



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Judicial Review 130 of 2011**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL  
REVIEW ORDERS UNDER SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 AND  
ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF: KENYA MARITIME AUTHORITY ACT, KENYA REVENUE  
AUTHORITY ACT, CUSTOMS AND EXCISE ACT AND THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: CERTIFICATE OF DESTINATION AND FERI CERTIFICATE**

**REPUBLIC ..... APPLICANT**

**V E R S U S**

**1. KENYA PORTS AUTHORITY**

**2. KENYA REVENUE AUTHORITY**

**3. KENYA MARITIME AUTHORITY ..... RESPONDENTS**

**AND**

**OFFICE DE GESTION DU FRET MULTIMODAL (OGEFREM) .....INTERESTED PARTY  
EX-PARTE**

- 1. ROSMIK TRADING CO. LIMITED**
- 2. ATHANASE KIRO M. MUHAVIRWA**
- 3. KAMBALE VALEVEKA KDEPHONSE**
- 4. ABDULLATIF IBRAHIM**
- 5. KATALIKO KANIKI**
- 6. KASEREKA MBAYAH**
- 7. PALUKU JEAN-BOSCO**
- 8. A. BAGHA**

9. KAMBALE KAZINGUFU
10. CLAUDE MAHENGERA
11. KAHINDI NZOKA
12. KAMBALE MAHAMA
13. PALUKU MALIYABWANA
14. KATEMBO MAHEMBE
15. KAMATE MARANZI
16. LWANZO MUTUMISHI
17. KAKULE VIKWIRAHANGI
18. KALUME KABUNGA FRANCOIS
19. MUHINDO KYAVERE ROGER
20. KASEREKA VAHWERE IZRON
21. PALUKU LUSENGE
22. KAMBALE CHARLES
23. KAMBALE KATSONGO

### **RULING**

1. On 27<sup>th</sup> September 2012 this Court dismissed the application for Judicial Review in these proceedings. Promptly, and not unexpectedly, the Applicants have returned back to Court seeking stay of the requirements of FERI Certificate and/or Certificate of Destination pending the hearing and determination of their application for stay in the Court of Appeal.
2. The application before Court dated 9<sup>th</sup> October 2012 reveals that the Applicants have filed a Notice of Appeal and thereafter filed an application for stay in the Court of Appeal under the provisions of the rules of that Court.
3. When the application came up for hearing it was met with a barrage of resistance by the Respondents and Interested Party. A vexing issue was whether this Court could grant stay after rendering a final decision. The Respondents and Interested Party did not think so. That no such jurisdiction was granted under Order 53 of The Civil Procedure Rules or the Law Reform Act. Further and connected with this is that the decision of the Court was a dismissal Order and no positive orders were granted in the Respondents and Interested Party's favour save for costs. So there is nothing to stay.
4. Although raised in answer to the application Counsel did not address that issue as exhaustively as this Court would have wished. I will leave that matter to another Court on another day. I do not have to make any finding on it as the Court is able to determine the matter at hand without making that decision. This Court is, however, aware that the Court of Appeal in **Civil Appeal No. 51 of 2008 Republic –Vs- The Kenya Anti-Corruption Commission & 2 Others** had to grapple with somewhat similar questions. There the Applicant had sought to stay Criminal proceedings which were the subject of a Judicial Review application which had been dismissed by The High Court. On that occasion the Court

of Appeal gave the Applicant a reprieve by granting the stay orders. There may be some lessons the High Court can learn from that decision, but I will say no more.

5. Even if I were to assume that I have jurisdiction to entertain the application, I am inclined to refuse it. The basis of the application is that the Applicant will suffer irreparable loss and the Appeal will be rendered nugatory if stay is not granted.

6. The crux of the matter would be in paragraph 13 of the affidavit of Gabriel Imojir Etyang sworn on 9<sup>th</sup> October 2012 in support of the application it reads-

**“13. That the Respondents’ actions led to the Ex-parte Applicants being deprived of an opportunity to lawfully process and clear goods from the Port and being compelled to pay additional irregular and unlawful sums which were being variously referred to as “Congo Levy” or “Freight Tax Surcharge” or “Congo Surcharge”. I refer the Court to the affidavit in support of application for leave to commence Judicial Review proceedings, annexure “GIE7” thereof which comprises copies of invoices as well as notices by shipping lines.”**

7. As I understand it, if stay is not granted then the Respondents and The Interested Party will insist on Certificates of FERI and COD. This would mean that the Applicants will be required to pay additional sums so as to obtain these Certificates. I am not told that these sums are so onerous or so excessive as to be beyond the reach of the Applicants. I am not told that there are practical difficulties in processing the Certificates. All I hear is that the requirement for the Certificates is unlawful and so would be the charges. This Court has made a decision on that but, of course, that decision can be upset on Appeal.

8. Yet on the evidence presented, I cannot see the substantial or irreparable harm that the Applicants can suffer. If the Court of Appeal were to agree with them, then the sums paid for the Certificates will become automatically recoverable. These payments are to a State Agent. It has not been demonstrated that the Agent and its principal (the State) will not be in a position to repay those sums if asked to do so or that proceedings to recover the sums will meet insurmountable challenges.

9. I decline to grant the Orders. The temporary Orders subsisting upto now are hereby discharged. The application of 9<sup>th</sup> October 2012 is dismissed with costs.

*Dated and delivered at Mombasa this 17<sup>th</sup> day of October, 2012.*

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Omondi for the Applicant**

**Kyandi for the 1<sup>st</sup> Respondent**

**Tarus for Lavuna for the 2<sup>nd</sup> Respondent**

**Okello for the 3<sup>rd</sup> Respondent**

**Tarus for the Interested Party**

**Court clerk - Moriasi**

**F. TUIYOTT**

**JUDGE**