



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 80 of 2018

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

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

AND

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

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 LTD**
- 2. REGIONAL LOGISTICS LTD**
- 3. MITCHEL COTTS FREIGHT (K) LTD**
- 4. KENCONT LTD**
- 5. INTERPEL CONTAINER FREIGHT STATION**
- 6. FOCUS CONTAINER FREIGHT STATION LTD**
- 7. AWANAD ENTERPRISES KENYA LIMITED**
- 8. CONSOLBASE LIMITED**
- 9. BOSS FREIGHT TERMINAL LTD**
- 10. PORTSIDE FREIGHT TERMINALS LTD**
- 11. MOMBASA ISLAND CARGO TERMINAL LTD**

12. AUTOPORT FREIGHT TERMINALS LTD

13. SIGNON CONTAINER FREIGHT STATION LTD

14. MULTIPLE INLAND CONTAINER DEPOT LTD

15. MOMBASA CONTAINER TERMINAL LTD.....PETITIONERS

AND

1. KENYA PORTS AUTHORITY.....1ST RESPONDENT

2. KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

RULING ON PRELIMINARY OBJECTIONS DATED 10.4.2018

1. The Petitioners by way of a Petition dated 4th April, 2018 allege that their rights under Article 19, 40 and 260 of the Constitution have been violated by the Respondents. The Petitioners claim to be gazetted under Section 12 of the East Africa Community Customs Management Act to operate container freight stations commonly known as “*transit sheds*” in Mombasa. Their operations involve handling of cargo on behalf of their customers. The cargo that they handle is either nominated cargo or unnominated cargo. Unnominated cargo being cargo that is assigned to the Petitioners by the 1st Respondent under an agreement while nominated cargo is cargo that is designated by the importer or by the shipper to be delivered to a member of the Petitioners’ association vide a bill of lading. The Petitioners’ claim revolves around the nominated cargo.

2. The Petitioners claim that the 1st and 2nd Respondent entered into a “*Take or Pay Agreement*” dated 30th September 2014 for the consignment of freight from the Port of Mombasa to 1st Respondent’s Embakasi ICD using the SGR. In the said agreement, the Petitioners contend that the 1st Respondent is required to move a certain volume of freight within a given period of time failure to which the 1st Respondent shall pay the 2nd Respondent the value of the shortfall.

3. In a bid to fulfil their obligations in the said contract, the Petitioners claim that the 1st Respondent has interfered with nominated cargo designated for delivery to their transit sheds and has instead diverted the same and handed it to the 2nd Respondent for transportation by the SGR to Nairobi. It is this interference that the Petitioners contend has violated their economic rights under article 19 and their right to property under Article 40 of the Constitution.

4. Simultaneously with this Petition, the Petitioners filed an application dated 3rd April, 2017 seeking an injunction order or in the alternative an order of prohibition to stop the Respondents from interfering with the nominated cargo pending the hearing and determination of this Petition.

5. The 2nd Respondent opposed the application and Petition by way of a Preliminary Objection dated 10th April, 2018. It is this Preliminary Objection that is the subject of this ruling. In summary the objection is based on two grounds; that the Petitioners do not have the locus standi to bring these proceedings and the Petitioners’ claim should not have been initiated by way of a Constitutional Petition hence this court lack jurisdiction. The issues raised in the Preliminary Objection were also raised in the Replying affidavit of TURASH J. KINYANJUI sworn on 9th April, 2018 and filed by the 1st Respondent in opposition to the application dated 3rd April, 2018. And so in effect there are two preliminary objections by the Respondents. These Preliminary Objections are invariably similar as they raise similar issues and were canvassed together.

6. On the first ground, the 2nd Respondent contends that the Petitioners are not privy to the contract of carriage between any named shippers, any named consignee in any bill of lading or any other contract. Further, the 2nd Respondent argues that Petitioners lack the locus to claim possession of goods because they are not shippers, consignees or carriers.

7. On the second ground, the 2nd Respondent contends that the Petitioner ought to have filed an ordinary suit and not a Constitutional Petition as they have not demonstrated that the principles of common law on trespass to goods as modified by statutes and international conventions are not sufficient to resolve this dispute.

Hearing and Submissions

8. The Preliminary Objection was heard on 10th April, 2018. Mr. Mungai, Mr. Sanjiv Khagram and Mr. Kongere appeared for the 1st Respondent, Dr. Ndegwa appeared for the 2nd Respondent, while Mr. Paul Buti appeared for the Petitioners.

9. Mr. Khagram submitted that the matter herein did not involve protection of any constitutional rights but rather protection of the Petitioners from loss of revenue. Counsel contended that this was a contractual issue as the Container Freight Stations operated by the Petitioners are licensed by the 1st Respondent. In the contract between the Petitioners and the 1st Respondent, Counsel submitted that handling and storage of cargo is not exclusive, and that any Kenya bound cargo can go to a Container Freight Station and there is no guarantee of volume. Further, Counsel pointed out that the license of each of the Petitioners, except the 12th and 14th Petitioners with the 1st Respondent had expired hence there were no rights to be protected.

10. Mr. Khagram submitted that as part of the Petition, the Petitioners had annexed at page 59-60 resolutions of a meeting held on 6th March 2018 in which they agreed to promote the use of the SGR and in case of any dispute, the same would be referred to arbitration. Therefore, the Petitioners can now not approach this court claiming violation of constitutional rights. Counsel argued that the entire Petition raised issue of loss of revenue and/or profit which is a contractual issue and not a constitutional issue.

11. Dr. Ndegwa submitted that the Petitioners lack locus to institute this suit as they are not entitled to possession of the goods as either shippers or carriers or consignees. Additionally, Counsel contended that the claim against the 2nd Respondent is for trespass of goods but the Petitioners are neither the shippers nor carriers hence they cannot lodge such a claim for conversion or possession of goods.

12. Alternatively, Counsel submitted that even if there is a cause of action against the 2nd Respondent the same can be determined by way of a civil suit and not a constitutional petition. Counsel contended that if this matter is determined as a constitutional one then the 2nd Respondent will be denied the right to a fair hearing under Article 50 of the Constitution as the 2nd Respondent will not be allowed to interrogate contractual issues that may arise in this matter.

13. Mr. Buti in opposing the preliminary objections submitted that economic rights form part of the fundamental rights and freedoms as Article 19 establishes the Bill of Rights which includes social, economic and cultural rights. Further, Counsel submitted that Article 260 of the constitution defines property to include any contingent or vested right which includes money thus the revenue that the Petitioners seek to protect forms part of their property.

14. As to the contention that the Petitioner are not carriers or shippers, Mr. Buti submitted that under the Carriage of Goods by Sea Act, the goods belong to the Petitioners' clients and cannot be surrendered to the 2nd Respondent without the clients' authority.

15. Mr. Buti submitted that a bill of lading is an international transport document and by the 1st Respondent passing on goods to the 2nd Respondent without the authority of the Petitioners' clients, the Respondents by this action disregard the Bill of Lading and hence violate Article 2(4) as they in turn fail to observe international law.

16. Mr. Buti acknowledged that the contracts between the Petitioners and the 1st Respondent had expired. However, Counsel submitted that this is the reason why the Petitioners cannot sue the Respondents under contract law the implication being that their claims lay within the constitution. Further, Counsel submitted that in bringing this suit the Petitioners do not rely on any contract but on the gazette notice gazettement them as Container Freight stations and on the bill of lading under the Hague Rules.

17. In rejoinder, Mr. Khagram argued that the gazette notice under which the Petitioners purport to derive their rights only gives them storage rights and since the Petitioners' licenses have expired they cannot claim economic rights under the gazette notice. On the issue of the bill of lading, Dr. Ndegwa submitted that the Petitioners are not mentioned as receivers of the goods in the bills of lading. Whilst, Dr. Ndegwa admitted that Article 43 of the Constitution protects economic rights, Counsel contended that this right does not extend to the right to be given business. Counsel urged the court to allow the Preliminary Objections and to dismiss the Petition herein.

Analysis and Determination

18. I have carefully considered the issues raised in the Preliminary Objections, and in Counsel submission. The only issues that arise for determination are whether the Petitioners have *locus standi* to bring this Petition and whether this court has the jurisdiction to entertain this suit.

a) Whether the Petitioners have locus standi to bring this Petition

19. The Respondents contend that the Petitioners are neither the shippers nor the carriers of the goods thus they are not entitled to possession of the goods, ousting their locus to bring this Petition. The Petitioners on the other hand argue that the goods belong to their clients and cannot be surrendered to the 2nd Respondent without their client's authority hence there is a linkage between the Petitioners and the goods.

20. The Black's Law Dictionary, 10th Edition defines *locus standi* as "the right to bring an action or to be heard in a given forum". Do the Petitioners has a right to institute these proceedings? Article 22 (1) and (2) of the Constitution provides as follows:

22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

It is evident that any person can lodge a suit claiming that fundamental freedoms as guaranteed by the Bill of Rights have been violated. Article 260 defines the term "person" as used under Article 22. Accordingly, "person" includes a company, association or other body of

persons whether incorporated or unincorporated.

21. In the Petition, the Petitioners describe themselves as members of the Container Freight Stations Association of Kenya, an association registered under the Societies Act, Cap 108, Laws of Kenya under Certificate No. 28378 dated 10th December, 2007 (a copy of the certificate of registration is annexed to the affidavit of Daniel Nzeki sworn on 4th April, 2018). I should think that the Petitioners fall within the definition of a person under Article 260 of the Constitution.

22. The current Constitution by virtue of Articles 22 and 258 has widened the scope of litigants that can bring suits against violation of fundamental rights. In my view, the intention was to ensure that every person can access justice without unnecessary technicalities. The impact of this is that courts no longer frown upon constitutional petitions instituted by individuals who previously lacked the “capacity” to do so. For instance, under the Societies Act, an association is an unincorporated entity that can only bring a suit in the name of its officials or trustees. However, the Constitution recognizes an association as a person who can bring a claim against violation of fundamental rights. Taking note that the Societies Act is subordinate to the Constitution, the Petitioners’ right under Articles 22 and 258 cannot be wished away. This was the case in **Mining Temoi & Another v. Governor of County of Bungoma & 17 others [2014] eKLR** where the court held as follows:

“I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms. A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where the breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the “CEO/CO-ORDINATOR of the organization and the Petition is about the alleged violation of the Constitution, Mr. Khaoya has in my view illustrated that there is a nexus between him and the organization.”

23. The Respondents further claimed that the Petitioners are not carriers or shippers of the goods. In essence, that the Petitioners have no claim over the goods/consignment hence they cannot bring this suit. As I understand it, the Petitioners operate Container Freight Stations “transit sheds” offering storage and handling facilities for either nominated or unnominated cargo. The Petitioners have no problem with the unnominated cargo which is normally allocated to them by the 1st Respondent. The Petitioners’ concern lies with the nominated cargo which they claim is designated to them by the importer or by the shipper vide the bill of lading to be delivered to their facilities. It is this nominated cargo that the Petitioners contend the 1st Respondent has been delivering to the 2nd Respondent for onward transmission to Nairobi without the consent of the Petitioners’ clients. I do find that there is a nexus between the Petitioners and the cargo. The Petitioners handle the cargo on behalf of their clients thus they may not be the carriers or shippers but they do have an interest in the cargo. In my view, it is this interest that the Petitioners seek to protect by instituting these proceedings. I therefore do find that the Petitioners do have *locus standi* to bring this suit.

b) Whether this court has the jurisdiction to entertain this suit

24. Article 23 of the Constitution provides as follows:

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

25. Article 23 gives this court the jurisdiction to hear and determine suits relating to threat or violation of fundamental rights and freedoms enshrined in the Constitution. The jurisdiction to deal with violation of fundamental rights and freedoms is also expressed under Article 165 (3) (b). However, the Respondents contend that the Petitioners’ claim is contractual and can be dealt with in an ordinary civil suit. The Respondents peg their assertion on the allegation that the Petitioners’ claim revolves around loss of revenue and/or profits and does not raise any constitutional issues. The 1st Respondent submitted that the Petitioners operate under license issued by the 1st Respondent and in the said contracts there are various obligations to be met by each party and if violated, a party can sue the other for breach of an obligation. It was the 1st Respondent’s contention that the Petitioners can sue for breach in contract. Ironically, the 1st Respondent pointed out that the licenses for

all the Petitioners except the 12th and 14th Petitioners had expired thus the Petitioners may not have a cause of action under the law of contract. The 2nd Respondent submitted that the Petitioners' claim as against the 2nd Respondent is for trespass of goods but the Petitioners are neither carriers nor shippers to bring an action for conversion or possession of goods.

26. In as much as this court has jurisdiction under Articles 23 and 165(3) (b) of the Constitution, this court is enjoined to consider whether there are other appropriate avenues to deal with the issue before entertaining the matter. In the case of **International Centre for Policy and Conflict & 5 others v. Attorney General & 4 others [2013] eKLR**, the court observed as follows:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under article 165 of the Constitution in general, must exercise restraint. It must give an opportunity to the relevant constitutional bodies to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”

27. Also in the case of **Lipisha Consortium Limited & another v. Safaricom Limited [2015]eKLR**, the case of **Parpinder Kaur Atwal v. Manjit Singh Amrit NBI HCCP No. 236 of 2011** was cited where Lenaola J (as he then was) observed as follows:

“All the authorities would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes...I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the world. Our courts must interpret it with all liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

28. Despite the above being true, can this court dismiss a matter simply because there is another forum where the matter can be heard and determined? In the case of **Lipisha Consortium Limited & another v. Safaricom Limited (supra)** the court opined as follows:

“There is however another school of thought. The school of thought that the Petitioners in the instant case appear to pledge to. This school of thought is of the view that the High Court has under Article 165 (3) (b) of the Constitution the jurisdiction to hear and determine all allegations of violations of constitutional rights and fundamental freedoms. The view is that even where there is a private agreement and breach thereof is alleged by either party, the fact that the Constitution recognizes rights including contractual rights creates a pathway for their recognition either through private or public reliefs...It is for the court to undertake a proper scrutiny based on the pleadings to determine whether the dispute and indeed the claim has taken a constitutional trajectory and the alleged violations are evident. The scrutiny needs to be painless as the principle in **Anarita Karimi Njeru v. Republic [1979] dictates that pleadings be reasonably precise to reveal alleged breaches or violations.”**

29. I have carefully read through the Petition and considered the rival submissions. In my view the Petition does identify the rights that are alleged to have been violated and makes an attempt at explaining the manner in which the rights were violated. The 1st Respondent pointed out (although not proven) that the licenses between the 1st Respondent and 13 of the Petitioners had expired. If that were the case, I should think that the 13 Petitioners can no longer seek to enforce any obligations under the licenses. Further, I am of the opinion that it would be preemptive to rule this matter as being purely of a commercial nature at this point having noted that the Petition as drafted does allege violation of fundamental rights. I therefore find that this court has the jurisdiction to entertain this matter.

30. The Preliminary Objection dated 10th April 2018 and that raised in the 1st Respondent's replying affidavit filed on 10th April 2018 are hereby dismissed. Costs shall be in the cause.

Dated, Signed and Delivered in Mombasa this 3rd day of May 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Khagram & Mr. Kamau for 1st Respondent

Dr. Ndegwa for 2nd Respondent

Mr. Buti for Petitioner

Mr. Kibara holding brief for Mutubia for Petitioners 1 & 9

Mr. Kaunda Court Assistant