Whether criminal sanction by subsidiary legislation is this limited by section 31(e) of cap. 2.

[118] Section 31 of the Interpretation and General Provisions Act cap. 2 provides as follows:

“31. General provisions with respect to power to make subsidiary legislation Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

(a) when subsidiary legislation purports to be made or issued in exercise of a particular power or powers, it shall be deemed also to be made or issued in exercise of all other powers thereunto

enabling;

(b) no subsidiary legislation shall be inconsistent with the provisions of an Act;

(c) subsidiary legislation may at any time be amended by the same authority and in the same manner by and in which it was made; but where the authority has been replaced wholly or in part by another authority, the power conferred hereby upon the original authority may be exercised by the replacing authority concerning all matters or things within its jurisdiction as if it were the original authority;

(d) where an Act confers power on an authority to make subsidiary legislation for a general purpose and also for special purposes incidental thereto the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;

(e) there may be annexed to the breach of subsidiary legislation a penalty, not exceeding six thousand shillings or such term of imprisonment not exceeding six months, or both, which the authority making the subsidiary legislation may think fit. [Act No. 21 of 1966, 1st Sch.]”

nullum crimen sine lege nulla poena sine lege

[119] It is incontestable that a person can only be charged and punished for an offence known to law in accordance with the principle of criminal law expressed in the Latin Maxim ***nullum crimen sine lege nulla poena sine lege*** (no crime and no penalty without law). See also Kimaru, J. in ***Sigilai & Anor. v. Republic*** [2004] 2 KLR 480. In providing under Regulation 12. (1) (k) that it shall be professional misconduct for any maritime service provider—

(k) to fail to observe any other professional conduct as may be prescribed by the Authority,

the Regulations give the 3rd Respondent a right to create new offences at its discretion in breach of the Latin maxim ***nullum crimen*** entrenched in the principle of a **clear charge on an offence known to law, which has constitutional** foundation under Article 50 (2) as follows:

“(2) Every accused person has the right to a fair trial, which includes the right—

(a)

(b) to be informed of the charge, with sufficient detail to answer it;”

[120] I respectfully agree with the statement of Kimaru, Ag. J. (as he then was) in ***Sigilai & Anor. v. Republic*** [2004]2 KLR 480 he laid the law as follows-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused to prepare his defence to the charge. This principle has a constitutional underpinning. See section 77 of the Constitution of Kenya.”

[121] Regulation 12 (1) (k) is unconstitutional.

Presumption of Innocence

[122] An accused person (including a legal person) is entitled to be presumed innocent. Article 50 (2) of the Constitution of Kenya 2010 provides for presumption of innocence as follows:

“(2) Every accused **person** has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;”

[123] The principle of presumption of innocence was also emphasized in *The Queen v. Oakes* [1987] LRC (Const) 477, [*R v. Oakes* [1986] 1 S.C.R. 103], which developed the *Oakes* test upon which limitation of rights under our Article 24 of Constitution of Kenya 2010 is based. The Canadian Supreme Court (Dickson, CJ, Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain, JJ.) held, as set out in the headnote, that –

“1. The “reverse onus laid down in section 8 of the [Narcotic Control Act, RSC 1970]” violated the presumption of innocence guaranteed by section 11(d) of the Charter. Section 8 established a mandatory presumption of law and, in using the word “establish”, imposed a legal burden of proof on the accused, and not merely an evidentiary burden. **By requiring the accused to prove on a balance of probabilities that he was not in possession for purposes of trafficking, it compelled him to prove that he was not guilty of the offence of trafficking. This was radically and fundamentally inconsistent with societal values of human dignity and liberty espoused in Canada and directly contrary to the presumption of innocence enshrined in section 11 (d) of the Charter.**

Per curiam: The presumption of innocence is a hallowed principle lying at the very heart of criminal law. It protects the fundamental human dignity of any and every person accused by the State of criminal conduct. This is essential in a society committed to fairness and social justice.

2. The provisions of section 8 did not come within the concept of a “reasonable limit” recognised by section 1 of the Charter. The onus of proving that an alleged limit was reasonable and demonstrably justified rested on the person seeking to uphold it. The standard of proof was the civil standard of proof by preponderance of probability, given that the object was to justify a violation of constitutional guarantees, a very high probability was required. Two central criteria had to be satisfied: (a) the objective of the limitation must be of sufficient importance to justify overriding the constitutional guarantee; (b) the means chosen must be reasonable and demonstrably justified, i.e., a “form of proportionality” test. Though the object of protecting society from the grave evils of drug trafficking satisfied the first criterion, the reverse onus in section 8 of the Narcotic Control Act failed the second criterion. The proportionality test required that section 8 be internally rational, i.e., there must be a rational connection between the basic fact of possession and the presumed fact of possession for purpose of trafficking. The section failed this test and could result in convictions for trafficking of persons guilty of possession only.”

[124] Regulation 9 gives the general penalty for breach of the Regulations is in terms as follows:

“9. (1) A maritime service provider who—

(a) fails to comply with the terms and conditions of the grant of the licence;

(b) ceases to hold any of the qualifications specified in these Regulations;

(c) fails to renew the licence within the period specified under regulation 8; or

(d) fails to meet any of the standards specified in these Regulations; commits an offence and shall be liable on **conviction to a fine of not more than three million shillings.**

(2) If despite the fine imposed under paragraph (1), a maritime service provider **continues committing the offences** mentioned in paragraph (1), **the Authority may, subject to these Regulations, suspend or revoke the licence.**

(3) Where the Authority suspends or revokes a licence issued under these Regulations, the

Director-General shall notify the licensee of the decision of the Authority within fourteen days of the date of the decision.”

[125] While the person who breaches the Regulations require to be convicted by a court of law under Regulation 9 before the penalty of fine of 3 million is imposed, the secondary punishment for suspension or revocation of the licence under Regulation 9 (2) appears only to require the subsequent **commission of the offences** and it is not clarified that it has to follow a further conviction by a court of law for the subsequent offences. This is critical because the Regulations appear to give the 3rd respondent Regulator the powers of the Court to impose fines and other penal consequences as in Regulation 9 (2). Take for instance, Regulation 16 (8) which provides as follows:

“16. (8) The Authority, in making the report under paragraph (6), may—

(a) caution the maritime service provider; or

(b) suspend the licence of the maritime service provider; or

(c) revoke the licence of the maritime service provider; or

(d) if there is a finding of an offence as provided in regulation 9 (2), apply the sanctions provided thereunder.”

[126] As discussed below, the Regulations giving the 3rd respondent Regulator the powers of the Court are in clear violation of the doctrine of Separation of Powers between the Judiciary and the Executive and are, therefore, wholly unconstitutional, null and void.

Disproportionate penalties

[127] The petitioners also complained about disproportionate penalties. In ***Attorney General of Antigua and Barbuda and Anor. v. Godwin and Ors.*** (2001) LRC 1, Mathew JA (with whom Byron, CJ. And Singh JA concurred) while accepting the power of **Parliament** to prescribe or impose substantial fines especially in drug offences, found the penalties imposed by the Parliament of Antigua and Barbuda for offences under the **Business Licence Act 1994** to be disproportionate as follows:

“I have no hesitation in coming to the conclusion that the penalties under the Act especially under s.20 are unduly severe. Learned Counsel for the respondents submitted that the penalties are excessive and intimidating and constitute a violation of the right to protection of law in ss. 3 and 15 of the Constitution. I am not sure if counsel is relying on the ‘fair hearing’ required by s 15(1) of the Constitution. I agree with learned trial judge that the penalties under s20 are highly disproportionate to the offences. The learned judge referred to a passage by Wilson J in Reference re s. 94(2) of the Motor Vehicle Act (1985) 24 DLR 536 at 572:

‘I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system referred to in paragraph (4) above. It is basic to any theory of punishment that the sentence imposed bears some relationship to the offence; it must be a “fit” sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender “deserved” the punishment he received and feel a confidence in the fairness and rationality of the system.’

I should like to adopt the words stated above. I declare that the penalties imposed under the Act are disproportionate to the offences to which they are attached.”

[128] In addition, ***Mohamed Gulam Huessein Farazal Karmali & Anor v. Chief Magistrate’s Court*** (2006) eKLR, (Nyamu, J. as he then was) is authority for the proposition that criminal process must not be used **oppressively**, especially where the dispute may be handled under the civil court process.

[129] The 3rd Respondent offers section 429 of the Merchant Shipping Act but does this section authorize the re-creation of an offence by subsidiary legislation? With respect, it is accepted pursuant to section 33 of cap 2 anything done under the Regulations is deemed as having been done under the Act for purposes of the criminal sanction under the Act, there would be no need to promulgate any other regulation as section 429 already affects anything done under the Act, which includes the Regulations. Section 429 must relate to offences in the Act rather than in the Regulations, otherwise there would be no need for the provisions of section 31(e) of cap 2. The power for the Minister to make by subsidiary legislation penal regulations is for purposes of **breach of the regulations** not substantive offences to which section 429 refers.

[130] The 3rd Respondent contends that what the Petitioners term new offences are *default penalties* imposed on the Petitioners for not complying with specific provisions of the Regulations and cites section 33 of the Interpretation and General Provisions Act, cap. 2 as authority that an act shall be deemed as done under the Act if it is done under Regulations made thereunder. With respect, if the question is one of breach of the Regulations, its penalty must be lawful in view of section 31 (e) of cap 2. In the absence of any provision to the contrary in the enabling Act, the provisions of section 31(e) must apply.

[131] The Regulations create offences for various breaches of the Regulations and impose unauthorized criminal sanctions ranging from 3 - 10 million shillings fine and in default three years imprisonment or both. These are Regulations 6 (5), 13(3), 15(2), 17(5), 18(3), 19(8), 20 (4) as follows:

“6. (5) Any person who carries on the business of a maritime service provider without a valid licence commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding three years, or both such fine and imprisonment.

9. (1) A maritime service provider who—

(a) fails to comply with the terms and conditions of the grant of the licence;

(b) ceases to hold any of the qualifications specified in these Regulations;

(c) fails to renew the licence within the period specified under regulation 8; or

(d) fails to meet any of the standards specified in these Regulations; commits an offence and shall be liable on conviction to a fine of not more than three million shillings.

(2) If despite the fine imposed under paragraph (1), a maritime service provider continues committing the offences mentioned in paragraph (1), the Authority may, subject to these Regulations, suspend or revoke the licence.

13. (3) A person who contravenes the provisions of this regulation commits an offence and shall be liable, on conviction, **to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.**

15.(2) A person who contravenes the provisions of this regulation commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.

17. (5) **Any person who contravenes the provisions of this regulation commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.**

18.(3) A maritime service provider who fails to file a report or document when required to do so by the Authority under paragraph (1) or who contravenes paragraph (2) commits an offence and **shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding three years, or both.**

19. (8) Any person who—

(a) obstructs or hinders the Authority in the exercise of its powers or performance of its duties under this regulation; or

(b) furnishes information or makes a statement to the Authority which he or she knows to be false or misleading; or

(c) without good and reasonable excuse fails to implement the recommendations made pursuant to this regulation, commits an offence and shall be liable, on conviction, **to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.**

20. (4) **Any person who contravenes this regulation commits an offence and is liable, on conviction, to a fine not exceeding five million shillings and shall in addition be liable to the affected cargo owners for all losses, fines, penalties, demurrage, storage charges or any other charges arising from such failure to comply. Authority may impose penalty upon admission of guilt.**

The Regulations offend the provisions of section 31 (e) of the Interpretation and General Provisions Act, set out below.

Effect of section 31 (e) of the Interpretation and General Provisions Act

[132] Section 31 (e) of the Interpretation and General Provisions Act provides as follows:

“31. General provisions with respect to power to make subsidiary legislation

Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—

*(e) there may be annexed to the breach of subsidiary legislation a penalty, **not exceeding six thousand shillings or such term of imprisonment not exceeding six months, or both,** which the authority making the subsidiary legislation may think fit.”*

Section 31 (e) is subject to the proviso of the parent section 31 that **“unless a contrary intention appears”** in the Act conferring authority to make subsidiary authority. There is no such contrary intention shown in the Merchant Shipping Act 2009, upon whose sections 4 and 8 the Respondent relies for the Minister’s rule-making power, and the insertion of section 412A by Act No. 12 of 2012 does not operate retrospectively and therefore does not apply to the 2011 Regulations herein.

[133] There are also noted inconsistencies in the Regulations in that for the same default imprisonment term of *three* years different fines of one, three and ten million are imposed by Regulations 19 (8), 9(1) (d) and 6 (5) among others, respectively, for various offences under the Regulations, while the fine of five million shillings in Regulation 20(4) has no default imprisonment term but improperly imposes a criminal sanction together with civil liability for compensation by way of damages at large for *‘to the affected cargo owners for all losses, fines, penalties, demurrage, storage charges or any other charges arising from such failure to comply.’*

[134] The penalties of one, three or ten million and the default imprisonment terms of 3 years are wholly un-proportional to breaches of the administrative provisions of the Regulations to which they apply. It is not accurate that the prescription of a penalty of ten million or three years imprisonment in default was based on the minimum penalty prescribed under the Act. While section 429 makes provision for the offences under the act where no penalty is prescribed, it is not the least sentence under the Act. As noted by the Petitioners, the sentence for breach of duty to assist in case of a collision under section 209 has a

penalty of only six months imprisonment and Ksh.50,000/- fine and the more serious offence of forgery and fraudulent alteration relative to the breach of administrative requirements of the Regulations attract the similar sentence under section 73 of the Act of “imprisonment for a term not exceeding three years or a fine not exceeding five hundred thousand shillings, or both”. Section 255 of the Act more serious offences relating to proceeding to sea without observance of the limit on the number of passengers and safety certificates imposes a fine of Ksh.100,000/- or imprisonment for six months.

Pretended judicial authority of the Regulator

[135] That the Regulations give the Authority judicial authority to conduct trial and impose criminal sanction is objectionable not only on the constitutional principle of separation of powers between the Executive and the Judiciary but also on a cardinal principle of law and practice that judicial function especially criminal punishment may only be performed by a court of law. Only a court or tribunal under the Judiciary can perform a judicial function as held in the case of power to commit an uncooperative examinee at creditor’s meeting under Insolvency Act of South Africa in the leading case of **Douglas Michael De Lange v. Francois J. Smuts NO and 4 Ors.** CCT 26/97 of 28th May 1998 where the Constitutional Court (Chaskalson, P., Langa DP., and Madala J. concurring in the judgment of Ackermann J.) confirmed a declaration of invalidity by the High Court that ‘section 66(3), read with section 39 (2) of the Insolvency Act NO. 24 of 1936, is **constitutionally invalid to the extent that it authorizes a presiding officer who is not a magistrate to issue a warrant committing to prison an examinee at a creditor’s meeting held under section 65 of the Insolvency Act**’ and said that –

“This [Separation of Powers] is a complex matter which will be developed more fully as cases involving separation of powers issues are decided. For the moment, however, it suffices to say that whatever the outer boundaries of separation of powers are eventually determined to be, the power in question here – i.e., the power to commit an uncooperative witness to prison – is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.”

Didcott J. joined by Kriegler J. found no breach of separation of powers arguing that the separation of powers between the executive and the judiciary is not total in South Africa. Mokgoro, J. and O’Regan J. took the view that what mattered is the process rather than the office. Mokgoro, J. admirably put the matter of procedural fairness as follows:

“When contemplating the essential purpose of the protection afforded through the notion of procedural fairness, my sight is arrested by this fact: at heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time honoured principles that no one shall be the judge in his or her own matter and that the other side should be heard, the aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of an y argument, the arbiter, still a fallible human being, must be informed about the points view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation. When the clear basis for committing a person to prison is coercive rather than punitive, warning lights begin to flash.”

O’Regan J while agreeing with Ackermann J that the separation of powers issue and went further to finds that even when magistrates are presiding officers there was breach of the right to freedom and liberty because of lack of procedural safe guards saying:

“I agree with [Ackermann, J] that section 66 of the Insolvency Act, 24 of 1936 (“the Insolvency Act”) is in conflict with the provisions of section 12 of the 1996 Constitution to the extent that it permits a person presiding over a creditor’s meeting who is not a judicial officer to order the imprisonment of a person who refuses to testify or produce documents to the meeting. He holds however, in paragraphs 76 to 83 of his judgment that where a magistrate presides over the meeting of creditors, there is no breach of section 12. I am in respectful disagreement with this aspect of my colleague’s decision for the reasons given in this judgment.

[143] section 12 (1) of the 1996 Constitution provides that:

“Everyone has the right to freedom and security of the person which includes the right –

- a) Not to be deprived of freedom arbitrarily or without just cause;***
- b) Not to be detained without trial;***
- c) To be free from all forms of violence from either public or private sources;***
- d) Not to be tortured in any way; and***
- e) Not to be treated or punished in a cruel, inhuman or degrading way.”***

I agree with Ackermann, J at paragraph 22 of his judgment where he states that amongst other things, this section protects individuals from the deprivation of physical freedom save where there is a good reason for the deprivation and where appropriate procedural safeguards exist. I also agree with Ackermann J that there can be no doubt that in this case there are good reasons for the deprivation of freedom which section 66(3) authorizes. The difficulty lies in the question of whether there are appropriate procedural safeguards accompanying that deprivation. Of course, there is no rigid rule as to what safeguards are appropriate in the context of section 12(1). The procedural safeguards required will depend on the nature of the deprivation and its purpose. It is necessary therefore to examine the nature of deprivation of freedom occasioned by section 66(3) as well as its purpose....

[147] There can be no doubt that the power conferred upon presiding officers of creditor’s meetings is an extraordinary one. It is the power to imprison a person indefinitely until that person complies with what is required of him or her. The purpose of imprisonment, in these circumstances, is not punishment but coercion. The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite imprisonment for coercive purposes may involve a significant inroad upon personal liberty. Clearly, it will constitute a breach of section 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case, there is no dispute that the purpose is a legitimate one. It also seems necessary and proper however for the exercise to be accompanied by a high standard of procedural fairness.”

O’Regan J. also faulted the section 66(3) allowing presiding officers other than magistrates on the basis of contempt of court jurisdiction which is exercised by court of law rather than tribunal, at paragraph 156 of the Judgment. Sachs, J was content to resolve the matter by reference only to the principle of separation of powers as follows:

“[174] In my opinion, however, it is not necessary to resolve the problems of how to construe section 12. As I see it, the matter falls properly to be determined by the application of the doctrine of separation of powers. Section 66(3) of the Insolvency Act gives authority to appointees who happen not to be judicial officers to send recalcitrant witnesses to jail. Even though the processes followed by non-judicial but experienced appointees may in practice show the utmost procedural fairness and even if the dangers of abuse may in reality be minimal, there is a simple, profound and well-understood principle which I believe this Court should uphold, and that is that only

judicial officers should have ;power to send people to prison.

[175] Section 165 (1) of the Constitution makes it clear that “[t]he judicial authority of the Republic is vested in the Courts. The appointee of the Master or the magistrate, however, need not be a judicial officer serving in any court. When such appointee is not a judicial officer, he or she should not be able to exercise what is really a crucial part of the authority reserved in democratic states to the judiciary, namely the power to punish misconduct or penalize recalcitrance by means of incarceration in a state jail.

[176].... [t]he authority to incarcerate for purposes of imposing penalties for past or continuing misconduct belongs to the judiciary, and to the judiciary alone. In my view, the doctrine of separation of powers prevents Parliament for entrusting such authority to persons who are not judicial officers performing court functions as contemplated by section 165(1).”

[136] The outcome of the various judicial pronouncement of the Constitutional Court in **De Lange**, is therefore that only the court should deal with the issue of punishment – coercive or punitive – of offenders and that a law that grants power to presiding officers other than judicial officers is on the grounds of Separation of Powers unconstitutional, apart from any considerations whether the law provides mechanisms for procedural fairness including the principle that a person shall not be a judge in his own cause. The Regulations herein create own criminal trial procedure by **inquiry** for determination as to whether offences created have been committed. Even as an administrative procedure, the **Inquiry** clearly offends the right to fair administrative action with provisions that clearly indicate that the Regulator is judging its own cause. The 3rd respondent as the Regulator in the industry would be judging its own cause if, without recourse to a court, it directly imposed criminal sanctions on offenders under the Regulations.

[137] As a criminal trial process, these regulations violate the Article 50 rights for fair trial, which in accordance with Article 25 (c) of the Constitution shall not be limited. Most importantly, by providing that the Regulator may upon such **inquiry** find an offence to have been committed and **impose criminal sanctions**, the Regulations offend the principle of separation of powers where the judicial function is the province of the Judiciary and never an executive function. In this regard, Regulations 16, 20 (4) and 21 (a) provide as follows:

“16. (1) Whenever **the Authority**—

(a) **is of the opinion that a marine service provider has committed a professional misconduct; or**

(b) receives a complaint or allegation that a marine service provider has committed an act of misconduct,

(c) the Authority shall commence an inquiry by issuing a notice in writing to that maritime service provider.

(2) The notice issued by the Authority under paragraph (1) shall—

(a) state the Authority’s opinion, or the complaint or allegation of misconduct received, as the case may be; and

(b) require the maritime service provider to submit, within such time not being longer than thirty days, as may be specified in the notice, a response in writing.

(3) Upon receipt of the written response, or where no such a response has been received, within the time limit set out under paragraph (2)(b), the Authority shall inquire into the grounds set out in its notice under paragraph (1) or such of the grounds not admitted, as the case may be.

(4) The Authority may, in the course of the inquiry, consider such documentary evidence and take

such oral evidence as may be relevant or material to the inquiry, and may put any questions to any person tendering evidence for or against the maritime service provider.

(5) The maritime service provider shall be entitled to cross examine any person on the grounds forming the basis of the proceedings but where the Authority declines to examine any person on the ground that his or her evidence is irrelevant or immaterial, it shall record its reasons in writing.

(6) At the conclusion of the inquiry, the Authority shall prepare a report of its findings with appropriate orders.

(7) The Authority shall subject to paragraph (9) furnish the maritime service provider with a copy of its report and the maritime service provider shall within a period of not more than thirty days from the date of receipt of the report, submit, in writing, any representations which it may have against the findings.”

(8) The Authority, in making the report under paragraph (6), may—

(a) caution the maritime service provider; or

(b) suspend the licence of the maritime service provider; or

(c) revoke the licence of the maritime service provider; or

(d) if there is a finding of an offence as provided in regulation 9 (2), apply the sanctions provided thereunder.

20. (4) **Any person who contravenes this regulation commits an offence and is liable, on conviction, to a fine not exceeding five million shillings and shall in addition be liable to the affected cargo owners for all losses, fines, penalties, demurrage, storage charges or any other charges arising from such failure to comply. Authority may impose penalty upon admission of guilt.**

21. If a maritime service provider—

(a) admits to the Authority that he has contravened any provisions of these Regulations or the Act, or that he has failed to comply with any provision with which it was his duty to comply; (c) deposits with the Authority such sum as may be required of him, but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question, **the Authority may, after such enquiry as it deems necessary, determine the matter upon such enquiry and may, without legal proceedings, order by way of a penalty the whole or any part of the said deposit to be forfeited.**”

Article 31 Right to Privacy and Regulations 17, 18 and Regulation 19 of the Regulations

[138] The question here was whether the right to privacy applied in relation to public enforcement requirements? A declaration was sought that Regulation 17, 18 and 19 of the Regulations infringe on the Petitioners’ right to privacy as guaranteed by Article 31 of the Constitution, are unconstitutional and are void to the extent of their inconsistency with the Constitution. The 3rd Respondent contended that the requirements of the regulations are consistent with Article 46 right for consumer protection.

[139] The Regulation 17 requirement for payment of services in Kenya shilling is objected to by the Petitioners as “a capricious, abrupt and arbitrary as it is against custom and or usual practice in the marine service industry prior to the introduction of the impugned Regulations.” I do not see how such a change would be unconstitutional, while it is easy to see that as consumers in the local maritime industry are Kenyans, it may afford them price protection where they do not have to seek foreign exchange to pay for

the maritime services.

[140] Article 31 of Constitution provides for the right to privacy in terms as follows:

“31. Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.”

[141] Article 46 is in terms as follows:

“46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.”

[142] In accordance with this consumer protection right, the petitioners as private persons are as well as public entities obliged as maritime service providers to provide services of reasonable quality and for that purpose to provide information necessary for the customers to gain full benefit of the maritime service offered by the petitioners. In giving a harmonious interpretation to the two constitutional rights of the Bill of Rights under Articles 31 and 46, I find that the right to consumer protection and the right to privacy may be protected by the requirement for such information (not unnecessary private affairs) and right of entry only for purposes of giving effect to the consumer protection rights. Having chosen to engage in the provision of maritime service provider business, the petitioners cannot complain when provisions for the protection or enforcement of a constitutional right to consumer protection are enforced against them.

[143] I would, therefore, agree with the Respondents that right of entry is necessary for oversight generally and monitoring service delivery for purposes of Article 46 protection of consumer rights. I also do not consider the Regulations with regard to entry and inspection unreasonable in an open and democratic society. I would find that the Regulation are not unconstitutional content to the extent of breach of right to privacy.

Breach of the international treaties and conventions ratified by Kenya Article 2(6) of the Constitution

[144] The Petitioners sought a “declaration that the Regulations are contrary to and in breach of the international treaties and conventions ratified by Kenya contrary to Article 2(6) of the Constitution and are void to the extent to their inconsistency with the Constitution and in particular, a declaration that the Regulations are contrary to and are in breach of provisions of the African Charter on Human and People’s Rights and the International Covenant on Civil and Political Rights pursuant to Article 2 of the Constitution and are invalid.”

[145] Treaties and Conventions which Kenya has ratified become under Article 2 (6) part of the laws of Kenya under the Constitution, and are therefore subject to the provisions of the Constitution of Kenya. Having examined the Regulations against the provisions of the Constitution, which is the higher standard and supreme law in terms of Article 2 (4) of the Constitution, nothing would turn on the relationship of the Regulations with the Treaties and Conventions aforesaid.

Protection of right to fair and equitable treatment for the petitioners under Treaties between Kenya and the respective countries of origin of the petitioners.

[146] The alleged bilateral Treaties between Kenya and the respective countries of origin of the Petitioners were not proved. The Evidence Act requires proof of treaties by means as follows:

“82. Proof of certain public documents

Without prejudice to any other mode of proof, prima facie evidence of the following public documents may be given in the manner hereinafter shown, that is to say—

(a) deleted by L.N. 22/1965;

(b) deleted by L.N. 22/1965;

(c) proceedings of the East Africa Central Legislative Assembly, or of the legislature of any country in the Commonwealth, by the journals thereof, or, in the case of such Assembly or legislature as aforesaid, by copies of such journals purporting to be printed or published by or under the authority of such Assembly or legislature, or by or under the authority of the government of any such country;

(d) acts, orders or notifications of the executive Government of Kenya, the High Commission or the Organization or any service, thereof, or any local authority, or of a ministry or department of any of the foregoing—

(i) by the records of the service, ministry or department certified by the head of the service or department, or, in the case of a ministry, by the permanent secretary thereof; or

(ii) by any document purporting to be printed or published by the

Government Printer;

(e) proceedings of any local authority, or of any corporate body created by Act or Ordinance, by a copy of the proceedings certified by the person having the lawful custody of the original thereof, or by a public document purporting to be printed or published by or by the authority of such authority or corporate body;

(f) proclamations, treaties and other acts of State of any foreign country or of any part of the Commonwealth, and judgments, decrees, orders and other judicial proceedings of any court of justice in such country or part, and all affidavits, pleadings and other legal documents filed or deposited in any such court, by the procedure required by section 7 of the Evidence Act, 1851, of the United Kingdom;

(g) public documents of any other class in a foreign country, by the original, or by a copy thereof bearing a certificate under the seal of a notary public or of a Kenya consular officer or diplomatic agent that the copy is duly certified by the officer having the lawful custody of the original thereof, and upon proof of the character of the document according to the law of the foreign country.

[L.N. 22/1965.]”

[147] The Treaties having not been proved, the Court is unable to make any findings on the allegations made by the petitioners, thereon.

Power of the Minister to make Regulations and Whether the Regulations are ultra vires

[148] The final consideration of the Petition relates to a determination whether 2nd Respondent Minister for Transport had lawful authority to make the Regulations herein published as LN. No. 112 of 2011. If he had no lawful authority to make the Regulations and only exercised pretended powers under the Act, the Regulations are **ultra vires** and their constitutionality **in content**, or otherwise, will be of no consequence. If he has such authority to make the Regulations, further inquiry will be made as to whether the Regulations made are within the matters for which authority is given.

Traditional Legislative Authority of the Minister

[149] The determination of the question of **ultra vires**, or otherwise, of the Regulations in Legal Notice No. 112 of 2011 must begin with an inquiry whether the Minister for Transport had power under the relevant law – the Constitution and the Merchant Shipping Act - to make the Regulations. The 3rd respondent contends that the Minister had authority under section 8 of the Merchant Shipping Act, 2009 to **“prescribe anything that may be prescribed under the Act”** which gave him authority to make regulations and that, therefore, **“without a challenge on statutory provision, the complaint against the Regulations stemming therefrom is without foundation.”**

[150] The remit of the prescription **“anything that may be prescribed under the Act”** is the traditional method of delegation of legislative authority by Parliament to the Executive through an Act of Parliament, which cast the net as far a sea as possible to cover all non-foreseeable exigencies. The Constitution of Kenya 2010 has underscored the constitutional separation of Sovereign mandates of legislative, executive and judicial with a new elaborate method of delegations with strict and restricted specifications of the mandate, extent and standards of the delegated legislative authority, rather than the broad measure of **‘anything that may be prescribed under the Act.’**

151] With respect, the whole case of the Petitioners is that the Regulations were made without authority as section 8 of Act, before and after the amendment of 2012, did not comply with the constitutional standards of delegation of legislative authority. This is clear from paragraph 19 of the Petition where the petitioners state:

“More importantly, a provision in legislation limiting a right or a fundamental freedom is invalid unless the legislation specifically expresses the intention to limit the right, the nature and the extent of the limitation. This is under Article 24 (2) (a) of the Constitution.

The Minister has purportedly sought to unlawfully limit the rights and fundamental freedoms of the Petitioners, Maritime Service Providers and their shareholders including the right to property, freedom from discrimination, right to privacy, right to a fair administrative action, and right to protection of the law among others by using subsidiary regulations.

Clearly, the Minister cannot and does not have the power to limit any of the power to limit any of the rights and fundamental freedoms guaranteed by the Constitution. No such powers have been delegated to the Minister under Section 8 of the Act and an attempt to limit the rights and fundamental freedoms would be unconstitutional and usurpation of the doctrine of separation of powers.

152] The Petitioners also challenge the rule making provisions of section 8 of the Act against the constitutional requirements of delegation of legislative authority under Article 94 (5) and (6) of the Constitution as shown in Paragraph 3.1 of the **Petitioner’s Reply to the 3rd Respondent’s Submissions**,

dated 30th June 2014. The 3rd respondent relies on sections 4 and 8 of the Merchant Shipping Act 2009 which are in the following terms:

“4. The Minister shall, in addition to any other power conferred on him by any other provisions of this Act, *be responsible for the administration and implementation of this Act.*”

“8. (1) *The Minister may make regulations generally for the better carrying out into effect the provisions of this Act.*

(2) *Without prejudice to the generality of the foregoing, the Minister may make regulations for the following purposes—*

(a) *the extent to which this Act may be applicable to Government ships which are engaged in government non-commercial service;*

(b) *the facilitation of the enforcement of any international convention or instrument relating to this Act;*

(c) *prescribing anything that may be prescribed under this Act;*

(d) *prescribing fees, stamp duties and all other payments required under this Act;*

(e) *the holding of enquiries and investigations;*

(f) *port state control of ships while in Kenyan ports;*

(g) *the granting and withdrawal of licenses for maritime service providers;*

(h) *oversight and monitoring of service delivery in the maritime sector, having regard to availability, quality, standards of service, cost, efficiency of production and distribution of such services.*”

153] The 3rd Respondent further relies on section 33 of the Interpretation and General Provisions Act cap. 2 of the Laws of Kenya to found a case for the Minister’s power to enforce or secure compliance with the Regulations that he makes. Section 33 of the Interpretation and General Provisions Act is as follows:

“33. *Acts done under subsidiary legislation deemed done under Act which authorizes it*

***An act shall be deemed to be done under an Act or by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, if it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act.*”**

[154] With respect, such a reading of the section is faulty. The role of the section is to donate the **authority** of the Act to the Subsidiary legislation made under it. The section does not authorize the imposition of penalties for breach of the Regulations to the same levels of punishment as in the Act. The effect of the section is, therefore, that, subject to the requirements for constitutional validity and **ultra vires**, anything authorized to be done under subsidiary legislation is deemed to be authorized by the Act itself. It is a matter of authority for acts done pursuant to Regulations made under an Act of Parliament. But the provision is no substitute to requirement of constitutionality and **ultra vires**: if the subsidiary legislation is unconstitutional and **ultra vires**, section 33 of the Interpretation and General Provisions Act cannot save it. I agree with the petitioners that section 31 (e) of the Act provides for the penalty for breach of subsidiary legislation save where the enabling Act shows contrary intention, in which case the statutory provision will prevail. There must be a contrary provision in the Act to off-set the application of the general provision of section 31 (e) of the Interpretation and General Provisions Act.

[155] The Respondent offered a High Court decision in ***Vania Investments Pool Ltd. v. Capital Markets Authority*** (Misc. Application NO. 139 of 2014) where Majanja J. considered a provision similar to section 8(1) of the Act herein in The Capital Markets (Takeovers and Mergers) Regulations, 2002 issued under The Capital Markets Act (cap 485A, and held:

“The scheme of the Act in providing a dispute resolution process and timelines for specific actions to be taken under the Regulations is to ensure that matters are dealt with expeditiously and efficiently in line with the objects of the Act.”

The petitioners countered that the decision is not relevant as in that case the Court was weighing the applicant’s private commercial interest and the general public interest in light of a takeover process and not as against the applicant’s rights and fundamental freedoms granted by the Constitution. I would agree with the petitioners and observe that the Court in ***Vania*** found that the Act had a scheme of a dispute resolution process which provided a basis for the Regulations, and that the Regulations in that case were made in 2002 and therefore based on the state of the law before the Constitution of Kenya 2010. Moreover, the decision in ***Vania*** was of preliminary nature in an application for leave to file judicial review proceedings and for such leave to operate as a stay, the test for which, as the Court states at paragraph 30 thereof, was without examining the matter in any depth *an arguable case* that the relief might be granted at the hearing of the substantive application.

Modern Delegation of Legislative Authority of Parliament

The Legislative Scheme of the Constitution of Kenya 2010

[156] The Court must observe that a transformative constitution such as our Constitution of Kenya 2010 seeks to change the way things have been done in the previous legal dispensation including the way legislative authority was delegated and exercised. It is not idle, therefore, that the Constitution devotes text on the manner of delegation of the State’s legislative authority by Parliament which has the Sovereign legislative mandate under the Constitution. The power to legislate is, in accordance with constitutional doctrine of Separation of Powers, the preserve of the Legislature with only provisions for delegation to persons or bodies in accordance with Article 94 of the Constitution. Article 2 (1) and (2) of the Constitution gives the Supremacy of the Constitution:

*“2. (1) This Constitution is the supreme law of the Republic and **binds all persons and all State organs at both levels of government.***

*(2) **No person may claim or exercise State authority except as authorised under this Constitution.**”*

[157] Article 94 of the Constitution provides for the legislative authority of Parliament as follows:

“94. (1) The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

(2) Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.

(3) Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.

(4) Parliament shall protect this Constitution and promote the democratic governance of the Republic.

(5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

[158] It is clear that the legislative mandate of the Minister is a delegated authority which must be read in the context of the provisions of Article 94 (5) and (6), which while declaring that legislative power lies with the Parliament provides for delegation of the legislative power in certain circumscribed situations, as set out in Article 94 (5) and (6) of the Constitution, above. Accordingly, the Minister's power to "**make regulations generally for the better carrying out into effect the provisions of this Act**" and to "**prescribing anything that may be prescribed under this Act**" must be construed in such a manner as to bring it into conformity with the Constitution of Kenya, 2010.

[159] Clause 7 of the **Transitional and Consequential Provisions** of the Constitution of Kenya 2010 set out in Schedule Six thereof, seeks to bridge the gaps in the old laws of the Republic by providing that all laws existing before the Constitution must be construed so as to give effect to the new constitutional ordering of things as follows:

"7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

(2) If, with respect to any particular matter—

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict."

[160] In terms of Clause 7 of the Transitional Provisions it is mandatory to upgrade the provisions of section 8 with regard to the rule making power of the minister in the light of the new prescriptive directions of Article 94 (5) and (6) of the Constitution. Otherwise, an exercise by the Minister of any legislative power without the sanction of the Constitution is invalid in terms of Article 2 (2) of the Constitution. The issue of the Minister's authority to make the Regulations must, therefore, be resolved with reference to the constitutional provisions of delegated legislative powers under Article 94 (5) and (6).

[161] An enabling Act is required by Article 94 (6) of the Constitution to "**expressly specify** –

1. the purpose and objectives for which that authority is conferred,

2. the limits of the authority,

3. the nature and scope of the law that may be made, and

4. the principles and standards applicable to the law made under the authority."

[162] Two questions immediately arise: what does the Constitution require the enabling Act to do while donating Parliament's power to legislate; and has this been done in respect of the Act under consideration in this Petition?

The 2012 Amendment

[163] While the Petition was pending, the Minister amended section 8 of the Merchant Shipping Act 2009 to provide for expanded rule making powers to insert a new paragraph (gg) of section 8 (2) and a new section 412A as follows:

(gg) prescribing the requirements for licencing as a maritime services provider, the conditions subject to which a maritime services provider should operate and the standards to be maintained in the provision of services;

The new section 412A provides as follows:

412A. Regulations made under sections 8, 360, 410 and 450 may provide that any person contravening any of the provisions thereof is liable on conviction to a *fine not exceeding ten million shillings, or to imprisonment for a term not exceeding ten years, or to both.*

[Act No. 12 of 2012, Sch.]”

[164] Obviously, the 2012 amendment was to provide grounding for the legislative provisions of the requirements for licencing, penalties, professional qualifications etc. set out in the Regulations of 2011, and the Counsel for Petitioner properly objected that the amendment by **Statute Law (Miscellaneous Amendment) Act**, No. 12 of 2012 could not retroactively be used to justify or ground the Regulations made the year before by LN No. 112 of 2011 and long after the Petition had already been filed to challenge the Regulations.

[165] However, even assuming that the 2012 amendment could be retroactively used to justify the Regulations made the year before in April 2011 and gazetted on 9th September 2011, is there any **constitutionally** compliant authority to make the delegated legislation? In other words does section 8 (as amended in 2012) of the **Merchant Shipping Act, 2009** grant valid authority to the Minister make subsidiary law?

[167] A close examination of the amended section 8 and the new section 412A is necessary: the exercise is to identify the four ingredients of a valid delegation under Article 94(6) as set out above. Is there an **express specification**, in section 8 or any other provision of the Act, of the following four necessary ingredients of valid delegation of legislative authority:–

1. the purpose and objectives for which that authority is conferred,

2. the limits of the authority,

3. the nature and scope of the law that may be made, and

4. the principles and standards applicable to the law made under the authority.”

[168] While the purpose and objectives for which the authority is given and the nature and scope of the law may be deduced from the provision of section 8 (1) and (2), respectively, there is nothing on the requirements of the limits of the authority and the principles and standards applicable to the law to be made by the Minister. The limits of the authority may be construed by application of the principle of interpretation expressed in the Latin maxim **expressio unius est exclusio alterius** to exclude everything which is not set out in section 8(2) of the Act, but would do injustice to the subsection which expressly provides that the listing of the matters therein is without prejudice to the generality of the general power under subsection (1). It does not suffice, also that the principles and standard of the subsidiary legislation may be said to accord to the constitutional and statutory requirements; being already expressed in the invalidity of any law that violated the constitution and statute under principles of Supremacy of the Constitution and doctrine of *ultra vires*, the requirements of principles must refer to other additional criteria for assessing the competency of the subsidiary law promulgated under delegated legislative authority.

[169] Moreover, the law delegating the legislative authority is required to ‘**expressly specify**’ the **purpose, limits, nature and scope and standards** of delegated law to be made and not to leave to deduction in interpretation of the relevant provision.

[170] As regards section 412A, the provision that penalties for breach of the Regulations only apply to the penalty clauses of the Regulations, and not the substantive provisions of the Regulations for which the Minister required specially delegated authority to promulgate. Nothing is said of the standards of the regulations to be made seeing as here there are contentions that the criminal trial/disciplinary procedure of the Regulations offend the fair trial guarantees of Article 50 of the Constitution. However, nothing turns on it as it was enacted after the Promulgation of the Regulations.

Statutory Requirement for tabling of the Regulations before Parliament.

[171] **The Statutory Instruments Act**, No. 23 of 2013 has of course clarified the rationale and procedure for laying subsidiary legislation before Parliament. While the procedure therein laid out is new and will not be applied to the Regulations which pre-date it, the reason for laying of instruments before Parliament as laid out in section 10 thereof is relevant.

[172] Before the Statutory Instruments Act 2013, the applicable provision for the laying before parliament of subsidiary legislation was the **Interpretation and General Provisions Act**, cap. 2 Laws of Kenya which provided at section 34 thereof (repealed by the Statutory Instrument Act No. 23 of 2013) that –

*“34.(1) All rules and regulations made under an Act shall, **unless a contrary intention appears in the Act, be laid before the National Assembly without unreasonable delay, and, if a resolution is passed by the Assembly within twenty days on which it next sits after the rule or regulation is laid before it that the rule or regulation be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule or regulation.**”*

(2) Subsection (1) shall not apply to rules or regulations a draft of which is laid before the National Assembly and is approved by resolution before the making thereof, nor to rules of court.

(3) In this section, "rules" and "regulations" mean respectively those forms of subsidiary legislation which may be cited as rules or regulations, as the case may be.”

This provision for the laying of subsidiary legislation in Parliament was subsequently repealed by Statutory Instrument Act No. 23 of 2013, s. 27, which has similar provision for the tabling of the subsidiary legislation before the Committee of the National Assembly under section 12 thereof.

[173] Section 10 of the Statutory Instruments Act, 2013 gives the rationale for tabling before Parliament as follows:

*“10. The purpose of this Part is to **facilitate the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance.**”*

[173] The criteria for consideration of the Statutory Instruments, or what the Act calls by its marginal notes **“relevant considerations”** are given in section 13 of Act as follows:

“13. The Committee shall, in carrying out its scrutiny of any statutory instrument or published Bill be guided by the principles of good governance, rule of law and shall in particular consider whether the statutory instrument-

(a) is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other written law;

(b) infringes on fundamental rights and freedoms of the public;

(c) contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

(d) contains imposition of taxation;

(e) directly or indirectly bars the jurisdiction of the Courts;

(f) gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

(g) involves expenditure from the Consolidated Fund or other public revenues;

(h) is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation;

(i) appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(j) appears to have had unjustifiable delay in its publication or laying before Parliament;

(k) makes rights , liberties or obligations unduly dependent upon non-reviewable decisions;

(l) makes rights , liberties or obligations unduly dependent insufficiently defined administrative powers;

(m) inappropriately delegates legislative powers;

(n) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

(o) appears for any reason to infringe on the rule of law;

(p) inadequately subjects the exercise of legislative power to parliamentary scrutiny; and

(q) accords to any other reason that the Committee considers fit to examine.”

[174] Clearly, although the Judiciary is the final arbiter of constitutionality, Parliament would have done the initial sweep for mines that render the statutory instruments unconstitutional, ultra vires and, therefore, void, and for consideration apart from the question of constitutionality whether the legislation should more properly be dealt with as an Act of Parliament. I would venture to suggest that had this been done, there may not have been any petition of the kind before the court today. There is always merit in the judicial policy that where the constitution or statute has made provision for dealing with a particular matter that mechanism should be followed strictly before the matter is presented to the Court, see **Speaker of the National Assembly v. Karume** [2008] KLR (EP) 425.

Effect of failure to lay Regulations before Parliament.

[175] To underscore the seriousness of the Parliamentary supervision over subsidiary legislation Section 11 (4) of the Statutory Instruments Act, 2013 provides that the Rules published but not presented to Parliament within seven (7) days will become null and void on expiry of the prescribed period of seven (7) days. Section 34 of the Interpretation and General Provisions Act, which was at the time of promulgation of the Regulations in 2011, then applicable to the Regulations herein, required laying before Parliament of Regulations without unreasonable delay. However, in both cases annulment does not prejudice a new

rules or regulations being made. It must follow that want of laying the Regulations before Parliament nullifies the Regulations, with a rider that the Rule-making authority may promulgate new rules. This would be the same effect where under the Statutory Instruments Act, 2013 where such Regulations become void for not being laid in Parliament within the prescribed period of seven (7) days.

CONCLUSION

Findings of the Court

[176] As demonstrated above, the Court finds that legislation contemplated under Article 24 of the Constitution which has the effect of limiting constitutional rights in the Bill of Rights can only be done by legislation enacted by or under an Act of Parliament in strict compliance with Articles 24 (2) and 94 (5) and (6) of the Constitution. The Court finds that ***The Merchant Shipping (Maritime Service Providers) Regulations 2011*** published as under Legal Notice No. 112 of 2011 are unconstitutional and, therefore, null and void for most of the Regulations in their **content** violate the rights and fundamental freedoms of the petitioners without constitutional authority to do so by express specification of the intention, nature and extent and the standard and principles of the limitation of the rights and fundamental freedoms under Article 24 (2) of the Constitution. The Regulations are also **ultra vires** the Merchant Shipping Act, 2009 as the Act does not in compliance with Article 94 (5) and (6) of the Constitution give to the Minister valid authority to make law by delineating ‘**expressly specify**’ the **purpose, limits, nature and scope and standards** of delegated law to be made. In addition the Regulations were a nullity for not being tabled before Parliament as was then required by section 34 [now repealed and replaced by section 11 of the Statutory Instruments Act, No. 23 of 2013] of the Interpretation and General Provisions Act, cap. 2 of the Laws of Kenya.

Balance of Convenience with regard to public interest

Transformative Object of the Constitution of Kenya 2010

[177] For completeness, I agree that as a general principle public interest should be able to trump any individual or personal interest of the petitioner whether in private law or in public constitutional law. We must also agree that there is overriding public interest in the observance of the rule of law as a national value and principle of governance under Article 10 (2) of the Constitution. The rule of law principle applicable to the inquiry before the Court is that all law inconsistent with the Constitution is invalid and the State is enjoined to protect the rights and fundamental freedoms Bill of Rights to the greatest extent of their enjoyment.

[178] I do not think anyone would quarrel with - and I respectfully agree with it - the holding of Gacheche, Dulu and Muchelule, JJA in ***John Kabui Mwai v. Kenya National Examination Council & 2 Ors.*** (2011) eKLR on the transformative nature of the constitution aimed at equal and equitable distribution of resources, as follows:

“This court is being asked to determine whether the 2nd Respondents’ policy in relation to admission into national schools discriminated against candidates from private schools. In dealing with this question the court recognizes that under Article 10 (2) (b) of the Constitution there are national values and principles of governance that should be borne in mind. They include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Article 19(2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Under Article 20(4) (a) the court, in interpreting the Bill of Rights, shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. Article 21 (3) enjoins the court to address the needs of the vulnerable groups within the society, including women, older members of society, persons with disability, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. The state is commanded by Article 27 (6) to give full effect to the realization of the

right to equality and freedom from discrimination by taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b)."

[179] There is a public law duty of Court not to interfere with the constitutional functioning of public bodies trace-able to the constitutional doctrine of Separation Powers. As a consequence, I, respectfully, agree that there is a duty not to hamstring public bodies in exercise of their constitutional or statutory mandates. The Court of Appeal in ***East African Cables v. Public Procurement Complaints, Review and Appeals Board & Anor.*** (2007) eKLR on an application for stay pending appeal from a High Court decision in Judicial Review proceedings challenging an award of tender said:

*"We think that in a case like this one we must consider the likely effect of the orders sought by the applicant. We should take into account the special nature of the set up of the 2nd respondent. It is common ground that it is the sole supplier of electricity in the country and that it has the duty to satisfy its ever surging number of consumers of that vital commodity. While we agree that the applicant has an undoubted right of challenging the decision of the superior court and that the court has a duty to see that procurement laws are not breached, nevertheless, **the court has a reciprocal duty to ensure that it does not hamstring such bodies like the 2nd respondent from performing their lawful duty or duties as bestowed upon them by the relevant law.***

*We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that ***in evaluating the rightness or wrongness of an action we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods.*** Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable.*

We have further considered the fact that the value of the items tendered for by the applicant is in the region of Shs.5.9 billion and if the applicant's bid was successful it would have commissioned a new factory which would have employed directly a good number of Kenyans."

[180] However, such deference by the Court can only be justified in situations where the operations of the public bodies are authorized or where as in this case subsidiary legislation in the form of Regulations are made without authority of a Statute and where such regulations offend the Constitution of the Republic.

[181] There was no factual basis for the submission that the petitioners and all they represented amounted to only 1% of the Maritime Service Providers in Kenya. The 3rd Respondent improperly sought by factual statements, rather than evidence, set out at paragraphs 85 - 91 of the submissions of 15th May 2014 that the petitioners were in the minority of the Industry which included Kenyan as well as regional players. The utilitarian versus individual test may only be relevant where the regulations as made are constitutional and within the delegated rule making power of the Act but in some way infringed upon the rights of individual petitioners.

[182] The Regulations herein are wholly unconstitutional and ultra vires. Article 24 (2) (1) of the Constitution renders them invalid for want of specific expression of the intent and nature and extent of limitation of affected rights. In accordance with Article 24 (2) (b) the Court cannot construe them as

valid to limit the rights of the petitioners. Article 94 (5) and (6) require express delegation and delimitation of legislative authority of Parliament. Both were not done. In these circumstances, it is the Court's duty to declare such regulations, unconstitutional, *ultra vires* and, therefore, null and void.

[183] The Court's duty to enforce the Rule of Law was clear in the decision of Nyamu, J. (as he then was) in ***Keroche Industries Limited v. Kenya Revenue Authority & 5 Ors.***, [2007] eKLR applied the principle in the House of Lord's case of ***Bennet v. Horse Ferry Road Magistrate's Court and Anor.***, 1993] 3 ALL ER 150 that the court has power to check threats to human rights or the rule of law, in the words of Lord Griffiths as follows:

"1. there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain"

2. ...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."

[184] Similarly Ojwang, J. (as he then was) in ***Republic v. KRA ex p. L.A.B. International Kenya Limited*** [2011] eKLR found renewed authority of the Court under the Constitution of Kenya 2010 for the control of public authorities as follows:

"The common law, in its evolution, has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of the Courts of law; but for Kenya, such a general competence of the Courts is now no longer confined to the terms of statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47, which imposes a duty of fair administrative action, and [Art. 10 (2) (c)] demands "good governance, integrity, transparency and accountability".

From the facts of the instant case, it is clear to this Court that the respondent failed to deal with the applicant's claim of VAT refund in the context of fairness, transparency, accountability or good governance. Besides, I agree with learned counsel for the applicant that the applicant had been subjected to discrimination, in the terms signalled by Article 27 (1) and (2) of the Constitution."

[185] In the end, had the Court found some parts of the legislation constitutional and others unconstitutional, the Court would, holding everything else constant and particularly assuming validity of the Minister's rule-making authority, been with a faced choice of three directions to take in accordance with three principles, namely:

a) Reading in provisions into a law so as to cure ellipsis in draftsmanship and achieve the intention of Parliament. See ***A-G for The Gambia v. Jobe*** (1985) LRC (Const) 556.

b) Avoid encroachment on the role of the Legislature if what would be required is to fill obvious lacunae in the legislation. See ***Hunter v. Southam Inc.*** [1984] 2 SCR 145, 169 where Dickson J delivering judgment of the Supreme Court said:

"While the Courts are guardians of the Constitution and individuals' rights under it, it is the Legislature's responsibilities to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the Courts to fill in the details that will render legislative lacunae constitutional."

c) Where the doctrine of severance has application, sever the unconstitutional or ultra vires and void parts of the legislation. See the test of severability in *A-G for Alberta v. A-G for Canada* [1947] AC 503 and its reference and application in *Hinds v. R* [1976] ALL ER 353; *A-G for The Gambia v. Jobe* [1985] LRC (Const.) 556 and *A-G for Antigua and Barbuda v. Goodwin & Ors.* [2001] 2 LRC 1.

[186] However, the principles of reading into the law or severability of offending clauses are not applicable here because, as the Court has found, the Regulations were bad as **one** rather than some parts being declared constitutional and others unconstitutional. The unconstitutionality and *ultra vires* affects the whole regulatory regime in the Regulations and even though some regulations were, **in content**, reasonable and justifiable, the want of constitutional and statutory authority to make them affects the whole and, consequently, it is not possible to sever bad from good. On that account the whole text of the Regulations would have to go.

[187] I respectfully venture to hold that in view of the substantial nature of the legislative changes sought to be made by the Regulations with impact on the rights and fundamental freedoms of the petitioners, the Court should defer to the Parliament to effect the necessary changes in the law, rather than attempting a reading into (or out of) the Regulations to give effect to a legislative intent which can directly be given by enactment of an Act of Parliament in that behalf or by amendment to existing Acts.

[188] It is noteworthy and encouraging that all the legislation from other jurisdictions proffered by the 3rd respondent as portraying the international best practices are enacted by Acts of Parliament and not subsidiary legislation, as follows:

1. National Ports Act, 2005 (No. 12 of 2005) of South Africa;
2. United States Merchant Marine Act, 1920 (The Jones Act);
3. The Shipping Agency Act, (No. 12 of 2002) of Tanzania;
4. The Shipping and Trade Interests (Protection) Act 1995 of the United Kingdom;
5. Bangladesh Merchant Shipping Ordinance, 1983;
6. The Coastal and Inland Shipping (Cabotage) Act 2003 of Nigeria; and
7. Indonesia Shipping Law.

In my view, it is proper and fitting that the substantive provisions of Merchant Shipping law should be underpinned by an Act of Parliament.

Verdict of good intentions bad law

[189] Contrary to the submission by the 3rd Respondent the ‘suspension’ of the Regulations would contravene Kenya’s International Obligations and Conventions such as the Convention on Facilitation of International Maritime Traffic 1965 (FAL Convention) and the UNCTAD Code of Conduct for Shipping Agents, respectively geared towards efficiency in maritime documentation and professional qualification of shipping agents. These are clearly part of Kenya law by virtue of Article 2 (6) of the Constitution, subject to domestication, as necessary, by **valid law**.

[190] Whether for patriotic, strategic economic and or national security and other public/national interest concerns and whether it is intended that the Republic obliges its international commitments under various agreements or instruments as urged by the 3rd Respondent, there cannot be a justification for making **unconstitutional** and *ultra vires* legislation. The law promulgated for purposes of compliance with such obligations must pass the constitutional and statutory, if applicable, muster for it to be valid and of any desired effect.

[191] With respect to the Regulations herein published as ***The Merchant Shipping (Maritime Service Providers) Regulations, 2011*** under Legal Notice No. 112 of 2011, the Court must return a verdict of ***good intention, bad law***. Legislation for the regulation of an important service industry as the maritime sector with a view to improvement of quality and efficiency of service, international competitiveness and even promotion of local player participation may well be good-intentioned and beneficial to the citizens and inhabitants of Kenya, not to mention the neighbouring countries which rely on its Ports for carriage of goods and human transport. However, whether the country adopts a protectionist or competitive policy and legislation in the local maritime service industry is a matter for serious consideration, and while the Court does not hold that it cannot be done by subsidiary legislation, it is considered that the matter is serious enough to call for careful deliberation by the supreme legislative authority of the Republic by a suitable Act of Parliament.

[192] Any law promulgated for any purposes that affect the rights and fundamental freedoms must pass the special constitutional and statutory threshold criteria established for the limitation of rights and freedoms of the person - natural and corporate - under the Bill of Rights, and if, subsidiary legislation by the delegated legislative power is contemplated, as in the case here, the authority to make the law must in addition accord to the strict terms of delegation with clear delimitation of the intention, nature and extent, and standards and principles of such subsidiary legislation. Otherwise, the noble intentions notwithstanding, a bad law for their implementation will remain null and void, *ab initio*.

[193] If the Respondents' interest in the regulation of the maritime service industry remains, the Respondents must by independent legislative enactment or amendment to the Merchant Shipping Act, 2009 directly provide for the desired changes, or otherwise provide statutory underpinning for reasonably justifiable limitation of the rights and freedoms in the Bill of Rights and expressly demarcate the delegation of the legislative authority to the Minister to make the desired Regulations. Such subsidiary legislation will then be made, in accordance with the Statutory Instruments Act, 2013, s. 5, with consultation '*with persons who are likely to be affected by the proposed instrument*' and thereafter laid before Parliament for validation.

[194] For now, the Court is obliged to hold that the Regulations herein published as ***The Merchant Shipping (Maritime Service Providers) Regulations, 2011*** under Legal Notice No. 112 of 2011 were made without statutory authority and were unconstitutional in their contents, and they must, accordingly, be declared ultra vires, unconstitutional and therefore null and void.

ORDERS

[195] Accordingly, for the reasons given above, the Court makes the following orders on the Petition dated 1st December 2011 herein:

1. The Petition is granted as prayed on the basis of the unconstitutionality of the Regulations published as *The Merchant Shipping (Maritime Service Providers) Regulations 2011* under Legal Notice No. 112 of 2011 for their want of compliance with Article 24 (2) of the Constitution and for *ultra vires*, as the Minister for Transport had no authority under the Merchant Shipping Act, 2009, as required by Article 94 (6) of the Constitution for valid delegation of legislative authority of Parliament.

2. Orders of the Court will issue in the general terms of Prayers (xi), (xii), (xiii), (xiv) of the Petition as follows:

(xi) *"A declaration that the Regulations are generally inconsistent with the Constitution and are void to the extent of their inconsistency.*

(xii) *A declaration that the Regulations are ultra vires the Merchant Shipping Act (Act No. 4 of 2009).*

(xiii) *An order of prohibition or injunction restraining the implementation or coming into*

force or continuing of the operation of the Regulations.

(xiv) An order of prohibition restraining the Respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the impugned Regulations.”

3. The Petition raised serious constitutional issues regarding the constitutionality of the Regulations, which affected the entire maritime service industry, with obvious public interest concerns including people participation in subsidiary law making and the manner and extent of the delegation of law-making power under the Constitution and Statute, but there was no evidence that the Regulations were ill-motivated. Accordingly, the appropriate order on costs is that there shall be no order as to costs.

SIGNED THIS 30TH DAY OF SEPTEMBER 2016.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 21ST DAY OF NOVEMBER 2016.

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JUDGE

In the Presence of:-

Mr Kariga holding brief for Mr M Oraro for the Petitioners.

Mr Makutor for the 1st Respondents and 2nd Respondents.

Mr Makutor holding brief for Gihunge for the 3rd Respondents.

No appearance for the Interested Party.

Mr Rashid - Court Assistant.