



**Kenya Ships Agents Association v Kenya Maritime Authority (Petition E050 of 2023) [2025] KEHC 5239 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 5239 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E050 OF 2023**

**OA SEWE, J**

**MARCH 14, 2025**

**IN THE MATTER OF ARTICLES 2(1) & (2), 19, 20, 21, 22,  
23 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
ARTICLE 10 OF THE CONSTITUTION OF KENYA, 20**

**AND**

**IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT, 2013**

**AND**

**IN THE MATTER OF THE COMPETITION ACT, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE KENYA MARITIME AUTHORITY ACT, 2006**

**BETWEEN**

**KENYA SHIPS AGENTS ASSOCIATION ..... PETITIONER**

**AND**

**KENYA MARITIME AUTHORITY ..... RESPONDENT**



## RULING

1. Before the Court for determination is the Notice of Motion dated 7<sup>th</sup> November 2023 by the petitioner, Kenya Ships Agents Association, pursuant to Articles 22, 23 and 165(3)(b) of the Constitution of Kenya and Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The petitioner/applicant sought the following orders pending the hearing and determination of the Petition:
  - (a) Spent
  - (b) Spent
  - (c) A conservatory order restraining the respondent either by itself, its agents or servants or anyone acting through it from implementing and/or enforcing the Notice to Ships Agents, Shipping Lines and Cargo Consolidators operating at the Port of Mombasa dated 31<sup>st</sup> October 2023 pending the hearing and determination of the Petition.
  - (d) That costs of the application be provided for.
2. In support of the application, the applicant relied on the affidavit sworn on 7<sup>th</sup> November 2023 by Mr. Juma Ali Tellah, the Chief Executive Officer of the petitioner. He averred that on the 29<sup>th</sup> July 2023, an Intergovernmental Steering Committee on the Ease of Doing Business along the Northern Corridor and the Port Reforms Working Group met and discussed various issues affecting services at the Port of Mombasa. The issues were set out in a working document by the Port Reforms Working Group High Level Consultative Forum. The applicant averred that the report listed various recommendations to address the challenges, some of which related to shipping lines, ship agents and cargo consolidators.
3. It was further the averment of the applicant that, vide a letter dated 7<sup>th</sup> August 2023, the respondent, through its acting Director General, Mr. John Omingo, wrote to various stakeholders in the shipping industry, including the applicant, informing them that as a result of the report of the working group, a Presidential Directive had been issued to the respondent requiring it to act on the same. The applicant further stated that the stakeholders were thereafter invited by the respondent to a consultative meeting on 10<sup>th</sup> August 2023 to address the concerns raised in the report aforementioned, particularly the concerns raised on destination charges that had the effect of making the Port of Mombasa and the Northern Corridor uncompetitive.
4. The applicant averred that it made its position known, and stated that it would not be prudent to arbitrarily fix destination charges since the same are dictated by market forces and international best practices, conventions and laws. The applicant further stated that the meeting concluded with the formation of a sub-committee to conclusively deliberate on the issues arising from the meeting. The sub-committee met and generated a report with recommendations for implementation which the applicant was not in agreement with. It accordingly wrote to the respondent a letter dated 12<sup>th</sup> September 2023 setting out its concerns. It particularly took issue with the fact that it was being blamed for the challenges facing the Port of Mombasa. It also wrote to the Cabinet Secretaries, the Ministry of Roads and Transport and the Ministry of Mining, Blue Economy and Maritime Affairs in respect of its concerns.
5. The applicant was aggrieved that, instead of addressing the issues raised by it, the respondent proceeded to issue a notice announcing the implementation of the Guidelines for addressing the prevailing high cost of destination charges at the Port of Mombasa with a view of improving the ease of doing business



at the Port. The effective date was indicated as 31<sup>st</sup> October 2023, which was the same date of issuance of the notice. The applicant further averred that it immediately wrote to the respondent a letter dated 1<sup>st</sup> November 2023 communicating its stance that the Guidelines were illegal and unconstitutional in nature; and that its members were not in a position to comply therewith. At paragraphs 22 to 39 of its Supporting Affidavit, the applicant sets out the grounds for its stance.

6. Accordingly, the applicant sought that conservatory and/or injunctive orders be issued restraining the respondents and its agents and/or servants from implementing the notice pending the hearing and determination of the Petition so as to ensure that the Petition is not rendered nugatory. It further averred that its members stand to incur irredeemable damage and loss as the respondent might proceed and decline to issue operating licences to its members. In the applicant's view, it has made out a prima facie case to warrant the issuance of the orders prayed for.
7. The application was opposed by the respondents vide the affidavit sworn on 17<sup>th</sup> November 2023 by John O. Omingo, the then acting Director General of the respondent. He set out the statutory mandate of the respondent as the maritime industry regulator. He conceded to most of the facts as set out by the applicant and the events that culminated in the issuance of the notice dated 31<sup>st</sup> October 2023. He averred that the immediate implementation of the Guidelines was necessary as an urgent intervention to avoid further loss of business by the Port of Mombasa.
8. The respondent further deposed that before the Guidelines were issued it engaged all the key stakeholders and held several meetings as set out at paragraph 8 of its Replying Affidavit. It added that the Guidelines were widely circulated before implementation and pointed out that the Guidelines do not fix any prices, but merely provided a cap on specific charges in addition to removing application of unjustified and unfair charges in the maritime industry. In its view, compliance with the Guidelines will stimulate the overall competitiveness and efficiency of the market forces in the logistics sector. It was its prayer that the entire Petition be struck out.
9. The interested party likewise filed their responses. It supported the position taken by the petitioner in impugning the Notice issued by the respondent dated 31<sup>st</sup> October 2023.
10. The application was canvassed by of written submissions. The applicant filed written submissions dated 29<sup>th</sup> November 2023 and proposed the following issues for determination:
  - (a) Whether the application merits the grant of conservatory orders.
  - (b) Who should bear the costs of the application?
11. The applicant submitted that the Replying Affidavit filed by the respondent offers no answer to the grievances set out in the Notice of Motion or Petition, both dated 7<sup>th</sup> November 2023, particularly on the patent illegality of the impugned Guidelines for violation of the Statutory Instruments Act, 2013, the Kenya Maritime Authority Act, 2006; the Competition Act, 2010 and the Fair Administrative Action Act, 2015. The applicant also submitted that the Guidelines violate Articles 2, 19, 20, 21, 23, 27 and 40 of the Constitution and therefore the application ought to be allowed ex debito justitiae. On the jurisdiction to grant the orders sought, the applicant made reference to Articles 22 and 23 of the Constitution and the cases of *Isaiah Luyara Odando & another v Kenya Revenue Authority & 6 others*; *Nairobi Branch Law Society of Kenya (Interested Party) [2022] eKLR*, *Abdullahi Mohammed Farah & 3 others v County Government of Mandera & another [2021] eKLR* among others. The cases were also cited as authority for the applicable principles, namely:
  - (a) That an applicant must demonstrate an arguable prima facie case with a likelihood of success and show that in the absence of the conservatory orders he/she is likely to suffer prejudice.



- (b) Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - (c) Whether if an interim conservatory order is not granted the Petition or its substratum will be rendered nugatory.
  - (d) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
12. The applicant then engaged in a discussion of the pertinent elements of its case with a view of demonstrating that it has a prima facie case. At paragraph 40 of its submissions, the applicant contended that its members stand to suffer immense prejudice should the orders sought not be granted. The applicant was also convinced that the orders sought will serve to enhance the constitutional principle of the rule of law, non-discrimination and equal protection under the law, fairness and public participation. It endeavoured to show that failure to grant the orders would render the Petition nugatory and therefore that it is in the public interest for conservatory orders to be issued at this stage.
13. The respondent relied on its written submissions dated 7<sup>th</sup> June 2024. It reiterated the assertions made by it in its Replying Affidavit and underscored its mandate. In its view it had the jurisdiction to issue the Notice and impugned Guidelines. The respondent relied on *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as to the nature of a conservatory order. The applicant urged the court to presume constitutionality and validity of the Guidelines until the contrary is proved. It relied on *Ndyanabo v Attorney General* [2001] EA 485 among others in support of this argument. It also took the view that public interest tilts in favour of implementation of the Guidelines and therefore urged the Court to dismiss the application with costs.
14. The interested party relied on its written submissions dated 22<sup>nd</sup> January 2024. It submitted that the Court's powers to grant conservatory orders is fettered by three conditions, namely:
- (a) That the applicant must demonstrate a prima facie case with a likelihood of success;
  - (b) Whether the Petition will be rendered nugatory if conservatory orders are not granted;
  - (c) Whether the grant or denial of the conservatory relief will enhance constitutional values and whether the public interest lies in granting the conservatory orders.
15. The interested party placed reliance on *Gatirau Peter Munya v Dickson Mwenda Kithinji* (supra) and *Wilson Kaberia v Magistrates and Judges Vetting Board & another* [2016] eKLR. According to the interested party, the consultative meetings were beyond reproach and that the Guidelines were extensively discussed at those meetings which the applicant attended and fully participated in. The applicant also relied on *Richard Owuor & 2 others* (suing on behalf of Busia Sugarcane Importers Association v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Cooperatives & 8 others [2020] eKLR for the proposition that consultations or stakeholder engagements tend to give more latitude to key stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions because such stakeholders are the most affected. According to the interested party, the applicant has no cause for complaint, given that it was accorded full participation in all the public participation meetings.
16. The interested party posited that the applicant stands to suffer no prejudice as the Petition will not be rendered nugatory if the conservatory orders sought are declined. In its view, the Court retains the powers to ultimately grant the orders sought in the Petition should the applicant turn out successful. The interested party further submitted that, Article 10 of the Constitution having been, denial of



conservatory orders would enhance the constitutional values set out therein. In its view, it is for selfish gain that the applicant applied for suspension of the Guidelines.

17. The interested party reiterated paragraph 11 of the respondent's Replying Affidavit in which the respondent stated that the Guidelines signified the start of the process of reforming the maritime industry on the ease of doing business and is positioned to immensely contribute to the unlocking of the potential of the maritime industry, thus leading to growth and development of the Kenyan economy.

18. I have given careful consideration to the Notice of Motion dated 7<sup>th</sup> November 2023 together with the affidavits filed in respect thereof as well as the written submissions filed herein by the parties. The jurisdiction to grant conservatory or injunctive orders is derived from Article 23(3) of the Constitution, which states:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and (f) an order of judicial review.

19. In the same vein, under Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, also known as the Mutunga Rules, the Court has powers to grant such interim measures as may be necessary to meet the ends of justice. The provision states:

“Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.”

20. Nevertheless, it is imperative to note the distinction drawn by the Supreme Court between injunctions and conservatory orders in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (surpar). The Supreme Court held:

“(86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

21. Granted the overall nature of this Petition, I will confine myself to the prayer for a conservatory order, noting this approach would be in-keeping with the interim relief granted by the duty judge on 15<sup>th</sup>



November 2023 pending the hearing and determination of the application dated 7<sup>th</sup> November 2023. Those orders are still in force.

22. As was pointed out by Hon. Ibrahim, J. (as he then was) in the *Muslim for Human Rights & 2 Others v Attorney General & 2 Others* [2011] eKLR, the Court ought not to look at the merits of the case closely at this stage. The learned judge cautioned:

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters...”

23. Similarly, in *Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General*, it was held:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

24. Hence, an applicant for interim orders for injunction purposes of Articles 22 and 23(3)(c) of the Constitution must satisfy the Court as to the following three elements:

- (a) A prima facie case with a high likelihood of success;
- (b) That the Petition will be rendered nugatory; and,
- (c) That public interest weighs in the applicant’s favour.

25. What amounts to a prima facie case was aptly stated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 thus:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. Similarly, in *Kevin K Mwiti & Others v Kenya School of Law & others (supra)*, it was held that:

“A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.



27. The key issues arising from the Petition are whether the views of the applicant were taken into account pursuant to Article 10 of the Constitution. In addition, the applicant challenged the constitutionality of the Guidelines, and whether they were formulated in accordance with Article 47 and the Statutory Instruments Act. Although in its written submissions the applicant delved deeply into the merits of its case, these are not issues for determination at this stage. Suffice it to say that they are not frivolous issues. They raise valid concerns worth investigating at the hearing of the Petition with a probability of success.
28. In the premises, it is my finding that the application dated 7<sup>th</sup> November 2023 is meritorious. The same is hereby allowed and orders granted as follows:
- (a) A conservatory order be and is hereby issued restraining the respondent either by itself, its agents or servants or anyone acting through it from implementing and/or enforcing the Notice to Ships Agents, Shipping Lines and Cargo Consolidators operating at the Port of Mombasa dated 31<sup>st</sup> October 2023 pending the hearing and determination of the Petition.
  - (b) That costs of the application be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**OLGA SEWE**

**JUDGE**

