REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MISCELLANEOUS APPLICATION NO. 77 OF 2010 (J.R.)

IN THE MATTER OF: AN APPLICATION BY I. MESSINA (K) LIMITED FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION,

CERTIORARI AND MANDAMUS

-AND-

IN THE MATTER OF THE DECISION OF 24TH MAY, 2010 BY THE DEPUTY COMMISSIONER OF CUSTOMS SERVICES

-AND-

IN THE MATTER OF THE DECISION OF 25TH MAY, 2010 BY THE KENYA PORTS AUTHORITY

-AND-

IN THE MATTER OF THE REPORT OF THE TASK FORCE ON MODALITIES FOR CARGO TRANSFER FROM THE

PORT OF MOMBASA TO CONTAINER FREIGHT STATIONS

-AND-

IN THE MATTER OF AN APPLICATION

-BETWEEN-

REPUBLIC.....APPLICANT

-AND-

1. THE KENYA PORTS AUTHORITY.....RESPONDENTS
2. THE COMMISSIONER OF CUSTOMS SERVICES

ex parte

I. MESSINA (K) LTD

[as consolidated with]
MISCELLANEOUS APPLICATION NO. 75 OF 2010 (J.R.)

-BETWEEN-

REPUBLIC.....APPLICANT

-AND-

1. THE KENYA PORTS AUTHORITY.....RESPONDENTS
2. THE COMMISSIONER OF CUSTOMS SERVICES

ex parte

OCEANFREIGHT (E.A.) LIMITED

JUDGMENT

I. TWO APPLICATIONS FOR JUDICIAL REVIEW ORDERS

The applications for leave to move the Court for grant of judicial review orders were granted, in the case of Miscellaneous Application No. 75, on ***8th July, 2010*** and in the case of Miscellaneous Application No. 77, on ***13th July, 2010***; and on ***19th August, 2010*** at the request of all the counsel present in Court, the two matters were consolidated, in the interests of time-economy. As the two applications have common cause, it suffices to extract the essence of the gravamen from just one file (in this case, ***Application No. 77***), as the submissions by all counsel were focused on the same questions.

The Orders sought may be enumerated as follows:

(a) an Order of *certiorari* ***to remove into the Court and quash the decision of the Kenya Ports Authority (KPA) communicated in its letter of*** *25th March, 2010****, in which KPA declared that it shall be the sole nominating party for containers due for transfer to the privately-owned Container Freight Stations;***

(b) an Order of *certiorari* ***to remove into the Court and quash the decision of the Deputy Commissioner of Customs Services (DCCS) carried in a letter of*** *24th May, 2010****, declaring that, with immediate effect, DCCS will only accept manifests which are duly authorized by KPA, and will not accept manifests whose Port of Clearance differs from that notified by KPA;***

(c) an Order of *mandamus* ***to compel KPA and DCCS to accept and honour manifests and nominations submitted by the applicants herein;***

(d) an Order of *certiorari* ***to remove into the Court and quash the report of the Task Force on***

Modalities for Cargo Transfer from the Port of Mombasa, dated** 21st June, 2010 **to the privately-owned Container Freight Stations;

(e) an Order of** prohibition **prohibiting DCCS from suspending manifests presented by the applicant, on the basis that these do not comply with the requirement for nomination of containers by KPA;
(f) an Order of** prohibition **prohibiting KPA from nominating and releasing the applicants' containers and cargo to any privately-owned Container Freight Station other than the Container Freight Stations submitted by the applicants and/or their consignees.

The applicants rest their cases on the grounds that: the respondents had arrived at their decisions in breach of the rules of natural justice; the respondents had acted without jurisdiction and/or outside their powers; the respondents' decisions were illegal; the respondents acted with irrationality and/or wanton unreasonableness; the respondents' decisions had been arrived at in breach of the law.

II. SAMPLE EVIDENCE

(a) The Applicants' Side

Evidence to support the applications is set out in quite lengthy depositions – in the case of Misc. Application No. 75 of 2010, ***Issa Kiraithe Muslim's*** 53-paragraph affidavit dated ***6th July, 2010***; and in the case of Misc. Application No. 77 of 2010, ***Peter Kwinga's*** 57-paragraph affidavit dated ***12th July, 2010***.

The gravamen is exemplified in the averments of ***Peter Kwinga***, elements of which may be set out as follows:

(i) the deponent is the Shipping Manager of I. Messina (K) Limited (one of the applicants);

(ii) the Kenya Ports Authority (one of the respondents), as a measure of decongesting the Port, sent out a letter dated** 18th July, 2007 **to shipping agents,** appointing two Container Freight Stations **to handle full container loads from the Port of Mombasa – namely,** Consolbase Limited **and** Mombasa Container Terminal**;

(iii) KPA, by the said letter, acted contrary to the Kenya Ports Authority Act (Cap. 391, Laws of Kenya), by undertaking to indemnify the applicant "against all proceedings, costs, claims, damages, expenses and liability of whatsoever nature and howsoever suffered" occasioned by –

(a) granting of licence to Container Freight Stations or any other right granted under the agreement with Container Freight Stations;

(b) any act or omission of the appointed Container Freight Station operators in the performance of the exercise related to containers handed over to them by KPA;

(c) any breach or non-compliance with the laid down container release procedures;
(d) any damage and/or loss of containers/cargo handed over to the appointed Container Freight Station for onward delivery to the owner/agent;

(iv) KPA requested shipping agents to manifest containers to be transferred to the Container Freight Stations and to forward container release documents directly to the nominated Container Freight Stations;

(v) I. Messina (K) Ltd's principal, namely Ignizio Messina Spa of Genoa, Italy (or IM) operates *ro-ro type of vessels* ***which*** *do not berth at the container terminal,* ***and only use the conventional cargo berth; the ro-ro operations did not contribute to congestion at the KPA terminal, and therefore the applicant's vessels, containers and cargo were not subject to nomination by KPA for transfer to Container Freight Stations;***

(vi) the applicant was informed by KPA in 2007 that IM will not be subjected to nomination, as the ro-ro yard was not congested;

(vii) but KPA, by letter of *25th March, 2010* ***gave a list of Container Freight Stations licensed to handle full container loads which it (KPA) nominated;***

(viii) KPA, by the letter of *25th March, 2010* ***decided it shall be the sole nominating party for all containers due for transfer to the licensed Container Freight Stations;***

(ix) KPA further decided that if IM wished to nominate containers directly to Container Freight Stations, then such nominations would not be covered by the indemnities and rebates given by KPA, and the containers will have to be delivered ex-hook, as no storage space would be provided by KPA;

(x) KPA also decided that the shipping agents would have to arrange to manifest containers to the appointed Container Freight Stations designated from time to time by KPA;

(xi) KPA made rules and guidelines for the nomination of vessels, annexing these to its letter of *25th March, 2010****;***

(xii) On *24th May, 2010* ***DCCS directed that, with immediate effect, they would only accept manifests duly authorized by KPA, and they would not accept manifests whose port of clearance differ from that notified by KPA;***

(xiii) the Container Freight Stations are privately-owned, and thus the containers and cargo of IM cannot be transferred to them just on the nomination of KPA, without an *agreement* ***between KPA, IM, the Container Freight Stations, and the owner of the cargo – in the absence of a*** *law* ***imposing a particular requirement;***

(xiv) IM was not accorded a hearing before KPA decided to be the sole nominating party for containers for transfer to the Container Freight Stations;

(xv) KPA's decision to be the sole nominating party for containers to Container Freight Stations was made without jurisdiction, and outside the terms of the Kenya Ports Authority Act;

(xvi) on *9th June, 2010* ***DCCS wrote to the applicant suspending its manifests for its vessels*** *M.V. Jolly Rosso Voy* ***10080N and*** *M.V. Jolly Morrone* ***10095S, on the basis that they did not comply with the nominations by KPA, despite KPA having written to DCCS stating that KPA had no objection to the***

submission of the manifests as lodged by the applicant;

(xvii) the decision of DCCS not to accept and to suspend manifests is contrary to the provisions of the Customs and Excise Act (Cap. 472) and the East African Habours Regulations, 1970 and is taken without jurisdiction;

(xviii) the decisions of both KPA and DCCS were made without jurisdiction;

(xix) the decision of KPA adversely affects IM, in that the responsibility of IM for the containers and cargo is extended beyond the Port contrary to the bills of lading;

(xx) the decisions by KPA and DCCS are unreasonable, and contrary to law;

(xxi) as a result of the decisions by KPA and DCCS there has been a delay in the transfer of cargo to the Container Freight Stations nominated by KPA, in delivery of cargo to the consignees, and in the return of containers to IM;

(xxii) the relationship between IM and the consignees of cargo is contractual, and governed by the bills of lading and instructions given by the consignee on place of delivery;

(xxiii) KPA has refused to clear goods at the Port in accordance with the bill of lading and the manifest, thus subjecting the consignees to additional charges;

(xxiv) by delivering cargo or handing over the same to Container Freight Stations who are strangers to the contract between IM and the consignees, I.M. shall be exposed to liability for loss or damage to cargo, as well as delays, or delivery to wrong destinations;
(xxv) IM is not opposed to any programme of Port de-congestion, but KPA should respect the contracts between IM and its consignees, as well as the power of the Master of a vessel and the agent to lodge the cargo manifest and nominate the Container Freight Station in accordance with the bill of lading or the instructions of the consignees.

(b) The Respondents' Side

For 1st respondent, ***James Oluoch Rarieya***, a Terminal Manager, swore a replying affidavit on ***11th August, 2010*** averring (in summary) as follows:

(i) KPA, drawing its mandate from the Kenya Ports Authority Act (Cap. 391, Laws of Kenya), has continuously been adopting innovations and new technology, as dictated by the dynamics of industry;

(ii) in 2007 the Port experienced acute congestion of ships and containers, leading to shortage of space, and prolonging turn-around time;

(iii) KPA responded by licensing two private Container Freight Stations to hold cargo containers

on its behalf; and this arrangement was made with the concurrence of the Customs Department and the shipping lines;

(iv) KPA is statutorily empowered to out-source services and/or facilities; and it may delegate its functions to Container Freight Stations;

(v) although the Container Freight Stations are privately-owned, they are, in character, an extension of the Port for customs and security purposes – and so are properly designed for the main task, clearance;

(vi) to improve service delivery, KPA in *December, 2008* ***licensed five more Container Freight Stations;***

(vii) to give comfort to the cargo owners and shipping lines or their agents, KPA gave indemnity against all claims, loss or damage "of whatsoever nature" incurred by reason of any act or omission on the part of the appointed Container Freight Station; in addition, KPA executed an insurance bond issued by Cannon Assurance Limited in favour of Kenya Revenue Authority, in respect of cargo at the Container Freight Stations; this was to ensure that the shipping lines were not exposed to liability for loss and damage for goods deposited at the Container Freight Stations;

(viii) as the Container Freight Stations were outsourced and appointed, KPA gave them a substantial rebate on port charges; and all the stakeholders were provided for;

(ix) bills of lading, which are contracts of carriage between the shipping lines and the cargo owners, invariably provide that the shipper's responsibility ends at the ship's tackle upon discharge of cargo at the Port; and so the shipper is exposed to no loss;

(x) KPA noticed a significant increase in preferred selection of Container Freight Stations by shipping agents, which led to an overload in particular Container Freight Stations; and KPA took upon itself the responsibility of responding to the complaints of the under-utilized Container Freight Stations; the preferential use of particular Container Freight Stations led to delays, pilferage, and evasion of duty, and occasioned complaints from cargo owners;

(xi) in historical perspective, KPA has always been the sole nominating authority for the depositing of containers at Container Freight Stations; but at some stage, it allowed shipping lines and agents to choose Container Freight Stations – a decision which proved to have been inappropriate;

(xii) the applicants herein had freely exercised the option of electing Container Freight Stations who offered commissions and discounts on cargo lodged with them;

(xiii) in *December, 2009* ***the Kenya Maritime Authority organized a stakeholders' meeting, following complaints of unlawful and sharp practices by certain shipping lines or agents;***

(xiv) KPA then endeavoured to ensure equity in the use of Container Freight Stations, while giving liberty to the Shipping lines or agents to forgo this arrangement, provided they removed their containers "*ex-hook****" – and in that case, they would not be entitled to rebate;***

(xv) this equitable arrangement had the full support of the Kenya Revenue Authority;

(xvi) a meeting was called, attended by the respondents and the shipping lines/agents on *21st May, 2010****, for the purpose of improving the more equitable, rotational system which had been put in place for the use of Container Freight Stations;***

(xvii) the Kenya Maritime Authority sought further improvement by setting up, on *16th June, 2010* ***a task force bringing together the Container Freight Stations Association; Kenya Shipping Agents Association; KPA; Kenya Revenue Authority (KRA); and Kenya Maritime Authority (KMA);***

(xviii) thus, the questions at the bottom of the instant judicial review matters were fully discussed with the stakeholders, and the opportunity to be heard was duly availed;

(xix) the operation and management of the Port is solely the responsibility of KPA, and the Container Freight Stations are an extension of the KPA even though they are located away from the Port; these Container Freight Stations are answerable to KPA; the shipping lines/agents had no legal right to nominate the Container Freight Stations which they would use, but KPA gave them this liberty, on certain conditions; and KPA, in nominating the Container Freight Stations, had accorded the shipping lines/agents comfort in the shape of indemnities against loss or damage;

(xx) the object of the applicants is to secure continuation of "an unfair trade practice".

For KRA and 2nd respondent, ***Charles Esonga Onduso***, Deputy Commissioner of Customs Service, swore a replying affidavit on ***12th August, 2010*** deposing (in summary) as follows:

(i) 2nd respondent bears responsibility for enforcing all the Acts set out in the First Schedule to the Kenya Revenue Authority Act (Cap. 469, Laws of Kenya), among them the East African Community Customs Management Act, 2004;

(ii) the operations of the Kenyan Ports is the responsibility of certain statutory bodies (notably the Kenya Maritime Authority, the Kenya Revenue Authority, and the Kenya Ports Authority) which work together to achieve the goals of public interest prescribed by parliament;

(iii) substantial growth in the national economy, and the increased use of Mombasa Port by regional markets in Uganda, Southern Sudan, Rwanda, Burundi, Ethiopia and the Democratic Republic of Congo, has led to a rapid increase in cargo-handling through the Port; and this challenge has led to an intimate co-functioning of the relevant statutory bodies, in the deployment of innovations and technology;

(iv) the Port operates as a security zone, gazetted as such, and management is reserved to the statutory bodies, to the exclusion of private business organizations;

(v) on account of congestion, the Port management has had to make use of the Container Freight

Stations, with cargo-handling facilities licensed to offer services for handling and temporary storage of import-laden containers and motor vehicles, under customs control; these Container Freight Stations are under the full supervision and control of KPA, as they are, in character, an extension of the Port, for customs and security purposes;

(vi) the clearing of cargo is done at the Container Freight Station (CFS), just as it would be done at the Port; and officers from the relevant statutory bodies are stationed at the CFS where several important clearing functions take place: verification of cargo; examination of cargo; confirmation of duty; processing of the containers;

(vii) all CFS nominated by KPA have to meet certain standards before being licensed; and hence similar services and standards are given by all of them; so that no prejudice will be suffered by any shipping line if its cargo is handled by any of the CFS;

(viii) initially, the statutory authorities had allowed shipping lines to give manifests and sometimes nominate CFS – though always with KPA's approval – but it was later realized that some CFS were canvassing for cargo directly from the shipping lines; and the shipping lines started dictating their preferred CFS.

(ix) the Commissioner of Customs of the KRA is empowered by law to prescribe the manner in which manifests are submitted, and may return any manifest if not compliant; and thus the DCCS, by letter of *24th May, 2010* ***notified all shipping agents that they would only accept manifests that were duly authorized by KPA and will not accept manifests whose port of clearance differs from that notified by KPA;***

(x) the Port, being a gazetted security area, can only be run by the operative Rules and Regulations made by those relevant authorities, and not by private parties who may accommodate canvassing, collusion or unethical conduct aimed at goals of profit;

(xi) the KPA, KMA and KRA have acted within jurisdiction, as they are statutory bodies mandated to carry out certain functions; and moreover, the decisions taken were arrived at after consultations with stakeholders;

(xii) it is not true that the rights of the Master of the vessel to nominate has been taken away; for, even when Masters were allowed to nominate, this had to be with the approval of the KPA; and so KPA cannot abdicate its role to Masters of vessels, as that would lead to Port congestion, insecurity and cargo-loss, and loss of revenue;

(xiii) the decisions sought to be quashed by the applicants, are in all respects reasonable, and were made in good faith.

For the Kenya Maritime Authority (KMA), ***John Odira Omingo***, the Commercial Shipping Manager, swore a replying affidavit on ***10th August, 2010*** deponing (in summary) as follows:

(i) by s. 4 of the Kenya Maritime Authority Act, 2006 KMA has the mandate to "*regulate, co-ordinate and oversee maritime affairs****", and in that behalf KMA appointed a "****Task-Force on Modalities for Cargo Transfer from the Port of Mombasa to the Container Freight Stations, which was all-inclusive……[and comprised] all affected stakeholders in the maritime industry****";***

(ii) KMA has an interest in overseeing and monitoring service-delivery in the maritime sector in order to achieve "*quality standards, equitable costs, as well as efficiency of production from such services****";***

(iii) KMA held several consultative meetings with stakeholders in the maritime industry, including CFS-operators and shipping agents; and in the course of such meetings, KMA received numerous complaints from CFS- operators and other stakeholders, which called for "*extensive consultations with all parties, in order to arrive at reasonable, fair and well-balanced resolutions****";***

(iv) a meeting was held on *3rd December, 2009* ***with all stakeholders who included the representative of Kenya Shipping Agents Association, among them the applicants herein; out of this meeting, recommendations were made which led to further such meetings on*** *3rd March, 2010* ***and*** *23rd April, 2010****.***

Sam Kairu Njonde, the Vice-Chairman of the Container Freight Stations Association of Kenya, swore a replying affidavit on ***12th August, 2010***, the content of which may be summarized as follows:

(i) the Container Freight Station of which the deponent is the Managing Director, namely Compact Freight Systems Limited (CPT), "had to undergo a rigorous tendering process and as a condition for the grant and maintenance of…licence and gazettement…..has to have in force Insurances (for the purpose of indemnities to KPA) and Customs Bonds (to secure goods in the transit shed for due payment of duty to the 2nd respondent)…….;"

(ii) KPA has the power and mandate to regulate the operations of the Port, and at no time did it give up its right to the *ex parte* ***applicants or any other person to nominate CFS to which containers should be transferred;***

(iii) CPT entered into a licence agreement with KPA in December, 2008, and found the process of nominations by KPA of containers to two CFS in progress;

(iv) CPT has invested more than Kshs. 350 million in furniture, equipment, ICT and land, and has a labour force of approximately 70 employees; and other CFS have invested similar amounts of money and have about the same size of work-force;

(v) CPT is well bounded by masonry wall that is secured by electric fence, and manned gate, and the buildings fitted with CCTV cameras; KPA has seconded Port Police to CPT's premises; and CPT has hired guard services, and has Administration Police on hire, to escort cargo from the Port to its premises;

(vi) KRA has deployed at the entrance to the CFS, control officers who "*ensure security and efficient collection of revenue****".***

III. NATURAL JUSTICE; ULTRA VIRES; ILLEGALITY; UNREASONABLENESS: THE APPLICANTS' CASE

Counsel for the ***ex parte*** applicants submitted that their grievance was sparked on ***25th March, 2010*** when 1st respondent wrote a letter to the shipping agent (Ocean freight (EA) Limited) of Mediterranean Shipping Company S.A. of Geneva (MSC) – indicating that it had licensed ***seven*** CFS to handle full container loads. KPA had already, in ***2007*** licensed ***two*** CFS: and now, the grievance is that MSC was not given a hearing when ***five*** additional CFS were being licensed.

MSC was also aggrieved that, by the letter of ***25th March, 2010***, KPA had stated that if MSC nominated containers ***directly*** to CFS, then such nominated containers would not be given any rebates; and these containers would have to be delivered "***ex-hook***", as KPA would provide no storage space.

There was a third grievance: KPA had decided that MSC was to arrange to manifest the containers to the CFS nominated by KPA, and, if it failed to do so, then the ships would have no berthing arrangement.

The applicant also complained about new rules for vessel nominations which were annexed to KPA's letter of ***25th March, 2010***: these provided that KPA shall have the sole discretion in nominating containers. KPA also introduced a rotational system in which it allocated and distributed containers from vessels of MSC and I. Messina to two Container Freight Stations.

The applicants felt even more aggrieved when 2nd respondent, on ***24th May, 2010*** sent out a letter saying they would only accept manifests that were duly authorized by 1st respondent.

Counsel submitted that, in a letter dated ***26th November, 2009*** the Kenya Maritime Authority (KMA) stated that:

"although the adoption of Container Freight Stations had significantly reduced congestion in the Port, no clear operational rules and mechanisms for service delivery had been developed to guide the Port operations".
KMA, in the said letter, observed that

"there was need to establish regulations to steer the operations of the Container Freight Stations……..."

From the foregoing statements by KMA, learned counsel drew an inference which he urged to be the basis of a legal principle touching on the legality of the operations of the respondents: ***that there is no law or regulations that govern the operations of the Container Freight Stations.***

Learned counsel urged that KPA "*should have heard MSC and Messina and their agents because, firstly, the containers… are properties of MSC and Messina*"; that "*the cargo is subject to contracts of carriage with consignees*"; and that "*therefore, MSC and Messina can only deliver the cargo to the final destination or Container Freight Stations as per the bills of lading and manifests lodged by the Master of the vessel or shipping agent*".

It was contended that KPA could not decide to be the sole nominating party for containers due for transfer to Container Freight Stations, or "*transfer the same arbitrarily to any of the seven Container Freight Stations without hearing MSC and Messina or their agents.…..*"
A similar argument is made, in relation to 2nd respondent: "*the Deputy Commissioner of Customs Services neither heard nor afforded the **ex parte** applicants the opportunity to be heard before deciding that KRA shall only accept manifests which are authorized by KPA and to reject manifests whose port of clearance differs from the one notified by KPA*". It was urged that 2nd respondent failed to hear the ***ex parte*** applicants or afford them any opportunity to be heard before suspending their manifests.

The applicants also contested the prescriptions of a task-force report on modalities for cargo transfer from

the Port to the Container Freight Stations – for not giving them a hearing before compiling the report and on that basis, leading to a "*service-level agreement*". The applicants contended that the decisions of the respondents, and the resolutions in the task-force report, were "*in breach of the rules of natural justice…..., null and void.*" Counsel urged that this was precisely the case typified by an authority of the Court of Appeal, ***Matiba v. Attorney-General*** [1995-1998] 1EA 192, in which the following passage appears (at p.194):

"The rule that no man shall be condemned unless he has been given a fair opportunity to be heard is a cardinal principle of natural justice. In the result, the rule having been breached, this court cannot sustain any order that flows from such a fundamental breach".

The applicants contended, further, that the respondents had acted without jurisdiction, and outside the powers conferred by the Kenya Ports Authority Act (Cap. 391, Laws of Kenya). It was urged, in this respect, that s. 12 (1) (b) of the said Act, which donates to KPA "*the power to maintain, operate, improve and regulate the ports set out in the Second Schedule*" [namely Funzi, Kilifi, Kiunga, Lamu, Mombasa, Malindi, Mtwapa, Shimoni and Vanga], does not contemplate ***Container Freight Stations*** as extension to Ports. Counsel submitted that: "*The Kenya Ports Authority can only exercise jurisdiction over Ports, and not privately-owned Container Freight Stations, which are not Ports*". Counsel urged:

"*the Kenya Ports Authority only has power or jurisdiction over Ports gazetted under the Kenya Ports Authority Act*".

That contention led counsel to the inference that: "*by transferring containers and cargo to privately-owned Container Freight Stations, without an agreement with MSC and Messina, the Kenya Ports Authority not only acted without jurisdiction but also outside its jurisdiction*".

Counsel also contested the validity of the accommodation which the applicants had been granted by KPA; that KPA "*acted without jurisdiction in giving indemnity against all proceedings, costs, claims, damages, expenses and liabilities of whatsoever nature and howsoever suffered or incurred*". It was urged that since KPA itself has indemnity by virtue of s.22 of the Kenya Ports Authority Act, KPA "*cannot.…… purport to give indemnity for delay in the delivery of cargo or return of containers to MSC and Messina in view of the express provisions of ss.22 and 45.……..*"

Besides, it was urged, Regulation 293 of the East African Harbour Regulations provided that granting of a licence or permit by KPA shall impose no liability or responsibility upon KPA "*for any cause whatsoever*".

Counsel submitted that KPA had departed from the law, by undertaking in its letter of ***25th March, 2010*** to give a general indemnity against loss and damage to containers.

Counsel submitted that 2nd respondent had acted without jurisdiction in suspending the manifests lodged by the ***ex parte*** applicants, on the ground that the same did not comply with nominations by KPA; and that the DCCS is not vested with the power to suspend a manifest lodged by the Master of a ship, or an agent.

It was submitted that the DCCS had acted without jurisdiction in directing that they will not accept manifests whose port of clearance differs from that notified by KPA; for KPA has no power in law to interfere with the manifests, that power being bestowed upon the Master of the ship, or the shipping agent.

Counsel urged that KMA's Task Force on Modalities for Cargo Transfer from the Port to Container Freight Stations, too, had acted without jurisdiction, in resolving that the Kenya Revenue Authority will accept manifests lodged in accordance with nominations by KPA. It was contended that "the Report of the Task Force, its resolutions, and service-level agreement is ***ultra vires*** the provisions of the Kenya Ports Authority Act, the Merchant Shipping Act, the East African Community Customs Management Act, the Customs and Excise Act, and the Kenya Maritime Authority Act."

The applicants sought to rely on the High Court's decision (***Visram, J***, as he then was) in ***Republic v. Permanent Secretary/Secretary to the Cabinet and Head of Public Service, Office of the President & Another ex parte Ng'ang'a and Others*** [2006] 2E.A. 294, in which the following passage appears (at p. pp.294-295):

"The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. The institution of a judicial review suit is not a bar to seeking other forms of relief as judicial [review posits] that as soon as a public body exceeds its jurisdiction, or acts unfairly, or disregards the principles of natural justice, then the very act of the public body must be scrutinized."

Counsel submitted that the conduct of the respondents was marred by illegality, in relation to ss. 22, 45 and 63 of the Kenya Ports Authority Act, and Regulations 291 and 293 of the East African Harbour Regulations, 1970: in the form of giving indemnity for any loss and damage to the containers and cargo transferred to private Container Freight Stations.

Counsel urged that KPA and Container Freight Stations are not bestowed with the power to lodge manifests, and that only the Master of the vessel is so empowered: Regulation 48(1) of the East African Harbour Regulations empowers the Master or agent of any ship to deliver to the management a true copy in duplicate of the complete manifest of cargo, and provides that the ship shall not break bulk until the copies of the manifests have been lodged with the management; by Regulation 48(2) the Master of a vessel or agent is empowered to notify the management of any subsequent amendments to a manifest; and by Regulation 51, a ship shall not break bulk until her cargo has been duly reported at the customs house in accordance with the customs laws, i.e. the Customs and Excise Act (Cap. 472, Laws of Kenya), and the East African Community Customs Management Act; under s.24 of the East African Community Customs Management Act, the Master of a vessel is given the power to make a report of the vessel and its cargo to the proper officer on a prescribed form; and by s.20(1) of the Customs and Excise Act, the Master or agent of a vessel is required, within 24 hours after arrival, to make a report of the vessel and its cargo to the proper officer shown in the prescribed form.

Counsel submitted that there is no requirement in law that the manifest must comply with nominations made by KPA: "*the right to fill [in] the destination of the cargo in the manifest is absolutely the prerogative of the master of the ship and the agent, and depends on the bills of lading*."
Counsel urged that "the [KPA] cannot in the exercise of its powers, disregard the law of contract of carriage of goods entered into between MSC and Messina [for] the one part and the consignees of the cargo [for] the other, with regard to the final destination of the cargo."

It was submitted for the applicants that the respondents, by making certain detailed consultations with the applicants before resorting to the use of Container Freight Stations, had conferred upon the applicant reasonable expectations which could not later be arbitrarily taken away; so, "*MSC would be granted a hearing before any decision is taken that adversely affects its rights*"; and "Messina would not be subjected to the process of nomination and transfer of its containers and cargo to the Container Freight Stations".

Counsel submitted that KPA, on ***25th March, 2010*** acted "*irrationally and/or unreasonably in deciding to be the sole nominating party for containers for transfer to Container Freight Stations and increasing the number of Container Freight Stations to seven from two and transferring containers to the newly licensed Container Freight Stations without hearing MSC and Messina or their agents.…*"

It was submitted that 1st respondent had not complied with s. 8(2) of the Kenya Ports Authority Act, which placed KPA under "*general duty to secure that no particular person or body is given any undue preference or is subjected to any undue disadvantage*": and so, "[*by] giving rebates to the Container Freight Stations in respect of containers nominated by [KPA] and declining to do so in respect of containers nominated by the* ***ex parte*** *applicants, [KPA] gave undue preference to the Container Freight*

Stations, and subjected the ***ex parte*** *applicants to undue disadvantage through denial of rebate*".

Anticipating the censure upon them that they were motivated by refusal to accept technological and management innovation, the ***ex parte*** applicants thus contend:

"….the *ex parte* ***applicants are not opposed to changes at the Port. However, such changes must be within the existing law, and the affected parties must be constructively heard on the same".***

IV. KENYA PORTS AUTHORITY BEARS DISCRETIONARY OPERATIONAL FUNCTIONS: FIRST RESPONDENT'S CASE

Counsel for 1st respondent urged that the actions taken by the respondents had been in perfect compliance with the empowerment given under ss.8 and 12 of the ***Kenya Ports Authority Act***; and this includes (s.12):

(i) to "*maintain, operate, improve and regulate the ports****……";***

(ii) "to act as warehousemen and to store goods whether or not such goods have been or are to be handled as cargo or carried by the Authority"…..;

(iii) "to consign goods on behalf of other persons to any places whether within Kenya or elsewhere";

(iv) "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";

(v) "….the powers conferred…..shall include all such powers as are necessary or advantageous and proper for the purposes of the Authority……."[s.12(2)];

(vi) "to carry on any business necessary or desirable to be carried on for the purposes of the Authority and to act as agent for the Government in the provision of agreed functions……..";

(vii) "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 or for the grant to any person of a licence, permit or certificate";

(viii) "to prohibit, control or regulate –

the use by any person of the services performed, or the facilities provided, by the Authority….";

(ix) "to enter into agreements with any person –

….for the performance or provision by that person of any services or the facilities which may be performed or provided by the authority".

Learned counsel, ***Mr. Shah***, for 1st respondent, urged that the actions taken by that party, and which are being contested, were in every respect in accordance with the governing law; by s.8 of the Kenya Ports Authority Act, 1st respondent is under duty to secure

"the fullest development, consistent with economy, of the undertaking of the Authority" [s.8 (2)(a),(b)]; and to provide all reasonable facilities for the handling and warehousing of cargo [s.8(2)(d)]. In the performance of these tasks, counsel submitted, "*the Act does not state that these are to be undertaken [in] consultation, [or with the] permission and/or approval of the two applicants*". Counsel submitted that, from a "*plain reading of s.8 [of the Act], [1st] respondent has the sole, exclusive and final decision in how best to run the Port, to attain these laudable objectives*".

Counsel urged that the applicants' claim herein was not founded on law, principle or fact: the representatives of the two applicants, one ***Mr. Muslim*** and one ***Mr. Kwinga***, had attended all consultative meetings on the basis of which the contested actions were conceived; and indeed, this was a preferential setting for the applicants, as the Port is host to many other shipping lines which have not questioned the actions taken by KPA, in this instance.

Counsel contested the applicants' case, for inviting the Court to substitute the statutorily valid decisions made by the respondents; such an invitation flies in the face of the law relating to judicial review, which is thus treated in ***Halsbury's Laws of England***, 4th ed. vol. 1 (para. 60):

"*The Nature of Judicial Review****. Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties…….***

"Judicial review is concerned with reviewing not the merits of the decision in respect of which the application……is made, but the decision-making process itself…..The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected: *it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question****."***

Counsel urged that "*there is nothing illegal about restructuring the container business to allow for equitable and fair distribution*…."; and that the task-force had done "*nothing illegal in devising a rotational system*".

V. THE CONTESTED DECISIONS REST ON STATUTORY DISCRETIONS: SECOND RESPONDENT'S CASE

Learned counsel, ***Mr. Gatonye*** submitted that no illegality or impropriety could be attributed to the respondents, in respect of their actions which are being contested; for they had taken practical decisions, in the light of the fact that, the growth of the economy, and the consequent increased use of the Port of Mombasa by the various countries of Eastern Africa, has led to congestion, and to the need to create the Container Freight Stations: and this has made it necessary for all the statutory bodies involved in the Port's affairs, to function in co-operation. Learned counsel submitted that the use of Container Freight Stations has been adopted so as to allow faster movement of cargo, to match on-line clearing systems; for the purpose of expanding the Port's capacity; towards the goal of decongesting the Port, in accordance with best practices internationally; for the purpose of improving efficiency, and making the Port more competitive. These objects have been sought within the terms of s. 12(1) of the Kenya Ports Authority Act (Cap. 391, Laws of Kenya): this "*empowers the KPA to maintain, operate, improve and regulate the Ports*".

Counsel submitted that the terms of s. 12(1) of the Kenya Ports Authority Act, which empower KPA to

manage, operate and improve the Port, should be regarded as entailing that KPA may on its own, nominate the Container Freight Stations, and that KPA was in a position to ensure equity in the distribution of cargo; to prevent loss of cargo, thus curbing the accrual of liabilities; to monitor, supervise and advise on inquiries from stakeholders and shipping lines; etc. Since KPA required of Container Freight Stations certain performance standards, counsel urged, shipping lines stood to suffer no loss, by their cargo being handled by any of the Container Freight Stations; and there was no reason, therefore, for the applicants herein to insist they ought to nominate their own Container Freight Stations. Counsel submitted, further, that the applicants bore no right nor duty to "*dictate the place of delivery of any container or cargo within the jurisdiction of the Kenya Ports Authority*": that mandate rests squarely with the Kenya Ports Authority, by statute law.

Counsel contested the attribution of illegality in Port operations to the respondents herein: 2nd respondent is established under the Kenya Revenue Authority Act (Cap. 469, Laws of Kenya), and acts as an agent for the assessment and collection of revenue on behalf of the Government; it enforces all Acts listed in the First Schedule to that Act, including the East African Community Customs Management Act, 2004; it works in collaboration also with the Kenya Maritime Authority [Interested Party] which is a body established under the Kenya Maritime Authority Act, 2006 (Act No. 5 of 2006) and carrying the mandate to regulate, co-ordinate and oversee maritime affairs in Kenya.

Counsel relied on the High Court's decision (***Wendoh, J***.) in ***Republic v. The Kenya National Examinations Council & Another***, ***ex parte Busara Forest View Academy Ltd. & 94 Others***, Nairobi H.C. Misc. Case No. 4 of 2009, as a basis for the submission that the applicant's demand for a hearing before the respondents' could take their decisions, was untenable; and counsel, on this point, thus submitted:

"…..KPA has the statutory authority to run the Port and make any rules and regulations that it may deem fit, to achieve its mandate. It is not possible for KPA and the related statutory bodies including KRA and KMA to consult its customers in the course of effecting their statutory duties in their day-to-day operations".

Counsel urged that the object sought by the applicants, as regards being accorded a hearing before the decisions are taken, is impractical: it involves many hours of labour; it would create uncertainty in the system; it would open a flood-gate to all others who may feel aggrieved; the Court would end up deciding the operational questions which rightly belong to the statutory bodies; it would be contrary to the public interest; it would create room for insecurity.

VI. RESPONDENTS WERE DISCHARGING STATUTORY MANDATE, IN THE PUBLIC INTEREST: THE CASE OF 1ST & 2ND INTERESTED PARTIES

The position of 1st and 2nd Interested Parties, namely Compact Freight Systems Ltd, and Container Freight Stations Association of Kenya, is that "*the Port operations are run by several statutory bodies that work hand-in-hand to achieve the goals and objectives set by Parliament, these being the KMA [3rd Interested Party], KRA [2nd respondent] and KPA [1st respondent*]"; and that even though the applicants have no prescribed role in that process, there is evidence, in the depositions filed, showing that they [the applicants] were given opportunities to air their views.

The 1st and 2nd Interested Parties urged that KRA was under no duty to hear the applicants before issuing the letter of ***24th May, 2010*** suspending the manifests lodged by the applicants: for, by the said letter, KRA "*did not introduce any new law that was not in existence*"; and "*by suspending the manifests it did what it was in law authorized to do in implementing and carrying out its functions and objectives which include ensuring compliance with rules and regulations set out in the law governing its operations*".

VII. THERE'S NO BASIS FOR GRANTING JUDICIAL REVIEW ORDERS: THE CASE OF 3RD INTERESTED PARTY

The 3rd Interested Party, which is set up under the Kenya Maritime Authority Act, 2006, urged that it has "*an unfettered mandate to regulate, co-ordinate and oversee the maritime sector*", and is not obliged to give stake-holders, including the applicants, a right to be heard in the exercise of its mandate, even though, as a fact, the 3rd Interested Party did give the stake-holders an opportunity to be heard. Counsel relied on the terms of s. 12 (n) of the Kenya Ports Authority Act (Cap. 391), for the proposition that the actions duly taken by 1st respondent have the effect of rendering the Container Freight Stations an extension of the Port, and thus falling squarely within the jurisdiction of 1st respondent.

VIII.DOES ALLEGED PREJUDICE FLOW FROM BREACH OF STATUTE? – ANALYSIS

I have endeavoured to extract the material part of the pleadings, the evidence, and the submissions of counsel; and out of these, the milestones are now recorded which lead to the determination of the outcome.

The respondents are statutory bodies, entrusted with a wide range of public functions bearing on the management of a vital sphere of the national economy: maritime commerce and the docking-in and departure of ocean-going vessels, and the discharge, warehousing and movement of cargo destined for the Eastern region of Africa as a whole. That such varied activities, requiring complex design and planning, utilization of finite ground-space, and deployment of a wide range of technology cannot, in the nature of things, be suitably regulated by pre-set rules, or by any tested management-template, is clear from the fact that Kenya has had to set up ***several statutory regimes***, with institutions working in collaboration: Kenya Ports Authority (1st respondent); Kenya Revenue Authority (2nd respondent); Kenya Maritime Authority (3rd Interested Party).

It emerges from the evidence and the submissions, that the constitutive statutes for the several maritime authorities have reposed in those entities a competence, to be exercised in the ***public interest***, which imposes obligations of decision-making limited only by express provisions, and by the ordinary requirements of good faith and fairness.

The claims made by the applicants will stand or fall, insofar as they accommodate or exclude the foregoing principles. To seek judicial review orders, as the applicants do, on the ground that they were not accorded natural justice, the nature of the impugned decision must be clarified: was it a statutorily-authorised management decision? Was it a decision founded on a clearly-donated discretionary remit? Was it an operational action intended to bring efficiency in the management of the Port? Was it a decision that inherently lent itself to detailed fixed-rule compliance? Was there a clear, pre-set regime of regulatory procedure, failure to comply with which showed the respondents' actions as unlawful, irregular or unfair? Was an obligation imposed by law on the respondents not to create new structures of decision-making, or of execution of relevant tasks?

If in answering such questions, it emerges that the respondents' statutory mandate allowed them a discretion, then it means the law required ***them***, and not anyone else, to exercise that discretion; and so, the Court will not, by way of judicial review, either restrain them in the discharge of those functions, or assume the statutorily-assigned task of deciding and executing the matters in question.

Proper answers to the category of questions set out above, in my judgment, decisively show the ***respondents*** to have been under a public mandate, conferred by statute law, to ***create necessary structures***, and ***execute measures intended to assure efficiency*** at the Port, and to serve the public interest in the conduct of maritime matters. Such actions, by their ***constant and detailed nature***, and by their ***contingency upon changing situations***, were ill-suited to regulation by judicial review orders; and it is thus inapposite for this Court to make the kinds of orders now sought by the ***ex parte*** applicants.

The applicants have asked for a hearing to be accorded them, before the respondents could take certain operational decisions; but any hearing in this regard must fall strictly at the level of convenience and courtesy, as the authority of decision-making has been statutorily vested upon the respondents.
The claim that the respondents lacked jurisdiction to act as they did, bears no relation to the facts: for the

governing statutes certainly empower the respondents accordingly. Similarly, there is no basis for attributing illegality to the respondents, in their decision-making; and it follows that their decisions, which have not been shown to have been actuated by bad faith, cannot be said to have been unreasonable.

The contest to the nomination of Container Freight Stations by the respondents, is not, in my opinion justified: for I take judicial notice of the fixity of the physical space at the harbour facility, which must necessitate the establishment of warehousing and related services some distance from the docks. If ? as I find to be the case ? the use of Container Freight Stations was justified, then it is not possible to challenge it on grounds of illegality or unreasonableness.

It may well be that the applicants sustained some injury in terms of their profits or related matters; but if they have valid claims in this regard, I hold that such, belong squarely to the domain of ***private law***, and are unrelated to the public law remedy of judicial review. I find that the applicant's complaints have not touched on the framework of legality and propriety of the respondent's actions, the justification for which come from the terms of the governing statutes.
Consequently, I decline to grant the judicial review orders sought. The ***ex parte*** applicants shall bear the costs of the respondents and the Interested Parties.

Decree accordingly.

SIGNED at **MOMBASA**

J. B. OJWANG

JUDGE

DATED and **DELIVERED** at **MOMBASA** this ***24th*** day of ***June, 2011.***

M. A. ODERO

JUDGE

Coram: *Ojwang, J.*
Court Clerk: *Ibrahim*
For the Applicants: *Mr. Odera*
For the 1st Respondent: *Mr. Kassim Shah*
For the 2nd Respondent: *Mr. Gatonye*
For 1st and 2nd Interested Parties: *Ms. Kiarie*
For 3rd Interested Party: Ms. Kairaria