



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 82 OF 2019**

- 1. THE DOCK WORKERS UNION**
- 2. TAIRENI ASSOCIATION OF MIJIKENDA**
- 3. MUSLIMS FOR HUMAN RIGHTS (MUHURI).....PETITIONERS**

**VERSUS**

- 1. THE HONOURABLE ATTORNEY GENERAL**
- 2. CABINET SECRETARY, MINISTRY OF TRANSPORT & INFRASTRUCTURE.....RESPONDENTS**

**AND**

- 1. KENYA PORTS AUTHORITY**
- 2. MEDITERRANEON SHIPPING COMPANY**
- 3. KENYA SEAFARES WELFARE ASSOCIATION.....INTERESTED PARTIES**

**DIRECTIONS BY COURT**

1. This afternoon the parties have addressed the court in extensio on a variety of issues on which they sought courts directions before the matter can progress further. These issues are:-

- Whether the 3<sup>rd</sup> petitioner’s name should be struck out the petition on account of the fact that it seeks to file its own separate and independent petition?
- Whether the 1<sup>st</sup> petitioner having appointed another advocate, different from the advocate who filed the petition, it should be granted leave to discontinue its petition?
- Whether the application by parties, currently not parties to the petition, need be dealt with before the objection by the Respondent on jurisdiction can be dealt with?
- It being conceded by all parties to the petition that the matter raises weighty constitutional issues deserving being referred to the Chief Justice for purposes of empaneling of an even number of judges, whether this court is entitled to consider granting interim conservatory orders.

**Certification under Article 165 (4)**

2. In the Notice of Motion dated 15/7/2019 and filed simultaneously with the petition, the petitioner did make a specific prayer that the matter be certified to raise substantial questions of law under Article 165(3).

3. To that prayer none of the parties have any opposition but agree that the matter be so certified. Having perused the petition, I do agree that substantial issues of law in the nature of constitutional ethos have been raised and I therefore direct that this file be transmitted to the office

of Chief Justice for purposes of Article 165 (4). This be done forthwith for the file to be in Nairobi latest by Monday 22/7/2019.

### **Striking out of the 3<sup>rd</sup> petitioner from the petition**

4. This was yet another request made by the petitioner and not contested by the other side. I take it that the 3<sup>rd</sup> petitioner has no interest to proceed with the petition as currently presented and wish not to be party. I see no reason to decline the request. It having come to my attention that as this matter was proceeding in court, the 3<sup>rd</sup> petitioner had in fact filed petition No. 111 of 2019 whose tenure and purport is not different from the current petition.

5. I do allow and order that the name of the 3<sup>rd</sup> petitioner be struck out of this petition. I make no orders as to costs.

### **Withdrawal by the 1<sup>st</sup> Petitioner**

6. While the court has the discretion to allow the discontinuance of a petition where public interest is alleged like in the matter, the purpose intended to be served with that restriction against free will withdrawal and discontinuances is to ensure that public interest is not prejudice by a petitioners sole decision once a matter is in court. This is more critical where the petition is by a single party.

7. Here there would still remain, the 2<sup>nd</sup> petitioner who the Advocate say is still keen to proceed with the matter. In those circumstances, I see no possible prejudice to public interest alleged in the petition if the 1<sup>st</sup> petitioner is permitted to withdraw its petition. The request is allowed with no orders as to costs.

### **Application for joinder**

9. By dint of Rules 5, 6 & 7 if the, the constitution of Kenya (protection of rights and fundamental freedom) practice and procedure rules, 2013, which echos the principle of the constitution against undue regard to procedural technicalities, the court has the last say on who to participate in a petition by having a very wide and unfiltered discretion to order additional, striking out of parties names to the petition as well as inclusion and addition as friends of the court or interested parties.

10. The general principle is that it is in the interest of every Kenyan that the constitution and its value systems is defended, upheld, protected and respected.

11. That duty of the citizenry is best guarded when every deserving person is given a chance to have a say where an allegation is made about a violation or threat to violation.

12. That coupled with the need for expeditious disposal of court business and having read the application by Mr. Gikandi's client, that Mr. Angelo Owino and by Mr. Mohamed, the counsel for the National Assembly, I see no prejudice that any of the parties would suffer if the same parties are allowed to be joined so that when the weighty issue of jurisdiction is canvassed they have contributions to make. I therefore make an order that SEAFARERS UNION OF KENYA and MR. MOHAMED MWAWIRA be joined as 4<sup>th</sup> & 5<sup>th</sup> interested parties respectively while the National Assembly be added as the 3<sup>rd</sup> Respondents.

### **How about interim orders at this juncture?**

13. When the matter was first placed before me, I did consider it to raise weighty issues and I hesitated from issuing any orders before the other side were served. Today parties have addressed me on the preliminary issues on which I give these directions including whether or not to give interim orders.

14. An important point I picked from the petitioner is the fact that even though the law was assented to by the President, the same is yet to be published in accordance with article 116 of the constitution. To that contention none of the respondents including the National Assembly's Advocate was willing to assert that the law has come into operation.

15. On that account and the provisions of Article 116 (2) I direct that an interim conservatory order issues to halt the operationalization of Section 6(2A), statute law (Miscellaneous Amendment) Act, 2019 as far as it anchors the memorandum of understanding between the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> interested party pending the hearing and determination of the Notice of Motion dated 15/7/2019 *interpates*.

16. Let the costs of today be in the petition.

**Dated, signed and delivered at Mombasa this 18th day of July 2019.**

**P.J.O. OTIENO**

**JUDGE**