Ogelo v Crawford Capital Limited; Kenya Pipeline Company Limited & another (Interested Parties) (Civil Suit E007 of 2024) [2024] KEHC 5303 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E007 OF 2024

RN NYAKUNDI, J

MAY 3, 2024

BETWEEN

KENNEDY OMONDI OGELO ..... PLAINTIFF

AND

CRAWFORD CAPITAL LIMITED ..... DEFENDANT

AND

KENYA PIPELINE COMPANY LIMITED ..... INTERESTED PARTY

KENYA REVENUE AUTHORITY ..... INTERESTED PARTY

RULING

Mr. Apollo Mboya Advocate for the Plaintiff

Mr. Lagat Advocate for the 1st Defendant

Mr. Osoro Advocate for the 2nd Interested Party

1. There two applications before me one dated 16th, April, 2024 by the applicant/plaintiff expressed to be brought pursuant to section 1A & 1B, 3, 3A of the *Civil Procedure Act* and order 40 Rules 1 and 2 of the *Civil Procedure Rules*, sections 145 and 146 of the *East African Community Customs Management Act* 2004, Regulations 149 and 150 of the *East African Community Customs Management Regulations*, 2010 and all enabling provisions of the law.

2. The notice of motion seeks the following substantive remedy;

    1. That pending the hearing inter parties and determination of the suit, this Honourable court be pleased to issue an order of temporary injunction, restraining the Respondent, whether by themselves, their agents, employees, servants or any person acting at their behest, from carrying out clearance procedures, customs controls and collecting any fees for petroleum

products destined to the Republic of South Sudan or in any other manner interfering with the Exportation of petroleum products.

3. This remedy is based on the following grounds;

   i. On Monday 25th March, 2024 the Respondent, Purported on the directive of South Sudan Revenue Authority (SSRA) begun to pre-approve for validation E-petroleum accreditation permits for all petroleum products destined for the Republic of South Sudan

   ii. The Respondent requires all the Oil Marketing Companies (OMCs) in Kenya intending to export their products to the Republic of South Sudan to have the loading order validated by the Respondent.

   iii. The Respondent demands that OMCs to print out the said E- Petroleum accreditation permits, attach the loading order and to present to the Respondent Representative after the order booking at Kenya Revenue Authority.

   iv. The Respondent is demanding US$ 0.05 per litre of export Petroleum products from every petroleum exporter and stand to benefit colossal sums by levying illegal charges.

   v. The Crawford Capital Limited, the Respondent herein is not among the List of licensed Customs Agents 2023 form the Website of Kenya Revenue Authority

   vi. The Respondent is purporting to carry out clearance procedures, and customs controls for Petroleum products destines to the Republic of South Sudan contrary to *East African Community Customs Management Act*, 2004 and the *East African Community Customs Management Regulations*, 2010.

   vii. The actions of Respondent, has significantly inconvenienced business, caused loss of business, delays in trucks turn-around time and slow product movement leading to ageing of products in the Kenya Pipeline Company Limited system thus resulting into ageing penalties.

   viii. The Applicant and the other OMCs stand to suffer huge financial loss if the Respondents are not restrained form purporting to be a customs Agent carrying our clearance procedures and customs controls for petroleum products destined to the Republic of South Sudan.

4. In support of the application is an affidavit by the Applicant Kennedy Omondi Ogelo dated the same day reiterating the same grounds as in the body of the notice of motion. In opposition to the application the operations manager of the 1st defendant/respondent Mr. Abdi Kadir Ibrahim in his replying affidavit deposed as follows;

   1. That the Government of South Sudan through the Council of Ministers Resolutions No.30/2020, 32/2020 and 33/2020 adopted a government policy on economic governance and the implementation of e-government services by all government institutions. As part of this policy the Government of South Sudan required the National Revenue Authority (NRA) to inform all petroleum product importers that fuel being imported into South Sudan must be evidenced with “e-petroleum Product Accreditation Permit Certificate”. (Attached herewith and marked A1 -1 is a letter dated 13/2/2024 from the South Sudan Ministry of Finance and Planning on the e-government services policy to the NRA).

   2. That the South Sudan National Revenue Authority wrote to the Defendant/Respondent regarding the implementation of the e-government Accreditation of all fuel imports into South Sudan from all borders and stations. The NRA designated the Defendant/Respondent as the

official system provider for customs services. (Attached herewith and marked A1 – 2 is a copy of the letter dated 1/3/2024 from the NRA designating the Customs Services provider).

3. That the South Sudan Ministry of Petroleum wrote to the Kenyan Ministry of Energy and Petroleum regarding the application for system integration Petroleum products imports. South Sudan Ministry of Petroleum required its counterpart Kenyan Ministry to share with it the bill of lading for the imported petroleum products form the Republic of Kenya through its entry and exit ports into the Republic of South Sudan. In this communication the South Sudan Ministry of Petroleum was categorical that the Defendant/Respondent was contracted by the Government of South Sudan as the customs service provider. (Attached herewith and marked A1 – 3 is a letter dated 7/3/2024 form the South Sudan Ministry of Petroleum).

4. That the Kenyan Ministry of Energy and Petroleum wrote to Oil marketing Companies informing them that the Republic of South Sudan had nominated and authorized the Defendant/Respondent to obtain the Bill of lading data for South Sudan destined products from all Western Kenya Depots (Attached herewith and marked A1-4 is the letter dated 8/3/2024 form the Kenyan Ministry of Energy and Petroleum to the Oil Marketing Companies).

5. That the South Sudan Ministry of Petroleum wrote to its Kenyan Counterpart referencing implementation of the policy on "e-petroleum Product Accreditation Permit". It required compliance with its new policy and required the Kenya Pipeline Company to provide information at fuel depots that no fuel truck destined for the Republic of South Sudan should be loaded without the said e-petroleum product Accreditation Permit as a prerequisite. (Attached herewith and marked A1 – 5 is the letter dated 12/3/2024 from the South Sudan Ministry of Petroleum).

6. That the Application is full of falsehoods and is intended to mislead this Honourable Court. The Applicant alleges that the Defendant/Respondent is not among the licensed customs Agents by the Kenya Revenue Authority. I am advised by my advocate on record which information I verily believe to be true that this is manifestly absurd as the Defendant/Applicant is the Customs Agent for the Republic of South Sudan. Further the National Revenue Authority of South Sudan is empowered *East African Community Customs Management Act*, section 145 to license persons to act as agents for transacting business relating to the declaration or clearance of any goods.

5. The second interested party in a rejoinder to the application dated 16th April, 2024 the applicant had this to state in the affidavit sworn by Benard Kibiti couched in the following evidential material;

    1. That I have read and fully understood the Notice of Motion Application and the Affidavit sworn by Kennedy Omondi Ogelo both dated on 16th April, 2024 and wish to respond to the same as follows.

    2. That the Kenyan Revenue Authority (KRA) is a statutory body established under the Kenya Revenue Authority Act, Cap 469 laws of Kenya, as a Central Agent of the Government for the assessment and collection of all Government Revenue.

    3. That in exercise of its mandate, the KRA is under Section 5(2) (a) (i) of the *Act* empowered to enforce and administer all provisions of the written laws set out in Part 1 of the first schedule to the Act, among them the *Income Tax Act* (Cap 470 of the Laws of Kenya) and the *value added Tax Act* (Cap 476 laws of Kenya now repealed).

4. That the KRA statutory obligation is enshrined under Articles 210(1) of the *Constitution of Kenya* to assess and collect taxes on behalf of the Government of Kenya.

5. That effective 1st March 2024, the South Sudan Ministry of Petroleum introduced a mandatory permit for Oil Imports into South Sudan. The e-Petroleum Permit would be issued after payment of USD 0.05 per litre through an online platform in the Ministry's website. Welcome (eservices.gov.ss) by importers of petroleum products in South Sudan. The amount was revised to USD 0.03per litre through a ministerial order dated 22nd April, 2024.

   (Annexed and Marked BK 1 is a copy of the Ministerial Order dated 22nd April, 2024).

6. That the permit must be paid before the product is loaded at the first point of departure as per the Single Customs Territory guidelines. South Sudan Revenue Authority was given the mandate to ensure compliance through the Department of Customs Services as per the East African Community (EAC) and Single Customs Protocols.

7. That Crawford Capital (Defendant) is the service provider for Government services in Sudan, and was deployed to Oil Deports to support the system rollout.

8. That the e-petroleum accreditation permit was introduced by the Government of South Sudan to be paid by importers of Petroleum products in South Sudan. Kenyan Companies are not required to pay as the permit is applicable to South Sudan importers. Kenyan companies would be the exporter, hence not required to pay the levy.

9. That the enforcement agency is South Sudan Revenue Authority, Customs Department, who have officers in Nakuru, Eldoret, Kisumu and Mombasa to oversee clearance cargo as per the single customs Territory protocols.

10. That the single Customs Territory procedures provide that an importer in the destination Country must clear with Customs Authority of the destination Country, who then advices the Customs authority of departure Country, who then carries out final clearance procedure to allow cargo depart to the destination Country.

11. That the 2nd interested party is mindful of the provisions of section 2 of the *East African Community Customs Management* 2004 (EACCMA). "Customs Laws" includes this *Act,* Acts of the Partner states and of the Community relating to Customs relevant Provisions of the treaty, the protocol, regulations and directives made by the council and relevant principles of international law, "Customs" or "the customs" means the customs departments of the partner states;

12. That in this case, all partner states (Uganda, Rwanda, South Sudan etc) clear cargo destined to their countries before the 2nd interested party (KRA) can allow final release. If the consignment is not cleared by the destination partner state, then KRA cannot release the same because it will have not complied with requirements of the destination Country.

13. That the 2nd interested party is carrying out its obligation in accordance with the provisions of the East Africa Community Treaty and in particular Article 6 thereof and the single customs territory procedures and manual (Annexed and marked BK 2 is the SCT Procedures and manual).

6. On the other hand the 1st Respondent filed yet another application dated 18th April, 2024 expressed to be brought under section 1A, 1B &3A pf the *Civil Procedure Act*, Order 40 Rule 7 and Order 51 Rule 3 of the *Civil Procedure Rules*.

7. The 1st respondent applied for the following orders;

    1. That this honourable court be pleased to set aside the Ex-parte Orders issued on 18th April, 2024 granting interim conservatory orders to the plaintiff/Respondent herein

    2. That the status quo ante be maintained

    3. That the entire suit be dismissed

    4. That costs be in the cause.

8. The two applications were canvased by way of written submissions. The learned counsel Mr. Mboya for the Applicant to lend credence to the issues raised in the notice of motion placed reliance on the following authorities;

    Civil Application No. 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*(2014)eKLR, Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co.Ltd v MW (Minor suing thro' next friend and mother (HW)* [2016] eKLR, *Judicial Service Commission v Speaker of the National Assembly & Another* [2013]eKLR, *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015]eKLR, *Wilson Kaberia Nkunja v the magistrate and Judges vetting Board and Others* Nairobi High Court Constitutional Petition No.154 of 2016 (2016)eKLR, Civil Appeal 66 of 2019 *Mary Gathoni & another v Frida Ariri Otolo & Another* [2020]eKLR, *Regina Munyiva Ndunge v Kenya Commercial Bank Limited* (2005)eKLR and *CMC Motors Group Limited v Bengeria Arap Korir trading as Marben School & Another*(2013)eKLR.

9. I have therefore come to the conclusion that there can be no doubt that in exercise of this court's jurisdiction the professed measure vested in the above authorities will form the yard stick to determine the merit and demerits of the application by the plaintiff/applicant prayers on conservatory orders.

Analysis and Determination

10. The carrier principles on conservative orders are as articulated in the *Gitaru Munya case supra* where the court stated as follows:

    " 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".

11. The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of Law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

    "

"i. The appeal or intended appeal is arguable and not frivolous; and that

ii. Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These Principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the *Constitution of Kenya*, 2010, a third condition may be added namely:

iii. That it is in the public interest that the order of stay be granted

This third condition is dictated by the expanded scope of the Bill of Rights, and the Public Spiritedness that run through the constitution".

12. What may be gleaned from the above principles their ought to be evidence which can be taken into account from the perspective of the applicant capable of supporting the conservatory orders pending the hearing and determination of the petition or in any event the suit as in the instant case. The most in-depth evidence in support of the application is to be found in the affidavit of one Kennedy Omondi Ogelo. The analogy to be drawn from the contentious issues raised by the Applicant must be weighed alongside the interlocking issues raised by the affidavit of one Ibrahim Abdi Kadir the Head of operations for the 1st defendant. It is also through the 2nd interested party vide a replying affidavit of one Bernard Kibiti has also taken issues with the notice of motion filed by the applicant in this cause of action challenging the powers and functions being executed by the 1st defendant/Respondent on behalf of the Government of Southern Sudan.

13. In the rejoinder submissions the 1st Respondent learned counsel opposed any grant of conservatory orders for want of merit based on the brief factual matrix. It was the contention of learned counsel The South Sudan Ministry of Petroleum wrote to the Kenyan Ministry of Energy and Petroleum regarding the application for system integration of Petroleum products imports. South Sudan Ministry of Petroleum required its counterpart Kenyan ministry to share with it the bill of lading for the imported petroleum products form the Republic of Kenya through its entry and exit ports into the Republic of South Sudan.

14. In this communication the South Sudan Ministry of Petroleum was categorical that the Defendant/Respondent was contracted by the Government of South Sudan as the Customs Service Provider. The Kenyan Ministry of Energy and Petroleum wrote to Oil Marketing Companies informing them that the Republic of South Sudan had nominated and authorized the Defendant/Respondent to obtain the Bill of Lading data for South Sudan destined products from all Western Kenya Depots. Learned Counsel also submitted on the issue of jurisdiction in which he urged this court to down tools for reason of not being clothed with jurisdiction to enforce any judgment against the government of Southern Sudan.

15. In buttressing the issues of jurisdiction and territorial sovereignty learned counsel cited the principles of *Ingang'a & 6 others v James Finlay (Kenya) Limited* (Petition 7 (E009) of 2021) [2023] KESC 22(KLR) wherein the Supreme Court held that

"To allow universal recognition and enforcement of foreign decisions would result in recognizing that foreign courts are superior to the national courts, thereby infringing on the sovereignty of a country."

16. It is also important to note that from the point of view of learned counsel of the 1st Respondent in his submissions that taking the four corners of granting conservatory orders none of it has been surpassed

by the applicant. In this respect learned counsel was of the strong view that the questions raised in the application surrounded the interpretation of the *East African Community customs management Act* more specifically section 145.

17. Learned counsel also invited the court to appreciate the principles in the cases of *Bryan Chebii Kipkoech v Baknabas Tuitoek Bargoria & Another* [2019]eKLR and *Giella v Cassman Brown & Co Ltd* 1973 EA 358, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003)eKLR, *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another* [2016]eKLR, *Evan Bwire v Andrew Aginda* Civil Appeal No.147 of 2006 cited fin the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi T/A providence Auctioneers* (2016)eKLR, in the case of *Nyamago & Nyamogo v Kogo* (2001) EA 170 cited in Veleo (K) limited, in the case of *Sadar Mohamed v Charan Singh and Another, National Bank of Kenya Ltd v Ndungu Njau*, *Republic v Public procurement Administrative Review Board & 2 others*[2018]eKLR, *Mukisa Biscuit Manufacturing Co. Ltd v West End Districutors Ltd* (1969) EA 696, *Oraro Mbaja* [2005]1KLR 141, *Francis Angueyah Ominde & another v Vihiga County Executive Committee members Finance Economic Planning and 3 others; Controller of Budget and 10 others (interested parties* [2021]eKLR, *Lazaro Kabebe v Ndege Makau & another* [2004]eKLR (F/. Ochieng J) and *Ibrahim Musa & Sns Limited and Another v First National Finance Bank & another* [2002]eKLR which are in tandem with the position taken by the 1st Respondent that no valid grounds exist to grant any remedy of conservatory or injunction as prayed by the applicant.

18. Learned counsel for the 1st Respondent was emphatic in his submissions that the application dated 24th April, 2024 is non-suited for reason of the preliminary objection on jurisdiction as clearly set out in *Mukisa Biscuits Manufacturing Ltd supra*.

19. I have considered the applications as cumulatively filed by the Applicant/Plaintiff and the 1st Defendant/Respondent with the legal spicing from the 2nd interested party Kenya Revenue Authority. With regard to the many issues adverted to by the parties, it is now my task to evaluate the efficacy and probative value of the affidavit evidence and the legal perspectives as ventilated by the parties to this dispute.

20. I proceed to consider the first question arising in this case on the frontiers of granting conservatory orders in our legal system which tend to flow from Article 23 (3) (c) of the *constitution*. It is the authority prescribed by the constitution empowering the courts to uphold and enforce the bill of rights. This dominant remedy in our constitution is of great significance in the realm of constitutionalism and enforcement of the bill of rights. The idea of constitutionalism is bolstered by the specific entrenchment of the rule of law in the founding provisions of Article 10 of the *Constitution*. In construing Article 23 it is moreover essential to remember the nature and subject matter of that Article and to interpret it subjectae materies. Applying the criteria in *Dickson Mwenda Kithinji & 2 others* [2014] eKLR which is consistent with the *Gitaru Munya Case* which was laid down at the beginning of this ruling it is equally true that this decision expounds the law in contemplation of the character in this aspect of conservatory orders.

> " Conservatory orders" bear a more decided public-law commutation; 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 applicant'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. There are a number of points to note about this application. The first one is whether the court has jurisdiction derived from the constitution or a statute to adjudicate between the scheme of relationship established within the Southern Sudan government ordained in the ministry of trade and industry based on a ministerial order No.5. 2024 A.D. for the implementation of E government Tariff and E-product Accreditation permit. The test of the due process on jurisdiction is for this court to distil the text and context of the executive order issued by the minister under Article 114 (1) of the *Transitional Constitution of the Republic of South Sudan*, 2011 as amended (2015),

22. What also needs to be considered carefully is the impact of the following executive orders issued by the Minister of the Republic of South Sudan handling the docket of Trade and Industry;

    1. All petroleum products destined for South Sudan must be evidenced with the e-petroleum Product Accreditation permit. The said permit can be obtained by Petroleum importing companies form the official government website www.mop.eservices.gov.ss.

    2. All petroleum products must validate their accreditation permit through the South Sudan Revenue Authority's e-custom system before applying for custom duties as prerequisite.

    3. The value for the E-Petroleum Products Service License has been reduced form five (5) to three (3) United States Cents per litre, which shall be levied by e-Government department through South Sudan Revenue Authority e-payment system form all Petroleum Products destined to the Republic of South Sudan by importers.

    4. Government exemptions are not applied on the E-Petroleum Accreditation permit.

    5. The fees are meant for the system provider operation and maintenance

    6. The South Sudan Chamber of Trades and all other Trade Unions are requested to facilitate the execution of the order with immediate effect.

    7. The E-Government Board of Directors are to submit the implementation mechanism for the Ministry of Trade and Industry's approval, to which the e-product accreditation permit shall be applied for the luxurious Commodities and other items as a policy of the government.

23. When pronouncing the meaning and application of conservatory orders in any given circumstances I find the guidelines set in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015]eKLR of significance that;

    a. The Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he/she is likely to suffer prejudice.

    b. The court should decide whether a grant or a 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. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion.

    e. It is clear that a party seeking a conservatory order is mandated to demonstrate that should the court fail to grant a conservatory order, there is a high probability of him/her suffering prejudice as a result of the violation or threatened violation of the Constitution. However, this must be weighed against public interest.

24. In the *Katiba institute v AG & nine others* [2018]eKLR the court observed inter-alia that conservatory orders must be merited for them to be granted by the court. Given the manner in which the courts have sought to give meaning to the question on differentiation between conservatory orders and injunction is a very thin layer with the injunctions being confined essentially to deal with private party interests and rights or issues whereas conservatory orders carry a public interest connotation whose foundational value as a remedy is provided for in Article 23 of the *constitution*. In my view both accommodate the principles in *Kenleb Cons Ltd v Gatitu Services Station Ltd & Another* [1990] KLR 557 Bosire J A as he then was held as follows;

> " To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction". The same judge in *Njenga v Njenga* [13] [1991]KLR 401held that; "an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles."

25. The fashioned remedy of conservatory orders by the Applicant when considered in detail is against the state of Southern Sudan its minister or officers of the Trade and Industry portfolio. The letter of the application if considered and allowed in its completeness could prevent the oil imports to that sovereign state and its inhabitants from accessing the products until the determination of this proceedings. The Purpose of preserving the property and maintaining the status quo pending determination of the suit in the strictest sense of the order would direct both parties to undertake no action of any kind to enforce their respective rights until the substantive suit has been determined. It is obvious in my view the order being in the nature of an injunction will offend the Ministerial order No. 5.2024 A.D. for the implementation of E Government Tariff and E Product Accreditation dated 22nd April, 2024. Adverting to the necessity of incorporating the 1st Defendant/Respondent as the service provider for government services deployed to the oil depots to support the system roll out to address enforcement of matters relating to customs, conservatory orders granted in favour of the Applicant will directly be orders against the state of Southern Sudan. In weighing the facts as pleaded by the applicant the modification is such that the guidelines of an injunction might not be squarely applicable given the cause of action as an element of public law. In order to prevent the government of Southern Sudan from proceeding with any plan as premised in the ministerial order No. 5.2024 A.D. dated 22nd April, 2024 for the E Government Tariff and E. Petroleum Accreditation Permit Fees as expressly provided for in the detailed order will in the circumstances in law entitle the applicant to substantive relief. In order to exercise discretion in favour of the applicant so as to injunct the 1st Defendant with any action to carry out the mandate specified in the ministerial order the applicant will have to show that the state of Southern Sudan did not follow due process and any such duties conferred to the 1st Defendant/Respondent are in breach of the East African Community Union protocols and East African Community Common Market protocols. Section 2 of the *East African Community Customs Management* 2004 (EACCMA). "Customs Laws" includes this *Act*, Acts of the Partner States and of the Community relating to customs relevant provisions of the Treaty, the protocol regulations and directives made by the Council and relevant principles of international law, "Customs" or the Customs" means the customs departments of the Partner States. Therefore every person employed on any duty or service relating to the Customs by order, or with the concurrence of the Commissioner shall be deemed to be the proper officer for that duty or service; and every act required by this *Act* at any time to be done by, with, to, or before, any particular officer nominated for such purpose, if done by, with, to, or before, any person appointed by the Commissioner, to act for such particular officer, shall be deemed to be done by, with to, or before, such particular officer.

26. In addition the single customs territory procedures manual compliments the provisions of the East African Treaty and *EACCMA* on clearance of Maritime and Intra Regional cargo under the Single Customs Territory. The manual also covers imports, Exports and Transits to and from EAC neighbouring Countries. It is also stated in 1.3 that the EAC Single Customs Territory is premised on the following pillars. Free circulation of goods; Revenue management systems; Port management systems and Regional legal and institutional framework. It will therefore be seen that fundamentally there is a valid regulatory framework operating as a reasonable restriction in the interests of the public in Southern Sudan. The scope, origin and objects of the obligations and rights *EACCMA* and the East African Community Single Customs Territory procedures manual have been graphically stated in a manner sovereignty of the member States remain intact. The constitution of the Republic of Kenya is designed to give the judge of a Superior court like in the instant case the power and the means by which to ensure that certain rights and freedoms provided for in the bill of rights may ultimately be protected or on occasion, may temporarily be protected pending a determination by the court at a later stage of the merits of a citizens case that the state, or an organ or public body of the state breached a right of his or hers under the constitution.

27. The applicant in this case is mainly aggrieved as pleaded in the suit that the 1st defendant/respondent demanding of all oil marketing companies exporting their products to the Republic of South Sudan have a loading order validated by the defendant and the print out of the E- Petroleum Accreditation Permit is illegal and against the provisions of *East African Community Customs Management Act*, 2004 and the *East African Community Customs Management Regulations*, 2010.

28. A template of questions to consider in relation to this application

    1. Is South Sudan a partner State of the East African Community?

    2. Does the *East African Treaty* Articles 5 (2) on establishment of custom union applicable to the Republic of South Sudan?

    3. Does Article 6(f) on cooperation of Member State for the mutual benefit of significance to South Sudan?

    4. Does the applicant have a cause of action in law entitling him to a substantive relief, that's to say can he say there is a serious issue to be tried as to the reality of whether his rights under the fundamental rights provisions of the *constitution* 2010 have been breached?

    5. Is there any subject matter or any status quo to conserve? In this case from the readings of the notice of motion and affidavit evidence the horse may for instance, have bolted. If the answer to that question is in the negative, it is difficult to see how a conservatory order would lie: Courts do not act in vain. In light of the above clustered questionnaire template and the evidence placed before the court in support of the remedy in the notice of motion does not sufficiently satisfy the criterion for conservatory orders.

29. One of the vexed question raised by the 1st defendant legal counsel is on the controversial issue of jurisdiction. Whether the jurisdiction of this court flows from the constitution or the East African Community Treaty. The 1st respondent in that context raised a preliminary objection to the extent that this court's jurisdiction is hosted by the provisions of the *East African Treaty* and *East African Community Customs Management Act*, 2004. In terms of the preliminary objection learned counsel for the 1st defendant/respondent reinforced his submissions from the excerpt in the landmark case of *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd* [1969] EA 696 at page 700, comes to

the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner:-

> ... so far as I am aware , a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute arbitration.
>
> .....A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is south is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

30. The reason for this objection is that generally what is in issue is the assertion of the subject matter apparently presumed to fall squarely within the *Regional East African Treaty* and the Collateral institutions of the East African Customs Union. Essentially learned counsel for the 1st defendant argued and submitted that this court cannot pretend to pass judgment against the Republic of South Sudan on policy controversies arising out of the duties of an import agent tasked by the ministry of Trade and Industry to oversee the payment and assessment of tax by the destination country of importation of goods and services. In dealing with jurisdiction some confusion arises out of the fact that a large portion of specifically applied law of jurisdiction is stated in terms of the substantive law and the procedural law. It is trite as did the 1st defendant/Respondent that a question of jurisdiction may be raised while an action has just been initiated or when it is pending or it may be at the very least be raised after the action has been disposed of and a judgment has been rendered by the impugned court. Broadly speaking jurisdiction is also divided into jurisdiction of actions in rem and jurisdictions of actions in personam. It is undoubtedly clear in the celebrated case of *Owners of Motor vessel Lilian v Caltex Oil Kenya Ltd* (1989) KLR (1) without jurisdiction a court has no power and must down tools in respect of the matter in question. Similarly the Court in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 others* (2012)eKLR held that the jurisdiction of a court is for that court to operate within those limits provided by the constitution or enabling statutes. It cannot expand its jurisdiction through judicial craft or innovation.

31. The concept of jurisdiction in public international law has traditionally had a strong link with the notion of sovereignty. That is to say jurisdiction allows the State to give effect to the sovereign independence which they are endowed in a global system of formally equal States through stating what the law is relating to persons or activities in which they have a legal interest. Where the jurisdiction of a court is at stake a trial judge must discern and distinguish what can be called Regional or International jurisdiction on the one hand from subject matter jurisdiction the other hand. In principle subject matter jurisdiction is not about that International jurisdiction conceptual framework but is about the cause of action as between the disputant the court is entitled to adjudicate. It is also true that courts derive the subject matter jurisdiction based on the applicability of the International or Regional conventions/treaties.

32. The issue raised by the first defendant/Respondent learned counsel has to whether this court has adjudicatory jurisdiction is relevant and two very different stages in an International or for that matter Regional litigation. The first inquiry concerns the proceedings before this court required to render the decision on the issues being canvassed by the parties herein after becoming the rendering court of the

decision. The second stage of inquiry concerns the proceedings as alluded to by the learned counsel of the first defendant/respondent before this court where the interlocking issues transcend the Republic of South Sudan. It was learned counsel's contention that South Sudan would have no obligation to recognize and enforce judgment. Analogously, this two twin concepts are sometimes treated as though they are similar, but a deeper appreciation of their characteristics convey some differential minimal. In my considered view the issue of jurisdiction as a requirement for adjudication is analytically different from the issue of jurisdiction as a requirement for recognition. The first view is governed by the law of the land in which the court exercises jurisdiction to render the decision whereas the second issue is by operation of the law of the requested court.

33. A practically more important anchor for applicability of the limits in jurisdiction, the constitution of Kenya has developed in its entirety provides in Article 2 (5) & (6) as follows;

> The general rules of the international law shall form part of the law of Kenya. Any treaty of convention ratified by Kenya shall form part of law of Kenya under this constitution.

34. Whether or not jurisdiction exists for this case to adjudicate the issues arising out of the *East African Community Customs Act* [2004] and the *East African Community Management Regulations* [2010] in the Regional Legal Systems frequently is a matter of case -by -case analysis of the individual case, which helps domestic courts to administer justice in the individual cases filed by Transnational Corporate Actors. Thus in our constitutional and Regulatory framework the court has to determine as part of the jurisdictional test whether the exercise of jurisdiction is reasonable hence the court may decline jurisdiction to ensure the application of mandatory forum laws in the *East African Community Treaty*. In this same spirit the East African Court of justice was created as one of the organs of the Community as stipulated in Article 23 of the *Treaty*. The jurisdiction of the Court is spelt out in Article 27 of the *Treaty* in the following words.

> The Court shall initially have jurisdiction over the interpretation and application of the Treaty. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

35. The proviso in Article 27 (1) reads;

> " provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty to the Organs of Partner States"

36. The new clause (3) to Article 30 reads;

> " The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under the Treaty to an institution of a Partner State."

37. From this provisions on the doctrinal jurisdiction of the East African Court of Justice a judge would decline to exercise jurisdiction when the forum is inappropriate, and an available alternative forum in another legal system is clearly better suited than the impugned forum. Doctrinally, forum non conveniens is not a jurisdictional provision, because its application leaves the existence of jurisdiction in the case intact and goes merely to the exercise of such jurisdiction. It cannot be gainsaid a first set of interest underline the law of jurisdiction in an International or Regional arena are party interests seeking to vindicate their Fundamental Rights and Freedoms by invoking the Municipal Courts. To some extend whether the interests are in violation of Human Rights, Regional Trade Barriers,

Imports and Exports of goods and services within the common market or the customs and Tariffs regime Management to some extend this interests are antagonistic, and everything else being equal both plaintiffs and defendants are typically each interested in litigating in an environment which he or she is conversant in navigating the legal landscape. It is also apt to examine the emergency of jurisdiction by necessity to regulate the transnational corporate actors involved in contracts and Transactions which are entered into extraterritorially.

38. In such circumstances when a court lacks territorial jurisdiction to determine the dispute it may turn to an emerging legal framework in jurisdictional law which allows the court to assume jurisdiction over the claim or cause of action where the court considers that there is no other forum in which the issues in dispute will be adjudicated or in which the plaintiff, petitioner, or applicant may reasonable be expected to initiate the suit, claim or petition. It is a jurisdiction I consider to be in line with Article 48 of the *constitution* on access to justice. It serves as a safety valley to avoid a total denial of access to justice to the most forum of Conveniens.

39. Today in International Trade Formulations the main focus of a fairness theory in most the International Instruments and our very own Constitution Article 50 is not the power of the court over the defendant but rather whether it will be inconvenient for the defendant to depend himself or a legal entity to defend itself in a forum one did not choose. The East African Community jurisdictional paradigm can be called us or them. First the East African jurisdictional paradigm focus on horizontal relations between countries rather on the vertical relation between the court and the parties.

40. The real question of jurisdiction in the East African Community and member states is neither whether there is sufficient vertical relationship between the plaintiffs, the defendant whose courts are seized, nor whether such contracts exist between that country and the controversy before court. The real question which turns out is which of the several Regional courts are the most appropriate with a type of litigation filed in the Municipal courts including the East African Court of justice.

41. The Eastern African block in their Governance Treaties have however created uniform jurisdictional rules for enforcement of judgments in civil, commercial and customs matters regulations, but this jurisdictional rules have not always met the dictates of justice. In a number of cases my reading of the provisions of the Treaty *EACCMA* and *East African Community Customs Management Regulations*, 2010. Strict adherence to them is likely to result in denials of access to justice. For instance, in a matter by the plaintiff/applicant initiated before this forum the requirements for it for the jurisdiction to be exercised in the Regional sphere in which the judgment is to be given effect one might find proceedings abroad impractical to reasonably commence and concluded within a reasonable time.

42. Certainly, contrary to the submissions by learned counsel for the first defendant/respondent Article 33 of the *EAC Treaty* says Municipal court cannot be excluded from interpretation and application of the Treaty, on that account alone. However, it proceeds to place a rider decisions of the EACJ on interpretation and application of the Treaty on a similar matter override decisions of national courts. Equally, the domestic court may refer a matter (a question) to the EACJ if it considers it necessary to enable it to give a judgment. (See also Article 34 as read with 35 of the *EAC Treaty*). By dint of this Treaty the courts of a member state may on an exceptional basis hear the case if proceedings cannot reasonably be brought or conducted in a third state which the dispute is closely connected. However the dispute must have a sufficient connection with the member state of the court seized of jurisdiction. There is no jurisdiction stripping of the domestic courts as argued and submitted by the learned counsel for the first defendant/respondent about the said courts not being the appropriate forums for litigants to pursue any of their claims.

43. The question of limitation of jurisdiction as confined in the preliminary objection by the first defendant/respondent be and is hereby dismissed for want of merit. In the same breadth for fundamentals postulates of the law on conservatory orders which contributes to the trajectory of preserving the status quo or subject matter of the dispute to shape the road map of the case docket and its ability to bring about meritorious adjudication of the dispute is also declined.

44. Keeping in view the afore-stated legal position under section 80 of the *civil procedure Act* and order 45 rule 1 of the *civil procedure rules* is permissible to review the interim orders issued in the first instance when circumstances of substantial and compelling character made it necessary to do so. Based on the law and the principles which govern grant of conservatory orders the interim decree on the face of it is set aside. The various aspects of the substratum of the suit and the canons of the single customs territory procedures founded within the scope of *East African Community Customs Management* (2004) remain litigated before this forum or the East African Court of Justice. It is the opinion of this court that once the issues are correctly crystalized by the parties it may be at liberty to very much invoke the jurisdictional provisions sufficiently adequate to sustain the claim. The defendant/respondent shall be entitled to costs of the application by the Applicant. Each has leave to apply in any event.

SIGNED, DATED AND DELIVERED THIS 3RD DAY OF MAY, 2024.

IN THE PRESENCE OF;

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R NYAKUNDI

JUDGE