



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 80 of 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004

AND

IN THE MATTER OF: THE CARRIAGE OF GOODS BY SEA ACT, CAP (392) LAWS OF KENYA 2004

AND

IN THE MATTER OF: THE HAGUE RULES 1924 AND THE HAGUE VISIBLY RULES 1968

AND

IN THE MATTER OF: A CONSTITUTIONAL PETITION BY THE CONTAINER FREIGHT STATIONS ASSOCIATION OF KENYA THROUGH ITS MEMBERS, NAMELY:

- 1. MAKUPA TRANSIT SHADE LIMITED**
- 2. REGIONAL LOGISTICS LIMITED**
- 3. MITCHEL COTTS FREIGHT (K) LIMITED**
- 4. KENCONT LIMITED**
- 5. INTERPEL CONTAINER FREIGHT STATION LIMITED**
- 6. FOCUS CONTAINER FREIGHT STATION LIMITED**
- 7. AWANAD ENTERPRISES KENYA LIMITED**
- 8. CONSOLBASE LIMITED**
- 9. BOSS FREIGHT TERMINAL LIMITED**
- 10. PORTSIDE FREIGHT TERMINALS LIMITED**
- 11. MOMBASA ISLAND CARGO TERMINAL LIMITED**
- 12. AUTOPORT FREIGHT TERMINALS LIMITED**
- 13. SIGNON CONTAINER FREIGHT STATION LIMITED (hereinafter collectively**

referred to as “THE ASSOCIATION”).....PETITIONERS

AND

1. KENYA PORTS AUTHORITY

2. KENYA RAILWAYS CORPORATION.....RESPONDENTS

RULING

1. By a Notice of Motion application herein dated 16th April, 2018 the 1st and 9th Petitioners seek to withdraw from the petition herein on the grounds that their consent to be joined to the petition was not given.

2. **Mr. Rono** for the Applicants submitted that the issue of costs of the withdrawal can be addressed by court and the cost, if any taxed.

3. **Mr. Ondego** for the 1st Respondent on his part submitted that if a party withdraws from the petition then the entire petition is bad in law and that the entire petition should be struck out.

4. **Mr. Karina** counsel for the 2nd Respondent supported the withdrawal but asked for their costs.

5. **Mr. Buti** counsel for the rest of the Petitioners objected to the withdrawal stating that he is the advocate who received instructions from the 1st and 9th Petitioners and other Petitioners, and that it is not true that the 1st and 9th Petitioners never consented to the petition. Counsel submitted that if the court exercises its discretion to allow the withdrawal then the 1st and 9th Petitioners should pay his costs.

6. On the submission of Mr. Ondego that the entire petition be struck out Mr. Buti submitted that there is no such application before the court now, but that Mr. Ondego had filed an application for striking out the petition. He should therefore prosecute his application if he wants the court to strike out the petition.

Determination

7. In my view, when a party want to exit court proceedings a party cannot be denied the right to do that. It matters not that it is a petition. Parties can only come to court, and testify if they so wish. The only issue which a party has to contend with is the costs of withdrawal. This court cannot tell whether or not Mr. Buti secured consent instructions to join the 1st and 9th Petitioners to the petition. That is an issue squarely within advocate and client, and this court cannot order costs to be paid to Mr. Buti. Mr. Buti knows how to secure such costs. The only costs this court is concerned with is that which the Respondents have incurred in order to defend the petition. But even then this court notes that the proceedings in this matter have just started and parties have not incurred so much costs.

8. In the exercise of my discretion in this matter I allow the said withdrawal of the 1st and 9th Petitioners from the petition herein. There are no orders on costs but Mr. Buti is at liberty to pursue costs from the 1st and 9th Petitioners if indeed he acted on their instructions.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 9th day of April, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Ms. Ombogo holding brief Mr. Karina for 2nd Respondent

Mr. Ochieng holding brief Mr. Kongere for 1st Respondent

Mr. Mohamed holding brief Mr. Buti for Petitioners

Mr. Kaunda Court Assistant