



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 4 OF 2014**

**IN THE MATTER OF:           ARTICE 22 (1) OF THE CONSTITUTION OF THE   REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF:   ALLEGED CONTRAVENTION OF FUNDAMENTALRIGHTS AND FREEDOMS UNDER ARTICLES 10,47, 48, 50 AND 73 OF THE CONSTITUTION OF THE REPUBLIC OFKENYA**

**CIVICON LIMITED .....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY .....1<sup>ST</sup> RESPONDENT**

**KIVUWATT LIMITED .....2<sup>ND</sup> RESPONDENT**

**RULING**

- 0. The petitioner, which operates a transit godown in Mombasa in which the 2<sup>nd</sup> defendant’s machine known as a separator was stored on transit to Rwanda, and over which it claims a lien for contractual claims and handling charges against the 2<sup>nd</sup> respondent, has sued the 1<sup>st</sup> respondent authority challenging as unconstitutional breach of its right to property a consent entered by the authority with the 2<sup>nd</sup> respondent purporting to authorize release of the said separator machine to its owner the 2<sup>nd</sup> respondent in a suit filed for that purpose by the 2<sup>nd</sup> respondent against the authority, being *Mombasa High Court Civil Suit Number 117 of 2013: KivuWatt Limited versus The Commissioner, The Kenya Revenue Authority, Customs Services Department*.
- 0. The petitioner had sought to be joined in the suit *Mombasa High Court Civil Suit Number 117 of 2013: KivuWatt Limited versus The Commissioner, The Kenya Revenue Authority, Customs Services Department*, but the court (Kasango, J) dismissed the application and the petitioner has sought to appeal from the ruing.
- 0. Between the petitioner and the 2<sup>nd</sup> Respondent there is a previous suit *Mombasa High Court civil suit Number 36 of 2013: Civicon Limited versus KivuWatt Limited*, in which the petitioner

unsuccessfully sought an injunction to restrain the 2<sup>nd</sup> respondent herein from taking over any of its assets in the possession of the petitioner pending arbitration of the dispute in accordance with construction contracts between the parties. The court (Muya, J) refused the injunction and stayed the suit pending the hearing and determination of arbitration proceedings in accordance with the contracts. An application for injunction pending appeal from the decision of the court was unsuccessful.

0. The petitioner's case as set out in paragraphs 4 – 24 of the petition is as follows:

#### THE FACTS CONSTITUTING THE PETITIONER'S CASE

- iv. *Civicon, amongst other trading operations, runs a transit godown within its premises situate at Kibarani in Mombasa along the Makupa Causeway. It is licensed to operate as such by the Commissioner pursuant to the provisions of the East African Community Customs Management Act As well as the Customs and excise Act (in particular Paragraph 96B of the principal Regulations to the Act).*
- v. *A transit godown according to the said Regulations means any building premises licensed by the Commissioner in writing where goods entered in transit may be stored pending re-importation.*
- vi. *As a transit godown, Civicon receives from time to time, for deposit and storage within its above premises, goods which are subject to customs control upon being nominated as the receiving transit godown by either the Commissioner or the consignee of such goods.*
- vii. *Ordinarily goods which are deposited in a transit godown will usually be uncustomed goods meant for transit (or re-exportation) outside Kenya.*
- viii. *Before their release for transportation (or re-exportation) outside the country, the owner of the goods, usually the consignee, or his agent, has to pay the applicable administrative charges to the KIRA which comprise mostly of warehouse rent.*
- ix. *In addition to paying the charges referred to in 8 above, the owner of the goods or his agent also has to pay to the owner of the transit godown, in consideration, the applicable transport, handling, storage, security and other related charges which will usually be charged on a day to day basis from the date of deposit until the date of exit.*
- x. *In addition to running the business of a transit godown, Civicon is also a civil contractor specializing in the construction of energy and infrastructure projects both within and without the Republic of Kenya.*
- xi. *On or about 31.05.2010, Civicon entered into an agreement with a corporation known as KivuWatt Limited (hereinafter referred to as "KivuWatt") in which Civicon undertook to execute the erection of the first phase of a methane gas extraction barge on Lake Kivu in Rwanda.*
- xii. *The said agreement was terminated on 22.08.2011 by mutual agreement and replaced by 3 other agreements of even date known as the EPC Agreements between Civicon, its sister company known as Civicon Limited Mauritius and KivuWatt. The subject matter of the said contracts substantially remained the erection of the first phase of the methane gas extraction barge on Lake Kivu in Rwanda.*
- xiii. *Pursuant to these contracts, Civicon was also responsible for transporting various equipment imported from abroad by KivuWatt to the contract site in Rwanda.*
- xiv. *On account of the contractual relationship with Civicon, KivuWatt nominated Civicon's transit godown at Kibarani, Mombasa for purposes of depositing and or storing the said equipment pending clearance by the KRA or the Commissioner for onward transportation by Civicon to Rwanda.*
- xv. *By virtue of its capacity as (i) the owner of the transit godown and (ii) its contractual relationship with KivuWatt, an equipment known as a Separator was imported and deposited in Civicon's transit godown on 18.08.2012 or thereabouts and has remained so deposited.*
- xvi. *Consequently, the Separator has attracted, and continues to attract various charges payable to Civicon with effect from 18.08.2012 until the date of payment. The amount outstanding as of 17.12.2013 from KivuWatt stood at the sum of United States Dolas 72,750. In addition, there are outstanding loading, transport, security and related charges that have accrued and which remain unpaid.*
- xvii. *In addition, Civicon and KivuWatt are locked up in a contractual dispute which is the subject of Mombasa High Court civil suit Number 36 of 2013: Civicon Limited versus KivuWatt Limited.*

- xviii. *The above suit has however been stayed by the Court pending arbitration in Switzerland in accordance with the provisions of the EPC Agreements.*
- xix. *In the meantime, Civicon in whose transit godown the Separator has been deposited and or stored has asserted a lien over the Separator on account of (I) unpaid contractual dues, (ii) on account of Civicon's own equipment illegally detained by KivuWatt at the contract site in Rwanda, and (iii) on account of the outstanding unpaid transit godown handling and other charges set out in paragraph 16 above.*
- xx. *Civicon's claim against KivuWatt approximately amounts to United States Dollars 20,000,000 excluding their claim for damages for breach of contract.*
- xxi. *In another suit filed before the Commercial Division of this Court, being Mombasa High Court Civil Suit Number 117 of 2013: KivuWatt Limited versus The Commissioner, The Kenya Revenue Authority, Customs Services Department, KivuWatt have sought mandatory injunctive orders to supervise its loading and to ensure its exit from Kenya. It is alleged in that suit that the Separator is in the custody and possession of the Commissioner, Customs Services department.*
- xxii. *Civicon, however, is not a party to that suit and its attempt to be joined as a party in the said suit has been rejected by the Court.*
- xxiii. *Civicon has however established that by a letter dated 18.11.2013 signed between the KRA and KivuWatt, KRA has purported to concede to KivuWatt's case and has undertaken to release the separator forthwith to its owners without involving Civicon.*
- xxiv. *It is Civicon's case that KRA as well as the Commissioner in entering into purported consent letter between the KRA and KivuWatt to the exclusion of the Petitioner, who are holding or storing the Separator in their transit godown, is connivance and is any event clearly illegal and outside KRA's and the Commissioner's statutory mandate for the following reasons: -*
- a. *The Separator is currently deposited and or stored at Civicon's transit godown.*
  - b. *Civicon is licensed by the Commissioner in accordance with the provisions of the East African Community Customs Management Act, as well as the Customs and excise Act (in particular Paragraph 96B of the principal regulations to the Act) as a transit godown.*
  - c. *A transit godown is a building or premises licensed by the Commissioner in writing where goods entered in transit maybe stored pending re-exportation.*
  - d. *Transit goods are ordinarily subject to customs control for purposes of inter alia protecting the revenue due to the government of Kenya in the event that the said goods are diverted and sold in the Kenyan market.*
  - e. *For the purposes of KRA, the Separator is therefore deposited and or stored in Civicon's transit godown within Civicon's premises in accordance with the provisions of Paragraph 96 of the principal regulations to the Customs and Excise Act.*
  - f. *The concern of KRA and that of the Commissioner of Customs is solely to safeguard duties, taxes and other applicable administrative charges that are payable in respect to the goods deposited in the transit godown.*
  - g. *The said Regulations provide that the Commissioner may extend the period in which goods are stored in the transit godown over and the above timelines stipulated on the ground that the goods are a subject of a pending court case and the Respondents have granted such extensions on various instances before.*
  - h. *The owner of the transit godown has concurrent interest in the goods in that it must ensure its dues are paid before the goods may be released. This means that the owner of goods deposited in a transit godown, in addition to paying duties, taxes and other applicable administrative charges that may be due to KRA, also has to pay certain charges to the owner of the transit godown prior to obtaining a release for removal of the goods from the godown for transit purposes.*
  - i. *Civicon has not been paid by KivuWatt their handling charges amounting to USD 72,750 as at 17.12.2013. Moreover, Civicon is holding the Separator to assert a lien on account of contractual amount due which remain unpaid as well as its own equipment which has been detained by KivuWatt.*
  - j. *The Petitioner has legitimate expectation that having been licensed by the Respondents as a transit godown and allowed to receive transit cargo, the respondents will not interfere in its business such as to occasion it economic loss or jeopardize its business unless there is a lawful and or reasonable basis for doing so.*

- k. *This means that in any event, the KRA the Commissioner have no business undertaking to release the Separator to KivuWatt or even to supervise its loading and exiting out of the Country without ascertaining first that Civicon has no claim in respect of their handling charges over the Separator which has been deposited with them for over one years.*
- l. *KRA and the Commissioner do not legally or factually have any basis or any valid basis for taking sides in an entirely private matter and they have no business consenting to the release of the Separator unless they are willing to expend tax payer funds making good Civicon's handling charges and the contractual claims against the owner of the separator.*
0. On the basis of the above facts the petitioner contended that the consent by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in *Mombasa High Court Civil Suit Number 117 of 2013: KivuWatt Limited versus The Commissioner, The Kenya Revenue Authority, Customs Services Department* contravened its constitutional rights primarily to protection of property and fair administrative action and sought orders as follows:
  - a. ***A declaratory order that the consent letter dated 18.11.2013 and or any other agreement entered into by the KRA and the Commissioner for the release of the Separator to its owners without the consent or involvement of Civicon is in breach of Civicon's constitutional rights and freedoms as guaranteed under Articles 10, 40, 47, 48, 50 and 73 of the Constitution of Kenya.***
  - b. ***An order of judicial review by way of prohibition to prohibit the KRA and the Commissioner of Customs from illegally agreeing to give possession of the Separator to its owners prior to the determination of the arbitral proceedings pending in Switzerland.***
  - c. ***Costs.***
  - d. ***Any other relief the court deems fit."***
0. The 2<sup>nd</sup> respondent who was not originally made a party to this petition successfully applied to be joined and has sought by Chamber Summons dated 7<sup>th</sup> January, 2014 the striking out of the petition and the interlocutory application for conservatory orders herein on the grounds set out in the application primarily that the petition seeks to have the court deal with matters that have already been dealt with by other Courts of concurrent jurisdiction in contravention of the limits of the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution. The application was supported by the 1<sup>st</sup> respondent and opposed by the petitioner.
0. Arguments for the parties in sum: The 2<sup>nd</sup> respondent/applicant contended that the petition and the application for conservatory orders therein were an attempt by the petitioner to have the Constitutional Division of the Court unconstitutionally supervise the High Court judges who have dealt with the same matters in the previous named suits. The 1<sup>st</sup> Respondent supported the application and justified its entering into a consent for the release of the Separator machine on the basis that it had already effected a system's release of the cargo by the time the suit HCC No. 117 of 2013 was filed and emphasized that it had under section 16 (1) (h) of the East African Community Customs Management Act, 2004 the legal control of goods deposited in a transit shed such as the petitioner's godown. The petitioner objected that the cause of action in the petition was different from the disputes in the two suits, being the violation of its constitutional rights including to property and to fair administrative action in the respondents consent to release the Separator machine without its involvement in view of its interest in the property.
0. Counsel for the parties – Mr Ongoya with Mr. Biketi for the 2<sup>nd</sup> Respondent, Mr. Ado for the 1<sup>st</sup> Respondent and Mr. Kashindi for the petitioner – made oral arguments supplemented by written submissions and ruling was reserved.
0. I agree with the judicial policy that variously set out by the authorities relied by the 2<sup>nd</sup> respondent – *Peter Ng'ang'a Muiruri v Credit Bank Ltd and Anor. Court of Appeal Civil Appeal NO. 203 of 2006* and *Ventaglio International SA and Anor. v The Registrar of Companies and Anor Nairobi HC Constitutional Petition No. 410 of 2012* (per Lenaola, J) that the High Court's constitutional division or indeed any other division cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinates courts under Article 165 (6) of the Constitution. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any other court process before the same court or court of concurrent jurisdiction a different decision from one already rendered

by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd. v Commissioner of Customs, and 2 Ors.* Nairobi HC Petition No. 125 of 2010 (per Majanja, J).

0. The question before the court is therefore how the above principles of law apply to the facts of this case. The issue is whether the petition herein is an attempt to re-litigate matters that have already been determined by other courts of concurrent jurisdiction. Or put in another way whether the petition seek to have the High Court as a constitutional court supervise the High Court in exercise of other jurisdictions.

***Mombasa High Court civil suit Number 36 of 2013: Civicon Limited versus KivuWatt Limited.***

0. In the words of the counsel for the petitioner in their written submissions on this application, the position with regard to this suit by the petitioner against the 2<sup>nd</sup> respondent is as follows:

***“Mombasa H.C.C. S No. 36 of 2013 was filed by the petitioner against the 2<sup>nd</sup> respondent on 16.4.2013. KRA is not a party to that suit. The petitioner sought various declaratory reliefs as well as interim injunctive reliefs against the 2<sup>nd</sup> respondent pending arbitration as well as pending hearing and determination of the suit. The interim reliefs were sought to restrain the 2<sup>nd</sup> respondent from demanding the payment of a certain Performance Bond issued to the 2<sup>nd</sup> respondent by the Petitioner’s Bankers and also to restrain them from seizing or attempting to forcefully take possession of or seize or in any other way from interfering with any of its (2<sup>nd</sup> respondent’s) assets including the so called Seperator which were in possession of the petitioner and stored in the petitioner’s premises pending the determination of an existing contractual dispute between the two parties by way of arbitration as required by certain contracts between them. By his ruling, delivered on 25.07.2013, Muya, J ruled that the court lacked jurisdiction over the matter in view of the agreement between the parties to settle any disputes between them through arbitration. Consequently, he vacated existing interim injunctive orders and stayed the suit pending arbitration. The petitioner’s subsequent motion for injunction pending appeal was dismissed for lack of leave of court in view of the order staying the proceedings pending arbitration.”***

In the petition, the petitioner prays for an order –

***An order of judicial review by way of prohibition to prohibit the KRA and the Commissioner of Customs from illegally agreeing to give possession of the Seperator to its owners prior to the determination of the arbitral proceedings pending in Switzerland.***

This is a clear repeat of the application for injunction sought in the earlier suit which was refused by Muya, J in that suit in addition to staying the suit pending arbitration. I consider that the petitioner cannot properly seek by this petition the same injunctive relief that it failed to secure in the previous suit both at the interlocutory stage and upon an application for injunction pending appeal. It is an abuse of process which the court cannot permit and the said prayer and the parts of the petition upon which it is based will be struck out.

***Mombasa High Court Civil Suit Number 117 of 2013: KivuWatt Limited versus The Commissioner, The Kenya Revenue Authority, Customs Services Department, KivuWatt Ltd.***

0. In a ruling dated 18<sup>th</sup> December 2013, upon an application by the petitioner herein to be joined as a party in HCC No. 117 of 2013 on the principal grounds that the petitioner is in possession of the Seperator and that they have a lien over the same, the Court (Kasango, J) found that the petitioner did not have possession of the Seperator and its claim to a lien was therefore defeated. The Judge said:

4. The issue of who has the possession of the Seperator is essential when determining whether a general lien can be asserted by Civicon. Halsbury's Laws of England 4<sup>th</sup> edition vol. 28 at p. 227 has this to say on lien –

***“A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied.”***(underlining mine)

5. It was conceded by the Plaintiff that as at 25<sup>th</sup> July 2013 the Seperator was in possession of Civicon. It was on that date that this Court vacated the injunction order that had been issued in favour of Civicon against the 1<sup>st</sup> Plaintiff in ***Mbsa HCC No. 36 of 2013***. The learned Counsel for the Plaintiff submitted that after the injunction was vacated the Seperator was put in the hands of KRA. In support of that submission the Plaintiffs relied on the rental payment made to KRA. Civicon did not respond to that specific submission other than relying on the Rulings delivered on ***Mbsa HCC No. 36 of 2013***. It argued that those rulings supported its claim that it had a right to assert a lien over the Seperator. What is clear from those rulings is that the court found that the Seperator belonged to the 1<sup>st</sup> Plaintiff. In my considered view those rulings made no further finding in regard to the Seperator.
6. Bearing in mind that the Seperator is in a warehouse where the Plaintiffs have paid the rental to KRA it follows that Civicon does not have possession of it. Section 2 of the Act defines Warehouse as: -

***“Means deposited in a government or bonded warehouse with the authority of the person in charge of that warehouse.”***

Further Section 42 (8) of the Act makes it clear who controls the property in a Customs Warehouse. That Section provides: -

***“Any officer having the custody of any goods in Customs warehouse, or place of deposit deemed to be a Customs warehouse, may refuse delivery therefrom until he or she is satisfied that all duties, expenses, rent, freight and other charges due in respect of of such goods have been paid.”***

7. Having considered the provisions of the Act and the evidence produced by the Plaintiffs I make a finding that Civicon does not have possession of the seperator and therefore it fails the test of asserting a lien over it. In addition by virtue of Section 16 (1) (h) of the Act the Seperator which is destined to be transported to Rwanda is under Customs control and cannot therefore be the subject of a lien by a party in this country without an offence being committed.
8. The issue of KRA being in possession of the Seperator is made more poignant by the fact that KRA has recorded a consent with the Plaintiff by their letter dated 18<sup>th</sup> November 2013 in the matter. It is important to reproduce that letter in this ruling as follows: -

***“Deputy Registrar, 18<sup>th</sup> November, 2013***

***High Court of Kenya***

***Mombasa Law Courts***

***MOMBASA***

***Dear Sir,***

***RE: MSA HCCC NO. 117 OF 2013***

***KIVUWATT LIMITED & ANOTHER -VS- KENYA REVENUE***

## AUTHORITY

*We refer to the above matter and would be grateful if the following consent would be recorded in the court file: -*

*i. The Defendant undertakes to forthwith release to the Plaintiffs the “Seperator” from the Customs warehouse in accordance with Section 42 (8) of the East African Customs Management Act, 2004.*

*ii. The Plaintiffs, jointly and severally undertake to pay the Defendant's costs agreed at Kshs.200,000/= (Kenya Shillings Two Hundred Thousand Shilling only), immediately upon the release of the “Seperator” the subject matter of this suit.*

*iii. The application dated 10<sup>th</sup> October 2013 and the entire suit be and is hereby marked as settled.*

*Yours faithfully,*

*Wamalwa, Abdi & Co. Advocates*

*Advocates for the Plaintiff/Applicant*

- 9. It follows therefore as provided under section 43 (1) of the Act that although the land upon which the warehouse is situated belonged to Civicon as alleged it is however deemed under that Section as a Custom Warehouse.*
- 10. Because Civicon claim for asserting a lien over the Seperator is defeated by the lack of possession and because as rightly submitted by the Plaintiffs that Custom goods cannot be delivered to the local market, the application dated 15<sup>th</sup> November 2013 must and does fail.*
- 11. In the end the Notice of Motion dated 15<sup>th</sup> November 2013 is dismissed with costs to the Plaintiffs.*
- 0. In a subsequent application filed in this petition by the Petitioner for the recusal of Kasango, J on the ground that the judge had already taken a position on the issue of the consent the subject of this proceedings, the court ruled on 8<sup>th</sup> February 2014 as follows:*
- 29. The question therefore is, is the petitioner's apprehension of bias in the circumstances of this case reasonable? In the impugned ruling, the petitioner claims, this court endorsed and/or approved the consent which is the subject of this petition and which the petitioner claims to have been entered into in breach of its constitutional rights.*
- 30. It is important to distinguish the subject matter of this petition from the subject matter of the ruling delivered by this court on the 18<sup>th</sup> December 2013 in HCC No. 117 of 2013. The Petitioner has pointed out in no uncertain terms that the subject of this petition is the consent entered into between the Respondents vide letter dated 18.11.2013 and whether the said consent was entered into in breach of the petitioner's constitutional rights. On the other hand, the subject of the impugned ruling was whether the petitioner could be enjoined in HCC No. 117 of 2013 as a second defendant. These are two distinct matters. The court did not address or render its views on the constitutionality or otherwise of the consent and whether the same was in breach of the petitioner's rights. In my view, this court only made reference to the consent as support of a finding that the Seperator was not in the possession of the petitioner, hence the petitioner could not be enjoined in the suit. The consent was referred to by the court only to the extent of demonstrating that, in as much as the petitioner was the one in physical custody of the Seperator, it did not have legal possession of the same since it is only KRA who could authorise its release.*
- 31. The Court did not make any pronouncement on whether the consent was properly entered into by the respondents, or not. The Petitioner's submission that this court has a preconceived view*

*of the propriety or otherwise of the consent is misconceived because this court has never, either in the impugned ruling or elsewhere, rendered its opinion on the propriety, legality, constitutionality or lack thereof of the consent.*

32. *The court did not approve or endorse the consent as claimed by the petitioner. All the court did was to rely on the evidence before it to arrive at its finding. The evidence before the court at that time was the letter of consent, which had not been challenged at all. The court did not have any reason at all not to rely on the same, as no such reason was placed before the court. The upshot of this is that, in my view, the petitioner's apprehension of bias is unfounded and unreasonable and seems to me to be a mere figment of its imagination. The same cannot be a basis for the judge to disqualify herself (see the Anyang Nyong'o case [A-G of Kenya v. Prof. Peter Anyang' Nyong'o East African Court of Justice Application NO. 5 of 2007]).*
0. It is clear that although the Judge did not deal with the issue of 'the propriety, legality, constitutionality or lack thereof of the consent' the court did determine the question of the petitioner's lien over the separator has already been determined by the High Court (Kasango, J) in the ruling of 18<sup>th</sup> December 2013 in HCC No. 117 of 2013. The same cannot be reopened by constitutional petition as sought by the petitioner. Its remedy lies in the intended appeal to the Court of Appeal or by application for review before the High Court.
0. However, the petitioner has an arguable case as to infringement by the 1<sup>st</sup> Respondent of its right to property with regard to storage and handling charges with respect to the Separator which has been deposited in the petitioner's transit godown for some time during the litigation on it. The 1<sup>st</sup> Respondent agrees that the petitioner is entitled to the handling charges when it states in its written submissions that –
- iii. *On issue no. (iii), the 2<sup>nd</sup> Respondent states that under customs law and procedures, the petitioner is indeed entitled to some handling charges. However, these charges are due only after authority for release (release on the SIMBA SYSTEM) has been given by the Commissioner.*
- iv. *The petitioner has not demonstrated to this court in its pleadings that they have made demand for their handling charges in respect of the subject machine which demand the importer (2<sup>nd</sup> respondent herein) has failed to honour.*
- v. *That in the circumstances, the allegation by the petitioner that the release of the machine by the commissioner would be in breach of their constitutional rights is therefore untenable.*
- vi. *In any event, the 2<sup>nd</sup> Respondent's view is that even assuming they were owed by the 2<sup>nd</sup> respondent, such a dispute would not be a constitutional dispute.*
0. I find that as the twin issues of the petitioner's contractual claims for dues and equipment against the 2<sup>nd</sup> respondent and the claim to a lien over the Separator machine have already been determined by the High Court in the previous suits respectively HCC No 36 of 2013 and HCC No. 117 of 2013, the same cannot be re-litigated by the way of the constitutional petition now before the court. The only issue which remains valid in the petition is whether the respondents could lawfully enter into a consent for the release of the separator machine without involving the petitioner who has undisputed right to charge storage and handling charges over the property. To this extent only, the petition may proceed to hearing.
0. I consider that, in accordance with Article 159 of the Constitution for substantial justice without undue regard to technicalities, the question of the legality of the consent between the respondents could have been taken before the court in HCC NO. 117 of 2013, without the necessity of filing a separate petition. I am aware that as argued by the petitioner that the **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (popularly known as Mutunga Rules) provide only for the filing of a petition to litigate constitutional rights.
0. I should take this opportunity to call on the Rule Committee to consider amendment to the Mutunga Rules to reinstate a rule similar to rule 23 of THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES,

2006 (The Gicheru Rules) which allowed any High Court in which a matter of interpretation or application of the constitution arises to deal with the issue as a preliminary point. The Rule was in these terms –

***23. Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.***

0. This means that a party in a suit may have raised a constitutional point in the same suit without the necessity of filing a separate constitutional application, and this would remove the incidence of appearance that the High Court division on constitutional matters is supervising the other divisions or stations of the Court. Translated into these proceedings, it means that the petitioner could have raised the issue of infringement of his right to property by the impugned consent between the respondents through an application in the same suit without filing a separate constitutional petition.
0. Accordingly, for the reasons set out above, I grant the 2<sup>nd</sup> Respondent's application for the striking out of the petition to extent that the issues of contractual claims by the petitioner against the 2<sup>nd</sup> respondent and the claim of a lien over the 2<sup>nd</sup> respondent's Separator machine both which were the subject of court rulings in previous proceedings before the High Court in HCC No. 36 of 2013 and HCC No. 117 of 2013, respectively, shall not be dealt with in the petition. The petition will however proceed to hearing on the validity of the consent letter dated 18.11.2013 between the respondents on the basis of the Petitioner's right to storage and handling charges. On account of the urgency shown, the petition shall be heard on a date within the next seven (7) days to be fixed in consultation with the parties. Costs in the cause.

**Dated, signed and delivered this 5<sup>th</sup> day of May, 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Sitonik for Mr. Kashindi for the Petitioner

No appearance for the 1<sup>st</sup> Respondent

Miss Kariuki for Mr. Biketi for the 2<sup>nd</sup> Respondent

Miss Linda - Court Assistant