



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION NO. E006 OF 2020

DOCK WORKERS UNION OF KENYA.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

AND

1. PORTSIDE FREIGHT TERMINALS LIMITED

2. MERCANTILE CARGO TERMINAL

OPERATIONS LIMITED.....INTERESTED PARTIES

RULING

Introduction

1. The Petitioners herein filed a **Petition** together with a **Notice of Motion** application dated 26/10/ 2020 brought pursuant to **Articles 19, 20, 21, 22, 23, 165 (4), 159 and 259 of the Constitution of Kenya, Rules 13 and 19 of the Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and procedure Rules, 2013** and all enabling provisions of laws. The Applicant prays for the following orders:

1. Spent

2. THAT an order of injunction be and is hereby issued to compel the Respondent to produce all the lease agreements, temporary or permanent agreements and or contract(s) entered between the Respondent and M/s Regional Logistics, M/s World Food Programme Organization, M/s Mitchel Cotts Freight (K) Ltd, M/s Mackenzie Maritime E.A Ltd, M/s Port Side Freight (K) Ltd and M/s Mercantile Cargo Terminal Operations Ltd.

3. THAT pending the hearing and determination of this Application, an interim conservatory order be and is hereby issued suspending the operations of the lease agreements or any other instruments signed between the Respondent and the 1st and 2nd Respondent or any other persons and or entities, conducting and or carrying handling operations and verification of import and or export goods from any shipping line, within any port's, or harbor's premises, warehouse, inland container terminals and or any waterways and or depots, respectively;

4. THAT pending the hearing and determination of this Petition, an interim conservatory order be and is hereby issued suspending the operations of the lease agreements or any other instruments signed between the Respondent and the 1st and 2nd Respondent or any other persons and or entities, conducting and or carrying handling operations and verification of import and or export goods from any shipping line, within any port's, or harbor's premises, warehouse, inland container terminals and or any waterways and or depots, respectively;

5. THAT cost of this Application be borne by the Respondent.

2. The Application is premised on the grounds set out therein, inter-alia that the Respondent has leased out sheds 7 and 8 to the 1st Interested Party to handling of operations contrary to **sections 8, 9, 10 and 12 of the Kenya Ports Authority Act**. Further that the Respondent, has issued a notice dated the 6/6/2020 stating that the 2nd Interested Party shall be responsible for verification of imported goods in the Country.

3. The Applicant main contention is that loading and offloading is an exclusive statutory duty of the Respondent. The Petitioner/Applicant

avers that inspection of goods is a function of the customs officer of the Respondent as well as the Kenya Bureau of Standards.

4. The Applicant in its application states that the Respondent, is a public entity and does not have power to lease sheds 7 and 8 and that they are not allowed under the Kenya Ports Authority Act to outsource for services without public participation.

The Response

5. The Respondent filed a replying Affidavit sworn by one **Turasha J. Kinyanjui**, the Respondent's Head of Litigation and Disputes where he avers that the Applicant is not properly before this court as its authority vests in the National Executive Committee. The Respondent states that Applicant is not allowed to file Petitions without the authorization of the National Executive Committee and thus this court lacks jurisdiction to hear this Petition.

6. The Respondent further states that the Applicant has not followed the set-out procedures as provided under the **Access to Information Act No. 31 of 2016** and thus the court still lacks jurisdiction to entertain the Application as filed.

7. The Respondent further aver that the Applicant is engaging in a fishing expedition because they have no information to assist in prosecution of its case and is now fishing for that information from the Respondent.

8. In regard to the lease issued to the 1st Interested Party, the Respondent avers the same was done through a competitive, voluntary and open process and the lease awarded in the year 2006 under the Public Procurement & Disposal Act 2005. (The Respondent attached the lease marked as JT-2 to the Replying Affidavit sworn by Turasha J. Kinyanjui).

9. As for the 2nd Interested Party, the Respondent states that the tendering process was open, and that the 2nd Interested Party emerged the successful bidder and a complete tender is available at the Respondent's website.

10. The 1st Interested Party filed a Grounds of Opposition on the 16th November 2020 in which they oppose the Applicant's application in its entirety. The 1st Interested Party in its ground of opposition avers that Article 35 of the Constitution of Kenya does not give power for anybody to request whimsically for all manner of information. The 1st Interested Party states that there has been enacted an Act of Parliament, The Access to Information Act, No. 31 of 2016. Section 21 thereof provides for a commission empaneled to hear and determine complaints arising from the lack of access to information. The 1st Interested Party further avered that Section 23 (2) of the Act gives the commission authority to listen to complaints such as this, brought before Court and the High Court holds appellate jurisdiction in that regard.

11. On prayer Nos. 3 and 4, the 1st Interested Party contends that the Court cannot grant them as prayed as the same are pegged on prayer no. 2 and that there exists no evidence to warrant the grant of the prayers as prayed.

12. The 1st Interested Party contends further that the dispute herein as per the Applicant's pleading, is a matter that ought to have been before the Public Procurement Administrative Review Board and not before this Court and thus, this court lacks original jurisdiction to deal with the matter.

13. The 1st Interested Party avers that the Applicant has not proved its case as provided under Articles 23(3) (b) and (c) of the Constitution. The 1st Interested Party prayed that the Application and Petition herein be dismissed.

14. In response to the Application the 2nd Interested Party filed a Grounds of Opposition dated the 4/12/2020. The 2nd Interested Party's case is that the Applicant's Officer one Mr. Simon Sang, does not have authority and/or resolutions from the National Executive Committee of the Applicant to appear, plead, act and/or swear Affidavits on behalf of the National Executive Committee. Further, that Mr. Simon Sang's powers do not extend to filing or authorizing the filing of suits on behalf of the Applicant. The 2nd Interested Party avers that the grounds raised by the Applicant are misguided and that the Application and Petition as drawn are defective both in substance and procedure and that the same be struck out.

Submissions

15. The Applicant filed its submissions on the 23/11/2020 and additional submissions on the 11/12/2020. The Respondent filed submissions on the 2nd December 2020. The 1st Interested Party filed their submissions on the 4th December 2020 while, the 2nd Interested Party filed submission on 20th November 2020.

16. Parties relied on their written submissions.

Determination

17. I have carefully considered the Application dated 26/10/2020, the opposing Affidavits, grounds of oppositions and submission of the parties. The main issue that arises for determination is whether the Court has jurisdiction to grant the orders as prayed.

18. The *locus classicus* on jurisdiction is the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court

seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

19. The Respondent and Interested Parties raise a jurisdictional objection based on the doctrine of exhaustion. They claim that the Applicants have not exhausted the alternative dispute mechanism which is available under the Access to Information Act No. 31 of 2016.

20. The Access to Information Act confers power to the Commission on Administrative Justice to review decisions of a public entity or a private body in relation to request for access to information. The Respondent and the Interested Parties aver that the right procedure would have been for the Applicant to refer the matter to the Commission on Administrative Justice as provided under Section 14 of the Access to Information Act. The Applicant on the other hand, aver that the reading of the Access to Information Act is not in mandatory terms and that they are not obligated to seek remedy under the Act, and that they are rightfully before this Court.

21. From the record before this Court, it is evident that the Applicant wrote two letters dated the 17/7/ 2020 and 18/8/2020 to the Respondent requesting for documents pursuant to **Article 35 of the Constitution**. The Respondent responded via letters dated 22/7/ 2020 and 7/9/2020 objecting to the request. On the basis of that refusal, the Applicant believes that they are now rightfully before this Court.

22. It is now trite law that once the constitution or statute confers jurisdiction upon a Court, Tribunal, Person or Body or any Authority, that jurisdiction must be exercised in accordance with Constitution or Statute.

23. In *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] e KLR* the Court of Appeal stated:

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

24. In the case herein there existed an avenue for the Applicant to request for information from the Respondent as provided under **Section 14 of the Access to Information Act**.

The said **section 14** provides:

... (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—

(a) a decision refusing to grant access to the information applied for;

25. Once the Respondent refused to grant their wishes to produce documents via the letters 22/7/2020 and 7/9/2020, the Applicant ought to have applied for review to the Commission on Administrative Justice as provided under the Access to Information Act.

26. **The law recognizes exceptional circumstances where an Applicant can be excused for failure to satisfy the exhaustion doctrine. Section 9(4) of the Fair Administrative Action Act stipulates that:**

“Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

27. The court is allowed to exempt a party from alternative remedy, but the same is only possible where the Applicant has presented a compelling case. See *Kenya Revenue Authority & 2 others v Darasa Investments Ltd [2018] eKLR* [Visram, Karanja and Koome JJA] stated as follows when it posed the following question:

“... the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy...”

28. The Applicant herein has not shown any compelling reasons as to why the Court should order the Respondents to produce the documents as sought. The mere allegations that the Respondent is not mandated to lease or enter into agreements with third parties is not good enough reason to allow the grant of an order of injunction, in circumstances where on the face of it the Respondent and the Interested Parties engaged lawfully.

29. Under **section 23** of the Access to Information Act No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR*, Korir J observed correctly in my view, as follows:

“It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the Constitution to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism

has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.

The preamble of the Access to Information Act, 2016 clearly states that it is an “Act of Parliament to give effect to Article 35 of the Constitution; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes.”

“It is therefore an Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the Constitution. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice. Indeed Section 23(2) empowers the Commission on Administrative Justice as follows:-

“The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-

- a. the release of any information withheld unlawfully;*
- b. a recommendation for the payment of compensation;*
- or*
- c. any other lawful remedy or redress.”*

Section 23(3) of the Act provides that:

“A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.”

“I do not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the Access to Information Act. Section 23(5) of the Act actually provides that an order of the Commission on Administrative Justice can be enforced as a decree. What the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice.”

30. The Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] Eklr, underlined the importance of courts and tribunals operating within their jurisdictional fields as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

31. The upshot, is that this Court lacks jurisdiction to direct the Respondent to release documents to the Applicant for the reasons stated.

32. In the circumstance having not granted prayer No. 1 the entire Application dated 26/10/ 2020 fails and is hereby dismissed.

33. Costs shall be in the cause.

Dated, Signed and Delivered at Mombasa this 5th Day of February, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Ms. Sidinyu for 2nd Interested Party

Mr. Makori holding brief Mr. Buti for 1st Interested Party

Ms. Peris Court Assistant