



**Autoports Nairobi Freight Terminal Limited & another v Cabinet Secretary,  
Ministry of Roads & Transport & 4 others (Commercial Petition E002 of 2023)  
[2024] KEHC 2362 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2362 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL PETITION E002 OF 2023**

**A MABEYA, J  
MARCH 8, 2024**

**BETWEEN**

**AUTOPORTS NAIROBI FREIGHT TERMINAL LIMITED ..... 1<sup>ST</sup> PETITIONER  
COMPACT FREIGHT SYSTEM LIMITED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF ROADS & TRANSPORT .... 1<sup>ST</sup>  
RESPONDENT  
MINISTRY OF INDUSTRIALIZATION, TRADE AND ENTERPRISE  
DEVELOPMENT ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT  
KENYA PORTS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT  
SIGINON FREIGHT ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. For determination before me are a total of 11 applications and 2 preliminary objections. The background to these applications is that vide a petition dated 18/1/2023, amended on 18/4/2023, the petitioners petitioned this Court for various declarations on the alleged breach of their rights under *the Constitution*.
2. Simultaneous with the petition, the petitioners took out a Motion on notice which was also amended on 18/4/2023, for conservatory orders. Vide a ruling made on 18/8/2023, that Motion was allowed and conservatory orders issued accordingly. The Orders restrained the respondents from interfering



with the existing arrangements whereby cargo destined for South Sudan through the Port of Mombasa is handled and warehoused by either of the petitioners.

3. The enforcement of that order by the 4<sup>th</sup> respondent led to the filing of five suits in the Mombasa High Court. Together with the suits, the plaintiffs in those suits took out Motions on notice and obtained injunctive orders restraining the 4<sup>th</sup> respondent from directing any nominated cargo destined to South Sudan to the petitioners but to those plaintiffs.
4. With such conflicting orders, the 4<sup>th</sup> respondent found itself at a crossroad as contempt proceedings were in the offing. With such an embarrassing situation, on 13/12/2023 Magare J directed that three of the said matters (MSA HCCOM E031 of 2023, E021 of 2023 and E079 of 2023, be placed before me for directions. The said matters were subsequently registered in the Commercial and Tax Division as HCCOM E058, E059 and E060 of 2023, respectively.
5. On 21/12/2023, the Court directed that all matters pending in those files be responded to and be heard together. By further directions of 6/2/2024, the Court directed that all applications in the said matters be heard together with the applications pending in this petition. Those are the applications that are for determination and are as follows;

**a. Motion dated 21/11/2023 for injunction by the plaintiff in E058 of 2023**

6. The plaintiff claimed that a CFS it was entitled to have its contracts with Southern Sudanese importers respected. That the cargo by Southern Sudan importers that were nominated to its CFS should not be interfered with by the 4<sup>th</sup> respondent.
7. The 4<sup>th</sup> respondent opposed the application vide a replying affidavit dated 19<sup>th</sup> January 2024 sworn by STEPHEN KYANDIHI. It contended that it was not party to any business arrangement between the CFSs and the importers. That the Government of South Sudan had issued directives on the place of clearance and mode of transport of cargo destined to that country.
8. In opposition to the application, the 2<sup>nd</sup> defendant filed grounds of opposition and a preliminary objection dated 7/12/2023. It also filed a replying affidavit sworn by SALIM JUMA. Its contention was that the plaintiff was not an agent, shipper or consignee of the goods. That the plaintiff had not produced evidence to show that it had been approved by the Government of South Sudan to warehouse or transport Cargo to its country.
9. In the submissions, the plaintiff submitted that the 2<sup>nd</sup> defendant's preliminary objection and grounds of objection were not sustainable since there was no evidence that the plaintiff had not authorized the deponent of the supporting affidavit or that he was not a director. That the suit was not subjudice as it had a right to institute its own proceedings and that it had met the threshold for an injunction.
10. The defendants submitted that the suit was res subjudice and as it ought to have joined in the petition rather than filing separate suits.

**b. Motion dated 7/9/2023 for injunction by the plaintiff in E059 OF 2023**

11. The application sought injunctive orders to the 4<sup>th</sup> respondent from redirecting to third parties any cargo where consignees have nominated the plaintiff as the CFS of choice.

**c. Motion dated 18/9/2023 for injunction by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant in E059 OF 2023**

12. The plaintiffs raised a preliminary objection to the application on 5<sup>th</sup> February 2024 the grounds that the court lacked jurisdiction to hear and determine the applications as such directions would affect the



proceedings of the suit. That any further proceedings in the matter would be in contravention of the spirit of Article 165 of *the Constitution*, section 12 and 15 of the *Civil Procedure Act* 2010 and section 3 and of the *Judicature Act* CAP 8 Laws of Kenya. the plaintiffs' submissions were that the suit had been filed in Mombasa by private companies based in Mombasa and the breach happened in Mombasa as well. that the transfer to Mombasa would be a great miscarriage of justice.

**d. Motion dated 13/10/2023 for injunction by the plaintiff in E060 of 2023**

13. The Motion sought to restrain the 4<sup>th</sup> respondent from transferring the South Sudan Cargo to any other person and from excluding the plaintiff from allocation of the Cargo. The gravamen to its case was that the 4<sup>th</sup> respondent's actions were contrary to *the Constitution*, the *Competition Act* and that those actions had resulted to losses.
14. The application was opposed on the grounds that evidence, the Government of South Sudan had the authority to choose Container Freight Station to warehouse and transport cargo destined to its territory.

**e. Motion dated 9/10/23 for review by the 3<sup>rd</sup> respondent**

15. The Motion sought the interpretation of the conservatory orders dated 18/8/2023 and orders for review of the said orders in order to facilitate the implementation of the instructions of the Government of South Sudan dated 3/3/2023.
16. The application was supported by the affidavit sworn by Hon. Onesmus Kipchumba Murkomen on 9/10/2023. The 3<sup>rd</sup> respondent observed that the Republic of South Sudan had directed in its communication dated 3/3/2023 that the cargo be handled from the port of Mombasa rather than the Nairobi Freight Terminal. That the letter further advocated against monopoly in handling process of the cargo destined for the republic. The 3<sup>rd</sup> respondents position was that the orders dated 18/8/2023 were being misused and was against the decision of South Sudan dated 3/3/2023 and that the petitioner's private interests should not affect the country's public policy with South Sudan.
17. The petitioners filed grounds of opposition dated 18/12/2023 in opposition to the application. They contended that there was no evidence produced to warrant the review and the grounds for review set out under Order 45 of the Civil Procedure Rules 2010 had not been met.

**f. Motion dated 9/11/23 by 5<sup>th</sup> respondent on petition No E002 OF 2023 for review of the order of 18/8/2023**

18. The Motion sought a review of the orders of the court dated 18/8/2023 to the effect that it exempts cargo that was subject to the contractual relationship between the 5<sup>th</sup> respondent and its clients. It contended that the said order discriminated against it. That it gave the petitioners a monopoly.
19. The 5<sup>th</sup> respondent submitted that the order of the Court had condemned it unheard and as a result lost its clientele and business. That there was an error on the face of record to warrant a review in that the said orders affected persons not party to the petition. That the order was erroneous for directing the respondents to have all the cargo for South Sudan be stored by the petitioners.

**g. Motion dated 08/01/2024 to clarify the order of 20/12/2023 by the petitioner in E002 of 2023**

20. The petitioners sought the Court's interpretation of the orders of 21/12/2023 and confirm that the orders of 18/8/2023 did not affect any of the respondents.



**h. Motion dated 19/12/23 by the 6<sup>th</sup> respondent Mombasa Island Cargo Terminal**

21. The Motion sought a review of the orders of 18/8/23 to exempt cargo that was subject to contracts between the 6<sup>th</sup> respondent and its clients. It contended that the said order discriminated against it for it interfered with its right to receive, clear or store the nominated cargo.

**i. Motion dated 16/11/2023 in E058 of 2023**

22. The Motion sought mandatory and injunctive orders restraining the 4<sup>th</sup> respondent from redirecting cargo where the consignee had nominated the plaintiff. The plaintiffs contended that it had been nominated by the Government of South Sudan to clear 10 containers. That it confirmed that there was an order allowing the 4<sup>th</sup> respondent to reassign Southern Sudanese Cargo.

**j. Notice of Motion dated 1/2/2024 by the 4<sup>th</sup> respondent in E002 of 2023 to clarify orders**

23. The 4<sup>th</sup> respondent sought the Court's clarification of the orders of 23/1/2023, 18/9/2023 and 17/10/2023. That the court to vary the existing orders in order to align with the court order directing the 4<sup>th</sup> respondent to comply with the instructions issued by the Government of South Sudan.
24. The 4<sup>th</sup> respondent's contention was that subsequent to the order of 18/8/2023, the plaintiffs in the different suits had moved and obtained different orders that were contradictory. That there was need for clarity and interpret the orders since it had difficulties in implementing them.
25. The 5<sup>th</sup> and 6<sup>th</sup> respondent filed grounds of opposition dated 6/2/2024. Their contention was that the 4<sup>th</sup> respondent was supposed to discharge its functions based on the law and not instructions from a third party the Government of South Sudan. That instructions from South Sudan did not have a force of law in Kenya

**k. Notice of Motion dated 7/12/2023 4<sup>th</sup> respondent consolidation**

26. The 4<sup>th</sup> respondent sought the consolidation of this Petition and five suits filed in the Mombasa High Court.
27. The petitioners opposed the application vide grounds of opposition dated 18/12/2023. They urged that the suits may be consolidated and be heard in Nairobi.
28. There were two preliminary objections dated 14/9/2023 by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant in E059/2023 and 5/2/2024 by the plaintiff in the same suit. The first objection challenged the competence of the said suit while the 2<sup>nd</sup> objection challenged the jurisdiction of this court to hear and determine the matters before it.
29. The parties filed their respective submissions which I have carefully considered. In the directions of 6/2/2024, the Court and the parties agreed that the issues that fell for determination from all the said Motions and objections were as follows:-
- a. Whether the Court has jurisdiction to entertain the suits and the petition
  - b. Whether the complaints in both HCOM E058 and E059 of 2023 are bad in law.
  - c. Whether all the suits subsequent to petition no. E002/2023 are subjudice.
  - d. Whether the suits should be consolidated with the petition and if so, where they should be tried.



- e. Whether the order of 18/8/2023 was in rem or in personam.
  - f. How should KPA deal with the Cargo that is destined to Southern Sudan?
30. The lengthy and extensive submissions by the parties addressed the foregoing issues which I propose to determine seriatim. This being at the interlocutory stage of these proceedings, I will refrain from making any firm findings or determination so as not to preempt both the petition and the substantive suits. The determinations herein shall be preemptory and only on a prima facie basis.

**a. Whether the court has jurisdiction to entertain the suits and the petition**

31. It was submitted that, on the authority of the Supreme Court decision in *Benson Adege vs Kibos Distillers* [2020] eKLR the jurisdiction of this Court can be limited by statute. Dr. Ndegwa for the 5<sup>th</sup> respondent submitted that, the jurisdiction of the High Court is limited by station, division and over supervisory under Article 165 (1) (b) 6 of *the Constitution* of Kenya. That the Commercial and Tax Division has no jurisdiction to hear Constitutional and Human Rights matters and that more so, it has no jurisdiction to hear matters from the County of Mombasa.
32. He cited Rule 8 of Mutunga Rules, sections 14 and 15 of the *Civil Procedure Act* and Section 25 of the High Court Administration and Organization Act as authority for the submission that this Court has no jurisdiction to deal with the suits that had been filed in Mombasa and transferred to this Division, to wit, HCOM Nos. E 058/2023, E059/2023 and E060/2023.
33. Dr. Ndegwa was supported by Mr Karina, Mr Gathu, Ms Nzamsa on the submissions that this court has no jurisdiction, Mr Buti Mr Gikandi, Mr Somane, Mr Munyao submitted otherwise.
34. The starting point on jurisdiction is *the Constitution*. The provisions of *the Constitution* cited by Dr. Ndegwa and his colleagues do not donate any jurisdiction to the High Court but make other provisions on the running or composition of the High Court. The applicable provision is Article 165 (3) and (5). It provides:-
- “(3) Subject to clause (5), the High Court shall have:-
    - a. Unlimited original jurisdiction in Criminal and Civil matters;
    - b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened
    - c. ....
    - d. ....
    - e. ....
  - (5) The High Court shall not have jurisdiction in respect of matters-
    - (a) reserved for the exclusive jurisdiction of the Supreme Court under this constitution; or
    - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”
35. From the foregoing, the only caveat to the original and unlimited jurisdiction of the High Court is to be found in Sub-Article (5) of Article 165 of *the Constitution*. That is, Presidential Election Petitions,



matters reserved for the Environment and Land Court as well as the Labour Relations Court. It will also not supervise a tribunal established under Article 144 for the removal of the President while acting in its supervisory jurisdiction.

36. In this regard, the decision of the Supreme Court relied on by Dr. Ndegwa meant that where there is an express bar by statute, it will be a no go zone by the High Court and not as submitted by him. Other than referring this Court to sections 14 and 15 of the *Civil Procedure Act* (which relate to matters procedure), Rule 8 of Mutunga Rules (which is not jurisdictional) and section 5 of the High Court Administration and Organization Act which is only administrative, Dr Ndegwa and his colleagues did not cite any statute that bars this Court from handling the matters before me.
37. I would like to point out here that the provisions relied on by those who submitted that the Court has no jurisdiction are only administrative for convenience but not jurisdictional. The High Court has jurisdiction from boarder to boarder of this country on all matters save as already stated above.
38. As to whether a Judge of a Commercial Division of the High Court can hear a constitutional matter, it is a resounding yes. Judges of this Division hear and determine Election Petitions from all over the country and are regularly empaneled in benches that hear matters filed in the Constitutional and Human Rights Division. Further, where Constitutional Petitions relate to Commercial disputes, such as the one before me, they are usually lodged in this Division for determination and not the Constitutional and Human Rights Division.
39. In the present case, the issue at the heart of the dispute between the petitioners and the respondents is alleged violation of right to property and economic rights under Articles 40 and 43 of *the Constitution*. It is alleged that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who are headquartered in Nairobi, have threatened or have violated the rights of the petitioners.
40. In view of the foregoing, I hold that the petition was properly lodged in Nairobi before the Commercial and Tax Division of the High Court. This Court has the jurisdiction and competence to hear and determine this petition.
41. As regards, the other suits, the direction by Kizito J that they be placed before me for directions was procedural and affectively transferred those suits to this Court for directions. I will later have something to say about those suits.

**(b) Whether the complaints in HCCOM E058 and E059 of 2023 are bad in law**

42. Mr. Buti submitted that, to the extent that those complaints were not accompanied with resolutions authorizing their filing or the deponents of the verifying affidavits to do so, they were bad in law and liable to be struck out. However, Mr. Gathu, Ms Nzamsa and Mr Karina, Learned Counsels for the plaintiffs in those suits and the 6<sup>th</sup> respondent submitted that the suits were proper. That it was not necessary to have resolutions accompany the complaints and that in any event, such resolutions have since been filed in Court. They relied on the cases of Interactive Advertising Ltd and Anor vs Equity Bank Ltd [2014] eKLR and Spire Bank Ltd vs the Land Registrar [2019] eKLR in support of those submissions.
43. I do agree with Mr. Gathu and his colleagues that those complaints are not bad in law. The view I take is that, the provisions in the Civil Procedure Rules that require the filing of a company's resolution to institute a suit was not meant to curtail Corporations' right to access to justice. It was meant to bar persons purporting to act on behalf of such Corporations, and who did not have authority to bind the Corporations, from instituting unauthorized suits. It sought to safeguard companies from being



dragged into unnecessary suits which resulted in heavy expenses by way of costs that are appurtenant to litigation.

44. Those provisions did not intend to regulate the internal affairs of companies. They sought to bar abuse of process by either a section of directors or shareholders of companies in lodging unnecessary and unauthorized law suits. In this regard, I find and hold that the only competent person to rely on the provision for filing of resolutions authorizing filing of suits should be a member or director of the company and not 3<sup>rd</sup> parties. (see *Interactive Advertising Ltd & Anor vs Equity Bank Ltd* (supra).
45. Further, even where the challenge is by a member or director of a company, such resolution can be lodged with the Court at anytime before the hearing of the suit or at the hearing of such challenge. In the present case, Mr Buti's clients were neither members or directors of the plaintiffs in E058 and E059 of 2023.
46. Accordingly, I hold that the plaints in HCOM E058 and E059 of 2023 are not bad in law as contended.

**(c) Whether all the suits subsequent to Petition E002 of 2023 are subjudice.**

47. It was contended by Mr. Buti, for the defendants in E059 and E058 of 2023 and Mr Gikandi and Mr Nyachoti for the petitioners and supported by Mr. Somane and Mr. Munyao that the said suits were sub-judice. That to the extent that they were a collateral challenge to the orders of 18/8/2023, those suits were sub-judice.
48. The Counsels for the other parties submitted otherwise. They were of the view that their client's suits were independent of this petition and had been properly filed seeking to enforce their contractual rights. They urged the Court to dismiss the contentions by the petitioners.
49. At the heart of the petition herein is the petitioners' contention that, all cargo passing through the Port of Mombasa and destined for Southern Sudan should be handled by them only. That they have been nominated as such by the Government of Southern Sudan. They believe they have that right and have sought to bar the respondents from acting otherwise than as such.
50. At the interlocutory stage, on 18/8/2023, this Court issued a conservatory order directed at the 4<sup>th</sup> respondent in the following terms:-

“ 1        .....

2.        That a conservatory order be and is hereby issued restraining the Respondents from interfering with the current existing arrangements whereby general and containerized cargo destined for South Sudan passing through the Port of Mombasa is handled, stored and warehoused by either of the petitioners.
3.        That a conservatory order be and is hereby issued restraining the Respondents from interfering with the current existing arrangements whereby cargo destined for South Sudan passing through the Port of Mombasa is handled, stored and warehoused by either of the Petitioners pending the hearing of the Petition.
4.        That a conservatory order be and is hereby issued restraining the Respondents and their agents from interfering with the current existing arrangements whereby cargo destined for South Sudan passing through the Port of Mombasa is handled, stored and warehoused by either of the Petitioners pending the hearing of the petition.



5. ....”

51. That order effectively barred the 4<sup>th</sup> respondent, who manages the entry of cargo at the Port of Mombasa, from giving any other party other than the petitioners an opportunity to handle the cargo destined to Southern Sudan.
52. The suits subsequent to Pet No. E002 of 2023 sought to restrain the 4<sup>th</sup> respondent from transferring cargo destined to South Sudan to any other party other than the plaintiffs in those suits. They alleged that since the importers had nominated them to handle their cargo, the 4<sup>th</sup> respondent should honour such nomination and refrain from interfering with the freedom of contract between the plaintiffs in those suits and such importers.
53. Pursuant to the said suits, the Court in Mombasa, oblivious of the order of 18/8/2023, issued orders against the 4<sup>th</sup> respondent. The 4<sup>th</sup> respondent was thereby caught between two conflicting orders. It was at a cross-road and was faced with contempt proceedings.
54. It is clear from the foregoing that, the suits filed in Mombasa and subsequent to this petition, were but a collateral attack on the orders of 18/8/2023. It should be noted that all those suits were filed immediately after the order of 18/8/2023 was issued and the 4<sup>th</sup> respondent attempted to comply therewith. The plaintiff therein cunningly overturned the order of 18/8/2023 without seeking to directly challenge the same.
55. It is after realizing that courts of concurrent jurisdiction had issued two conflicting orders, that Kizito J exercised his discretion and referred those suits to this Court for directions. This Court was expected to marry the conflicting orders and save the Judiciary the embarrassment that had been brought by the existence of two conflicting orders directed at the same entity, the 4<sup>th</sup> respondent.
56. To buttress the position that the suits are but a collateral attack on the orders of 18/8/2024; it would be apt to refer to some of the pleadings filed in those suits:-
  - a) HCCC No. E 059 of 2023
    - (i) Paragraph 14 of the Amended plaint on the “Particulars of illegality” on the part of the 4<sup>th</sup> respondent sub paragraph (e), it is pleaded:-
      - “e) Enforcing unknown orders on the plaintiffs in an arbitrary manner despite the wishes of the consignee and the directions of the government of Kenya to allow consignees nominate their own CFS of choice.”
    - (ii) Paragraph 10 of Abdiwahid Haji Yerrow sworn on 7/9/2023 states:-
      - “10) That upon inquiring with officers of the Defendant, none of them want to give a straight response but we have since come to know that the Defendant is using proceedings filed in Milimani High Court Commercial Petition No. E002 of 2023 to frustrate the plaintiffs herein whereas the said proceedings have nothing to do with the plaintiffs and/or their clients. I annex hereto and mark as “AHY-23” Photostat copies of the pleadings aforementioned.”
  - b. Hcom E060/2023



In the supplementary Affidavit of the plaintiff sworn by Alex Kipngetich on 8/12/2023 he stated at paragraphs 6,7 and 8 as follows: -

- “6) That I am informed by the plaintiff’s advocate on record Mr. Karina whose information I verily believe to be true that this petition does not raise any Constitutional issues because the Course (sic) of action in this suit and the petition is a common law tort of conversion/interference with goods. The forum for hearing such disputes is before a normal Civil Court applying the settled principles of common law and not a Constitutional Court interpreting or applying *the constitution*.”
- 7) That accordingly, the correct forum is to hear the cases in Mombasa by applying the *Civil Procedure Act*, the *Consumer Protection Act*, the *Kenya Ports Authority Act* the *Competition Act* and the Common Law principles on the tort of conversion of goods.
- 8) That the purported ruling of 18/8/2023 delivered in Pet No. 2 of 2023 in Nairobi did not address the private contractual agreement between the consignee in Sudan and their nominated CFS in Mombasa.”

57. From the foregoing, it is crystal clear that not only did the parties know of the orders of 18/8/2023, but that they sought to defeat the same by filing the said suits.

58. The doctrine of sub-judice is encapsulated in section 6 of the *Civil Procedure Act*. It is meant to prevent a likelihood of two suits touching on the same subject matter being litigated in separate forums with the likelihood of having two conflicting situations. The section is clear:-

- “6) No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

59. As properly agreed by the parties in the directions of 6/2/2024, at the heart of all these suits is “how should the 4<sup>th</sup> respondent deal with Cargo destined for Southern Sudan”. That is the central issue to be determined in all the suits. All the other submissions about freedom of contracts, business competition, etc are either red herring or but simply collateral. The main issue is the handling of the Cargo destined to Southern Sudan.

60. The view I take is that, all the issues raised in the subsequent suits could properly, effectively and substantively be dealt with in the petition. There are procedures for the parties in the said suits being enjoined in the Petition as did the 5<sup>th</sup> respondent, rather than rush to a court of concurrent jurisdiction and seek to upset a lawful order by referring to it as “purported”.

61. Accordingly, I hold that all the suits subsequent to the petition are subjudice and are hereby stayed until the petition is heard and determined.



**(d) Whether the Suits should be consolidated with the petition and if so, where should they be tried?**

62. Having arrived at the determination that the suits filed subsequent to the petition are sub-judice, the issue of consolidation does not arise. Although there is jurisdiction to order consolidation, if it was necessary, the same cannot be exercised as those suits are now stayed.
63. As to the seat of trial, I have already made a finding that the petition was properly filed in Nairobi. That is where the wrongful acts that were being challenged arose. With technology the hearing of cases is nowadays virtual. And, with the e-filing already in existence, issues of convenience does not arise. It was submitted that Mr. Buti, Learned Counsel for the defendants in E059/2023 had difficulties coming to Nairobi to lodge documents for the hearing of these matters. That was not necessary as he could have lodged his clients' documents from the comfort of his Chambers.
64. It was submitted that the majority of the Advocates appearing are from Mombasa and that the Cargo is in Mombasa. That is not a consideration as to the place of trial for a suit. There will be no necessity to visit and/or inspect the cargo. The wrongful acts complained of were those of the 1<sup>st</sup> and 2<sup>nd</sup> respondent, they were committed in Nairobi and those respondents are in Nairobi.
65. Accordingly, the petition shall be tried at Nairobi as originally filed.

**(e) Whether the order of 18/8/2023 was in rem or in personam**

66. It was contended that since the parties in the suits filed subsequent to the petition were not parties to the proceedings, the order of 18/8/2023 was in personam. That they were not bound by the same.
67. Under section 44 of the *Evidence Act*, a final judgment, order or decree of a competent court is admissible and is held to be in rem and binding on all parties. The section provides:-

“44

- (1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.”

68. It was submitted that the order of 18/8/2023 was not final but interlocutory and therefore only in personam and not in rem. The view the Court takes is that, the said order is binding on all parties in so long as it relates to the matters declared therein ie cargo destined to Southern Sudan until the petition is disposed off.
69. The order was directed at the 4<sup>th</sup> respondent which is a public body undertaking public functions. The issues pronounced therein were not personal as between the petitioners and the 4<sup>th</sup> respondent so as to make the order to be in personum. They related to the 4<sup>th</sup> respondent's undertaking of its public functions in relation to the specified Cargo ie that which is destined to Southern Sudan. That order is binding on all those who would handle such cargo through the operations of the 4<sup>th</sup> respondent.
70. Accordingly, I hold and find that, until the hearing and determination of the petition, the order of 18/8/2023 was in rem and is binding on all those dealing with the 4<sup>th</sup> respondent as relates the cargo destined to Southern Sudan.



**(f) How should the 4<sup>th</sup> respondent deal with the cargo destined to Southern Sudan**

71. As already stated, the entire petition and dispute before Court is about how KPA is to deal with the cargo destined to Southern Sudan. There were lengthy submissions by the parties on this issue. What Learned Counsel failed to consider is that, the order of 18/8/2023 was only made in the interim. It was only conservatory. I need not explain here what the term conservatory means. But suffice to state that it means only “in the interim”, “to await the outcome of the main proceeding.”
72. In this regard and as already stated, the Court cannot make any findings on this issue at this stage. It can only deal with the matter on a prima facie basis. Making any findings or determination would be to pre-empt the main trial.
73. In its ruling of 18/8/2023, the Court found on a prima facie basis that the petitioners had established a case for the grant of a conservatory order. That order was to subsist until the petition is disposed off. On a prima facie basis, the Court found that Kenya, being a member of the Community of Nations, it is bound by international law under Article 2 of *the Constitution*.
74. The Court held in paragraph 52 of the ruling, that:-
- “It is not in dispute that under UNCLOS, the Government of Southern Sudan freely appointed the petitioners as it (sic) preferred CFS for its imports vide letter dated 9/11/2022 and the same was acceptable to the Government of Kenya and Communicated to South Sudan vide the 1<sup>st</sup> respondent’s letter dated 13/12/2022”.
75. In my view, that position subsists. The Court cannot go into the merits or otherwise of the correspondence produced at this stage. Most of the submissions made by the parties are reserved for the hearing of the petition itself.
76. The 5<sup>th</sup> respondent advanced the argument that the order of 18/8/2023 should be reviewed and be discharged. I am not satisfied that, on the material on record and at this stage, a case have been made for the review and/or discharge of the said orders.
77. Accordingly, all the applications and the Preliminary Objections are determined as follows:-
- a) all the applications and preliminary objections set out at the beginning of this ruling, save for the Motion by the 4<sup>th</sup> respondent dated 1/2/2024 are hereby dismissed.
  - b) This Court has the jurisdiction to hear and determine the petition herein.
  - c) All suits filed subsequent to the petition touching on the issue of Cargo destined for Southern Sudan, and in particular HCCOM Nos E058/2023, E059/2023 and E060/2023 are subjudice petition no. E002/2023 and are hereby stayed. The orders made therein are hereby set aside.
  - d) The petition shall be tried in Nairobi by way of Affidavit evidence.
  - e) For expedited determination of the petition in terms of Article 159 of *the Constitution*, the plaintiffs in the Mombasa suits are hereby enjoined in the petition as interested parties, as follows: -
    - (i) Focus Container Freight Station as 1<sup>st</sup> Interested Party.
    - (ii) Makupa Transit Shade Ltd as 2<sup>nd</sup> Interested Party.
    - (iii) Boss Freight Terminal Ltd as 3<sup>rd</sup> Interested Party.



- f. The 5<sup>th</sup> and 6<sup>th</sup> respondent and the Interested Parties do file and serve their responses to the petition within 14 days of the date hereof, if they so wish.
- g. The petitioners do file a reply to those responses, if need be, together with written submissions within 10 days of service.
- h. The respondents and the interested parties do file their respective submissions within 10 days of service by the petitioners.
- i. Time is of the essence.
- j. A date for highlighting be fixed.
- k. Costs to abide the outcome of the Petition.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**

