REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW CIVIL APPLICATION NO. 15 OF 2015

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER THE MERCHANT SHIPPING ACT, 2009 LAWS OF KENYA

AND

IN THE MATTER PUBLIC PRIVATE PARTNERSHIPS ACT NO. 15 OF 2013 LAWS OF KENYA

REPUBLIC……..APPLICANT

VERSUS

ATTORNEY GENERAL……...….1ST RESPONDENT

KENYA PORTS AUTHORITY…….……..…2ND RESPONDENT

KENYA MARITIME AUTHORITY.....INTERESTED PARTY

EX PARTE: **APM TERMINALS B.V**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd January, 2015, the *ex parte* applicant herein, **APM Terminals B.V,** seeks the following orders:

1. **An order of Prohibition do issue to prohibit the 2nd Respondent from denying the Applicant the opportunity to participate in Tender No. KPA/007/2014-15/CS for Qualification for Procurement of Concessionaire for Phase 1 of the Second Container Terminal at the Port of Mombasa on the grounds that the Applicant had "a relationships prohibited under Section 16(1) of the Merchant Shipping Act 2009" or any such or similar reason;**
2. **An order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the decision contained in the 2nd Respondent's Qualification Document for**

Tender No. KPA/007/2014-15/CS for Qualification for Procurement of Concessionaire for Phase 1 of the Second Container Terminal at the Port of Mombasa namely, to bar from participation in the tendering process any company and/or person who has "a relationship prohibited under Section 16(1) of the Merchants Shipping Act 2009";

3. **Costs of and incidental to this suit be borne by the Respondents.**

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by **John Williams**, the Applicant's East Africa Regional Representative, on 20th January, 2015.
3. According to the deponent, the applicant is a private limited liability company registered under the laws of The Netherlands Commercial Registration Number 2730390, having its registered company offices at The Hague, The Netherlands and is a wholly-owned subsidiary of Maersk Holding B.V., The Netherlands and an independent port operator, operating a Global Terminal Network of 20,300 professionals and 186 port and inland services operations in 63 countries around the globe. The Maersk Group, according to the deponent, has five core businesses which include Maersk Line, APM Terminals B.V.; Maersk Oil; Maersk Drilling and APM Shipping Services.
4. The Applicant however, provides port management and operations to over 60 liner shipping customers who serve the world's leading importers and exporters of containerized and other cargoes and identified a local company with whom they intended to form a consortium in response to the upcoming tender for the concession of second container terminal in the Port of Mombasa.
5. According to the deponent, the 2nd Respondent advertised and invited bids from eligible companies for the Qualification of Concessionaire for Phase 1 of the Second Terminal at the Port of Mombasa under Tender No. KPA/007/2014-15/CS and that the consortium formed between the Applicant and the local company intended to be a bidder in response to the Tender and the parties would ultimately be shareholders in the Joint Venture Company to be incorporated in the event that the consortium was the successful bidder of the Tender.
6. Having obtained copies of the qualification documents for the intended tender from the 2nd Respondent's website the deponent upon reading the eligibility and qualification criteria set out in Section II of the Qualification Document believed that the Applicant met the said criteria and therefore stood a good chance to ably compete in the tender. Criterion 4.2 required that the Applicants should have experience in container terminal operations of at least 5 years and 3 successful international container terminals as concessionaire with average annual throughput of not less than 400,000 TEUs per terminal or combined 1,200,00 TEUs including transit, transhipment, laden and empty containers. To the deponent, the Applicant began container terminal operations in the year 2008 and in 2014 estimated to have a global container throughput of 677 million TEUs, with industry projection of further volume growth of 5.3% in 2015.Criterion 4.3, on the other hand required the Applicant to have experience in container terminal operations as a concessionaire for at least 2 successful container terminals in developing countries and the Applicant currently carries on container terminal operations in among other countries Ghana, Niger, Cameroon, Benin, Angola, Sri Lanka among several others. Clause 3.1(a) of the Qualification Document, on the other hand, permits the application for prequalification by entities jointly with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. Further, the financial performance criteria set out under criteria 3.1 and 3.2 of the eligibility and qualification criteria required that the Applicants should demonstrate a current soundness of their financial position and indicate prospective long term profitability and also ability to raise capital amounting to USD 100,000,000 for infrastructure projects. To the deponent, the current financial statements of the Applicant alone show that it recently realized a profit of up to USD 200Million from its container terminal business operations and the Audited estimates show that the Applicant had a projected annual market growth of between 4-5%. Clause 3.4 (b) of the Qualification document provided that the Tender Applicants and all parties constituting the Tender Applicants and or associates should not have a conflict of interest. Applicants would be considered to have a conflict of interest if they have the relationship prohibited under Section 16(1) of the ***Merchant Shipping Act***, 2009 (hereinafter referred to as "the Act") under which section 16 provides:.

(1) No owner of a ship or a person providing the service of 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, container freight station. Quay side service provider, general ship contractor, haulage, ship broker, ship breaker, ship chandler, cargo consolidator, ship repair, maritime training or such other services 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.

7. It was disclosed that there were legal proceedings in the nature of a petition pending being High Court (Mombasa) Petition No. 18 of 2010 Maersk Kenya Ltd & 14 Others vs. Attorney General, Kenya Maritime Authority and Minister for Transport (hereinafter referred to as "the Petition"), challenging the constitutionality of Section 16 aforesaid in which the court, on the 25th of November 2010 issued Conservatory Orders by way of a temporarily stay of operation, implementation and enforcement of the said provision pending the hearing and determination of the Petition. It was deposed that on 16th January, 2015 a representative of Maersk Kenya Ltd and the deponent met **Mr. George Oraro, SC** who represents the Petitioners in Petition No. 18 of 2018 at the High Court in Mombasa and the latter informed them that that the Petition had not yet been argued and that the conservatory orders still subsisted.
8. What provoked these proceedings, according to the deponent was the decision of the 2nd Respondent as contained in Clause 3.4 (b) of the Qualification Document for Tender No. KPA/007/2014-15/CS and in particular its inclusion in the Tender document by the 2nd Respondent given that the High Court had issued Conservatory Orders staying the application of Section 16 of the Act. In the applicant's view, there was no rational justification for requiring that inclusion of cause 3.4 (b) in the Tender and given the competence and qualification of the Applicant in view of the substantive criteria set out under the Qualification documents, the requirement under Clause 3.4 (b) of the Qualification Document was discriminatory.
9. As the 1st Respondent herein is also a Respondent in the said Petition hence is fully aware that the conservatory orders are subsisting, it was contended that it was an abdication of power and/or responsibility for the 1st Respondent not to ensure that the impugned Clause 3.4 (b) was not included in the Tender.
10. The Applicant was therefore apprehensive the application or implementation of Clause 3.4 of the Tender document by the Respondent would unlawfully and unjustly deprive the Applicant an opportunity to participate in the tendering process hence these proceedings.
11. In a rejoinder, the applicant filed a supplementary affidavit sworn by the aforesaid **John Williams** in which it was deposed the 2nd Respondent is among the State Corporation which were directly linked to Section 16 of the Merchant Shipping Act and its suspension thereof by the High Court of Kenya in Petition No. 18 of 2010 and as the principal legal advisor to the government, the 1st Respondent ought to implement the constitutional function of advising the government and in particular to ensure that the 2nd Respondent does not include Clause 3.4 (b) in the Tender No. KPA/007/2014-15/CS which would thereupon require the Applicants to comply with Section 16 of the Act which has been suspended by the High Court.
12. In his view the statement the Maritime sector has been and continues to be under the control of foreigners and that foreign shipping lines own the bulk of the fleet and serve as freight intermediaries and service providers is not factual at all.
13. He added that the court found it fit to issue the conservatory orders in the said Petition in light of the threatened fundamental breach of the Petitioner's Constitutional rights which Conservatory orders are binding on every person unless and until the same are vacated and that the Orders issued by the High Court bind all persons whether named in the Petition or not. It was his view that the Interested Party's narrow and restricted view of a court order in a Constitutional Reference is erroneous in law.
14. To him, there is a lot of public interest in seeing to it that competition thrives in the maritime services sector which would result in lower process for consumers and the Petitioners are well

within their rights to present Petition number 18 of 2010 under Article 22(2) (c) of the Constitution as persons acting in the public interest to stop any unwarranted statutory limitation that is aimed at Stifling competition and depriving the Petitioners of their hard earned and laboriously built investments.

15. It was contended that the 2nd Respondent has conveniently neglected to read through and appreciate the whole of the Court Order. The Conservatory Order was not only issued with regard to licensing, but it was a "temporary stay of operation, application and enforcement of Section 16 of the Merchant Shipping Act 2006 pending the hearing and determination of the Petition"

1st Respondent's Case

16. In response to the application, the 1st respondent filed a replying affidavit sworn by **Emmanuel Bitta**, an advocate practising in the Office of the Attorney General, on 2nd February, 2015.
17. According to him, upon receipt of the present application he sought to confirm the position and current status of the said Petition from his colleague **Mr. Eredi** who was in charge of the Civil Litigation Department of their Mombasa office and was informed by **Mr. Eredi** that the High Court issued conservatory orders in respect to the operation of section 16 of the Act in the said Petition which orders are subsisting. On 3rd May 2010 the Attorney General issued a general circular to all Ministers, the secretary to the Cabinet and Head of the Public Service, all Permanent Secretaries, the Controller and Auditor-General, the Private Secretary/Comptroller of State House, the Secretary, Public Service Commission, the Secretary, Teachers Service Commission, the Clerk of the National Assembly, the Registrar, High Court of Kenya, the Director-General, National Security Intelligence Services, the Chairman, Electoral Commission of Kenya in which he advised the government Ministries, agencies, services and corporations under the said Ministries and Commissions that the principle of rule of law demanded that all be accorded equal treatment before the law and that it is therefore imperative that court orders are complied with by all. The said departments were further advised that in the event any party, government Ministers, Permanent Secretaries/Accounting Officers and any other public officers are dissatisfied with any order, they should immediately instruct the Attorney-General to apply to court to have the orders vacated, stayed or otherwise dealt with.
18. To the deponent, it was therefore not accurate as alleged by the ex-parte applicant that the Attorney General had abdicated his power and responsibility of insuring that the clause in issue is not included in the tender and that it was not practicable for the office of the Attorney General to inform all State Corporations of all interlocutory orders issued in proceedings where they are not party.

2nd Respondent's Case

19. The 2nd Respondent, Kenya Ports Authority (hereinafter referred to as "KPA") in its part responded to the application vide a replying affidavit sworn by **Justus Omae Nyarandi**, its General Manager, Corporate Services on 16th February, 2015.
20. According to him, KPA issued a qualification document for tender number KPA/007/2014-15/CS for qualification for procurement of concessionaire for phase 1 of the second container terminal at the port of Mombasa (hereinafter "the qualification for tender document") and it is that qualification of the tender document that forms the subject of the judicial proceedings herein. I wish to give the court the background to the instant dispute in order to contextualize some of the issues.
21. According to him, the Government of Kenya in conjunction with the KPA commissioned a study of the port of Mombasa in the year 2000. The purpose of this study was to come up with recommendations on optimal utilization of the port to take into account growth in the Kenyan regional economies and the attendant throughput at the port of Mombasa. The study's main recommendation was for the expansion of the port to address capacity challenges foreseen in the near future, given the significant growth of cargo throughput in the port. The study specifically identified the construction of a second container terminal as the most suitable solution to the capacity constraints. In the year 2000, the government of Kenya (GOK) requested the government

of Japan (GOJ) to extend an ODA loan for the expansion of the Mombasa port through construction of a second container terminal (hereinafter "the Mombasa port development project"). This financial assistance was provided through the Japan bank for international cooperation (JBIC).

22. After detailing the background of the project, he deposed that the inclusion of clause 3.4(b) into the qualification for tender document was based on the express provisions of section 16(1) of the Act. He however disclosed that KPA was and is not a party to the Petition and the conservatory order and prohibition said to have been issued therein was neither issued in the presence of any KPA representative neither was it ever brought to KPA's attention as the applicant never took any step to bring the provisions of that order to the attention of KPA before filing this suit. It was therefore his view that there is no basis for the applicant to suggest that KPA abused its power, acted irrationally, unfair, discriminatorily or contrary to the applicant's legitimate expectation in including clause 3.4(b) into the qualification for tender document.
23. It was nevertheless the deponent's view that a reading of the said conservatory order and prohibition precludes its application to the applicant since the relevant parts of the conservatory order was *granted "..<u>to the petitioner herein</u> by way of temporary stay of operation, application and enforcement of section 16 of the Merchant Shipping Act, 2009 <u>in respect of or against the petitioners herein and/or their officers, agents, and/or servants or employees</u>…"*. In respect of the order of prohibition, the relevant portion of the order reads *"…or using the said provision administratively <u>to deny or refuse issuance to the petitioners herein of any trade or business licenses</u>…"*. It was therefore the deponent's position that the scope of the conservatory and prohibitory orders is limited and since the applicant was neither a petitioner in the said Petition an "officer, agent, and/or servant or employee" of any of the petitioners as stipulated in the conservatory order but a separate legal entity from any of the petitioners in the Petition, the said conservatory and prohibitory order did not apply to the applicant.
24. The deponent further contended that based on legal advice from Mohammed Muigai Advocates, the KPA advocates in this suit, clause 3.4(b) of the qualification for tender document does not constitute a 'decision' capable of being quashed in judicial review proceedings. Nevertheless, upon KPA being served with the ex parte conservatory orders issued herein, its PPP Node issued an addendum advertisement to the qualification for tender document suspending the application of clause 3.3(b) thereof pending further orders of this court.
25. Based on the Key Timeliness in the Concession Plan it was disclosed that it is important for the successful bidder to be on board by September 2015 and this is because the successful bidder is required to receive and test the equipment to be used at the second container terminal upon delivery by the manufacturers. The successful bidder will at this time also be able to start requisitions for any additional equipment and system that may be required including recruiting and training staff.
26. It was disclosed that the loan facility that was granted by JICA included the components for the manufacture and delivery of the machinery and equipment to be used as the second container terminal. This was tied to the loan agreement signed in September 2007 with JICA. As such, the timeliness for delivery and testing of the equipment and machinery was not subject to change. Further, it was further critical to note that the timelines for the repayment of the JICA Loan was currently approaching which timeline was also not amenable to change. As such, it was critical that the procurement process for the concessionaire to manage the second container terminal proceeds as smoothly as possible.
27. The 2nd respondent's position was therefore that any delays to the procurement process will result in irreversible consequences of having the second container terminal completed and available for use, as well as equipment delivered, without a terminal operator on board and that this would result in a scenario where KPA would be constrained to operate the second container terminal within its current structure and administration. Further, any further delays in the conclusion of the procurement process would lead to the second container terminal and the assets deployed therein lying idle with the nearing loan repayment dates; loan repayments are likely to be delayed or defaulted due to inoperability of the second container terminal. Further, there would be imminent congestion at the port of Mombasa which would have a ripple effect both to the economy and the regional agreements that Kenya has with its neighbours for the use of the port of Mombasa. Consequently, it is in the public interest that this dispute be resolved as soon as possible as the

Kenyan taxpayers' money and a very strategic national resource are at stake. In making its determination on the matter, the Court was urged to weigh the competing interests.

Interested Party's Case

28. On its part the interested party, Kenya Maritime Authority, filed a replying affidavit sworn by its Director-General, **Mrs Nancy Wakarima Karigithu**, on 16th February, 2015.
29. According to her, the Interested Party/Applicant herein is the 2nd Respondent in the Petition which is pending hearing and determination and the application filed by the Applicant dated 20th January 2015 is premised on the order issued on 26th November 2010 in the said Petition which order according to is temporary as the Petition is pending directions on highlighting of submissions and final determination.
30. In her view, in the present proceedings, this honourable court would be required to interpret the order issued on 26th November 2010 in the said Petition in order to reach a finding here.
31. After dwelling on what the deponent termed "a firm grounding of the nature of the dispute and interim order in Mombasa High Court Petition No. 18 of 2010, the role of the Interested Party as well as the legislative history leading to the enactment of Section 16 of the Merchant Shipping Act 2009", it was against the need to protect the indigenous players in the shipping industry that Parliament saw it necessary to put in place laws to strengthen and reinforce local capacity in the maritime industry, and the first logical step in this regard was the introduction of the ***Merchant Shipping Act 2009***, through Legal Notice No. 125 dated 14th August, 2009, in which the Minister for Transport appointed 1st September 2009 as the day on which the Act was to come into operation.
32. In her view considering the principles that a legislation is presumed constitutional until the contrary is proved and finally determined; that it is a sound principle of constitutional construction that an interpretation of law should generally be to make a statute operative and not inoperative; that Conservatory Orders to suspend operation of statutes, statutory provisions or even regulations should be wholly avoided except where national interest demands so; and that generally, conservatory or interim orders in petitions which seek to declare provisions of legislations as unconstitutional are draconian and unreasonable, the provisions of Section 16 of the ***Merchant Shipping Act 2009*** are still constitutional until proved and/or finally declared unconstitutional.

Determinations

33. I have considered the Notice of Motion, affidavits, the written submissions and judicial authorities herein and this is the view I form of the matter.
34. The genesis of the instant application is the conservatory order issued on 25th November, 2010, in High Court (Mombasa) Petition No. 18 of 2010 Maersk Kenya Ltd & 14 Others vs. Attorney General, Kenya Maritime Authority and Minister for Transport in which a challenge was taken to the constitutionality of Section 16 of the ***Merchant Shipping Act 2009***. In the said decision the Court temporarily suspended of operation, implementation and enforcement of the said provision pending the hearing and determination of the Petition. It would however seem that Clause 3.4 (b) of the Qualification document if read with section 16(1) aforesaid would have the effect of disqualifying the applicant from the subject tender on the ground of conflict of interest.
35. That the said order exists is not in question. That the said order is a temporary order pending the hearing and determination of the petition is similarly not denied. It is when it comes to the effect of the said order and its efficacy that the parties hereto are unable to agree.
36. What is the effect of a temporary order on legal proceedings? In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

"An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially

oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court…Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail either the first or the second defendant".

37. Accordingly, Court orders are binding be they final or temporary and disobedience of Court orders cannot be excused merely because they are temporary. In fact even in cases where the case is eventually dismissed, a party who disobeyed a Court order during the pendency of the proceedings is still liable to be punished in order to assert the authority and dignity of the Courts. I accordingly hold that the rule of law enjoins the parties to comply with the existing orders in the petition pending the determination of the petition.
38. It was contended that since the applicant is not a party to the said proceedings, it cannot derive benefit therefrom. In my view, the success or otherwise of that argument depends on the nature of the orders made in the said petition. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995, Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997** and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995.**
39. However, there are other orders or judgements which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In ***Conflict of Laws*** (7th Edn. 1974) at page 98 by **R H Graveson** it is stated:

"An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*." See ***Black's Law Dictionary*****,** 9th Edn. Page 862.

40. With respect to a decision *in rem* it was held in **Kamunyu And Others vs. Attorney General & Others [2007] 1 EA 116:**

"In a suit seeking judgement *in rem,* that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."

41. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Marteemns & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

"Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant."

42. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

"It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."

43. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from ***Jowitt's Dictionary of English Law*** (2nd Edn.) p. 1025-6 to the effect that:

"A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*."

44. In my considered view, the issue of the constitutionality of a provision of a statute cannot be said to be restricted to the parties before the Court. Such a decision is a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148**.

45. It was contended that since the said order was not brought to attention of the parties, it ought not to affect the said parties. However, as was pronounced by this Court in **Judicial Service Commission vs. Speaker of the National Assembly & Another Petition No. 518 of 2013**:

"Conservatory orders, in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies *in rem* as opposed to remedies *in personam*. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person…In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void. If therefore it turns out that the action by His Excellency the President of appointing the Tribunal was undertaken in breach of the orders of this Court, that action may well be null and void and of no effect. It is as if it was never done in the first place. It is as if it never existed."

46. This Court was addressed on the principles which guide the Court in determining the constitutionality of legal provisions. Since that is the subject of the pending petition, I will for good reasons refrain from embarking on the said discourse.

47. I was further urged to consider the public interest in deciding whether or not to grant the orders sought herein. In my view adherence to the rule of law which encompasses compliance with the Court orders is one of the basic foundation of a stable society that prides itself as founded in democratic principles such as ours. Public interest in my view dictate that Court decisions be adhered to and not the opposite since the stability of our nation in my view depends on adherence to the rule of law.

48. Having considered the subject matter of the Notice of Motion dated 23rd January, 2015, I find the same merited.

Order

49.In the result, I grant the following orders:

1. **Subject to the determination in High Court (Mombasa) Petition No. 18 of 2010 Maersk Kenya Ltd & 14 Others vs. Attorney General, Kenya Maritime Authority and Minister for Transport, I grant an order of Prohibition prohibiting the 2nd Respondent from denying the Applicant the opportunity to participate in Tender No. KPA/007/2014-15/CS for Qualification for Procurement of Concessionaire for Phase 1 of the Second Container Terminal at the Port of Mombasa or disqualifying the Applicant thereon on the grounds that the Applicant had "a relationships prohibited under Section 16(1) of the Merchant Shipping Act 2009" or any such or similar reason;**
2. **Since the validity section 16(1) of the Merchants Shipping Act 2009 is yet to be determined, I will not grant the order of certiorari in the manner sought**
3. **Half the costs of and incidental to these proceedings are awarded to the Applicant be borne by the 2nd Respondent.**

50.Those shall be the orders of this Court.

Dated at Nairobi this 20th May, 2015

G V ODUNGA

JUDGE

In the presence of:

Mr Ngatia for the ex parte Applicant

Mr Imende for the 2nd Respondent

Mr Moya for the Interested Party

Cc Patricia