



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 64 OF 2013

JOHN FLORENCE MARITIME SERVICES LIMITED 1ST PETITIONER

CONKEN CARGO FORWARDERS LIMITED 2ND PETITIONER

AND

CABINET SECRETARY FOR TRANSPORT AND

INFRASTRUCTURE 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

KENYA MARITIME AUTHORITY 3RD RESPONDENT

**OFFICE DE GESTION DU FREIT MARITIME (OGEFREM) 4TH
RESPONDENT**

RULING

BACKGROUND

1. The Petitioners are Kenyan companies carrying on the business of clearing and forwarding of goods within Mombasa. The 3rd respondent OGEFREM is alleged to be an agent of the Democratic Republic of Congo (DRC) in respect of Maritime Freight Management, relating to all cargo destined to the DRC in Mombasa. By virtue of an Agreement for Freight Management, the Republic of Kenya was tasked with collecting taxes and levies for the DRC and to channel the same to the alleged agent of the DRC – the OGEFREM. The petitioners allege that the agreement has since expired, and challenged the authority of the respondents to continue levying freight charges.
2. The Petitioners filed this petition under certificate of urgency on 05/11/2013 seeking the following orders:
 - a. *A conservatory order does issue restraining the 1st, 2nd and 3rd Respondents from levying any fees that are not provided for under the Bilateral Agreement dated the 30th Day of May 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo, and then only on the condition that all such payments must and shall be made or effected and receipted only to and by the Merchant Shipping Office.*

- b. A declaration be made that any provision(s) not having the force of Law in Kenya and which require the payment of anything over and above the sum of 1.8% of the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo are in contravention of the Petitioners' fundamental rights and freedoms under Article 95 of the Constitution and are therefore null and void ab initio.
 - c. A declaration that the Bilateral Agreement entered into on the 30th Day of May 2000 and known as the "AGREEMENT ON MARITIME FREIGHT MANAGEMENT" is null and void and that its continued enforcement by any body or person as part of the Laws of Kenya contravenes the Petitioners' fundamental rights and freedoms under Article 2, 40 and 95 of the Constitution and are therefore null and void ab initio.
 - d. A declaration be made that any and all provisos not having the force of Law in Kenya and that contravene the Petitioner's fundamental rights and freedoms under Article 40 of the Constitution be held to be null and void ab initio.
 - e. A declaration be made that any provisions of the Agreement contravenes the terms of Article 2 of the Kenyan Constitution be held to be null and void ab initio.
 - f. General damages.
 - g. Punitive damages.
3. The Petitioners filed, alongside the Petition, a Notice of Motion dated 05/11/2013 seeking conservatory orders in the same terms as prayer (a) of the Petition. The application was based on the grounds set out on the face of the Notice of Motion and the affidavit of Gilbert Ojwang', the 1st Petitioner's Director, sworn on even date. The allegations were, inter alia that; the agreement had expired and/or was unconstitutional, invalid or void in the circumstances; the Respondents were acting outside their ambit both in the agreement and in law; the Respondents were collecting illegal taxes and depositing the same into their own personal/ private accounts as opposed to government coffers; and that the Petitioners risked losing their monies, goods and business.
 4. Mr. Ousa Okello, Advocate, entered appearance for the third respondent, Kenya Maritime Authority on 11/11/2013 and filed Grounds of Opposition to oppose the Notice of Motion 05/11/2013. The court was urged to find that the matter directly in issue in this petition was a matter that had been determined by this court in Mombasa HC Misc. Application No. 130 of 2011 which was currently before the Court of Appeal. The application was termed as frivolous, fatally defective, misconceived, bad in law, an egregious abuse of court process and failing to demonstrate any breach by the third respondent or how the petitioner's alleged rights have been violated. It was also stated that the petitioners did not have locus standi to make the application since the agreement in question had been validly entered into between two sovereign governments. On 14/11/2013, Mr. Okello filed in court a Replying Affidavit dated 13/11/2013 sworn by John Dira Omingo, on behalf of the third respondent annexing a copy of the Judgment of this court in ***Mombasa HC Misc. Application No. 130 of 2011***, aforesaid.
 5. The Honourable Attorney General filed Grounds of Opposition through Richard Ngari, State Counsel raising an objection that the issues herein had been determined in Mombasa HC Misc. Application No. 130 of 2011, for which reason this court lacks jurisdiction.
 6. Ms. Berthe Morisho Mwamvua, the appointed OGEFREM representative in Kenya filed a Replying Affidavit sworn on 02/12/2013 opposing the Petition and Application on behalf of the fourth respondent. The affidavit highlighted four issues: first, that the matter in issue in the Petition as well as the Application herein were res judicata as they had been raised and determined in Mombasa HC Misc. Application No. 130 of 2011 (the JR); second, that the fourth respondent being a creation of Congolese statute the matters before this court should be litigated in DRC; third, that the Petition does not raise any constitutional issues known to the Constitution of Kenya; fourth, that the petitioners are estopped by the doctrine of privity of contract from challenging the contents and validity of the agreement entered into between Kenya and DRC.
 7. Counsel for the parties – Mr Taib for the petitioners, Mr. Okello for the 3rd Respondent, Mr. Ngari for the 1st and 2nd Respondents, and Mr. Tarus for the 4th Respondent, made oral submissions and ruling was reserved.

Issue for determination.

8. The issue before the court is whether the court will issue a conservatory order to stop the

implementation of the FERI certification, Certification of Destination and the levy of charges therefor pending the hearing and determination of the petition herein. In making this determination the court is mindful of the test for the grant of conservatory orders developed by various courts in and out of Kenya in the exercise of the constitutional jurisdiction, that while the applicant must show a *prima facie* case, as understood that a *prima facie* case does not mean a case that must succeed, or an arguable case or as sometimes called *prima facie* arguable case, the court has jurisdiction to give such directions as it may consider appropriate for purpose of securing the enforcement of the constitution and to avoid the ends of justice from being rendered nugatory. See Privy Council decision in *Attorney General v. Sumar Bansraj* (1985) 38 WIR 286, cited in *Muslims for Human Rights and 2 Ors v. Attorney General*, Mombasa HC Pet. NO. 7 of 2011, Nairobi HC Pet. NO. 16 of 2011 *Centre for Rights Education and Awareness (CREAW) and 7 Ors.* and *Judicial Service Commission v. Speaker of National Assembly and Anor.* Nairobi HC Pet. NO. 518 of 2013.

9. The respondents have all raised a question as to whether the matters herein are *Res Judicata*. As *res judicata* is a matter affecting the jurisdiction of the court, it is prudent that this be determined *in limine* before delving into the merits of the case, if jurisdiction is established.

Determination

10. The doctrine of Res Judicata is set out in Section 7 of the Civil Procedure Act in the following terms:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

11. Explanation VI of the section 7 on *res judicata* is in the following terms:

*“Explanation. (6)—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”*

12. The Petitioners in the present petition are described at Paragraph 1 of the petition as *“limited liability companies duly registered with the Companies Registry under the Companies Act, chapter 486 of the laws of Kenya and carry on the business of importers, exporters, agency, clearing and forwarding of goods within the region with offices at Mombasa in the Republic of Kenya...”*

13. The ex parte applicants in the Judicial Review Application No. 130 of 2011 were described in the ruling and judgment of the court, respectively, as *“a company, a firm and individuals engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo”* and *“[Many of the imports into Democratic republic of Congo pass through the Port of Mombasa.] The applicants are involved in the clearing and forwarding some of those transit goods at that Port.”*

14. The Judicial Review application no. 130 of 2011 sought orders as follows:

A. *Prohibition restraining the respondents from demanding from the ex parte applicants or any other persons FERI certificate or Certificate of Destination issued by the Interested Party prior to release of any goods imported through the port of Mombasa or through any other Kenyan port.*

B. *Mandamus compelling the Respondents to release all goods that have complied with all lawful customs procedures other than the requirement for the aforesaid FERI Certificate and Certificate of Destination.*

15. In seeking the primary prayer in the petition for *“A declaration that the Bilateral Agreement entered into on the 30th Day of May 2000 and known as the “AGREEMENT ON MARITIME FREIGHT MANAGEMENT” is null and void and that its continued enforcement by any body or*

- person as part of the Laws of Kenya contravenes the Petitioners' fundamental rights and freedoms under Article 2, 40 and 95 of the Constitution and are therefore null and void ab initio”, the petitioners herein have raised the same issues about the validity, scope and legality of the agreement which was the basis for the requirement of the two certificates (FERI & COD), which were the subject of the determination in the judicial review application JR 130 of 2011.*
16. In addition, the issue of the constitutionality of the treaty and its infringement of the property rights of the clearing and forwarding operators could have been made in the previous suit and these having not been raised would in the subsequent suit, on the authority of **Mburu Kinyua v. Gichini Tuti** 1978) KLR 69, be barred by **res judicata**.
17. Moreover, the prayer for ‘*a conservatory order does issue restraining the 1st, 2nd and 3rd Respondents from levying any fees that are not provided for under the Bilateral Agreement dated the 30th Day of May 2000, thereafter Gazetted on the 30th of August 2002 and more specifically restraining them from demanding for the payment of any monies, taxes or levies in addition to the collection of the commission specified of only 1.8% on the Gross Freight Charges paid by shipping lines on imported cargo destined for the Democratic Republic of Congo*’ is to the same effect as the Prohibition sought in the Judicial Review proceedings JR 130 of 2013.
18. In its judgment of 27/9/2012, the court determined in material parts as follows:
- “20.Both GOK [Government of Kenya] and DRC [Democratic Republic of Congo] recognize the Agreement as existing and valid. It is my view therefore that at the time when the requirements of the two Certificates were imposed a valid Inter-Government agreement on freight management existed....
26. I think I need to add that I would reach the same conclusion even if I was to hold that the bilateral agreement was not a treaty. This is because both GOK and DRC recognize it as binding and providing a framework for freight management. This is not an informal or private arrangement. GOK notified the public of its existence by way of Gazette Notice Number 5625 of 30th August 2002 and the requirement for COD and FERI certificate are underpinned in Decree NO. 118/18 of 11th April 2011 issued by the Government of DRC.
27. The procedure implemented by the Respondents (KPA, KRA & KMA) are procedures of DRC. The Respondents are merely implementing them as agents of GOK who is in turn acting on the instructions of DRC. If the Applicants are unhappy about the rules then they should take that up against the DRC. This court would not have jurisdiction to entertain that grievance. This same can be said about the complaint that the FERI charged is being paid into an account in Italy. The FERI certificate is issued by the Interested Party (OGEFREM). The Respondents neither collect the charges nor issue the certificates so any grievance about the integrity of the process needs to be directed against the Interested Party and its principal (DRC)
28. The above analysis leads this court to reach the conclusion that the imposition of FERI and COD is with a legal basis. The statutory bodies implementing it are doing so in the discharge of their statutory duties. This court is not persuaded that they have acted ultra vires or in breach of statutory duty. It has not been demonstrated how the implementation of that procedure is unfair, unreasonable or discriminatory. The procedure is prescribed by the Government of DRC. That procedure cannot be impeached by a Kenyan Court unless it can be shown to manifestly unlawful.”
19. In holding that ‘*I would reach the same conclusion [that the agreement was valid] even if I was to hold that the bilateral agreement was not a treaty*’ the court answers the objection by the petitioners in this petition that the agreement between the Government of Kenya and the Democratic Republic of Congo did not amount to a valid treaty in accordance with the applicable constitutional and statutory provisions under Article 2 of the Constitution and the Treaty Making and Ratification Act, 2012.
20. The court further made a determination in its judgment that “[t]he above analysis leads this court to reach the conclusion that the imposition of FERI and COD is with a legal basis. The statutory bodies implementing it are doing so in the discharge of their statutory duties. This court is not persuaded that they have acted ultra vires or in breach of statutory duty. It has not been

- demonstrated how the implementation of that procedure is unfair, unreasonable or discriminatory.”*
21. Having found that the imposition of FERI and COD had a legal basis the court in JR 130 of 2011 conferred status upon the two certificates which is protected by the provision of law on estoppel by record by way of a judgment **in rem** against the whole world, as opposed to judgment **in personam** or **inter partes** which operates as against the parties to the suit. Judgment **in rem** is defined in *Halsbury’s Laws of England* 4th ed. Vol.16 at p. 1024 paragraph 1522 as “*the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing as distinct from the particular interest in it of a party to the litigation.*”
 22. It would appear to me that the subject matter in dispute herein that is the agreement between the Government of Kenya and the Democratic Republic of Congo upon which the procedure for the certification of goods destined to the latter through the FERI and COD certificates and payment of a levy was the same matter in controversy in the previous suit JR 130 of 2011 upon which the court of competent jurisdiction has made a final decision by its judgment of 27//2012 referred to above.
 23. In addition, the applicants in the previous suit JR 130 of 2011, sought orders for the benefit of all clearing and forwarding operators and they must be considered in terms of Explanation VI of section 7 of the Civil Procedure Act on *res judicata* as ‘*bona fide* in respect of a public right or of a private right claimed in common for themselves and others’ and therefore the petitioners in this petition and other clearing and forwarding agents being interested in the subject matter of the agreement between the Government of Kenya and the Democratic Republic of Congo must be deemed ‘*to claim under the persons so litigating.*’
 24. Further nexus between the petitioners in this case and the ex parte applicants in JR 130 of 2013 is disclosed by paragraphs 41 and 42 of the Affidavit in Support of the Petition where petitioners’ affidavit sworn by Gilbert Ojwang, a director of the 1st petitioner company where he avers that to have been aware of letters of protest the exhibit **GO 010 and GO 011 by Representative Group of Business Stakeholders of the East of Democratic Republic of Congo** making complaints respecting the legality of imposition of the new charges to the Ambassador for Democratic Republic of Congo, among others. The said letters was signed by one Paluku Lusenge and other ex parte applicants in the JR 130 of 2013.
 25. The respondents in the previous suit were statutory authorities of the Republic of Kenya while in the petition only one the Kenya Maritime Authority is sued alongside the Cabinet Secretary for Transport and Infrastructure and the Attorney General and the Interested party who is the 4th respondent in petition is sued in the same capacity as the agent of the Democratic Republic of Congo in charge of implementing the agreement on its behalf. The two suits are clearly against the relevant executive organs of the Government of Kenya and the DRC agent. It must be considered that the respondents in the two suits are litigating in the same capacities.
 26. It is clear that despite protestation to the contrary that the petitioners were aware of the proceedings and outcome of JR 130 of 2013. Indeed, the cause of action in the petition is listed as including the issue of a circular by the OGEFREM representative dated 26/10/2012 (subsequent to the judgment of the court in the JR 130 of 2013) which seeks to further enforce the decision of the court in the Judicial Review case and reads as follows:

*“OGEFREM / Commercial section of DRC Embassy in Mombasa-Kenya wishes to remind all our esteemed partners about compliance to DRC regulations as per the office of the DRC Prime Minister's decree No. 011/18, Volume 1 Reference 5, dated 11th April 2011 and the **Mombasa High Court order dated 17th October 2012** with regard to FERI Certificate and Certificate of Destination.”*

27. It is on record that the decision in JR 130 of 2013 is on appeal in Mombasa Court of Appeal Civil Appeal No. 254 of 2012 whose last hearing was on 15/11/2013. The petitioners could have under the rules of that court participated in the appeal as persons affected by the decision of the High Court. There is no indication of whether this appeal has been concluded.

Order

28. Accordingly, for the reasons set out above, I find that the matters raised in this petition are **res judicata** by virtue of the previous decision of the court in Judicial Review case No. 130 of 2011. The petition and the Notice of Motion filed there-under are therefore barred by section 7 of the Civil Procedure Act. In accordance with the decision of the Court of Appeal in **Owners of the Motor Vessel Lilian SS v. Caltex Oil (Kenya) Ltd** (1989) KLR 1, having determined that it has no jurisdiction in the matter, the court has no power to make one more step and it must lay down its tools. For this reason, the Notice of Motion for conservatory orders together with the petition both dated 5th November 2013 are struck out with costs to the respondents.

Dated, signed and delivered this 31st day of July, 2014

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss Muyaa for Mr. Taib for the 1st and 2nd Petitioners

M. Eredi for Mr. Ngari for the 1st and 2nd Respondents

Mr. Okello for the 3rd Respondent

Mr. Tarus for the 4th Respondent

Miss Moriasi - Court Assistant