



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Judicial Review 532 of 2008**

**KOBIL PETROLEUM LIMITED .....APPLICANT**

**VERSUS**

**KENYA PORTS AUTHORITY .....RESPONDENT**

**JUDGEMENT**

The application for my determination is the Notice of Motion dated 8<sup>th</sup> September 2008 seeking the following orders;

**1. That an order of prohibition be issued directed to Kenya Ports Authority (“KPA”) prohibiting it and any officer or servant of KPA from demanding payment of or putting into effect or directing others to enforce as against the Applicant charges for services not requested by the Applicant nor rendered by KPA or for facilities not provided for by KPA namely for:**

- (i) Alleged stevedoring services pursuant to Clause 11.7 of KPA’s Tariff;**
- (ii) Alleged wharfage pursuant to Clause 15.4 of KPA’s Tariff; and**
- (iii) Imposing penalties under Clause 16.30 of KPA’s Tariff.**

**2. That an order of certiorari be issued to remove into this honourable Court and quash the said Clauses of KPA’s Tariff which became effective or came into operation on 1<sup>st</sup> March 2008.**

**3. That the costs of this application as well as the costs of the application to obtain leave to apply for the aforementioned orders be provided for.**

It is the contention of the applicant that the respondent has put into effect without lawful authority tariffs that are ultravires the Kenya Ports Authority Act Cap 391, tariffs that are contrary to public policy and not in public interest. The applicant accuses the respondent of abusing its monopoly unlawfully to the detriment of applicant. That KPA’s tariffs are devoid of bonafides, they are being put in place for ulterior, extraneous or improper purposes namely to impose upon applicant charges for services not requested and provided and for facility not used at all.

It is also the contention of the applicant that KPA's tariffs are being made and implemented to the prejudice of the applicant and to destroy or damage its business. It is contended further that the tariffs imposed and implemented are null and void having been made without any lawful authority or in excess of powers, therefore ultravires the provisions of the Kenya Ports Authority Act.

In reply to the issues raised by the applicant, the respondent contends that the instant proceedings relate to the validity of KPA's claims for stevedoring and wharfage made in KPA's new 2008 tariff book which came into effect on 1<sup>st</sup> March 2008. Stevedoring is defined to mean a transfer or movement of cargo within the vessel and/or between the vessel and the quay or the next mode of transportation. Wharfage charges shall be raised on all cargo passing over the quay wharfs, jetties and buoys except transshipment cargo which is exempted. In the case of stevedoring charges for liquid bulk cargo such as petroleum products is described as conventional cargo and charges shall be levied on liquid bulk cargo per harbor ton as follows:-

- (a) Import bulk cargo handled through conveyors or pipeline from the vessel within the port area or to storage areas outside the port US\$1.5 per ton or part thereof.**
- (b) Wharfage charges for liquid bulk cargo at US\$2 per ton or part thereof.**

It is the position of the respondent that it is a statutory corporation established by an Act of Parliament. Under section 8(1) of Cap 391, the respondent is under duty to provide by means of undertaking a coordinated system of ports and facilities for the discharge of the said duty. Section 12(1) (h) provides that the authority shall have the power to provide such amenities or facilities for persons making use of the services performed or facilities provided by the authority as may appear to the board of directors as necessary or desirable. Section 12(2) (i) provides that the authority shall have the power to determine, impose and levy rates, fares, charges, dues or fees for any service performed by the authority or for the use by any person of the facilities provided by the authority.

It is pursuant to the said provisions that KPA has prepared and published the 2008 tariff book to provide for and determine the rates and charges to be paid not only for the handling or warehousing of goods but also for any other services performed by it under section 12(2) of the KPA Act. It is the position of the respondent that KPA has accordingly determined the rates and charges for stevedoring and wharfage as defined by the said tariff book for the services performed and facilities provided. It is also the contention of the applicant that it provides facilities and services which consist inter alia of;

- (i) Two specially designed jetties and jetty-heads at Kipevu and Shimanzi respectively known as Kipevu Oil Terminal (KOT) and Shimanzi Oil Terminal (SOT);**
- (ii) One 24" crude oil pipeline and one 8" fuel oil pipeline from the head to the root of the jetty at KOT.**
- (iii) Yokohama fenders, mooring bollards and dolphins at each of the said jetties to enable the carrying vessels to come alongside and discharge the said products for the purpose of effecting delivery of the same to the importers, consignees or receivers of the same and to enable the said importers, consignees or receivers to receive and accept delivery of the same in terms of their respective contractual obligations under the relevant bills of lading;**
- (iv) A pollution control and inspection service at each of the said jetties for the purpose of preventing or controlling (as the case may be) pollution resulting from the discharge of the said products from the carrying vessels or from the escape of the said products from the pipes on the jetty and elsewhere into which the said products are discharged;**
- (v) A fire monitoring control room and pump house together with fire fighting personnel and firefighting equipment and facilities at each of the said jetties comprising of water pipes, foam pipes, foam storage tanks, fire brigade vehicles and fire fighting pumps for use in case of fire either on board the carrying vessel or on the jetty or at the pipes receiving and carrying the**

said products;

(vi) Security personnel and services both on the land side and the water side of each of the said jetties for the protection and security of the said products as well as of the pipes and other equipment used for the discharge and carriage for delivery of the said products;

(vii) A total of eight (8) loading arms on the jetty-head at KOT, one end of each of which is connected to a flexible pipe belonging to the carrying vessel and the other end of each of which is connected to the fixed pipes are thereafter connected to transmission lines belonging to Kenya Pipeline Company Limited (KPCL) or Kenya oil Refineries Limited (KORL) for the discharge (as the case may be) of refined or crude bulk petroleum products for carriage to bonded storage tanks of KPCL or KORL prior to their release and delivery to the importers, consignees or receivers of the same on completion of the Port and Customs formalities;

(viii) A “walkway” to the jetty-head at KOT to enable access to be gained to the jetty-head either for the purpose of the connection of the pipes of the carrying vessel and/or of KPCL or KORL and/or for any other necessary purpose.

It is contended by the respondent that the use of the above services and facilities by the importing oil companies enable them to discharge their bulk petroleum products from vessels chartered by them at jetties constructed and provided by KPA and to transfer or move the same between the said vessels through the 24 crude oil pipelines and 8 fuel oil pipelines provided by the respondent. It is also contended that all importers of petroleum products in bulk have paid and have continued to pay the stevedoring and wharfage charges levied in respect of imports without any question or protestation. And that the applicant is the only such importer who is objecting to pay such charges.

The applicant filed several submissions and authorities in support of its case. The respondent also filed considerable amounts of documents and submissions to contest the position of the applicant. I have considered the submissions, affidavits and authorities filed by the applicant and the respondent. Having done so, the question for my determination is whether the applicant is entitled to the orders sought. It is the contention of the applicant the tariffs by the respondent has been made without lawful authority. And that the clauses and provisions allowing the respondent to levy the charges and tariffs are irrational, unreasonable and an abuse of the purported power of KPA.

It is also the contention of the applicant that the respondent has raised charges on goods imported by it which it has never requested KPA for any facilities for its goods. As is demonstrated quite conclusively, in the replying affidavit by **Ms Gatere** the publication of the 2008 tariff book was well within the respondent’s powers under Cap 391 Laws of Kenya. Under section 8(1) of the Kenya Ports Authority Act, the respondent is under duty to provide by means of undertaking a coordinated system of costs and facilities. Section 12(1) (h) provides;

**“The authority shall have the power to provide such amenities or facilities for persons making use of the services performed or the facilities provided by the authority as may appear to the board necessary or desirable.”**

Section 12(2) (i) provides;

**“Subject to this Act the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the authority and in particular without prejudice to the generality of foregoing shall include the power to determine, impose and levy rates, fares, charges, dues or fees for any service performed by the authority or for the use by any person of the facilities provided by the Authority.”**

Section 24(1)(b) provides;

**“The Authority may subject to this Act determine the rates and charges for the handling or**

**warehousing of goods and for any other service or facility and such rates and charges shall be published in the tariff book and shall have effect from the date of such publication or from such letter later date as may be specified therein.”**

Section 30(1) provides;

**“The Authority shall cause to be prepared and published in such manner as it may think fit;**

**(a) A tariff book containing all matters which under the Act are required to be contained therein together with such other matters as under this Act may be determined by the Authority and any such other matters the Authority may think fit.”**

It is also important to note that section 2 of KPA Act provides and gives and/or gives definition of rates and charges. Rates includes”

**“All sums which may under the provisions of the Act be levied for or in respect of any ship or part or the handling or warehousing of goods by the Authority or for or in respect of any other service performed or facility provided by the Authority.”**

Charges means;

**“All sums received or receivable, charged or chargeable for or in respect of any ship or part or the handling or warehousing of goods by the authority or for or in respect of any other service performed or facilities provided by the authority.”**

It is clear that the respondent has the statutory powers, functions, duty and responsibilities to carry out the functions stated under sections 12, 24 and 30 of KPA Act. No doubt pursuant to its statutory powers, the respondent prepared and published the 2008 tariff book which came into effect on 1<sup>st</sup> March 2008. Under part B of the said tariff book, stevedoring and wharfage is clearly defined and stated as to the mode and principles of application.

It is not the case of the applicant that the respondent did carry out its function and statutory duties in a particular manner which is prejudicial and detrimental to its rights and interests. Even if that were the position, there is no evidence or material to show the respondent dealt with applicant in a particular manner or that it treated the applicant in a manner that is contrary to the principles for levying charges and rates for all stakeholders or users of its facilities.

In my mind the respondent is under duty to provide facilities and amenities to all persons or entities using the port of Kilindini in Mombasa. The respondent is required to provide a coordinated system of ports and facilities for all users and consumers of its services. It is also clear that the respondent has been given unfettered discretion in relation to determining rates and charges to be levied for the use of its facilities, services and amenities. It is incumbent upon the respondent to publish a tariff book which clearly defines its role, its powers, duties and responsibilities of all users and the amount of money to be levied for the facilitation of a particular service provided by the respondent.

As was rightly pointed out by **Mr. Inamdar**, learned counsel for the respondent, sections 12, 24 and 30 of the KPA Act grants or gives a wide discretion to the respondent with respect of charges and rates. And that there is no limitation or restriction imposed on the powers of the respondent to levy charges and rates provided the same is not unreasonable, irrational and/or ultravires its jurisdiction. There is nothing to suggest that the respondent exceeded its powers when it published the 2008 tariff book. There is also no evidence to show that the rates and charges were targeted against applicant in order to prejudice their rights and interests.

It is therefore my decision that there is nothing ultra vires, unreasonable or contrary to public policy and public interest in the way the 2008 tariff book was published and implemented. There is nothing to show that clauses in the tariff book have been made and have been implemented to the prejudice of the

applicant and to destroy its business. The tariffs were published and implemented against all consumers and users of the respondent's facilities.

The question is whether the applicant is entitled to the orders sought. The first prayer is a prayer of prohibition against the respondent from demanding payment of or putting into effect against applicant charges for services not requested. In my understanding such an order cannot be granted without showing and demonstrating that there is a decision which has been made or which is about to be made. It is elementary that prohibition looks into future and that the KPA charges were already published and implemented at the time the present application was brought, consequently the prayer for prohibition is misconceived and unmerited.

The second order which the applicant seeks is an order of certiorari to quash the clauses of KPA tariff which came effective or came into operation on 1<sup>st</sup> March 2008. No doubt the application for leave was filed on 4<sup>th</sup> September 2008 meaning that the application was filed outside the mandatory six months period. The decision being challenged came into operation or effect 1<sup>st</sup> March 2008 while the chamber application seeking leave was filed on 9<sup>th</sup> September 2008. Leave was granted on 8<sup>th</sup> September 2008. In my understanding leave should not have been granted since the application was brought outside the mandatory stipulated time for challenging such a decision. Consequently, it is my decision that the orders sought are not merited and cannot be granted. The application dated 8<sup>th</sup> September 2008 is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of February 2012.

**M. WARSAME**  
**JUDGE**