



**Taireni Association of Mijikenda v Cabinet Secretary Ministry of Finance & National Treasury & 3 others (Constitutional Petition 2 of 2023) [2025] KEHC 2276 (KLR) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 2 OF 2023  
J NGAAH, J  
FEBRUARY 14, 2025**

**BETWEEN**

**TAIRENI ASSOCIATION OF MIJIKENDA ..... PETITIONER**

**AND**

**HON CABINET SECRETARY MINISTRY OF FINANCE & NATIONAL TREASURY ..... 1<sup>ST</sup> RESPONDENT**

**HON CABINET SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**KENYA PORTS AUTHORITY (KPA) ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before court is the petitioner’s application dated 7 November 2024 seeking the following orders:

- “1. That, this application be certified as urgent, service upon the respondents be dispensed with and the same be heard ex parte in the first instant;
2. That, pending the hearing and determination of this application, a conservatory order does issue to stop or prohibit and or restrain the respondents by themselves, agents and or servants from leasing, concessioning and or privatizing Dongo Kundu Export Processing Zone and or doing anything which has the effect of disposing it to any entity and or person; and
3. That, costs be borne by the Respondents.”



2. The application is supported by the affidavit of Peter Ponda Kadzaha and on the grounds that the petition before court was compromised in terms of a consent dated 2 April 2024. The petition itself is said to have challenged the constitutionality of disposing of the public properties vide the tender bid dated 17 October 2023, in which the respondents had identified Berth 1-3 at Port of Lamu, Lamu EPZ, Container Terminal at the Port of Mombasa, berths 11-14 at the Port of Mombasa and Dongo Kundu EPZ at Mombasa for disposal.
3. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents through the Minister of Trade is alleged to have commenced the disposal of part of the subject bid properties “The Dongo Kundu EPZ” contrary to the contents of the consent of 2 April 2024. As a matter of fact, the Ministry of Trade has directed that the residents who are currently in occupation of the Dongo Kundu be compensated and vacate the subject land. Yet, according to the consent, the respondents were required to ensure that the process complied with the Constitution and the law, besides subjecting any process to public participation. The residents now allege that they are being removed from their ancestral land contrary to the provisions of Articles 40 and 63 of the Constitution.
4. According to the applicant, the disregard of the consent is an overreaching conduct which is contrary to Article 10(2) of the *Constitution*, which has entrenched the rule of law as a value and principle of good governance. Further, the disobedience of the court orders contradicts the mandates of the sovereign powers of the people given to this Court under Article 1(3) of the *Constitution*. It is, therefore, necessary that the process be halted to enable the residents pursue their rights before the court with jurisdiction.
5. I cannot readily find the petition to which reference has been made but from what I gather in the submissions filed in support of the petition, the petition was dated 27 November 2023 and sought the following orders:
  - “(a) a) An Order Of Declaration is hereby issued that it is only the *Public Procurement and Asset Disposal Act*, 2015, which provides for the procedures for procuring public services, goods and disposal of public assets pursuant to Article 227 of the *Constitution*;
  - (b) An Order Of Declaration is hereby issued that berths 1-3 at Port of Lamu, berths 11-14 at the Port of Mombasa and container terminal 1 at Port of Mombasa contained in the Tender No. KPA/052/2023-2024/CPS are public assets and not projects and hence cannot be disposed in accordance with the *Public Private Partnerships Act*, 2022;
  - (c) An Order Of Declaration is hereby issued that if the parliament intended to prohibit the application of values and principles of good governance as decreed by Article 10 of the constitution in Section 4 of the *Public Private Partnerships Act*, 2022, the same is declared as unconstitutional;
  - (d) An Order Of Declaration is hereby issued that the processes leading to the issuance of the offer of Tender No. KPA/052/2023-2024/CPS were unconstitutional;
  - (e) An Order Of Declaration is hereby issued that, where an employer intends to sell part/proportion, whether substantial by way of mortgage, lease and or complete transfer, the employer shall notify its employees as a matter of rights;



- (f) An Order Of Prohibitio is hereby issued stopping and or suspending the tender processes for the disposal of berths and container terminal at the ports of Lamu and Mombasa or any other port operated by the 4<sup>th</sup> respondent to anybody/person and or entity through a Public Private Partnership arrangements;
- (g) An Order Of Quashing is hereby issued to quash the Tender No. KPA/052/2023- 2024/CPS or any other tender issued in respect of the facilities contained in the Tender No. KPA/052/2023-2024/CPS;
- (h) Any other relief that this Honourable court may deem fit to grant; and
- (i) Costs of the petition to be borne by the Respondents.”

6. The application has been opposed and, amongst the documents filed in that regard, is the 4<sup>th</sup> respondent’s preliminary objection dated 17 November 2024 in which it raised the following grounds:

“

- “1. That, the Honourable Court lacks jurisdiction having adopted the Consent entered into by all parties dated 2nd April 2024 as its Judgment on 4th April 2024 as an order of the Court, this Honourable Court is now functus officio in the matter. To hold otherwise would amount to reviewing or setting aside the consent which has not been prayed for by the Petitioners in their application dated 7th November 2024.
- 2. That, in the absence of a prayer seeking to set aside the Consent dated 2nd April 2024, and adopted by this Honourable Court on the 4th of April 2024 as a judgment of this Honourable Court this matter is *Res Judicata*.
- 3. That the issues and prayers sought by the Petitioner contradict the orders of the Consent dated 2nd April 2024 and adopted by this Honourable Court on the 4th of April 2024 as a judgment of this Honourable Court. This offends the doctrine of res judicata.

And further take notice that the 4<sup>th</sup> respondents will apply to have the said Notice of Motion struck out in limine with costs.”

7. It is true, and it is not in dispute, that indeed parties entered into a consent the effect of which was to conclude the applicant’s petition together with an application for conservatory orders filed alongside the petition. The consent read as follows:

“Whereas the Parties herein have negotiated with a view to record a consent to enable a full and final settlement of the matter, we the undersigned Advocates representing the Parties herein and on the instructions of our respective clients wish to record the following Consent:

It is hereby agreed by consent:

- 1. That the 4<sup>th</sup> Respondent shall comply with the construction and PPP laws to ensure public participation, value for money, increased efficiency in service delivery, inclusivity and local content in the project.



2. That the 4<sup>th</sup> Respondent will ensure involvement of stakeholders throughout the process, in terms of creating awareness as to the project.
  3. That the Petition dated 27<sup>th</sup> November 2023 be and is hereby determined as per the terms 1,2 and 3 hereinabove and/or with no orders as to costs.
  4. That the interim conservatory order issued by the Honourable Court on the 27<sup>th</sup> of November 2023 and extended on the 19<sup>th</sup> of December 2023 be and is hereby set aside and discharged.
  5. That the Petitioner's Application dated 27<sup>th</sup> November, 2023 seeking interim conservatory orders be and is hereby withdrawn with no orders as to costs.
  6. That the 4<sup>th</sup> Respondent's Application dated 5<sup>th</sup> December 2023 seeking setting aside of the interim orders issued on 27<sup>th</sup> November 2023 be and is hereby withdrawn with no orders as to costs.
  7. That the Petition dated 27<sup>th</sup> November 2023 be marked as settled.”
8. Before considering the preliminary objection, it is puzzling yet obvious on the face of the application that, besides the prayer for costs, there is no other substantive prayer that this Honourable Court is being called upon to consider. The first prayer is, of course, for the certification of the application as urgent and to be heard as a matter of priority. That prayer was spent on 9 November 2024 when the court certified the application urgent. The second prayer, as noted, reads as follows:
- “2. That, pending the hearing and determination of this application, a conservatory order does issue to stop or prohibit ant or restrain the Respondents by themselves, agents and or servants rom leasing, concessioning and or privatizing Dongo Kundu Export Processing Zone and or doing anything which has the effect of disposing it to any entity and or person.” (Emphasis added).
9. As the prayer suggests, the applicant sought for a conservatory, pending the hearing of the application. However, the record of the proceedings before Mutai, J. on 9 November 2024 shows that although the learned judge set the application for hearing inter partes 18 November 2024, he never gave the interim order sought by the applicant. The only orders granted by the judge are stated to be as follows:
- “1. That the notice of motion dated the 7<sup>th</sup> November 2024 is hereby certified urgent;
  2. That the said notice of motion be served on the respondents within 3 working days of the date hereof for hearing inter partes on 18<sup>th</sup> November 2024.”
10. It follows that, like the prayer for certification, the second prayer in application was also spent. When the applicant states that it wants a conservatory order “pending the hearing and determination of this application” the presumption is that the applicant is looking forward to a more permanent order upon the determination of the application. But there is no prayer for such a permanent order, so that, regardless of whether prayer 2 of the application was granted or not, there would be nothing and, indeed there is nothing else left the applicant is seeking from the court. For this reason alone, I hold the purported application to be incompetent.



11. The second reason why the applicant's application would fail is that the applicant is seeking to reopen a case that has, for all intents and purposes, been determined.
12. As noted, parties entered into a consent the terms of which have been reproduced verbatim in this ruling. For the avoidance of doubt, the consent was adopted as the order of the court and endorsed accordingly on 4 April 2024 in the following terms:
  - “ 1) The consent agreement dated the 2<sup>nd</sup> April 2024 and filed herein by the parties is hereby adopted as an order of the court.
  - 2) The same be endorsed herein as part of the proceedings for today by the Deputy Registrar.
  - 3) The petition is accordingly marked as settled and the file closed.”
13. This order has not been set aside and neither is the applicant seeking, in its application, to set it aside.
14. I need not belabour the point that once the suit was determined and the file marked as closed, the court was rendered functus officio. Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro* AG1997 (4) SA 298 (A) AT 306H-307H referred to this principle with particular reference to the question of variation of orders of court and stated thus:

“The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject- matter has ceased.” (Emphasis added).
15. Thus, the court has no authority to regurgitate afresh matters upon which it has pronounced itself. For the foregoing reasons, I find the applicant's application to be incompetent, misconceived and an abuse of the due process of this Honourable Court. I hereby uphold the preliminary objection and strike out the applicant's application with costs. It is so ordered.

**SIGNED DATED AND DELIVERED ON 14 FEBRUARY 2025**

**NGAAH JAIRUS**

**JUDGE**

